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13 ATTORNEYS FOR PLAINTIFF AND THE
14 PROPOSED CLASS

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO/OAKLAND DIVISION**

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

20 Plaintiff,

21 v.

22 Schwab Charitable Fund, Charles Schwab
23 Corporation, Schwab Charitable Board of
Directors, and Schwab Charitable Investment
24 Oversight Committee.

25 Defendants.

Case No. 20-7657

CLASS ACTION COMPLAINT

**(1) Breaches of Fiduciary Duties at
Common Law**

**(2) Third-Party Contribution to Breaches of
Fiduciary Duties at Common Law**

**(3) Unlawful Conduct in Violation of
California's Unfair Competition Law,
California Business and Professions Code
§ 17200**

NATURE OF THE ACTION

1
2 1. Plaintiff Philip Pinkert (“Plaintiff”), individually and as representative of the class
3 described herein, and on behalf of the general public, brings this action under California common
4 law and California Business and Professions Code § 17200.

5 2. Plaintiff asserts his claims against Schwab Charitable Fund (“Schwab Charitable”),
6 the Schwab Charitable Board of Directors (“the Board”), and the Schwab Charitable Investment
7 Oversight Committee (“the Committee”), who collectively failed to manage the Schwab Charitable
8 donor-advised fund (“Schwab DAF”) in a prudent manner, and against Charles Schwab Corporation
9 (“Schwab Corporation”), who facilitated and knowingly profited from these fiduciary breaches and
10 statutory violations.

11 3. As described herein, Schwab Charitable, the Board, and the Committee have
12 breached their fiduciary duties with respect to their management of the Schwab DAF under the
13 common law and California’s Uniform Prudent Management of Institutional Funds Act, Cal. Prop.
14 Code §§ 18501-18510 (“UPMIFA”), to the detriment of donors to the Schwab DAF and the
15 charitable organizations that are the ultimate recipients of its assets and who suffer when excessive
16 fees are deducted from those assets. As a result of these breaches and violations, Defendants have
17 in turn violated Cal. Bus. & Prof. Code § 17200. Plaintiff brings this action to remedy this unlawful
18 conduct, prevent further mismanagement of the Schwab DAF, recover the losses caused by
19 Defendants’ violations and fiduciary breaches, and obtain equitable and other relief as provided by
20 California law.

21 **PRELIMINARY STATEMENT**

22 4. Private charitable giving is critically important to funding public and social goods in
23 the United States.¹ Since as early as the Great Depression with the creation of the New York
24 Philanthropic Trust, the donor-advised fund (“DAF”) has served as an important philanthropic
25

26 ¹ As some leading commentators have explained: “In other countries, it is common for
27 universities, hospitals, art museums, symphonies, and social safety nets to be funded by
28 governments. In the US, charitable organizations, supported by tax-favored private foundations,
carry out many of the same social functions.” Lewis B. Cullman *et al.*, *The Undermining of the
American Charity*, N.Y. Review of Books (July 14, 2016).

1 vehicle and a staple of community foundations. As a less administratively burdensome alternative
2 to a private foundation, DAFs provide a means for individuals to receive a present-year tax
3 deduction for making a charitable donation while retaining the flexibility to delay the donation of
4 those assets to future years, and earn investment income on the assets in the interim. In the 90 years
5 since their inception, the availability of DAFs has grown to include those supporting various city
6 and community needs such as the New York Community Trust and the San Francisco Foundation,
7 as well as those devoted to specific causes such as the Catholic Charities Donor Advised Fund, the
8 Stanford University donor-advised fund, and the National Christian Foundation Giving Fund. As of
9 2018, DAFs held more than \$72 billion in assets, and four of the ten largest charities in the United
10 States by assets were DAFs.

11 5. DAFs are non-profit entities. When donors contribute assets to their DAF account,
12 the nonprofit organization takes legal title to the assets, but donors typically direct how funds are
13 invested (from among several investment options offered by the DAF) and ultimately distributed to
14 charitable organizations. The National Philanthropic Trust describes DAFs as a kind of “charitable
15 savings account.” With a single donation, DAF donors can create a charitable legacy spanning
16 decades or even generations, given that donors can name the successors who inherit their right to
17 direct future charitable giving from the DAF account. Though prominent DAF donors include
18 Facebook founder Marc Zuckerberg, Twitter founder Jack Dorsey, and Microsoft CEO Steve
19 Ballmer, DAFs are not limited to the wealthy, as some DAFs have account minimums of only
20 \$5,000.

21 6. DAFs are accounted for in and regulated by the tax code. The Internal Revenue Code
22 defines a “donor-advised fund” as (1) a fund or account owned and controlled by a sponsoring
23 organization, (2) which is separately identified by reference to contributions of the donor or donors,
24 and (3) where the donor has or reasonably expects to have advisory privileges over the distribution
25 or investment of the assets by reason of the donor’s status as a donor. 26 U.S.C. § 4966(d)(2).

26 7. Thus, although a DAF holds title to the money, donors possess broad rights and
27 continue to receive significant benefits after their initial contributions are made. DAFs let donors
28 choose the investment options in which DAF assets are invested, and give them a robust right to

1 “advise” how the funds will ultimately be distributed to existing public charities. The IRS Guide
2 Sheet on DAFs sets the baseline for donors’ advisory rights as “the right of a donor to provide
3 noncompulsory recommendations, suggestions or consultative advice” about the disposition or
4 investment of funds in the donor’s account. Internal Revenue Service, *Donor-Advised Funds Guide*
5 *Sheet Explanation* at 8 (July 31, 2008). In practice, for purposes of this case, donors control the
6 disposition of account assets, subject only to Schwab Charitable’s review to ensure donations are
7 going to charitable organizations and will not provide personal benefit to the donor. Thus, the
8 advisory rights granted to donors permit donors “to promote [their] own substantive, religious, or
9 social goals” for many years after the DAF is first funded. *In re McCune*, 705 A.2d 861, 865 (Pa.
10 Sup. Court 1997).

11 8. DAF accounts are generally charged two types of expenses. First, there is an
12 administrative fee that covers the expense of operating the accounts and processing charitable
13 donations. This fee is generally charged annually as a percentage of the assets in the account, with
14 the percentage charged declining as the amount of account assets exceeds certain breakpoints (e.g.
15 the administrative fee might be 0.75% on the first \$100,000 donated, 0.50% on the next \$900,000,
16 0.25% on the next \$1,000,000, etc.). Second, DAF assets are then invested in one or more pooled
17 investment vehicles, and these vehicles charge annual investment management fees as a percentage
18 of the assets invested.

19 9. DAFs are maintained and operated by section 501(c)(3) public charities, called
20 sponsoring organizations. As such, operating a DAF cannot be a for-profit enterprise. A DAF
21 organized in the State of California cannot be “organized or operated for profit,” and “no part” of
22 its net earnings may “inure to the benefit of any private shareholder or individual.” Cal. Const.,
23 Article XIII, § 4(b); Cal. Rev. Code 214(a)(1)-(2). The assets of a nonprofit corporation cannot
24 facilitate a third party’s “more advantageous pursuit of their business,” meaning that the DAF
25 cannot, through its dealings with a third party, provide the party “a benefit better than a person might
26 obtain through arm’s length negotiation.” Cal. Rev. Code 214(a)(4); *Scripps Clinic & Research*
27 *Found. v. Cnty. of San Diego*, 53 Cal. App. 4th 402, 410 (1997).

28

1 10. The directors of a DAF established in the State of California are also subject to
2 fiduciary duties under California law. The duties of care and loyalty require that “[a] director shall
3 perform the duties of a director ... in good faith, in a manner that director believes to be in the best
4 interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent
5 person in a like position would use under similar circumstances.” Cal. Corp. Code § 5231(a).

6 11. The duty of care extends to the management of institutional assets, § 5240(b), and
7 those assets must be managed in accordance with the provisions of the Uniform Prudent
8 Management of Institutional Funds Act (“UPMIFA”) as codified in the California Probate Code.
9 *See* Cal. Prob. Code §§ 18501–18510.²

10 12. UPMIFA incorporates the aforementioned state law fiduciary duties while also
11 imposing rules as to how institutional funds³ shall be managed. These rules were designed to
12 emulate the Uniform Prudent Investor Act and trust law’s prudent investor rule,⁴ but tailored to the
13 nonprofit context. In managing institutional assets, DAF directors are required to “manage and
14 invest the fund in good faith and with the care an ordinarily prudent person in a like position would
15 exercise under similar circumstances.” Cal. Prob. Code § 18503(b). UPMIFA further states than an
16 institution “may incur only costs that are appropriate and reasonable in relation to the assets, the
17 purposes of the institution, and the skills available to the institution.” Cal. Prob. Code § 18503(c)(1).
18 Additionally, to facilitate this goal of cost minimization, the law provides that “[a]n institution may
19 pool two or more institutional funds for purposes of management and investment.” Cal. Prob. Code
20 § 18503(d).

21 13. The fiduciaries of DAFs have common law duties as well. The donation of property
22 to a DAF for a charitable purpose creates a charitable trust under common law. *L.B. Research &*

23 _____
24 ² Section Three of the Schwab Charitable Investment Policy Statement states that “[t]he
25 Committee shall exercise prudence and appropriate care in accordance with the Uniform Prudent
26 Management of Institutional Funds Act.”

27 ³ “Institutional fund” means a fund held by an institution exclusively for charitable purposes.
28 Cal. Prob. Code § 18502(e).

⁴ *See* Uniform Prudent Management of Institutional Funds Act (2006) at 14 (explaining that
prudence standard in UPMIFA is meant to emulate the “prudence norms of the Restatement and
UPIA”), [https://www.uniformlaws.org/HigherLogic/System/DownloadDocument
File.ashx?DocumentFileKey=d7b95667-ae72-0a3f-c293-cd8621ad1e44&forceDialog=0](https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d7b95667-ae72-0a3f-c293-cd8621ad1e44&forceDialog=0).

1 *Educ. Foundation v. UCLA Foundation*, 130 Cal. App. 4th 171, 177 (2005); *Amer. Ctr. for*
2 *Education, Inc. v. Cavnar*, 80 Cal. App. 3d 476, 486 (1978). A charitable trust is a fiduciary
3 relationship, and the fiduciary duties owed by a trustee include a duty to act loyally and prudently
4 in the investment of the assets of the charitable trust. *See L.B. Research*, 130 Cal. App. 4th at 177;
5 *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 483 (1998);
6 American Law Institute, RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE, at 190–91
7 (1992) (stating that “absent a contrary statute or other provision, the prudent investor rule applies to
8 investment of funds held for charitable corporations.”). Third parties who actively participate in a
9 trustee’s breach of fiduciary duty to advance their own financial position are liable to the trust’s
10 beneficiaries for the breach. *Atascadero*, 68 Cal. App. 4th at 483–84.

