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2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 CHARLOTTE B. MILLINER, et al.,

6 Plaintiffs,

7 v.

8 MUTUAL SECURITIES, INC.,

9 Defendant.

Case No. 15-cv-03354-TEH

**ORDER REGARDING MAY 23, 2016
HEARING**

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11 On April 18, 2016, Plaintiffs filed a Motion for Partial Summary Judgment Re:
12 Existence of Contractual Duty to Determine Suitability (“Mot.”). Dkt. No. 30. Defendant
13 Mutual Securities Inc. (“MSI”) timely opposed the motion, Plaintiffs timely replied in
14 support of the motion, and the matter is currently set for hearing on May 23, 2016. Opp’n
15 to Pls.’ Mot. for Partial Summ. J. (“Opp’n”) (Dkt. No. 32); Pls.’ Reply in Supp. of Mot. for
16 Partial Summ. J. (“Reply”) (Dkt. No. 33).

17 Plaintiffs request a very narrow ruling: “Plaintiffs seek a ruling from this Court
18 establishing that Defendant MSI owed Plaintiffs a contractual duty to ‘*determine the*
19 *suitability of any investment recommendations and advice,*’ in accordance with the express
20 terms of their Brokerage Agreement.” Mot. at 1 (emphasis in original). MSI does not
21 appear to contest the veracity of this narrow statement, since it agrees that “if MSI or one
22 of its agents were to make investment recommendations or give investment advice to the
23 Plaintiffs or the putative class members, then MSI and/or its agents would have a duty to
24 make suitability determinations with respect to such recommendations or advice.” Opp’n
25 at 4-5. Thus, there appears to be no genuine dispute of material fact that the quoted
26 language from the Brokerage Agreement (the “suitability clause”) created a duty. *See* Fed.
27 R. Civ. P. 56(a) (“The court shall grant summary judgment if the movant shows that there
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1 is no genuine dispute as to any material fact and the movant is entitled to judgment as a
2 matter of law.”).

3 However, the parties do dispute whether the contractual duty created by the
4 suitability clause extends to the investment advice Plaintiffs received from Bock Evans
5 Financial Counsel, Ltd. (“BEFC”). *See* Reply at 1 (“MSI wants to exclude from its
6 suitability duty all recommendations and advice that it received from MSI’s affiliated
7 investment advisors.”); *id.* at 8 (“There is no language that excludes investment
8 recommendations and advice from Thomas Bock, Mary Evans, or [BEFC].”); Opp’n at 1
9 (“Plaintiffs have not alleged, nor can they allege, that MSI actually made investment
10 recommendations or gave investment advice relating to the Plaintiffs’ or the putative class
11 members’ accounts.”); *id.* at 2 (“MSI has some supervisory obligations over Bock and
12 Evans as individually associated persons of MSI, but its obligations to Plaintiffs were
13 significantly less because they were advisory clients of BEFC.”).

14 Consequently, it appears that the narrow ruling Plaintiffs request would do little to
15 move this case forward, as it would not address what appears to be the ultimate issue: the
16 scope of the duty created by the suitability clause. It is not clear whether Plaintiffs’
17 arguments about the scope of MSI’s contractual duty indicate that Plaintiffs seek summary
18 adjudication of this broader issue, but Plaintiffs have not, in any case, provided sufficient
19 legal argument to support a broader ruling. Accordingly, IT IS HEREBY ORDERED that
20 the May 23, 2016 hearing is VACATED, and the parties shall meet and confer on whether
21 the Court should treat Plaintiffs’ motion as seeking: (i) a narrow ruling on whether MSI
22 had a contractual duty to “determine the suitability of any investment recommendations
23 and advice,” as presented in Plaintiffs’ motion and proposed order; or (ii) a broader ruling
24 on the scope of the duty created by the suitability clause and, more specifically, whether
25 that duty extends to the investment advice Plaintiffs received from BEFC.

26 If the parties do not agree that the Court should treat Plaintiffs’ motion as seeking
27 the broader ruling, then Plaintiffs shall file a statement, on or before **May 25, 2016**, on
28 whether the Court should enter a ruling on the narrow question presented in their motion or

1 whether Plaintiffs seek to withdraw their motion. If Plaintiffs state that the Court should
2 enter a ruling on the narrow question presented in their motion, then the Court is prepared
3 to rule on the motion without further briefing or oral argument. Civil L.R. 7-1(b).

4 If the parties do agree that the Court should treat Plaintiffs' motion as seeking the
5 broader ruling, then Plaintiffs shall file a statement, on or before **May 25, 2016**, reflecting
6 this agreement. If the parties so agree, then IT IS HEREBY ORDERED that the May 23,
7 2016 hearing is continued to **June 20, 2016**, and the parties shall submit supplemental
8 briefs by **June 8, 2016**, not to exceed 15 double-spaced pages, addressing the following
9 questions:

10 For Both Parties

- 11 1. The parties agree that the scope of the suitability clause is determined by
12 the parties' objective intent. Mot. at 10; Opp'n at 4. How is that intent not
13 in dispute, and therefore not properly left to determination by a jury?
- 14 2. Do the Registered Investment Advisor Agreements between Plaintiffs and
15 BEFC have any bearing on the scope of the suitability clause? If so, what
16 do those agreements say about MSI's role or duties regarding the
17 investment advice Plaintiffs were to receive from BEFC?
- 18 3. How, if at all, does the fact that MSI conducts business as a "hybrid"
19 broker-dealer have any bearing on MSI's role or duties regarding the
20 investment advice Plaintiffs received from BEFC?

21 For Plaintiffs

- 22 4. Do Plaintiffs contend that the investment advice they received from BEFC
23 is covered by the suitability clause because: (i) Thomas Bock and Mary
24 Evans were acting as MSI's affiliated investment advisors when they gave
25 Plaintiffs investment advice; (ii) Thomas Bock and Mary Evans were
26 acting as MSI's agents when they gave Plaintiffs investment advice; (iii)
27 the suitability clause covered any advice Plaintiffs received while MSI was
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their broker-dealer, regardless of the source; or (iv) some, none, or all of the above? Please explain.

For Defendant

5. If MSI did not intend for the suitability clause to apply to the advice Plaintiffs received from BEFC, then why didn't the clause contain the sort of conditional language that MSI identifies elsewhere in the Brokerage Agreement? *See* Opp'n at 5-6.

IT IS SO ORDERED.

Dated: 05/18/16



THELTON E. HENDERSON
United States District Judge