UNITED STATES SECURITIES AND EXCHANGE COMMISSION

In the matter of the application of GOPI KRISHNA VUNGARALA For Review of Disciplinary Action Taken by FINRA.	SEC ADMINISTRATIVE PROCEEDING FILE No. 3-18881

REPLY BRIEF OF APPELLANT GOPI KRISHNA VUNGARALA

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Dated: April 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Introduction

FINRA erroneously defends the result below on the basis that Vungarala's failure to disclose his commissions materially altered the total mix of information available to the Tribe. Department of Enforcement ("DOE"), however, was obligated to probe the Tribe's conduct thoroughly to determine what exactly the total mix of information available to the Tribe was. This it failed to do.

We now have incontrovertible proof that Angela Osterman and Dustin Davis, two of DOE's three witnesses against Vungarala below, lied under oath when they said they never knew the Tribe was paying commissions on its purchases of REITs/BDCs. Suppression of this proof violates the Brady doctrine[1]; the document itself mandates reversal of the determinations below. This document's discovery underscores the inadequacy of DOE's initial investigation and prosecution.

Moreover, in its zeal to defend the botched decisions below, DOE argues that the disclosures in written prospectuses (which FINRA concedes were adequate) can be contradicted by a registered representative's ***silence***. That proposition – which would undermine the very reason for prospectuses in the first place and would allow aggrieved investors to challenge every failed investment without proof of having been misled -- cannot be allowed to stand and is a separate basis for reversal of the determinations below.

Finally, as if recognizing the flaw in its argument about prospectuses, FINRA has also seen fit to engraft a new rule upon all registered representatives: that, despite the disclosures in a prospectus, an individual representative must affirmatively disclose the amount of his/her actual commissions to the client. This is neither the law nor the practice of the thousands of representatives currently at work in this country.

For these reasons, the decisions below must be overturned.

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[1] Brady v. Maryland, 373 U.S. 83 (1963). FINRA applies Rule 9251(b)(3) consistent with Brady. In a FINRA disciplinary proceeding, "material evidence" is evidence that might be considered favorable to the respondent's case, which, if suppressed, would deprive the respondent of a fair hearing. See OHO Order 12-04 (2010023367001) (8/30/12).

Preliminary Statement

Respondent-Appellant Gopi Krishna Vungarala respectfully submits this reply memorandum in support of his appeal from the decision of FINRA's National Adjudicatory Council's decision, dated October 2, 2018 ("NAC Decision") affirming the Extended Panel Decision of FINRA's Office of Hearing Officers, dated October 25, 2017 ("OHO Decision"; jointly, the "Decisions").

Vungarala has made three arguments in support of his appeal. First, the proceeding below failed to comport with traditional notions of fair play and substantial justice. There was no way for DOE, OHO or NAC to probe thoroughly the total mix of information available to the Tribe, because the Tribe refused to produce it. The Tribe controlled what information it made available. Exculpatory evidence, such as the memorandum identified above, was never provided. FINRA's invitation to rubberstamp the proceedings below should therefore be rejected. See Point I, infra.

Second, OHO and NAC failed to consider the ***total mix of information*** known by the Tribe. Both panels failed to account for the institutional knowledge of the Tribe, instead relying upon the testimony of the lower level employees offered by the Tribe. This error was critical, in that the Panels ignored the knowledge of those involved in crafting the advertised job description for Vungarala's position and the requirements for that position, which had to have originated with someone with a fundamental understanding of the brokerage industry.

There is no dispute that the Tribe required Vungarala to be a registered representative as not only a prerequisite to his job, but to also *maintain his broker license in active status*, throughout his employment. The Tribe, it is thus reasonable to expect, ***possessed knowledge*** about registered representatives and broker licenses. This knowledge would have included a basic understanding of how the broker-dealer/registered representative arrangement operates, the very foundation of which is transaction-based compensation. By contrast, it is unreasonable to conclude the Tribe required this license of Vungarala yet had no knowledge as

to why they were doing so. The Tribe's institutional knowledge cannot be ignored. It alters the ***total mix*** of information and is in fact material here.[2]

In addition to that general knowledge, the offering documents regarding the investments provide specific knowledge. These prospectuses, prepared by battalions of securities lawyers employed by unrelated third party issuers, detail the commission structure and the availability of volume discounts on those commissions. There can be no deception when the operative facts have been provided to the investor, but particularly so, where that investor comes to the transaction with an understanding of what a broker-dealer and registered representative are, and how this commission-based business works. There can be no reasonable debate that the Tribe at an institutionalized level knew that information. ***The particular witnesses who were selected to appear at hearing did not represent the total mix of information known to the Tribe.*** OHO and NAC ignored the total mix of information because it made a finding of fraud impossible in this case.

