No. 21-16299

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Philip Pinkert, individually and on behalf of a Class of similarly situated individuals, and on behalf of the general public,

Plaintiff-Appellant,

v.

Schwab Charitable Fund, Charles Schwab & Co., Schwab Charitable Board of Directors, and Schwab Charitable Investment Oversight Committee,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:20-CV-07657-LB
Hon. Laurel Beeler

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Although this appeal concerns a matter of first impression for this Court, it calls for straightforward application of California property law and this Court's jurisprudence under Article III, both of which recognize that an "interest" in property may extend beyond its legal owner. At issue is whether an account holder in the Schwab Donor-Advised Fund ("Schwab DAF" or "Fund") has standing to bring suit to challenge the mismanagement of assets in his charitable investment account by the Fund's fiduciaries. The District Court held that Plaintiff-Appellant Philip Pinkert ("Plaintiff") lacked standing because legal title to those assets was transferred to Schwab Charitable for tax purposes. However, this ruling ignores the significant rights and privileges that Plaintiff retains in his account under the applicable Program Policies, his economic interest in not being forced to contribute more to his account to "make up" for the dissipation of assets in his account, and his reputational and expressive interests in maximizing his donations to his chosen beneficiaries.

Notably, unlike other charitable organizations, Schwab Charitable does not provide money or services to those in need. Instead, it has

established a funding vehicle, the Schwab DAF, which is a charitable investment trust through which individual account holders can invest assets that they have earmarked for charitable purposes before distributing them to beneficiary organizations. The Schwab DAF operates much like any other defined contribution investment program (*e.g.*, 401(k) plan), in that account holders have the right to allocate the assets in their account among various investment options that the fiduciaries of the program have decided to make available. The main difference is that accounts are set up for charitable purposes, as opposed to retirement savings or some other purpose. And while account holders do not retain legal title to the funds that they deposit in their account for charitable purposes, they are expected to—and granted privileges to—invest the funds and identify the ultimate recipient of the charitable donation.

The individual account privileges associated with donor-advised funds ("DAFs"), and the investment and disposition rights that account holders retain, make them unique within the universe of charitable giving, and differentiate them from typical charitable trusts or organizations. Moreover, another important distinguishing feature of

the particular DAF here—the Schwab DAF—is that it is affiliated with Schwab & Co., a service provider to the Fund that charges fees to the Fund. DAFs affiliated with financial services companies are relatively new, and cry out for oversight. Yet, the District Court's ruling effectively makes that impossible.

It is precisely for the reason that the District Court found Plaintiff lacked standing—because he surrendered legal title to Schwab Charitable—that the risk of disloyal management is so great. Under the District Court's reasoning, DAFs like the Schwab DAF are effectively immune from accountability. Account holders cannot sue for fiduciary mismanagement of the trust because they have surrendered legal title to their account assets, and beneficiary organizations cannot sue because they have not yet been identified. All the while, Schwab Charitable (which enjoys 501(c)(3) status) is able to funnel millions of dollars in fees to Schwab & Co., which would otherwise have gone to actual charities that serve pro-social functions. Courts have long recognized that exclusive reliance on the Attorney General for enforcement of charitable trusts is neither realistic nor good policy, and that is especially true here.

In promoting the Schwab DAF, Schwab Charitable promises current and prospective account holders that it will "keep[] donor-advised fund account costs prudent and competitive." ER-084.[1] Yet, Plaintiff alleges that Schwab Charitable has done exactly the opposite by: (1) limiting the available investment options almost exclusively to investments available on Schwab & Co.'s OneSource platform, which caused the Schwab DAF to pay excessive administrative and investment fees to Schwab & Co.; (2) selecting only Schwab-affiliated index and money market funds, when nearly identical marketplace alternatives were significantly less expensive and better performing; and (3) selecting higher-priced retail share classes for unaffiliated mutual funds, when the Schwab DAF would have qualified for lower-priced institutional share classes, thereby causing it to pay excessive fees to Schwab & Co. for no valid reason. Given his rights as an account holder, and the promises made to him as an account holder, Plaintiff has standing to sue for these fiduciary breaches.

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[1] The Schwab Charitable Program Policies [ER-078–109] are the subject of the Parties' Joint Motion to Supplement Record on Appeal, Dkt. 9-1 & 9-2 (filed October 11, 2021).

Under the District Court's reasoning, however, account holders retain no interest whatsoever in the use or disposition of their contributions, and even if Schwab Charitable absconded with *all* of their account assets (instead of merely diminishing or wasting a portion of those assets), account holders would have no recourse. That is not and should not be the law. *See United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051, 1057 (9th Cir. 1994) ("In order to contest a forfeiture, a claimant need only have some type of property interest in the forfeited items. This interest need not be an ownership interest; it can be any type of interest …"), *superseded by statute on other grounds*, Pub. L. No. 106–185, 114 Stat. 202 (2000) (codified principally at 18 U.S.C. § 983); *Fairbairn v. Fidelity Invs. Charitable Gift Fund* ("*Fairbairn I*"), No. 18-cv-04881-JSC, 2018 WL 6199684, at *5–6 (N.D. Cal. Nov. 28, 2018) (upholding standing of Fidelity Charitable account holders to sue under California state law).

In summary, Schwab Charitable cannot take advantage of the unique structure of DAFs, create only the illusion of control, misuse account assets for the benefit of its for-profit affiliate Schwab & Co., and stand immune from accountability. Such an egregious violation of

fiduciary obligations should not be left unremedied, and account holders like Plaintiff have the most direct stake in rectifying these breaches. For these and all the reasons that follow, the District Court's order should be reversed.

JURISDICTIONAL STATEMENT

The District Court had diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332(a)(1). ER-043. Plaintiff is a citizen of Connecticut. Defendant Schwab Charitable is a California nonprofit corporation with its principal place of business in California. *Id*. Defendant Schwab & Co. is a California corporation with its principal place of Business in California. *Id*. The members of the Schwab Charitable Board of Directors ("Board") and the Schwab Charitable Investment Oversight Committee ("Committee") are not Connecticut residents. *Id*. Therefore, complete diversity of citizenship exists. In addition, the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $75,000. ER-044.

The District Court also had original jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2). ER-044. Plaintiff is a citizen of the State of Connecticut and at least one Defendant is a

citizen of a different state. *Id*. The amount in controversy in this action exceeds $5,000,000, and there are more than 100 members of the Class. *Id*. All parties consented to the jurisdiction of the Magistrate Judge. ER-134–35.

The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The District Court entered an order dismissing Plaintiff's First Amended Complaint on June 17, 2021. ER-024–34. After Plaintiff declined to further amend his Complaint, ER-022–23, the District Court entered a final judgment in favor of the Defendants on July 12, 2021, ER-021. The Notice of Appeal was filed on August 9, 2021. ER-110–111.

STATUTORY AUTHORITIES

The most pertinent statutory authority appears in the Addendum to this brief.

ISSUES PRESENTED

1.) Does an account holder in the Schwab Charitable Donor-Advised Fund who is authorized to direct the disposition of his account assets have an interest sufficient to support Article III standing to sue for mismanagement of those assets by the Fund's fiduciaries?

