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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EMILY FAIRBAIRN, ET AL.,
Plaintiffs,
v.
FIDELITY INVESTMENTS
CHARITABLE GIFT FUND,
Defendant.

Case No.18-cv-04881-JSC

ORDER RE: MOTION TO DISMISS

Re: Dkt. No. 21

Emily and Malcolm Fairbairn sue Fidelity Investments Charitable Gift Fund (“Fidelity Charitable”) alleging contract and tort claims based on the Fairbairns’ \$100 million donation to Fidelity Charitable through a donor advised fund. Fidelity Charitable’s motion to dismiss for lack of standing under Federal Rule of Civil Procedure 12(b)(1) and for failure to state a claim under Rule 12(b)(6) is now pending before the Court.¹ (Dkt. No. 21.) Having considered the parties’ briefs and having had the benefit of oral argument on November 16, 2018, the Court DENIES the motion to dismiss. Drawing all reasonable inferences in Plaintiffs’ favor, they have standing to pursue their negligence claim and their other claims are adequately pled.

BACKGROUND

A. Complaint Allegations

Emily and Malcolm Fairbairn run Ascend Capital, a San Francisco based registered investment advisor, which manages billions of dollars’ worth of investment accounts for a range of clients including pension funds and university endowments. (Complaint at ¶ 40.) In 2017, “the Fairbairns were facing a substantial tax payment.” (*Id.* at ¶ 42.) They therefore decided to donate

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

1 \$100 million to charity—the bulk of which would be directed at fighting Lyme disease. (*Id.* at ¶
2 43.) The Fairbairns had previously used commercial donor advised funds (“DAFs”) to make
3 charitable donations through both Fidelity Charitable and JP Morgan. (*Id.* at ¶¶ 41, 45.)

4 Commercial DAFs “are a special type of financial account that individual donors open at a
5 501(c)(3) nonprofit organization that has been created by a for-profit financial institution.” (*Id.* at
6 ¶ 2.) When donors contribute to their DAF account, “the nonprofit organization takes legal title to
7 the assets, but donors choose how funds are invested and ultimately distribute to charitable
8 organizations.” (*Id.*) DAFs are required to give donors “advisory privileges with respect to the
9 distribution or investment of amounts” held in their DAF. (*Id.* at ¶ 27 (quoting 26 U.S.C. §
10 4966(d)(2).) “Fidelity Charitable gives account holders particularly robust advisory rights” over
11 their funds including:

- 12 • holding the funds in a dedicated account and donating them to the charitable
13 organization in the donor’s name;
- 14 • giving the donor exclusive advisory rights over the funds; and
- 15 • Fidelity Charitable cannot make grants or otherwise take money out of an account
16 without action from the donor—it only has veto power if the donor attempts to use
17 the funds for an improper or non-charitable purpose.

18 (*Id.* at ¶ 29.)

19 On December 12, 2017, Fidelity Charitable reached out to the Fairbairns regarding whether
20 they had “any bitcoin or ‘other securities’ they would like to contribute to their DAF in 2017.”
21 (*Id.* at ¶ 49(a).) The Fairbairns contact with Fidelity Charitable was managed by the Fidelity
22 Family Office Services, which works with the “ultra wealthy community,” and in particular, Justin
23 Kunz. (*Id.* at ¶¶ 47; 49(a).) Mr. Kunz “aggressively pitched Fidelity Charitable as a superior
24 option to JP Morgan and Vanguard” which also have DAF accounts. (*Id.* at ¶ 50.) Mr. Kunz
25 repeatedly boasted of Fidelity Charitable’s sophistication and “superior ability to handle complex
26 assets.” (*Id.* at ¶¶ 52-53.)

27 The Fairbairns decided to structure their donation using their holdings in Energous, a
28 publicly traded company whose core technology was approved by the Federal Communications

1 Commission on December 26, 2017, causing the company’s stock to “skyrocket 39% over the
2 course of December 27.” (*Id.* at ¶ 56.) Because the Fairbairns’ “average cost basis in the stock
3 was substantially lower than its current, post-jump value [] they would face enormous capital
4 gains tax if they eventually sold the shares for their own benefit.” (*Id.* at ¶ 58.) However, if they
5 donated the shares, then “their full liquidation value could go to the charity tax free” which would
6 mean “far more money to fight Lyme disease, *and* a smaller tax bill for the Fairbairns.” (*Id.*
7 (emphasis in original).)