DOE confused OHO. While DOE originally alleged the Tribe did not know it was paying commissions to PKS, that claim evaporated at hearing.[3] By email, dated October 27, 2014, to the Investment Committee and Tribal Council members, Osterman confirmed that the Tribe "would be paying this commission to any broker dealer as long as we are buying these Alternative Investments."[4] Weeks later – after the Investment Committee and Tribal Council knew the Tribe was paying sales commissions -- the Tribe purchased another $4.12 Million of these alternative investments, *through six separate transactions.* By continuing

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[2] FINRA asks the SEC similarly dismiss this critical evidence and, like OHO and NAC, ignore both the job description and the institutionalized knowledge to be attributed to the Tribe as a result, because "the Tribe did not fully understand the significance of these registrations, or why these registrations were necessary to perform the job." FINRA Br. at 4. The Tribe ***created the job description.*** At best, the only evidence in the record is that the particular witnesses questioned did not understand. But that does not warrant the broader conclusion that the Tribe did not know this information when it crafted the job description or required these licenses, or signed the personal services contract requiring that licenses be maintained throughout Vungarala's employment. That strains credulity. RXV 3, para. 7A; RXV 4, para. 7A; RXV 2 ("Series 7 and 63 certifications required.")

[3] RXV 1, Paras. 1, 4, 26, 36, 37, 82, 85, 87 (alleging Tribe did not know PKS was receiving commissions); Para. 36 (Vungarala controlled paper flow).

[4] RXV 43.

to make these investments while knowing it was paying a commission, the Tribe clearly demonstrated that the commissions were not material. The Tribe wanted access to these products.

This information was well-known to DOE prior to filing its complaint. Nonetheless, DOE argued in its opening statement that the Tribe did not know it was paying commissions to PKS.[5] This was not the case. At best, it is careless; at worst, it shows a deplorable lack of commitment to actual facts. The dirt kicked up by these allegations deprived Vungarala of a fair hearing.

If not confused, then OHO and NAC improperly disregarded this timeline and how the Tribe behaved. We submit, had they not ignored these facts as they did, a finding of fraud would not have been possible under the facts of this case. There can be no showing of scienter, or a conclusion that the Tribe found this information material, when it made additional subsequent purchases armed with this knowledge.

More importantly, DOE asserted its position despite evidence that complete prospectuses were in fact delivered to the Tribe.[6] Yet Vungarala was accused of keeping "tight control over the information flow to and from the Tribe."[7] This is specious. The two analysts who worked in the Treasury Department accompanied Vungarala on due diligence trips offered by the REITS/BDCs.[8] **This is direct access.** Walton, one of the REIT offerors, hosted a luncheon for Investment Committee and Tribal Council members.[9] **This too is direct access.** DOE argued Vungarala intercepted communications from the REIT/BDCs so he could perpetuate his fraud.[10] In fact, those communications were addressed to the Tribe's Chief and Sub-Chief, and emails were delivered to an account within the Treasury Department, readily accessible to all Treasury employees, including Vungarala's supervisor, Osterman.[11] **That is direct access.**

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[5] Tr. 22:24-23:6
[6] Tr.680:16-681:22.
[7] Tr.26:2-11.
[8] RXV 39.
[9] RXV 38.
[10] Id.
[11] Rather than being deprived of access, as DOE claimed, Osterman elected not to open the emails. Tr.1378:9-22.

