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
Vikram Iyer (SBN 318324)
vikram.iyer@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,<br><br>Plaintiffs,<br><br>v.<br><br>FIDELITY INVESTMENTS CHARITABLE GIFT FUND,<br><br>Defendant. | Case No. 3:18-cv-04881-JSC<br><br>**DEFENDANT FIDELITY INVESTMENTS CHARITABLE GIFT FUND'S POST-TRIAL BRIEF** |

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## INTRODUCTION

After more than two years of litigation and a seven-day bench trial, Plaintiffs Malcolm and Emily Fairbairn have fallen far short of carrying their burden to show that Fidelity Investments Charitable Gift Fund ("Fidelity Charitable") made them any of the promises they alleged, or negligently sold the donated shares of the Energous Corporation ("WATT").

As for the promises, Plaintiffs ask this Court to take their word that Justin Kunz made four specific oral promises relating to how Fidelity Charitable would go about selling 1.93 million shares of donated stock. Notably, Plaintiffs offer no contemporaneous written evidence of the promises, nor corroboration from any other witness. Moreover, Plaintiffs' own testimony does not actually support their claims that these promises were made. For example, Plaintiffs allege that they were promised that Fidelity Charitable would use "sophisticated" and "state of the art" methods to sell the stock, but Mr. Fairbairn admitted that nobody ever used those words, and Ms. Fairbairn could not supply "the precise words" that were used in their place. Similarly, Plaintiffs allege that they were promised the opportunity to advise on a "price limit," but Ms. Fairbairn did not hear that promise, and Mr. Fairbairn did not know whether the words "price" or "price limit" were ever spoken.

In other instances, even if a promise were made, it was indisputably not broken. Thus, while Plaintiffs allegedly were promised that Fidelity Charitable would not trade more than "ten percent of the daily trading volume of Energous shares" (Compl. ¶ 65), the evidence (which did not show that any such promise had been made) was undisputed that Fidelity Charitable sold less than ***seven*** percent of the daily trading volume of Energous shares on December 29, 2017.

Also, Plaintiffs have not shown reliance—let alone ***reasonable*** reliance—on ***any*** of the alleged promises. Plaintiffs allege that each purported promise was made on either December 27 or December 28, 2017, but they could not say whether any one of the promises was made on any particular day. To prove reliance, then, Plaintiffs had to show that they decided to donate the WATT shares no sooner than after the last alleged promise was made, which they admit could have been sometime on December 28. The evidence was otherwise: by mid-afternoon on December 27 the decision had been made, and Ms. Fairbairn had called Fidelity Charitable to

confirm the donation was coming and provided wiring instructions that would allow the transfer of WATT shares to Fidelity Charitable. Indeed, Ms. Fairbairn admitted that the process of donating the stock was "in motion" on December 27; and before 8:00 am on December 28, the board of the Fairbairns' hedge fund was notified that the decision had already been made to donate all the shares of WATT stock held by the fund. Unable to say whether any promise was made before they decided to make their donation, Plaintiffs have failed to prove that they relied upon the alleged promises.

In contrast to the hazy testimony from the Plaintiffs as to the content and timing of the promises, Justin Kunz testified clearly and consistently that he made no promises to the Fairbairns regarding the liquidation of the donated stock. Plaintiffs conceded that there is not a single document from December 2017 that evidences them. This absence of even a single piece of contemporaneous corroborating evidence is telling, particularly in light of numerous other written communications between the Fairbairns and Fidelity Charitable in the waning days of 2017.

As for the negligence claim, Plaintiffs fail on every element. Fidelity Charitable owed them no duty with respect to its sale of stock they had irrevocably given away; did not breach any duty; and did not cause any harm to Plaintiffs (whose claim that Fidelity Charitable was responsible for the decline in the price of the stock is at odds with the fact that even during the time in which it was trading, Fidelity Charitable represented fewer than 16% of the shares sold). Fidelity Charitable's sale of the donated stock conformed to its publicly available policy of selling "as quickly as possible" and "at the earliest date possible," a policy that is consistent with the policies of the largest national donor advised funds.

While Plaintiffs emphasize that the price of WATT declined during the period in which Fidelity Charitable was trading, they failed to show that Fidelity Charitable ***caused*** the price decline. Their primary trading expert conceded both that it is not negligent to have ***some*** price impact, and that he could not identify the extent of price impact that ***would*** be negligent.

Meanwhile, Fidelity Charitable's trading experts demonstrated a series of facts that belie negligence and that were entirely unrebutted:

- Fidelity Charitable sold just 6.7% of the daily trading volume (of more than 28 million shares) of WATT and 15.3% of the volume in the market during the time it was selling;
- Fidelity Charitable sold the majority of its shares at prices at or above the midpoint of the bid/ask spread, and sold 44% of its shares at the highest available price in the market at the time (the ask);
- Fidelity Charitable had a net positive order imbalance, while other sellers of WATT stock had a strongly negative order imbalance, meaning that Fidelity Charitable was not putting downward pressure on the stock and others were;
- Fidelity Charitable sold its shares of WATT at higher average prices than other sellers of WATT shares in the market at the same time on December 29, 2017;
- Fidelity Charitable's sale exceeded the iVWAP benchmark by 28 cents per share, realizing approximately $538,000 ***more*** for Fidelity Charitable than the average trader in the market at the time would have realized;
- The price of WATT stock did not rebound during after-hours trading on December 29, 2017; and
- An alternative liquidation strategy of selling the WATT shares over the first four trading days of January 2018 would have generated fewer proceeds.

Plaintiffs have had their day in court. They did not prove a single one of their claims. Judgment must enter in favor of Fidelity Charitable.

## LEGAL STANDARDS

Plaintiffs bear the burden of proving each and every one of their claims by a preponderance of the evidence. *Sierra Nat. Bank v. Brown*, 18 Cal. App. 3d 98, 105 (1971) (stating that the burden of proof in a fraud case is a preponderance of the evidence); *Exxon Mobil Corp. v. New West Petroleum L.P.*, 566 F. Supp. 2d 1148, 1155 (E.D. Cal. 2008) ("The plaintiffs have the burden of proving by a preponderance of the evidence all of the facts necessary to establish breach of contract…") (quoting *San Diego Hous. Com'n. v. Indus. Indem. Co.*, 68 Cal. App. 4th 526, 537 (1998)) (internal quotations omitted); *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 866 (2001), as

modified (July 11, 2001) (stating that the plaintiff bears the burden of proof by a preponderance of the evidence as to her unfair competition law cause of action); Cal. Evid. Code § 115 (stating that except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence); *see also* Judicial Council of California Civil Jury Instructions (2020 edition), CACI ("CACI") No. 1900 (stating that to establish a claim for intentional misrepresentation, Plaintiffs must prove the stated elements); CACI 303 (stating that to recover damages for breach of contract, Plaintiffs must prove the stated elements); CACI 400 (stating that to establish a claim for negligence, Plaintiffs must prove the stated elements). Proving a claim by a preponderance of the evidence requires showing that each element of the claim is more likely than not to have been satisfied. *See Aguilar*, 25 Cal. 4th at 851. Each of Plaintiffs' claims fails because Plaintiffs have failed to carry their burden on multiple elements required to prove each of their claims.

## ARGUMENT

### A. Fidelity Charitable Is Entitled To Judgment On Plaintiffs' Promise-Based Claims

#### 1. Fidelity Charitable Did Not Make Any Misrepresentations

Plaintiffs have failed to meet their burden of showing that any of the four specific alleged promises was ever made. As discussed further below, the Fairbairns could not identify the what, where or when with respect to ***any*** of the alleged oral promises. Nor did the Fairbairns offer even the slightest bit of corroborating contemporaneous evidence.

To distract from this failure of proof, Plaintiffs cast aspersions on Mr. Kunz's memory. *See, e.g.*, 10/19 Tr. 17:2-13. But unlike the Fairbairns, Mr. Kunz's recounting of events has been entirely consistent: he "did not make any of the four claimed promises" or "any promises of any sort to the Fairbairns about how Fidelity Charitable would sell the Energous stock." Kunz Decl. ¶3; *see also id.* at ¶¶ 4, 29, 52; 10/20 Tr. 213:11-16 (Kunz) ("I know I didn't make any promises and so there is nothing more to be said than that."); *id.* 213:18-214:3 ("I know I didn't make the promise…"); *id.* 231:24-232:2 ("I didn't make any promises."); *id.* 237:17-25 ("I know I didn't make any promises."); *id.* 238:21-239:1 ("there was no promise made"); *id.* 247:19-248:2 ("where they came up with these ideas, or these promises, is truly beyond me").

Mr. Kunz was sure of this particular fact notwithstanding the passage of time because, among other reasons, he had been told in trainings and discussions dating back to when he first joined Fidelity in 2007—nearly a decade before the events in question—that Fidelity Charitable does not allow donors to advise on the liquidation of donated stock. 10/19 Tr. 109:1-110:10 (Kunz). And that understanding was confirmed by his personal experience donating stock to his own Fidelity Charitable Giving Account. *Id.* 109:1-9. That is why he told the Fairbairns—as he does all his clients interested in donating public stock to Fidelity Charitable—that "(1) the donations are irrevocable, (2) there can be 'no strings attached,' and (3) the Charity will sell the securities at its discretion." Kunz Decl. ¶ 12; *see also* 10/19 Tr. 80:7-23, 177:25-178:19 (Kunz). The record supports Mr. Kunz's account. 10/20 Tr. 393:25-394:7 (M. Fairbairn) (Mr. Fairbairn agreeing that Mr. Kunz told him the donation was irrevocable and the charity had to sell the shares); Ex. 836 (e-mail from Mr. Kunz to Mr. Fairbairn referring to the problem of "strings attached").

In any event, the burden to prove the promises were made rests squarely with the Fairbairns. Even without Mr. Kunz's categorical denials, Plaintiffs' testimony cannot carry that burden. Time after time, Plaintiffs testified that they could not recall the words of the promises that purportedly induced them to make a multimillion-dollar donation to Fidelity Charitable. 10/20 Tr. 409:20-22 (M. Fairbairn); 10/21 Tr. 495:16-22 (E. Fairbairn). Neither could recall whether anyone else—including their spouse—was on the telephone line when any one of the alleged promises was made. 10/20 Tr. 407:23-25, 409:14-16 (M. Fairbairn); 10/21 Tr. 419:24-420:1 (M. Fairbairn), 496:21-22, 499:15-19 (E. Fairbairn). And Ms. Fairbairn did not know where she was when the promises were made. 10/21 Tr. 493:9-18; 496:18-20, 499:12-14 (E. Fairbairn). Indeed, despite the involvement of countless other individuals—from Fidelity Charitable, from Fidelity Family Office Services, from Energous, and from Ascend—in the events leading up to the donation of the Energous shares, not a single witness other than the Fairbairns took the stand to corroborate their story of promises made and broken.

And Plaintiffs' story at trial that the promises were also previously made in "numerous conversations and meetings" (10/20 Tr. 368:4-12 (M. Fairbairn)) during a multi-month

"prospecting period" (*id.* 354:9-355:3)—a story absent from their Complaint (Ex. 723) and their interrogatory responses (10/21 Tr. 519:4-520:5 (E. Fairbairn))—casts still more doubt on their claim: the Fairbairns would have the Court believe that they received four specific assurances repeatedly over a period of months, and cannot point to a single piece of paper evidencing them. *See* 10/21 Tr. 439:3-440:8 (M. Fairbairn) (admitting that despite "two years of careful planning" and many emails about the donation, Mr. Fairbairn "did not get any of the alleged promises in writing").

Indeed, given Plaintiffs' failure to provide a cogent account of the purported oral promises, it is little surprise that Plaintiffs "can't identify a single piece of paper created in December 2017 that references the promises" (10/21 Tr. 484:14-18 (E. Fairbairn)), and are "not aware of a single piece of paper in the entire world that was created in December 2017 that references the promises." 10/20 Tr. 397:4-7 (M. Fairbairn). The simple explanation is that there were no promises.

**a. Alleged Promise #1: Fidelity Charitable Employed Sophisticated, State-Of-The-Art Methods For Liquidating The WATT Stock**

Plaintiffs did not carry their burden of showing either that Justin Kunz promised that Fidelity Charitable would use sophisticated, state-of-the-art methods for liquidating large blocks of stock, or that Fidelity Charitable broke that promise even if it had been made.

According to the Complaint, Mr. Kunz promised Plaintiffs that Fidelity Charitable "would employ sophisticated, state-of-the-art methods for liquidating large blocks of stock." Ex. 723, ¶ 65. But Plaintiffs could testify to no such thing. Mr. Fairbairn disclaimed any recollection of Mr. Kunz using the words "sophisticated" or "state-of-the-art." 10/20 Tr. 369:22-25, 399:24-400:4 (M. Fairbairn). And Ms. Fairbairn could not fill in the blanks, testifying that she could not recall the exact words of the purported promise. 10/21 Tr. 495:16-18 ("… I don't know the precise words.") (E. Fairbairn). This is dispositive: Plaintiffs failed to prove that it is more likely than not that a promise they alleged and litigated for more than two years was even made.

Instead, the Fairbairns testified that the alleged (but not made) promise to use "sophisticated, state-of-the-art methods" was actually something different: a promise that the donated stock would "be liquidated by the same individuals that sell and trade for the Fidelity

Group." 10/20 Tr. 400:5-12 (M. Fairbairn); *id.* 369:4-11 (reciting promises, including that "Fidelity . . . Capital Markets Group was the ones that was going to liquidate it"). Even if the Plaintiffs could recast their claim in these terms, that promise would not have been broken: the sale of the WATT stock was executed by Gerry Celano, an institutional trader for Fidelity Capital Markets. *See, e.g.*, McLean Decl. ¶ 22; Celano Tr. 24:10-25:8, 35:15-36:3.

Nor could Plaintiffs establish any breach of the "sophisticated methods" promise they pled in their Complaint (a moot point since they failed to prove the promise was made). It is undisputed that Fidelity Charitable sold the WATT shares using sophisticated TWAP and VWAP algorithms. 10/23 Tr. 630:13-17 (Domowitz); 10/20 Tr. 404:14-22 (M. Fairbairn). Plaintiffs' expert Professor Harris acknowledged that such algorithms are "a typical tool used by traders to sell large blocks of stock." 10/26 Tr. 811:6-11 (Harris). And Mr. Fairbairn agreed "that there is nothing inherently wrong with using a VWAP or TWAP algorithm to sell large blocks of publicly traded securities," and testified that "the algorithm itself . . . is probably fine . . . probably good." 10/20 Tr. 405:22-406:14 (M. Fairbairn).

Fidelity Capital Markets trader Mr. Celano's testimony about the design of the algorithms he deployed also made clear that these are "sophisticated" and "complicated programs." Celano Tr. 114:8-115:25, 116:3-10, 134:16-18, 134:20-135:7, 136:23-137:3. Indeed, as discussed more fully below, the algorithms divided the large parent orders into more than 52,000 small "child orders" (10/27 Tr. 1030:15-17 (Zarcu)), submitted 91% of the orders as "hidden" (*id.* 1006:24-1007:7) and routed 85% of all orders to dark pools (*id.* 1006:8-22), making the overwhelming majority of Fidelity Charitable's trading activity "invisible to the market." *Id.* 1006:24-1007:7. The testimony of Fidelity Charitable's experts corroborated Mr. Celano's account of the sophistication of these trading tools. *Id.* 1002:7-1003:6, 1062:4-24 (Hendershott).

