

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3
4 CHARLOTTE B. MILLINER, et al.,
5 Plaintiffs,
6 v.
7 MUTUAL SECURITIES, INC.,
8 Defendant.

Case No. 15-cv-03354-TEH

**ORDER GRANTING IN PART AND
DENYING IN PART MSI'S MOTION
FOR PARTIAL
RECONSIDERATION OF THE
COURT'S MARCH 18, 2017 ORDER**

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10 Presently before the Court is Defendant Mutual Securities, Inc.'s ("MSI") motion
11 for partial reconsideration of the Court's March 18, 2017 Order¹. ECF No. 121 ("Mot.").
12 Plaintiffs timely opposed the motion, ECF No. 125 ("Opp'n"), and MSI timely replied,
13 ECF No. 128 ("Reply"). After carefully considering the parties' arguments, the Court
14 GRANTS IN PART and DENIES IN PART, MSI's motion for partial reconsideration for
15 the reasons stated below.

16 **I. BACKGROUND**

17 As the parties are familiar with the factual background of this case, the Court
18 provides only a brief summary of the facts relevant to this Order.

19 This class action is related to another class action separately filed in this Court:
20 Milliner v. Bock Evans Financial Counsel, Ltd., No. 15-cv-1763 TEH (the "Bock Evans
21 Class Action"). The Bock Evans Class Action was brought by the same Plaintiffs as the
22 present class action, to challenge the "'one size fits all' investment approach implemented
23 by their investment advisor, Defendant Bock Evans Financial Counsel, Ltd. ('BEFC')."
24 Compl. ¶ 1 (ECF No. 1). Plaintiffs brought the present class action against MSI because of
25 its relationship with BEFC. Specifically, BEFC required that clients hire MSI as their
26 broker-dealer. Id. ¶ 9. Plaintiffs allege one reason BEFC required clients to use MSI is

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28 ¹ The Court previously granted MSI leave to file this motion pursuant to Civ. L.R. 7-9(a).
See ECF No. 113.

1 because Thomas Bock and Mary Evans, the principal executive officers of BEFC, were
2 registered representatives of MSI. *Id.* ¶ 9. In other words, Bock and Evans were “dually
3 registered as registered representatives and commissioned brokers of MSI and as
4 investment advisors and principals of BEFC.” ECF No. 32 at 1:27–2:1. Plaintiffs allege
5 BEFC “plac[ed] 100% or nearly 100% of their assets in high risk and highly speculative
6 foreign mining stocks, including over-the counter and penny stocks” resulting in the value
7 of BEFC’s portfolios going “from \$60 million to \$4.17 million in just a few years, a drop
8 of roughly \$55.83 million, or 93%.” *Compl.* ¶¶ 1–2.

9 In the Court’s March 18, 2017 Order, the Court granted Plaintiffs’ motion for
10 partial summary judgment and established that MSI breached its duty to determine
11 suitability under FINRA Rules. ECF No. 87 at 8:23–24. This was because MSI had
12 “clearly admitted it did not make any suitability determinations for transactions linked to
13 the either of the Plaintiffs’ accounts,” and because case law precluded the Court from
14 considering any of MSI’s evidence to the contrary. *Id.* at 7–8. Following that Order, MSI
15 filed a motion to amend its prior responses to Plaintiffs’ Requests for Admission, ECF No.
16 91, and a motion seeking leave to file the present motion for partial reconsideration of the
17 Court’s March 18, 2017 Order, ECF No. 90. MSI explained that these motions were
18 warranted because the Court’s March 18, 2017 Order altered MSI’s understanding of how
19 the law applies to the facts giving rise to this action thus making MSI’s prior admission no
20 longer accurate. ECF No. 91 at 1–2. The Court granted both of these motions and
21 clarified that, under FINRA rules, the actions of Bock and Evans may be imputed to MSI.
22 ECF No. 113 at 4–6. At the same time, the Court explained that “while Bock and Evans’
23 actions in determining the suitability of the Plaintiffs’ transactions may be imputed to MSI,
24 this does not absolve MSI of further responsibility.” Stated differently, even assuming that
25 Bock and Evans did determine the suitability of the challenged transactions, MSI is still
26 required to show “it had a supervisory system capable of satisfying the requirements of
27 NTM 96-33.” ECF No. 113 at 6:27–7:2. Subsequently, MSI submitted amended
28 responses to Plaintiffs’ Requests for Admission to deny that it “did not ‘determine the

1 suitability of any investment recommendations and advice’ made in connection with
2 [Plaintiffs’] Trust Account[s]”. See ECF No. 91-1. In light of these amended responses,
3 MSI asks the Court to reconsider its prior holding that MSI ““did not make any suitability
4 determinations for transactions linked to either of the Plaintiffs’ accounts,’ and to enter
5 partial summary judgment finding that MSI did make suitability determinations for
6 transactions linked to Plaintiffs’ accounts.” Mot. at 1:3–7.