11 14. Though DAFs have existed in the United States for upwards of ninety years, a more
12 recent development has been the establishment of DAFs by several financial service companies such
13 as Charles Schwab, Fidelity, and Vanguard. Unlike prior DAFs which traditionally sought to support
14 specific regions or advance particular causes, the financial service-affiliated DAFs generally provide
15 only the administrative and investment function of the traditional DAF, while allowing donors
16 greater discretion to determine the charitable causes to which their funds are applied. Although these
17 affiliated DAFs may help facilitate charitable giving, their affiliation with a financial services
18 company presents a significant risk that the DAF may be used to generate profits for its financial
19 services affiliate through the DAF’s investment decisions and service provider contracts.

20 15. Schwab Charitable was founded in 1999 and sponsors a DAF with accounts that
21 range in size from \$5,000 to more than \$500 million. As of its most recent financial statement, the
22 Schwab DAF has more than \$15 billion in assets, making it one of the ten largest charities in the
23 United States.

24 16. The Charles Schwab Corporation (“Schwab Corporation”), which made the initial
25 investments and contributions necessary to create the Schwab DAF, is a financial services company
26 founded in 1971 with over \$3.5 trillion in total client assets. Through its operating subsidiaries,
27 Schwab Corporation provides a full range of brokerage, custodial, banking, investment
28 management, and financial advisory services to retail and institutional clients.

1 17. Though Schwab Charitable is legally independent of the Schwab Corporation,
2 several members of the Board of Schwab Charitable are affiliated with the Schwab Corporation or
3 worked there prior to working at Schwab Charitable. Schwab Corporation permits Schwab
4 Charitable to use all of its trademarks, and virtually all of the service contracts Schwab Charitable
5 has entered into for the provision of administrative, custodial, and brokerage services are with the
6 Schwab Corporation. In addition, every person working for Schwab Charitable is actually an
7 employee of the Schwab Corporation.

8 18. The result of this close relationship is that Schwab Charitable does not act
9 independently, with a sole focus on advancing its charitable purpose, but instead has helped
10 maximize the profits of the Schwab Corporation by making imprudent investment decisions and
11 paying grossly excessive administrative fees for the benefit of Schwab Corporation. And these
12 excess profits all come at the direct expense of the “charitable purposes” that Schwab Charitable
13 was supposedly established to promote,⁵ because every dollar of fees charged to donor accounts is
14 one less dollar that can be donated to a charitable organization.

15 19. Schwab Charitable offers donors fourteen pre-selected investment pools, each of
16 which is invested entirely in a single underlying mutual fund.⁶ Thirteen of these underlying mutual
17 funds do not reflect the purchasing power possessed by one of the nation’s largest charities. Instead,
18 they benefit Schwab Corporation. This has manifested itself in two ways.

19 20. First, Schwab Charitable promoted the financial interests of the Schwab Corporation
20 by using uncompetitive mutual funds affiliated with Schwab as underlying investment options. Five
21 of the underlying investment pools were invested in index funds, and one pool was invested in a
22 money market fund. Although the marketplace for both index funds and money market funds is
23 highly competitive, Schwab Charitable utilized a Schwab-affiliated investment for each of these
24 pools, despite the availability of lower-cost and better-performing alternatives from managers such

25 ⁵ Schwab Charitable Fund (originally called Schwab Philanthropy Fund) Articles of
26 Incorporation, § IV.A (filed with CA Sec. of State Jan. 4, 1999),
27 <https://businesssearch.sos.ca.gov/Document/RetrievePDF?Id=02129372-4718625>.

28 ⁶ Donors with accounts of more than \$250,000 may select an independent investment advisor
to actively manage a customized investment portfolio subject to Schwab Charitable’s investment
policies and oversight.

1 as Vanguard and Fidelity. This resulted in higher fees paid to Schwab Corporation and lower
2 investment returns, reducing the amount of money that could be donated to charitable corporations.

3 21. Second, Schwab Charitable caused donors to pay excessive administrative fees to
4 Schwab Corporation by failing to prudently negotiate fees for custodial services at arm's length.
5 Among the standard services that Schwab Corporation provided to Schwab Charitable were standard
6 brokerage and custodial services such as holding securities and executing trades (collectively
7 referred to as "custodial services"). Institutional investors with billions of dollars of assets, like a
8 DAF, minimize these types of expenses by (1) seeking bids from multiple service providers in the
9 marketplace to get the most competitive price available, and (2) monitoring all sources of
10 compensation to the custodian in addition to any direct fees, such as revenue sharing rebates to the
11 custodian from investments on the custodian's investment platform. If an institutional investor is
12 going to invest in mutual funds, for example, it must be aware of all service fees the custodian can
13 collect from the mutual fund company for holding the assets, and if those fees exceed the negotiated
14 price, negotiate for the excess to be refunded to the institutional investor.

15 22. Had Schwab Charitable acted prudently and loyally in negotiating its contract with
16 Schwab Corporation, it would have both negotiated a lower rate for brokerage services, and had all
17 available revenue sharing rebates from investment providers that exceeded that rate refunded to
18 donors, or worked with a third-party custodian who would have done the same. But Schwab
19 Charitable failed to do so, and as a result, Schwab Corporation received excessive compensation.

20 23. In addition to failing to negotiate marketplace rates for brokerage services, Schwab
21 Charitable also caused Schwab Corporation to receive excessive administrative fees by using
22 higher-cost versions of several third-party mutual funds in order to generate additional profits for
23 Schwab Corporation. For example, the "Large Cap Equity Managed Pool" was invested entirely in
24 investor shares of the Parnassus Core Equity Fund, ticker PRBLX, with an annual expense ratio of
25 0.86% as of 2019. Schwab Charitable has continued to use this fund and not the lower-cost (but
26 otherwise identical) institutional version of this fund, ticker PRILX, which cost only 0.63% and was
27 available to investors that satisfied a \$100,000 investment minimum. The Schwab Charitable DAF
28

1 could satisfy this minimum thousands of times over,⁷ yet has continued to use the more expensive
2 version of the fund.

3 24. Not coincidentally, all of the additional fees paid by donors for the more expensive
4 version of these funds ended up in the pockets of Schwab Corporation. Investor share classes of the
5 Parnassus Core Equity Fund are part of Charles Schwab's "OneSource" program in which certain
6 mutual funds are given preferred status on Schwab's brokerage platform in exchange for paying the
7 Schwab Corporation a minimum of 0.40% in revenue sharing payments every year.⁸ Institutional
8 shares of Parnassus Core Equity are not part of the "OneSource" program and thus would have
9 generated much lower revenue sharing payments for the Schwab Corporation.⁹ And those extra fees
10 (amounting to millions of dollars each year) did not result in the provision of additional services of
11 comparable value to donors; the "shareholder services" those extra fees supposedly paid for would
12 have cost 10 to 30 times less had Schwab Charitable prudently negotiated for their provision at
13 arm's length with an unaffiliated party, as other DAFs have done.

14 25. By managing the administration and investment of the Schwab DAF for the benefit
15 of Schwab Corporation and failing to exercise the requisite prudence for an investment fund of its
16 size, Schwab Charitable, the Board, and the Committee violated their fiduciary duties under
17 common law, and their statutory duties under UPMIFA, California's non-profit corporation code,
18 and California's unlawful business practice and unfair competition statute (Cal Bus. & Prof. Code
19 § 17200). Further, by colluding with Schwab Charitable to perpetrate and/or promote the foregoing
20

21 ⁷ It is standard practice for investment companies such as Parnassus to permit institutional
22 investors overseeing a large number of individual accounts to pool the assets within those
23 accounts to satisfy the investment minimum.

24 ⁸ *Schwab's financial and other relationships with ETFs and mutual funds*,
25 <https://www.schwab.com/legal/financial-and-other-relationships> (stating that funds participating in
26 the OneSource program pay "Schwab's standard OneSource/NTF Fee of 0.40% per year).

27 ⁹ *See generally* Charles Schwab, Mutual Fund Quotes & Research Tools,
28 https://www.schwab.com/public/schwab/investing/investment_help/investment_research/mutual_fund_research/mutual_funds.html?path=%2FProspect%2FResearch%2Fmutualfunds%2Foverview%2Fscreeener.asp%3Fsymbol%3D (Schwab mutual fund screener allowing investors to view which funds are part of the OneSource program; applying a filter of large cap stock funds in the OneSource program reveals that while Investor shares of the Parnassus Core Equity Fund are part of the OneSource program, its Institutional shares are not).

1 fiduciary breaches and unlawful conduct, Schwab Corporation is also liable for the losses caused by
2 such fiduciary breaches and unlawful conduct and disgorgement of all profits it earned therefrom.

3 **JURISDICTION AND VENUE**

4 26. **Jurisdiction:** Federal diversity jurisdiction exists pursuant to 28 U.S.C. § 1332.
5 Plaintiff is a citizen of Connecticut. Defendant Schwab Charitable is a California nonprofit
6 corporation with its principal place of business in California. Defendant Schwab Corporation is a
7 California corporation with its principal place of business in California. Each member of the Board
8 and Committee is believed to be a California resident. Therefore, complete diversity of citizenship
9 exists. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of
10 \$75,000. This Court also has original jurisdiction under the Class Action Fairness Act (“CAFA”),
11 28 U.S.C. § 1332(d)(2). Plaintiff is a citizen of the State of Connecticut, and at least one Defendant
12 is a citizen of a different state. The amount in controversy in this action exceeds \$5,000,000, and
13 there are more than 100 members of the Class.

14 27. **Venue:** Venue in the Northern District of California is proper pursuant to 28 U.S.C.
15 § 1391 because Defendants are located and transact business within this District. Additionally, a
16 substantial part of the events giving rise to the claims asserted herein occurred within this District.

17 28. **Intradistrict Assignment:** Pursuant to L.R. 3-2(c) and (d), this action is properly
18 assigned to the San Francisco or Oakland Division of the Northern District of California because a
19 substantial part of the events giving rise to the claims asserted herein occurred in San Francisco
20 County.

