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David C. Marcus (SBN 158704)
david.marcus@wilmerhale.com
Christopher T. Casamassima (SBN 211280)
chris.casamassima@wilmerhale.com
Nicholas G. Purcell (SBN 313630)
nick.purcell@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Telephone: +1 213 443 5300
Facsimile: +1 213 443 5400

Andrew Dulberg (*admitted pro hac vice*)
andrew.dulberg@wilmerhale.com
Sarah R. Frazier (*admitted pro hac vice*)
sarah.frazier@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Telephone: +1 617 526 6000
Facsimile: +1 617 526 5000

Attorneys for Defendant
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 SUPPLEMENTAL BRIEF RE MOTION *IN LIMINE* NO. 5 TO PRECLUDE PLAINTIFFS FROM PURSUING DAMAGES TO THE DONOR-ADVISED FUND ACCOUNT**

Plaintiffs' supplemental brief in opposition to Fidelity Charitable's Motion in Limine No. 5 does nothing to answer the Court's repeated questions about Plaintiffs' ability as donors of an irrevocable gift to charity to obtain a monetary recovery for alleged damage to the DAF that took ownership of the gift. At the summary judgment hearing in February, the Court stated that the parties would have to address at the pretrial conference whether Plaintiffs "even have a right to any damages" for the allegedly reduced funds in the giving account. ECF No. 170 at 3:13-16. Perhaps reading the writing on the wall, Plaintiffs argued for the first time just a few weeks ago that they are seeking a "surcharge." However, their new position contradicts arguments they made to oppose Fidelity Charitable's motion to dismiss, and their failure to raise the new surcharge theory until now constitutes waiver.

On the merits, Plaintiffs' new theory and the case law they invoke still fail because they do not apply to the facts of this case. The Restatement provides that "beneficiaries" (which Plaintiffs indisputably are not) may "surcharge" the "trustee" (whom Plaintiffs did not sue) for "a breach of trust" (which Plaintiffs previously disclaimed having alleged). *See* Restatement (Third) of Trusts § 95 cmt. b (2012). So, surcharge is not available to Plaintiffs under the plain language of the Restatement. Meanwhile, the case Plaintiffs described as "right on point" (ECF No. 228, Ex. A (10/2/20 Tr.) at 27:15-22) does not help either. It is a 26-year-old Pennsylvania state court case brought by an "incidental beneficiary"—not a donor—that ultimately found "***no*** supportable ground for imposing a surcharge" against individual trustees who were named defendants. *In re Francis Edward McGillick Found.*, 537 Pa. 194, 203 (1994) (emphasis added). Plaintiffs have failed entirely to provide any basis to depart from the general rules in the Restatement (which Plaintiffs contend govern) and the basic principle that one cannot recover for damage to someone else's property. The Court should grant Fidelity Charitable's motion.

A. Plaintiffs' Latest Arguments Are Subject To Judicial Estoppel And Waiver

Plaintiffs' shifting arguments regarding remedies—culminating with their recent arrival at surcharge—give rise to estoppel and waiver.

Judicial Estoppel. In Plaintiffs' opposition to Fidelity Charitable's motion to dismiss, they stated that "the Fairbairns' negligence claim is not the same as a claim for breach of fiduciary duty

or to enforce a charitable trust." ECF No. 29 at 22. Plaintiffs also argued that they had standing because they "assert their distinct personal interest … not a generalized public interest." *Id.* at 20. After using those arguments against the motion to dismiss, Plaintiffs now try the opposite tack. At the final pretrial conference, Plaintiffs represented that their negligence claim really ***is*** a breach of fiduciary duty claim. *See* ECF No. 228, Ex. A (10/2/20 Tr.) at 31:2-18 (Court: "You're saying it's really a breach of fiduciary duty claim." Mr. Stris: "That's correct."). Similarly, instead of seeking a remedy based on their "distinct personal interest," Plaintiffs now claim to seek a recovery on behalf of either Fidelity Charitable itself or Fidelity Charitable's beneficiaries (which Plaintiffs do not identify). *See, e.g.*, ECF No. 203 at 26:1-3 (stating in trial brief that they are entitled to sue on the DAF's behalf); ECF No. 228, Ex. A (10/2/20 Tr.) at 36:7-9 (claiming "they can sue on behalf of the beneficiaries who have no other voice…"). This is a textbook justification for judicial estoppel. *See, e.g., Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) ("Judicial estoppel . . . precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