**b. Alleged Promise #2: Fidelity Charitable Did Not Sell More Than 10% Of The Daily Trading Volume Of WATT**

Plaintiffs also cannot carry their burden of proving that Fidelity Charitable promised to sell no more than 10% of the daily trading volume of Energous shares, or that Fidelity Charitable broke that promise even if it were made. Again, the Plaintiffs' testimony failed to establish the terms of

the promise with any particularity. Mr. Fairbairn testified he did not "recall whether it was 10 percent daily trading volume or volume," or whether any "qualifier" may have been used. 10/20 Tr. 407:3-8 (M. Fairbairn). But Mr. Fairbairn testified that without a qualifier, the phrase "daily trading volume" is literally meaningless. *Id.* 408:21-409:5. Unable to supply the qualifiers he claimed were necessary to imbue the phrase with meaning, Mr. Fairbairn cannot possibly prove the existence of an enforceable promise. Ms. Fairbairn's testimony was no stronger: when asked if Mr. Kunz said "daily volume" or "10 percent volume" or "something else," she answered, "I don't remember." 10/21 Tr. 468:8-25 (E. Fairbairn). Unable to identify the words of the purported promise about trading volume, Plaintiffs' claim fails out of the gate. *See, e.g.*, *Conrad v. Bank of America*, 45 Cal. App. 4th 133, 156 (1996) (finding no misrepresentation where "[t]he alleged promise was oral and, other than [plaintiff], there were no witnesses and no documentary evidence to establish such a promise," and plaintiff's "testimony with respect to the promise was vague"). And their failure to testify to the precise words of the purported promise renders moot any debate about what those words might mean.

The evidence does show that Plaintiffs spoke with Mr. Kunz about the percentage of daily trading volume Fidelity Charitable typically sells. Mr. Kunz stated that although he "did not promise anything," he did tell Ms. Fairbairn "that Fidelity Charitable 'typically' sells below 10% of the daily trading volume." Kunz Decl. ¶ 29. Unlike the Fairbairns' account, Mr. Kunz's recollection of what was said is corroborated multiple times over: by his own handwritten notes (Ex. 1342) ("typically don't trade more than 10% daily volume") (10/19 Tr. 177:25-180:25 (Kunz)); by Mr. Brooks, who confirmed having a discussion with Mr. Kunz about "the 10 percent general guideline" (10/21 Tr. 567:1-16 (Brooks)); and by emails sent close-in-time to the relevant events (Ex. 136.001 (e-mail from Mr. Kunz to Mr. Brooks on January 17, 2018: "[A]ll I said is what you told me – 10% daily volume."); Ex. 149.001 (e-mail from Mr. Kunz on January 18, 2018: "[W]hat I mentioned to him is what charitable told me that we look to maintain no more than 10%

daily volume.”)).[1]

Still other documents support Mr. Kunz’s testimony that he told Ms. Fairbairn that Fidelity Charitable typically sells no more than ten percent of the daily volume of donated stock. An internal email from February 2017 describes Fidelity Charitable’s practice of not selling “more than ~10% of the ***overall trading volumes for the day***.” Ex. 36.001 (emphasis added). That same month, a client services manager at Fidelity Family Office Services informed Ms. Fairbairn that the charity “generally trades about ***10% of the daily volume***.” Ex. 1504.001 (emphasis added). Fidelity Charitable’s practices and its communications—both internal and with the Fairbairns—have been consistent.

In any event, even if the promise Plaintiffs alleged in their Complaint (that Fidelity Charitable would sell no more than 10% of the daily volume of WATT shares (Ex. 723, ¶ 65)) were made, that promise was not broken. Ms. Fairbairn herself confirmed that “‘daily trading volume’ means how much is traded from the time the market opens until the time the market closes” and that “it’s the total number of shares traded in the day.” 10/21 Tr. 497:12-17. Mr. Fairbairn agreed that “daily trading volume means daily trading volume.” 10/20 Tr. 408:18-20 (M. Fairbairn). And experts for both sides agreed that the phrase has its commonsense meaning. 10/23 Tr. 687:16-25 (Domowitz) (“Q. So daily trading volume is the total volume of trades during the trading day; correct? A. That is correct.”); 10/27 Tr. 1018:15-19 (Zarcu) (“Q. What does daily trading volume mean to a trader? A. Daily trading volume refers to the volume traded in any security during a full day, between 9:30 and 4 o’clock.”). It is undisputed that Fidelity Charitable was only 6.7% of the daily trading volume of Energous shares on December 29, 2017. Ex. 1361;

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[1] Plaintiffs’ only response to this consistent and credible evidence is to point to selected telephone call logs to suggest that Mr. Kunz did not, in fact, speak to Mr. Brooks on December 27, 2017. This effort is misguided: Mr. Kunz testified that his notes likely reflected a conference call with Mr. Brooks, Mr. Casserino, and Ms. McKeon, 10/19 Tr. 180:7-10, 181:1-9 (Kunz), and there is no evidence as to how such a call would be reflected in Mr. Kunz’s call log, let alone evidence of all the other numbers (*e.g.*, cell phone numbers) the other participants may have used. *See, e.g.* 10/21 Tr. 572:6-18 (Brooks) (testifying he used his cell phone for work sometimes). Indeed, there was no testimony from Mr. Casserino or Ms. McKeon regarding their phone habits at all. And even if Mr. Kunz were mistaken as to ***when*** this call occurred (a theory unsupported by actual evidence), there is no legitimate dispute as to the authenticity of Mr. Kunz’s notes, or the substance of what Mr. Brooks told him and what Mr. Kunz repeated to Ms. Fairbairn.

10/23 Tr. 692:20-693:1 (Domowitz); 10/27 Tr. 1018:20-25 (Zarcu); 10/26 Tr. 808:12-19 (Harris).

**c. Alleged Promise #3: Fidelity Charitable Did Not Promise To Allow The Fairbairns To Advise On A Price Limit**

Plaintiffs' allegations of a third purported promise are equally defective. Ms. Fairbairn has no memory whatsoever of Mr. Kunz ever making a promise to her that Fidelity Charitable would allow the Fairbairns to advise on a price limit. 10/21 Tr. 490:24-491:15 (E. Fairbairn) ("Q… "It would allow the Fairbairns to advise on a price limit.' You don't recall Mr. Kunz making that promise to you; correct? A. I don't recall."). And Mr. Fairbairn does not recall Mr. Kunz using the words "price" or "price limit." 10/20 Tr. 409:20-25 (M. Fairbairn). The Court need look no further—Plaintiffs alleged in their Complaint that they were promised the right to "advise on a price limit" (Ex. 723, ¶ 65), and failed to supply testimony in support of this promise.

Even allowing Plaintiffs to redefine the promise they pled does not help them. Mr. Fairbairn claims that he understood this (unmade) alleged promise to mean that he would be "kept in the loop." 10/20 Tr. 409:23-410:3 (M. Fairbairn). But when asked what it meant that Mr. Kunz would keep him in the loop, Mr. Fairbairn admitted that he "did not flesh that out in sufficient detail" (*id.* 410:11-14) and was not promised that he would be kept apprised of the liquidation at every step of the way (*id.* 410:8-10). In fact, Mr. Fairbairn understood that—even if he had been "kept in the loop"—Fidelity Charitable "may or may not take [his] advice," and that "the ultimate decision on how to liquidate the shares belonged to Fidelity." *Id.* 411:18-412:4 (M. Fairbairn). Plaintiffs' testimony does not support the existence of a promise at all, let alone an enforceable one. *See RSB Vineyards, LLC v. Orsi*, 15 Cal. App. 5th 1089, 1102 (2017) ("[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion."); *see also Ladas v. California State Automobile Association*, 19 Cal. App. 4th 761, 771 (1993) (holding unenforceable "an amorphous promise" that obligated promisor to "consider" something when contract did not establish what consideration entailed).[2]

[2] Plaintiffs' effort to prove their case by suggesting that someone other than Mr. Kunz made a different promise to a different donor of a different type of asset (privately held stock that converted to publicly-traded shares under the ticker PZN) several years before the events at issue in this case does not help them carry their burden of proving that Mr. Kunz made them a specific set of promises in December 2017. As the Court previously observed, this issue is a "rabbit hole"

**d. Alleged Promise #4: Fidelity Charitable Did Not Promise To Wait To Liquidate Until The New Year**

As to the last alleged promise, all Ms. Fairbairn could offer was that "it's highly likely if you were to pin [her] to the wall, that [Mr. Kunz] said: There's no trading till January." 10/21 Tr. 10/21 Tr. 520:23-521:4 (E. Fairbairn). The suggestion that she could only vouch for the purported promise if under duress is hardly sufficient to establish that it is more likely than not that the promise was made. For his part, Mr. Fairbairn claimed that "I said: We're going to start trading this – we won't start trading this until next year, right? And he [Mr. Kunz] said, yes." 10/20 Tr. 369:14-21 (M. Fairbairn).

Mr. Fairbairn's naked say-so is insufficient to establish the existence of this promise. It is flatly contradicted by Mr. Kunz's testimony. Kunz Decl. ¶ 3. It is contradicted by emails Ms. Fairbairn received regarding Fidelity Charitable. 10/21 Tr. 481:19-482:9 (quoting Feb. 14, 2017 email from Mr. Fernandez stating, "Shares are automatically sold once they arrive in the DAF."); Ex. 1504. It is incompatible with Mr. Fairbairns' email to Mr. Kunz stating that the donation came with "[n]o conditions." Ex. 836.[3] And it conflicts with the Fairbairns' understanding of how DAFs work. *See, e.g.*, 1339 (Mar. 13, 2017 email from E. Fairbairn) ("We may end up donating shares to charity and they will sell it after. […] The shares will get sold by the Donor advised fund but I will no longer own them the minute I give it away."); 10/20 Tr. 391:19-24 (M. Fairbairn) (agreeing that he understood his gift was irrevocable and that he did not own the stock once it was donated), *id.* at 394:4-7 (agreeing that Mr. Kunz told Mr. Fairbairn, before the donation was made, that the charity had to sell the shares); 10/21 Tr. 447:7-10 (E. Fairbairn) (admitting that she "gave

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(11/14/19 Hearing Tr. 25:5-11): there was no evidence that Mr. Kunz knew anything at all about PZN or the circumstances of its donation. Kunz Decl. ¶ 51. Moreover, Ryan Boland, the representative who assisted with the PZN contributions, testified that he did not make the donor of that asset any promise, and that he had never spoken about PZN with Mr. Kunz. *See* Boland Tr. 396:21-23, 395:25, 399:17-19, 399:21-24, 400:1. Mr. Boland also testified that he never discussed PZN with Mike McLean, who supervised the donation liquidation process (McLean Decl. ¶¶ 24-25), which Mr. McLean also confirmed. Boland Tr. 398:14, 398:18; McLean Decl. ¶ 34.

[3] Plaintiffs' allegations that Mr. Kunz made this promise is also inconsistent with Mr. Kunz's reaction to learning, in early 2018, that the WATT shares had been sold in December 2017. Ex. 123 (Jan. 3, 2018 email from Mr. Kunz thanking Ms. McKeon for preparing summary of sale of WATT shares and expressing no surprise that they were sold).

up ownership" upon donation), 481:8-10 (similar).

Most importantly, the alleged promise that Fidelity Charitable would not sell the Energous shares on the date they were contributed is flatly contradicted by the Fidelity Charitable Program Circular. That document—which reflects the only policy of Fidelity Charitable with respect to the liquidation of contributed assets (10/26 Tr. 879:14-22 (Podvojsky))—provides that "Fidelity Charitable processes contributions periodically throughout the day and will liquidate contributions as quickly as possible after all the requisite paperwork has been received." Ex. 183.007.

The Program Circular specifically details how it processes donations of publicly traded securities. It states: "Upon receiving the appropriate paperwork and the donated securities in good order, Fidelity Charitable will generally sell the securities at the earliest date possible, but reserves the right to sell at any time." Ex. 183.008 (emphasis added); McLean Decl. ¶ 7. The Program Circular also states that publicly traded securities that are received from an account outside of Fidelity are generally liquidated "on the Business Day on which the assets are received by Fidelity Charitable," and that securities received from a Fidelity account are also generally liquidated "on the Business Day the instructions are received…." Ex. 183.008.

These policies take on greater significance here because Mr. Fairbairn acknowledged that he had "read the current Fidelity Charitable Policy Guidelines Program circular and ***agree[d]*** to its terms and/or conditions described therein." Ex. 832.004 (emphasis added); Tr. 392:7-393:20 (M. Fairbairn). The failure to reduce to writing an oral promise that is directly at odds with a published policy of the alleged promisor makes no sense and undermines the claim that the promise was made.

Mr. Fairbairn's testimony that he believed the Program Circular to be "[c]ompletely consistent" with the alleged promises (10/20 Tr. 378:25-380:17) is at odds with the unambiguous language of the Program Circular itself. It is also a complete reversal from the Fairbairns' allegations in the Complaint. In the Complaint, the Fairbairns alleged that they in fact understood the Program Circular's use of "earliest date possible" to have its plain meaning; *i.e.*, that pursuant to Fidelity Charitable's Program Circular donated stock would be sold the same day it was received if "'the earliest date possible' for liquidation was the same day the stock was donated." Ex. 723

¶¶ 62-63. Far from the Program Circular being "[c]ompletely consistent" with the alleged promises (10/20 Tr. 378:25-380:17), the Fairbairns alleged in the Complaint that the promises were extracted precisely because they were ***inconsistent*** with the Program Circular. Ex. 723 ¶¶ 62-63. Their about-face on this (and other issues) undermines the Fairbairns' credibility.

**2. Plaintiffs Did Not Rely On The Alleged Misrepresentations**

Plaintiffs' inability to say when the alleged promises were made is fatal to their promise-based claims. In every instance, they admitted to being uncertain as to whether any of the promises was made on December 27, 2017 or December 28, 2017. 10/20 Tr. 399:21-23, 408:4-6, 409:17-19 (M. Fairbairn); 10/21 Tr. 420:2-4, 429:14-17 (M. Fairbairn); 10/21 Tr. 492:23-493:3, 496:10-17, 498:3-499:5, 500:4-10, 519:19-520:5; 520:23-25; 521:12-19 (E. Fairbairn). But the Fairbairns' decision to donate the stock was indisputably made by December 27, 2017, if not several days prior. Because Plaintiffs failed to establish that they made their decision to donate the Energous shares after they obtained the purported promises, they cannot establish reliance, an essential element of their claims. *See, e.g.*, CACI 1900.