21 **THE PARTIES**

22 **Plaintiff**

23 29. Plaintiff Philip Pinkert is a resident of Greenwich, Connecticut. Mr. Pinkert opened
24 an account with Schwab Charitable in approximately 2007. For at least the past five years, his
25 account on behalf of the Pinkert Family Trust has been invested in the Schwab Treasury Inflation
26 Protected Securities Index Fund, one of the pre-selected investment pools made available by Schwab
27 Charitable.

1 Francisco, California and is the sponsoring organization of the Schwab DAF, a donor-advised fund
2 with over \$15 billion in assets.¹⁰

3 ***Schwab Charitable Board of Directors***

4 33. Schwab Charitable is governed by a seven-person Board of Directors (the “Board”).
5 The Board has full discretion over Schwab Charitable and its activities, including overseeing and
6 appointing members to the Investment Oversight Committee. The Board is composed of various
7 institutional investment professionals, including its chairperson who is the daughter of Charles R.
8 Schwab, founder of Schwab Corporation.

9 ***Schwab Charitable Investment Oversight Committee***

10 34. The Board of Schwab Charitable delegates to the Investment Oversight Committee
11 (the “Committee”) the responsibility for fulfilling its responsibilities with respect to the investments
12 of Schwab Charitable. The Committee, comprised of at least three members of the Board, is
13 obligated to review the performance of the investment funds and investment managers used by
14 Schwab Charitable consistent with the Investment Policy Statement adopted by the Committee. As
15 defined in the Investment Policy Statement, “[t]he Committee shall exercise prudence and
16 appropriate care in accordance with the Uniform Prudent Management of Institutional Funds Act.”¹¹
17 Further, “each member of the Committee shall act, in good faith, in a manner such member believes
18 to be in the best interests of Schwab Charitable and with such care, including reasonable inquiry, as
19 an ordinary prudent person in a like position would use under similar circumstances.”¹²

20 35. Schwab Charitable, the Board, and the Committee are referred to collectively herein
21 as the “Fiduciary Defendants.”
22
23
24

25 ¹⁰ The Conversation, *Donor-Advised Funds: Charities with Benefits*, April 5, 2017,
<https://theconversation.com/donor-advised-funds-charities-with-benefits-74516>.

26 ¹¹ *Schwab Charitable Investment Policy Statement*,
27 <https://www.schwabcharitable.org/public/file/P-8085399/#:~:text=The%20investment%20objectives%20of%20Schwab,aggregate%20grants%20equal%20to%20at.>

28 ¹² *Id.*

1 ***The Charles Schwab Corporation***

2 36. Defendant Schwab Corporation is based in San Francisco, California and provides a
3 full range of brokerage, banking, and financial advisory services through its operating subsidiaries.
4 With over \$3.5 trillion in total client assets, it is one of the largest broker-dealers in the United
5 States. Schwab Corporation provides administrative and research services to Schwab Charitable,
6 and the workforce of Schwab Charitable are employees of Schwab Corporation.

7 **FACTUAL ALLEGATIONS**

8 **I. THE EMERGENCE OF DAFs, INCLUDING THOSE SPONSORED BY FINANCIAL**
9 **INSTITUTIONS**

10 37. In recent years, DAFs have become an increasingly popular vehicle for charitable
11 giving, largely because they fill a gap in the landscape of philanthropic vehicles. Outside of DAFs,
12 donors have two basic, and very different, options to accomplish their philanthropic goals. They can
13 either engage in private philanthropy, exemplified by the creation of a private foundation, or they
14 can give directly to a public charity that is already in existence.

15 38. Private foundations give donors complete control over their charitable giving—
16 donors can contribute assets at any time (and thus receive an immediate personal tax benefit), while
17 spreading the distribution of those assets to charitable causes over a longer period.

18 39. But private foundations are expensive to set up and maintain. Moreover, given the
19 lack of oversight—and the resulting potential for abuse by individuals hoping to avoid taxes—
20 Congress has imposed limits on the tax benefits available for donations to private foundations. For
21 example, whereas a donor may deduct the full fair market value of an appreciated stock when that
22 stock is given directly to an existing public charity, the donor may deduct only her cost basis in the
23 stock (*i.e.*, the amount she originally paid) if she gives it to a private foundation.

24 40. Instead of setting up a private foundation, donors can give directly to existing public
25 charities. This has the obvious advantage of immediately benefiting social causes that depend on
26 philanthropy to function. Additionally, as noted, direct donations receive favorable tax treatment
27 compared to donations into private foundations.

28

1 41. But giving directly to public charities eliminates the donor's ability to control the
2 timing of donations relative to the donor's broader financial and philanthropic objectives. For
3 example, some public charities are unable or unwilling to accept a donation of appreciated stock or
4 an even more complex asset. Or a donor may wish to ensure that her large donation is used over
5 time, but the charity may lack the ability or willingness to accommodate that desire. At the simplest
6 level, it may be tax-efficient for a donor to make a large donation at one particular point in time, but
7 the donor may not yet know where that money will do the most good.

8 42. DAFs have come to prominence because they strike a sweet spot between private
9 giving via the paradigmatic vehicle of a private foundation and direct giving to an already-existing
10 public charity.

11 43. DAFs have existed in some form since the 1930s, but for decades were little utilized.
12 As recently as 1995, DAF accounts held only around \$2.4 billion in assets, compared to over \$72
13 billion in 2018. In recent years, however, for-profit financial institutions like the one affiliated with
14 Schwab Charitable have learned to leverage DAFs' unique characteristics to bridge the gap between
15 private foundations and direct giving. And once these financial institutions recognized the
16 opportunity this presented, "a number of [them] ... formed charitable corporations for the principal
17 purpose of offering donor advised funds..." H.R. Rep. No. 109-455, at 180 (2006).

18 44. As a result of this development, there are now donor-advised funds offered by mutual
19 fund companies, such as Vanguard, Fidelity, and Franklin Templeton; brokerage firms, such as
20 Raymond James and Charles Schwab; and banks, such as Bank of America and Goldman Sachs.

21 45. At a high level, DAFs work as follows: Donors create an account with a sponsoring
22 organization, here Schwab Charitable. When donors contribute assets to fund their DAF account,
23 the sponsoring organization takes legal title to the assets. Thus, in accordance with rules and
24 regulations regarding charitable contributions described in the Internal Revenue Code, all
25 contributions to Schwab Charitable, both initial and subsequent, are irrevocable.

26 **A. Donors' Robust Rights Under the Schwab Charitable DAF**

27 46. Although donations to a DAF are irrevocable, DAFs guarantee donors a right to
28 choose how the DAF account's funds are invested and a robust right to "advise" about how the

1 funds will ultimately be distributed to existing public charities. Federal law requires DAFs to give
2 donors “advisory privileges with respect to the distribution or investment of amounts” held in the
3 account. 26 U.S.C. § 4966(d)(2).

4 47. A sponsoring organization has latitude to offer donors even stronger advisory rights,
5 short of allowing them to retain legal title to the funds. Here, Schwab Charitable gives account
6 holders particularly robust advisory rights over the funds they contribute.

7 48. Schwab Charitable account holders can recommend a name for their donor-advised
8 fund account “to honor an individual or a family, to cultivate a legacy of charitable giving, or for
9 another charitable purpose.”¹³ Additionally, account holders may update account names at any time,
10 including after the initial contribution.

11 49. Schwab Charitable account holders retain the power to recommend grants to eligible
12 charities and change successors or charitable beneficiaries.¹⁴

13 50. Schwab Charitable account holders can recommend a portfolio asset allocation
14 among the investment pools or recommend a qualified investment advisor to professionally manage
15 their account.¹⁵

16 51. Schwab Charitable may not recommend a grant without obtaining client approval
17 unless an annual giving threshold of 5% of average net assets is not met, and only if sufficient grant
18 recommendations are not received from the donor within 90 days from notice of the deficiency.¹⁶

19 52. Further, Schwab Charitable may decline or modify a grant recommendation, but only
20 if the recommendation is inconsistent with program policies or used for improper purposes,
21 generally limited to personal gain.

22 53. Thus, although Schwab Charitable holds title to the money and reviews grants to
23 make sure donors give to proper organizations, donors’ rights are very broad and exist long after the
24 initial contribution to a DAF account is made. In addition, Schwab Charitable advertises the
25

26 ¹³ *Schwab Charitable Program Policies* (as of September 2020) at 4,
27 <https://www.schwabcharitable.org/public/file/P-5252372>.

28 ¹⁴ *Id.* at 5.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 24.

1 reputational benefits that donors continue to receive after their donations have been made. For
 2 example, each grant to a recipient charity is accompanied by an award letter that can be personalized
 3 to include the name of the donor and contact information.¹⁷

4 54. Schwab Charitable prominently displays a “Charitable Donation Calculator” on its
 5 website, stating that the “donor-advised fund can continue for years—and can even provide a legacy
 6 of generosity for generations.”¹⁸ This legacy-building sentiment is echoed in Schwab Charitable
 7 sales literature that states, “DAFs are designed to make it easy for donors to bequeath their account
 8 and enable others to support charitable causes after their passing.”¹⁹

9 55. Because of these robust advisory rights, which are possessed indefinitely after the
 10 initial donation is made, Plaintiff has a personal interest regarding the management and disposition
 11 of his donations, including an interest in ensuring that they are managed in accordance with state
 12 and federal laws. These special rights and interests differentiate accountholders like Plaintiff from
 13 general members of the public that may simply benefit from the DAF and its disbursements.

14 56. As the California Supreme Court explained in *Holt v. College of Osteopathic*
 15 *Physicians and Surgeons*, “[t]he prevailing view of other jurisdictions is that the Attorney General
 16 does not have exclusive power to enforce a charitable trust and that a trustee *or other person having*
 17 *a sufficient special interest* may also bring an action for this purpose. This position is adopted by the
 18 American Law Institute (Rest.2d Trusts, s 391) and is supported by many legal scholars.” 61 Cal.
 19 2d 750, 753 (1964) (emphasis added) (citations omitted). This broader enforcement authority
 20 recognizes the reality that “[b]eneficiaries of a charitable trust, unlike beneficiaries of a private trust,
 21 are ordinarily indefinite and therefore unable to enforce the trust in their own behalf.” *Id.* at 754.
 22 However, donors maintain “a special relationship sufficient to confer standing to sue regarding the

23
 24 ¹⁷ See Sample: Smith Family Charitable Fund Letter,
 25 <https://www.schwabcharitable.org/public/file/P-6528490> (sample grant award letter that includes
 26 the identity of the donors, the donor’s address, an honorarium, and a personalized message from
 the donors to the charity, and is sent on personalized letter that features the Schwab Charitable
 logo and the donors’ names).

