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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**
15

16 EMILY FAIRBAIRN and MALCOLM
FAIRBAIRN,

17 Plaintiffs,

18 v.

19 FIDELITY INVESTMENTS CHARITABLE
20 GIFT FUND,

21 Defendant.

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

**PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION *IN LIMINE* NO. 5
REGARDING RESTORATION OF DAF
LOSSES**

Hearing Date: October 1, 2020
Time: 2:00 p.m.
Courtroom: E

Hon. Jacqueline Scott Corley

S T R I S | 777 S. FIGUEROA ST., STE 3850
M A H E R | LOS ANGELES, CA 90017

1 **INTRODUCTION**

2 Plaintiffs' central demand has always been to restore to their charitable DAF account the
3 millions of dollars lost through Fidelity's incompetence. *E.g.*, Compl., ECF No. 1 ¶¶ 98, 114, 121.
4 Fidelity challenged Plaintiffs' standing to seek this relief, insisting that Plaintiffs could not recover
5 on their negligence claim "for losses to property Plaintiffs did not own or control." MTD, ECF No.
6 21 at 9-10. Fidelity argued that even if Plaintiffs were "harmed" by "having less money in their DAF
7 account," they lacked standing to sue for negligence. According to Fidelity, only the Attorney
8 General had standing to seek restoration of DAF losses. MTD Reply, ECF No. 32 at 8, 13-14.

9 This Court disagreed. Relying on the settled body of law governing "special interest"
10 standing, the Court correctly held that Plaintiffs "alleged a special relationship sufficient to confer
11 standing to sue regarding the disposition of their donation"—a donation to which "they have retained
12 future rights." MTD Order, ECF No. 39, at 10-11. In short, as Plaintiffs alleged in the Complaint,
13 Plaintiffs could sue to recover losses to the DAF.

14 On the eve of trial, Fidelity now presents a thinly veiled request for reconsideration. Fidelity
15 repeats the refrain from its standing motion that the DAF funds belonged only to Fidelity, claiming
16 (again) that Plaintiff cannot sue for losses to the DAF. Not only has the Court already rightly
17 rejected this argument, but Fidelity's foundational predicate is flawed. Fidelity "owned" the DAF
18 only in the way a trustee "owns" a trust or a University "owns" endowed funds. Fidelity admits that
19 it cannot steal this money or throw it on a bonfire. It simply argues that the Attorney General is the
20 only one who can sue to restore such losses. But as this Court correctly held, the law is otherwise.
21 Because the Fairbairns retained an interest in the DAF—*e.g.*, their rights to advise over the
22 disposition of their DAF account and their interest in having the maximum funds available to donate
23 to charity—Fidelity cannot frustrate those interests by reducing those funds through its negligence.
24 Like the Attorney General, the Fairbairns have standing to compel Fidelity to return DAF losses
25 caused by its incompetence. MTD Order, ECF No. 39 at 10-11.

26 Fidelity's recycled arguments provide no coherent basis for questioning the Fairbairns'
27 standing. To begin with, Fidelity does not dispute, nor could it, that the Fairbairns meet the baseline
28 requirements for Article III standing: the Fairbairns were injured by the loss of funds in their DAF,

1 because they can no longer direct those funds to charities; Fidelity’s incompetent liquidation caused
 2 that injury; and this Court can redress the injury by ordering Fidelity to restore the losses. *See, e.g.,*
 3 *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102-03, 107 (1998).¹ Most of Fidelity’s motion
 4 represents an unsuccessful attempt to narrow the Court’s ruling regarding special interest standing,
 5 but Fidelity gets both the Court’s decision and the underlying legal principles wrong. As a party with
 6 special interest standing, the Fairbairns may sue to recover the losses to their DAF account caused
 7 by Fidelity’s negligence. The fact that the Fairbairns did not have “legal title” to the donated assets
 8 does not limit their remedies for negligence or for their promise-based claims, because the Fairbairns
 9 retained an interest in their DAF and were injured by the losses.