The evidence is clear that the Fairbairns decided to donate the Energous shares to Fidelity Charitable before December 28. On December ***20***, Ms. Fairbairn learned that the FCC had approved certain Energous technology. 10/21 Tr. 523:19-21, 524:7-16 (E. Fairbairn). This was six days before the Company announced the FCC approval to the market. *Id.* 523:16-18, 524:17-19. Ms. Fairbairn anticipated that the announcement of FCC approval would have a positive impact on the price of WATT stock. *Id.* 524:20-22. Two days later, on December ***22***, Ms. Fairbairn sent herself an email stating: "We need transfer stock to Fidelity," and "From JPMorgan to Fidelity via DTC it's two business days." Ex. 715.[4] Also on December ***22***, Ms. Fairbairn called Mr. Kunz and Mr. Boland to report that "if nothing else, she will do [a donation of] public

[4] Although Ms. Fairbairn referenced JPMorgan, the majority of the WATT shares at issue in this case were actually in an account at Morgan Stanley, which ultimately transferred the shares via DTC to Fidelity Charitable. *See* Ex. 1690 (authorizing transfer "per the below DTC instructions" of 700,000 shares of Energous Corp. from a "MS account" in the name of Ascend Legend Master Fund, Ltd. to Fidelity Charitable); *see also* 10/19 Tr. 159:11-19 (Kunz) (agreeing that reference to JP Morgan was a typo and that "Morgan Stanley is where the Fairbairns had most of their WATT shares").

securities next week." Ex. 71.001.

At the latest, the Fairbairns' decision to contribute Energous stock to Fidelity Charitable was finalized by mid-afternoon on December 27, 2017. In the Complaint, which Mr. Fairbairn reviewed before it was filed and confirmed was accurate (10/21 Tr. 423:9-14 (M. Fairbairn)), Plaintiffs alleged that "Malcolm Fairbairn informed Fidelity Charitable ***on December 27*** that the Fairbairns would transfer 1.93 million shares of Energous stock to their Fidelity Charitable DAF account." Ex. 723, ¶ 68 (emphasis added). A heap of documentary evidence confirms this timing (which defeats reliance). At 1:40 pm PT on December 27, 2017, Mr. Brooks reported that Ms. Fairbairn had "just called Ryan [Boland] to donate shares of WATT." Ex. 1540.001. Exactly one minute later, Ms. Fairbairn sent an email titled "WATT shares move to fidelity" to Ben Slavet, the CFO of Ascend, the Fairbairns' hedge fund. Ex. 1341; 10/21 Tr. 528:4-15 (E. Fairbairn). Ms. Fairbairn wrote: "I need the shares moved to our account by tomorrow so that we can donate it to charity." Ex. 1341.

Additional record evidence confirms that the Fairbairns decided to donate the WATT shares to Fidelity Charitable on December 27. At 3:13 pm PT, Mr. Kunz emailed Mr. Slavet instructions that would allow shares to be moved "directly into the Fidelity DAF" via DTC. Ex. 75.001. Ms. Fairbairn did not contest that by that point in time, she had given Mr. Kunz permission to provide wiring instructions to Mr. Slavet. 10/21 Tr. 527:7-18 (E. Fairbairn). At 4:22 pm PT, Mr. Fernandez, a FFOS representative, emailed the Fairbairns the contribution form that would allow them to authorize the transfer of shares from FFOS to Fidelity Charitable. Ex. 81. Ms. Fairbairn responded two minutes later: "We sign it and tomorrow we decide if it will happen tomorrow or Friday." *Id.* The only thing to "decide" was which day Ms. Fairbairn wanted the stock transfer to occur. Ultimately she held the shares until December 29 on the (mistaken) belief that the price of the stock would be higher on that day. 10/21 Tr. 536:12-357:2 (E. Fairbairn). So while the timing had not been finalized on December 27, the ***decision*** to donate the WATT shares to Fidelity Charitable clearly had been.

As Ms. Fairbairn admitted, the process of donating the shares to Fidelity Charitable was in motion on the afternoon of December 27, 2017, and the result of that process was going to be a

gift to the Fidelity Charitable giving account. 10/21 Tr. 530:7-531:24 (E. Fairbairn). Accordingly, before 8 am PT on December 28, 2017, the board of directors of Ascend Capital Limited Partnership was notified that the partnership "has decided to make a charitable donation of all its assets of Energous Corporation, WATT shares . . . to the Fidelity Charitable Gift Fund." Ex. 259; 10/21 Tr. 430:19-432:5 (M. Fairbairn).

Plaintiffs simply cannot prove it is more likely than not that they relied on representations they admit they might have received on December 28, 2017 when the record is clear that they decided to donate the Energous stock to Fidelity Charitable by December 27, 2017. This alone is sufficient to prevent Plaintiffs from establishing reliance and provides an independent reason to enter judgment for Fidelity Charitable on all of the promise-based claims. *Cadlo v. Owens–Illinois, Inc.*, 125 Cal. App. 4th 513, 519-20 (2004) (dismissing misrepresentation claim for failing to allege that misrepresentation was an "immediate cause of the plaintiff's conduct").

In arguing otherwise, Plaintiffs suggest that they could have made their donation to JP Morgan Charitable, where they maintained another donor advised fund account. But the suggestion that Plaintiffs actually entertained the idea of donating the Energous shares to JP Morgan Charitable is a contrivance. In fact, between December 19 and December 29, 2017, the Fairbairns spoke with representatives of only one donor advised fund sponsor: Fidelity Charitable.

Although they received one—and only one—email from their JP Morgan Charitable relationship manager Dennis Hearst in December 2017, they did not respond to it. 10/21 Tr. 426:8-12 (M. Fairbairn). In fact, both Malcolm and Emily Fairbairn testified that they did not speak with Mr. Hearst at all about the possibility of donating WATT shares to JP Morgan Charitable in December 2017 (10/21 Tr. 425:18-21 (M. Fairbairn), 516:23-517:1 (E. Fairbairn)), and did not take any steps towards making such a donation. 10/21 Tr. 425:22-25 (M. Fairbairn), 516:16-19 (E. Fairbairn). Moreover, the single communication they received from Mr. Hearst recommended that contributions of public stock be initiated by December 22, 2017 (Ex. 1670; 10/21 Tr. 426:20-427:11 (M. Fairbairn)), which, of course, was several days before the price of the WATT stock increased, and with it, the size of the Plaintiffs' potential tax deduction. *See, e.g.*, 10/21 Tr. 429:7-13 (M. Fairbairn). Plaintiffs, who anticipated (correctly) that the price of Energous shares would

increase upon the announcement of FCC approval (10/20 Tr. 352:17-18 (M. Fairbairn), 10/21 Tr. 524:20-22 (E. Fairbairn)), would have no reason to donate the Energous shares to charity before that announcement occurred.

As a factual matter, then, Plaintiffs did not rely on any of the promises they supposedly received from Mr. Kunz to donate to Fidelity Charitable rather than to J.P. Morgan Charitable.

**3. Any Reliance On The Purported Promises Was Not Reasonable**

The promise-based claims fail across the board for a third reason: to the extent they were made (they were not), and to the extent the Fairbairns actually relied upon them (they did not), any such reliance was unreasonable. The critical facts are not in dispute. First, Fidelity Charitable has a policy, set forth in its Program Circular, of selling donated stock "as quickly as possible," "at the earliest date possible," and "on the Business Day on which the assets are received by Fidelity Charitable." Ex. 183.007-8. The Circular also provides that "[o]nce Fidelity Charitable accepts a contribution, it is irrevocable and is owned and controlled by the Trustees." Ex. 183.006. Second, Mr. Fairbairn read the Program Circular before making his donation, acknowledging both that he had done so and that he agreed to its terms. Ex. 832.004; 10/20 Tr. 376:17-377:19 (M. Fairbairn).

There is a patent incompatibility between the alleged promises and the terms of the Program Circular. The tension between Fidelity Charitable's published policy and the purported promises is not subtle: as just one example, Fidelity Charitable's policy states that it will sell donated stock "at the earliest date possible" (Ex. 183.008), but Plaintiffs allege that Fidelity Charitable promised (in 2017) not to sell a single share donated in 2017, until 2018. Indeed, in their Complaint (which, again, they testified was accurate, 10/21 Tr. 423:9-14 (M. Fairbairn)), the Fairbairns claimed that the entire reason they supposedly extracted the promises they have alleged was ***because*** they did not want the Energous shares traded in the manner set forth in Fidelity Charitable's Program Circular. Ex. 723 ¶¶ 62-65. Where an oral promise is contradicted by a written agreement, reliance on the oral promise is unreasonable as a matter of law. *See, e.g.*, *Assilzadeh v. California Federal Bank*, 82 Cal. App. 4th 399, 417 (2000) (unreasonable for plaintiff to rely on real estate agent's representation that it would be "no problem" to install marble flooring when plaintiff purchased property "as-is"); *Slivinsky v. Watkins-Johnson Co.*, 221 Cal.

App. 3d 799, 807 (1990) ("alleged reliance on [defendant's] oral promises of continuing employment is simply not justifiable because the representations contradict the parties' integrated employment agreement which provided that the employment was at will"); *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467, 482 (1984) ("[Plaintiff] could not have reasonably relied on any implied promise by Wells Fargo which contradicted the express provisions of the written Stock Option Agreement which he signed.") (disapproved of on other grounds).

The Plaintiffs' intelligence and sophistication, and common sense, all counsel against a finding of reasonable reliance on alleged oral promises at odds with Fidelity Charitable's written policies. *See, e.g.*, *IV Solutions, Inc.*, 2017 WL 3018079, at *8 ("California courts have found plaintiffs' claims unreliable as a matter of law, typically in cases where the court determines that the plaintiff was experienced enough to know better"); *Roberts v. UBS AG*, 2013 WL 1499341, at *10 (E.D. Cal. Apr. 11, 2013) (finding that plaintiffs could not have justifiably relied on representations that contradicted the IRS's tax disclosure requirements); *Alliance Mort. Co. v. Rothwell*, 10 Cal. 4th 1226, 1240 (1995) ("If the conduct of the plaintiff in the light of his own intelligence and [the available] information was manifestly unreasonable," plaintiff's claim fails as a matter of law); *Cameron v. Cameron*, 88 Cal. App. 2d 585, 594 (1948) ("If [one] becomes aware of facts that tend to arouse his suspicion, or if he has reason to believe that any representations made to him are false or only half true, it is his legal duty to complete his investigation and he has no right to rely on statements of the other contracting party."); *Guido v. Koopman*, 1 Cal. App. 4th 837, 843-44 (1991) (affirming summary judgment for defendant where plaintiff, a practicing attorney, unreasonably relied on equestrian instructor's statement that written release of liability was "meaningless" because "[i]n determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered.") (citation omitted). These cases require judgment to enter for Fidelity Charitable on the promise-based claims.[5]

[5] The fact that Ms. Fairbairn sought written confirmation of other agreements relating to the donation to Fidelity Charitable in the waning days of December 2017 (10/21 Tr. 482:23-489:23 (E. Fairbairn)) but did not confirm the alleged oral promises is strong evidence that the promises were never made, and that even if made, any reliance upon them was objectively unreasonable.

**4. Plaintiffs Have Failed To Prove Any Enforceable Contract**

Plaintiffs' argument that the promises formed a contract that Fidelity Charitable breached is a non-starter. Their vague and shape-shifting account of the purported misrepresentations provides no basis upon which to conclude that Fidelity Charitable even entered into a contract with Plaintiffs relating to the sale of the WATT shares in the first place.

It is axiomatic that to prevail on any claim for breach of contract, a party must first prove that the parties entered into one. Plaintiffs cannot clear this hurdle. Their testimony about the content of the promises is inconsistent, unsupported, and flatly denied by the purported counterparty to the oral contract, Mr. Kunz. In these circumstances, Plaintiffs cannot possibly establish the meeting of the minds that the law requires. *See, e.g.*, *Simar Shipping Ltd. v. Global Fishing, Inc.*, 540 Fed. App'x 565, 567 (9th Cir. 2013) ("[T]he legal principle that a valid contract requires a meeting of the minds on essential terms [is] a proposition finding ample support . . . at common law.") (citation and punctuation omitted).

Even if Plaintiffs' account were credited, it still would not be sufficient to prove a contract or its breach. For a contract to be enforceable, its terms must be "clear enough that the parties could understand what each was required to do." *Webpass Inc. v. Banth*, No. C14-02291 HRL, 2014 WL 7206695, at *4 (N.D. Cal. Dec. 18, 2014) (citing *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998)); *see also* CACI No 302. California law is settled that a contract's terms must be sufficiently precise "that the performance promised is reasonably certain"—that is, the terms of the contract must "provide a basis for determining the existence of a breach and for giving an appropriate remedy." *Weddington Prods.*, 60 Cal. App. 4th at 811. "If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." *Id.*; *see also Halvorsen v. Aramark Uniform Services, Inc.*, 65 Cal. App. 4th 1383, 1389 (1998) ("An alleged oral contract with vague and uncertain terms is not binding."); *Barajas v. Carriage Servs., Inc.*, 2019 WL 6699737, at *6 (N.D. Cal. Dec. 9, 2019) ("in order to support [the] position that a binding oral contract was … created, … it must appear from the evidence that the essential terms of the contract were sufficiently definite") (quoting *Jaffe v.*

*Albertson Co.*, 243 Cal. App. 2d 592, 600 (1966) (internal quotation marks omitted)). But Plaintiffs cannot agree (either with their Complaint or with each other) as to the precise words of the promises relating to "sophisticated" and "state-of-the-art" methods, "daily trading volume," and the ability to set a "price limit." *See supra* § A.1.a-c. Plaintiffs' imprecise recitation of the purported promises is fatal to their contract claim.

Moreover, as to two of the purported promises, to the extent they gave rise to an enforceable contract, Fidelity Charitable did not breach it. As discussed above, Fidelity Charitable used sophisticated algorithms to liquidate the WATT stock, *supra* § A.1.a, and indisputably sold less than 7% of the daily volume of Energous shares traded on December 29, 2017. *Supra* § A.1.b.

Nor can Plaintiffs prevail on their claim for breach of what they previously referred to as "the price-limit promise." ECF No. 214. (Of course, they've now conceded that Mr. Kunz did not use the word "price" or the phrase "price limit." 10/21 Tr. 409:23-25 (M. Fairbairn).) An "amorphous promise" that obligates the promisor to "consider" something "cannot rise to the level of a contractual duty" when the contract does not establish what that consideration must entail. *See Ladas v. California State Auto. Ass'n*, 19 Cal. App. 4th 761, 771 (1993). But that is precisely what Plaintiffs have claimed: that Fidelity Charitable would keep Mr. Fairbairn in the loop and consider his advice. This testimony, even if credited, could not sustain a claim for breach of contract in light of Mr. Fairbairn's own admissions that Fidelity Charitable had no obligation to take his advice, that the ultimate decision on how to liquidate the stock belonged to Fidelity, and that he did not flesh out "in sufficient detail" with Mr. Kunz what it actually meant to be kept in the loop. 10/21 Tr. 411:18-412:4 (M. Fairbairn); *id.* 410:11-14. Similarly, even assuming there was evidence that a contract had been formed and breached, the speculative nature of any harm flowing from the breach of that alleged promise defeats the claim. *See Ladas*, 19 Cal. App. 4th at 770 ("To be enforceable, a promise must be definite enough that a court can determine the scope of the duty and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages.").