PKS's Donald Guider made multiple efforts to communicate directly with the Tribe's Chiefs and Sub-Chiefs. He wanted to provide the Tribe with a direct path of communication to its broker-dealer without having to go through Vungarala, should they wish to do so.[12] **This is direct access.** On April 22, 2013, less than two years after the Tribe began investing through PKS, PKS sent Lisa Evans, its Chief Compliance Officer, and Guider, a regional supervisor, to visit the Tribe in person. Well outside the bounds of any obligation PKS has to a customer, PKS sought to verify the Tribe's internal due diligence process that was in place for the investments at issue and to confirm the Tribe understood what it was purchasing.[13] **This is direct access.**

Perhaps the most notable access, however, was given to the Tribe's in-house legal department. As part of the Tribe's internal review of the investments, each prospectus was reviewed by Legal. In 2013, Osterman described the Tribe's due diligence process to PKS' Evans and Guider, including Legal's review of not just the prospectuses, but the subscription agreements and the due diligence performed. There is no evidence in the record that Legal limited its review in any way.[14] To the contrary, as Osterman told PKS, Legal comprehensively reviewed those materials, and PKS and Vungarala were well-justified in believing Legal's review was robust.[15] Legal's review of investment disclosures and due diligence before making the investment is the ***ultimate access to information.*** It is undisputed that Legal reviewed *every single investment* prior to an investment being made by the Tribe's trusts.

NAC summarily concluded, "[t]he Legal Department would review the prospectus for a proposed REIT or BDC, and would occasionally comment on certain aspects of a proposed investment. *The record, however, contains no evidence that the Tribe's Legal Department reviewed the prospectuses with regard to whether Vungarala*

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[12] RXV 46, 47 and 50.

[13] RXV 48, 49.

[14] FINRA's reliance upon RP 1142 (fn. 7 of its brief) is both improper and probative. RP 1142 is an affidavit of the Tribe's General Counsel Sean Reed in opposition to Vungarala's pretrial motion to dismiss. At the hearing, DOE attempted to get the affidavit admitted into evidence as CX-83; that effort was rejected. By citing it in its brief, DOE is improperly referring to excluded evidence. At the same time, however, DOE's reliance on Reed's affidavit underscores our very argument that Legal had testimonial information relevant to this case that was never disclosed.

[15] Id.

would earn a commission on any purchase, or the Tribe's eligibility to receive volume discounts." (NAC Decision, p. 9, par. 3). The record, however, contains precisely that. Legal was charged with reviewing not just the prospectus, but the accompanying due diligence and the subscription agreement. These materials contain ample disclosures related to commissions, including one on the face of the subscription agreements themselves, describing "net of commissions" purchases.[16]

According to Osterman, Legal was assessing generally whether any particular investment it reviewed was appropriate for the Tribe.[17] There is no contrary evidence on this record. No member of the Tribe's legal department testified. The existing evidence, however, supports the conclusion that Legal was conducting a deep review, and there is no evidence to support NAC's conclusion to the contrary.

NAC continues, "A memorandum reflecting the Legal Department's opposition would accompany the material sent to the Tribal Council for its final approval of the recommendation."[18] (NAC Decision, p. 9, par. 3.) As we have now seen, these memoranda by Legal span twenty or more pages.

To salvage their case, DOE contends that Vungarala affirmatively made oral misrepresentations at multiple meetings of the Tribe's Investment Committee, that he was not receiving commissions, which contradicted the prospectuses and substantially altered the Tribe's total mix of information. This is not true. There are no affirmative misrepresentations ascribed to him anywhere in the record. The sole evidence that Vungarala failed to state affirmatively that he was receiving commissions is captured in a single ambiguous sentence contained in flawed meeting minutes[19], dating back to 2011. This is the documentary evidence relied upon by DOE.

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[16] RXV 20-25, 31.

[17] RXV 48.

[18] While we cannot describe Legal's memoranda, we have now seen fully redacted copies of memoranda spanning more than twenty pages. It is thus unreasonable to make any assumption as to what is, or is not, in those memoranda. The point remains that NAC has drawn a conclusion, ***without any evidence*** in the record at all to support that conclusion.

[19] Osterman and Davis contradicted each other by their testimony. Importantly, there is no dispute the meeting minutes were never circulated or approved for accuracy (such as by vote at subsequent meetings). Further, pressed, Osterman conceded inaccuracies in the minutes. TR 506:17-509:4; 559:7-8; 560-1. NAC, however, embraced these minutes as accurate. To find the minutes unreliable, as NAC should have done, would have required Vungarala be provided the opportunity for a fair hearing.