8 The Fairbairns were nonetheless concerned about donating the stock to Fidelity Charitable
9 given its policy of liquidating stock “at the earliest date possible.” (*Id.* at ¶ 62 (quoting the
10 “Fidelity Charitable Policy Guidelines: Program Circular”).) If Fidelity Charitable did that with
11 the Energous stock, the stock’s value could crash. (*Id.* at ¶¶ 60-63.) To convince the Fairbairns to
12 use its services,

13 Fidelity Charitable made four critical representations about how it
14 would handle the liquidation: (1) it would employ sophisticated, state-
15 of-the-art methods for liquidating large blocks of stock; (2) it would
16 not trade more than 10% of the daily trading volume of Energous
17 shares; (3) it would allow the Fairbairns to advise on a price limit (i.e.,
18 a point below which Fidelity would not sell shares without first
19 consulting the Fairbairns, and (4) it would not liquidate any shares
20 until the new year.

21 (*Id.* at ¶ 65.) Mr. Kunz made these representations as Fidelity Charitable’s agent. (*Id.* at ¶ 66.)

22 Based on these representations, on December 27, the Fairbairns decided to donate 1.93
23 million shares of Energous stock to Fidelity Charitable’s DAF. (*Id.* at ¶ 68.) On December 28,
24 the Fairbairns transferred 700,000 shares and then transferred another 1.2 million the following
25 day. (*Id.* at ¶ 69.) Upon receipt of the final shares, “Fidelity Charitable immediately began
26 liquidating the entire 1.93 million-share block.” (*Id.* at ¶ 70.) Indeed, Fidelity Charitable
27 liquidated the entire 1.93 million shares in a matter of hours on the last business day which was
28 “perhaps the year’s single slowest trading period.” (*Id.* at ¶ 70(a).) During this three-hour trading
window, Fidelity Charitable traded approximately 16% of the daily volume rather than the 10%
promised. (*Id.* at ¶ 70(b).) In doing so, Fidelity Charitable used incompetent and inappropriate
methods—not the sophisticated and state-of-the-art trading strategies promised. (*Id.* at ¶ 70(c).)
Fidelity Charitable also failed to allow the Fairbairns to advise on a price limit. (*Id.* at ¶ 70(d).)

1 As a result of Fidelity Charitable’s handling of the liquidation, the “Energous shares were
2 liquidated for tens of millions of dollars less than they would have been and the Fairbairns were
3 able to deduct millions less from their taxes.” (*Id.* at ¶ 71.)

4 The Fairbairns did not even discover that this had occurred until two weeks later. (*Id.* at ¶
5 76.) Fidelity Charitable has not been forthcoming with specific information regarding what
6 happened and why. (*Id.* at ¶¶ 76-82.)

7 **B. Procedural Background**

8 The Fairbairns filed this action in August 2018 alleging five claims for relief: (1)
9 misrepresentation; (2) breach of contract; (3) estoppel; (4) negligence; and (5) violation of
10 California’s Unfair Competition law, Cal. Bus. & Prof. Code § 17200. (Dkt. No. 1.) Fidelity
11 Charitable responded by filing the now pending motion to dismiss which is fully briefed and came
12 before the Court for a hearing on November 16, 2018.

13 **DISCUSSION**

14 **A. The Misrepresentation Claims**

15 Fidelity Charitable moves to dismiss Plaintiffs’ claims for misrepresentation, breach of
16 contract, estoppel, and violation of the UCL for failing to satisfy the pleading requirements of
17 Rule 9(b). Fidelity Charitable also insists that the first and second promises outlined in Plaintiff’s
18 complaint cannot sustain any claim for relief.

