

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

PURSHE KAPLAN STERLING
INVESTMENTS
(CRD No. 5428974),

and

GOPI KRISHNA VUNGARALA
(CRD No. 4856193)

Respondents.

Disciplinary Proceeding
No. 2014042291901

Hearing Officer — LOM

**ORDER DENYING RESPONDENTS'
MOTION FOR SUMMARY DISPOSITION**

On November 18, 2016, Respondents filed a motion for summary disposition ("Motion"), accompanied by three affidavits and multiple exhibits. On December 9, 2016, the Department of Enforcement filed an opposition to Respondents' motion ("Opposition"), which is accompanied by six affidavits and multiple exhibits.¹ Because Respondents have not met the standard under FINRA Rule 9264 for summary disposition, their Motion is **DENIED**.

A. Nature of the Case

At the time of the alleged misconduct, Respondent Gopi Krishna Vungarala was a registered representative with the Respondent broker-dealer firm, Purshe Kaplan Sterling Investments ("PKS" or the "Firm").² In its Complaint, Enforcement charges Vungarala with two counts of fraud and the Firm with two counts of supervisory failures.

¹ Respondents' Motion is titled "Respondents Purshe Kaplan Sterling Investments and Gopi Krishna Vungarala's Motion for Summary Disposition." Folded into Respondents' Motion is a statement of facts that Respondents believe are undisputed. Enforcement's Opposition is titled "Department of Enforcement's Opposition to Respondents' Motion for Summary Disposition." It is accompanied by a separate statement of disputed facts.

² Amended Answer and Aff. Defenses ¶ 1.

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Enforcement first charges that Vungarala made fraudulent misrepresentations to a Native American tribe ("Tribe") when he recommended that the Tribe buy non-traded real estate investment trusts ("REITs") and business development companies ("BDCs"). The Tribe was both his employer and his customer, and, according to Enforcement, Vungarala led the Tribe to believe that he had avoided any conflict of interest because neither he nor the Firm would receive commissions on the recommendations he made to the Tribe. In fact, his recommendations generated \$11.4 million in commissions for the Firm, of which Vungarala received roughly \$9.6 million. Enforcement alleges that this misconduct violated Section 10(b) of the Securities Exchange Act of 1934 and FINRA Rules 2020 and 2010.

Enforcement separately charges that Vungarala violated the same antifraud provisions by failing to disclose to the Tribe that it was eligible to receive more than \$3.3 million in additional volume discounts on the REITs and BDCs purchased by the Tribe through multiple accounts. According to Enforcement, the failure to disclose the availability of those volume discounts benefited Vungarala because, if the Tribe had availed itself of the discounts, Vungarala's commissions would have been reduced.

As to the Firm, Enforcement charges that it failed to supervise Vungarala in violation of NASD Conduct Rule 3010 and FINRA Rules 3110 and 2010. Enforcement alleges that, once the Tribe became Vungarala's customer, the Firm was on notice of the potential for unethical conduct, but it nevertheless failed to perform an adequate review of the inherent risks or establish adequate procedures to mitigate the risks.

A separate cause of action against the Firm for violation of the same supervisory rules is related to Vungarala's failure to inform the Tribe of its right to volume discounts. Enforcement alleges that Vungarala told the Firm that the Tribe did not want to take advantage of the volume discounts and the Firm did not take reasonable steps to verify Vungarala's representations.

B. Summary Disposition Standard

FINRA Rule 9264 permits a party to file a motion for summary disposition and sets forth the procedures for making and deciding such a motion. Subsection (d) provides that any motion for summary disposition "shall be accompanied" by "a statement of undisputed facts; a supporting memorandum; and affidavits or declarations that set forth such facts as would be admissible at the hearing and show affirmatively that the affiant is competent to testify to the matters stated therein." Subsection (e) authorizes a Hearing Officer to deny or defer a decision on any motion for summary disposition but only a Hearing Panel may grant such a motion.

