

Jacqueline Scott Conly

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMILY FAIRBAIRN, et al.,

Plaintiffs,

v.

FIDELITY INVESTMENTS
CHARITABLE GIFT FUND,

Defendant.

Case No. 18-cv-04881-JSC

**ORDER RE: MOTIONS FOR
SUMMARY JUDGMENT**

Re: Dkt. Nos. 134, 136

United States District Court
Northern District of California

Emily and Malcolm Fairbairn sue Fidelity Investments Charitable Gift Fund (“Fidelity Charitable”) alleging contract and tort claims arising from the Fairbairns’ 2017 donation of Energeous shares to Fidelity Charitable through a donor advised fund (“DAF”). The parties’ motions for summary judgment are now pending before the Court.¹ (Dkt. Nos. 134, 136.) Having considered the parties’ briefs and having had the benefit of oral argument on February 20, 2020, the Court DENIES Fidelity’s motion for partial summary judgment and GRANTS the Fairbairns’ motion on certain of Fidelity’s affirmative defenses.

DISCUSSION

I. Fidelity Charitable’s Motion for Summary Judgment

Fidelity Charitable moves for summary judgment on all of the Fairbairns’ claims except their negligence claim. All of the remaining claims—breach of contract, misrepresentation, estoppel, and the UCL—are premised on the Fairbairns’ contention that Fidelity Charitable made four legally enforceable promises:

¹ All parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 11 & 18.)

- 1 • Fidelity Charitable would employ sophisticated state-of-the-art methods for liquidating large blocks of stock,
- 2 • Fidelity Charitable would not trade more than 10 percent of the daily trading volume of Energeous shares,
- 3 • Fidelity Charitable would not liquidate any shares until the new year, and
- 4 • Fidelity Charitable would allow the Fairbairns to advise on a price limit; that is, a price below which Fidelity Charitable would not liquidate the Energeous shares.

5 Fidelity Charitable argues summary judgment is warranted because (1) the Fairbairns are estopped
6 from pursuing any claims based on the first three promises, and (2) the first and last promises are
7 too indefinite to support any claim as a matter of law.

8 **A. Tax Estoppel/Doctrine of Inconsistency**

9 Fidelity Charitable has not proved that the Fairbairns' representation on their 2017 federal
10 tax return that their donation of Energeous stock to Fidelity Charitable is tax deductible clearly
11 contradicts their contention that Fidelity Charitable made the asserted legally-enforceable
12 promises. To put it another way, Fidelity Charitable has not established as a matter of law that the
13 Fairbairns' donation with the alleged conditions means that Fidelity Charitable did not acquire
14 exclusive legal control of the donation as required by the tax code. *See* 26 U.S.C. § 170(f)(18)(B)
15 (providing that an individual can claim a tax deduction for a DAF contribution "if the taxpayer
16 obtains a contemporaneous written acknowledgment ... from the sponsoring organization (as so
17 defined) of such donor advised fund that such organization *has exclusive legal control* over the
18 assets contributed") (emphasis added).

19 First, the Fairbairns' misrepresentation claim is that Fidelity Charitable induced them to
20 donate their shares by falsely promising that it would it would employ state-the-art share
21 liquidation methods, not trade more than 10% of the Energeous daily trading volume, and not trade
22 any shares until the new year. In other words, even if, as Fidelity Charitable claims, a legally-
23 enforceable promise would mean the donation did not qualify as a tax deductible DAF donation,
24 the misrepresentation claim does not require Fidelity Charitable to have made a promise that the
25 Fairbairns could sue to enforce; instead, the misrepresentation claim is based on Fidelity
26 Charitable falsely promising that it was making a legally-enforceable promise.
27
28