19 **1. Rule 9(b)**

20 Causes of action grounded in fraud are subject to Rule 9(b), which requires a plaintiff to
21 “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b).
22 Under this heightened pleading standard, “the circumstances constituting the alleged fraud [must]
23 be specific enough to give defendants notice of the particular misconduct.” *Vess v. Ciba-Geigy*
24 *Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks and citation omitted).
25 Thus, “[a]verments of fraud must be accompanied by the who, what, when, where, and how of the
26 misconduct charged.” *Id.* (internal quotation marks and citation omitted). In other words, when
27 alleging fraudulent statements or omissions of material fact, a plaintiff must not only identify the
28 statements or omissions, but also “set forth an explanation as to why the statement or omission

1 complained of was false or misleading.” *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 876
2 (9th Cir. 2012). However, “[m]alice, intent, knowledge, and other conditions of a person’s mind
3 may be averred generally.” Fed. R. Civ. P. 9(b).

4 Plaintiffs allege that Fidelity Charitable made the following four promises to induce
5 Plaintiffs to donate the Energous shares: (1) that “it would employ sophisticated, state-of-the-art
6 methods for liquidating large blocks of stock,” (2) that “it would not trade more than 10% of the
7 daily trading volume of Energous shares,” (3) that “it would allow the Fairbairns to advise on a
8 price limit (i.e., a point below which it would not sell without first consulting the Fairbairns),” and
9 (4) that “it would not liquidate any shares until the beginning of 2018.” (Complaint at ¶ 91.)
10 Further, Plaintiffs allege that Fidelity Charitable knew when it made these promises that it had no
11 intention of keeping them, or alternatively, that it negligently and recklessly failed to honor these
12 promises. (*Id.* at ¶ 95.) According to Plaintiffs, Fidelity Charitable violated each of these
13 promises by

14 (1) liquidat[ing] the entire block of shares on December 29, (2)
15 accounting for around 16% of the day’s trading volume (and 35% of
16 volume over the three-hour trading window), (3) using inappropriate
17 trading methodologies, in a way that caused Fidelity’s own trades to
18 compete against each other, (4) without even telling the Fairbairns it
19 was happening, let alone allowing them to advise on a price limit.

20 (*Id.* at ¶ 94.)

21 Fidelity Charitable insists that these allegations are insufficient because Plaintiffs do not
22 specify to whom these promises were made or what exactly was promised. Neither argument is
23 availing.

24 First, Plaintiffs allege that “they” had a “series of frank conversations beginning on the
25 afternoon of December 27” with Mr. Kunz wherein he made the four representations which form
26 the basis of their misrepresentation claim. (Complaint at ¶¶ 64-66.) These allegations are
27 sufficient to satisfy the “who” for purposes of Rule 9(b). Fidelity Charitable’s reliance on *Sanford*
28 *v. MemberWorks, Inc.*, 625 F.3d 550, 558 (9th Cir. 2010), is unpersuasive. There, the plaintiffs
had “failed to allege which of them made any of the telephone calls to purchase the various bait
products and, thus, who was a party to the alleged misrepresentations.” Here, in contrast,

1 Plaintiffs allege that “they” had series of conversations with Mr. Kunz wherein he made these
2 representations. While the language of the Complaint could be clearer, it does not support an
3 inference that these representations were made to an agent or third-party as Fidelity Charitable
4 seems to suggest. The Court thus concludes that Plaintiffs have adequately alleged the “who” for
5 purposes of Rule 9(b).

6 Second, there is no ambiguity regarding what Mr. Kunz allegedly promised Plaintiffs. As
7 Fidelity Charitable concedes, paragraph 65 of the Complaint lays out the promises that were made.
8 Fidelity Charitable nonetheless argues that a later paragraph summarizing an email that Mr.
9 Fairbairn sent to Mr. Kunz two weeks after the stock liquidation “leaves ambiguous whether Mr.
10 Kunz said that Fidelity Charitable would limit sales to 10% of the trading volume, or whether his
11 ‘promise’ was only to be ‘gentle’ which Mr. Fairbairn construed as a 10% limit.” (Dkt. No. 21 at
12 31:7-10 (citing Complaint at ¶ 77).) This email does not make the prior allegations regarding the
13 representations lack the requisite particularity. Fidelity Charitable’s arguments go to the merits of
14 Plaintiffs’ claims and not whether they have adequately alleged facts sufficient to put it on “notice
15 of the particular misconduct which is alleged to constitute the fraud charged so that they can
16 defend against the charge and not just deny that they have done anything wrong.” *Semegen v.*
17 *Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

