

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 RE: SEPTEMBER 12, 2016  
HEARING**

9  
10 Counsel shall come prepared to address the following questions at the September  
11 12, 2016 hearing on Plaintiffs' motion for partial summary judgment:

12  
13 **For Plaintiffs**

- 14  
15 1. Is your argument that Defendant had a duty to supervise the investment  
16 advisory activities of Bock and Evans dependent on the Court's earlier  
17 Order, ECF No. 39, finding a duty was created by the "suitability clause" in  
18 the parties' Brokerage Agreement? In other words, do you argue that the  
19 Defendant's duty to supervise Bock and Evans would exist even without the  
20 "suitability clause" in the Brokerage Agreement?
- 21 2. You argue that Chevron requires that the court grant deference to the NTMs  
22 (Pls.' Reply 5:1-2 n. 2). However, NTMs do not appear to be promulgated  
23 by an administrative agency such as the Securities and Exchange  
24 Commission. Can you cite any cases holding NTMs are entitled to Chevron  
25 deference?
- 26 3. Can you cite any cases addressing how much deference, if any, courts should  
27 give to the Notice to Members ("NTMs") that accompany FINRA rules?
- 28 4. You argue 15 U.S.C. §78cc "invalidates provisions in brokerage agreements  
that require customers to waive compliance with FINRA rules." (Pls.' Reply

1 7:20-21). Can you cite any cases where courts have applied § 78cc in this  
2 particular way?

3 5. Several recent Ninth Circuit cases establish that there are two elements  
4 required for “control person” liability: (1) a primary violation of federal  
5 securities laws and (2) actual power or control over the primary violator.  
6 See, e.g., Howard v. Everex Systems, Inc., 228 F.3d 1057, 1065 (9th Cir.  
7 2000). What federal security laws, if any, have you alleged Defendant  
8 violated?

9 6. What was the reasoning behind the Plaintiffs refusing to provide some  
10 documents that Defendant asked for? (See Def.’s Opp’n. at 15-16; Pls.’  
11 Reply at 11:15-12:1). Was there a particular difficulty involved with turning  
12 over the requested documents?

13 **For Defendant**

14 1. Can you cite any cases where courts, in applying FINRA rules (or other  
15 related rules), have differentiated between RR/IAs acting as registered  
16 representatives or as investment advisors?

17 2. If we accept your argument that FINRA Rules 3270 and 3280 only apply  
18 when registered agents are acting as such (i.e., not as investment advisors)  
19 (Def.’s Opp’n. 6:22-7:1), wouldn’t broker-dealers always be able to contract  
20 their way out of FINRA’s supervision requirement?

21 3. If we accept your argument that the application of FINRA Rules may depend  
22 on whether a person is acting as a registered representative or an investment  
23 advisor, how should the Court determine in what capacity a person is acting?

24 4. Defendant argues the non-binding nature of the NTMs accompanying the  
25 relevant rules (Def.’s Opp’n. 9:8-23), yet Defendant’s Representative  
26 Agreement for Registered Representatives expresses a commitment to  
27 comply with “The Rules” which is defined to include “all rule or conduct  
28 interpretations and directives issued by the NASD.” Also, Defendant’s  
Written Supervisory Procedures Manual directly cites several NTMs. How  
do you reconcile your position regarding NTMs in your Opposition with the  
inclusion of NTMs in your policies?

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5. Regarding the discovery dispute brought up in your opposition (See Def.'s Opp'n. at 14-17), please explain exactly what facts you expect or hope to find that should prevent the Court from ruling on Plaintiffs' summary judgment motion now? Why did Defendant not bring up the discovery issue earlier?

**IT IS SO ORDERED.**

Dated: 09/08/16



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THELTON E. HENDERSON  
United States District Judge