2.) Does an account holder in the Schwab Charitable Donor-Advised Fund who is authorized to direct the disposition of his account assets have an interest sufficient to support standing under California Corporations Code § 5142 or California common law, to sue for mismanagement of those assets by the Fund's fiduciaries?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. THE SCHWAB DONOR-ADVISED FUND

Donor-advised funds serve as a kind of "charitable savings account" and appeal to donors as a less administratively burdensome alternative to private foundations. ER-037. While historically associated with certain charitable causes or geographic areas (e.g., Catholic Charities Donor Advised Fund, San Francisco Foundation), in recent years, for-profit financial institutions have sought to leverage the unique structure of DAFs and have recognized the business opportunity they present. ER-037, -040, -048. Today, many of the largest donor-advised funds are affiliated with for-profit financial institutions. ER-040.

The Schwab DAF is one such fund. It is sponsored by Schwab Charitable and has $15 billion in assets, making it one of the ten

largest "charities" in the country. *Id*. Although the Schwab DAF has a charitable purpose, no charitable services are actually provided through the Schwab DAF; instead, the Fund serves as an intermediary investment vehicle in which donors can deposit monies in individualized accounts for charitable purposes, and invest those account assets tax-free in an effort to yield a return on those assets, before determining the ultimate charitable beneficiary. ER-037–38.

As structured, the Schwab DAF allows donors to invest their account in any of fourteen investment pools. ER-052. While donors can choose among the fourteen investment pools, Schwab Charitable selects the investment underlying each investment pool.[2] *Id*. Donors' accounts incur investment management fees depending on how the account is invested and a separate administrative fee that covers the expenses of operating a donor's account. ER-051–52.

Although legally unaffiliated with Schwab & Co., Schwab Charitable and the Schwab DAF would not exist without Schwab & Co.

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[2] The fourteen underlying investment options comprise five passively managed options that track a benchmark index (commonly referred to as index funds), eight actively managed funds, and one money market fund. ER-052–53.

ER-040. In 2010, Schwab & Co. made the initial investments necessary to create the Schwab DAF, and Schwab & Co. continues to provide virtually all administrative, custodial, and brokerage services for the Schwab DAF today. *Id*. Every person working for Schwab Charitable is, in fact, an employee of Schwab & Co. *Id*. Moreover, the chair of Schwab Charitable's Board of Directors is Carrie Schwab-Pomerantz, the daughter of the founder of Schwab & Co. and a Vice President at Schwab & Co. ER-045. As a result of this close, co-dependent relationship, Schwab Charitable does not act independently, focusing only on its charitable purpose, but instead selects investment options and enters into fee arrangements in a manner designed to benefit Schwab & Co. ER-040–43; *see also infra* at Statement of Case § I.D.

B. ACCOUNT HOLDER PRIVILEGES

An individual who establishes a Schwab DAF account is the primary account holder. ER-081. By law, Schwab must maintain the account assets in a separately identified account, *see* 26 U.S.C. § 4966(d)(2)(A)(i), which account holders can name "to honor an individual or a family, to cultivate a legacy of charitable giving, or for another charitable purpose," ER-081. Although an account holder must

surrender legal title to the account assets in order to claim a present-year tax deduction, those same statutory provisions likewise require Schwab Charitable to confer advisory privileges on account holders, through which account holders exercise significant control over their account assets. *See* 26 U.S.C. § 4966(d)(2)(A)(iii). Indeed, Schwab Charitable gives account holders particularly robust advisory rights, beyond those mandated by law. ER-053.

In an effort to encourage donors to invest in the Schwab DAF and open accounts, Schwab Charitable emphasizes the benefits associated with such accounts and the privileges that account holders enjoy. Schwab Charitable advertises Schwab DAF accounts as a tool to "maximiz[e] tax-free growth potential to give even more to charity." ER-093. Account holders are not treated as passive donors, and "are expected to be actively involved in recommending grants to eligible charitable organizations" from their account. ER-100.

According to Schwab Charitable, one of the "most important and fulfilling" privileges of the Schwab DAF is the ability to recommend grants to eligible charities. ER-096. This is not merely a feel-good benefit of the Schwab DAF account—it is one of the core features of the

account and distinguishes account holders like Plaintiff from typical charitable donors. Account holders can require Schwab Charitable to transfer legal title to another charitable corporation (including another DAF). Account holders can also dictate how their grants are publicly identified (by the account holder or anonymously). ER-100.

While Schwab Charitable has final authority to approve account holder recommendations, that authority is narrowly proscribed to instances when the initial recommendation is unlawful, contrary to the purposes of the DAF, or otherwise prohibited, and does not amount to an affirmative right to control account assets. ER-096–97. For example, if Plaintiff wished to support Doctors Without Borders with an unrestricted distribution from his account, Schwab Charitable could not override his recommendation and instead make a donation in his name (or Schwab Charitable's name, for that matter) to the Red Cross, even though it has legal title to Plaintiff's account assets. Indeed, in such an instance—where the distribution is to an eligible organization for a permissible purpose—Schwab Charitable would be contractually obligated to effectuate Plaintiff's recommended distribution. Similarly, if Plaintiff wished to move all his account assets to Fidelity Charitable,

a competitor DAF, Schwab Charitable would have to comply, even though it has legal title to Plaintiff's account assets.

The ability to recommend grants and determine which charitable organization ultimately holds legal title to account assets is a privilege so substantive that the account holder can transfer that privilege to others, and even pass it to successors upon death. ER-082; ER-102–04. Through succession planning, "account holders can plan a charitable legacy" for generations. ER-102. If an account holder recommends multiple successors, upon the account holder's death (or other circumstance activating the succession plan) "a new account will be established for each individual named as a successor" thus conferring all the rights and privileges of the account holder to the named successors. *Id*.

In addition to recommending grants, an account holder also can control how their account assets are invested, much like any other investment account, and can "recommend that their account assets be allocated among a variety of investment pools" or "recommend an investment advisor to manage the assets outside of the investment pools." ER-093–94. This empowers account holders to control how their

money is invested, how it will grow, and over what time period. Even Schwab Charitable acknowledges the significant role of account holder recommendations with respect to investing account assets. In its Investment Policy Statement, under a section titled "Role of the Donor," Schwab Charitable states:

> Each Donor-Advised Fund Account is funded by contributions made by individual donors. Once the donor makes the contribution, Schwab Charitable has legal control over it. However, the donor, or the donor's representative, retains advisory privileges with respect to the distribution of the funds and the investment of the assets in the account. While the Investment Oversight Committee exercises ultimate control over Schwab Charitable's investments and investment advisors, the donor's advice is a key consideration in each Donor-Advised Fund Account's investment allocation.

Schwab Charitable Investment Policy Statement (August 2021) ("IPS") at 1, *available at* https://www.schwabcharitable.org/public/file/P-8085399/, referenced in ER-089.

These privileges are exclusive to account holders, and neither the general donor public nor even Schwab Charitable can exercise them. The same is true of a third party who has contributed to Plaintiff's Schwab DAF account. That person, called a "third-party contributor," "[has] no account privileges with respect to [their] contributions." ER-

086. A summary of the various privileges and interests in account assets is outlined below.

	Account Holder	**General Donor Public**	**Schwab Charitable**
Can Contribute Funds to an Account	X	X	
Has Legal Title Over Account Assets			X
Can Designate Secondary Account Holders	X		
Can Designate Successors to Exercise Full Privileges Upon an Account Holder's Death	X		
Can Recommend a Qualified Investment Advisor	X		
Can Recommend How Account Assets Will be Invested	X		
Can Recommend Grants to Eligible Organizations for Permissible Charitable Purposes, including After One's Death	X		

See ER-081, -082, -093, -094, -096, -100, -102, -104.