FINRA Rule 9264 also sets forth the standard for granting summary disposition. The standard is two-pronged. FINRA Rule 9264(e) permits summary disposition only if both prongs are satisfied. First, there must be "no genuine issue with regard to any material fact," and, second, the moving party must be "entitled to summary disposition as a matter of law."

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With respect to the first prong of the standard, FINRA Rule 9264(e) further provides that “the facts alleged in the pleadings of the Party against whom the motion is made shall be taken as true....”³ Accordingly, Rule 9264(e) places the burden on the moving party to establish the absence of any genuine dispute of material fact.

It is well-established that a motion for summary disposition under FINRA Rule 9264 (and the former NASD Rule 9264) is analyzed in the same general way as a motion for summary judgment under the Federal Rules of Civil Procedure.⁴ “Summary disposition is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. All reasonable inferences must be drawn in favor of the party opposing summary disposition.”⁵

This is consistent with the analysis applied to motions for summary judgment under the Federal Rules of Civil Procedure, which can be consulted in a FINRA disciplinary proceeding for guidance.⁶ In connection with a motion for summary judgment under Federal Rule of Civil Procedure 56, the evidence of the non-moving party will be believed as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn in favor of the party opposing the motion.⁷ Even if the facts are undisputed, summary judgment cannot be granted if there is disagreement over the inferences that could reasonably be drawn from those facts.⁸

Thus, neither summary judgment nor summary disposition can be granted if there is a genuine dispute of material fact.⁹ In such a case, the disagreement must be submitted for fact finding at a trial or hearing.

³ Rule 9264 contains exceptions not relevant here, where the opposing party’s pleadings are modified by stipulations or uncontested affidavits or other means.

⁴ See OHO Order 07-37 (2005001919501) (Oct. 16, 2007) at 10, http://www.finra.org/sites/default/files/OHODecision/p037809_0_0.pdf.

⁵ *Id.* (footnotes with citations omitted).

⁶ FINRA disciplinary proceedings are governed by FINRA’s own procedures, as set forth in the Rule 9000 Series. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence are binding, although they and the case law developed under their auspices may be consulted for guidance as appropriate. OHO Order 12-02 (2011029760201) (Apr. 5, 2012) at 5, http://www.finra.org/sites/default/files/OHODecision/p126070_0_0_0_0.pdf.

⁷ See, e.g., *Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1863, 1866 (2014); *Crawford v. Metropolitan Gov’t of Nashville & Davidson County*, 555 U.S. 271, 274 n.1 (2009); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

⁸ See *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 744 (3d Cir. 1996).

⁹ See OHO Order 14-01 (2011026788801) (June 17, 2014) at 3-4, http://www.finra.org/sites/default/files/OHODecision/p532204_0.pdf; OHO Order 07-37 (2005001919501) at 10.

With respect to the second prong of the standard, under FINRA Rule 9264(e), the moving party also must establish that he is entitled to prevail "as a matter of law." Federal Rule of Civil Procedure 56 contains a parallel requirement to obtain summary judgment. It is essential that the moving party establish that he is entitled to judgment under the applicable law.¹⁰

C. Respondents Failed To Meet The Standard

1. Fraud Claims

a. *Fraudulent Misrepresentations Regarding Compensation*

In connection with the fraud claims against Vungarala, Respondents argue in their Motion that the Tribe was a sophisticated institutional investor that conducted extensive due diligence prior to approving investments in the REITs and BDCs sold by Vungarala to the Tribe. Respondents further assert that the Tribe was fully aware that PKS and Vungarala received commissions on those securities sales.¹¹

Much of the material submitted by Respondents in support of their Motion consists of information about the Tribe's history and governance, which is intended to show that the Tribe was a sophisticated institutional investor. Respondents emphasize that the Tribe is a sovereign nation with its own governing body, laws, court systems, schools, and casino. According to Respondents, it is the largest employer in the county where it is located, and, as one of the largest Indian Nations in the country, it generates hundreds of millions of dollars in revenue each year. It has various tribal officials involved in managing its money and its investments, who in turn hire professionals to assist them. The investments at issue were subject to a multi-step review process involving various tribal officials, which Respondents set forth in some detail.¹²

