

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF CALIFORNIA
3
4

5 MANUEL LOPES and MARIANA LOPES,
6 dba LOPES DAIRY; JOSEPH LOPES,
7 Trustee of the RAYMOND LOPES
8 FAMILY TRUST as successor-in-
9 interest to RAYMOND LOPES; JOSEPH
10 LOPES and MICHAEL LOPES,
11 individually and dba WESTSIDE
12 HOLSTEIN; MARIA MACHADO, Trustee
13 of the Machado Family Trust and as
14 the successor-in-interest to
15 ALVARADO MACHADO and TONY ESTEVAM,

16 Plaintiffs,

17 v.

18 GEORGE VIERIA; MARY VIERIA;
19 CALIFORNIA MILK MARKET, a
20 California Corporation; VALLEY
21 GOLD LLC, a California Limited
22 Liability Company; GENSKE-MULDER
23 LLP, a California Limited
24 Liability Partnership; ANTHONY
25 CARY; DOWNEY BRAND LLP, a
26 California Limited Liability
27 Partnership; CENTRAL VALLEY
28 DAIRYMEN, INC., a California Food
and Agricultural Nonprofit
Cooperative Association, and DOES
1 through 25, inclusive,

Defendants.

1:06-cv-01243 OWW SMS

MEMORANDUM DECISION RE
GENSKE, MULDER & COMPANY'S
MOTION FOR RECONSIDERATION OF
MOTION FOR SUMMARY JUDGMENT
AGAINST VALLEY GOLD

(DOCS. 390)

24 I. INTRODUCTION

25 Genske Mulder and Company ("Genske Mulder"), a certified
26 public accounting firm, moves for reconsideration of the May 17,
27 2011 memorandum decision denying Genske Mulder's motion for
28

1 summary judgment against Valley Gold LLC ("Valley Gold") (Doc.
2 377) ("Memorandum Decision"). Doc. 390. Plaintiffs oppose the
3 motion. Doc. 397.

4 II. FACTUAL BACKGROUND

5 This lawsuit concerns alleged misrepresentations in the
6 financial projections and Offering Memorandum for Valley Gold,
7 which Plaintiffs allege induced them, individually and through
8 Central Valley Dairymen, to invest more than \$530,000 in the
9 formation of Valley Gold and to supply millions of dollars worth
10 of milk to Valley Gold, for which they were never paid.

11 Plaintiffs' Third Amended Complaint ("TAC"), filed November
12 1, 2010, asserts the following Causes of Action against Downey
13 Brand and Genske Mulder: (1) Fourth Cause of Action for
14 securities fraud: Securities Exchange Act of 1934; (2) Fifth
15 Cause of Action for violation of California securities law; (3)
16 Sixth Cause of Action for negligence; (4) Seventh Cause of Action
17 for intentional misrepresentation; and (5) Eighth Cause of Action
18 for negligent misrepresentation. Doc. 329. Plaintiffs also assert
19 the Sixth Cause of Action for negligence derivatively on behalf
20 of Valley Gold.
21
22

23 Downey Brand and Genske Mulder filed motions for summary
24 judgment against Plaintiffs in late 2009, which were heard on
25 December 21, 2009. Summary judgment was granted against Plaintiff
26 Antonio Estevam (Doc. 297) and Plaintiff Maria Machado as trustee
27
28

1 of the Machado Family Trust (Doc. 298). By memorandum decision
2 and order dated September 30, 2010, summary judgment was granted
3 in part, denied in part, and deferred in part against Joseph
4 Lopes as trustee for the Estate of Raymond Lopes. Doc. 301. The
5 memorandum decision granted Downey Brand's and Genske Mulder's
6 motions for summary judgment on (1) the Fifth Cause of Action
7 against Joseph Lopes as trustee for the Estate of Raymond Lopes
8 and (2) claims for consequential damages under the Fourth and
9 Fifth Cause of Actions for failure to receive payment for milk
10 shipped to Central Valley Dairymen, Inc. ("CVD"). Doc. 301, 48,
11 53.
12

13 Plaintiffs were permitted to, but did not, file supplemental
14 oppositions to the summary judgment motions before January 25,
15 2011 (Doc. 329, 36). Downey Brand filed a combined supplemental
16 reply on February 15, 2011 (Doc. 344), and Genske Mulder filed a
17 combined supplemental reply on February 14, 2011 (Doc. 343).
18 Plaintiffs were permitted to file supplemental oppositions on or
19 before March 15, 2011 (Doc. 352), and did so (Docs. 363, 364).
20 Downey Brand and Genske Mulder filed second supplemental replies
21 March 25, 2011 (Docs. 366, 367). The motions were heard April 1
22 and 6, 2011.
23
24