1 Second, the cases Fidelity Charitable cites do not establish that if a sponsoring
2 organization promises to handle a future donation in a particular way that means that the
3 sponsoring organization, here Fidelity Charitable, does not retain exclusive legal control within
4 the meaning of the tax code. In *Fund for Anonymous Gifts v. I.R.S.*, No. CIV 95-1629 RCL, 1997
5 WL 198108 (D.D.C. Apr. 15, 1997), vacated in part, 194 F.3d 173 (D.C. Cir. 1999), for example,
6 the trial court held that the purported DAF fund was not entitled to tax-exempt status because
7 under its agreement with the anonymous donors, the fund was “bound by any enforceable
8 conditions *subsequent* which a donor places on his donation.” *Id.* at *4 (emphasis added). That is,
9 the fund was required to honor donor requests made *after* the donation as part of the charity’s
10 explicit investment purpose. *Id.* Indeed, the D.C. Circuit described the district court’s decision to
11 disallow charity tax exempt status as being based “solely on the ground that the Fund’s governing
12 instrument permitted donors to place conditions *subsequent* on their donations.” 194 F.3d 173 at
13 *1 (emphasis added). The D.C. Circuit vacated the district court’s decision because the Fund was
14 willing “to amend its governing instrument to strike out the provision authorizing conditions
15 *subsequent* on donations to the Fund.” *Id.* (emphasis added); *see also New Dynamics Found. v.*
16 *United States*, 70 Fed. Cl. 782, 803 (2006) (denying tax exempt status to an organization because
17 its DAF donors “did not truly relinquish ownership and control over the donated funds and
18 property. Rather, they were allowed to treat [the organization] as a conduit for accomplishing the
19 twin tax avoidance goals of building up their assets tax-free and then siphoning off the
20 accumulated wealth to pay for personal expenditures”). The Fairbairns placed the alleged
21 conditions at issue here prior to or at the time of their donation, not subsequent to their donation.

22 At oral argument Fidelity Charitable relied heavily on *Styles v. Friends of Figi*, 373 P.3d
23 965 (2011), a Nevada Supreme Court unpublished decision. *Styles*, however—apart from being
24 noncitable, *see Nev. R. App. Pro. 36(c)(3)* (a party may cite a Nevada Supreme Court unpublished
25 decision *issued after January 1, 2016*)—does not involve a promise made to induce a donation;
26 instead, following a bench trial the court found that the plaintiff had made an “unrestricted” gift to
27 the defendant charity, and that the gift specifically allowed the charity to reject any donor
28 recommendations as to the donation’s use. The court’s emphasis on the unrestricted nature of the

1 gift contradicts Fidelity Charitable's assertion that *Styles*, as this case, involved a gift with
2 conditions.

3 The agency and legislative material Fidelity Charitable cites likewise do not distinguish
4 between a legally-enforceable promise made at the time of the donation versus a legally-
5 enforceable promise to abide by a donor's directions given after a donation. *See* The Joint
6 Committee on Taxation, Pension Protection Act of 2006, Title XII: Provisions Relating to Exempt
7 Organizations, 2006 WL 4791686; [www.treasury.gov/resource-center/tax-](http://www.treasury.gov/resource-center/tax-policy/Documents/Report-Donor-Advised-Funds-2011.pdf)
8 [policy/Documents/Report-Donor-Advised-Funds-2011.pdf](http://www.treasury.gov/resource-center/tax-policy/Documents/Report-Donor-Advised-Funds-2011.pdf), at p. 2. Fidelity Charitable fares no
9 better with the other charitable donation cases it cites. *See Goldstein (Joel H., Elaine P.) v.*
10 *Comm'r of Internal Revenue*, 89 T.C. 535, 541-42 (1987) (case did not involve any pre or post
11 donation conditions); *Gookin v. United States*, 707 F. Supp. 1156, 1158 (N.D. Cal. 1988) (donor
12 maintained control of donation by paying his personal expenses from the charity); *Fakiris v.*
13 *Comm'r of Internal Revenue*, 113 T.C.M. (CCH) 1555, 2017 WL 2805207, at *25 (T.C.
14 2017)(donor retained the right to require donee to transfer property to a different charity).