Waiver. Plaintiffs also have waived any arguments regarding entitlement to specific remedies that they did not raise in their pretrial briefing—including the trial brief, proposed findings of fact and conclusions of law ("FOFCOL"), and especially the joint proposed pretrial order ("JPPTO"). It is black letter law in the Ninth Circuit that "[i]ssues not preserved in the pretrial order are eliminated from the action." *Pierce Cty. Hotel Emps. & Rest. Emps. Health Tr. v. Elks Lodge, B.P.O.E. No. 1450*, 827 F.2d 1324, 1329 (9th Cir. 1987); *see also Alonso v. Blackstone Fin. Grp., LLC*, 2013 WL 6843597, at *10 n.3 (E.D. Cal. Dec. 20, 2013) ("[T]he Court deems any claims which were not included in the parties' trial briefs to have been waived."). Plaintiffs did not even utter the word "surcharge" in their trial brief, FOFCOL or JPPTO, nor did they raise in any of their three required pretrial filings that they were effectively bringing a breach of fiduciary duty claim. Instead, while stating that their right to sue for restoration of losses to the DAF account was an "overarching issue of law" that "inform[s] multiple (or all) of [Plaintiffs'] claims," Plaintiffs' sole relevant argument in their pretrial briefs (made only in their trial brief) was that the Court's order on standing had already decided the issue. ECF No. 203 at 23-26. In

fact, in the JPPTO, Plaintiffs described their pursuit of a restoration of the DAF funds as "damages"—not a surcharge or even an unspecified equitable remedy. *See* ECF No. 191 at 7; *see also* ECF No. 216, Defendant's MIL No. 5, Ex. C at 22 (Plaintiffs' final proposed jury instructions seeking "damages to the Donor Advised Fund Charitable Account").

Plaintiffs raised a surcharge theory for the first time in their opposition to Fidelity Charitable's motion in limine (ECF No. 216, Plaintiffs' Opposition, at 2-3), while waiting even longer—until the final pretrial conference—to contend that this case was in effect a breach of fiduciary duty case. *See* ECF No. 228, Ex. A (10/2/20 Tr.) at 31:15-18. This is far too late to present new theories of recovery and liability.[1] The Court would be well within its discretion to reject Plaintiffs' new arguments on this basis alone.

B. No Authority Justifies The Remedy Plaintiffs Seek

As Fidelity Charitable has consistently maintained, Plaintiffs' reliance on cases involving a breach of trust is misplaced because those cases are vastly different from the present case.[2] For one, Plaintiffs do not contend that anyone involved in this case breached a specific term of Fidelity Charitable's declaration of trust. In fact, as Fidelity Charitable pointed out at the final pretrial conference and Plaintiffs have failed even to attempt to explain, Plaintiffs objected to the declaration of trust itself as irrelevant. ECF No. 212 at 48 (showing Plaintiffs' objections to Ex. 1251). Yet the cases and authority Plaintiffs rely on make clear that breach of trust claims are meant to enforce the terms of the trust. *See, e.g.*, ECF No. 29 at 23 (donor had "standing to enforce the terms of the trust it created"); ECF No. 37 at 30:16-20 ("The terms of the charity trust . . . give

[1] Plaintiffs' pleas for additional briefing ring hollow—they have had ***five*** opportunities to brief this issue: (i) the trial brief, (ii) the FOFCOL, (iii) the JPPTO, (iv) the opposition to this motion in limine, and now (v) this further supplemental brief. Plaintiffs' waiver applies not only to surcharge, but also to "specific performance" and the other remedies Plaintiffs identified for the first time at the Final Pretrial Conference or in their Opposition.

[2] Plaintiffs' supplemental brief contends Fidelity Charitable has "always" argued that Plaintiffs' negligence claim should be construed as a breach of trust claim. ECF No. 228 at 2. Plaintiffs misconstrue Fidelity Charitable's position, which has been that Plaintiffs did not have standing to bring a general mismanagement claim, and that the requirements of special interest standing to seek the restoration of funds are not met in this case. *See, e.g.*, ECF No. 21 at 15-16 (Motion to Dismiss addressing the inapplicability of special interest standing); *see also Lopez v. Medford Community Center, Inc.*, 424 N.E.2d 229, 231 (Mass. 1981) (finding that plaintiffs had standing to assert their personal interests but not claim for general mismanagement). That remains Fidelity Charitable's position in the currently pending motion. *See* ECF No. 216 at 4-7 (same).

the power-holder a special interest in enforcing the charitable trust, and therefore, standing.").

Plaintiffs are indisputably ***not*** seeking to enforce the terms of a trust. Indeed, Plaintiffs previously argued that "a tort committed against a third party is not a matter of trust … administration." ECF No. 203 at 28. Now, Plaintiffs argue that "innumerable cases hold that an appropriate plaintiff … may sue to restore losses caused by negligent investment decisions," and assert—without support—that the Fairbairns are "indisputably" appropriate plaintiffs here. ECF No. 228 at 3-4. But Plaintiffs cite no case in which a donor of an irrevocable charitable gift was able to recover damages or a surcharge based on the claims that Plaintiffs allege here. Plaintiffs rely primarily on a series of out-of-state cases involving breach of trust or breach of fiduciary duty claims (which Plaintiffs did not plead) brought by trust beneficiaries or attorneys general (which Plaintiffs are not) against trustees (whom Plaintiffs have not sued), typically in probate court.[3]