7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 54(b) establishes that interlocutory orders “may be
9 revised at any time before the entry of a judgment adjudicating all the claims and all the
10 parties’ rights and liabilities.” Fed. R. Civ. P. 54(b). The federal rules do not set forth a
11 standard for reconsideration of interlocutory orders. *Level 3 Commc’ns, LLC v. Lidco*
12 *Imperial Valley, Inc.*, No. 3:11-cv-1258-GPC-MDD, 2013 WL 394059, at *2 (S.D. Cal.
13 Jan. 30, 2013). However, Civil Local Rule 7-9(b) requires that the party moving for
14 reconsideration must show “reasonable diligence in bringing the motion,” and one of the
15 following:

- 16 (1) That at the time of the motion for leave, a material
17 difference in fact or law exists from that which was presented
18 to the Court before entry of the interlocutory order for which
19 reconsideration is sought. The party also must show that in the
20 exercise of reasonable diligence the party applying for
21 reconsideration did not know such fact or law at the time of the
22 interlocutory order; or
(2) The emergence of new material facts or a change of law
occurring after the time of such order; or
(3) A manifest failure by the Court to consider material facts or
dispositive legal arguments which were presented to the Court
before such interlocutory order.

23 Civil L.R. 7-9(b). “[T]he major grounds that justify reconsideration involve an intervening
24 change of controlling law, the availability of new evidence, or the need to correct a clear
25 error or prevent manifest justice.” *Pyramid Lake Paiute Tribe of Indians v. Hodel*, 882
26 F.2d 364 n. 5 (9th Cir. 1989).

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1 **III. DISCUSSION**

2 MSI's motion seeks two holdings. First, a holding vacating the Court's prior Order
3 establishing that MSI did not determine the suitability of the transactions linked to
4 Plaintiffs' account. Second, a holding granting partial summary judgment to MSI
5 establishing that it did determine the suitability of these transactions and that it adequately
6 supervised the activities of Bock and Evans. Mot. at 1. The Court turns to address each
7 request in turn.

8 a. **MSI's Request Vacating the Prior Court's Order Establishing that MSI**
9 **Did Not Determine the Suitability of the Transactions Related to the**
10 **Plaintiffs' Accounts**

11 MSI contends that because the Court's prior order that it breached its duty to
12 determine suitability under FINRA rules was "based solely on MSI's admissions that have
13 now been withdrawn and amended with leave of Court," the Court should reconsider the
14 issue in light of its amended responses to Plaintiffs' Requests for Admissions. Mot. at 1.
15 MSI suggests that its amended responses constitute a "material difference in fact" that
16 satisfies the requirement set forth in Civil L.R. 7-9(b), and that the evidence demonstrates
17 that MSI did in fact, through Bock and Evans, determine the suitability of the trades at
18 issue. In particular, MSI cites the declaration of Mary Evans which sets forth her efforts in
19 determining the suitability of the transactions linked to Plaintiffs' accounts. See ECF No.
20 91-2 ("Evans Decl."). Ms. Evans proffers that she obtained in-depth questionnaires from
21 the Plaintiffs regarding their ages, income, net worth, investment background and
22 experience, investment goals, and risk tolerance, among other things. Evans Decl. at ¶ 4.a.
23 She also maintains she held several conversations with the Plaintiffs in order to confirm
24 and update Plaintiffs' investment profiles and strategies, and that she researched and
25 investigated the various companies in which BEFC invested Plaintiffs' assets to determine
26 their suitability for the Plaintiffs' portfolios. Id.

27 Plaintiffs oppose the motion on several grounds. First, Plaintiffs assert that in order
28 for the Court to reverse its prior order, MSI must show that the March 18, 2017 Order was

1 “clearly erroneous,” which it is not. See Opp’n at 2–3. And second, that there are no
2 “new” facts or a change in controlling law to warrant reconsideration of the Court’s prior
3 order. See *id.* at 2–3. These arguments, however, are misguided.

4 As to the first contention, the cases which Plaintiffs rely on to support its argument
5 are inapposite. In *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2007 WL 2349338, at
6 *6–7 (N.D. Cal. Aug. 14, 2007), the court denied the plaintiffs’ motion for reconsideration.
7 But unlike here, in *Bowoto* the parties were filing a motion for reconsideration under Civil
8 L.R. 7-9(b)(3), which requires the parties to show a court’s failure to consider material
9 facts or dispositive legal arguments which were presented before the court’s interlocutory
10 order. *Id.* Although the plaintiffs in that case were seeking reconsideration based on a
11 prior case, the court found the plaintiffs failed to present any evidence that they were even
12 aware of the case at the time they filed their briefing. *Id.* at *7. Thus, the plaintiffs could
13 not have possibly “presented” the argument to the Court, as required by Civil L.R. 7-9(b).
14 This case is factually and legally distinguishable from *Bowoto*. The other cases Plaintiffs
15 rely on for support were discussing the standard for a post-judgment motion for
16 reconsideration, which is governed under Fed. R. Civ. P. 59. See *Bull v. City & Cty. of*
17 *S.F.*, 758 F. Supp. 2d 925, 928 (N.D. Cal. 2010) (reviewing motion for reconsideration
18 under Fed. R. Civ. P. 59); *McDowell v. Calderon*, 197 F.3d 1253, 1254–55 (9th Cir. 1999)
19 (same); *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715–16 (9th Cir.
20 1990) (same); *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)
21 (same). In short, a party moving for reconsideration of an interlocutory order is not
22 required to show the Court’s prior interlocutory order was “clearly erroneous” by
23 demonstrating a “wholesale disregard, misapplication, or failure to recognize controlling
24 precedent” as Plaintiffs suggest.