27 ¹⁸ Schwab Charitable Donation Calculator, [https://www.schwabcharitable.org/charitable-](https://www.schwabcharitable.org/charitable-donation-calculator)
 donation-calculator.

28 ¹⁹ Rande Spiegelman, *Donor-Advised Funds: Making Giving Strategic, Easy, Tax Smart*,
<https://www.schwabcharitable.org/public/file/P-5252372>.

1 disposition of their donation” especially where “they retained certain future rights to the donation,”
 2 such as those Schwab Charitable provides donors. *See supra* ¶¶ 47-52. *Fairbairn v. Fidelity*
 3 *Investments Charitable Gift Fund*, No. 18-cv-04881-JSC, 2018 WL 6199684, at *6 (N.D. Cal. Nov.
 4 28, 2018).

5 **B. Conflicts and Potential for Abuse in DAFs Sponsored by Financial Institutions**

6 57. In order to maintain compliance with the Internal Revenue Code, DAFs must be
 7 independent, nonprofit organizations. Though DAFs are often created by a financial services
 8 company, the financial services company cannot have an ownership role or serve as parent company
 9 to the DAF.

10 58. Despite the technical legal independence of Schwab Charitable, potential conflicts
 11 of interest are rampant. For example, Schwab Corporation “provides administrative and back-office
 12 services as necessary to administer and maintain all of the donor-advised accounts[,]” and “all
 13 [Schwab Charitable] employees are employed by [Schwab Corporation].”²⁰ Thus, even though
 14 Schwab Charitable is an independent legal entity, it is dependent upon Schwab Corporation for its
 15 operation and administration.

16 59. The structure of the Schwab DAF here creates further potential for abuse. The
 17 investment options made available to donors include mutual funds affiliated with and providing
 18 undue benefit to Schwab Corporation. Additionally, because nearly all of Schwab Charitable’s
 19 service contracts for administrative and investment services are with Schwab Corporation and its
 20 subsidiaries, nearly every aspect of the Fund’s operations generates fees for the Schwab
 21 Corporation.

22 **C. Legal Safeguards**

23 60. Fortunately, checks on abuses are provided by applicable law. For example, the
 24 common law imposes fiduciary duties upon the trustees of a DAF. Restatement (Third) of Trusts §
 25 2, cmt. b. (“The trust relationship is one of many forms of fiduciary relationships[.]”). As part of
 26 these duties, the trustees must administer the trust as a prudent person would, in light of the purposes,
 27

28 ²⁰ *Schwab Charitable Fund Financial Statements as of and for the Years Ended June 30, 2019*
 and 2018 at 6, <https://www.schwab.com/public/file/P-6528471>.

1 terms, and other circumstances of the trust. Restatement (Third) of Trusts § 77. Additionally, the
 2 duty of prudence requires the exercise of reasonable care, skill, and caution. *Id.* If, however, the
 3 trustee possesses special facilities or greater skill than that of a person of ordinary prudence, the
 4 trustee has a duty to use such facilities or skill. *Id.*²¹

5 61. Schwab Charitable’s fiduciary directors possess special facilities and greater skill
 6 than that of a person of ordinary prudence. Included among Schwab Charitable’s seven directors are
 7 a managing partner of a private investment firm; a chief investment officer who manages funds on
 8 behalf of pensions, endowments, and foundations; a chief executive officer of the nation’s largest
 9 accounting organization; and “a leading advocate for financial literacy and one of America’s most
 10 trusted sources for financial advice.”²² Six of the seven members hold MBAs.

11 62. Schwab Charitable’s status as an institutional fund also subjects it to statutory
 12 fiduciary duties imposed by California’s Uniform Prudent Management of Institutional Funds Act
 13 (“UPMIFA”).²³ Similar to common law fiduciary duties, UPMIFA requires “that each person
 14 responsible for managing and investing an institutional fund shall manage and invest the fund in
 15 good faith and with the care an ordinarily prudent person in a like position would exercise under
 16 similar circumstances.” Cal. Prob. Code § 18503(b). Further, UPMIFA provides the institution “may
 17 incur only costs that are appropriate and reasonable in relation to the assets ... and the skills available
 18 to the institution.” *Id.* § 18503(c)(1). Additionally, “[a]n institution may pool two or more
 19 institutional funds for purposes of management and investment.” *Id.* § 18503(d). Lastly, as with
 20 common law fiduciary duties, UPMIFA provides that a person with special skills or expertise has a
 21 duty to use those skills or that expertise in managing and investing institutional funds. *Id.*
 22 § 18503(e)(6).

23
 24
 25 ²¹ These duties have been codified in the California Probate Code. *See supra* ¶¶ 11-12.

26 ²² *See* About Carrie Schwab-Pomerantz, Board Chair, Schwab Charitable,
<https://www.aboutschwab.com/carrie-schwab-pomerantz>; *see also* Schwab Charitable board of
 27 *directors*, <https://www.schwabcharitable.org/about-schwab-charitable/board-of-directors>

28 ²³ An institution means “a person, other than an individual, organized and operated exclusively
 for charitable purposes.” Cal. Prob. Code § 18502(d). “Institutional fund means a fund held by an
 institution exclusively for charitable purposes.” *Id.* § 18502(e).

1 63. “[A] trustee is to ‘incur only costs that are reasonable in amount and appropriate to
2 the investment responsibilities of the trusteeship.’” *Tibble v. Edison International*, 843 F.3d 1187,
3 1198 (9th Cir. 2016) (quoting Restatement (Third) of Trusts § 90(c)(3)). “[C]ost-conscious
4 management is fundamental to prudence in the investment function’ and should be applied ‘not only
5 in making investments but also in monitoring and reviewing investments.’” *Id.* (citing Restatement
6 (Third) of Trusts § 90, cmt.b). As the Uniform Prudent Investor Act observes: “Wasting
7 beneficiaries’ money is imprudent. In devising and implementing strategies for the investment and
8 management of trust assets, trustees are obliged to minimize costs.” *Id.* at 1198 (citing Uniform
9 Prudent Investor Act § 7).

10 64. In addition, “under trust law, a fiduciary normally has a continuing duty of some kind
11 to monitor investments and remove imprudent ones.” *Tibble v. Edison Int’l*, 135 S. Ct. 1823, 1828-
12 29 (2015). The Restatement (Third) of Trusts explains that “a trustee’s duties apply not only in
13 making investments but also in monitoring and reviewing investments, which is to be done in a
14 manner that is reasonable and appropriate to the particular investments, courses of action, and
15 strategies involved.” § 90, Comment b, p. 295 (2007). This is consistent with the Uniform Prudent
16 Investor Act, which commands that “[m]anaging embraces monitoring” and that a trustee has
17 “continuing responsibility for oversight of the suitability of the investments already made.” § 2,
18 Comment, 7B U.L.A. 21 (1995) (internal quotation marks omitted); *see also* 4 A. Scott, W. Fratcher,
19 & M. Ascher, *Scott and Ascher on Trusts* § 19.3.1, p. 1439 (5th ed. 2007) (“When the trust estate
20 includes assets that are inappropriate as trust investments, the trustee is ordinarily under a duty to
21 dispose of them within a reasonable time.”); *Bogert* 3d § 685, at 156–157 (explaining that if an
22 investment is determined to be imprudent, the trustee “must dispose of it within a reasonable time”).
23 Given this ongoing duty to monitor imprudent investments, each failure to monitor and remove
24 imprudent investments is a separate fiduciary breach. *Tibble*, 135 S. Ct. at 1829.

25 **II. SCHWAB CHARITABLE DONOR-ADVISED FUND**

26 65. An account with Schwab Charitable can be established with a minimum contribution
27 of \$5,000 if invested in any of the pre-approved investment pools. Appointing a professional account
28 manager requires at least a \$250,000 account size. Donors that opt to use an investment advisor

1 must choose one that conducts advisory business on the Schwab Advisor Custody and Trading
2 Platform and is approved by Schwab Charitable. According to the account opening forms and the
3 Schwab DAF Program Policies, all Schwab Charitable-related contribution agreements are deemed
4 to be entered into in the State of California, all contributions to Schwab Charitable are intended to
5 be administered and managed in the State of California, and any disputes are governed by California
6 law.²⁴

7 66. Donors are charged fees both for the administration and investment of their accounts.
8 As reported on the account application and the program policies, Schwab Charitable charges an
9 administrative fee that covers expenses of operating a donor's account, including online donor
10 services, phone support, grant due diligence and administration, tax filings, quarterly account
11 statements,²⁵ annual account summaries, and communications. The annualized administration fee is
12 0.60% on the first \$500,000 of a donor's account, decreasing over six additional asset thresholds
13 before reaching a minimum level of 0.10% of assets over \$15,000,000.²⁶ Administrative fees are
14 charged under the same structure for both professionally managed accounts and pre-selected
15 investment pools.

16 67. Investment fees charged to donors vary depending on how an account is invested.
17 Each investment pool charges fees related to the management of the underlying mutual fund that
18 are disclosed by Schwab Charitable on its website. Mutual funds incur costs stemming from
19 investment advisory fees, marketing and distributing expenses, brokerage fees, and custodial,
20 transfer agency, legal, and accountant fees. Typically, mutual funds pay these regular and recurring,
21 fund-wide operating expenses out of fund assets in the form of an expense ratio.²⁷

22 68. Investors possess the option to invest in one or more of fourteen investment pools
23 offered by Schwab Charitable. Although donors can choose among the fourteen options, Schwab

24 ²⁴ Schwab Charitable Program Policies, *supra* note 13, at 30.

25 ²⁵ Schwab Charitable Administrative Fees for Core Accounts and Professionally Managed
Accounts (as of October 2020), <https://www.schwabcharitable.org/public/file/P-6215154/>.

26 ²⁶ Schwab Charitable Program Policies, *supra* note 13, at 7.

27 ²⁷ Because Schwab Charitable does not make any of the investment management or asset
28 allocation decisions for any of the underlying investments, the investment pools are not charged
any additional investment fees on top of the expenses associated with each underlying mutual
fund.

1 Charitable is responsible for selecting the investments underlying each investment pool. Each
2 investment pool invests entirely in an underlying mutual fund and assumes all fees and expenses
3 associated with the underlying fund, as well as an additional annualized administrative fee for
4 charitable services. The available pools are divided into asset allocation and individual investment
5 pools.