The record does not establish the existence of any contract at all, let alone an enforceable one.

### 5. Plaintiffs Did Not Show That The Breach Of The Alleged Promises Caused Them Any Harm

Plaintiffs' promise-based claims also fail for the independent reason that Plaintiffs cannot show that any breach of those promises—even if made—caused them any harm, an essential element of each of their claims.

As discussed above, Plaintiffs were not even plausibly harmed by Fidelity Charitable's purported promise to sell less than 10% of the daily volume of Energous shares, because Fidelity Charitable ***did*** sell less than 10% of the daily volume of Energous shares. *See supra* § A.1.b. Nor did Fidelity Charitable cause any harm to Plaintiffs as a result of its promise to use "sophisticated methods" to liquidate large blocks of stock: Fidelity Charitable did use such methods, and to the extent Plaintiffs understood the promise to mean merely that the stock would be sold by Fidelity Capital Markets, it was. *See supra* § A.1.a.

Fidelity Charitable also cannot be said to have caused the Fairbairns any harm by failing to allow Mr. Fairbairn to advise on a price limit (or even by failing to keep him in the loop). As discussed in the preceding section, Mr. Fairbairn admitted that "Fidelity Charitable may or may not take [his] advice." 10/20 Tr. 411:14-412:4 (M. Fairbairn). Thus, to show any harm, Plaintiffs would have to show not only the advice Mr. Fairbairn would have given (which he claims was not to sell below $25/share (10/21 Tr. 438:12-21 (M. Fairbairn))), but also that Fidelity Charitable would have taken that advice. Plaintiffs have not even attempted to make such a showing. Nor could they. Mr. McLean testified that "[e]ven if on December 29, 2017, during the liquidation, Mr. Fairbairn had attempted to advise me to hold the shares for later liquidation, I would have declined given the available volume and our policy and objectives regarding liquidation." McLean Decl. ¶ 33. It is one thing to suggest that Mr. Fairbairn could give his advice; quite another to suggest that Fidelity Charitable would have taken it given its facial incompatibility with Fidelity Charitable's policy regarding the liquidation of donated stock.[6]

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[6] Of course, after December 29, 2017, the Energous stock never traded above $25 per share. Ex. 1355. Following Mr. Fairbairn's advice would only have ensured that Fidelity Charitable sold the shares for a lower average price than it actually obtained.

Plaintiffs also cannot show that they were harmed by Fidelity Charitable's breach of a purported promise not to sell shares until 2018. This is because, as discussed at much greater length below, there is no evidence that Fidelity Charitable's sale of the Energous shares on December 29, 2017 was the cause of any decline in the price of that stock. *See infra* § B.3. In fact, holding the shares until 2018 would have resulted in fewer proceeds available to be granted to other charities. Specifically, Mr. Zarcu showed that selling the Energous shares in equal amounts across the first four trading days of January 2018 would have yielded a lower average price per share than the $22.82 that Fidelity Charitable obtained by selling on December 29, 2017. 10/27 Tr. 1026:15-1027:18 (Zarcu).

* * *

Plaintiffs' promise-based claims fail for many reasons: Plaintiffs' inability to establish what the promises were; the total absence of contemporaneous evidence supporting the making of the alleged promises (let alone their content); the chronology, which disproves reliance; the contradiction with Fidelity Charitable's policies and emails they received from Fidelity, all rendering any reliance unjustified; the fact that two of the promises, if made, were not broken; the failure to evince a meeting of the minds; and the absence of proof of harm. Because Plaintiffs' claims for misrepresentation, breach of contract, promissory estoppel, and the UCL all depend on the alleged promises, on each of those claims, judgment must enter for Fidelity Charitable.

**B. Fidelity Charitable Is Entitled To Judgment On Plaintiffs' Negligence Claim**

To prove negligence, a plaintiff must show that it was owed a duty by the defendant, breach of the duty, and damage caused by the breach. *Ladd v. County of San Mateo*, 12 Cal. 4th 913, 917 (1996). "Where there is no duty, there can be no negligence." *Toomer v. United States*, 615 F.3d 1233, 1237 (9th Cir. 2010).

"[T]he existence of a duty is a question of law for the court." *Ky. Fried Chicken of Cal. v. Superior Court*, 14 Cal. 4th 814, 819 (1997). California's general rule—Civil Code § 1714(a)—is that people owe a duty of care to avoid causing harm to others; but "[w]hat Civil Code section 1714 does not do is impose a presumptive duty of care to guard against any conceivable harm that a negligent act might cause." *Southern California Gas Leak Cases*, 7 Cal. 5th 391, 399 (2019)

("*Gas Leak Cases*"). And in California, "liability in negligence for purely economic losses," such as the losses alleged in this case, is "the exception, not the rule." *Id.* at 400 (citation omitted).

As discussed below, Plaintiffs proved none of the elements of their negligence claim. Fidelity Charitable did not owe the Fairbairns' any specific duty; its duty—which ran to the charity's trustees—was (and is) to follow its policy and act as a prudent charity would. Fidelity Charitable did exactly this when it took advantage of the volume in the market to liquidate the WATT stock "as quickly as possible"—reducing the charity's risk and promptly turning the donation into cash that could be granted to other charitable organizations.

And Plaintiffs introduced no credible evidence that Fidelity Charitable was the ***cause*** of WATT's price decline on the afternoon of December 29, 2017. Plaintiffs' "proof" amounts to nothing more than the circumstantial fact that the price declined while Fidelity Charitable was selling; but the same is true of all other sellers of WATT—who collectively sold more than 84% of the WATT shares that afternoon. The evidence shows that it was the other sellers and other events—including a tweet posted on NASDAQ regarding Energous' "history of deception" and predicting the stock would drop to $15 a share—that are the better explanation for why the price of WATT dropped that afternoon. Accordingly, Plaintiffs' negligence claim fails.

### 1. Fidelity Charitable Did Not Owe A Duty To The Fairbairns Regarding The Liquidation Of WATT

Plaintiffs' negligence claim is based on Fidelity Charitable's sale of WATT stock on December 29, 2017, which Plaintiffs allege caused (1) a reduced tax deduction, and (2) a decrease in the amount of money in the Giving Account bearing their name.[7] But to demonstrate negligence, Plaintiffs must first demonstrate that Fidelity Charitable owed them a duty. *See, e.g., Toomer*, 615 F.3d at 1237. Plaintiffs have not done so, and their negligence claim fails as a result.

Plaintiffs' arguments regarding the existence of a duty misstate the relevant California law. Plaintiffs cite to California Civil Code § 1708 for the proposition that "Fidelity Charitable owes everyone with whom it interacts a duty of ordinary care—including the Fairbairns." ECF No. 203

[7] As the Court is aware, and has been fully briefed in connection with Motion in Limine No. 5, Fidelity Charitable's position is that Plaintiffs lack the ability to pursue a monetary remedy on behalf of the DAF. *See* ECF No. 216.

at 33. However, Plaintiffs are incorrect for two reasons.

First, the relevant section of the California Civil Code is § 1714, not § 1708, because Plaintiffs allege that Fidelity Charitable's negligence occurred during the sale of Fidelity Charitable's own stock. *Compare* Cal. Civ. Code § 1708 ("Every person is bound, without contract, to abstain from ***injuring the person or property of another***, or infringing upon any of his or her rights.") (emphasis added), *with* Cal. Civ. Code § 1714(a) ("Everyone is responsible, not only for the result of his or her willful acts, but also ***for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person***….") (emphasis added); *see* Ex. 183.006 ("Once Fidelity Charitable accepts a contribution, it is irrevocable and is owned and controlled by the Trustees."); 10/20 Tr. 391:19-24 (M. Fairbairn) (agreeing that he understood his gift was irrevocable and that he did not own the stock once it was donated); 10/21 Tr. 481:8-10 (E. Fairbairn) (same); 10/28 Tr. 918:13-16 (Norley) (explaining donations are owned by Fidelity Charitable trustees); *see also* Ex. 1339.001 (e-mail from Ms. Fairbairn acknowledging she "will no longer own [stock] the minute [she] give[s] it away" to a DAF).

Second, Plaintiffs claim that it is a "basic tenet of California law" that a person owes everyone with whom s/he interacts a duty of ordinary care. *See* ECF No. 203 at 33. But "liability in negligence for purely economic losses … is 'the exception, not the rule' under [California Supreme Court] precedents." *Gas Leak Cases*, 7 Cal. 5th at 400 (citing *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 58 (1998); *see also Bily v. Arthur Young & Co.*, 3 Cal. 4th 370, 376, 398 (1992) (acknowledging that financial losses to investors from negligently prepared audit reports were "certainly" foreseeable, but that an auditor "owes no general duty of care regarding the conduct of an audit to persons other than the client"). Accordingly, to establish that Fidelity Charitable owed Plaintiffs a duty, Plaintiffs must establish an "exception to the general rule of no-recovery for negligently inflicted purely economic losses." *Gas Leak Cases*, 7 Cal. 5th at 400; *id.* (noting that "recovery for stand-alone economic loss is frequently rejected") (citation omitted).

The "primary exception" in such circumstances "is where the plaintiff and the defendant have a 'special relationship.'" *Id.* The relevant factors to consider in determining whether a special

relationship exists are:

> (i) the extent to which the transaction was intended to affect the plaintiff, … (ii) the foreseeability of harm to the plaintiff, (iii) the degree of certainty that the plaintiff suffered injury, (iv) the closeness of the connection between the defendant's conduct and the injury suffered, (v) the moral blame attached to the defendant's conduct, and (vi) the policy of preventing future harm.

*Id.* at 401. However, beyond articulating these factors, the California Supreme Court further held that, as it recognized *Bily*, "[d]eciding whether to impose a duty of care turns on a careful consideration of 'the sum total' of the policy considerations at play, not a mere tallying of some finite, one-size-fits-all set of factors." *Id.* (citing *Bily*, 3 Cal. 4th at 397). Plaintiffs have not come close to showing that the relevant facts and policy considerations weigh in favor of imposing a duty of care on Fidelity Charitable in these circumstances.[8]

Fidelity Charitable's liquidation of WATT (the only conduct of Fidelity Charitable that Plaintiffs have alleged was negligent) was not "intended to affect" Plaintiffs. *Id.* at 401. Once donated, the WATT shares (and proceeds from their liquidation) were owned exclusively by Fidelity Charitable—specifically, the Trustees of the charity—and those proceeds were earmarked for the exclusive purpose of being granted to other charitable organizations. As Mr. McLean, who was responsible for the WATT liquidation, testified, the obligations regarding the donated stock were "[t]o the charity, the trustees of the charity." 10/20 Tr. 331:18-20 (McLean). The liquidation of the Energous stock (again, the sole transaction relevant to Plaintiffs' negligence claim), was intended to benefit Fidelity Charitable and the charities to whom the proceeds of the liquidation would ultimately be donated, not Plaintiffs. That it may have been foreseeable that Fidelity Charitable's liquidation could possibly affect Plaintiffs' tax deduction is insufficient under the law to establish a duty of care in a case involving only economic losses. *See Gas Leak Cases*, 7 Cal.

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[8] Fidelity Charitable does not dispute that a duty may be assumed by a defendant. *Doe v. United States Youth Soccer Assn., Inc.*, 8 Cal. App. 5th 1118, 1128 (2017). However, because the evidence at trial showed that Fidelity Charitable did not make any promises to the Fairbairns regarding how it would liquidate the Energous shares, it assumed no such duty. *See supra* § A.1; ECF No. 39 at 13-14 (finding that the alleged specific representations by Mr. Kunz are "sufficient to plausibly allege a duty of care under California law"). Additionally, the following analysis shows that Fidelity Charitable also did not owe the Fairbairns a duty of care independent of its contractual duties.

5th at 401 (stating that the Court in *Bily* "require[ed] more than mere foreseeability for imposing a duty of care").

Applying the "general rule of no-recovery" for economic losses is appropriate in this case given the "sum total of the policy considerations at play." *Id*. Extending tort liability to the situation presented in this case—a donor suing for pure economic losses despite irrevocably transferring full title in the donated assets to charity before the charity's allegedly negligent conduct occurred—is precisely the concern articulated by the California Supreme Court in limiting tort liability. *Id*. ("In requiring more than mere foreseeability for imposing a duty of care in *Bily*, we appreciated the need to safeguard the efficacy of tort law by setting meaningful limits on liability."). Imposing a duty on Fidelity Charitable to trade its own stock in a particular way would allow any donor to sue any charity regarding the liquidation of its assets and effectively control, or at least second guess, how the liquidation was managed. And it would allow donors to exercise this significant power over charities despite necessarily giving up ownership and control of the donated asset in order to take an immediate tax deduction, and despite not having the contractual right to control the liquidation. Applying the exception to the general rule in imposing a duty of care on Fidelity Charitable in this case of pure economic loss would extend negligence liability far outside the scope contemplated by the California Supreme Court in *Gas Leak Cases*.

A recent Central District of California case is instructive with respect to applying the *Gas Leak Cases* factors and policy considerations in an analogous context. In *Soundgarden v. UMG Recordings*, plaintiffs were musical artists whose original sound recordings of songs ("Master Recordings") were stored in a warehouse leased by the defendant, UMG. No. LACV1905449JAKJPRX, 2020 WL 1815855, at *1 (C.D. Cal. Apr. 6, 2020). The Master Recordings were owned by UMG through contracts signed between recording artists and UMG's predecessors, *id.* at *16, but Plaintiffs had rights to royalty payments through those contracts. *Id.* at *22. Plaintiffs alleged that those Master Recordings were destroyed in a fire at the warehouse, and that UMG was liable in negligence for the destruction of those recordings for failing to properly store them. *Id.* at *1.

The court applied the six *Gas Leak Cases* factors and held that the first five factors

"provide[d] limited support for imposing a non-contractual duty," and the final factor—"the policy of preventing future harm"—weighed "substantially against imposing such a duty on UMG," because the parties could have controlled and adjusted the relevant risks of storing the Master Recordings in their contract but chose not to do so. *Id.* at *20. Ultimately, the court declined to impose a non-contractual duty on UMG "to exercise reasonable care and to avoid economic loss in storing its own property." *Id.* at *21. The court noted that "for sophisticated classes of plaintiffs, effective use of contract rather than tort liability to control and adjust the relevant risks worked against imposing tort liability." *Id.* at *19 (citing *Bily*, 3 Cal. 4th at 398).