10 ARGUMENT

11 I. **Plaintiffs may restore DAF losses on their negligence claim because a party with special 12 interest standing may restore any losses caused by the trustee’s mismanagement.**

13 **A.** In its current filing, Fidelity is trying to do the impossible: accept the Court’s standing
 14 ruling on the negligence claim (MIL No. 5 at 4 n.1), while insisting that Plaintiffs were not harmed
 15 by the DAF losses and thus have no standing to recover them (*id.* at 4). But Fidelity makes the same
 16 arguments that the Court rejected two years ago. *Compare, e.g.,* MTD Reply, ECF No. 32 at 12-13,
 17 with MIL No. 5 at 2, 4-6. As the Court put it, Plaintiffs have standing because “their special right
 18 was impaired by Fidelity Charitable’s negligence.” MTD Order, ECF No. 39 at 10-11. And that
 19 conclusion was based *solely* on Plaintiffs’ claim for DAF losses—the Court expressly declined to
 20 consider Plaintiffs’ tax losses. *Id.* at 11 n.4.²

21 The Court’s holding on the standing issue necessarily means that Plaintiffs may recover DAF
 22 losses on the negligence claim. It is indeed blackletter law that a person with standing to sue for
 23 charitable mismanagement “may have the trustee surcharged for the amount necessary to

24 ¹ Fidelity briefly disputed Article III standing in its motion to dismiss (ECF No. 21 at 25 n.8), and
 25 then disclaimed the point at oral argument. Nov. 20, 2018 Hrg. Tr., ECF No. 37 at 39. Its motion *in*
 26 *limine* does not suggest that Plaintiffs lack a legally cognizable injury or otherwise dispute that
 27 constitutional standing requirements are met.

28 ² Fidelity fails to mention that Plaintiffs’ claim for tax damages was not part of the Court’s standing
 ruling. Fidelity also wrongly claims that Plaintiffs asserted and abandoned a different damages
 claim, one for losses to Plaintiffs’ other WATT holdings. That is false. Plaintiffs’ other WATT
 holdings indeed lost value because of Fidelity’s trading, and Plaintiffs disclosed that loss in
 discovery when asked to identify all categories of harm. But Plaintiffs have never sought to recover
 those losses as damages in this case—as their discovery responses confirm. MIL No. 5, Ex. E.

1 compensate fully for the consequences of the breach.” Restatement (Third) of Trusts § 95 cmt. b
 2 (2012). By choosing to accept Plaintiffs’ standing on the negligence claim, Fidelity Charitable
 3 necessarily must accept that Plaintiffs can restore losses to their DAF account on that claim—the
 4 two issues cannot be divorced, because the losses to the DAF were the only non-tax recovery sought.

5 1. As the Court explained in its order denying Fidelity Charitable’s motion to dismiss, special
 6 interest standing rules arose out of the “problem of providing adequate supervision and enforcement
 7 of charitable trusts.” MTD Order, ECF No. 39 at 9 (quoting *Holt v. Coll. of Osteopathic Physicians*
 8 & *Surgeons*, 61 Cal. 2d 750, 754 (1964)). In a normal private trust, the beneficiaries are empowered
 9 to sue when the trustee mismanages trust assets. But “[b]eneficiaries of a charitable trust . . . are
 10 ordinarily indefinite and therefore unable to enforce the trust in their own behalf.” *Id.* (quoting *Holt*,
 11 61 Cal. 2d at 754). Thus, historically, the Attorney General was empowered to sue on their behalf
 12 instead. *Id.*

13 “[P]art of the problem of enforcement,” however, “is to bring to light conduct detrimental to
 14 a charitable trust so that remedial action may be taken.” *Id.* (quoting *Holt*, 61 Cal. 2d at 754-55).
 15 And given limitations on the Attorney General’s resources and knowledge, she is unable to do that
 16 alone. *Id.* A body of law thus developed in California, Massachusetts, and elsewhere holding that
 17 “the Attorney General does not have exclusive power to enforce a charitable trust and that a trustee
 18 or other person having a sufficient special interest may also bring an action for this purpose.” *Id.* at 9
 19 (quoting *Holt*, 61 Cal. 2d at 753); *see id.* at 11 (explaining that the same is true in Massachusetts).