25 As to the second contention, the Court finds that MSI’s amended responses create a
26 “material difference in fact” from that which was presented to the Court before entry of the
27 March 18, 2017 Order. Indeed, the Court’s holding that MSI breached its duty to
28 determine the suitability of the disputed transactions was solely based on MSI’s admission

1 that it did not do so. ECF No. 113 at 7:19–8:4. Now that MSI has amended its responses,
2 there are different facts that support MSI’s motion for reconsideration. Moreover, unlike
3 the facts in Kilopass Tech. Inc. v. Sidense Corp., No. C 10-02066 SI, 2012 WL 1901198,
4 *4 (N.D. Cal. May 24, 2012), MSI’s amended responses do not suggest gamesmanship or
5 bad faith. In Kilopass, the court denied a plaintiff’s motion for reconsideration finding that
6 Civil L.R. 7-9 “does not apply where the ‘new material fact’ is merely a party’s attempt to
7 undo a strategic position for which it has been penalized.” But in that case, the plaintiff
8 was attempting to adopt two separate, inconsistent interpretations of its patent in two
9 separate ongoing cases. *Id.* at 3–4. Upon finding that its proclaimed definition in a case
10 before the United States and Patent Office harmed its position in Kilopass, the plaintiff
11 sought reconsideration and attempted to re-characterize its conflicting positions. Here, in
12 contrast, MSI’s responses to Plaintiffs’ Requests for Admissions have been consistent with
13 its theory of the case. MSI’s initial response that it did not determine the suitability of the
14 challenged transactions was consistent with its position that “Bock and Evans were
15 communicating with Plaintiffs in their capacities as Investment Advisers of BEFC, not as
16 Registered Representatives of MSI,” ECF No. 43 at 11:17–20. Once the Court rejected
17 that position and made it clear that Bock and Evans’ actions were imputed to MSI, MSI
18 promptly filed a motion to alter its responses. In sum, the Court finds that Mary Evans’
19 declaration creates a genuine dispute of material fact as to whether MSI determined the
20 suitability of the transactions at issue in this case.

21 **a. MSI’s Request Seeking Partial Summary Judgment in its Favor**

22 MSI further requests that the Court not only vacate the granting of partial summary
23 judgment in favor of the Plaintiffs on the issue of whether MSI determined the suitability
24 of the trades at issue in this case but that the Court also grant partial summary judgment in
25 its favor on this issue. *Mot.* at 1:8–24. MSI also suggests that the Court should grant
26 partial summary judgment in its favor on the issue of whether MSI adequately supervised
27 the suitability determinations of Bock and Evans. *Id.* Although MSI acknowledges that it
28 is seeking for partial summary judgment while seeking reconsideration of the underlying

1 motion in which Plaintiffs were moving for summary judgment, MSI argues the Court may
2 grant this relief because the Plaintiffs have had a “full and fair opportunity to litigate the
3 issue before the Court.” Mot. at 6 n. 3 (citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309,
4 312 (9th Cir. 1982)). On the other hand, Plaintiffs argue that granting partial summary
5 judgment in MSI’s favor would preclude them from the opportunity to conduct appropriate
6 discovery. Opp’n at 5–6. In essence, Plaintiffs argue they have not had the opportunity to
7 fully and fairly litigate the issue, because, in obtaining partial summary judgment based on
8 MSI’s responses to their Requests for Admission, they did not anticipate needing to depose
9 Mary Evans or needing to conduct further discovery.

10 On this point, the Court agrees with Plaintiffs. Simply stated, because the Court’s
11 March 18 Order conclusively established that MSI failed to determine suitability, the
12 Plaintiffs did not have a need to propound further discovery on this issue. To deny
13 Plaintiffs the ability to do so at this juncture would be unfair and prejudicial to them.
14 Accordingly, MSI’s request for partial summary judgment in its favor is DENIED
15 WITHOUT PREJUDICE. If MSI wishes to do so, it may seek summary judgment by
16 filing its own motion at a later time.

17 **IV. CONCLUSION**

18 For the aforementioned reasons, MSI’s request for partial reconsideration is
19 GRANTED IN PART and DENIED IN PART. The Court’s prior holding that MSI failed
20 to determine the suitability of the transactions linked to Plaintiffs’ account is hereby
21 VACATED. However, MSI’s request for partial summary judgment in its favor is
22 DENIED WITHOUT PREJUDICE. To the extent there are any inconsistencies between
23 this Order and the Court’s March 18, 2017 Order, this Order supersedes the previous one.

24 **IT IS SO ORDERED.**

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26 Dated: 8/11/2017



THELTON E. HENDERSON
United States District Judge