15 Fidelity Charitable's reliance on the Fairbairns' response to a Request for Admission is not
16 persuasive. Fidelity Charitable asked the Fairbairns to admit that they "retained control" of the
17 donated shares. In response, the Fairbairns admitted they only retained advisory rights and that
18 Fidelity Charitable had legal control. Fidelity Charitable contends that the Fairbairns' admission
19 that Fidelity Charitable had legal control means they have admitted that Fidelity Charitable did not
20 induce them to donate their shares through the unfulfilled promises. But "legal control" was not
21 defined at the time of the response by the Fairbairns or Fidelity Charitable. According to the
22 Fairbairns, legal control in the context of their response meant that once the donation was made,
23 Fidelity Charitable alone controlled the donation, subject to any promises it made prior to the
24 donation. In any event, requests for admission seeking legal conclusions are generally not
25 permitted. *See Taylor v. Cty. of Calaveras*, No. 1:18-CV-00760-BAM, 2019 WL 6341131, at *4
26 (E.D. Cal. Nov. 27, 2019) (collecting cases). To the extent that Fidelity viewed the Fairbairns'
27 response as in some way unclear regarding what "legal control" meant, Fidelity Charitable could
28 have "move[d] to determine the sufficiency of an answer or objection," *see* Fed. R. Civ. P.

1 36(a)(6), but it cannot instead hold the Fairbairns to having made an admission regarding their
 2 lack of legal control as the term is defined in the tax code when that term was not defined in the
 3 request for admission itself or the response. *See Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242,
 4 1247 (9th Cir. 1981) (“A party requesting an admission may, if he feels these requirements have
 5 not been met, move to determine the sufficiency of the answer, to compel a proper response, or to
 6 have the matter ordered admitted.”).

7 Because the Fairbairns’ charitable tax deduction is not clearly inconsistent with their
 8 assertion that Fidelity Charitable is bound by its alleged promises, the “tax estoppel” cases on
 9 which Fidelity Charitable relies are distinguishable. In *Carpet Supermarket, Inc. v. Nat’l Fire Ins.*
 10 *Co. of Hartford*, No. CV 09-4951 GAF (CWX), 2009 WL 10675718, at *1-2 (C.D. Cal. Sept. 17,
 11 2009), the plaintiff was estopped seeking indemnification under its insurance policy’s employee
 12 dishonesty endorsement because it previously designated the at-issue employee as a non-employee
 13 for tax purposes and the definition of employee under the policy was narrower than the Internal
 14 Revenue Service definition of employee. Similarly, in *Marks v. Am. Airlines, Inc.*, 313 Fed.Appx.
 15 933 (9th Cir. 2009), the plaintiff was estopped from contending he was a California resident and
 16 therefore able to bring a claim under California law because for years he avoided California
 17 income tax by claiming to be a Florida resident, indisputably irreconcilable positions. *Id.* at *1.
 18 As explained above, no such clear inconsistency is present here. *See Milton H. Greene Archives,*
 19 *Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 995 (9th Cir. 2012) (holding that judicial estoppel
 20 generally requires “clearly inconsistent” positions).

21 Further, both *Carpet Supermarket* and *Marks* relied on of *Estate of Ashman v. C.I.R.*, 231
 22 F.3d 541 (9th Cir. 2000). There, the Ninth Circuit held that the duty of consistency requires “(1)
 23 [a] representation or report by the taxpayer; (2) on which the Commission[er] has relied; and (3)
 24 an attempt by the taxpayer after the statute of limitations has run to change the previous
 25 representation or to recharacterize the situation in such a way as to harm the Commissioner.” *Id.*
 26 at 545. *Estate of Ashram’s* “statute of limitations” factor suggests that if a party’s representation
 27 to the IRS is inconsistent with a position taken in a later proceeding, the appropriate approach is
 28 for the IRS to pursue the taxpayer, which it can do only if the statute of limitations has not run.

1 The statute of limitations has not run on the Fairbairns' 2017 tax return. *See Shields v. United*
2 *States*, 136 Fed. Cl. 37, 50 (2018) (three-year statute of limitations). (Dkt. No. 133-10, Marcus
3 Decl. Ex. L (filing extension granted until 10/15/18).) Thus, if the Fairbairns prove that Fidelity
4 Charitable made the legally-enforceable promises, and Fidelity Charitable is correct that such
5 legally-enforceable promises disqualify the donation from a charitable tax deduction, the IRS may
6 take action against the Fairbairns to recover any improper deduction. No "taxpayer estoppel" is
7 needed to prevent any unfairness: Fidelity would be held to its promises, and the Fairbairns would
8 suffer the consequences, if any, of enforcing those promises.

9 **B. Definiteness of the Promises**

10 Next, Fidelity Charitable insists that the first and fourth promises are not sufficiently
11 definite under California law as a matter of law. The Court disagrees.