C. PLAINTIFF'S SCHWAB DAF ACCOUNT

Plaintiff Pinkert opened his Schwab DAF account in approximately 2007 and has contributed to his account multiple times. ER-044. Plaintiff did not open an account to support Schwab & Co., but rather to advance his own philanthropic goals, support organizations that are personally meaningful to him and his family, and to cultivate the family value of charitable giving. *Id*. Although Plaintiff surrendered legal title to his account assets upon depositing them in his account, he maintains substantial personal interests in his account by virtue of his account privileges. ER-053–54. Since opening his account, Schwab Charitable has invested and distributed assets from his account at his exclusive direction. ER-044–45.

For example, at Plaintiff's direction, Schwab Charitable has directed multiple donations from his account to At Home in Greenwich, a nonprofit membership organization that helps seniors live in their homes as they age. *Id*. Plaintiff has a meaningful personal attachment to this charity. In addition to financially supporting At Home in Greenwich, Plaintiff volunteers as a driver to take senior citizen

members to and from appointments, and has previously served on its finance committee. ER-045.

Also at Plaintiff's direction, Schwab Charitable has directed multiple donations to Jewish Family Services in Greenwich, which provides a wide range of services to poor families emigrating to the United States. *Id*. Financially supporting organizations like Jewish Family Services in Greenwich is an expression of a shared family value of supporting immigrant communities in America. *Id*.

Finally, as to the investment and management of Plaintiff's account assets, Schwab Charitable has followed his direction to invest those account assets in the Schwab Treasury Inflation Protected Securities Index Fund. ER-044. Schwab Charitable pre-selected this as the Schwab DAF's inflation-protected bond option even though a competing option was available from Fidelity that charged less than one-third the cost and would have offered better investment returns to account holders like Plaintiff who desired this type of investment. ER-060. As a result of the excessive investment management fees and other administrative fees that are paid to Schwab & Co. in connection with his account, Plaintiff must contribute more to his account to achieve his

charitable goals, ER-045, and has suffered an economic detriment, ER-073.

D. SCHWAB CHARITABLE'S FIDUCIARY MISMANAGEMENT OF THE SCHWAB DAF

This is just one example of how Schwab Charitable has subverted the interests of account holders like Plaintiff to the interests of its real benefactor, Schwab & Co. At every opportunity, Schwab Charitable has managed the Schwab DAF with an eye towards maximizing revenues for Schwab & Co., to the detriment of account holders and beneficiary charities. Schwab Charitable has accomplished this in three ways: (1) by considering almost exclusively investment options available on Schwab & Co.'s OneSource platform, which caused the Schwab DAF to pay excessive administrative and investment fees to Schwab & Co., ER-056–57; (2) selecting only Schwab-affiliated index and money market funds, when nearly identical marketplace alternatives were significantly less expensive and better performing, ER-058–60; and (3) selecting higher-priced retail share classes for unaffiliated mutual funds, when the Schwab DAF would have qualified for lower-priced institutional share classes, thereby causing it to pay excessive fees to Schwab & Co. for no valid reason, ER-061–65. Defendants' imprudent

and disloyal conduct has diverted millions of dollars out of Schwab DAF accounts (and ultimately, beneficiary charities) into the pockets of Schwab & Co. ER-062.

Needless to say, this is not how a charitable organization is supposed to conduct itself,[3] nor is it how Schwab Charitable represents it will handle donors' account assets. To the contrary, account holders are advised that Schwab Charitable is committed to "keeping donor-advised fund account costs prudent and competitive." ER-084. Similarly, Schwab states in its Investment Policy Statement that it will "exercise prudence and appropriate care in accordance with the

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[3] Schwab Charitable—acting through its Board of Directors and Investment Oversight Committee—is subject to the twin fiduciary duties of loyalty and prudence. Restatement (Third) of Trusts § 2 (cmt. b) (2003) ("The trust relationship is one of many forms of fiduciary relationships. . . ."). These duties require Schwab Charitable to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. Restatement (Third) of Trusts § 77. They also require Schwab Charitable to "administer the trust solely in the interests of the beneficiaries." *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000). To the extent that Schwab & Co. aids and abets breaches of these duties, it is also subject to liability. ER-066–067, -072–075.

Uniform Prudent Management of Institutional Fund Act [UPMIFA]."[4] IPS at 1.

II. PROCEDURAL BACKGROUND

Plaintiff filed the present action on October 30, 2020. ER-134. On January 22, 2021, Defendants moved to dismiss the Complaint. ER-137. In response, Plaintiff filed his First Amended Complaint. ER-137; *see also* ER-035–76. On February 26, 2021, Defendants then moved to dismiss the First Amended Complaint. ER-138. Briefing was complete on April 23, 2021, ER-139, and the motion was heard on June 17, 2021, ER-141. On June 17, 2021, the District Court granted Defendants' motion, ER-141; *see also* ER-024–34, and entered judgment in favor or Defendants on July 12, 2021, ER-141; *see also* ER-021. Plaintiff timely filed his notice of appeal on August 9, 2021. ER-141.

SUMMARY OF THE ARGUMENT

The District Court's order, which was based almost solely on the fact that Plaintiff transferred legal title over his charitable account

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[4] UPMIFA, in turn, requires that an institution that is managing or investing an institutional fund shall "comply[] with the duty of loyalty" and "shall manage and invest the fund in good faith." Cal. Prob. Code § 18503(b).

deposits to Schwab Charitable for tax purposes, should be reversed. The monies that Plaintiff deposited into his Schwab DAF account were not meant to be retained by Schwab Charitable (which serves no direct charitable purpose), and certainly not Schwab & Co. As an account holder with a personal account in his family name, Plaintiff retained robust rights and privileges in his account, including the right to (1) determine how his account assets would be invested (among the available options), (2) designate who would ultimately receive those assets, (3) specify the manner in which donations to end charities would be expressed (in his name, the name of his family, anonymously, etc.), (4) exclude others from his account (or, alternatively, permit secondary account holders), and (5) transfer these and other account privileges to his identified heirs. ER-053–55; *see also* ER-082, -093, -096, -100, -102. And in connection with his account, Schwab Charitable represented that the purpose of the Schwab DAF was "maximizing tax-free growth potential," ER-093, and "keeping donor-advised fund account costs prudent and competitive," ER-084, as a means to allow Plaintiff and others to "give even more to charity," ER-093. Accordingly, Plaintiff is much more than an ordinary donor, Schwab Charitable is much

different than a typical end charity, and Plaintiff has an interest in preventing the diversion of his account assets away from future beneficiary charities and into the pockets of Schwab & Co.

The rights and privileges that are vested in Plaintiff as an account holder are meaningful and personal interests that historically have been recognized as property interests under California law. *See infra* at Argument § I.A.1. It is equally well-recognized that formal legal title over assets and the tax treatment of assets are not dispositive of whether a party has a cognizable interest in those assets, as the District Court seemed to assume. *See infra* at § I.A.2. Plaintiff maintains numerous other hallmarks of property interests, and courts have recognized such equitable property interests as adequate for purposes of Article III, which only demands that Plaintiff have a "sufficiently personal stake in the outcome of the controversy." *Washington v. Trump*, 847 F.3d 1151, 1159 (9th Cir. 2017) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)). *See infra* at § I.A.3. Plaintiff need not be the legal owner or ultimate beneficiary of the funds in his account. *See infra* at § I.A.4.