20 Based on this authority, and in light of Plaintiffs’ advisory rights over their DAF account
 21 (and without considering the tax losses at all), this Court held that Plaintiffs have “a special
 22 relationship sufficient to confer standing to sue regarding the disposition of their donation.” *Id.* at 10.
 23 For purposes of trial, Fidelity does not dispute any of this. MIL No. 5 at 4 n.1.

24 2. That holding, however, necessarily means that Plaintiffs may obtain restoration of losses to
 25 the DAF on their negligence claim. The entire point of special interest standing—the very reason the
 26 doctrine developed in the first place—“is to bring to light conduct detrimental to a charitable trust *so*
 27 *that remedial action may be taken.*” *Holt*, 61 Cal. 2d at 754-55 (emphasis added). There would be
 28 little point in letting the Attorney General or anyone else sue for charitable mismanagement if they

1 could not obtain the relief sought here—requiring the defendant to restore losses to the charity. It
 2 should thus be unsurprising that, under settled legal principles, a person with standing to sue on
 3 behalf of the charity may also obtain remedies on behalf of the charity.

4 The Restatement, which *Holt* cited with approval on the issue of special interest standing (61
 5 Cal. 2d at 753), makes this explicit. The latest installment of the Restatement discusses special
 6 interest standing in § 94, setting out the very principles this Court adopted in its earlier ruling. *See*
 7 Restatement (Third) of Trusts § 94 (“Standing to Enforce a Trust”); *id.* cmt. g. The *very next section*
 8 is entitled “Nature of Beneficiaries’ Remedies,” and it explains the remedies that a beneficiary or
 9 other person entitled to sue “on behalf of” the trust may obtain:

10 If a breach of trust causes a loss, including any failure to realize income, capital gain,
 11 or appreciation that would have resulted from proper administration, the beneficiaries
 12 [or other person with standing to sue on behalf of the trust] are entitled to restitution
 and may have the trustee surcharged for the amount necessary to compensate fully for
 the consequences of the breach.

13 *Id.* § 95 & cmt. b; *see id.* § 100 (“A trustee who commits a breach of trust is chargeable with . . . the
 14 amount required to restore the values of the trust estate and trust distributions to what they would
 15 have been if the portion of the trust affected by the breach had been properly administered”).

16 This is a basic, fundamental rule. Yet Fidelity Charitable does not mention it. That is because
 17 it directly answers the “DAF damages” question with respect to Plaintiffs’ negligence claim.
 18 Because Plaintiffs have a (presently undisputed) “special relationship sufficient to confer standing to
 19 sue regarding the disposition of their donation” (MTD Order, ECF No. 39 at 10), it follows that they
 20 may restore losses to the DAF caused by Fidelity’s negligence.

21 **B.** What Fidelity really seems to be arguing is that the Court’s standing ruling was limited:
 22 that a party has standing only to the extent her special interest in the charity—the thing that sets her
 23 apart from the general public—is impaired. MIL No. 5 at 4-5 (arguing that “the ‘special interest’
 24 doctrine underlying the Court’s ruling on standing is limited”). In other words, the plaintiff cannot
 25 sue for *general* charitable mismanagement; she may sue only for mismanagement with respect to her
 26 special interest. But that argument does not help Fidelity Charitable either.

27 Plaintiffs are not suing for general mismanagement at Fidelity Charitable, untethered from
 28 their special interest. They are suing over the mismanagement of the specific pool of assets they

1 donated and over which they have exclusive advisory rights. Fidelity’s incompetence impaired that
 2 interest by dramatically reducing the money over which Plaintiffs had a right to advise. That
 3 misconduct self-evidently implicates Plaintiffs’ special interest, which was exactly the basis for the
 4 Court’s standing ruling. MTD Order, ECF No. 39 at 10-11 (“Plaintiffs allege that their special right
 5 was impaired by Fidelity Charitable’s negligent liquidation of the shares.”). This argument thus gets
 6 Fidelity nowhere.