18 Accordingly, Fidelity Charitable’s motion to dismiss based on Rule 9(b) is denied. Given
19 this conclusion, the Court need not consider Plaintiffs’ argument that their contract and estoppel
20 claims are pled in the alternative. Fidelity Charitable only moved to dismiss these claims based on
21 Rule 9(b).²

22 **2. The First and Second Promises Support a Claim for Relief**

23 Next, Fidelity Charitable insists that the first and second promises outlined in Plaintiff’s
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25 ² Fidelity Charitable’s footnote argument on the final page of its brief suggests that the promissory
26 estoppel claim fails because it contradicts Plaintiffs’ express contract claim. The Court disagrees:
27 that the claims are mutually exclusive does not mean they cannot be pled in the alternative as
28 Plaintiffs have done here. *See Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.*, 211 Cal. App.
4th 230, 243 (2012) (describing contract and promissory estoppel claims as “not only [] distinct or
alternative theories of recovery but also as mutually exclusive.”); *see also* Fed. R. Civ. P. 8(d)(3)
 (“A party may state as many separate claims or defenses as it has, regardless of consistency”).

1 complaint cannot sustain any claim for relief. With respect to the first promise—“to employ
2 sophisticated, state-of-the art methods for liquidating large blocks of stock”—Fidelity Charitable
3 argues the claim is so vague that it cannot support any claim. It also argues that the second
4 promise—that it would not trade more than 10% of the daily trading volume of Energous shares,
5 Complaint ¶ 65—cannot support relief because it was not false. Neither argument is availing.

6 Unlike the “puffery” cases upon which Fidelity Charitable relies, the promise to use
7 “sophisticated, state-of-the art methods” was not a generic promise that Fidelity Charitable
8 allegedly made to solicit all donors. *See In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 793
9 (N.D. Cal. 2017) (“Generalized, vague, and unspecified assertions constitute ‘mere puffery’ upon
10 which a reasonable consumer could not rely, and hence are not actionable.”). Rather, it arose in
11 the context of a series of promises that Fidelity Charitable allegedly made—including promises
12 about trading volume, price limits, and timing—directly to Plaintiffs in light of their expressed
13 concerns regarding the timing of the liquidation of this stock. *See id.* (noting that in contrast to
14 puffery allegations, those based on “specific or measurable facts about the drives’ characteristics”
15 constitute representations on which a reasonable consumer could rely). The allegation must also be
16 read in the context of other allegations regarding industry trading and liquidation practices that
17 Fidelity Charitable allegedly did not employ. (Complaint at ¶ 74.) Under these circumstances,
18 Plaintiffs’ allegations are sufficiently specific to survive a motion to dismiss.

19 Fidelity Charitable’s argument about the second promise fares no better as it is predicated
20 on the Court resolving disputed factual questions, which is not appropriate at the pleading stage.³

21 Accordingly, the Court denies Fidelity Charitable’s motion with respect to the first and
22 second promises, without prejudice to renewal at the appropriate stage of the proceedings.

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25 ³ The Court declines to take judicial notice of the NASDAQ trading volume for Energous shares
26 for December 29, 2017. (Dkt. No. 23, Ex. G.) Plaintiffs dispute the relevance of the document to
27 the complaint allegations and what inferences can be drawn from it. (Dkt. No. 31.) “It is
28 improper to judicially notice a [document] when the substance of the [document] is subject to
varying interpretations, and there is a reasonable dispute as to what the [document] establishes.”
Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1000 (9th Cir. 2018) (internal citation and
quotation marks omitted). Fidelity Charitable’s argument is premised on the Court drawing
reasonable inferences in its favor. This the Court cannot do.

1 **B. Standing to Pursue Negligence Claim**

2 Fidelity Charitable also insists that Plaintiffs lack standing to bring any claim based on the
3 mismanagement of their donation because state law generally vests the state Attorney General
4 with the exclusive authority to bring any claims regarding mismanagement of charitable assets.

5 **1. Choice of Law**

6 As a threshold matter, there is the question of which state law governs Plaintiff’s
7 negligence claim: Massachusetts where Fidelity Charitable is incorporated or California because
8 Plaintiffs’ claims are brought under California law and the actions giving rise to this action all
9 arose in California.