12 As for the promise that Fidelity Charitable would use sophisticated state-of-the-art
13 methods for liquidating large blocks of stock, drawing all reasonable inferences in the Fairbairns'
14 favor, based on Mr. Fairbairn's testimony a reasonable trier of fact could find that Fidelity
15 Charitable made the promise alleged in the complaint, language that a reasonable trier of fact
16 could also find sufficiently definite.

17 Fidelity Charitable has also not proved that its alleged promise to allow the Fairbairns to
18 advise on a price limit is unenforceable as a matter of law. Performance on the promise is
19 objectively measurable—did Fidelity Charitable ask the Fairbairns' opinion on the sale price
20 before the trades were made? Fidelity Charitable's suggestion that damages for this specific claim
21 are too speculative is also unpersuasive. Based on the evidence in the record, there is a genuine
22 dispute as to whether Fidelity Charitable would have followed the Fairbairns' advice had it been
23 sought.

24 ***

25 For the above reasons, Fidelity Charitable's motion for summary judgment is DENIED.

26 **II. Fidelity Charitable's Affirmative Defenses**

27 Plaintiffs move for summary judgment on three of Fidelity Charitable's affirmative
28 defenses: (1) estoppel; (2) waiver; and (3) unclean hands. Viewing the evidence in the light most

1 favorable to Fidelity Charitable, the Court grants the Fairbairns’ summary judgment on Fidelity
 2 Charitable’s waiver and estoppel defenses for the reasons explained in denying Fidelity
 3 Charitable’s motion for summary judgment. Drawing all reasonable inferences in Fidelity
 4 Charitable’s favor, the Court nonetheless declines to apply estoppel or waiver. *See Rissetto v.*
 5 *Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996) (noting that estoppel is an
 6 “equitable doctrine invoked by a court at its direction”); *Keller v. Fed. Ins. Co.*, 765 F. App’x 271,
 7 273 (9th Cir. 2019) (waiver and estoppel are reviewed for an abuse of discretion). The Court is
 8 not ruling that Fidelity Charitable may not make a tax consequence argument to the jury; instead,
 9 the Court will not bar the Fairbairns’ claims from getting to the jury based on estoppel/waiver.

10 Fidelity Charitable’s unclean hands affirmative defense fares no better. “Whether the
 11 defense applies in particular circumstances depends on the analogous case law, the nature of the
 12 misconduct, and the relationship of the misconduct to the claimed injuries. The focus is the
 13 equities of the relationship between the parties, and specifically whether the unclean hands
 14 affected the transaction at issue.” *Jade Fashion & Co. v. Harkham Indus., Inc.*, 229 Cal. App. 4th
 15 635, 653 (2014) (internal citation and quotation marks omitted). “Not every wrongful act
 16 constitutes unclean hands.” *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970,
 17 979 (1999), as modified on denial of reh’g (Jan. 3, 2000). Further, “[t]he misconduct must
 18 prejudicially affect the rights of the person against whom the relief is sought so that it would be
 19 inequitable to grant such relief.” *Id.* (internal quotations marks omitted and citation omitted).

20 Fidelity Charitable contends that Emily Fairbairn behaved inequitably when she donated
 21 the shares while in possession of material non-public information regarding Michael Leabman—
 22 the founder and Chief Technology Officer of Energous—who planned to step down from his
 23 leadership role once FCC approval was obtained.² At oral argument, Fidelity Charitable insisted
 24 that when Ms. Fairbairn recalled the Energous shares following FCC approval, she knew the
 25 shares were “pregnant with an imminent and precipitous stock decline” and she shifted the risk to
 26

27 _____
 28 ² This was the only theory of unclean hands advanced by Fidelity Charitable at oral argument.
 The Court thus deems the other theories abandoned. *See Jenkins v. County of Riverside*, 398 F.3d
 1093, 1095 n.4 (9th Cir. 2005).

1 Fidelity Charitable that the stock price would plummet. Fidelity Charitable insists that whether
2 Ms. Fairbairn acted inequitably in doing so is a question of fact for the jury.