7 Fidelity also attempts to suggest that the “special interests” at issue in *Holt, L.B. Research*, or
 8 the other cases the Court previously relied on are somehow inapplicable here. MIL No. 5 at 4-6. But
 9 Fidelity’s attempt to narrow the principle of those cases fails. For example, Fidelity says *Holt* is
 10 inapposite because it involved “wrongful diversion of corporate assets in breach of a trust for
 11 charitable purposes,” rather than a botched liquidation of charitable assets as occurred here. MIL No.
 12 5 at 5. But “wrongful diversion” was just the breach of trust that had occurred in that case. There is
 13 no indication that plaintiffs would have lacked standing had the issue been mismanagement of the
 14 underlying assets—the point is that plaintiffs had a special interest in the relevant assets, so they
 15 could remedy *whatever* breach had occurred. *E.g.*, 61 Cal. 2d at 754-55 (broadly permitting standing
 16 “to bring to light conduct detrimental to a charitable trust so that remedial action may be taken”).

17 This Court properly understood the special interest standing cases. Because Plaintiffs’
 18 advisory rights give them a special interest in the disposition of their DAF account—an interest that
 19 was impaired by Fidelity’s negligence—Plaintiffs may seek restoration of losses to the DAF. MTD
 20 Order, ECF No. 39 at 10-11. There is no basis to reconsider that ruling now. *See* 18B E. Cooper,
 21 *Wright & Miller’s Fed. Prac. & Proc. Juris.* § 4478.1 (2d ed. Apr. 2020) (law-of-the-case doctrine
 22 counsels against late-stage reconsideration because “[a] ruling made early in the proceedings . . .
 23 may have shaped later proceedings,” and “[s]tability becomes increasingly important as the
 24 proceeding nears final disposition” due largely to parties’ “reliance on the earlier ruling”).³

25 _____
 26 ³ Indeed, Plaintiffs’ advisory rights specifically included the right to advise about the liquidation
 27 itself. Not only did Fidelity explicitly promise Plaintiffs such rights, but the evidence will establish
 28 that donors’ general advisory rights extend to the liquidation of donated stock. *Contra* MIL No. 5 at
 6. That is what the PZN evidence shows: Ryan Boland testified under oath that Fidelity made no
 specific promises to the PZN donor about how it would handle the PZN liquidation. Stokes Decl.,

1 **II. Fidelity Charitable's arguments against Plaintiffs' ability to restore DAF losses on the**
 2 **remaining claims lack merit.**

3 In addition to negligence, Plaintiffs assert contract, promissory estoppel, and
 4 misrepresentation claims based on Fidelity's promises about how it would handle the donated stock.
 5 As the Restatement makes clear, charitable trusts can be held liable just like any normal party for
 6 breaching contracts or making misrepresentations. *See* Restatement (Third) of Trusts § 105 & cmt. b,
 7 c. Plaintiffs thus need not rely on the special interest standing doctrine for these claims. And besides
 8 seeking tax damages on these claims, Plaintiffs contend that Fidelity's broken promises caused
 9 losses to their DAF account—no different than if Fidelity promised not to delete the account, but
 10 then did just that. In such circumstances, the obvious remedy is to make Fidelity put the money back.

11 Fidelity has never before disputed this common sense solution to its misconduct. But on the
 12 eve of trial, it now argues that Plaintiffs cannot recover loss to the DAF on their remaining claims
 13 for two specific reasons: (1) Plaintiffs no longer owned the WATT stock once it was donated to
 14 Fidelity, and only the property owner can sue for injury to that property, and (2) Plaintiffs did not
 15 themselves suffer any injury. MIL No. 5 at 2-4. Both of Fidelity Charitable's arguments are wrong.⁴

16 1. Fidelity simply misstates the law in arguing that one who does not own property cannot
 17 sue based on injury to that property. MIL No. 5 at 2-3. The very cases that Fidelity relies on explain
 18 that legal ownership of assets is *not* a prerequisite to seeking recovery. What matters is whether the
 19 plaintiff's rights with respect to the property have been impaired.

20 While ordinarily the owner of the real property is the party entitled to recover for injury
 21 to the property, the essential element of the cause of action is injury to one's interests
 22 in the property—ownership of the property is not. It has been recognized in many
 instances that one who is not the owner of the property nonetheless may be the real
 party in interest if that person's interests in the property are injured or damaged.

