

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 DEFENDANT'S
MOTION TO COMPEL**

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10 On February 8, 2017, the Defendant Mutual Securities, Inc. (“MSI”) filed a Motion
11 to Compel Plaintiffs’ Production of Documents. ECF No. 81 (“Mot.”). Plaintiffs timely
12 opposed the motion, ECF No. 83 (“Opp’n”), and Defendant timely replied, ECF No. 86
13 (“Reply”). The Court heard oral arguments on the motion on March 20, 2017. After
14 carefully considering the parties’ written and oral arguments, the Court GRANTS IN
15 PART AND DENIES IN PART Defendant’s motion for the reasons set forth 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.

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”).¹ 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 (EFC No. 1). Plaintiffs brought the present class action against MSI because of
25 MSI’s 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 Default has been entered in the Bock Evans Class Action. No. 15-cv-1763 TEH, ECF
No. 66 (N.D. Cal. May 18, 2016).

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

9 Through prior orders, the Court has established: “MSI owed Plaintiffs a contractual
10 duty to ‘determine the suitability of any investment recommendations and advice’ in
11 accordance with the express terms of their Brokerage Agreement,” ECF No. 38, 4:27–5:3;
12 MSI had a duty to supervise the outside advisory investment activities of Bock and Evans
13 pursuant to FINRA rules, ECF No. 52, at 12; and MSI breached its duty under FINRA
14 rules to determine suitability, ECF No. 87 at 8:23–24.

15 Presently before the Court is MSI’s Motion to Compel Plaintiffs’ Production of
16 Documents. MSI alleges that the Plaintiffs have not produced any documents in response
17 to its Requests for Production and seeks an order from the Court compelling Plaintiffs to
18 do so.

19 **II. LEGAL STANDARD**

20 A party may bring a motion to compel discovery when another party has failed to
21 respond adequately to a discovery request. Fed. R. Civ. P. 37(a)(3). A party “may obtain
22 discovery regarding any nonprivileged matter that is relevant to any party's claim or
23 defense and proportional to the needs of the case, considering the importance of the issues
24 at stake in the action, the amount in controversy, the parties' relative access to relevant
25 information, the parties' resources, the importance of the discovery in resolving the issues,
26 and whether the burden or expense of the proposed discovery outweighs its likely
27 benefit.” Fed. R. Civ. P. 26(b). As the moving party, MSI must inform the court which
28 discovery requests are the subject of the motion to compel, why Plaintiffs’ objections are

1 not justified or why the response provided is deficient, and how proportionality and the
2 other requirements of Federal Rule of Civil Procedure 26(b)(2) are met. See Civil L.R. 37-
3 2. “A district court has wide latitude in controlling discovery” *Lane v. Dep’t of*
4 *Interior*, 523 F.3d 1128, 1134 (9th Cir. 2008) (citation and internal quotation marks
5 omitted).

6 **III. DISCUSSION**

7 **a. Scope of Relief**

8 In its motion, MSI specifically asks the Court to order the Plaintiffs to produce
9 documents in response to MSI’s Requests for Production Nos. 1–78. Mot. at 1:7–10.
10 However, in its reply, MSI asks the Court to “order Plaintiffs to produce the documents
11 responsive to MSI’s narrow 18 categories of requests.” Reply at 12:2–4.² Because MSI
12 voluntarily narrowed its requests in good faith before the motion to compel and because
13 MSI’s reply only asks for an order relating to these 18 categories, the Court only considers
14 these 18 categories for purposes of the motion.

15 **b. Requests for Productions Regarding Plaintiffs’ Non-MSI Accounts, Tax**
16 **Returns, and Financial Statements are Relevant.**

17 Federal Rule of Civil Procedure 26(b)(1) allows parties to obtain discovery on “any
18 nonprivileged matter that is relevant to any party’s claim or defense and proportional to the
19 needs of the case.” Here, Plaintiffs object to MSI’s requests for the production of
20 Plaintiffs’ non-MSI accounts, tax returns, and financial statements on the basis that these
21 records are not relevant to case. Opp’n at 7:14–16, 8:11. Notably, however, while
22 Plaintiffs’ objections focused on arguing that these requests are not relevant to suitability –
23 Plaintiffs failed to refute MSI’s suggestion that the requests are relevant to issues of class
24 certification (e.g., typicality of claims and Plaintiffs’ adequacy to represent the class).
25 Because the Plaintiffs’ financial profiles and investment experience could raise unique
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27 ² MSI’s declaration in support of the motion suggests that the parties had a telephonic meet
28 and confer on October 19, 2016, pursuant to Judge Beeler’s discovery order during which
MSI narrowed its 78 requests for production to 18. ECF No. 81-1 at 84 (“Exh. H”).

1 defenses for MSI against Plaintiffs’ specific claims, see, e.g., *Navellier v. Sletten*, 262 F.3d
2 923, 941 (9th Cir. 2001), the Court finds these requests are relevant to determining class
3 certification issues. Accordingly, Plaintiff’s objections to these requests based on
4 relevance are rejected.