6 69. The asset allocation pools consist of three options which reflect varying investor risk
7 tolerance (the Conservative Pool, Balanced Pool, and Growth Pool) and a fourth, socially
8 responsible option (the Socially Responsible Balanced Pool). The individual investment pools are
9 further divided into index pools, which include five lower-cost passively managed funds that track
10 a benchmark index, eight actively managed pools that consist of higher-cost mutual funds where
11 managers seek to exceed market returns, and finally a money market pool that offers stability of
12 capital liquidity and current income.

13 **III. SCHWAB CHARITABLE IMPRUDENTLY SELECTED AND RETAINED ONESOURCE MUTUAL**
14 **FUNDS AS DAF INVESTMENT OPTIONS**

15 70. On its brokerage platform, Schwab Corporation offers the Schwab Mutual Fund
16 OneSource service (“OneSource”), which offers “no-load, no transaction fee mutual funds” that
17 allow consumers who wish to invest without going through a broker, to do so without paying a
18 commission.²⁸ As of October 23, 2020, there were over 4,200 mutual funds offered through
19 OneSource, managed by investment management firms such as American Funds, PIMCO, and T.
20 Rowe Price.²⁹ Such “no-transaction-fee” brokerage platforms are highly popular and many large
21 investment management firms offer their own version.

22 71. The purported benefit of such platforms is that they allow individual investors access
23 to purchase mutual funds without paying a transaction fee. However, nothing is free. Because mutual
24 fund companies must make substantial revenue sharing payments to get on a brokerage firm’s “no-
25 transaction-fee” platform, the mutual funds available on such a platform charge much higher annual

26 _____
27 ²⁸ No-Load, No Transaction Fee Mutual Funds, <https://www.schwab.com/mutual-funds/no-load-mutual-funds>.

28 ²⁹ See Mutual Fund OneSource Select List, <https://www.schwab.com/mutual-funds/no-load-mutual-funds/onesource-select-list>.

1 fees—generally costing much more per year than the transaction fee itself would have been.³⁰ This
2 is true of OneSource.

3 72. In order to have access to the OneSource platform, investment managers must make
4 annual revenue sharing payments to Schwab Corporation as a percentage of the assets held in the
5 manager’s funds on the platform. While most mutual funds offer a certain amount of revenue sharing
6 payments to brokerage firms holding their funds, Schwab’s large customer base has allowed it to
7 negotiate a much larger revenue sharing rate on OneSource mutual funds—40 basis points annually,
8 or 0.40% per year.³¹ To put that fee in perspective, 0.40% is more than half of the *entire* expense
9 ratio of 0.74% charged by the average actively managed equity mutual fund.³² This additional
10 revenue sharing was retained by Schwab Corporation, and not rebated to donors or the Schwab
11 Charitable trust.

12 73. Thus, in selecting and retaining investment options that were almost entirely
13 OneSource mutual funds, Schwab Charitable utilized mutual funds that charged significantly higher
14 fees than many marketplace alternatives and that multiplied the revenue sharing received by Schwab
15 Corporate, even though retaining those mutual funds was not in the best interests of the charitable
16 trust.

17 74. A large institutional investor such as the Schwab DAF has no need to purchase
18 OneSource mutual funds, which are marketed to *individual* investors who wish to purchase mutual
19 funds without going through a broker. Whereas an individual investor investing \$10,000 would be
20 effectively spending \$40 per year in revenue sharing payments on a OneSource mutual fund, an
21 institutional investor like the Schwab DAF with \$250,000,000 invested in a particular option would
22 effectively be spending \$1,000,000 per year. An institutional investor can and should use its

23 _____
24 ³⁰ See Steven Goldberg, *Don’t Be Fooled by No-Transaction-Fee Funds*, KIPLINGER, Jan. 23,
25 2013, <https://www.kiplinger.com/article/investing/T041-C007-S003-don-t-be-fooled-by-no-transaction-fee-funds.html> (“We’d like every dollar possible in the [lower-cost] institutional share class.... But you need a no-transaction fee share class to get traction in this business. Investors would rather pay no transaction fee because they don’t do the math.”).

26 ³¹ Schwab’s financial and other relationships with ETFs and mutual funds, *supra* note 8.

27 ³² Investment Company Institute, 2020 ICI Fact Book, at 127 (2020),
28 https://www.ici.org/pdf/2020_factbook.pdf. As ICI notes, “Expense ratios are measured as asset-weighted averages.” *Id.*

1 significant market power to negotiate custodial services (that would include all transactions) costing
2 ten to forty times less on an annual basis, while negotiating contractual rebates of any revenue
3 sharing payments that exceed those rates (discussed further below).

4 75. Twelve of the 14 mutual funds underlying the pooled investments in the Schwab
5 DAF were OneSource funds. Each of these mutual funds was more expensive than comparable, and
6 sometimes even identical, investment options available in the marketplace to an institutional
7 investor like the Schwab DAF.

8 **IV. SCHWAB CHARITABLE SELECTED AND RETAINED SCHWAB CORPORATION ONESOURCE** 9 **MUTUAL FUNDS**

10 76. Under the OneSource program, Schwab Corporation receives even more
11 compensation from the Schwab-affiliated mutual funds than it does from unaffiliated mutual
12 funds.³³ Not coincidentally, the Fiduciary Defendants selected Schwab-affiliated mutual funds to
13 underlie almost half of the Schwab DAF's investment pools (the money market and index
14 investment pools) when there were less expensive, comparable (if not superior), unaffiliated mutual
15 funds available. This was imprudent, disloyal, and unlawful.

16 77. Money market funds are capital preservation investments that provide investors an
17 option to purchase a pool of securities that generally provides higher returns than interest-bearing
18 bank accounts. Money market funds invest in high quality, short-term debt securities and pay
19 dividends that generally reflect short-term interest rates. The market for them is highly competitive.

20 78. Index funds provide investors the option to invest in a portfolio constructed to match
21 or track the components of a financial market index, such as the Standard & Poor's 500 Index. Index
22 funds provide broad market exposure, low operating expenses, and low portfolio turnover while
23 following a passive investment strategy. The market for index funds is also highly competitive.

24
25 ³³ According to Charles Schwab's disclosure to retirement plan customers, "Schwab Funds
26 have adopted a shareholder servicing plan with fees for shareholder services ranging from 0.02%
27 to 0.25% annual . . . In aggregate, the fees Schwab receives from Schwab Affiliate Funds are
28 greater than the compensation Schwab receives from unaffiliated fund companies participating in
the Schwab Mutual Fund OneSource Service." Charles Schwab, *ERISA 408(b)(2) Fee Disclosure*
Report, at 8 (2019), <https://www.schwab.com/public/file/P-5358937>.

1 79. Trustees of prudently run DAFs investigate the marketplace for the best available
2 money market and index funds rather than blindly selecting options affiliated with the sponsor of
3 the DAF. For example, Pershing LLC, a subsidiary of the Bank of New York Mellon, serves as
4 custodian of the multi-billion-dollar New York Community Trust. Despite the convenient
5 availability of BNY Mellon money market funds, trustees of the New York Community Trust
6 prudently investigated the marketplace and selected an unaffiliated fund, the Vanguard Federal
7 Money Market Fund, as the trust's capital preservation option. Similarly, BNY Mellon offers a
8 variety of index fund investments. But again, the trustees examined the marketplace for prudent
9 options and selected Vanguard passively managed funds for the New York Community Trust.

10 80. Because of the similarity in investment objective and holdings, a significant source
11 of competition among money market fund providers is the fees charged to investors. As a result,
12 prudently run DAFs will offer a money market fund with low fees.

13 81. Schwab Charitable, through the Schwab Government Money Market Fund, charges
14 donors 0.35% for investment in its money market pool.³⁴ There are countless alternative money
15 market funds with similar investment objectives, significantly lower fees, and better performance.
16 For example, the Vanguard Federal Money Market Fund utilized by the New York Community
17 Trust, which has a fraction of Schwab Charitable's assets, carries a 0.11% net expense ratio. The
18 amount of assets held by Schwab Charitable's money market investment pool would additionally
19 qualify for investment in the State Street Institutional U.S. Government Money Market Fund
20 charging 0.15%, and the Fidelity Investments Money Market Funds Government Portfolio charging
21 0.14%. Though these funds charge much lower fees than Schwab, they offer the exact same set of
22 services, and the quality of investment management is comparable if not superior.

23 82. As illustrated by the above, the Schwab Government Money Market Fund's fees are
24 at least two to three times higher than marketplace alternatives and provide donors inferior returns
25 as a result. Use of the Schwab Government Money Market Fund as the Schwab DAF's capital
26 preservation option is the result of a failure of the Fiduciary Defendants to discharge their duties

27 _____
28 ³⁴ *Schwab Government Money Fund – Investor Shares*,
<https://www.schwabfunds.com/products/snvxx>.

1 loyally with the care, skill, prudence, and diligence that an ordinarily prudent person in a like
2 position would use under similar circumstances.

3 83. Because index funds track identical or similar market-based indices, a significant
4 source of competition among index fund providers is also the fees charged to investors. Prudently
5 managed DAFs will seek to capitalize on this price competition by utilizing index funds with low
6 costs, and avoid index funds with high fees.

7 84. Schwab Charitable, through its five index investment pools, offers donors the
8 Schwab U.S. Aggregate Bond Index Fund, Schwab Total Stock Market Index Fund, Schwab
9 International Index Fund, Schwab Small Cap Index Fund, and Schwab Treasury Inflation Protected
10 Securities Index Fund.³⁵ A prudent review of the marketplace for similar index funds would have
11 revealed options with fees as low as half the cost of the Schwab-affiliated index funds.

12 85. For example, as of the beginning of 2017, the Schwab Treasury Inflation Protected
13 Securities Index Fund that was offered as one of the pre-selected investment options charged fees
14 of 0.19% per year. Given the assets in this fund, Schwab Charitable could have instead invested in
15 Institutional shares of the Fidelity Inflation-Protected Bond Index Fund, which tracks the exact same
16 index, for only 0.06%. As would be expected, the Schwab fund subsequently earned lower
17 investment returns than the Fidelity option given the higher fees.