23 Ex. A at 83:14–84:8. Yet the evidence indisputably shows that Fidelity accepted the donor's input on
 24 how the stock would be liquidated. *See, e.g., id.* at 112:14–114:17, 119:8–121:17. To be clear: the
 25 Court correctly held in its prior ruling that Plaintiffs have standing based on their special interest in
 26 the disposition of their DAF account, without regard to any promises Fidelity made about the
 liquidation. But even if special interest standing required advisory rights as to the exact matter
 Plaintiffs are suing over (*i.e.*, the liquidation), Plaintiffs would have standing to seek restoration of
 losses caused by Fidelity's negligent liquidation.

27 ⁴ These arguments are irrelevant to the negligence claim, where the question is simply whether
 28 Plaintiffs are the proper party to obtain loss restoration to the DAF for Fidelity's negligence. As
 discussed above, the special interest standing doctrine means that they are. In any event, the
 impairment of Plaintiffs' special interest in the DAF constitutes harm to Plaintiffs themselves.

1 *Vaughn v. Dame Constr. Co.*, 223 Cal. App. 3d 144, 148, *modified* (Aug. 23, 1990) (cited in MIL
 2 No. 5 at 3); *see Wolfsen v. Hathaway*, 32 Cal. 2d 632, 644 (1948) (“[A]n action for damages to
 3 property by [a non-owner] has been recognized . . . under varying factual circumstances, and the
 4 present case illustrates another type of situation where fundamental principles of right and justice
 5 would so require.”), *overruled in part on other grounds by Flores v. Arroyo*, 56 Cal. 2d 492 (1961).

6 2. The only question is accordingly whether Plaintiffs have suffered an injury (besides their
 7 tax losses) based on Fidelity’s botched liquidation of the WATT stock. They plainly have. But for
 8 Fidelity’s misconduct (under whatever cause of action), Plaintiffs would have had a larger pool of
 9 money to direct to the charitable causes they support. The whole point of Fidelity Charitable’s
 10 business is to provide a platform for donors to carry out *the donor’s charitable objectives*. If a donor
 11 has less money to direct to charity, the donor’s interests are impaired. Again, imagine if Fidelity
 12 simply deleted the donor’s account. It remains shocking that Fidelity would argue donors cannot sue
 13 for such misconduct, especially given how Fidelity markets its DAFs to the public.

14 Fidelity Charitable’s position boils down to an argument that it cannot be held liable for
 15 breaching a contract or making misrepresentations about how it would dispose of its “own”
 16 property.⁵ But Fidelity Charitable cites no authority to support that view. And its position is
 17 obviously wrong. If Fidelity Charitable promised (by contract or representation) not to take the
 18 money out of a donor’s DAF account, but then turned around and did so, it would be clear that the
 19 donor had suffered an injury and that the appropriate remedy would be to restore the money to the
 20 donor’s account. It does not matter if that money technically belonged to Fidelity Charitable;
 21 Fidelity Charitable broke a promise about how it would handle the money, and the only way to
 22 remedy that broken promise is to put the money back. The exact same thing is true here.⁶

23 _____
 24 ⁵ Because the property at issue is part of a charitable trust, it is not actually “Fidelity Charitable’s”
 25 property. Although Fidelity Charitable holds legal title, equitable title is held by the beneficiaries.
See, e.g., Restatement (Second) of Trusts § 74 cmt. a (1959).

26 ⁶ On the UCL claim, Fidelity does not dispute that equitable monetary relief is available; it just says
 27 such relief is limited to restitution. MIL No. 5 at 7. Plaintiffs disagree. Fidelity’s authority does not
 28 say that a UCL plaintiff cannot be made whole for harm caused by a defendant’s violations. And
 regardless, restitution would be appropriate to require, for example, Fidelity Charitable to restore the
 ill-gotten fees that it obtained from Plaintiffs’ donation. In any event, this question of substantive
 California law is separate from Plaintiffs’ standing, so Plaintiffs do not address it further here.

1 Dated: September 28, 2020

Respectfully submitted,

2 **STRIS & MAHER LLP**

3 /s/ Peter K. Stris

4 Peter K. Stris

5 *Attorneys for Plaintiffs*

6 Emily and Malcolm Fairbairn

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16 EMILY FAIRBAIRN and MALCOLM
FAIRBAIRN,

17 Plaintiffs,

18 v.