Acknowledging this point sub silentio, FINRA argues that Vungarala had an affirmative duty to disclose that he would earn commissions.[20] FINRA ignores the implication of its assertion: if that indeed were the standard, not a registered representative is in compliance. No prospectus identifies the person to whom commissions would be paid by name. No securities law or regulation requires that the investor be so notified. That is simply not the required standard of conduct. FINRA's argument is just lawyerly gloss and should not be approved. The legal standard for securities fraud claims cannot be satisfied on the facts of this case. See Point II, infra.

Moreover, Osterman testified that she did not believe commissions were being paid at all because the investment confirmation statements did not reflect any commissions. This too was part of the total mix of information known to the Tribe, was not attributable to Vungarala, was material to the accusations against Vungarala, but was completely ignored by NAC.

The proceedings below were not fair.

THE LOPSIDED PROCEEDINGS BELOW

Vungarala was one part of a highly organized financial and investment system. The Tribe is a multibillion dollar enterprise, with wealth fueled by multiple casino's revenues. It employs an extensive system of checks and balances in its finances and its investment practices. DOE ignores those checks and balances because they present ***what should have been an insurmountable hurdle to proving fraud.***

DOE disregards the documentary evidence of the Tribe's sophistication and its investment review process. DOE relied instead on what was – at best -- the *personal knowledge* of three junior Tribal representatives. This included Osterman, who had her own grievances against Vungarala, later suing him for the Tribe firing her. She had palpable motivation to build the case that Vungarala controlled everything investment-related and kept the prospectuses and other information away from the Tribe.

[20] FINRA Br. at 37 "The issue germane to this case is whether the Tribe knew that Vungarala was personally receiving commissions on the Tribe's investments (and not whether the products carried sales commissions)."

DOE did not call the Chief Pego, who ran the Tribe's multibillion dollar empire; nor did it call the Tribe's Chief Financial Officer, Michael Johnson, who chaired the Tribe's Investment Committee; nor did it call Sean Reed, the Tribe's legal counsel, whose department conducted independent reviews of the investments and their offering documents (and upon whose affidavit DOE now seeks to rely); nor did it call Shelly Bailey, the Tribe's Treasurer. These people formed the backbone of the Tribe's investment review process, yet not one of them took the stand. This destroys any notion of fairness.

After being fed incomplete information by DOE, OHO and NAC made mistakes too. The Panels confused Vungarala's dual role as both an employee of the Tribe and as a registered representative of PKS, and blurred the legal standards applicable to Vungarala's conduct as a registered representative, with those arising under employment law, and concluded that he violated his employment agreement by receiving commissions. See, e.g., NAC Decision, fn.45. Whether Vungarala violated his employment contract is not a matter for FINRA discipline. Its mandate does not include policing the employment relations of sovereign nations. Vungarala's employment contract[21] is a creature of and subject to Tribal law, as to which FINRA cannot reach, any more than it could punish a clerk in the British government. Nor does a breach of an employment contract rise to the level of securities fraud. The panels' failure to recognize this distinction or to articulate the appropriate legal standard warped the proceeding below.

FINRA has perpetuated this misunderstanding in its brief. Its framing of the issue in this case – whether the Tribe knew that Vungarala was personally receiving commissions on the Tribe's investments – has nothing to do with Vungarala's performance as a registered representative and everything to do with his employment relationship with the Tribe. The only legal basis on which Vungarala's receipt of commissions could be wrongful is in breach of his duty of loyalty as an employee of the Tribe. That breach, however, is not a securities law violation.

[21] RXV 4.

ARGUMENT

I. THE PROCEEDING BELOW WAS FUNDAMENTALLY UNFAIR

DOE's wide-ranging prosecutorial power proved impotent in the face of the Tribe's fierce privacy concerns. DOE has admitted that it built its case here only upon "what the Tribe was willing to provide and forgo what it was unwilling to provide."[22] It is fundamental that *typically*, DOE's investigation of customer-related cases as this include a review of the Tribe's own documents and witnesses. In FINRA proceedings, the mandate to "know your customer" means that the investor must be examined to determine, e.g., whether an investment was appropriate given the customer's investor profile, risk tolerance, etc. *Typically*, documents are generated by the ordinary course of dealing between a broker dealer and its customer. But the Tribe steadfastly refused to share information, or even communicate in a customary manner, making this customer relationship *anything but typical.* Here, the Tribe's stranglehold on information rendered DOE's prosecution fundamentally flawed, based on only limited information that supported DOE's allegations, but not the total mix of information available to the Tribe.