The circumstances in this case provide an even stronger rationale than *Soundgarden* not to allow for recovery in negligence for purely economic loss. As in *Soundgarden*, Plaintiffs here allege the existence of relevant contracts, and the existence of a duty of care independent of those contracts with respect to property owned by the defendant. *See* ECF No. 203 at 32; Ex. 183.006 ("Once Fidelity Charitable accepts a contribution, it is irrevocable and is owned and controlled by the Trustees."); 10/20 Tr. 391:19-24 (M. Fairbairn) (agreeing that he understood his gift was irrevocable and that he did not own the stock once it was donated). The plaintiffs in *Soundgarden*, however, retained a significant ongoing and direct financial interest in the Master Recordings in the form of royalty payments, unlike the Fairbairns, who received the benefit of a tax deduction only upon their relinquishment of their ownership and control of the stock, and retained only limited advisory rights with respect to the proceeds of the liquidation. *See Soundgarden*, 2020 WL 1815855, at *7 (describing royalties paid to relevant plaintiff under licensing agreement); *id.* at *20. And, although plaintiffs in *Soundgarden* were in contractual privity with defendant regarding the property at issue (the Master Recordings), the contract there was silent with respect to the specific transaction at issue in the case (the storage of the Master Recordings). *Id.* Here, the Contribution Form signed by Mr. Fairbairn—a sophisticated hedge fund manager—was ***not*** silent about the liquidation. It explicitly required Plaintiffs to both acknowledge reading the Program Circular and agree to its terms. Ex. 832.004; *see also* 10/27 Tr. 921:2-12 (Norley). The Program Circular, in turn, provided Mr. Fairbairn with information regarding Fidelity Charitable's liquidation policy: that public securities would be sold at the earliest date possible, that the earliest

date could be the day of donation, and that Fidelity Charitable had the right to sell donated assets at any time. Ex. 183.008.

Accordingly, even though in *Soundgarden* the property at issue was destroyed in a fire and the relevant contracts were silent as to the ultimate issue, the Court still held that there could be no negligence claim for purely economic losses. Here, the dispute focuses on the sale of property in which the Plaintiffs had no ongoing direct financial interest, and which was conducted in the manner as provided for in the written agreement between the parties. In these circumstances, there is no basis to depart from the California rule that Plaintiffs cannot bring a negligence claim against Fidelity Charitable for purely economic losses.

**a. Fidelity Charitable's Duty Was To Act As A Reasonable DAF Would And Consistent With Its Policy**

Fidelity Charitable's duty with respect to its liquidation of WATT was to act as a reasonable ***DAF***, not a hedge fund or institutional investor. Indeed, the model jury instructions for professional negligence provide that "an [*insert type of professional*] is negligent if [it] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances." CACI 600.[9] Accordingly, Fidelity Charitable was not required to sell the stock as an investor might, seeking to "maximize" charitable dollars or to maximize the Fairbairns' tax deduction to the exclusion of all other considerations. DAFs are ***not*** institutional traders or hedge funds. They have unique goals for distinct reasons (*e.g.*, to enable donors to grant proceeds to charity quickly), and their conduct must be evaluated within that context.

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[9] *See also Gagne v. Bertran*, 43 Cal. 2d 481, 489 (1954) ("The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of ***members of their profession***, and a failure to discharge that duty will subject them to liability for negligence. Those who hire such persons are not justified in expecting infallibility, but can expect only reasonable care and competence. They purchase service, not insurance.") (emphasis added); *Allied Properties v. John A. Blume & Associates*, 25 Cal. App. 3d 848, 856 (1972) ("This rule [of *Gagne v. Bertran*] has been consistently followed in this state with respect to professional services…."). "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." *LAOSD Asbestos Cases*, 5 Cal. App. 5th 1022, 1050 (2016) (internal quotation marks and citation omitted).

Fidelity Charitable's own policy and the policies of its peers help establish its compliance with the standard of care. *Bullis v. Security Pac. Nat. Bank*, 21 Cal. 3d 801, 809 (1978) (trial court properly considered defendant's procedures, as stated in its operations manual, and customs and practices of the banking industry in evaluating whether bank's actions complied with appropriate standard of care). Indeed, to the extent Fidelity Charitable had any duty to the Fairbairns regarding the Energous stock (it did not), that duty was simply to follow its policy as set forth in the written agreement between the parties—the Program Circular—which Fidelity Charitable provided to the Fairbairns, and which Mr. Fairbairn acknowledged he understood and agreed to. Ex. 183; Ex. 832.004; 10/20 Tr. 377:10-19 (M. Fairbairn); *see also infra* § B.1.b (discussing Dr. Domowitz's agreement that Fidelity Charitable's policies had to govern sale).

That policy is crystal clear:

> Fidelity Charitable processes contributions periodically throughout the day and ***will liquidate contributions as quickly as possible*** after all the requisite paperwork has been received, and after the assets have been received in good order. Ex. 183.007 (emphasis added)

And with respect to publicly traded securities in particular:

> Upon receiving the appropriate paperwork and the donated securities in good order, Fidelity Charitable will generally ***sell the securities at the earliest date possible***, but reserves the right to sell at any time. Ex. 183.008 (emphasis added).

The Program Circular further makes clear that publicly traded securities that are received from an account at another Fidelity-related entity "will generally be processed ***on the Business Day the instructions are received***," and that "[c]ontributions of stock held at a financial institution other than Fidelity" will likewise "generally be processed ***on the Business Day on which the assets are received*** by Fidelity Charitable" Ex. 183.008 (emphases added).

The Program Circular is Fidelity Charitable's only policy with respect to liquidating public securities. 10/26 Tr. 879:14-880:7 (Podvojsky); Podvojsky Decl. ¶¶ 9-12; 10/20 Tr. 342:6-16 (McLean); 10/27 Tr. 921:2-12 (Norley). And there is good reason for this policy: it reduces market risk to the charity, moves the charity's property into diversified pools approved by its trustees, avoids speculation, and enables donors to engage in grantmaking soon after they have

made their donations. The testimony on this subject was clear, consistent, and not contradicted. *See, e.g.*, McLean Decl. ¶¶ 8, 17, 28; Podvojsky Decl. ¶¶ 13, 19-20; 10/26 Tr. 880:8-881:6 (Podvojsky); 10/27 Tr. 920:10-25 (Norley); 10/27 Tr. 960:16-963:10 (Pierce).

Fidelity Charitable does not make decisions about when and how to liquidate donated securities based on the market price of the stock. McLean Decl. ¶¶ 19-20; 10/20 Tr. 331:21-332:6 (McLean). Although Fidelity Charitable tries to act responsibly in liquidating stock so as to not adversely affect the market price, its goal is always to sell as quickly as possible as a means of reducing risk. *See, e.g.*, 10/20 Tr. 332:10-21 (McLean); Ex. 198.003.[10] And the Fairbairns' own expert, Professor Harris, agreed that "Fidelity Charitable should not have engaged in speculative trading," and that "best practices for traders does not allow them to act on their opinions about value." 10/26 Tr. 815:815:14-816:3 (Harris).

Many of the nation's largest donor advised funds share Fidelity Charitable's policy regarding the liquidation of donated stock. Vanguard Charitable and Schwab Charitable sell donated stock "as quickly as possible" (Ex. 1221.012, Ex. 1041.010); National Christian Foundation sells "as soon as possible" (Ex. 1214.011); and the Greater Kansas City Community Foundation sells "as soon as practical" (Ex. 1209.006). For Vanguard Charitable, "as quickly as possible" meant the business day after the securities were donated, because of "a long-standing operational constraint." 10/27 Tr. 947:21-948:17 (Pierce). For Fidelity Charitable, the policy of selling stock "at the earliest date possible" (Ex. 183.008) results in the sale of donated stock "very frequently" on the same day it is donated. 10/26 Tr. 881:12-14 (Podvojsky). Meanwhile, the policy of National Philanthropic Trust—whose policies apply to JP Morgan Charitable (10/26 Tr. 955:1-5 (Pierce))—provides that contributions of publicly-traded stock "may be liquidated

[10] The Fairbairns' own conduct demonstrates the wisdom of Fidelity Charitable's policy. On December 28, 2017, the Fairbairns ***could have*** donated Energous shares held at Fidelity Family Office Services to Fidelity Charitable, but Ms. Fairbairn elected to wait to do so until December 29. 10/21 Tr. 536:9-23 (E. Fairbairn). She assumed the price would be higher—and therefore her tax deduction larger—on December 29, 2017. *Id.* 536:21-537:2 (E. Fairbairn). She was wrong; the price of Energous shares opened lower on December 29 than its closing price on December 28, and it had moved even lower before Fidelity Charitable sold a single share. 10/27 Tr. 1050:10-17 (WATT "opened higher on the 2[7]th. Then it went up dramatically that day and it stayed up. And then on the 29th, it opened a little bit lower, and then it declined after that.").

***immediately***." Ex. 1215.004 (emphasis added). These policies, like that of Fidelity Charitable, seek not to time the market but rather to minimize market risk to the charity. *See, e.g.* (10/28 Tr. 960:16-962:14 (Pierce) (explaining that Vanguard Charitable's policy works to "minimize market risk," "make sure … the publicly charity's assets are prudently invested" and "allows the charity to focus on its core competencies in order to fulfill its charitable mission")).[11]

Plaintiffs' hedge fund may well have sold the WATT shares in a different manner than Fidelity Charitable. But hedge funds and other institutional investors are in the business of analyzing individual securities for investment opportunities, developing a strategy for when to buy and sell such securities, and deciding how to maximize investment returns; charities, including Fidelity Charitable, generally are not. Fidelity Charitable's policy is designed to avoid speculation, avoid guessing about future price movement, and reduce risk to the charity. It is a reasonable policy, and as discussed below, Fidelity Charitable complied with it in this case.

**b. Plaintiffs Did Not Establish Any Alternative Duty**

In an effort to establish a relevant duty other than the one set forth explicitly in Fidelity Charitable's Program Circular (which the Fairbairns acknowledged), Plaintiffs called Dr. Domowitz to opine on what he believed was the applicable standard of care. But Dr. Domowitz has no experience, let alone expertise, in the standard of care for charities liquidating donations. 10/23 Tr. 735:5-15 ("My experience is bound by investment institutions such as Fidelity, the parent, for example…. I have not worked directly with a charitable institution with respect to the trading practices."). In fact, Dr. Domowitz admitted that his entire testimony regarding the "industry norms" and standard of care was derived from "institutional traders whose duty is to simply maximize the value . . . like a mutual fund, or something like that . . . ." *Id.* 654:5-15. When he prepared his opinions in this case, he was "not aware that Fidelity Charitable is a 501(c)(3) organization" (*id.* 677:2-7), or even that "once the Fairbairns had donated the WATT

[11] To the extent other national DAFs do not have a policy of selling donated stock as quickly as possible, their policies nonetheless make clear that the contributed property belongs to the charity, not to the donor, and that they have complete control over the liquidation. *See, e.g.*, 10/27 Tr. 957:3-958:14 (Pierce). Nor would such exceptions to the general trend in the national DAF arena affect the relevant standard of care, which requires Fidelity Charitable to "use such skill, prudence, and diligence as other members of his profession ***commonly possess and exercise***…." *Budd v. Nixen*, 6 Cal. 3d 195, 200 (1971) (emphasis added).

stock to Fidelity Charitable, they no longer owned it." *Id.* 677:16-19.

Despite his lack of relevant knowledge, Dr. Domowitz opined that, in the case of the WATT liquidation, "a reasonable standard of care [would] conform[] to the best execution guidelines," and specifically applied the SEC's standard for "best execution" to Fidelity Charitable. 10/23 Tr. 632:14-633:12, 676:8-677:1 (Domowitz). But Fidelity Charitable is not regulated by the SEC (or FINRA)—facts that Dr. Domowitz was also unaware of when he formed his opinions. *Id.* at 677:6-15.

Further, although Plaintiffs failed to demonstrate that the "best execution" standard applies to Fidelity Charitable, they also failed to prove that Fidelity Charitable fell short of that standard. Dr. Domowitz conceded that there is "no commonly accepted definition of 'best execution'" and that "[b]est execution requires taking client objectives into account." *Id.* 677:20-24, 678:24-679:7. In this case "Fidelity Charitable was the client of Fidelity Capital markets." *Id.* at 681:5-15. Accordingly, Fidelity Capital Markets had to take into account the policies and objectives of its client (Fidelity Charitable) in executing the trades. *Id.* at 679:5-7, 680:10-681:3, 685:9-12 (acknowledging that the sale of WATT should have been guided by Fidelity Charitable's policies); *see also* 10/28 Tr. 1013:10-12 (Zarcu) ("[B]rokers have an obligation to sell stock in accordance with their clients' wishes."). Significantly, neither Dr. Domowitz nor Dr. Harris even considered Fidelity Charitable's Program Circular, or the policy therein regarding liquidations of stock in forming their opinions. 10/23 Tr. 685:25-686:6 (Domowitz); 10/26 Tr. 804:16-22 (Harris).

As discussed below, the decision to sell the WATT stock on December 29, 2017 was made in accordance with Fidelity Charitable's policy by Mr. McLean and communicated to Mr. Celano at Fidelity Capital Markets. *See infra* § B.2.a. As Dr. Domowitz admits, Mr. Celano had to execute those orders. 10/23 Tr. 684:9-19, 685:9-12 (Domowitz); *see also* Celano Tr. 57:20-25, 58:1-11 (Mr. Celano testifying that he trades according to his customers' objectives, follows his customers instructions, and that on December 29, 2017, Mr. McLean instructed him to sell all of the WATT

shares in compliance with Fidelity Charitable's policies).[12] And there is no dispute that in doing so Fidelity Charitable in fact exceeded the prices other traders were obtaining in the market—a factor even Dr. Domowitz conceded is relevant to determining whether a duty of best execution has been met. *See, e.g.*, 10/26 Tr. 810:12-16 (Harris) (agreeing that Fidelity Charitable obtained higher prices than other traders); 10/23 Tr. 723:23-724:6 (Domowitz) (acknowledging that price has traditionally been a factor in evaluating best execution).

### 2. Plaintiffs Have Failed To Show Any Duty Was Breached: Fidelity Charitable's Liquidation Of The WATT Stock Was Reasonable, Prudent, And Successful

#### a. Fidelity Charitable's Sale Of The WATT Stock Was Consistent With Its Policy

As explained at length at trial, Fidelity Charitable's policy to liquidate donated assets "as quickly as possible" and to sell donated public securities "at the earliest date possible" means as soon as the paperwork is in good order and there is sufficient volume in the market. Ex. 183.008; McLean Decl. ¶¶ 7-8, 12-15; Podvojsky Decl. ¶¶ 10-11, 14, 16; 10/27 Tr. 920:10-18 (Norley); 10/20 Tr. 330:12-23 (McLean) ("Policy states that we need to sell as quickly as possible, and if there's volume in the market, I need to do that."). In other words, there must be enough demand for shares in the marketplace to enable Fidelity Charitable to sell the donated assets. Podvojsky Decl. ¶ 16. That is because, although the "primary goal is to liquidate stock as soon as possible," in doing so, Fidelity Charitable "tr[ies] to minimize any negative impact on price because, all things being equal, if a stock sells at a higher price, it is more money for charity." McLean Decl. ¶ 15.

Mr. McLean, who oversaw the liquidation of WATT for Fidelity Charitable, explained that "[t]o balance my goal of selling quickly, with minimizing price impact, I try to keep our sale of stock 'in line with volume.'" McLean Trial Decl. ¶ 15. This practice is also reflected in Exhibit 198, a document entitled "Trading Procedures," that Mr. McLean drafted and that best reflected

[12] There is no dispute that Fidelity Charitable was Fidelity Capital Markets' client in the trading—not the Fairbairns. 10/23 Tr. 681:11-15 (Domowitz). Therefore, to the extent Fidelity Capital Markets had any duty with respect to trading the stock, that duty ran to Fidelity Charitable, not Plaintiffs.