Relatedly, because Plaintiff's ultimate goal in opening a Schwab DAF account is to support organizations and charitable causes that he and his family personally identify with, injuries that diminish the value of his account necessarily injure his ability to manifest his charitable legacy and express support for organizations that he champions such as Jewish Family Services and At Home in Greenwich. These non-economic injuries are also sufficiently meaningful and personal to Plaintiff to satisfy Article III's injury-in-fact requirement. *See infra* at § I.B. And to the extent that he must contribute more to his account to make up for the losses to his account attributable to Defendants' conduct, and thereby preserve his expressive and reputational interests, Plaintiff suffers an obvious economic loss that serves as a basis for Article III standing. *Id.*

Statutory standing is also manifest. California law explicitly grants standing to those with "*a* . . . contractual or property interest" in the assets of a charitable trust. Cal. Corp. Code § 5142(a)(4) (emphasis added). Because Plaintiff unquestionably retains a contractual or property interest in his account assets, as guaranteed through Schwab Charitable's Program Policies, Plaintiff has standing under California

Corporations Code § 5142. *See infra* at § II.A. Regardless, California, like many other jurisdictions, has recognized "special interest" standing for enforcing charitable trusts. *See, e.g.*, *Fairbairn I*, 2018 WL 6199684, at *5. This common law principle recognizes that empowering others to bring suit may be "justified by society's interest in . . . enhancing enforcement of charitable trusts, in light of the limitations . . . inherent in Attorney General enforcement." Restatement (Third) of Trusts § 94 (cmt. g) (2012). Based on their unique special interests, certain charitable donors and persons authorized to direct charitable disbursements have standing to enforce charitable trusts, including DAF account holders. *See infra* at § II.B.

For all of these reasons, and the reasons set forth further below, the District Court's decision should be reversed, and the case remanded for further proceedings.

STANDARD OF REVIEW

Whether a plaintiff has standing is a legal question, which the Court reviews *de novo*. *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 907 (9th Cir. 2011) (citation omitted). In undertaking this review, this Court "'must accept all factual allegations of the complaint as true and draw

all reasonable inferences in favor of the nonmoving party.'" *Id.* (quoting *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). This includes general factual allegations of injury, as the Court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990)).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF LACKED ARTICLE III STANDING.

A. PLAINTIFF MAINTAINS EQUITABLE PROPERTY INTERESTS IN HIS SCHWAB DAF ACCOUNT SUFFICIENT FOR ARTICLE III.

In dismissing the First Amended Complaint for lack of standing, the District Court failed to recognize the equitable property interests that account holders like Plaintiff maintain in their account assets. The District Court's conclusion that Plaintiff lacked any "contractual or contingent property interest[s] that give a donor Article III standing" focused exclusively on the fact that Plaintiff "gave up legal control of his assets" in exchange for an immediate tax deduction. ER-028; *see also* ER-029 ("he gave up title to and control of his donation in exchange for an immediate tax deduction"); ER-030 (noting "the fund's exclusive legal control over the donations"). However, this analysis ignores

longstanding California law, which recognizes that individuals with property interests short of legal title have cognizable property interests. Under Article III, such interests are sufficient to satisfy the injury-in-fact requirement.

1. Plaintiff Has an Equitable Interest in His Account that Is Recognized Under California Law.

California recognizes that property comprises more than just legal title, but is "'the sum of all the rights and powers incident to ownership . . . . and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial.'" *Union Pac. R.R. Co. v. Santa Fe Pac. Pipelines, Inc.*, 231 Cal. App. 4th 134, 157 (2014) (quoting *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984)); *see also Kaiser Co. v. Reid*, 184 P. 2d 879, 884 (Cal. 1947) (in upholding taxation on possessory interests in property, explaining "[i]t is not the land itself, nor the tittle to the land, nor is it the identical estate held by the United States . . . but is the possession and valuable use of the land subsisting in the citizen."). Thus, property interests may extend beyond the "legal owner" of the property, as "the bundle of sticks that constitutes 'property' . . . may be divided and held (*i.e.*, owned) among

multiple persons." *Pac. Gas & Elec. Co. v. Hart High-Voltage Apparatus Repair & Testing Co., Inc.* ("*PG&E*"), 18 Cal. App. 5th 415, 426 (2017); *see also Shaw v. U.S.*, 137 S. Ct. 462, 466 (2016) (holding bank had property interest in deposited funds held in a customer's account, though it did not own legal title to those funds).

The District Court distinguished *PG&E* on the ground that the "right to [] power is not analogous to directing investments in pre-selected funds or donations, given the fund's exclusive legal control over the donations." ER-030. However, the underlying premise of this reasoning is incorrect. Plaintiff did *not* cede exclusive control over his donations to Schwab Charitable; to the contrary, he retained the right to direct how donated funds would be invested among the menu of available investment options, determine which charitable organizations would ultimately receive the donations (and in what amount), and other important rights. *See supra* at 10–15. Because Plaintiff retained these rights (including rights regarding how his account assets would be invested and ultimately used)—rights that Schwab Charitable does *not* have—he maintained a cognizable interest in his personal account and

the assets in that account, just as PG&E had a cognizable interest in the damaged transformer even though it was not its legal owner.

The District Court's opinion states that "[n]o case supports the conclusion that the right to designate investments (in pre-selected funds) and donations in a donor-advised fund is a contractual or contingent property interest that gives a donor [] standing" to sue to protect his interests as an account holder. ER-030. However, the *Fairbairn* case is directly on point. In *Fairbairn I*, the court held that Fidelity Charitable account holders who had virtually the exact same set of privileges as Plaintiff had "a special relationship sufficient to confer standing to sue regarding the disposition" of funds in their account. 2018 WL 6199684, at *6. Specifically, the court found it relevant that:

a) Fidelity Charitable held funds in a dedicated account—and ultimately donated them to charitable organizations—in the donor's name.
b) The donor had exclusive advisory rights over the funds—Fidelity Charitable could not allow anyone else to dictate where they are donated.
c) Nor could Fidelity Charitable itself even make grants or otherwise take money out of an account without action from the donor.
d) Fidelity Charitable retained only a veto power over a donor's decisions, which it would exercise only if the

> donor attempted to use the money for an improper or non-charitable purpose.

Id. (cleaned up). Plaintiff maintains nearly identical interests here, giving him standing to bring suit. Indeed, contrary to the District Court's analysis, the *Fairbairn I* court stated that "[n]o California court has held that a plaintiff with similar rights does *not* have standing to sue." *Id.* (emphasis added).

The District Court found *Fairbairn* inapplicable on the basis that Plaintiff has not alleged that the fund "broke specific promises," ER-030, -033, but this conflates the issue of whether Plaintiff held an interest in his account with whether that interest was breached. In any event, the District Court's statement is incorrect. In its Program Policies, Schwab Charitable states that part of its mission is "keeping donor-advised fund account costs prudent and competitive." ER-084. In alleging Defendants breached their fiduciary duties to manage the DAF prudently and loyally, Plaintiff alleges that the conduct at issue here was inconsistent with Schwab Charitable's promises and fiduciary obligations. *See Tibble v. Edison Int'l*, 843 F.3d 1187, 1197 (9th Cir. 2016) (en banc) ("[C]ost-conscious management is fundamental to prudence in the investment function.") (quoting Restatement (Third) of

Trusts § 90 (cmt. b) (2007)). Accordingly, the same analysis should apply. "The integral involvement of [Plaintiff] in the awarding of [donations]" creates an interest in the trust "which is immediate, direct, and substantial—certainly far greater than the abstract interest of all citizens in having others comply with the law." *In re Francis Edward McGillick Found.*, 642 A.2d 467, 469–70 (Pa. 1994).