25 The Memorandum Decision issued May 17, 2011: (1) denied
26 Plaintiffs' request for clarification of the court's earlier
27 rulings; (2) rejected Plaintiffs' offer of proof; (3) granted
28

1 Downey Brand's motions for summary judgment as to the individual
2 Plaintiffs' claims regarding Valley Gold's business plan and the
3 Sixth Cause of Action, and denied the motions as to the Fourth,
4 Seventh, and Eighth Causes of Action; (4) granted Downey Brand's
5 motion for summary judgment as to the derivative claim asserted
6 on behalf of Valley Gold; (5) granted Genske Mulder's motions for
7 summary judgment as to the individual Plaintiffs on the Sixth
8 Cause of Action, any misrepresentation claims regarding the
9 Offering Memorandum and business plan, and allegations that
10 Genske Mulder should have discovered George Vieira's wrongdoings,
11 should have advised Plaintiffs as to the Milk Fund, should have
12 advised Plaintiffs as to the viability and reputation of the New
13 Jersey distributor, and should have disclosed to Plaintiffs that
14 Valley Gold was selling its cheese at a discount, and denied as
15 to the other Fourth Cause of Action allegations, Seventh Cause of
16 Action, and Eighth Cause of Action; and (6) granted Genske
17 Mulder's motions for summary judgment as to any Valley Gold
18 claims based on allegations that Genske Mulder should have
19 discovered Mr. Vieira's wrongdoings, should have advised Valley
20 Gold as to the Milk Fund, should have advised Valley Gold as to
21 the visibility and reputation of the New Jersey distributor, and
22 should have disclosed to Valley Gold that Valley Gold was selling
23 its cheese at a discount, and denied as to the other Valley Gold
24 Sixth Cause of Action (derivative claim) allegations. Doc. 377.

1 On June 6, 2011, Downey Brand and Genske Mulder filed
2 Motions for Reconsideration of the Memorandum Decision. Docs.
3 390, 391. Plaintiffs filed oppositions (Docs. 397, 398), to which
4 replies were waived. The motions were heard June 27, 2011.

5 On July 13, 2011, the parties participated in a settlement
6 conference before Magistrate Judge Dennis Beck. Plaintiffs
7 reached a settlement with Defendants Mary Vieira, Genske-Mulder,
8 and Downey Brand. It was initially believed that the settlement
9 mooted the pending Motions for Reconsideration. Plaintiffs now
10 assert that the procedural steps in implementing the settlement
11 depend on whether Genske Mulder's Motion for Reconsideration as
12 to Valley Gold is granted or denied. Plaintiffs request an order
13 on this limited issue. Doc. 417.

16 III. LEGAL STANDARD

17 A motion for reconsideration filed within 28 days of a
18 judgment is treated as a Rule 59(e) motion. Fed. R. Civ. P.
19 59(e); *see Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007)
20 (applying Rule 59(e)'s 10-day deadline, before its 2009 expansion
21 to 28 days). Amending a judgment after its entry is "an
22 extraordinary remedy which should be used sparingly." *Allstate*
23 *Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). A motion
24 for reconsideration under Rule 59(e) is properly granted where
25 the district court: "(1) is presented with newly discovered
26 evidence, (2) committed clear error or the initial decision was
27
28

1 manifestly unjust, or (3) if there was an intervening change in
2 controlling law." *Id.*; *School Dist. No. 1J v. AC & S, Inc.*, 5
3 F.3d 1255, 1263 (9th Cir. 1993). A reconsideration motion is
4 properly denied where it merely presents arguments previously
5 raised in the prior motion or opposition. *Backlund v. Barnhart*,
6 778 F.2d 1386, 1388 (9th Cir. 1985). Genske Mulder's motion for
7 reconsideration was filed within 28 days of the Memorandum
8 Decision. Contrary to Plaintiffs' contention, Rule 59(e), not
9 Rule 60(b)¹, provides the applicable standard.