19 FIDELITY INVESTMENTS CHARITABLE
20 GIFT FUND,

21 Defendant.
22

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

[Hon. Jacqueline Scott Corley]

**DECLARATION OF JOHN STOKES IN
SUPPORT OF PLAINTIFFS' OPPOSITION
TO DEFENDANT'S MOTION *IN LIMINE*
NO. 5 REGARDING RESTORATION OF DAF
LOSSES**

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1 I, John Stokes, declare as follows:

2 1. I am counsel of record for Plaintiffs Emily and Malcolm Fairbairn in this action. I
3 submit this declaration in support of Plaintiffs' Opposition to Defendant's Motion *in Limine* No. 5 to
4 Preclude Plaintiffs from Pursuing Damages to the Donor-Advised Fund Account. I make this
5 declaration based on personal knowledge and, if called to testify about its contents, could and would
6 do so competently.

7 2. Attached as **Exhibit A** is a true and correct copy, with redactions, of excerpts from
8 the deposition of Ryan Boland.

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

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Dated: September 28, 2020

/s/ John Stokes
John Stokes

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Exhibit A

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1 Q. Could you read that sentence,
2 please?

3 A. He writes, "Our continuation in
4 this program is contingent on your treating
5 these assets with the care that you seemed to 10:20 AM
6 indicate when we originally made our
7 contributions."

8 Q. And what Mr. ██████ said in his
9 email is true, right?

10 MR. DULBERG: Objection, vague, 10:20 AM
11 foundation, calls for speculation.

12 A. I'm not sure what you're --

13 BY MS. ASAY:

14 Q. When Mr. ██████ said that you
15 seemed -- when Mr. ██████ says that his 10:20 AM
16 continuation in the program is contingent,
17 quote, "on your treating these assets with
18 the care that you seemed to indicate when we
19 originally made our contributions," he's
20 accurately describing what you communicated 10:20 AM
21 to him, correct?

22 MR. DULBERG: Objection, misstates
23 the document. The document speaks for
24 itself.

25 A. No, I don't think that's an 10:20 AM

CONFIDENTIAL

1 accurate representation.

2 BY MS. ASAY:

3 Q. So you're saying that Mr. [REDACTED] is
4 lying in this email?

5 MR. DULBERG: Objection. You're 10:20 AM
6 misstating the document.

7 A. I think he's mis --
8 misrepresenting.

9 BY MS. ASAY:

10 Q. And in 2012, you informed 10:21 AM
11 Mr. [REDACTED] that if a Fidelity trader could
12 find a single buyer interested in buying a
13 block of the donated PZN shares at a good
14 price, Fidelity Charitable would look to
15 accomplish a sale like that, right? 10:21 AM

16 MR. DULBERG: Objection.

17 A. I'm not sure what you're referring
18 to.

19 BY MS. ASAY:

20 Q. You don't recall telling Mr. [REDACTED] 10:21 AM
21 in 2012 that if a Fidelity trader could find
22 a single buyer interested in buying a block
23 of PZN shares, that they would pursue an
24 opportunity?

25 A. I -- I recall that we were open to 10:21 AM

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1 information, you were telling the truth,
2 right?

3 A. That was a guideline that was
4 shared with me and I shared it with him.

5 Q. And it was shared with you by the 11:10 AM
6 investments team, right?

7 A. Someone on the investments team.

8 Q. And who was that?

9 A. I -- I don't recall.

10 Q. So Mr. [REDACTED] indicates in his 11:11 AM
11 email, which is marked as Exhibit 1070, that
12 Fidelity was trading over a 10-day period 38
13 percent of the trading volume in PZN, right?

14 THE REPORTER: 30 percent?

15 MS. ASAY: 38 percent. 11:11 AM

16 THE REPORTER: 38 percent of
17 the --

18 MS. ASAY: Trading volume in PZN.

19 MR. DULBERG: Objection to the
20 form. 11:11 AM

21 A. That's what he reported.

22 BY MS. ASAY:

23 Q. And he also said that Fidelity was
24 trading 95 percent of the normal trading
25 volume for PZN, right? 11:11 AM

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1 MR. DULBERG: Objection to the
2 form.