Enforcement does not dispute many of the factual statements about the Tribe such as that it is one of the largest Indian Nations in the country and that it generates hundreds of millions of dollars in revenue. But Enforcement does dispute any inference from such facts that individual tribal members involved in the investment process were sophisticated investors who knew or should have known that PKS and Vungarala received commissions on the securities the Tribe purchased through PKS.¹³ Enforcement presented several affidavits to support its assertion that the tribal officials involved with managing the Tribe's money and investments were not financially sophisticated people.¹⁴ The affidavits indicate that Vungarala took advantage of that

¹⁰ It is not enough that a moving party's summary judgment record is uncontested or that the adverse party has failed to oppose the motion. The moving party still must demonstrate that judgment in his favor is appropriate as a matter of law. *See Edwards v. Aguillard*, 482 U.S. 578, 595 (1987); *Torres-Rosado v. Rotger-Sabat*, 335 F.3d 1, 9 (1st Cir. 2003).

¹¹ Motion, at 3-6.

¹² Motion, at 3-6, 14-19.

¹³ Opposition, Statement of Disputed Fact, 2-6.

¹⁴ CX-1, at ¶ 6; CX-2, at ¶ 7; CX-5, at ¶¶ 5, 8-9.

fact when he persuaded the Tribal Council to alter its investment policy to permit the Tribe to invest in the REITs and BDCs that Vungarala promoted to them.¹⁵ The Tribe's Chief provided an affidavit that makes plain that he relied on Vungarala's recommendations, and that he signed the necessary paperwork for each investment without reviewing it for commissions, volume discounts, or accuracy.¹⁶

In any event, and regardless of the purported sophistication of the Tribe and the tribal officials involved in managing its money and investments, Enforcement's Opposition makes clear that a material fact is in dispute—whether Vungarala affirmatively told the Tribe he would not receive commissions in connection with his sales of REITs and BDCs to the Tribe. The Opposition is accompanied by an exhibit and affidavits to support the claim that Vungarala repeatedly lied to the Tribal Council and Tribal Investment Committee by telling them that he would not receive commissions when the Tribe purchased the REITs and BDCs.¹⁷

The exhibit is an extract from the minutes of the Tribal Investment Committee. The Minutes record that Vungarala was at a meeting of the Investment Committee at which the Committee was led to believe that “[t]here will be no conflict of interest on Gopi's [Vungarala's] behalf, since he is not getting paid by with [sic] company.”¹⁸ While the minutes do not say that Vungarala himself made the statement that there would be no payment to him and therefore no conflict, at a minimum the statement was made in his presence and he apparently did nothing to correct the statement. Furthermore, the statement that Vungarala would not be “getting paid” in connection with the Tribe's investments in the REITs and BDCs had to be based on something, and a reasonable inference would be that the basis was a statement by Vungarala.

Indeed, an affidavit provided by Enforcement asserts that is exactly what happened. The affidavit is by the former Treasury Administrator of the Tribe. She affirmed under penalty of perjury that Vungarala approached the Tribe about investing in REITs and BDCs, and that, because of Vungarala's representations to her, she told the Tribal Investment Committee that there would be no conflict of interest if the Tribe purchased REITs through him at PKS because Vungarala would not make any money on the investments. She noted that Vungarala was present when she told the Investment Committee that Vungarala would not make money from the Tribe's investments, and he made no attempt to correct her or otherwise disclose that he or PKS would receive commissions on the Tribe's purchases.¹⁹

A second affidavit provided by Enforcement is by the Tribal Administrator, who was also a member of the Tribal Investment Committee. He affirmed under penalty of perjury that

¹⁵ CX-2, at ¶¶ 7-11.

¹⁶ CX-5, at ¶¶ 6-9.

¹⁷ Opposition, at 7.

¹⁸ CX-18, at 1.