18 86. In other instances, the Schwab fund had a demonstrably poorer track record than
19 another fund in the marketplace, but was retained by Schwab Charitable despite this persistent
20 underperformance. For example, consider the annual returns of the Fidelity Small Cap Index Fund
21 and the Schwab Small Cap Index Fund, each of which tracks the same underlying index, from 2013
22 to 2019:

23
24
25
26
27
28 _____
³⁵ *Schwab Charitable Investment Options*, <https://www.schwabcharitable.org/investment-options>.

| | 2019 | 2018 | 2017 | 2016 | 2015 | 2014 | 2013 |
|---------------------------------|--------|---------|--------|--------|--------|-------|--------|
| Fidelity Small Cap Index | 25.71% | -10.88% | 14.85% | 21.63% | -4.24% | 5.19% | 39.02% |
| Schwab Small Cap Index | 25.60% | -10.95% | 14.68% | 21.33% | -4.41% | 4.97% | 38.69% |

87. Yet despite the Schwab index fund materially underperforming marketplace alternatives for seven consecutive calendar years, the Fiduciary Defendants continued to retain the Schwab-affiliated index fund.

V. SCHWAB CHARITABLE SELECTED AND RETAINED MORE EXPENSIVE ONESOURCE MUTUAL FUNDS.

88. Many mutual funds offer multiple types of shares, known as “classes.” Generally, the more expensive share classes are targeted at smaller investors with less bargaining power, while the lower-cost shares are targeted at institutional investors with more assets, and therefore greater bargaining power. All classes of a fund invest in the same pool of securities, have the same investment manager, and have common investment objectives and policies. Therefore, differences in investment returns between share classes are directly attributable to differences in their fees and expenses.

89. Schwab Charitable’s reliance on OneSource Funds for the overwhelming majority of its investment pools also caused them to select higher-cost share classes of non-proprietary investment options, when the Schwab DAF, as a large institutional investor, could have qualified for lower-cost share classes.

90. As Schwab Charitable holds legal title to the moneys contributed by donors, it has sufficient assets and negotiating power to qualify for institutionally priced share classes. For example, in employer-sponsored 401(k) plans, although accounts are technically divided among investors and may not individually meet institutionally priced share class thresholds, this does not inhibit fiduciaries from leveraging the plan assets as a whole to obtain favorable pricing. Similarly, UPMIFA allows the pooling of funds “for purposes of management and investment.” Cal. Prob. Code § 18503(d).

1 91. Because there is no meaningful difference between share classes other than cost,
2 prudent fiduciaries will select the lowest-priced share class available to them. However, in several
3 instances, the Fiduciary Defendants failed to do so.

4 92. The Fiduciary Defendants' failure to monitor the investment pools and investigate
5 the availability of institutionally priced share classes cost donors, and ultimately recipient charities,
6 millions of dollars in fees each year. For example, the Conservative Pool invests entirely in Manning
7 & Napier Pro-Blend Conservative Series Class S, which has a prospectus net expense ratio³⁶ of
8 0.87%. However, throughout the statutory period the institutionally priced share class of this same
9 fund was available to Schwab Charitable with a prospectus net expense ratio of 0.64%.³⁷

10 93. Another example is the Income Pool, which invests entirely in Metropolitan West
11 Total Return Bond Class M and charges a prospectus net expense ratio of 0.67%.³⁸ Available to
12 Schwab Charitable throughout the statutory period was the institutional share class of this fund,
13 which charges investors 0.44%.³⁹

14
15 ³⁶ The prospectus net expense ratio is the percentage of fund assets, net of reimbursements,
16 used to pay for operating expenses and management fees, including 12b-1 fees, administrative
17 fees, acquired fund fees (i.e. the cost of owning other pooled investment vehicles such as mutual
18 funds or exchange-traded funds), and all other asset-based costs incurred by the fund. The
19 prospectus net expense ratio is an estimate of the expenses that investors are likely to be charged
20 in the current year, and is publicly disclosed in the prospectus that each mutual fund must file with
21 the SEC on an annual basis, though mutual funds can update their estimated expenses throughout
22 the course of the year by filing a summary prospectus with the SEC, which is also publicly
23 available to investors.

24 ³⁷ *Manning & Napier Pro-Blend Conservative Term Series Class I*, Charles Schwab Mutual
25 Fund Quotes & Research Tools,
26 https://www.schwab.com/public/schwab/investing/investment_help/investment_research/mutual_fund_research/mutual_funds.html?path=%2fProspect%2fResearch%2fMutualFunds%2fSummary.asp%3fsymbol%3dMNCIX.

27 ³⁸ *Metropolitan West Total Return Bond Fund Class M*, Charles Schwab Mutual Fund Quotes
28 & Research Tools,
https://www.schwab.com/public/schwab/investing/investment_help/investment_research/mutual_fund_research/mutual_funds.html?path=%2fProspect%2fResearch%2fMutualFunds%2fSummary.asp%3fsymbol%3dMWTRX.

³⁹ *Metropolitan West Total Return Bond Fund Class I*, Charles Schwab Mutual Fund Quotes &
Research Tools,
https://www.schwab.com/public/schwab/investing/investment_help/investment_research/mutual_fund_research/mutual_funds.html?path=%2fProspect%2fResearch%2fMutualFunds%2fSummary.asp%3fsymbol%3dMWTIX.

94. In total, the Fiduciary Defendants failed to utilize the least expensive available share class of *six* investments that were included in the Schwab DAF. The chart below shows the expense ratio of each fund's institutionally priced share class compared with what Schwab Charitable's investment pools held, as listed on Charles Schwab's website and in each fund's most recently filed statutory or summary prospectus:

| Investment Pool | Underlying Mutual Fund | Expense Ratio of Underlying Mutual Fund (Ticker) | Expense Ratio of Institutionally Priced Share Class (Ticker) |
|---|---|--|--|
| Conservative Pool | Manning & Napier Pro-Blend Conservative Series Class S | 0.87% (EXDAX) | 0.64% (MNCIX) |
| Balanced Pool | Janus Henderson Balanced Fund Class T | 0.83% (JABAX) | 0.65% (JBALX) |
| Growth Pool | T. Rowe Price Spectrum Moderate Growth Allocation Fund | 0.78% (TRSGX) | 0.66% (TGIPX) |
| Socially Responsible Balanced Pool | Pax Sustainable Allocation Fund Individual Investor Class | 0.92% (PAXWX) | 0.67% (PAXIX) |
| Income Pool | Metropolitan West Total Return Bond Class M | 0.67% (MWTRX) | 0.44% (MWTIX) |
| Large Cap Equity Managed Pool | Parnassus Core Equity Fund Investor Class | 0.86% (PRBLX) | 0.63% (PRILX) |

95. Schwab Charitable does not provide information regarding the asset levels of each investment pool. However, it is clear from public SEC filings for the underlying mutual funds, as well as Schwab Charitable's total assets of over \$15 billion, that the at-issue investment pools hold more than enough assets to meet institutional pricing investment minimums.

96. For example, the Growth Pool, which currently invests in the T. Rowe Price Spectrum Moderate Growth Allocation Fund, previously invested solely in the American Century One Choice Aggressive Fund.⁴⁰ SEC filings for the American Century fund show that 36% of its assets, or nearly \$500 million, were owned by Schwab Corporation in the months preceding the

⁴⁰ "As of 8/15/2019, the Growth Pool underlying fund was changed from the American Century One Choice Aggressive Fund to the T. Rowe Price Spectrum Moderate Growth Allocation Fund." Quarterly Performance Report (March 31, 2020), <https://www.schwabcharitable.org/public/file/P-10140962>.

1 investment change in the Growth Pool. Following the transition to the T. Rowe Price fund, Schwab
 2 Corporation's ownership in the American Century fund dropped to just 9% of total assets. In
 3 contrast, Schwab Corporation's ownership in the T. Rowe Price fund jumped from less than 5%
 4 prior to the transition to nearly 20% after, equating to over \$500 million in assets. This supports an
 5 inference that approximately 75% of the assets in each fund, or \$375 million, were part of the
 6 Schwab DAF. The Growth Pool therefore would have held nearly four-hundred times the investment
 7 minimum required to use the institutional share class. Despite this, Schwab Charitable selected the
 8 investor share class in 2019 when the Growth Pool's underlying mutual fund was changed, opting
 9 to utilize a share class with an investment minimum designed for individual investors instead of
 10 massive institutions:

| | Underlying Mutual Fund T. Rowe Price Spectrum Moderate Growth Allocation Fund (TRSGX) | | Institutionally Priced Mutual Fund T. Rowe Price Spectrum Moderate Growth Allocation Fund I (TGIPX) | |
|------------------------------------|---|---------------|---|---------------|
| Estimated Growth Pool Assets | Minimum Investment | Expense Ratio | Minimum Investment | Expense Ratio |
| \$375 million | \$2,500 | 0.78% | \$1,000,000 | 0.66% |

16 97. Despite the additional cost paid by donors for such higher-cost share classes, no
 17 additional services are received in return. As noted above, each share class of a specific mutual fund
 18 invests in the same underlying securities and employs the same managers.⁴¹ By not utilizing the
 19 institutionally priced share classes available, the Fiduciary Defendants breached their fiduciary
 20 duties at common law and under UPMIFA.

21 **VI. SCHWAB CHARITABLE'S SELECTION AND RETENTION OF ONE SOURCE MUTUAL FUNDS**
 22 **CAUSED THE SCHWAB DAF TO PAY EXCESSIVE ADMINISTRATIVE FEES**

23 98. In selecting mutual funds from OneSource—a platform designed for small,
 24 individual investors—Schwab Charitable also caused donors to pay excessive administrative fees.

25 ⁴¹ Though Schwab purports that the more expensive funds benefit shareholders because they
 26 are part of the “No-Transaction-Fee Program,” it was not prudent to pay between 0.13% and
 27 0.25% of additional fees given that Schwab Charitable could have obtained brokerage, custodial,
 28 and transactional services for between 0.01% and 0.04% in the marketplace. For example, the
 Silicon Valley Community Foundation charges donors only 0.03% per year for custodial and
 brokerage services, covering not only transaction fees but a whole host of other services.

1 OneSource mutual funds carry high fees in part to pay for shareholder servicing, recordkeeping,
2 brokerage, and custodial services.⁴² These fees contemplate the provision of services on an
3 individual level. However, institutional investors can achieve economies of scale for such services
4 and pay significantly less. Schwab Charitable should have used its significant bargaining power and
5 negotiated and monitored the fees paid to Schwab Corporation for custodial services, such as
6 brokerage and custodial services.