This is especially so because Plaintiff possesses other "traditional hallmarks of property," including "the right to exclude others" from impeding on his property interest and the right to "sell, assign or otherwise transfer" the interest. *Cal. Chamber of Comm.*, 10 Cal. App. 5th 605, 648 (2017) (citation and quotations omitted), *as modified on denial of reh'g* (June 20, 2005); *PG&E*, 18 Cal. App. 5th at 426. The Program Policies explicitly state that "Account holders may restrict account access and privileges to themselves." ER-081. These exclusionary rights apply not only against third parties, but also against Schwab Charitable. For example, Schwab Charitable cannot unilaterally transfer legal title of Plaintiff's account assets, nor can it assign another name to his account or determine how his donations will be recognized, nor can it unilaterally decide how his assets will be

invested. Moreover, Plaintiff's personal account privileges are transferable, as Plaintiff can confer his investment advisory privileges upon another person, and also heritable, as Plaintiff can designate to whom his account privileges pass in the event of his death. ER-055, *see also* ER-102.

2. The Transfer of Legal Ownership for Tax Purposes Does Not Negate Plaintiff's Equitable Interests in His Account.

The District Court focused on the fact that Plaintiff was required to "give up title to and control of his donation in exchange for an immediate tax deduction." ER-029 (cleaned up). Specifically, under the tax code, a deduction is allowed only if the donor/taxpayer obtains a written acknowledgement that the sponsor of the DAF "has exclusive legal control of the assets contributed." 26 U.S.C. § 170(f)(18)(B). Consistent with this code provision, Schwab Charitable advises prospective donors in the Program Policies that their donations are "subject to the exclusive legal authority and control" of Schwab Charitable. ER-026.

However, this is not dispositive because "federal tax laws are not intended to determine a party's property rights." *Hoffman v. Connell*, 73

Cal. App. 4th 1194, 1199 (1999). Instead, "state law creates legal interests and rights," and federal law merely "designate[s] what interests or rights, so created, shall be taxed.'" *Id.* (quoting *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940)). Under state law, Plaintiff has a cognizable interest in his account, even if he does not hold title to the assets. *See supra* at § I.A.1.[5]

Similarly, the written acknowledgement that Schwab Charitable provides in order to meet the deductibility requirements of the tax code is not determinative of whether Plaintiff has an interest in his account. *See* ER-026. Instead, California courts look at the substantive effect of the contract. *See Benninghoff v. Sup. Ct.*, 136 Cal. App. 4th 61, 73 (2006) ("'The nature of the instrument is not to be determined by what the parties called it. Its nature is to be determined by its legal effect.'" (quoting *Rosen v. E.C. Losch, Inc.*, 234 Cal. App. 2d 324, 331–32 (1965)).

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[5] Even if IRS regulations were relevant to the issue of whether Plaintiff has a property interest in his account, those same regulations require Schwab Charitable to provide Plaintiff with concrete interests in his DAF account in order for Schwab Charitable to claim 501(c)(3) status. 26 U.S.C. § 4966(d)(2)(A)(iii) (requiring donor-advised fund to provide donor with "advisory privileges with respect to the distribution or investment of amounts held in such fund").

As Abraham Lincoln observed, "calling a tail a leg does not make it so." *Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1167-68 (9th Cir. 2013). Thus, California courts have found that a contract or regulation conferred property interests upon a party despite language explicitly declaring those interests were "not property interests." *See, e.g.*, *PG&E*, 18 Cal. App. 5th at 420 (holding that a party that held "multiple property interests" in electric transformer short of legal ownership had standing to sue, despite language in the contract to the contrary); *Cal. Chamber of Comm*, 10 Cal. App. 5th at 634, 648 (holding that under California's cap-and-trade emissions, program, companies that had purchased carbon trading credits maintained "a valuable property interest—the privilege to pollute California's air—that may be freely sold or traded on the secondary market" notwithstanding language in the regulation explicitly stating that "the allowances confer no property rights"); *Habenicht v. Lissak*, 20 P. 874, 877 (Cal. 1889) (holding that a seat on stock exchange was property of individual holding it, despite the fact that the bylaws of the exchange stated that all property of the exchange was held in trust for the benefit of members, and that

members had no property interest in any property related to the exchange.).

Although the District Court held that this case law is "not analogous" ER-030, the distinctions that it drew support Plaintiff's position. For example, the District Court distinguished *California Chamber of Commerce* on the ground that the privilege to pollute "could be traded on a secondary market," and distinguished *Habenicht* on the ground that a seat on the stock exchange "could be sold to others." *Id.* But as noted above, Plaintiff's rights as an account holder are also transferrable. *See supra* at 30–31. Likewise, *PG&E* is not meaningfully distinguishable from this case for the reasons previously explained. *See supra* at 27.

3. Plaintiff's Equitable Interests Satisfy Article III's Injury-in-Fact Requirement.

Given Plaintiff's equitable property interests in his account under California law, there is little question that he has Article III standing. In numerous cases, courts have held that equitable property interests short of legal title are sufficient to satisfy Article III's "injury-in-fact" requirement. *See, e.g.*, *United States v. Real Prop. Located at 475 Martin Lane*, 545 F.3d 1134, 1140 (9th Cir. 2008); *$191,910.00 in U.S.*

Currency, 16 F.3d at 1058; *United States v. 1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984).

"The 'gist of the question of standing' is whether the plaintiff has a sufficiently 'personal stake in the outcome of the controversy.'" *Washington*, 847 F.3d at 1159 (quoting *Massachusetts*, 549 U.S. at 517). In forfeiture actions, for example,[6] the question is "whether the claimant has a sufficient interest in the property to create a case or controversy." *Real Prop. Located at 475 Martin Lane*, 545 F.3d at 1140 (citation and quotations omitted). This burden is "not a heavy one." *Id.* As then-Judge Alito put it: "Injury-in-fact is not Mount Everest." *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005).

When it comes to injuries to property, courts have recognized that those with "only . . . *some* type of property interest" can have standing under Article III. *$191,910.00 in U.S. Currency*, 16 F.3d at 1047 (emphasis added). "This interest need not be an ownership interest; it

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[6] The present case is analogous to a forfeiture action in that Plaintiff alleges a portion of the assets in his account were forfeited to Schwab & Co. (instead of preserved for charitable uses) as a result of the alleged fiduciary breaches by Schwab Charitable. The fact that he suffered only a partial forfeiture—not a complete loss—due to the alleged unlawful conduct makes no difference for standing purposes. *See infra* at 37–38.

can be any type of interest." *Id.*; *see also 1982 Sanger 24' Spectra Boat*, 738 F.2d at 1046 (same) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *U.S. v. 5 S 351 Tuthill Road,* 233 F.3d 1017, 1022 (7th Cir. 2000) (holding that a plaintiff "who does not own or control the land or its sale price" can still have Article III standing where he nonetheless "faces an immediate threat of injury if the land is forfeited," noting that Article III standing requirements are "undemanding"). When a party has been "'deprived of its right' to use of the property" it can suffer injury-in-fact, "even if it ultimately did not suffer unreimbursed loss." *Shaw*, 137 S. Ct. at 467 (quoting *Carpenter v. U.S.*, 484 U.S. 19, 26–27 (1987)). This includes a loss of use of money, even where the funds were ultimately reimbursed. *See Van v. LLR, Inc.*, 962 F.3d 1160, 1161–64 (9th Cir. 2020).