Had DOE assessed the *total mix* of information, DOE would have been stunned by the Tribe's claims that it did not understand the $220 million in alternative investments Vungarala made on its behalf, while simultaneously holding itself out as a sophisticated investor. The Tribe's incredible assertion should have prompted a searching review by DOE of the Tribe's documents, its internal review processes, and its witnesses. That did not happen. DOE's access to the Tribe's documents was unusually narrow, limited and selective, preventing it from uncovering all germane information -- including exculpatory evidence – such that it could never assess the total mix of information available to the Tribe. DOE's investigation was incomplete.

In contrast, in the Tribe's contested customer arbitration against Vungarala and PKS, the Tribe has been compelled to provide extensive document discovery -- over 130,000 pages – as recently as three weeks

[22] DOE Memo. In Opp. To Rule 9346 Motion at 7.

ago.[23] Further, it has identified over seventy Tribe members and employees involved in its internal investment review process. In this light, FINRA's assertion on appeal that DOE did enough investigating cannot be taken seriously.

The sheer volume of the Tribe's discovery production amply supports Vungarala's central claim regarding the depth and breadth of the Tribe's internal investment review process. More damningly, those documents include an April 2013 memorandum authored by Angela Osterman and addressed to the Tribe's Investment Committee (including Dustin Davis) discussing the commissions the Tribe had been paying on its REIT/BDC investments. We are barred from discussing that document further. [24]

This blockbuster document simultaneously corroborates Vungarala's testimony and contradicts Osterman's and Davis's, who swore they did not know about commissions. That is, two of the Tribe's three witnesses ***have now been caught in a lie*** regarding not a collateral matter but the central premise of DOE's prosecution. By itself, this document compels reversal of the decisions below.

We pointed out the limited nature of DOE's investigation to every level of FINRA; it ignored us. We attempted to expand the record on appeal; DOE opposed that motion and NAC agreed. We attempted to persuade FINRA arbitrators to allow us to use discovery from the Tribe's customer arbitration on this appeal; the arbitrators refused.[25]

On this appeal, we again invited FINRA to explain to this Panel why the incomplete nature of the investigation below should be deemed appropriate. In response, FINRA makes light of the missing Tribe documents and witnesses. Instead, FINRA parrots the Decisions below, faulting Vungarala's credibility while

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[23] Saginaw Chippewa Indian Tribe v. Purshe Kaplan Sterling Investments and Gopi Krishna Vungarala, FINRA Arbitration Case ID 17-00885.

[24] A confidentiality order in that proceeding, entered over Vungarala's and PKS's strenuous objection, prevents us from sharing the actual document with the Panel. "Neither the Confidential Documents nor their contents shall be shown or imparted to any other person." Unless relief is granted permitting disclosure of this and other documents now discovered that undermine the factual leaps taken by NAC and OHO, this case will result in a miscarriage of justice. The very existence of the document, however, demonstrates the inadequacy of the proceeding below. At a minimum, appropriate relief would include remand with instructions to DOE to conduct further discovery of the Tribe, should it continue this prosecution.

[25] DOE assisted the Tribe to obtain copies of the full transcripts and exhibits of the confidential OHO hearing, providing complete insight for the Tribe.

dismissing the documentary evidence which corroborated Vungarala's testimony and demonstrated the Tribe's own sophistication and internal investment review process.

But assessing Vungarala's credibility first is putting the cart before the horse. DOE was obligated to assess the total mix of information available to the Tribe in reaching its investment decisions. Among other things, Vungarala attempted to show that the Tribe was a sophisticated investor, that it had a detailed investment review process, and that its lawyers and other Tribal employees reviewed the prospectuses and trade confirmations on the Tribe's behalf. . All of this information lay within the Tribe's custody and control; none was produced. DOE's limited investigation meant that Vungarala's testimony regarding these matters stood on its own, when it could have been supported by documents in the Tribe's possession.

Moreover, Osterman's 2013 memorandum not only corroborates Vungarala's testimony, it contradicts hers and Davis's. This proves that the Tribe's carefully calibrated cooperation with DOE hamstrung the investigation. Specifically, the Tribe prevented DOE from accessing those supporting documents, including information that would have been exculpatory for Vungarala, such as Osterman's 2013 memorandum. This invalidates the prosecution below.