7 99. As noted above, institutional investors with billions of dollars in assets typically seek
8 to minimize these expenses by (1) seeking bids from multiple service providers in the marketplace
9 to get the most competitive price available, and (2) closely monitoring of all sources of
10 compensation to the custodian. However, the Fiduciary Defendants failed to do so with respect to
11 the Schwab DAF.

12 100. Similar to other administrative services, custodial services can be paid for directly
13 by a DAF or indirectly as a built-in component of the fees charged for the investment products
14 offered within the DAF. When custodial services are paid for indirectly, this practice is known as
15 “revenue sharing.” Ayres & Curtis, *Beyond Diversification* at 1486; ICI/Deloitte Study at 16. These
16 “revenue sharing” payments from investment managers to plan service providers typically happen
17 on a quarterly basis based upon an agreed-upon contribution formula.

18 101. As noted above, the OneSource mutual funds used by Schwab Charitable made
19 substantial revenue sharing payments to Schwab Corporation to compensate Schwab Corporation
20 for the provision of custodial services. These revenue sharing payments were in many cases 0.40%
21 or more. However, these indirect payments far exceed the amount needed to pay for custodial
22 services for a DAF of this size. An institutional investor with billions of dollars in assets such as
23 Schwab Charitable could have negotiated the provision of custodial services from providers such as
24 State Street or BNY Mellon for between 0.01% and 0.04%. Schwab Charitable should have known
25 this and used a different administrative service provider, used lower-cost investments without the
26 built-in revenue sharing (or less revenue sharing), or capped the amount of revenue sharing that
27 Schwab Corporation received with the excess refunded to donor accounts. But Schwab Charitable

28 ⁴² *Schwab’s financial and other relationships with ETFs and mutual funds, supra* note 8.

1 failed to act diligently or loyally, and as a result Schwab Corporation kept all of the revenue sharing
2 payments that were made by the underlying investment options.

3 **VII. SCHWAB CORPORATION HAD KNOWLEDGE OF AND PARTICIPATED IN SCHWAB**
4 **CHARITABLE’S FIDUCIARY BREACHES**

5 102. Schwab Corporation had knowledge of and participated in the fiduciary breaches and
6 unlawful conduct outlined above. Because Schwab Charitable was “established with the support of
7 [Schwab Corporation]” and “[a]ll Fund employees are employed by [Schwab Corporation],”
8 Schwab Corporation is an active participant in Schwab Charitable’s breaches. Additionally, Schwab
9 Corporation played an active role in Schwab Charitable’s breach by processing the transactions
10 within the Schwab DAF associated with the at-issue investment pools and receiving and retaining
11 the extra fees borne by the OneSource program.

12 103. For example, Schwab Corporation had knowledge that superior alternatives existed
13 to its proprietary money market and index funds. Schwab Corporation is aware of these alternative
14 options because it offers all of them on its own brokerage platform, which is an “open architecture”
15 platform, meaning that it offers investments from numerous different companies. Indeed, numerous
16 retirement plans that work with the Schwab Corporation offer their participants these superior index
17 and money market funds from providers such as Vanguard, Fidelity, State Street, and Blackrock.

18 104. Schwab Corporation also had knowledge of the excess administrative fees paid by
19 Schwab Charitable given that it was a party to the custodial services contract. Further, given its
20 industry status, Schwab Corporation had knowledge that Schwab Charitable was paying many times
21 above marketplace rates. Schwab Corporation further facilitated this fiduciary breach by leveraging
22 its close relationship with Schwab Charitable to secure this contract.

23 105. Finally, Schwab Corporation was also aware that Schwab Charitable failed to obtain
24 the lowest-cost share class for its investment options. Schwab Corporation’s knowledge of the
25 availability of institutional share classes is exhibited through publicly available SEC filings showing
26 Schwab Corporation’s substantial investment in institutionally priced share classes, including
27 institutional share classes of the very funds at issue. For example, Manning & Napier’s most recent
28 Statement of Additional Information reveals that Schwab Corporation owns 7.75% of *all*

1 institutional shares, the cheapest share class of the Manning & Napier Pro-Blend Conservative
2 Series fund.

3 106. This is not an anomaly. Schwab Corporation maintains substantial ownership in an
4 institutionally priced share class of each at-issue fund. According to recent SEC filings, Schwab
5 Corporation owns 5.44% of all Janus Henderson Balanced institutional shares, 16.29% of all T.
6 Rowe Price Spectrum Moderate Growth Allocation institutional shares, 7.08% of all Pax
7 Sustainable Allocation institutional shares, 16.33% of all Metropolitan West Total Return Bond
8 institutional shares, and 27.17% of all Parnassus Core Equity institutional shares.

9 107. Schwab Corporation knew that the Schwab DAF was eligible for these lower-cost
10 institutional share classes, but gladly accepted the significantly higher fees associated with the share
11 classes offered through its OneSource program, and indeed appears to have recommended the higher
12 cost share classes. As such, it is a third party who “received and retained trust property from the
13 trustee in knowing breach of trust.” *Atascadero*, 68 Cal. App. 4th at 462.

14 **CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200**

15 108. California Business and Professions Code § 17200 proscribes unlawful business
16 practices and authorizes an action resulting from unfair competition. “By proscribing ‘any unlawful’
17 business practice, Bus. & Prof. Code, § 17200, borrows violations of other laws and treats them as
18 unlawful practices that the unfair competition law makes independently actionable.” *Cel-Tech*
19 *Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 165 (1999).

20 109. “An unlawful business practice under section 17200 is ‘an act or practice, committed
21 pursuant to business activity, that is at the same time *forbidden by law.*’” *Progressive W. Ins. Co. v.*
22 *Superior Court*, 135 Cal. App. 4th 263 (2005) (citing *Bernardo v. Planned Parenthood Federation*
23 *of America*, 115 Cal. App. 4th 322, 351 (2004)). Therefore, “[v]irtually any law—federal, state, or
24 local—can serve as a predicate for an action under Business and Professions Code section 17200.”
25 *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 538 (2008) (citing
26 *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal. App. 4th 700, 717-18 (2001)). In addition,
27 violation of common law can serve as a predicate legal violation for purposes of § 17200. *See*
28 *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 828 n.3 (9th Cir. 2003).

1 110. By engaging in the conduct described above, the Fiduciary Defendants violated
2 fiduciary duties imposed by common trust law, California state law, and UPMIFA. These violations
3 of fiduciary duties imposed by law also constitute violations of California Business and Professions
4 Code § 17200.

5 **CLASS ACTION ALLEGATIONS**

6 111. Plaintiff seeks certification of this action as a class action pursuant to Federal Rule
7 of Civil Procedure 23. Plaintiff asserts his claims in Counts I, II, and III on behalf of a class of all
8 account holders defined as follows:⁴³

9 All account holders of Schwab Charitable Donor-Advised Fund accounts that have
10 had a balance in any of the investment pools at any time on or after October 30, 2016,
11 excluding members of the Schwab Charitable Board of Directors, Schwab
12 Corporation Board of Directors, and any other Schwab Charitable or Schwab
13 Corporation employees with responsibility for the Donor-Advised Fund's
14 investment or administrative functions.

15 112. Numerosity: The Class is so numerous that joinder of all Class members is
16 impracticable. As of the end of 2018, more than 56,000 donors had donor-advised accounts invested
17 with Schwab Charitable.

18 113. Typicality: Plaintiff's claims are typical of the Class members' claims. Like other
19 Class members, Plaintiff donated assets to the Schwab DAF and maintained control over his
20 donations through the robust advisory rights offered by Schwab Charitable. Additionally, like other
21 Class members, Plaintiff suffered injuries regarding the disposition of donated assets as a result of
22 the imprudent management of investment pools by Defendants. Defendants managed the assets of
23 each investment pool collectively, and all donors investing in a particular investment pool were
24 invested in the same underlying mutual fund.

25 114. Adequacy: Plaintiff will fairly and adequately protect the interests of the Class.
26 Plaintiff's interests are aligned with the Class that he seeks to represent, and he has retained counsel

27 _____
28 ⁴³ Plaintiff reserves the right to propose other or additional classes or subclasses in his motion
for class certification or subsequent pleadings in this action.

1 experienced in complex class action litigation. Plaintiff does not have any conflicts of interest with
2 any Class members that would impair or impede his ability to represent such Class members.

3 115. Commonality: Common questions of law and fact exist as to all Class members, and
4 predominate over any questions solely affecting individual Class members, including but not limited
5 to:

- 6 a) Whether Defendants Schwab Charitable, the Board, and the Committee are fiduciaries
7 with respect to the Donor-Advised Fund;
- 8 b) Whether the Fiduciary Defendants breached their fiduciary duties at common law by
9 engaging in the conduct described herein;
- 10 c) Whether the Fiduciary Defendants are additionally or alternatively liable for the
11 unlawful conduct described herein pursuant to Cal. Corp. Code § 5231(a);
- 12 d) Whether the Fiduciary Defendants are additionally or alternatively liable for the
13 unlawful conduct described herein pursuant to Cal. Prob. Code §§ 18501-10;
- 14 e) Whether the Fiduciary Defendants are additionally or alternatively liable for the
15 unlawful conduct described herein pursuant to Cal. Bus. & Prof. Code § 17200;
- 16 f) Whether Defendant Schwab Corporation liable for the unlawful conduct described
17 herein by knowingly facilitating and benefitting from such unlawful conduct;
- 18 g) The proper form of equitable and injunctive relief; and
- 19 h) The proper measure of monetary relief.

20 116. Class certification is appropriate under Fed. R. Civ. P. 23(b)(1)(A) because
21 prosecuting separate actions against Defendants would create a risk of inconsistent or varying
22 adjudications with respect to individual Class members that would establish incompatible standards
23 of conduct for Defendants.

24 117. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(1)(B) because
25 adjudications with respect to individual Class members, as a practical matter, would be dispositive
26 of the interests of the other persons not parties to the individual adjudications or would substantially
27 impair or impede their ability to protect their interests. As an example, any award of equitable relief
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1 by the Court, such as removal of particular investment pools or removal of a Schwab DAF fiduciary,
2 would be dispositive of non-party participants' interests.