The fundamental error in the District Court's analysis is revealed by the extreme results it would produce. If Defendants had absconded with all of Plaintiff's account assets to buy a corporate jet, it would be easy to perceive Plaintiff's standing to bring suit to remedy the injury. Yet, the District Court's opinion leaves no room for standing even under that circumstance because it found that Plaintiff had no interest

whatsoever in his account assets. The fact that the breach in this case takes on a more mundane appearance—succumbing to a conflict of interest and selecting more expensive and poorly performing investment options, which slowly siphons funds out of Plaintiff's account and into the pockets of Schwab & Co.—does not diminish Plaintiff's personal stake in this litigation or his standing to bring suit. Indeed, that the deception is harder to identify, incremental yet broad, and cloaked with the veneer of legitimate financial practices, makes it all the more important that those beyond the Attorney General have standing to bring suit to ensure that the assets of the charitable trust are not wasted. *See Holt v. Coll. of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 754–55 (1964) ("[P]art of the problem of enforcement is to bring to light conduct detrimental to a charitable trust so that remedial action may be taken. The Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact . . . .").

That the misconduct here amounts to a small fraction of account assets does not diminish Plaintiff's interest, either. "For standing purposes, a loss of even a small amount of money is ordinarily an

'injury.'" *Czyzewski v. Jevic Holding Corp.*, — U.S. —, 137 S. Ct. 973, 983 (2017)); *see also Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 289 (2008) (noting that the loss of "a dollar or two" is sufficient to confer Article III standing); *Van*, 962 F.3d at 1162 (collecting cases). For a donor-advised fund, where a key benefit is "maximizing tax-free growth potential to give even more to charity," ER-093, the injury based on improper charges and diminishment of account assets is even more apparent. *See Van*, 962 F.3d at 1162-63 (citing*, inter alia*, *Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 828 (7th Cir. 2018) ("The plaintiffs have standing . . . because unauthorized withdrawals from their accounts cause a loss . . . . ")).

Nor is it relevant that Plaintiff is not the only account holder who has been harmed. "[T]he fact that a harm is widely shared does not necessarily render it a generalized grievance." *Jewel*, 673 F.3d at 909. Plaintiff adequately alleged that the misconduct here injured his interests "in a 'personal and individual way'" and that is adequate for Article III purposes. *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 598 (9th Cir. 2020) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)), *cert. denied sub nom. Facebook, Inc. v. Davis*,

141 S. Ct. 1684, (2021). This is not a case where someone seeks to vindicate generalized interests in property, such as a shareholder. *See United States v. Real Prop. Associated with First Beneficial Mortg. Corp.*, No. 3:08-cv-285, 2009 WL 1035233, at *3 (W.D.N.C. Apr. 16, 2009) ("[A] shareholder in a corporation does not have Article III standing to contest the forfeiture of corporate property") (collecting cases); *see also United States v. Ribadeneira*, 105 F.3d 833, 836 (2d Cir. 1997) (general creditors lack cognizable ownership interest in specific property). Plaintiff's account assets are held in a separate account under his family name, and Plaintiff alleges that excessive fees were taken from his own account and diminish his particular property interests in those account assets. ER-044–45.

4. Plaintiff Maintains a Cognizable Interest in His Account Even Though He is Not a Beneficiary.

Finally, the District Court further erred in observing that notwithstanding any interests Plaintiff may have in his account assets, he lacked standing to assert the rights of the charitable trust because

he is not a beneficiary. ER-031.[7] There is significant irony in this reasoning, in that potential beneficiaries of a charitable trust are generally deemed *not* to have an interest sufficient to bring suit to enforce trust obligations. *See, e.g.*, *L.B. Rsch. & Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 171, 181 (2005) ("Beneficiaries of a charitable trust, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf." (quoting *Holt*, 61 Cal. 2d at 754)); *City of Palm Springs v. Living Desert Rsrv.*, 70 Cal. App. 4th 613, 620 (1999) (same). Thus, the District Court's analysis would result in an enforcement "no man's land," in which account holders lack standing to bring suit because they are deemed to have no interest in monies that they have set aside for charitable purposes, and potential beneficiaries have no standing to bring suit because they have not yet obtained an interest in those funds themselves.[8] The end result

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[7] The extent to which the District Court relied upon this analysis is unclear, as the Court discussed it only as a "related point" without drawing any conclusions from it, noting only that "[t]he plaintiff is not a beneficiary of the fund." ER-031.

[8] That the Attorney General could theoretically bring suit hardly provides sufficient protection for account holders and the charities that are meant to be served by their donations. *See supra* at 37 (citing *Holt*,

where the fiduciary responsible for the trust (Schwab Charitable) is tied to a for-profit financial services firm (Schwab & Co.) is not hard to discern.

The District Court's reasoning in this regard also suffers from at least two other flaws. *First*, Plaintiff is not raising the interests of another person. Although his interests may be aligned with the ultimate beneficiaries of his donations, they are distinct. As discussed above, Plaintiff maintains articulated, colorable property interests in his individual account, which are distinct from third party donors and which were directly impaired by Defendants' mismanagement of the assets in that account. *See United States v. JP Morgan Chase Bank Acct. No. Ending 8215*, 835 F.3d 1159, 1167 (9th Cir. 2016). Plaintiff is not raising a derivative claim on behalf of the entire trust, but rather, the "locus of the[] injury" is to his own individual account assets, held in his name. *Id.* His interests in determining which charitable

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61 Cal. 2d at 754–55). Nor is the Attorney General's authority relevant as to whether account holders also have an interest in bringing suit themselves. *See Holt*, 61 Cal. 2d at 755 ("There is no rule or policy against supplementing the Attorney General's power of enforcement by allowing other responsible individuals to sue [o]n behalf of the charity.").

organizations ultimately receive his account assets, properly investing those assets, and maximizing the growth of his account assets are (among others) directly injured by Defendants' disloyal and imprudent practices.

Second, the District Court's reasoning is the type of "prudential-standing addendum to the Article III standing inquiry [that] has fallen into disfavor in recent years." *JP Morgan Chase Bank Acct. No. Ending 8215*, 835 F.3d at 1167. Whether a plaintiff falls within the zone of interests of the statute authorizing suit is a question of statutory interpretation, not jurisdictional. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127–28 (2014); *see also Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1156 (9th Cir. 2015) ("[W]hether a plaintiff's claims are within a statute's zone of interests is not a jurisdictional question."). Here, the relevant statute, California Corporations Code § 5142, explicitly grants standing to several non-beneficiaries—including those with a "property or contractual interest" in the charitable trust. *See infra* at 47–48. Thus, Plaintiff satisfies any extraneous prudential standing requirement because he falls within the ambit of those authorized to bring suit under § 5142.

B. PLAINTIFF ALSO HAS COGNIZABLE EXPRESSIVE AND REPUTATIONAL INTERESTS IN DONATIONS MADE FROM HIS ACCOUNT.

The District Court's near-singular focus on whether Plaintiff retained an economic interest at law in funds that he donated to his account also failed to give proper consideration to his non-economic interests in his account, and in particular, his expressive and reputational interests in making and directing donations.