Fidelity Charitable's trading procedures at the time of the WATT sale.[13] 10/20 Tr. 321:23-322:22, 339:15-342:8 (McLean). "[I]n general terms, trading in line with volume means taking advantage of liquidity when it presents itself." 10/27 Tr. 1016:22-1017:14 (Zarcu); *see also* Celano Tr. 131:6-12. As Mr. McLean explained, it "is not a rigid measurement," but in his experience, selling "less than 10% of daily trading volume" or "a participation rate below 20%" are "well within 'in line with volume.'" McLean Trial Decl. ¶ 15.

And trading in line with volume is what Mr. McLean did when liquidating WATT. Shortly after trading began, Mr. Celano communicated to Mr. McLean that "we ***may*** be pressuring ***a bit***"—*i.e.*, putting pressure on the WATT stock. Ex. 213.006 (emphases added). Mr. McLean responded by extending the timeframe for completing the sale of the initial tranches. *Id.* ("Let [sic] stretch our current to 3:45 then"). He also noted that "[w]e can always sell the last 2 [tranches] in the last hour of the day." *Id.* That is because trading volumes typically increase at the end of the day. 10/20 Tr. 275:3-12 (McLean); McLean Decl. ¶ 26; *see also* 10/27 Tr. 1016:12-21 (Zarcu); 10/27 Tr. 1073:3-18 (Hendershott). In fact, the end of the trading day is typically where the greatest number of shares are traded. 10/20 Tr. 275:3-12 (McLean); 10/26 Tr. 767:17-22 (Harris). And as much as Plaintiffs try to suggest that Mr. McLean acted irresponsibly by completing the sale on

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[13] In advancing their negligence claim, Plaintiffs focused not on the Program Circular or relevant Trading Procedures document, but instead on Exhibit 205—a document dated "05/20/09" and entitled "Monitoring of Trade Execution Quality" that Plaintiffs suggested was the relevant policy. But Exhibit 205 was not in effect in 2017. 10/20 Tr. 332:7-9; 10/26 Tr. 880:6-7 (Podvojsky); 10/26 Tr. 803:24-10 (Harris) (testifying that he reviewed Mr. McLean's deposition before preparing his expert report and recalling that Mr. McLean testified that Exhibit 205 "was not a policy of Fidelity Charitable's in effect at the time of the WATT liquidation"). Indeed, Mr. Podvojsky, who manages the team that liquidates donated securities, had never even seen the document prior to preparing for his deposition in the litigation. 10/26 Tr. 879:23-880:5 (Podvojsky).

In any event, Exhibit 205 also lists some of Fidelity Charitable's objectives; it provides that Fidelity Charitable will seek to obtain the best price available while liquidating the stock; will convert the security to cash "as quickly as possible" to reduce risk and make funds available for giving; and act responsibly so as to not adversely affect the price of the stock it is liquidating. Ex. 205.001. As discussed in this section, Fidelity Charitable did all of those things. It further provides that Fidelity Charitable will monitor "the quality of trade execution" by "measurement against the IVWAP." *Id.* As discussed below, the trade execution as compared to the iVWAP in this instance was "a very favorable outcome" according to even Plaintiffs' own expert. *See infra* § B.2.d.

December 29, 2017 (*see, e.g.*, 10/19 Tr. 21:1-16 (Plaintiffs' opening)), this portion of his chat with Mr. McLean is proof that Mr. McLean knew exactly what he was doing. Specifically, at 1:56 pm, after noting the total volume of Energous shares Fidelity Charitable would likely receive on December 29 (Ex. 213.005-006 (noting the incoming "318k" and "343k" tranches)), in the midst of the chat about whether there was "pressure," Mr. McLean estimated the total volume on the day:

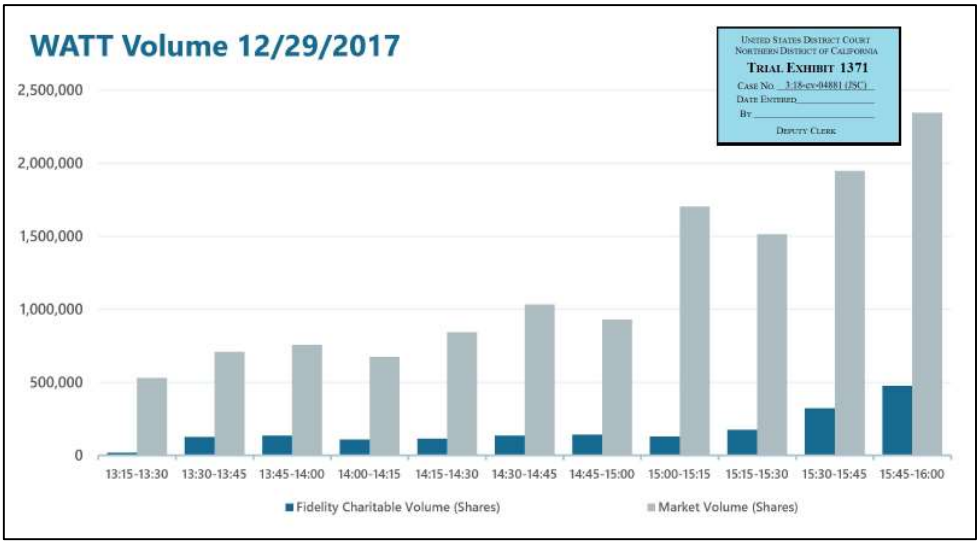
> Message: 12/29/2017 18:56:05 MICHAEL MCLEAN (NATIONAL CHARITABLE) <MMCLEAN27@Bloomberg.net>
> Should be ~25mm on the day

Ex. 213.006.

As Mr. McLean testified, "at that point in the day, beyond half the trading day was completed. Looking at the volume in the market at that time, I came up with a calculation and forecast as to what I thought the volume on the overall day would be, which I used as a guide to determine whether or not we could complete the sales by the end of the--end of the business day." 10/20 Tr. 329:6-13 (McLean); *see also id.* 274:21-25 ("I was calculating--or, rather, forecasting an approximate volume of 25 million to determine sort of decision-making on how to sell the remaining tranches. I believe[d], based on the 25 million, we would have sufficient volume in the market."). As it turned out, "WATT ended up with, like, 28 or 28 1/2 million shares on the day. So I was a little light on the forecast." *Id.* 275:1-2.

This projection—and the continuing focus on volume—is significant. Before 2:00 that afternoon, with over two hours left in the market to sell, Mr. McLean knew exactly how many shares of WATT stock he was likely to receive, made a conservative forecast of what the remaining volume of WATT was going to be in the afternoon, and was "comfortable selling all 1.9 million shares of WATT into [his] expectation of the remaining market volume for the day . . . ." *Id.* 329:19-25. That was because, in Mr. McLean's words, "given my forecast of the volume, I knew that our volume rate over the day was going to be well below 10 percent, and our participation rate was going to be within my comfort levels." *Id.* 330:5-11. Mr. McLean had a clear-eyed view of his strategy and a plan for the afternoon and relied on Mr. Celano to execute it. And the result was

that Fidelity Charitable sold WATT stock in-line with volume.




Ex. 1371; 10/28 Tr. 1016:22-1017:18 (Zarcu).

Further, the communication between the client (Mr. McLean) and the trader (Mr. Celano) is exactly what Plaintiffs' expert Dr. Domowitz testified that he would expect to see during a large trade. 10/23 Tr. 654:5-655:5. Mr. Celano—a longtime professional trader who has traded large blocks of stock for "many, many years" (Celano Tr. 199:11-15, 199:18-19)—was communicating with Mr. McLean throughout the day. *See, e.g.*, Ex. 213; Ex. 216. He provided Mr. McLean with market color, "some information on volume and, you know, things that he was seeing." 10/20 Tr. 328:11-16 (McLean). Mr. McLean took Mr. Celano's information into account and adapted his liquidation. 10/20 Tr. 328:11-16 (McLean).

And Mr. Celano has no reservations about how the trade was conducted:

> Q: Obviously, hindsight is 20/20. I'm asking you, at the moment where – when you asked Mr. McLean on December 29th, 2017, if it was necessary to complete the liquidation of Energous stock that day, would you have preferred to stretch out the sale over a longer time horizon?
>
> [A]: I can't remember what I was thinking, but in hindsight, I think what we did was great. I think we got the historical highs of the stock, and it's never seen those highs again.

Celano Tr. 120:5-15; *see also* McLean Decl. ¶ 28 ("I believe that our liquidation of the WATT shares was a success"); 10/26 Tr. 883:23-884:23 (Podvojsky) ("I absolutely believe [Mr. McLean] did the right thing, and he did his job, and he followed the Program Circular perfectly."); 10/27

Tr. 923:15-21 (Norley) ("We acted in accordance with our policy.").

**b. Fidelity's Charitable's Participation Rate Was Reasonable**

Plaintiffs' expert Dr. Domowitz—whose own trading experience is limited to only a few months in 1988 (10/23 Tr. 707:18-20 (Domowitz))—contends that Fidelity Charitable sold too much WATT stock too quickly on December 29, 2017, arguing that its 15.3% participation rate was too high.[14] But Dr. Domowitz admitted that it is ***not*** "in and of itself . . . a violation of any standard of care" to exceed a 10% participation rate, and that there is no single participation rate that should apply in all circumstances. 10/23 Tr. 689:12-690:4. His criticism was grounded in a comparison of Fidelity Charitable's participation rate to a paper he published regarding trading conducted in ***2004***—thirteen years before the trades at issue in this case. *Id.* 694:11-18. Far from being reflective of "industry norms" in 2017, by Dr. Domowitz's own admission, the numbers he was comparing "illustrate[d] the growing pains associated with the new technology" in 2004 when "algorithms were not yet sophisticated enough for large orders" and "only about 5-7 percent of all trading volume was being traded algorithmically." *Id.* 694:19-697:5. Ultimately, Dr. Domowitz conceded that his comparison between Fidelity Charitable's sale of Energous shares in 2017 against "market data independent of the WATT liquidation" from 2004 did not constitute an analysis regarding whether that liquidation complied with a reasonable standard of care. *Id.* 698:12-699:9.

Dr. Domowitz's other publications likewise undermine his claim that Fidelity Charitable's participation rate was too great. Specifically, an article he authored (closer in time to the WATT liquidation) showed that the threshold for measuring participation as "aggressive" actually begins at 30%. Not 10% or 15% or even 20%. 10/23 Tr. 700:1-25. In other words, Dr. Domowitz's published threshold for aggressive trading is nearly ***double*** Fidelity Charitable's 15.3% participation rate, and is consistent with Mr. McLean's, Mr. Celano's, and Mr. Zarcu's testimony

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[14] Dr. Domowitz also suggested that Fidelity Charitable's participation rate violated its own policies. But on cross examination, Dr. Domowitz admitted that Fidelity Charitable "does not have a formally stated policy regarding participation rate," and the emails he referenced in support of the alleged policy on participation rate referred to "10 percent of ***daily volume***" and "not sell[ing] more than approximately 10 percent of the ***overall trading volumes for the day***." 10/23 Tr. 690:5-692:13; Ex. 36. As discussed above, Fidelity Charitable's sale of WATT was less than 10 percent of the daily trading volume. *See supra* § A.1.b.

that on occasion a participation rate of up to 30% may be appropriate. 10/20 Tr. 324:18-326:6 (McLean); Celano Tr. 61:5-8; 10/27 Tr. 1015:13-15 (Zarcu) ("Generally, participation below 10 percent is considered to be passive. Aggressive comes into place when participation exceeds 30 percent.").

Dr. Domowitz further opined that Fidelity Charitable's trading was not "in line with volume" based on his understanding that in line with volume requires the participation rate not to fluctuate ***at all*** during trading, and that "to trade, really, in line with volume" Fidelity Charitable should have used a percent of volume ("POV") algorithm. 10/23 Tr. 645:18-646:11. But, as Mr. Zarcu—who himself has decades of trading experience (10/27 Tr. 990:14-993:2, 995:7-19 (Zarcu))—explained, "in general terms, [trading in line with volume] means taking advantage of liquidity when it presents itself" and VWAP algorithms are used to do that "all the time" (and were used as such in this case). *Id.* 1016:22-1017:22. While "trading in line with volume" can also refer to the use of a POV algorithm, a POV algorithm "would not have been" an appropriate tool to accomplish Fidelity Charitable's objective to sell the WATT that day because a POV algorithm "doesn't have an end. So, Fidelity could not have controlled whether the order would have been completed or not that day had they used the POV." *Id.* 1017:23-1018:14. In short, Dr. Domowitz's criticisms of Fidelity Charitable's participation rate are misplaced and prove nothing.

**c. Use Of Multiple Algorithms Was Reasonable**

Plaintiffs further claim that Mr. Celano should not have used multiple algorithms simultaneously and that doing so had a negative effect on the trading. However, Plaintiffs failed altogether to prove this claim. Both Dr. Domowitz and Dr. Harris were unfamiliar with how these particular algorithms functioned, and neither presented any analysis that attempted to test or measure in any way whether the use of more than one algorithm at a time actually had any impact on the execution of the WATT liquidation. *See, e.g.*, 10/23 Tr. 701:12-23 (Domowitz). Neither expert testified that they ran the algorithms, looked at the code, or constructed any model to assess any potential effect from running multiple algorithms. Dr. Domowitz ultimately conceded that he was ***not*** offering an opinion that the algorithms "competed" with each other. *Id.* 707:21-23. And Dr. Harris testified that he was not opining on competing algorithms at all. 10/26 Tr. 790:21-22

(assuming "competing algorithms" was "talked about . . . by others").

By contrast, Mr. Celano—the experienced Fidelity Capital Markets trader who uses the algorithms as his "tools" every day—explained the effect of using multiple algorithms and its potential effect on execution based on his extensive and direct experience with the algorithms themselves:

> Q Do you know what would happen if two VWAP algorithms ran simultaneously?
>
> THE WITNESS: Generally speaking, both algorithms are slicing small pieces at a time. If you had two VWAPs, essentially think of it as a pie; instead of cutting the pie into eight slices, you're cutting it into 16 slices.
>
> Q Can you explain a little bit more?
>
> A The two orders, the combination is the whole pie. The first pie is cutting it into eight slices; the second pie is cutting into eight slices. It's now 16 slices. The number doesn't change. It's the suborders that the algorithm will place out in its very small orders into many different market venues.
>
> Q Does it have any effect?
>
> THE WITNESS: The effect that I think that would happen is actually probably more advantageous, because it's sending smaller orders. So if you have 10,000 shares and it's supposed to spit out a thousand shares at a moment in time, and you had two 5s, it's going to spit out 500 and 500 rather than 1,000. It's going to slice it into smaller pieces.

Celano Tr. 56:6-57:5; *see also* 114:8-9, 131:15-18 (explaining algorithms are tools to achieve an objective).