11 Local Rule 230(j) of the United States District Court,
12 Eastern District of California provides:

13 Whenever any motion has been granted or denied in whole or
14 in part, and a subsequent motion for reconsideration is made
15 upon the same or any alleged different set of facts, counsel
16 shall present to the Judge or Magistrate Judge to whom such
17 subsequent motion is made an affidavit or brief, as
18 appropriate, setting forth the material facts and
19 circumstances surrounding each motion for which
20 reconsideration is sought, including:

- 18 (1) when and to what Judge or Magistrate Judge the
19 prior motion was made;
20 (2) what ruling, decision, or order was made thereon;
21 (3) what new or different facts or circumstances are
22 claimed to exist which did not exist or were not shown upon
23 such prior motion, or what other grounds exist for the
24 motion; and

23 ¹ An untimely motion for reconsideration is treated as a motion for
24 relief from judgment under Rule 60(b). *Am. Ironworks & Erectors, Inc. v. N.*
25 *Amer. Const. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001). A moving party is
26 entitled to relief from judgment under Rule 60(b) where there is: (1) mistake,
27 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence;
28 (3) fraud, misrepresentation, or other misconduct; (4) a void judgment; (5) a
satisfied or discharged judgment; or (6) any other reason justifying relief
from operation of judgment. Fed. R. Civ. P. 60(b); *Backlund*, 778 F.2d at 1388.
Relief under exception (6) requires a finding of "extraordinary
circumstances." *Id.* (quoting *McConnell v. MEBA Med. & Benefits Plan*, 759 F.2d
1401, 1407 (9th Cir. 1985)).

1 (4) why the facts or circumstances were not shown at
2 the time of the prior motion.

3 IV. DISCUSSION

4 The Memorandum Decision (1) granted Genske Mulder's motion
5 for summary judgment as to Valley Gold's derivative claims based
6 on the allegations that Genske Mulder should have discovered Mr.
7 Vieira's wrongdoings, should have advised Valley Gold as to the
8 Milk Fund success, should have advised Valley Gold as to the
9 viability and reputation of the New Jersey distributor, and
10 should have disclosed that Valley Gold was selling its cheese at
11 a discount; and (2) denied Genske Mulder's motion for summary
12 judgment as to the other allegations asserted in Valley Gold's
13 derivative claim for negligence. Genske Mulder moves for
14 reconsideration of the partial denial of its motion for summary
15 judgment on Valley Gold's derivative claim.
16

17 Genske Mulder asserts that the Valley Gold financial
18 forecasts were dated May 15, 2003. Genske Mulder contends that by
19 September 2003, Valley Gold knew that it was not performing as
20 its financial forecasts predicted and was then on notice of its
21 potential claims against Genske Mulder. Genske Mulder further
22 contends that because Valley Gold's Management Committee knew:
23 (1) that George Vieira was the subject of criminal investigations
24 before April 2003; (2) that Valley Gold could not pay for milk in
25 September 2003; and (3) that Mr. Vieira pleaded guilty to a
26 felony in January 2004, Valley Gold was on notice of its
27
28

1 potential claim against Genske Mulder for negligent preparation
2 of the financial forecasts. The Memorandum Decision explained
3 that the allegations as to Mr. Vieira supported discovery of the
4 allegations against Downey Brand, not that Genske Mulder had
5 negligently prepared the financial forecasts. The Memorandum
6 Decision examined all the evidence and drew all inferences in
7 Valley Gold's favor, and concluded that it could not be
8 determined as a matter of law that Valley Gold's derivative claim
9 against Genske Mulder is time barred.
10

11 Genske Mulder's Motion for Reconsideration reiterates its
12 previous arguments. Genske Mulder does not present newly
13 discovered evidence, show that the Memorandum Decision is clearly
14 erroneous or manifestly unjust, or point to any intervening
15 change in controlling law. *Herron*, 634 F.3d at 1111. A motion for
16 reconsideration is but a "second bite at the apple." As Genske
17 Mulder's motion simply repeats arguments raised in its previous
18 motion, it is DENIED. *See Backlund*, 778 F.2d at 1388.
19

20 V. CONCLUSION

21 For the reasons stated:

- 22 1. Genske Mulder's motion for reconsideration of its motion
23 for summary judgment of Valley Gold's derivative claim is
24 DENIED.
- 25 2. Plaintiffs shall submit a proposed form of order
26 regarding Genske Mulder's motion for reconsideration of
27
28

1 its motion for summary judgment of Valley Gold's
2 derivative claim consistent with this memorandum decision
3 within five (5) days following electronic service of this
4 memorandum decision.

5 SO ORDERED.

6 DATED: August 12, 2011

7 /s/ Oliver W. Wanger
8 Oliver W. Wanger
9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28