As alleged in the First Amended Complaint, Plaintiff uses his Schwab DAF account to express the shared family values of supporting immigrant families (through his donations to Jewish Family Services), and supporting senior members of his community (through his donations to At Home in Greenwich, for which he also volunteers). ER-044–45. By diverting money away from his account into the pockets of Schwab & Co., Defendants have injured those expressive interests, as every dollar taken away from his account reduces Plaintiff's ability to express his support for these causes. ER-045. Further, because each donation confers recognition from his community and peers, Defendants' conduct also injures his reputational interests by reducing

the amount he is able to donate (and thereby receive recognition for).[9] *Id*. And to the extent that Plaintiff contributes more to his account to make up for the losses to his account attributable to Schwab Charitable's fiduciary breaches (and Schwab & Co.'s aiding and abetting of those breaches), and thereby preserve his expressive and reputational interests, he suffers an obvious economic loss. *Id*.

It is well-established that Article III standing can arise from a "personalized injury stemming from noneconomic harm." *Meland v. Weber*, 2 F.4th 838, 844 (9th Cir. 2021) (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)); *see also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982) ("[W]e do not retreat from our earlier

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[9] As gifts grow larger, the reputational benefits become greater, as is apparent on any college campus tour when one observes the names of large donors engraved on certain buildings (or in periodic newsletters from educational or other non-profit organizations where donors are listed in tiers based on the size of their donations). Conversely, when gifts are smaller because the corpus of the trust has been wasted, the reputational benefits are diminished. The community recognition Plaintiff garners from donations to local organizations like At Home in Greenwich, especially when he volunteers as a driver and has served on its finance committee, is meaningful and significant, and he is harmed when the amount of his donation is reduced. ER-045.

holdings that standing may be predicated on noneconomic injury.")). For example, courts have found standing based on injuries to "aesthetic, conservational, and recreational" values, as well as religious interests. *Ass'n of Data Processing*, 397 U.S. at 154 (citation and quotations omitted).

In denying standing on this basis, the District Court stated that "the harm to a plaintiff-donor's advisory or reputational interest is not injury in fact commensurate with [] industrial pollution reducing recreational opportunities . . . or [] inaccurate information in a consumer report." ER-031. However, as noted above, Article III standing does not turn on whether the plaintiff has shown some undefined *amount* of harm, but rather whether the plaintiff has a personalized stake in the controversy at all. Given that Plaintiff has an individual DAF account in his family name, can personally determine who receives the monies in that account, and can determine how donations from his account will be recognized (by the account holder's name, a special account name, or anonymously, ER-100), Plaintiff has the necessary personal stake.

The expressive and reputational value of charitable giving is not mere pretext. The fact that account holders seek to direct their donations, and are not satisfied to simply accept the immediate tax deduction and allow Schwab Charitable to do whatever it wishes with their account assets, demonstrates the noneconomic value of charitable giving to account holders. *See, e.g.*, *Fairbairn v. Fidelity Invests. Charitable Gift Fund* ("*Fairbairn II*"), No. 18-cv-04881-JSC, 2021 WL 754534, at *2 (N.D. Cal. Feb. 26, 2021) (noting account holder's interest in tax deduction, but also their "particular interest[] in having their donated funds support Lyme disease research."). If account holders were truly indifferent to the value of directing donations from their accounts, Schwab Charitable would not market the ability to direct donations as "the most important and fulfilling feature of a donor-advised fund." ER-096.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFF LACKS STATUTORY OR COMMON LAW STANDING UNDER CALIFORNIA LAW.

A. PLAINTIFF HAS CONTRACTUAL AND PROPERTY INTERESTS IN HIS ACCOUNT THAT CONFER STANDING UNDER CALIFORNIA CORPORATIONS CODE § 5142.

The District Court also erred in concluding that Plaintiff lacks statutory standing under California Corporations Code § 5142. *See* ER-032. This statute explicitly expands the universe of parties with standing to enforce charitable trusts to include not only the Attorney General and those directly responsible for administering the trust, but also a "person with a reversionary, contractual, or property interest in the assets subject to [the] charitable trust." Cal. Corp. Code § 5142(a)(4). Account holders like Plaintiff—who maintain substantial contractual and property interests in their own accounts bearing their own names—have standing to bring claims to enforce obligations under the trust.[10]

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[10] Because a charitable trust is a fiduciary relationship, the fiduciary duties owed by a trustee apply to the investment of the trust assets. Therefore, a breach of charitable trust claim encompasses a breach of fiduciary duty claims against trustees. *See In re Old Canal Fin. Corp.*, 550 B.R. 519 (C.D. Cal. 2016); *Patton v. Sherwood*, 152 Cal. App. 4th

Once again conflating legal title with all property interests, the District Court concluded that because Plaintiff lacked "legal title and control" over his assets, he lacked *any* contractual or property interest for purposes of § 5142. ER-032. This is wrong for the reasons discussed above. *See supra* at 31–34.

The District Court's ruling is particularly curious in light of the language of the statute. Section 5142 requires only that the person bringing suit maintain "*a* . . . contractual[] or property interest" in the charitable trust assets, and is not limited to the legal titleholder. Cal. Corp. Code § 5142(a)(4) (emphasis added). Indeed, the word "legal" is entirely absent from the statute, and subsection (a)(4) of the statute would be rendered meaningless if it were interpreted to only include the legal titleholder to donated assets (since subsection (a)(1) already includes the charitable corporation, *see* Cal. Corp. Code § 5142(a)(1)).

California's recognition of property interests is flexible, and the California Supreme Court has explained that a property interest for

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339, 342–47 (2007) (trust provision allowing plaintiff "to bring a claim for breach of trust" provided authority to bring breach of fiduciary duty claim against former trustees of charitable trust); *see also* ER-071.

federal taxation purposes is different from a property interest for other legislative purposes. *See Hubbard v. Brown*, 50 Cal. 3d 189, 196 (1990). In *Hubbard*, the California Supreme Court considered whether a person with a grazing permit on federal land had "an interest in real property" to qualify for state statutory immunity from liability arising from injuries suffered on the property. *Id.* at 1185. Federal law explicitly stated that persons with grazing permits "convey no right, title, or interest . . . in any lands." *Id.* at 1186. The Court of Appeals reasoned that this precluded the grazing permit holder from having "any interest in land" for purposes of the immunity statute under state law. *Id.* However, the California Supreme Court reversed:

> California recognizes that lack of an interest in property for purposes of compensation is nonetheless compatible with a recognizable interest for other legislative purposes. For example, the concept of 'property interests' for taxation purposes is entirely different from that of compensable interests in eminent domain. . . . The phrase "interest in real property" should not be given a narrow or technical interpretation.

Id. (internal citations and quotations omitted). The same reasoning applies here.