DOE's choice of Tribe witnesses was constrained to three junior employees, none of whom established the licensing requirements for Vungarala. Among the witnesses DOE failed to call is the Tribe's CFO Michael Johnson, a knowledgeable and experienced financial services veteran.[26] NAC treated the Tribe as a hapless innocent navigating the nefarious shoals of the securities business naively led by evil Vungarala into making over 200 alternative investments totaling $220 million in REITs/BDCs over a period of years. In that light, Johnson's testimony regarding the Tribe's decision-making is not just worth hearing, but critical, and his absence warranted a missing witness charge.[27]

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[26] See RXV 7; RXV 15.

[27] DOE buries its half-hearted response to this argument in footnote 29. DOE complains that it was powerless to compel the attendance of knowledgeable Tribal witnesses such as Johnson. That is precisely the point: DOE could not present a complete case given the secrecy of this atypical client for a fair hearing.

Johnson's absence is but one example of the Tribe controlling the flow of information; the Tribe's refusal to produce all minutes of its Investment Committee meetings is another.[28] Clearly, the minutes of the Investment Committee meetings are critical to an evenhanded investigation into the propriety of any one investment. Yet DOE faltered in the face of the Tribe's refusal to produce those records, meekly conceding it could not obtain information from the Tribe other than what the Tribe volunteered. DOE's appellate brief glosses over this gaping hole in DOE's investigation. The Tribe hid its own behavior here and exactly how much it knew, and DOE let it; now DOE asks this Panel to ratify those choices.

It is not as if DOE's problem with the Tribe's cooperation was novel. A Michigan state court judge refused to let the Tribe get away with similar conduct in his courtroom ruling that Tribe members could not testify at hearing if the Tribe refused to provide pre-trial discovery. Osterman v. Vungarala, Case No. 16-13004-NZ (Isabella Co., Mich. 6/23/17).[29] Similar thinking here would have removed the Tribe's stranglehold on information: ***either testify or we will not prosecute.***

The Tribe not only concealed information and witnesses to obscure the total mix of information available to it, but affirmatively misrepresented information it made available to Vungarala. Its trusts were allegedly nothing more than bank accounts earmarked for certain spending. Despite an investment policy statement requiring Vungarala to maintain the "organizational structure" of the Tribe's investments, without trusts, this too was a farce. Had Vungarala been provided with the truthful and accurate information by the Tribe, rather than being misled by the apparently fictitious investment policy statement, Vungarala would have had the ability to apply volume discounts in the correct manner, rather than the manner applicable to calculating volume discounts for trusts.[30] NAC ignored all evidence of the Tribe's misrepresentations in this regard.

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[28] See TR 1577:9-1578:2; see also CX17 (produced only in redacted form).
[29] See Br. at 15 and cases cited therein.
[30] CX-89

This Panel thus cannot assure itself that DOE investigated this matter fully or that substantial justice was afforded Vungarala below. The proceedings were impermissibly lopsided, unfair, and should not be allowed to stand.

II. FINRA CANNOT PROVE SECURITIES FRAUD

The legal standard for securities fraud is well-known – an omission is material if it would have altered the total mix of information available to the investor. FINRA contends that, even if the prospectuses disclose the payment of commissions, the recipient of those commissions must be identified. This is not the law. Thus, even if Vungarala failed to announce to the Tribe that he was receiving a portion of the commissions it paid, that fact is immaterial in view of the total mix of information given to the Tribe, including that it knew enough to require Vungarala to have and maintain as active his Series 7 and 63, and therefore, cannot establish securities fraud. Similarly, there has been no showing that Vungarala acted with scienter. The inference of scienter is amply refuted by the fact that Vungarala disclosed, or made no effort to hide, the truth. That is what makes the prospectuses so critical here, and the institutionalized knowledge of the Tribe, not just the knowledge of the three individuals who appeared.