3 A. That's what he's reporting.

4 BY MS. ASAY:

5 Q. And you responded -- 11:11 AM

6 MS. ASAY: Can I have this marked?

7 (Exhibit No. 1076, Bates Nos.

8 FID-FRBN-0043674 through -3675, email string

9 Ryan Boland dated 4/15/13, marked for

10 identification.) 11:12 AM

11 (Witness reviewing document.)

12 A. Okay.

13 BY MS. ASAY:

14 Q. So at some point on April 15th,
15 2013, you responded to Mr. [REDACTED], right? 11:13 AM

16 A. That's correct.

17 Q. And that's the email -- one -- one
18 of those responses is the email marked 1076,
19 right?

20 A. That's correct. 11:13 AM

21 Q. And that top email is an email
22 from you to Mr. [REDACTED], copying Mr. [REDACTED] and
23 Mr. [REDACTED] on April 15th, right?

24 A. Correct.

25 Q. And that's April 15, 2013, right? 11:13 AM

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1 A. Yes.

2 Q. And you sent that email, right?

3 A. I believe so, yes.

4 Q. And in this email in response to

5 Mr. [REDACTED], you didn't tell him that Fidelity 11:14 AM

6 Charitable would not conform its sale of PZN

7 to his preferences, right?

8 MR. DULBERG: Objection, the

9 document speaks for itself.

10 A. Not in this email, no. 11:14 AM

11 BY MS. ASAY:

12 Q. And you didn't tell him that

13 Mr. [REDACTED] was free to express his views but

14 Fidelity Charitable wouldn't consider those

15 views, did you? 11:14 AM

16 MR. DULBERG: Objection.

17 A. Not in this email, no.

18 BY MS. ASAY:

19 Q. And you didn't tell him that

20 Fidelity Charitable would not commit to 11:14 AM

21 limiting its daily trading volume in PZN, did

22 you?

23 MR. DULBERG: Objection to the

24 form.

25 A. Not in this email, no. 11:14 AM

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1 BY MS. ASAY:

2 Q. In fact, you said, "Our trader has
3 been directed to sell no more than 10 percent
4 of average trading volume on any given day,"
5 right?

11:14 AM

6 A. Yes, that's what the email
7 reports.

8 Q. Is that statement true?

9 A. As it was relayed to me, I believe
10 it to be true, yes.

11:14 AM

11 Q. Your trader was directed to sell
12 no more than 10 percent of average trading
13 volume for PZN, right?

14 MR. DULBERG: Objection to the
15 form.

11:15 AM

16 A. I think so. That's what was
17 reported to me.

18 BY MS. ASAY:

19 Q. Who gave that direction to the
20 trader?

11:15 AM

21 A. It would have been a person or
22 people on the investments team, as I recall.

23 Q. Do you recall who it was?

24 A. No.

25 Q. Who was the trader?

11:15 AM

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1 THE VIDEOGRAPHER: The time is
2 11:18, and we are now off the record.

3 (Recess taken at 11:18 a.m. to 11:33 a.m.)

4 THE VIDEOGRAPHER: The time is
5 11:33, and we are now back on the 11:34 AM
6 record.

7 BY MS. ASAY:

8 Q. Mr. Boland, do you still have
9 Exhibit 1076 in front of you?

10 A. Yes, I do. 11:34 AM

11 Q. Okay. And this, again, is your
12 response to Mr. [REDACTED] on April 15th, 2013,
13 right?

14 A. Yes.

15 Q. And when you emailed Mr. [REDACTED] in 11:34 AM
16 response to his inquiry about trading volume,
17 you didn't -- actually, you didn't -- strike
18 that.

19 When you emailed him you mentioned
20 the possibility of a block sale; isn't that 11:34 AM
21 right?

22 MR. DULBERG: Objection to the
23 form.

24 A. I referenced a high volume
25 purchase, yeah. 11:35 AM

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1 BY MS. ASAY:

2 Q. You asked him -- or you said to
3 Mr. [REDACTED], "If you are aware of an investor
4 interested in a high-volume purchase, please
5 let us know and we will be able to accomplish 11:35 AM
6 that large sale," right?