¹⁹ CX-3, at ¶¶ 6-9.

members of the Tribal Council and Tribal Investment Committee are not sophisticated investors and that they relied on Vungarala as the Tribe's Treasury Investment Manager to make investment recommendations consistent with the Tribe's best interest and in accordance with the Tribe's investment goals and policy.²⁰ The Tribal Administrator further affirmed that he personally asked Vungarala about the fee structure of the REITs and BDCs on multiple occasions and Vungarala affirmatively stated more than once that he did not receive commissions when he purchased those instruments on behalf of the Tribe.²¹

Enforcement also disputes many of Respondents' other factual assertions, but it is unnecessary to analyze them all. In light of the exhibit and affidavits relating to Vungarala's alleged fraudulent misrepresentations and the dispute over whether Vungarala affirmatively represented that he would not receive compensation in connection with the Tribe's purchases, the first fraud claim against him must proceed to hearing for fact finding and resolution. Respondents failed to meet the standard for summary disposition.

b. Fraudulent Omission Of Discounts

With respect to the allegation that Vungarala failed to disclose to the Tribe that it was entitled to volume discounts on the REITs and BDCs it purchased, Respondents maintain that the Tribe received volume discounts where appropriate. This factual assertion appears based on Respondents' interpretation of the Tribe's organization of its investment portfolio into separate "trusts" with differing strategic goals and objectives. The separate "trusts" would then be managed, evaluated, and monitored for investment performance. Each "trust" was considered a separate account. The Tribe's Chief advised PKS at one point that each "trust" had its own purpose and funding obligations and their funds could not be co-mingled.²²

Enforcement presented evidence that it would proffer at the hearing to demonstrate that the Tribe's organization of its investments into separate accounts did not deprive it of volume discounts based on purchases made in multiple accounts. Among other items, Enforcement provided prospectuses some of the investments. The prospectus included statements to the effect that a volume discount could be obtained by an entity for all the accounts maintained by that entity in the aggregate.²³ Enforcement also presented an affidavit by the Tribe's current Chief Investment Officer and Director of Treasury affirming under penalty of perjury that the "trusts" are not actual legal trusts, but, rather, funds that are part of the Tribe's general fund. The Chief Investment Officer affirmed that there has never been any trust agreement or other document or

²⁰ CX-2, at ¶ 7.

²¹ CX-2, at ¶¶ 12-13.

²² Motion, at 3-6, 14-19.

²³ Opposition, at 8; CX-16, at 5; CX-17, at 5.

policy that prevented the Tribe's investments in the same product across multiple funds from being added together for purposes of receiving a volume discount.²⁴

The dispute over whether the Tribe could have received volume discounts for the aggregation of its purchases in multiple accounts is a genuine dispute of material fact. If the Tribe could aggregate its purchases for purposes of the volume discounts, then Respondents' assertion that the Tribe received all appropriate volume discounts would be incorrect. Thus, the second fraud claim against Vungarala must also proceed to hearing. Respondents failed to meet the standard for summary disposition.

2. Supervisory Claims

a. *Failure To Adequately Address Inherent Conflict Of Interest*

PKS argues that the supervisory charge contained in the third cause of action should be dismissed as a matter of law based on an April 5, 2016, FINRA Acceptance Waiver and Consent ("AWC") by which PKS settled certain supervisory charges FINRA previously brought against it. PKS argues that as a result of the AWC res judicata bars Enforcement from bringing this case.²⁵

Res judicata generally requires (i) a final judgment on the merits in the prior proceeding, (ii) identity of the parties, and (iii) identity of the cause of action in both the earlier and the later proceedings.²⁶ Res judicata concerns fairness and judicial efficiency. It is a concept that forecloses parties from re-litigating the same dispute if they have already had a full and fair opportunity to litigate it and an adjudicator with jurisdiction has resolved it. The SEC has explained, res judicata "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication."²⁷ As Respondents argue in their Motion, the AWC executed by PKS reflects the underlying concerns addressed by the concept of res judicata. PKS entered into the settlement on the "condition" that FINRA would not bring any future actions against PKS "alleging violations based on the same factual findings" described in the AWC.²⁸

I address only one of the elements of res judicata—the requirement that the causes of action be identical. That element is reflected in the AWC by the agreement that FINRA would not in the future charge PKS with a violation based on the same factual findings as the AWC.