10 Generally, a federal court sitting in diversity applies the choice-of-law rules of the state in
11 which it sits. *Mortensen v. Bresnan Comm’cns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013).
12 Where, as here, there is no advance agreement between the parties regarding applicable law,
13 courts apply the three-step governmental interest test, “analyz[ing] the governmental interests of
14 the various jurisdictions involved to select the appropriate law.” *Wash. Mut. Bank, FA v. Superior*
15 *Court*, 24 Cal. 4th 906, 915 (2001). “[G]enerally speaking the forum will apply its own rule of
16 decision unless a party litigant timely invokes the law of a foreign state. In such event [that party]
17 must demonstrate that the latter rule of decision will further the interest of the foreign state and
18 therefore that it is an appropriate one for the forum to apply to the case before it.” *Id.* at 919
19 (internal citation and quotation marks omitted; alterations in original). At the first step, the foreign
20 law proponent must identify the applicable rule of law in each potentially concerned state and
21 must show it materially differs from California law. *Id.* If there are no differences, then the court
22 applies California law. *Id.* at 920. If, however, there is a difference the court “must proceed to the
23 second step and determine what interest, if any, each state has in having its own law applied to the
24 case.” *Id.* “Only if the trial court determines that the laws are materially different and that each
25 state has an interest in having its own law applied, thus reflecting an actual conflict, must the court
26 take the final step and select the law of the state whose interests would be ‘more impaired’ if its
27 law were not applied.” *Id.*

1 The protection of charities from harassing litigation does not require that only the Attorney
2 General be permitted to bring legal actions in their behalf.” *Id.* at 756. As a result, “[t]here is no
3 rule or policy against supplementing the Attorney General’s power of enforcement by allowing
4 other responsible individuals to sue in behalf of the charity.” *Id.* The court accordingly held that
5 minority trustees of a charitable trust had standing to sue to enjoin a threatened breach of the trust.
6 *Id.* at 757; *see also San Diego etc. Boy Scouts of America v. City of Escondido*, 14 Cal.App.3d
7 189, 195 (1971) (“But the right of the Attorney General to sue to enforce a charitable trust is not
8 exclusive: other responsible individuals may be permitted to sue on behalf of the charity”).
9 Similarly, in *L.B. Research & Educ. Found. v. UCLA Found.*, 130 Cal. App. 4th 17, 180-81
10 (2005), the court, relying on the above language in *Holt*, reached a similar conclusion regarding a
11 donor’s standing to sue where the charitable gift came with a condition, which if not satisfied,
12 would mandate that the gift go to a different institution. There the donation specified if certain
13 conditions were not met by UCLA, then the donation should be transferred to the University of
14 California at San Francisco. *Id.* at 175-76.

15 Drawing all inferences in Plaintiffs’ favor, they have alleged a special relationship
16 sufficient to confer standing to sue regarding the disposition of their donation. *See Pride v.*
17 *Correa*, 719 F.3d 1130, 1133 (9th Cir. 2013) (“all factual allegations in [the] complaint are taken
18 as true and all reasonable inferences are drawn in his favor” when considering a 12(b)(6) motion
19 or a facial attack under 12(b)(1)). As did the plaintiffs in *L.B. Research*, they retained certain
20 future rights to the donation:

- 21 a. Fidelity Charitable holds funds in a dedicated account—and ultimately donates
22 them to charitable organizations—in the donor’s name.
- 23 b. The donor has exclusive advisory rights over the funds—Fidelity Charitable
24 cannot allow anyone else to dictate where they are donated.
- 25 c. Nor can Fidelity Charitable *itself* even make grants or otherwise take money out
26 of an account without action from the donor.
- 27 d. Fidelity Charitable retains only a veto power over a donor’s decisions, which it
28 will exercise only when the donor attempts to use the money for an improper or
non-charitable purpose.