Fidelity Charitable's experts also explained that algorithms did ***not*** "compete" with each other to cause negative price movement. *See* Tr. 1006:8-1007:7, 1013:18-1014:3 (Zarcu) (explaining why hidden orders and orders pegged to the offer price do not compete with each other); Tr. 1070:21-1072:6 (Hendershott) (describing the lack of any inference from the WATT prices that simultaneous algorithms affected price). Mr. Zarcu demonstrated that because of the way the algorithms executed the trades—sending a high percentage of orders to dark pools and pegging them as passive trades—Fidelity Charitable executed "a very passive and careful implementation of that trade." 10/26 Tr. 1006:8-22 (Zarcu); *see also* Ex. 1374. He explained that "if the market wasn't able to see these orders—91 percent, again, were not visible to the market—the algos were not pressing down the price in any way. They're just simply sitting and waiting in

a dark venue that was invisible to the market, waiting for an execution from the other side." 10/26 Tr. 1007:3-7 (Zarcu). And whether or not orders are in dark pools, "as long as they're pegged to the offer, they're not competing." *Id.* 1014:2-3. In fact, Mr. Zarcu was able to show that orders from different algorithms operating in the market at the same time achieved the same—and highest—price available in the market at that time. *Id.* 1006:2-1008:22, 1010:15-18 (Zarcu); *see also* 10/27 Tr. 1048:23-25 (Hendershott).

Further, as Professor Hendershott explained, if the algorithms had been competing with each other, the price chart would have shown noticeable price drops and increases when the algorithms began competing with each other and/or when they stopped trading (and the pressure was relieved). 10/27 Tr. 1071:7-1072:3 (Hendershott). This did not occur; the decline in the price of WATT stock was smooth. *Id.*

Plaintiffs have thus failed to prove that using four algorithms was a violation of any standard of care, or caused the trades to "compete" in a way that could have negatively affected the sale.

**d. Fidelity Charitable's Liquidation Was Successful**

The results of Fidelity Charitable's liquidation further prove that there was nothing negligent about it. The algorithms used did what they were supposed to do. 10/23 Tr. 702:11-13 (Domowitz) ("Q. And you agree that the VWAP algorithms in this case did what they were supposed to do; correct? A. Yes."); 10/26 Tr. 800:3-6 (Harris) ("So the fact that Fidelity was, on average, selling above the quote midpoint is just an artifact of the fact that the algorithms they were doing were—were effectively doing what they were programmed to do..."); 10/27 Tr. 1062:23-24 (Hendershott). And ultimately they achieved a great outcome for the charity.

In fact, there is no dispute that Fidelity Charitable outperformed the market in its execution of the WATT liquidation and significantly outperformed the iVWAP benchmark, the "weighted average price for the time when a trader is active," which the industry "refers to as the fair price achieved by the average trader in the marketplace during that window." 10/27 Tr. 1025:1-9 (Zarcu). The iVWAP benchmark compares the average price obtained by Fidelity Capital Markets against the volume weighted average price obtained by other traders in the market during the time

in which Fidelity Capital Markets is trading. *Id.* 1024:21-1025:9. It is a benchmark used by many institutions (10/23 Tr. 722:1-2 (Domowitz)), and also the benchmark by which Fidelity Charitable assesses the performance of Fidelity Capital Markets in the ordinary course. *See* Ex. 198.003; McLean Decl. ¶ 27.

As experts on both sides agree, Fidelity Capital Markets exceeded the iVWAP benchmark. 10/26 Tr. 801:1-3 (Harris); 10/23 Tr. 671:10-12 (Domowitz); 10/27 Tr. 1026:4-7 (Zarcu). As Dr. Harris acknowledged, "that means that Fidelity Charitable sold Energous at prices above the prices at which other trades were taking place near the times of Fidelity Charitable's trades" (10/26 Tr. 810:12-16 (Harris)), and that Fidelity Charitable sold at "higher average prices than other sellers of Energous during the same time . . ." *Id.* 819:15-19. And in fact, compared to the iVWAP benchmark, Fidelity Charitable obtained "a very favorable outcome" (10/23 Tr. 726:16-20 (Domowitz)); Fidelity Charitable exceeded the iVWAP benchmark by an average of ***28 cents per share***, which translates to approximately ***$538,000 more*** in the Fairbairns' Giving Account as compared to the average seller of WATT that afternoon. 10/27 Tr. 1026:4-7 (Zarcu); 10/26 Tr. 801:1-3 (Harris).

### 3. Plaintiffs Failed To Prove That Fidelity Charitable's Liquidation Caused Any Harm To The Plaintiffs

Finally, to prevail on their negligence claim, Plaintiffs must prove that Fidelity Charitable's allegedly negligent trading caused the harm they claimed to have suffered—*i.e.*, fewer funds in the Giving Account bearing their name and a decrease in their tax deduction. Specifically, Plaintiffs must show that Fidelity Charitable's allegedly negligent liquidation of the WATT stock impacted the price of those shares beyond the amount of any impact that non-negligent selling would have had. *See, e.g.*, Plaintiffs' Trial Brief (ECF No. 203 at 3:6-8) (stating the "relevant question" was whether the liquidation "dr[o]ve the price down more than a competent liquidation would have"). Further, in order to prove harm to their tax deduction—which is calculated as the average between the high and the low of WATT on December 29, 2017[15]—Plaintiffs must show that Fidelity

[15] Plaintiffs have no complaint regarding the amount of their tax deduction for the 700,000 shares they donated on December 28, 2017.

Charitable's trading caused WATT's ***low*** of the day to be ***lower*** than it would have been but for Fidelity Charitable's liquidation. Plaintiffs come nowhere close to carrying their burden.

As a preliminary matter, Plaintiffs have failed to even articulate what level of price impact it believes would show negligence, though their expert Dr. Domowitz acknowledged that "Fidelity Charitable did ***not have to have zero price impact*** to satisfy a reasonable standard of care." 10/23 Tr. 719:23-720:4 (Domowitz) (emphasis added). But in any event, Plaintiffs have failed to prove that Fidelity Charitable's sale was the cause of ***any*** of WATT's price decline on December 29. Their negligence claim therefore must fail.

**a. Plaintiffs Adduced No Evidence That Fidelity Charitable's Selling Was The Cause Of The Decline In WATT's Price**

(1) Dr. Domowitz's Transaction Cost Analysis Does Not Show Price Impact

Plaintiffs failed to prove that Fidelity Charitable ***caused*** the decline in the price of WATT on December 29, 2017. Indeed, Dr. Domowitz—Plaintiffs' primary liability expert—admittedly "did not attempt to quantify Fidelity Charitable's price impact" and "did not do any analysis that would provide the difference between Fidelity Charitable's price impact and what [he] would consider a non-negligent price impact." 10/23 Tr. 719:23-720:8 (Domowitz).

Dr. Domowitz presented only a transaction cost analysis—or "TCA"—to conclude that the transaction costs associated with Fidelity Charitable's sale of the WATT shares were greater than the average transaction costs for trades of microcap securities in the fourth quarter of 2017. 10/23 Tr. 663:11-15. But transaction costs are simply "the cost from the time that the decision is made to sell the security… through the end of the sale." *Id.* 664:9-665:2 (Domowitz). "The more the [] stock's price declines, the higher the transaction costs are going to be." 10/28 Tr. 1074:9-10 (Hendershott). It is thus unsurprising that Fidelity Charitable's transaction costs were high; because the price of WATT experienced a decline while it was trading.[16] But a transaction cost

[16] It is also unsurprising that the trades' costs were high relative to the average transaction costs to which Dr. Domowitz compared them. Dr. Domowitz admitted "we don't have the particular set of micro-capped stocks that traded over exactly this time period … in these types of conditions to compare it to," so he compared the transaction costs of Fidelity Charitable's trade to "aggregates and averages" of other "micro-capped securities … for the fourth quarter of 2017." 10/23 Tr. 666:24-667:24 (Domowitz). But WATT was not in an average situation on December 29, 2017. *Id.* 725:9-15 (Dr. Domowitz agreeing WATT's situation on that day "was not typical

analysis says nothing about the ***cause*** of that decline. *See id.* 1075:2-13 (Hendershott) ("Q. Okay. Well, can a transaction cost analysis show that a sale caused the price decline? A. No. …."). Indeed, as Professor Hendershott explained, the transaction costs associated with any trade would be the same if the trade was the only trade in the market, if there were multiple traders, or if there multiple traders and other factors impacting the stock price (*e.g.*, negative publicity); and the TCA does not tell one which (if any) of those things is responsible for the change in stock price. 10/27 Tr. 1075:14-1077:9 (Hendershott).

(2) Dr. Harris Did Not Present Any Analysis That Could Demonstrate Price Impact

Plaintiffs also called Dr. Harris in an effort to carry their burden of proving causation. Dr. Harris, however, did not attempt to show causation through his price impact regression model, and instead presented several ancillary observations: "So, he talked about random walk analysis. He talked about a length of line analysis. He talked about a volume multiplier, and his version of a TCA." 10/27 Tr. 1077:15-1078:18 (Hendershott). But "just as with Dr. Domowitz's TCA, none of them show that Fidelity Charitable had an impact." *Id.*

Like Dr. Domowitz, Dr. Harris also never even attempted to articulate the amount of a price impact that would constitute negligence. Dr. Harris testified that "every trade has an impact," and that "every seller of Energous in the market also impacted the stock's price" (10/26 Tr. 809:11-810:1 (Harris)), but he did not assess the existence of a difference between the price impact that Fidelity Charitable allegedly caused and a non-negligent price impact for a seller of WATT on December 29. This in and of itself means that Plaintiffs cannot carry their burden of proving causation.

Dr. Harris' testimony also does not demonstrate any price impact from Fidelity's Charitable's trading at all. None of the analyses Dr. Harris presented at trial prove that Fidelity

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relative to its previous behavior"). Its volume was "100 times more than the historical average daily volume" and "volatility was three times as high, and so was the price," making a TCA based on historical averages not an informative tool. 10/27 Tr. 1019:9-1020:19 (Zarcu); *see also id.* 994:12-15 ("One of the issues with transaction cost analysis – and it's well known in the industry -- is that it doesn't take into account current-day conditions. It only looks at historical information. And that's a problem that's well documented.").

Charitable (or any other seller) caused the decline in WATT prices on December 29, 2017. *See* 10/27 Tr. 1077:15-1078:18 (Hendershott) ("[N]one of them show that Fidelity Charitable had an impact."). Professor Harris' TCA suffers from the same flaws as Dr. Domowitz's, for the same reasons explained above. And "the random walk and length of line" merely show that "prices went down that day." *Id.* They, like the TCAs, do not link any particular trading to a decline in prices.[17] As a result, none of Dr. Harris' observations has any causal explanatory value because they do not "directly link [Fidelity Charitable's] selling to the price decline." *Id.*

A volume multiplier analysis likewise cannot demonstrate impact. It is different from Dr. Harris' other observations because, rather than being just about prices, it is about trading; however, it "doesn't link trading to prices." *Id.* 1078:1-6. A volume multiplier analysis could demonstrate whether certain trading prompted additional trading in the market. But Professor Harris "didn't provide any evidence on this. He just speculated that this might well be true." *Id.* 1149:9-1150:16. And even had he provided credible evidence of a volume multiplier effect, an analysis must "actually link the trading to the decline if one's going to come up with a reliable conclusion that the trading actually affected prices." *Id.* 1077:18-1078:6. A volume multiplier effect does not do that, and Professor Harris did not present an impact analysis that could have incorporated his purported volume multiplier effect.

Dr. Harris also heavily relied on the increase in the price of WATT between market close on December 29, 2017 to market open on January 2, 2018 (the next trading day), to suggest Fidelity Charitable's trading must have had an impact on the price of WATT on December 29. But this comparison does not prove that Fidelity Charitable was the cause of any price decline for several reasons.

First, to the extent a price rebound is any indicator that Fidelity Charitable was putting pressure on WATT's price, it is more probative to look at whether the price rebounded immediately after Fidelity Charitable stopped selling—*i.e.*, during the after-hours trading session on December 29. There was a "significant level of activity after the close that day." 10/27 Tr. 1023:7-12 (Zarcu);

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[17] And in any event, Professor Hendershott performed his own random walk analysis in response to Professor Harris and found that the WATT price "does not show a deviation from a random walk." 10/28 Tr. 1127:9-16 (Hendershott).

*see also id.* 1066:2-1068:9 (Hendershott). In fact, the after-hours trading volume on December 29 was greater than the average full day's volume prior to the FCC's announcement regarding WATT. 10/27 Tr. 1067:4-21 (Hendershott). Accordingly, "if Fidelity Charitable's selling had been pushing the price down during the day ... once Fidelity Charitable stopped selling, you would expect to see the price start to increase." *Id.* 1066:21-25; *see also id.* 1023:24-1024:3 (Zarcu) (same). But there was no price reversal at all; in fact, there was "a slight decline." *Id.* 1067:1-3 (Hendershott); *see also id.* 1023:13-17 (Zarcu) ("The price continued to go down for a significant amount of time. I believe it was trading below the closing price all the way up to after 5:30.").

Second, the price "rebound" from December 29 to January 2 is ***smaller*** than the price increase between the following Friday (January 5) and the following Monday (January 8). 10/26 Tr. 828:9-13 (Harris). This shows that the price movement of WATT between the December 29 close and January 2 open falls within, and below, the price changes in other observed, similar timeframes. Dr. Harris does not attempt to explain this, or even compare the December 29 to January 2 price change to any other Friday to Monday price change, or any other price change on consecutive trading days.

In sum, Dr. Harris' observation that WATT shares opened higher on January 2 is not proof that Fidelity Charitable's liquidation was the cause of the price decline on December 29. Mr. Celano's testimony, based on his decades-long experience as an institutional trader is apt. When asked about the higher opening price, he explained that there "[c]ould be a number of different reasons why a bounce on the open happened. Many reasons. Could be short covering. Could be just the overall market was higher. Could be on that day there was new news. Could be many different reasons. Each day is independent, generally speaking." Celano Tr. 205:15-206:2; *see also* 10/28 Tr. 1032:24-1033:11 (Zarcu) ("What I'm saying is that it's impossible to tell from one day to the next what the price may be doing. Consider that in this instance, this was December 29th; right? So you're going into a New Year's holiday. There's a long period of – there's no way of telling what the price might do on January 2nd when the market opens. And that's the case, honestly, from any day to day. There's so many things that could happen overnight, in the morning.").

Further, looking at the price of WATT at the end of the first week of January further confirms the reasonableness of Fidelity Charitable's policy of liquidating public securities at the earliest date possible. Dr. Harris admits that WATT may have been "overvalued" at end of December, and that the price was "closer to its fundamental value in the first week in January." 10/26 Tr. 828:15-831:1 (Harris). "[T]he price of WATT, by the end of the first week of January, was less than $22." *Id.* 831:2-4. Fidelity Charitable sold its WATT shares on December 29 for an average price of $22.82. *Id.* 831:5-7. Therefore, by Dr. Harris' own admission, Fidelity Charitable sold Energous shares on December 29 for a ***higher*** average price than its "fundamental value." Combined with Dr. Harris' admission that "Fidelity Charitable sold its shares of Energous at higher average prices than other sellers of Energous during the same time that Fidelity Charitable was selling its WATT shares" (*id.* 819:15-19), the undisputed record is that Fidelity Charitable obtained higher prices than the market average on the day it sold the stock, and obtained a higher average price for the stock than its fundamental value. That is not consistent with a conclusion that Fidelity Charitable caused any harm by its sale of the stock.