7 A. Yes.

8 Q. You also apologized to Mr. [REDACTED],
9 right?

10 A. I did. 11:35 AM

11 Q. You said, "I apologize for these
12 issues, but I am confident everyone is now on
13 the same page and we will be able to proceed
14 with these lesser daily sales, as referenced
15 above," right? 11:35 AM

16 A. That's -- yes, that's what I
17 wrote.

18 Q. And you also invited his further
19 thoughts and concerns, right?

20 A. I did. 11:35 AM

21 Q. And nowhere in your response to
22 Mr. [REDACTED] on April 5th, 2013, did you suggest
23 that Fidelity Charitable cannot coordinate
24 with donors regarding the sale of donated
25 assets, right? 11:35 AM

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1 MR. DULBERG: Objection to the
2 form.

3 A. Can -- can you re- -- restate
4 that?

5 BY MS. ASAY: 11:35 AM

6 Q. Sure. There's nowhere in your
7 email to Mr. [REDACTED] on April 15, 2013, that
8 tells him that Fidelity Charitable cannot
9 coordinate with donors regarding the sale of
10 donated assets, right?

11:36 AM

11 MR. DULBERG: Objection.

12 A. Not in this email, no.

13 BY MS. ASAY:

14 Q. Is there such an email?

15 MR. DULBERG: Objection.

11:36 AM

16 A. I don't know if there's such an
17 email.

18 BY MS. ASAY:

19 Q. You're not aware of any email to
20 Mr. [REDACTED] from anyone at Fidelity Charitable
21 that tells him that Fidelity Charitable
22 cannot coordinate with donors regarding the
23 sale of donated assets, right?

11:36 AM

24 MR. DULBERG: Objection.

25 A. I don't know if there's such an

11:36 AM

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1 email.

2 BY MS. ASAY:

3 Q. You haven't seen one, right?

4 A. No, not that I recall.

5 Q. And you didn't send one, right? 11:36 AM

6 A. I don't believe so.

7 Q. And in this email to Mr. [REDACTED] on

8 April 15th, 2013, did you tell him that

9 Fidelity Charitable would decide how to

10 liquidate the PZN stock? 11:36 AM

11 A. In the email?

12 Q. Yes.

13 A. No.

14 Q. Did you tell him that it's

15 Fidelity Charitable's policy to sell donated 11:37 AM

16 assets as quickly as possible?

17 MR. DULBERG: Objection, asked and

18 answered. Document speaks for itself.

19 A. In the email?

20 BY MS. ASAY: 11:37 AM

21 Q. That's correct.

22 A. No.

23 Q. And in this email, you did not say

24 that Mr. [REDACTED]'s inquiries regarding Fidelity

25 Charitable's sale of PZN could potentially 11:37 AM

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1 COMMONWEALTH OF MASSACHUSETTS
2 SUFFOLK SS.

3
4 I, Sandra A. Deschaine, Registered
5 Professional Reporter and Notary Public
6 within and for the Commonwealth of
7 Massachusetts at large, do hereby certify
8 that the deposition of Ryan A. Boland, in the
9 matter of Emily Fairbairn, et al. versus
10 Fidelity Investments Charitable Gift Fund, at
11 the offices of Wilmer Cutler Pickering Hale
12 and Dorr LLP, 60 State Street, Boston,
13 Massachusetts, on December 17, 2019, taken
14 and transcribed by me; that the witness
15 provided satisfactory evidence of
16 identification as prescribed by Executive
17 Order 455 (03-13) issued by the Governor of
18 the Commonwealth of Massachusetts; that the
19 transcript produced by me is a true record of
20 the proceedings to the best of my ability;
21 that the witness is reading and signing; that
22 I am neither counsel for, related to, nor
23 employed by any of the parties to the action
24 in which this deposition was taken, and
25 further that I am not a relative or employee
of any attorney or counsel employed by the
parties thereto, nor financially or otherwise
interested in the outcome of the action, on
this 19th day of December 2019.



Sandra A. Deschaine
Registered Professional Reporter

My Commission Expires:
July 5, 2024

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