The California authority cited by Plaintiffs is likewise inapplicable. *Lynch* is, as Plaintiffs acknowledge, an Attorney General suit against trustees, and *Mandel* was an appeal from an action brought by trustees against the State of California Cemetery Board (represented by the Attorney General). *See Lynch v. Redfield Found.*, 9 Cal. App 3d 293 (1970); *Mandel v. Cemetery Bd., Dep't of Prof. & Vocational Standards*, 185 Cal. App. 2d 583 (1960). Plaintiffs' claim in this case bears no resemblance to these old and factually inapposite cases, and Plaintiffs' reliance on them

[3] *See, e.g.*, *In re Billmyer*, 142 A.D.3d 1000 (N.Y. Sup. Ct. 2016) (objection, filed in surrogate's court, to trustee's sale of trust asset for below fair market value by executor); *The Woodward Sch. For Girls, Inc. v. City Of Quincy*, 13 N.E.3d 579, 583-584 (Mass. 2014) (claim by beneficiary against trustee for breach of fiduciary duty to invest trust assets properly); *In re Rosenfeld Found. Tr.*, 2006 WL 3040020, at *1 (Pa. Com. Pl. July 31, 2006) (orphans' court petition by trustee of charitable trust seeking surcharge against co-trustee); *Matter of Estate of Janes*, 681 N.E.2d 332 (N.Y. 1997) (surrogate's court account objections by beneficiary and attorney general seeking to surcharge trustee for losses incurred due to trustee's investment decisions); *In re McGillick Found.*, 642 A.2d at 468 (rejecting trust beneficiary's orphans' court petition seeking surcharge against trustees).

Plaintiffs erroneously assert that, in one such case, a federal court concluded that "individuals with special interest standing could sue a charitable hospital for breaching its duty of 'care and loyalty in the management of [its] funds.'" Pls.' Mot. at 4 n.4 (quoting *Stern v. Lucy Webb Hayes Nat'l Training Sch.*, 381 F. Supp. 1003, 1007 (D.D.C. 1974)). But in *Stern*, the complaint actually alleged that the ***trustees*** breached their fiduciary duties through self-dealing, and only named the hospital as a nominal defendant. *Stern*, 381 F. Supp. at 1007. For that reason, that court held that the plaintiffs could seek "an award of damages to be paid into the Hospital's funds" from the trustees—not from the hospital itself (which, like an order for Fidelity Charitable to pay itself, would have been illogical). *Stern v. Lucy Webb Hayes Nat. Training Sch. for Deaconesses & Missionaries*, 367 F. Supp. 536, 540 (D.D.C. 1973).

demonstrates the complete absence of on-point authority supporting Plaintiffs' position.

Plaintiffs' contention that a breach of the "prudent investor rule" can substitute for the breach of a specific provision of the trust in a special interest standing case, ECF No. 228 at 4, is incorrect. As a general matter, trustees may be sued for breaching their fiduciary obligations, but none of Plaintiffs' cases suggests that a plaintiff relying on special interest standing can bring such a claim (or ***any*** claim against anyone other than a trustee). Special interest standing is just that—standing that a party can assert against a trustee because of its special interest in enforcing specific terms of a trust. *See* ECF No. 216 (Defendant's MIL No. 5) at 4-7.

Plaintiffs' suggestion that they could simply amend their Complaint to include a breach of trust claim (ECF No. 228 at 3) is a stark concession that they have not brought a breach of trust claim and therefore cannot obtain a surcharge. It is also wrong. Fidelity Charitable would be substantially prejudiced by the late addition of a new claim. If Plaintiffs had pursued this as a breach of trust case, the record in discovery would been different (including a focus on the terms of the trust), Fidelity Charitable's defenses would have been different, and the parties would have been different. Indeed, Plaintiffs would have had to bring such a claim against Fidelity Charitable's trustees, who they have never even suggested could be liable here. *See Walter v. Drayson*, 538 F.3d 1244, 1249-1250 (9th Cir. 2008) (affirming dismissal of claim because all trustees were not named as defendants and both "the trust and the trustees are required parties").

* * *

The Court had a simple ask of Plaintiffs: provide their best case that justifies restoring the alleged loss to the DAF. *See* ECF No. 228, Ex. A (10/2/20 Tr.) at 27:2-14; 36:18-22; 38:3-11. Plaintiffs have not provided even one marginally good case (for their cause). As Fidelity Charitable has explained, Plaintiffs do not meet any of the Restatement's requirements for seeking a monetary remedy for the DAF specifically, nor do they establish an exception to 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). This is true whether or not the remedy is labeled a surcharge. It is Plaintiffs' burden to provide a justification to deviate from these widely accepted general rules, and they fail to do so.

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DATED: October 16, 2020

Respectfully submitted,

By: */s/ David. C. Marcus*

DAVID C. MARCUS
CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING HALE
AND DORR LLP
350 South Grand Avenue, Suite 2100
Los Angeles, CA 90071
Telephone: +1 213 443 5300
Facsimile: +1 213 443 5400

ANDREW S. DULBERG (*pro hac vice*)
SARAH R. FRAZIER (*pro hac vice*)
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Telephone: +1 617 526 6000
Facsimile: +1 617 526 5000

Attorneys for Defendant
FIDELITY INVESTMENTS FIDELITY
CHARITABLE GIFT FUND