3 The Fairbairns contend that it is not a jury question where—as here—Fidelity Charitable
4 has failed to offer evidence that Ms. Fairbairn had any knowledge as to when Mr. Leabman
5 planned to step down that factored into her decision to recall the shares at the end of December.
6 They insist that the more plausible explanation is that she recalled the shares when she did because
7 she wanted to obtain the maximum tax deduction and charitable contribution through the DAF.
8 Indeed, the only evidence regarding Ms. Fairbairn’s alleged insider knowledge Fidelity Charitable
9 identifies is Emily Fairbairn’s text messages (1) in November 2017, stating that Energous’ CEO
10 Stephen Rizzone should delay Mr. Leabman’s departure to avoid potential market share loss (Dkt.
11 No. 167-11), and (2) in January 2018, stating that she had fought to delay Mr. Leabman’s exit
12 until after the FCC approval (Dkt. No. 167-13). Viewing these facts in the light most favorable to
13 Fidelity Charitable, these messages do not support an inference that Ms. Fairbairn had insider
14 information regarding the *actual* date of Mr. Leabman’s departure such that she “manipulated the
15 stock price” by recalling the shares at the end of December 2017 as Fidelity Charitable suggests.

16 Even if Fidelity Charitable had identified evidence sufficient to support an inference that
17 Ms. Fairbairn’s conduct was in some way illegal, Fidelity Charitable has failed to show it was
18 prejudiced as a result of her alleged misconduct. Assuming Ms. Fairbairn sought to liquidate the
19 shares before Mr. Leabman left the company, such conduct would not leave Fidelity “holding the
20 bag” on reduced value Energous shares. The Court is not persuaded by Fidelity Charitable’s
21 suggestion that the unclean hands defense does not require a showing of prejudice to the
22 defendant. Despite precedential authority holding that prejudice is a required component of the
23 unclean hands defense, *see, e.g., Kendall-Jackson Winery*, 76 Cal. App. 4th at 979; *Jade Fashion*,
24 229 Cal. App. 4th at 653, Fidelity Charitable insists that because other cases did not include a
25 discussion of prejudice, it is not a requirement. *See Adler v. Fed. Republic of Nigeria*, 219 F.3d
26 869, 877-78 (9th Cir. 2000), as amended on denial of reh’g and reh’g en banc (Aug. 17, 2000);
27 *POM Wonderful LLC v. Coca Cola Co.*, 166 F. Supp. 3d 1085, 1091 (C.D. Cal. 2016); *Unilogic*,
28 *Inc. v. Burroughs Corp.*, 10 Cal. App. 4th 612, 621 (1992). These cases’ lack of discussion of

1 prejudice does not mean that prejudice is not a required factor, it just means that the courts there
 2 found other factors dispositive. Indeed, *Unilogic*, upon which Fidelity Charitable relies heavily,
 3 predated *Kendall-Jackson Winery*, and its discussion of prejudice. Further, *Alder* and *Pom*
 4 *Wonderful* are inapposite. See e.g., *Alder*, 219 F.3d at 877-78 (finding that the court did not abuse
 5 its discretion in rejecting the unclean hands defense because both parties appeared equally
 6 blameworthy and the party asserting the unclean hands defense had knowingly participated in
 7 paying illegal bribes for the illegal contracts); *POM Wonderful*, 166 F. Supp. 3d at 1091
 8 (considering whether unclean hands was a defense to a Lanham Act infringement suit under
 9 federal law, not under California law.). Nor does *Estates of Collins & Flowers*, 205 Cal. App. 4th
 10 1238, 1250-51 (2012), persuade the court that Fidelity Charitable can invoke the unclean hands
 11 defense based on the theory that the Fairbairns' conduct increased the risk to the investing public.
 12 *Estate of Collin & Flowers* merely held that unclean hands barred a party in a quiet title action
 13 from taking advantage of a forged deed when he was aware of the forgery. Not close to the
 14 evidence in this case.

15 Accordingly, summary judgment is granted in the Fairbairns' favor on the unclean hand
 16 defense.

17 CONCLUSION

18 For the reasons stated above, Fidelity Charitable's motion for summary judgment is
 19 DENIED. Plaintiffs' motion for summary judgment is GRANTED.

20 This Order disposes of Docket Nos. 134 and 136.

21 **IT IS SO ORDERED.**

22 Dated: March 2, 2020

23 
 24 JACQUELINE SCOTT CORLEY
 25 United States Magistrate Judge
 26
 27
 28