(Complaint at ¶ 29.) Plaintiffs allege that their special right was impaired by Fidelity Charitable’s

1 negligent liquidation of the shares. (*Id.*). Plaintiffs are thus not in the same position as any donor
2 to a charitable trust; they bring suit regarding their particular donation which is maintained in their
3 name and in which—according to the Complaint’s allegations—they have retained future rights.
4 No California court has held that a plaintiff with similar rights does not have standing to sue.⁴

5 Fidelity Charitable’s insistence that Plaintiffs’ allegations are wrong (Dkt. No. 23 at 11-12)
6 is a summary judgment argument, not an inferential leap that the Court can make on a facial
7 challenge to standing. *See Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (“The district
8 court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the
9 plaintiff’s allegations as true and drawing all reasonable inferences in the plaintiff’s favor.”).
10 Plaintiffs allege that a DAF can offer a donor stronger rights than those set forth in IRS guidance.
11 (Complaint at ¶ 29 (“But a sponsoring organization has latitude to offer donors stronger advisory
12 rights, short of allowing them to retain legal title to the funds. Fidelity Charitable gives account
13 holders particularly robust advisory rights over the funds they contribute.”). The Court must
14 accept this allegation as true.

15 **3. Plaintiffs Have Alleged Standing Under Massachusetts Law**

16 Although on reply Fidelity Charitable argued that California law and Massachusetts law
17 are the same regarding Plaintiffs’ standing, its briefs focus almost exclusively on Massachusetts
18 law. The Court has thus reviewed Massachusetts law and concludes that the result would be same.
19 While the general rule in Massachusetts is that “[t]he duty of taking action to protect public
20 charitable trusts and to enforce proper application of their funds rests solely upon the Attorney
21 General as the representative of the public interests,” *Ames v. Attorney Gen.*, 332 Mass. 246, 250
22 (1955); *see also* Mass. Gen. Laws Ann. ch. 12, § 8 (“The attorney general shall enforce the due
23 application of funds given or appropriated to public charities within the commonwealth and
24 prevent breaches of trust in the administration thereof.”), the Massachusetts Supreme Judicial
25 Court has carved out an exception just as the California Supreme Court did in *Holt*.

26 In *Lopez v. Medford Cmty. Ctr., Inc.*, 384 Mass. 163, 167 (1981), the Massachusetts
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28 ⁴ In light of this conclusion, the Court need not decide at this stage in the proceedings whether the
Plaintiffs’ allegations regarding the reduction in their tax deduction also gives them standing.

1 Supreme Judicial Court held that “[n]otwithstanding the Attorney General’s exclusive and
2 discretionary role as protector of the public interest in the efficient and lawful operation of
3 charitable corporations, a private plaintiff possesses standing to assert interests in such
4 organizations which are distinct from those of the general public.” Because the plaintiffs there had
5 paid the \$2.00 required to become members of the Medford Community Center, they had standing
6 to sue the board of directors for mismanagement when they were denied their right to become
7 members and argue that the directors were violating the bylaws. *Id.* at 168; *see also Jessie v.*
8 *Boynton*, 372 Mass. 293, 305 (1977) (holding that although members of a charitable corporation
9 had no property interest in their right to vote, because they had paid dues to become a member of
10 the hospital, they “had a vote concerning the operation of the hospital to the extent the by-laws
11 provided” which “should not be taken away except in accordance with lawful procedures and
12 practices.”).

13 Here, Plaintiffs allege that Fidelity Charitable has given them greater rights than donors
14 might ordinarily have including “exclusive advisory rights over the funds—Fidelity Charitable
15 cannot allow anyone else to dictate where they are donated” and that Fidelity Charitable cannot
16 “even make grants or otherwise take money out of an account without action from the donor.”
17 (Complaint at ¶ 29.) Just as in *Lopez*, Plaintiffs here gave Fidelity Charitable something—their
18 donation to create a DAF—and Fidelity Charitable in return gave them “robust” rights to control
19 the disbursements under the DAF which Plaintiffs allege are greater than those rights generally
20 held by DAF donors. These allegations are sufficient to confer standing on Plaintiffs to challenge
21 Fidelity Charitable’s mismanagement of their specific donation thus impairing their rights to
22 control disbursement of the donation.