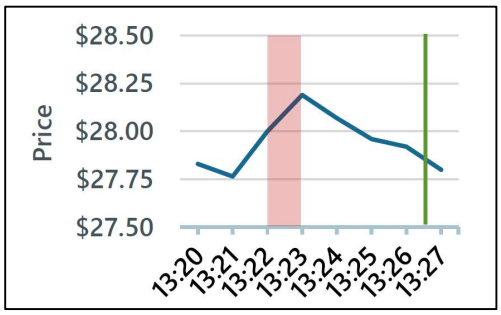
**b. There Are Multiple Alternative Explanations For WATT's Price Decline**

Not only did Plaintiffs' fail to produce evidence showing Fidelity Charitable was the cause of WATT's price decline, they (and their experts) ignored evidence that it was not. There is no dispute that WATT was a historically volatile and speculative stock, and that the announcement of the FCC approval "dramatically" increased the trading volume, stock price, and volatility of the stock. 10/23 Tr. 813:6-20 (Harris); 10/27 Tr. 1049:18-23 (Hendershott); Ex. 1355 (showing WATT's stock price history). And Professor Harris acknowledged that WATT's price had steeply declined in the morning (when Fidelity Charitable was not selling) and was forced to admit that the price decline in the afternoon began "a few minutes ***before***" Fidelity Charitable started trading. 10/26 Tr. 793:23-794:7, 823:6-13.

Neither Dr. Domowitz or Dr. Harris took into account the tweet from short-seller Citron Research that Energous "has a history of deception and the recent FCC info is no different" and predicting that the stock price would drop to $15 a share when forming their opinions. Ex. 1060;

10/26 Tr. 821:10-12 (Harris) (testifying that he did not mention Citron in opening report); *see generally* 10/23 Tr. 616:12-744:11 (Domowitz) (no testimony regarding Citron). That tweet originally appeared in the morning of December 29, after which the price of WATT declined—a sharper decline than even the one it experienced in the afternoon. 10/26 Tr. 824:7-14 (Harris); Ex. 1185 (10:03 am ET news email announcing "Citron Research tweets Energous' 'history of deception'; shares drop 6.4%"); 10/21 Tr. 512:15-513:2 (E. Fairbairn).

At 1:22 pm, the tweet was reposted on NASDAQ—the exchange on which WATT trades. Ex. 1060; 10/27 Tr. 1059:6-17 (Hendershott). Notably, the repost of the Citron tweet on the NASDAQ website (pink bar) is more closely correlated with the start of the WATT price decline than the start of Fidelity Charitable's trading (green line):




*See* 10/27 Tr. 1060:8-1061:13 (Hendershott); 10/26 Tr. 823:10-13 (Harris).

Although he ignored and then dismissed the Citron tweet, Dr. Harris admits that "publicity regarding a company ***can*** affect its stock price." 10/26 Tr. 820:7-9 (Harris) (emphasis added). Dr. Domowitz likewise testified that news ***is*** a factor that affects stock price "[t]o the extent it forms expectations about the future." 10/23 Tr. 721:19-22 (Domowitz). In fact, Dr. Domowitz has previously published that transaction cost "outliers"—as he labeled Fidelity Charitable's sale of WATT—"***most often occur*** because of unexpected news events, which disrupt the stock price." 10/23 Tr. 718:10-719:14 (emphasis added). Perhaps it is therefore no surprise that independent market commentators have pointed to the Citron tweet as the cause of the WATT price decline. 10/27 Tr. 1061:14-1062:2, 1108:14-1109:20 (Hendershott).

In addition, Drs. Domowitz and Harris largely ignored the other 84+% of the WATT sales volume sold during the time Fidelity Charitable was trading. Neither assessed whether any other

seller(s) of WATT that day sold as much or more of the stock than Fidelity Charitable. *See, e.g.*, 10/23 Tr. 720:21-25 (Domowitz) ("Q. And you do not have any idea whether there was another seller out there who was responsible for trading more than 10 percent of WATT during the afternoon of December 29th; correct? A. That is correct."). Nor did they attempt to assess whether any other seller of WATT that day sold in a manner they would deem negligent. *See, e.g.*, *id.* 721:1-5 ("Q. You did not do any analysis of whether any trades of WATT, other than those conducted by Fidelity Charitable, violated a standard of care that afternoon; correct? A. Yes. As I understand your question, that would be correct."). But the evidence suggests it was this other 84+% of trades—not Fidelity Charitable—that was responsible for WATT's decline.

**c. The Price Impact and Order Imbalance Models Both Associate The Decline In WATT Price With Non-Fidelity Charitable Trading**

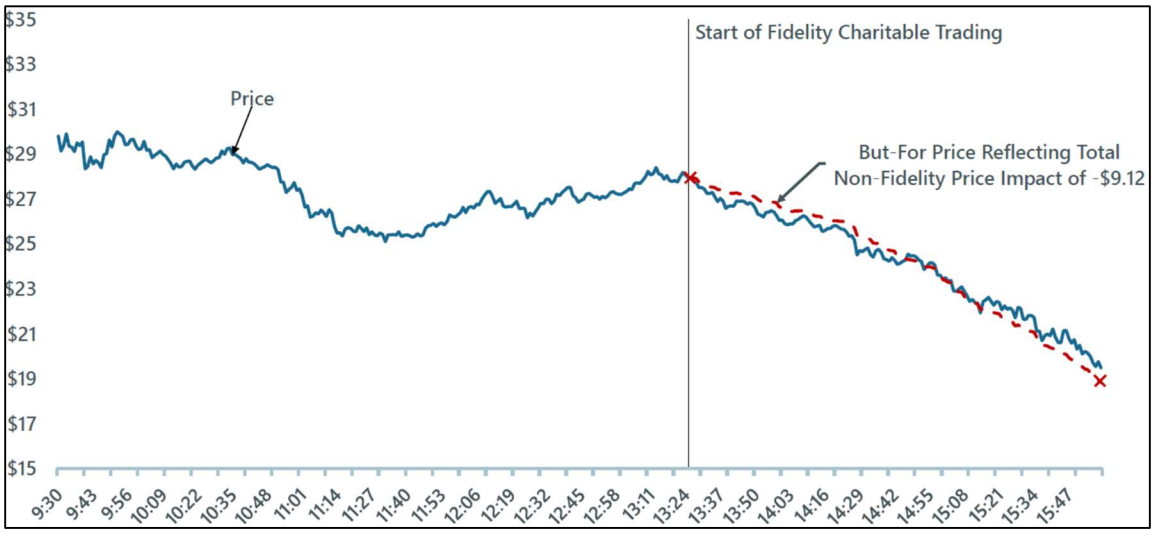
The only quantitative analyses that any expert presented at trial that are generally accepted approaches to assessing price impact were the price impact model and order imbalance study. Professor Hendershott presented both.

Professor Hendershott demonstrated that the price impact model does not show a negative impact from Fidelity Charitable's trading on the price of WATT, and that the price decline of WATT is associated with ***non***-Fidelity Charitable trading. 10/27 Tr. 1084:19-1086:25 (Hendershott). According to the price impact model, "the price impact, the total price impact of the non-Fidelity trades was about [negative] $9." 10/27 Tr. 1086:5-1086:25 (Hendershott).

The following demonstrative (DD6.18) summarized the results of Plaintiffs' price impact model, showing both the negative price impact associated with non-Fidelity Charitable trading, and the positive impact of $6.92 associated with Fidelity Charitable trading:

| | Overall Price Impact |
|---|---|
| Variable | Linear |
| Fidelity Taker Trades | ($2.69) |
| Fidelity Maker Trades | $9.61 |
| Total Price Impact of Fidelity Trades | $6.92 |
| Non-Fidelity Taker Trades | ($15.33) |
| Non-Fidelity Maker Trades | $6.21 |
| Total Price Impact of Non-Fidelity Trades | ($9.12) |

And another graph (DD6.20) showed what the result from non-Fidelity Charitable trading looked like when plotted against the actual price decline that occurred—it is almost an exact match:



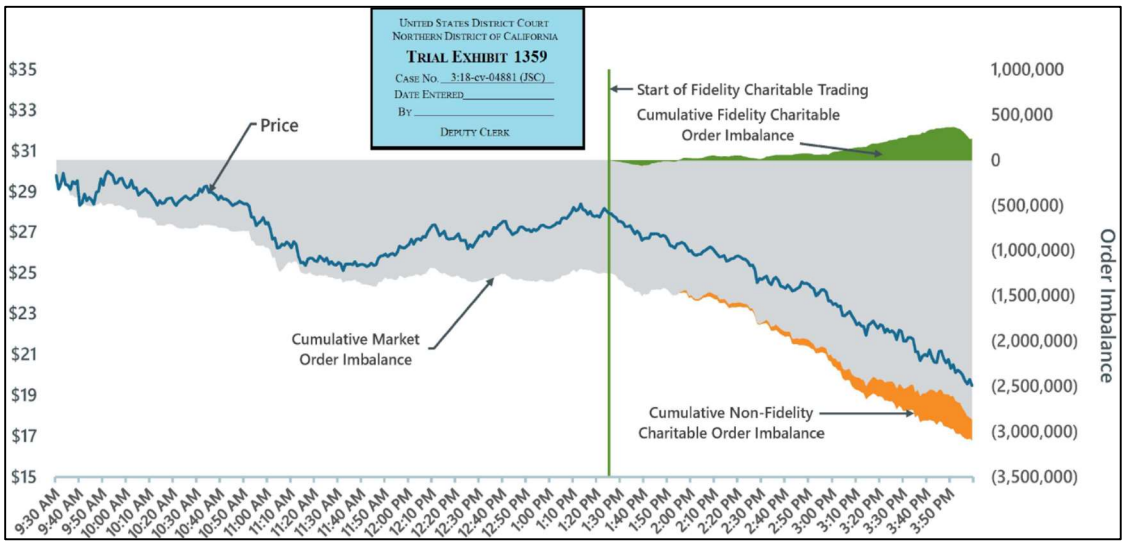

This price impact analysis establishes that the decline in the price of WATT stock is not associated with Fidelity Charitable trading and is instead proof that the price decline is associated with non-Fidelity Charitable trades. As Professor Hendershott testified, the model is "reliable evidence that would be accepted in the field because it tries to directly associate trading with price changes." 10/27 Tr. 1079:22-1080:14 (Hendershott). On cross-examination, Plaintiffs did not attempt to undermine the price impact model, and did nothing to refute its fundamental findings that (1) there is a lack of evidence supporting the inference that Fidelity Charitable's trading caused

the WATT price decline, and (2) the evidence instead suggests that the price decline is associated with the other 84+% of trades in the market at the same time.

Professor Hendershott also offered testimony about his order imbalance study. An order imbalance study is a "standard approach" that analyzes the trades above the midpoint of the spread between the bid and ask, versus those that are executed below the midpoint. Trades above the midpoint are seller-initiated trades and those below the midpoint are buyer-initiated trades. Categorizing the trades in this way shows whether the selling was causing downward or upward pressure on the price of WATT. 10/27 Tr. 1088:19-1090:8 (Hendershott).

Professor Hendershott's order imbalance study is consistent with the price impact model (and Mr. Zarcu's analysis). It shows that the price decline was associated with non-Fidelity Charitable trading, and does not support any conclusion that Fidelity Charitable caused the price decline. 10/27 Tr. 1091:24-1097:6 (Hendershott). That is because, as Dr. Harris admitted, Fidelity Charitable sold a majority of its shares "passively," had a more passive sales strategy than other sellers that day, and sold its shares at higher prices than other sellers. 10/26 Tr. 818:3-819:19 (Harris). As Mr. Zarcu explained, passive sellers are patient traders who are waiting for somebody else to make the trade happen. 10/27 Tr. 1001:5-16 (Zarcu). Fidelity Charitable executed a majority of its orders at prices greater than the midpoint, including nearly 44% at the ask—*i.e.*, the highest prevailing price in the market. Ex. 1369; 10/27 Tr. 1010:12-1011:17 (Zarcu). The other sellers in the market were more willing to be aggressive and therefore more willing to sell at lower prices. 10/26 817:24-818:6 (Harris); *see also* 10/27 Tr. 1021:8-25 (Zarcu). For instance, only 18% of Fidelity Charitable's orders were executed at the bid, compared to the rest of the market which executed 25% of its trades at the bid. Ex. 1369; 10/27 Tr. 1011:9-17 (Zarcu). And while the rest of the market traded 5.5 times the volume of shares as Fidelity Charitable did in the afternoon, it executed ***eight*** times as many shares at the bid price compared to Fidelity Charitable. 10/27 Tr. 1022:1-19 (Zarcu). These ratios show that "Fidelity was a very passive trader and the overall market was much more aggressive that day." *Id.* 1022:20-1023:1. In short, it shows that the other traders were the ones pushing the price of WATT down.

As Exhibit 1359 shows, the price of Energous stock closely tracks the "Cumulative Non-Fidelity Charitable Order Imbalance" (in orange), as opposed to Fidelity Charitable's order imbalance (in green)—which is positive—and the combined market order imbalance (in gray):




Professor Hendershott then looked at the order imbalances for the prior day, December 28, to see if the same relationship between price and order imbalance was present, and it was. *See* Ex. 1360, 10/27 Tr. 1094:5-1095:4 (Hendershott). This is strong evidence that shows that price for WATT at the end of December closely tracked the order imbalance for the stock.

None of Professor Hendershott's or Mr. Zarcu's opinions were undermined on cross-examination, and they remain essentially unrebutted. As a result, Plaintiffs have put forward no credible evidence of causation, and the evidence presented at trial "associate[ed] a price decline with non-Fidelity Charitable selling on that day." 10/27 Tr. 1096:8-1097:6 (Hendershott). Plaintiffs failed to meet their burden of proof and judgment should enter against them on their negligence claim.

* * *

In the final analysis, Plaintiffs fail to reckon with the fact that they donated what Professor Harris acknowledged was a "game of hot potato" (10/26 Tr. 786:1-6) (Harris)), a highly volatile stock whose price had just set a record high but had begun to fall precipitously on the morning of December 29. All of the witnesses at trial admitted the future prospects of WATT could not be predicted, and its trading volume reached record levels uncertain to be available in the future.

Fidelity Charitable relied on its longstanding policy, procedures, and the tools and guidance of Fidelity Capital Markets to steer it through these extraordinary circumstances. It sold the shares for a price that exceeded the iVWAP benchmark—a price that was multiple times what the Fairbairns paid for the shares—and generated more than $40 million for charity. That is far from negligence.

## CONCLUSION

For the foregoing reasons, the Court should find for Fidelity Charitable on each of Plaintiffs' claims.

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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