3 118. Class certification is also appropriate under Fed. R. Civ. P. 23(b)(3) because
4 questions of law and fact common to the Class predominate over any questions affecting only
5 individual Class members, and because a class action is superior to other available methods for the
6 fair and efficient adjudication of this litigation. Defendants' conduct as described in this Complaint
7 applied uniformly to all members of the Class. Class members do not have an interest in pursuing
8 separate actions against Defendants, as the amount of each Class member's individual claims is
9 relatively small compared to the expense and burden of individual prosecution, and Plaintiff is
10 unaware of any similar claims brought against Defendants by any Class members on an individual
11 basis. Class certification also will obviate the need for unduly duplicative litigation that might result
12 in inconsistent judgments concerning Defendants' practices. Moreover, management of this action
13 as a class action will not present any likely difficulties. In the interests of judicial efficiency, it would
14 be desirable to concentrate the litigation of all Class members' claims in a single forum.

15 COUNT I

16 **Breaches of Fiduciary Duties at Common Law** 17 **(as to the Fiduciary Defendants)**

18 119. Plaintiff alleges and incorporates by reference the allegations in the preceding
19 paragraphs.

20 120. The donation of property to the Schwab DAF for a charitable purpose creates a
21 charitable trust under California common law. *L.B. Research & Educ. Foundation*, 130 Cal. App.
22 4th at 177. A charitable trust is a fiduciary relationship, and the fiduciary duties owed by a trustee
23 apply to the investment of the assets of the charitable trust. *Id.*

24 121. As to the Schwab DAF, among other things, the Fiduciary Defendants are
25 responsible for prudently selecting appropriate underlying funds for the investment pools,
26 evaluating and monitoring the underlying investments on an ongoing basis and removing and
27 replacing those that are no longer appropriate, and taking all necessary steps to ensure that the
28 Schwab DAF's assets are invested prudently and in a low-cost manner.

1 122. As described throughout this Complaint, Defendants failed to employ a prudent
 2 process for selecting, monitoring, and reviewing the underlying investments held by the investment
 3 pools. Defendants imprudently selected and retained higher cost OneSource mutual funds and
 4 proprietary funds affiliated with Schwab Corporation, despite the availability of better-performing,
 5 lower-cost alternatives. In addition, Defendants caused donors to pay excessive administrative fees
 6 and allowed Schwab Corporation to retain excessive indirect compensation by failing to monitor
 7 the administrative fees being paid to Schwab Corporation and negotiate a service provider contract
 8 for the provision of custodial services at arm's length.

9 123. Each of the above actions described in paragraph 122 and elsewhere in this
 10 Complaint demonstrate that the Fiduciary Defendants failed to discharge their duties with the care,
 11 skill, prudence, and diligence that an ordinarily prudent person in a like position would use under
 12 similar circumstances. In addition, the Fiduciary Defendants placed the interests of Schwab
 13 Corporation and its affiliates over those of persons like Plaintiff who entrusted their assets to Schwab
 14 Charitable. As a result, the Fiduciary Defendants breached their fiduciary duties at common law.

COUNT II

Third-Party Contribution to Breaches of Fiduciary Duties at Common Law (as to Schwab Corporation)

18 124. Defendant Schwab Corporation is a knowing contributor to and beneficiary of
 19 Schwab Charitable's fiduciary breaches and unlawful conduct, and is therefore liable for the same.

20 125. As described throughout this Complaint, Schwab Corporation knowingly benefited
 21 from Schwab Charitable's fiduciary breaches. In receiving increased revenues resulting from
 22 Schwab Charitable's utilization of higher cost index funds, money market fund, and other mutual
 23 funds found within the OneSource program in the investment pools, Schwab Corporation enriched
 24 itself as a result of Schwab Charitable's breaches of fiduciary duties and other unlawful conduct.

25 126. Further, through its status as one of the largest financial services firms in the world,
 26 its operation of an open architecture brokerage platform, and as exhibited through substantial
 27 holdings in institutionally priced versions of the at-issue mutual funds, Schwab Corporation was
 28 cognizant of the availability of and Schwab Charitable's eligibility for institutionally priced share

1 classes and superior index and money market fund investments. Therefore, Schwab Charitable is a
2 knowing and benefitting participant in Schwab Charitable’s fiduciary breaches and unlawful
3 conduct.

4 127. Plaintiff is entitled to disgorgement of all profits received by Schwab Corporation on
5 account of the fiduciary breaches and unlawful conduct that it contributed to and/or benefitted from.

6 **COUNT III**

7 **Unlawful Conduct in Violation of California’s Unfair Competition Law, California Business**
8 **and Professions Code § 17200, *et seq.***
9 **(as to all Defendants)**

10 128. Plaintiff alleges and incorporates by reference the allegations in the preceding
11 paragraphs.

12 129. The Fiduciary Defendants are required to adhere to the requirements of California’s
13 Unfair Competition Law (the “UCL”), Cal. Business and Professions Code § 17200, in connection
14 with their management of the Schwab DAF on behalf of clients.

15 130. The UCL prohibits, among other things, any unlawful business act or practice.
16 Defendants engaged in unfair competition in violation of the UCL by violating each of the
17 following. Each of these violations constitutes an independent and separate violation of the UCL.

18 **A. Breaches of Fiduciary Duties at Common Law as to Fiduciary**
19 **Defendants. *See supra* ¶¶ 116-123.**

20 **B. Third-Party Contribution to Breach of Fiduciary Duties at Common**
21 **Law as to Schwab Corporation. *See supra* ¶¶ 124-127.**

22 **C. California Corporation Code § 5231**

23 131. The Fiduciary Defendants violated fiduciary duty of prudence under California
24 Corporation Code 5231, by failing to manage the Schwab DAF with the prudence that an ordinarily
25 prudent person would exercise under the circumstances, as described *supra* in paragraph 122 and
26 elsewhere in this Complaint. Because these actions prioritized the profitability of the Schwab
27 Corporation over the charitable objectives of Schwab Charitable, the Fiduciary Defendants also
28 violated the duty of loyalty imposed by California Corporation Code 5231.

D. Uniform Prudent Management of Institutional Funds Act (“UPMIFA”), Cal. Prob. Code § 18501, et seq.

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2
3 132. As a section 501(c)(3) nonprofit organization, and as acknowledged in Schwab
4 Charitable’s IPS, the Fiduciary Defendants were required to exercise prudent and appropriate care
5 toward Schwab Charitable’s assets in accordance with UPMIFA.

6 133. In addition to incorporating state law fiduciary duties, UPMIFA imposes rules as to
7 how institutional funds shall be managed. Among these requirements is that an institution “may
8 incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the
9 institution, and the skills available to the institution.” Cal. Prob. Code § 18503(c)(1). Additionally,
10 “[a]n institution may pool two or more institutional funds for purposes of management and
11 investment.” Cal. Prob. Code § 18503(d).

12 134. As described throughout this Complaint, the Fiduciary Defendants failed to incur
13 only costs that are appropriate and reasonable in relation to the assets of, the purposes of, and the
14 skills available to Schwab Charitable. The Fiduciary Defendants failed to pool assets among
15 individual accounts to obtain favorable institutional pricing for the underlying mutual funds of
16 investment pools. In addition, the Fiduciary Defendants failed to properly review the marketplace
17 for better-performing, lower-cost capital preservation and passive investment options when
18 selecting the Schwab DAF’s money market fund and index funds, instead utilizing inferior options
19 affiliated with Schwab Corporation. Further, Defendants caused donors to pay excessive
20 administrative fees and allowed Schwab Corporation to retain excessive revenue sharing payments.

21 135. Each of the above actions described in paragraph 134 and elsewhere in this
22 Complaint demonstrate that the Fiduciary Defendants failed to manage the Schwab DAF in
23 accordance with UPMIFA and in violation of Cal. Prob. Code §§ 18501-10.

24 136. As a result of Defendants’ breaches of fiduciary duties and violations of UPMIFA,
25 Plaintiff has suffered injury in fact and an economic detriment. “There are innumerable ways in
26 which economic injury from unfair competition may be shown.” *Kwikset Corp. v. Superior Court*,
27 51 Cal. 4th 310, 323 (2011). For example, “[a] plaintiff may (1) surrender in a transaction more, or
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1 acquire in a transaction less, than he or she otherwise would have” or “(2) have a present or future
2 property interest diminished[.]” *Id.*

3 137. Here, Plaintiff surrendered more in the transaction, because higher fees were paid for
4 the exact same investment services, and acquired less, because Defendants’ imprudence reduced the
5 amount of money that can be directed towards charitable causes. Additionally, Plaintiff had a
6 property interest diminished. Courts have consistently held that donors maintain some property
7 interest where they have the right to determine who is able to use and enjoy the property, even if
8 title has passed. *Connelly v. Bank of Am. Nat. Tr. & Sav. Ass’n*, 138 Cal. App. 2d 303, 305-07 (1956)
9 (collecting cases). Plaintiff’s robust advisory rights are reduced where the amount of assets that can
10 be directed is diminished. Therefore, Defendants are additionally in violation of California’s
11 unlawful business and unfair competition statute, Cal. Bus. & Prof. Code § 17200.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff Pinkert, individually and as representative of the Class defined
14 herein, prays for relief as follows:

- 15 A. A determination that this action may proceed as a class action under Fed. R. Civ. P. 23;
16 B. Designation of Plaintiff as Class Representative and designation of Plaintiff’s counsel as
17 Class Counsel;
18 C. A declaration that Defendants Schwab Charitable, the Board, and the Committee have
19 breached their fiduciary duties under common law and/or California state law;
20 D. A declaration that Defendants Schwab Charitable, the Board, and the Committee
21 violated UPMIFA and the California Corporation Code and, in turn, the UCL;
22 E. A declaration that Defendant Schwab Corporation is jointly liable for the Fiduciary
23 Defendants’ breaches of their fiduciary duties and other unlawful conduct as a knowing
24 participant in and beneficiary of such fiduciary breaches and unlawful conduct;
25 F. An order compelling Defendants to personally make good all losses resulting from the
26 breaches of fiduciary duties and violations of state laws described above;
27 G. An order granting equitable restitution, disgorgement of profits, and other appropriate
28 equitable monetary relief against Defendants such as surcharge or constructive trust;

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- H. An order enjoining Defendants from any further violations of their legal obligations to members of the Class;
- I. An award of pre-judgment interest;
- J. An award of attorneys' fees and costs pursuant to California Code of Civil Procedure § 1021.5, and/or the common fund doctrine; and
- K. An award of such other and further relief as the Court deems equitable and just.

Dated: October 30, 2020

NICHOLS KASTER, LLP

By: /s/ Matthew C. Helland
Matthew C. Helland

**COUNSEL FOR PLAINTIFF AND THE
PROPOSED CLASS**