Imposing a narrow reading of § 5142 would thwart the purposes of the statute and also run contrary to the expansive view of standing that

California courts have historically applied. As the California Supreme Court recognized in *Holt*, "the need for adequate enforcement [of charitable trusts] is not wholly fulfilled by the authority given" to the Attorney General and "[t]he administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." 61 Cal. 2d at 755–56 (holding that trustees of a charitable corporation also have standing to enforce a charitable trust even though they lack "legal title" and lack "all the attributes of a trustee of a charitable trust"); *see also Summers v. Colette*, 34 Cal. App. 5th 361, 374 (2019) (declining to "read into [§ 5142 and other related statutes] a continuous directorship requirement" and holding that a *former* director of a charitable corporation retains standing under § 5142). [11] Here, account holders have a more direct

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[11] *But see Turner v. Victoria*, 67 Cal. App. 5th 1099 (2021), *review filed* Sep. 24, 2021 (disagreeing with *Summers* and concluding § 5142 and related statutes do have a continuous directorship requirement). The court's analysis in *Turner* was largely focused on parallel provisions in the general corporation law (GCL) that do impose a continuous directorship requirement in a derivative lawsuit. *Id.* at 1120–21. That is not relevant here, where the plaintiff is not a director and is not suing derivatively, but is instead an account holder suing to recover losses suffered by his own account, under his family name, over which he has

interest in the account assets than any of the other parties authorized to enforce a charitable trust under § 5142.[12]

Indeed, especially "strong reasons of policy" favor a reading of § 5142 that would authorize account holders to enforce the charitable trust where the other parties granted standing—the Schwab Charitable Board and Committee—are alleged to have succumbed to a conflict of interest in mismanaging the trust. *See Summers*, 34 Cal. App. 5th at 373 (declining to read a continuous directorship requirement into § 5142, noting "[o]ther directors, themselves charged with fraud, misconduct or neglect, should not have the power to terminate the suit by effecting the ouster of the director-plaintiff"). It would undermine the purposes of § 5142 if the Board and Committee members alleged to

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account rights. Moreover, the provision of § 5142 granting standing to those with a "reversionary, contractual or property interest" in the trust assets has no analog under the GCL. *See id.* at 1122 ("Sections 5142 and 5233 were new provisions that did not have a direct correlation to the GCL . . . . [Section 5142] expands the statutory authority [to enforce a charitable trust].").

[12] Account holders also have the closest relationship to the potential trust beneficiaries because they, more than any other authorized party, are likely to know who beneficiaries of a charitable trust may be, since they are the parties who select them.

have breached their fiduciary duties could argue that they alone are empowered to enforce the charitable trust and that others with robust and cognizable property interests are not.[13]

While some courts have expressed reluctance to expand too greatly the universe of parties with standing to enforce a charitable trust, those policy considerations do not apply here. One recent decision denying standing to a former director, *Turner v. Victoria*, noted the "important contributions nonprofit organizations make to nearly every aspect of American life" through "religious institutions, schools and colleges, human and social resource agencies, cultural and arts organizations, medical and scientific research facilities" among others. 67 Cal. App. 5th at 1130 (citation and quotations omitted). In light of these valuable functions, they must be "allowed the greatest degree of freedom to operate" and courts must "strike the difficult balance between the desire to assure that abuses will be corrected and the

[13] That concern is particularly salient here where the chair of Schwab Charitable is the daughter of the founder of Schwab & Co. and a Vice President at Schwab & Co. *See supra* at 10.

desire to permit fiduciaries to function without unwarranted abuse and harassment." *Id.* at 158 (citation and quotations omitted).

Such policy considerations warrant the *opposite* outcome here. Schwab Charitable serves no direct charitable purpose, and the Schwab DAF operates merely as temporary waystation for donated funds before they are distributed to a bona fide charitable organization. *See Fairbairn II*, 2021 WL 754534, at *2 ("A donor advised fund (DAF) is a special type of financial account that . . . has usually been created by a for-profit financial institution . . . [and] enables a donor to get an immediate tax deduction but defer the actual donation of the funds to individual charities until later."). Whatever social purpose Schwab Charitable and the Schwab DAF may serve is limited to "maximizing tax-free growth potential" (*supra* at 21) and "keeping donor-advised fund account costs prudent and competitive" (*supra* at 21) as a means to "give even more to charity"—functions that are materially undermined by the conduct at issue in this case.

This is not a case where Plaintiff has donated to an organization committed to protecting whales, and he is upset that the organization is now directing resources to also protecting coral reefs. As alleged in the

First Amended Complaint, Schwab Charitable is diverting millions of dollars away from donor accounts (and ultimately beneficiary charities) into the pockets of its affiliated for-profit broker-dealer, Schwab & Co. This Court should not be concerned with ensuring that such DAFs have "the greatest degree of freedom to operate" but should instead be more focused on "assuring the public of the integrity" of Schwab Charitable, which has more than $15 billion in assets and is one of the ten largest charities in the country. *Turner*, 67 Cal. App. 5th at 1131 (second quotation cleaned up).

B. PLAINTIFF HAS SPECIAL INTEREST STANDING UNDER CALIFORNIA COMMON LAW.

While the statutory references make clear that Plaintiff has standing to sue to enforce a charitable trust, California has also adopted longstanding common law principles governing charitable trusts and recognized that those with a "'sufficient special interest'" may also bring suit. As the Restatement (Third) of Trusts explains, special interest standing is "justified by society's interest in honoring reasonable expectations of settlors and the donor public and in enhancing enforcement of charitable trusts, in light of the limitations (of information and resources, plus other responsibilities and influences)

inherent in Attorney General enforcement." Restatement (Third) of Trusts § 94 (cmt. g) (2012). Consistent with that principle, courts have recognized that even ordinary donors "who have directed that their contributions be used for certain charitable purposes" have special interest standing. *Fairbairn I*, 2018 WL 6199984. at *6 (quoting *Holt*, 61 Cal. 2d at 754); *see also L.B. Rsch & Educ. Found.*, 130 Cal. App. 4th at 180–81 (holding donor had standing to sue to enforce terms of donation).

Here, Plaintiff is more than just an ordinary donor. He is an account holder with robust, exclusive advisory privileges that ordinary donors lack. *See supra* at 10–15. In this specific context, and within this Circuit, "special interest" standing has been recognized. *See Fairbairn I*, 2018 WL 6199684; *accord In re Francis Edward McGillick Found.*, 642 A.2d at 469–70 (holding that diocese had standing to enforce trust by virtue of its power to advise and direct disbursement of scholarships, although it was not a named trustee). Thus, even without the explicit grant of standing under § 5142, Plaintiff has common law special interest standing to enforce the obligations associated with the at-issue trust.

CONCLUSION

For the foregoing reasons, the District Court's order and judgment dismissing Plaintiff's First Amended Complaint for lack of standing should be reversed, and the case should be remanded for further proceedings.

Date: October 12, 2021

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) 21-16299

The undersigned attorney or self-represented party states the following:

[x] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/ Kai H. Richter **Date** 10/12/2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-16299

I am the attorney or self-represented party.

This brief contains 10,800 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Kai H. Richter **Date** 10/12/2021

ADDENDUM

ADDENDUM TABLE OF CONTENTS

California Corporations Code

Title 1. Corporations

Division 2. Nonprofit Corporation Law

Part 2. Nonprofit Public Benefit Corporations

Chapter 1. Organization And Bylaws

Article 4. Powers

5142.

(a) Notwithstanding Section 5141, any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust:

(1) The corporation, or a member in the name of the corporation pursuant to Section 5710.

(2) An officer of the corporation.

(3) A director of the corporation.

(4) A person with a reversionary, contractual, or property interest in the assets subject to such charitable trust.

(5) The Attorney General, or any person granted relator status by the Attorney General.

The Attorney General shall be given notice of any action brought by the persons specified in paragraphs (1) through (4), and may intervene.

(b) In an action under this section, the court may not rescind or enjoin the performance of a contract unless:

(1) All of the parties to the contract are parties to the action;

(2) No party to the contract has, in good faith, and without actual notice of the trust restriction, parted with value under the contract or in reliance upon it; and

(3) It is equitable to do so.