23 In *Rockwell v. Trustees of Berkshire Museum*, No. 1776CV00253, 2017 WL 6940932, at
24 *6 (Mass. Super. Nov. 7, 2017), on which Fidelity Charitable heavily relied at oral argument, the
25 court concluded that “[t]he donors in this case have failed to explain how their interest in
26 enforcing the terms of their gifts is any different from the general public’s right to have those
27 terms enforced.” The opposite is true here—Plaintiffs have set forth detailed allegations as to how
28 Fidelity Charitable vested them with a unique right—to exclusively control the disbursements

1 under their DAF and to authorize any grants or actions on the account. Plaintiffs’ claim is not a
2 general claim that Fidelity Charitable mismanages its DAF accounts, but rather that Fidelity
3 Charitable negligently mismanaged *their* account in which they had specific and unique future
4 rights. *See Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 245 (2007) (“a
5 plaintiff who asserts an individual interest in the charitable organization distinct from that of the
6 general public has standing to pursue her individual claims.”).

7 ***

8 Because Plaintiffs have alleged facts sufficient to withstand Fidelity Charitable’s facial
9 standing attack under either California or Massachusetts law, the Court’s choice of law analysis
10 ends with the first step. *See Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 920 (Cal.
11 2001) (“if the relevant laws of each state are identical, there is no problem and the trial court may
12 find California law applicable to class claims”). Fidelity Charitable’s motion to dismiss Plaintiffs’
13 negligence claim for lack of standing is denied.

14 **C. Plaintiffs have Adequately Pled a Negligence Claim**

15 Finally, Fidelity Charitable makes a cursory argument that even if Plaintiffs have standing
16 to pursue a negligence claim, the claim fails because (1) it owed Plaintiffs no duty of care, and (2)
17 any negligence claim is inconsistent with their breach of contract claim. Neither argument is
18 persuasive.

19 First, a duty of care “may be imposed by law, be assumed by the defendant, or exist by
20 virtue of a special relationship.” *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 984-85
21 (1993). Plaintiff alleges that Fidelity Charitable actively solicited their business by offering them
22 lower administrative and investment fees, touting its expertise in handling complex assets, and
23 providing Plaintiffs “stronger advisory rights” than are generally available for DAF accounts.
24 (Complaint at ¶¶ 29, 51-52.) Further, Fidelity Charitable is alleged to have made specific
25 representations regarding the liquidation of the assets in Plaintiff’s DAF account and Plaintiffs’
26 control thereof. (*Id.* at ¶¶ 52-52, 65.) These allegations are sufficient to plausibly allege a duty of
27 care under California law. *See Joffe v. United California Bank*, 141 Cal.App.3d 541, 556 (1983)
28 (holding that a bank owed a customer a duty of care when it deposited a check into an account

1 different from the one specified on the check); *Sun 'n Sand, Inc. v. United California Bank*, 21
2 Cal.3d 671, 695 (1978) (holding that a bank has a general duty and obligation, based on
3 foreseeability of risk to a customer, to exercise reasonable care).

4 Second, “[a] contractual obligation may create a legal duty and the breach of that duty may
5 support an action in tort” where the conduct “also violates a duty independent of the contract
6 arising from principles of tort law.” *Erlich v. Menezes*, 21 Cal. 4th 543, 551 (1999). The Court
7 cannot say at this stage that Plaintiffs’ allegations do not support a duty of care that is actionable
8 both in tort and contract. Further, Plaintiffs have pled the claims in the alternative which is proper
9 under Rule 8. *See McCalden v. California Library Ass’n*, 955 F.2d 1214, 1219 (9th Cir. 1990).

10 Accordingly, Fidelity Charitable’s motion to dismiss Plaintiffs’ negligence claim is denied.

11 **CONCLUSION**

12 For the reasons stated above, the motion to dismiss is DENIED. (Dkt. No. 21.)

13 Fidelity Charitable’s answer is due in 21 days.

14 The Initial Case Management Conference remains calendared for December 20, 2018 at
15 1:30 p.m. in Courtroom F, 450 Golden Gate Ave., San Francisco, California. The Joint Case
16 Management Conference Statement is due December 13, 2018.

17 **IT IS SO ORDERED.**

18 Dated: November 28, 2018

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21 JACQUELINE SCOTT CORLEY
22 United States Magistrate Judge
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