²⁴ CX-1, at ¶¶ 8-10.

²⁵ Motion, at 30-33.

²⁶ *Gordon Brent Pierce*, Exchange Act Release No. 71664, 2014 SEC LEXIS 839, at *32 (Mar. 7, 2014).

²⁷ *Id.*, at *30 (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)).

²⁸ Motion, at 32-33.

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Although the charges settled by the AWC involved supervisory violations, and although the time period relevant to this case is within the time period covered by the AWC, the AWC did not involve the same type of supervisory violation. The factual findings in the AWC are not the same as the factual findings necessary to resolve this case.

The charges settled by the AWC related to the Firm's failure to conduct adequate due diligence of its registered representatives' outside business activities in order to determine whether those outside business activities were private securities transactions subject to the requirements of NASD Rule 3040. The charge was that this failure violated FINRA Rule 3270.²⁹

That is not the charge here. The charge here is that the Firm violated NASD Conduct Rule 3010 and FINRA Rule 3110. According to Enforcement, the Firm knew that Vungarala had entered into a particular relationship with the Tribe that was highly risky because of the inherent conflict between his interests and the Tribe's interests and that the Firm did not react appropriately to the risky nature of that relationship. The factual findings necessary to prove the charge here are different from the factual findings in the AWC. For example, Enforcement presented evidence that the Firm knew that Vungarala was prohibited from receiving commissions,³⁰ and yet the Firm nevertheless paid Vungarala millions of dollars in commissions on the Tribe's purchases.³¹ Those facts bear on the charges in this case but not the AWC.

Respondents failed to establish as a matter of law that this cause of action should be dismissed, and they are not entitled to summary disposition.

b. Failure To Adequately Address Volume Discounts

PKS argues that it became aware of the issue of volume discounts in October 2014 and promptly addressed the issue by correcting eight transactions and adding shares to various individual "trusts." The added shares totaled approximately \$70,000 in value. PKS asserts that it then implemented improved procedures to better ensure that volume discounts were given in all appropriate cases. It argues that its proactive response is "self-proving" evidence that the Firm properly supervised Vungarala.³²

Notably, the Firm continues to maintain that multiple "trusts" did not qualify as a single purchaser for purposes of aggregating purchases to obtain volume discounts.³³ As discussed above, Enforcement disputes that assertion and has presented evidence that would support a different conclusion.³⁴ In addition, Enforcement asserts that one of the issuers contacted PKS

²⁹ Motion, at 30-33; Opposition, CX-40 at 1.

³⁰ CX-40.

³¹ CX-13, at 2.

³² Motion, at 33-34.

³³ Motion, at 33.

³⁴ Opposition, at 8-9, 11-13.

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about the Tribe's failure to request a volume discount on the purchase of the same product across multiple tribal accounts.³⁵ According to Enforcement, Vungarala then fabricated an explanation, and told the Firm that the purchases could not be combined because this would cause the investment funds to be comingled and would violate the terms of various "trust" agreements. The Firm did not bother to obtain the "trust" agreements to verify Vungarala's statement.³⁶ If the Firm had asked for the "trust" agreements it would have learned that there were no such agreements.³⁷

With respect to this alleged supervisory violation, Respondents failed to establish that there is no genuine dispute of material fact. They are not entitled to summary disposition.

In sum, and with respect to all four causes of action, Respondents failed to meet the standard for summary disposition. For that reason, their Motion is **DENIED**.

SO ORDERED.

Lucinda O. McConathy
Hearing Officer

Dated: February 7, 2017

³⁵ CX-21.

³⁶ Opposition, at 12; CX-36.

³⁷ Opposition, at 12; CX-1.