5 **c. Plaintiff’s Proportionality Objections are Unavailing**

6 In responding to MSI’s motion, Plaintiffs contend that MSI’s demand “fail[s] to
7 meet the proportionality requirements of Rule 26(b)(2), since the vast majority of the
8 documents Defendant seeks to compel are Defendant’s own documents.” Opp’n at 1:18–
9 19. In support of this argument, Plaintiffs cite Rule 26(b)(1), which requires courts to
10 consider the “the parties’ relative access to relevant information,” and Rule 26(b)(2)(C)(i),
11 which permits a court to limit discovery if it determines that the requested information
12 “can be obtained from some other source that is more convenient, less burdensome, or less
13 expensive.” Plaintiffs’ theory is that because this case focuses on MSI’s alleged
14 misconduct, MSI’s own documents are the focus of discovery, not the Plaintiffs’. See
15 Opp’n at 3:13–26. Furthermore, Plaintiffs suggest MSI is likely to have the requested
16 documents because it “cannot provide any declaration stating that it does not have these
17 documents.” *Id.* at 11–14. These arguments fail. Plaintiffs cite no case law supporting
18 this position. In fact, MSI’s cited case law directly rejects Plaintiffs’ arguments. A party
19 is “required to produce documents he [or she] has in his possession, custody or control,
20 regardless of whether he [or she] believes [the opposing party] already has those
21 documents.” *Walt Disney Co. v. DeFabiis*, 168 F.R.D. 281, 284 (C.D. Cal. 1996). See
22 also *Hitachi, Ltd. v. AmTRAN Technology Co. Ltd.*, 2006 WL 2038248, at *3 (N.D. Cal.
23 July 18, 2006) (same); *Fort Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 79
24 (E.D. Cal. 1994) (“[I]t is not a bar to the discovery of relevant material that the same
25 material may be in the possession of the requesting party or obtainable from another
26 source. . . . Thus, Defendant must produce the requested documents regardless of their
27 existence in the possession of Plaintiff or of their accessibility through the sub-
28 contractors.”).

1 During oral arguments, the Plaintiffs attempted to distinguish these cases by citing
2 the 2015 amendment to Rule 26, which added language on the need to consider the
3 proportionality of discovery requests. But the Committee Notes on the 2015 amendment
4 explain that the amendment “does not change the existing responsibilities of the court and
5 the parties to consider proportionality,” rather the amendment simply reinforces this
6 obligation. Fed. R. Civ. P. 26, Committee Notes on Rules –2015 Amendment.
7 Additionally, the Committee stated the amendment was not “intended to permit the
8 opposing party to refuse discovery simply by making a boilerplate objection that it is not
9 proportional.” Id. Here, Plaintiffs have failed to show how MSI’s discovery requests are
10 disproportionate. This is especially true in light of MSI’s narrowed requests and its
11 willingness to bear the cost of producing these discovery requests. The fact that MSI’s
12 requests for production may include many documents that MSI already possesses does not
13 mean Plaintiffs can simply refuse to produce any documents. Lastly, Rule 26(b)(1)
14 requires the Court to also consider the case’s amount in controversy when determining
15 proportionality. Here, where Plaintiffs are seeking compensatory damages for “tens of
16 millions of dollars,” Compl. ¶ 17, the Court finds Plaintiffs’ proportionality objections
17 unpersuasive.

18 **d. Facially Overbroad Requests are Denied**

19 Even though Plaintiffs did not address the Court’s question during oral arguments
20 on whether any of MSI’s 18 requests needed to be eliminated or further narrowed, the
21 Court finds requests 8–9, 11, 13, and 15 to be facially overbroad.³ Accordingly, MSI’s
22 motion to compel production on these requests is DENIED. This order, however, does not
23 preclude MSI from narrowing the denied requests and re-seeking production.

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26 _____
27 ³ Although MSI’s 18 requests were not numbered, see ECF No. 81-1 at 84, the Court
28 identifies each request by its numerical order of appearance (i.e., “All BEFC/MSI account
statements” is Request #1; “Communications including electronic communications and
notes from telephone calls, between Plaintiffs and BEFC, Tom Bock, and/or Mary Evans”
is Request #2; etc.).

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e. Plaintiffs Must Allow Inspection and Copying

The parties also dispute whether Plaintiffs are required to produce copies of the requested productions to MSI. However, “[a] party producing documents will ordinarily not be put to the expense of making copies for the requesting party. Rule 34(b) merely requires that the responding party make documents available for inspection and copying.” *7 Moore’s Federal Practice* § 34.14[5] at 34-92 (2016). Accordingly, the Plaintiffs may fulfill their obligation under Rule 34(b) by allowing MSI to inspect its documents.

IV. CONCLUSION

In sum, the information MSI seeks is relevant to its claims and defenses, and Plaintiffs’ objections are unpersuasive. Accordingly, the Court GRANTS IN PART MSI’s motion to compel responses by requiring Plaintiffs’ to allow MSI to inspect and copy any documents included in requests 1–7, 10, 12, 14, and 16–18. The motion is DENIED in all other respects.

The enforcement of this Order and all further discovery disputes shall be referred back to Magistrate Judge Laurel Beeler.

The parties shall meet and confer and file a joint case management statement on or before **May 8, 2017**, and appear for a case management conference on **May 15, 2017, at 1:30 PM.**

IT IS SO ORDERED.

Dated: 3/24/17



THELTON E. HENDERSON
United States District Judge