In the securities field, prospectuses occupy a unique place. A fact disclosed in a prospectus constitutes notice to the world and provides immunization from claims of fraud or misrepresentation. The prospectuses here, among other things, detail the commissions to be paid as well as the volume discounts available for larger purchases. The Tribe received each prospectus, and Legal reviewed each one.[31]

In its complaint, DOE originally claimed that Vungarala fraudulently induced the Tribe to invest $190 million in non-traded REITs and BDCs.[32] DOE also alleged that Vungarala hid the fact that he and PKS

[31] NAC Decision at 6 (volume discounts fully disclosed in prospectuses).
[32] RXV 1, para. 1.

would earn commissions on the Tribe's investments.[33] DOE also alleged that Vungarala had trade confirmations and account statements routed to him to avoid the scrutiny of others.[34]

In opening, DOE abandoned the fraudulent inducement claim. Nor did counsel claim the Tribe did not know PKS was earning commissions, nor did he claim Vungarala hid trade confirmations and account statements from others at the Tribe. Instead, counsel claimed that Vungarala "lied about the commissions he had been receiving; and, second, he failed to inform the tribe that it was entitled to millions of dollars and discounts for its purchases of nontraded REITS and BDCs."[35]

FINRA concedes that the prospectuses given to the Tribe disclosed both commissions and volume discounts. FINRA nevertheless dismisses the prospectuses' importance. FINRA argues instead that Vungarala had an affirmative duty to disclose his commissions. See, e.g., FINRA Br. at 26; NAC Decision at 33. In one fell swoop, then, FINRA rejects the significance of the over 200 prospectuses. This, however, is not the law applicable to registered representatives.[36] DOE's failure to address the prospectuses was the fundamental flaw below; FINRA's casual dismissal of the prospectuses is fatal to its argument on appeal.

[33] RXV 1, paras. 3, 4.
[34] RXV 1, para. 36.
[35] Tr. 16:22–17:2
[36] It may be an issue under Tribal employment law.

A. THE PROSPECTUSES DISCLOSED BOTH COMMISSIONS AND AVAILABLE VOLUME DISCOUNTS

FINRA concedes that the prospectuses and subscription agreements describe both the payment of sales commissions and the availability of volume discounts on those commissions.[37] Each subscription agreement asks prominently on the first page whether the investment was made "Net of Commissions."[38] Even the junior-most witness testified she knew these were commission-based products.[39]

The Tribe made over 200 of these alternative investments. The Tribe employed a detailed due diligence process to vet each REIT/BDC purchase before it was made.[40] This included gathering each prospectus and material information related to the investments. Treasury conducted independent research of the REITs, including a review of the prospectuses and other relevant documents and information. The Investment Committee reviewed Treasury's written recommendation. The Investment Committee -- including CFO Michael Johnson -- then recommended the proposed REIT investment.

Meanwhile, Legal reviewed the prospectuses and subscription documents.[41] Legal reviewed *every prospectus or offering document* and prepared a written memorandum for each.[42] The Tribe's Chief and Sub-Chief never authorized an investment without Legal's written guidance.[43]

Once approved by both the Investment Committee and Legal, the proposed investment was presented to the Tribal Council. If approved, Treasury prepared investment documents for signature. Key provisions of each were then initialed by both the Chief and Sub-Chief, followed by their execution.[44] In fact, the Tribe

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[37] FINRA Br. at 38. Although FINRA discusses commissions and volume discounts separately, volume discounts exist only in connection with commissions. Any disclosure of volume discounts – such as the discussion between Vungarala and Burger whether the Tribe should receive volume discounts described in fn. 7 infra – by definition demonstrates an understanding of commissions themselves. After all, the volume discount is ON sales commissions.

[38] Volume discounts were not only mentioned in the prospectuses and subscription agreements. Both Burger and Osterman admitted Vungarala discussed volume discounts with the Tribe's investment review team. TR 505:5-14.

[39] TR 729:13.

[40] RXV 16.

[41] Id.; RXV 18; RXV 23; TR 1211:1-1212:7.

[42] RXV 23; RXV 18. See also RXV 16; TR 581:8-10.

[43] See RXV 85.

[44] See RXV 20.

was so confident in its internal review process that on multiple occasions it purchased REITs of which PKS did not approve.[45]

Sean Reed, the Tribe's general counsel and another missing witness, admitted Vungarala had "discussed volume discounts at Investment Committee Meetings, stating the Tribe was eligible per trust basis and listed the discounts in the REIT prospectus during presentations of new REITs."[46] Reed never corrected Vungarala or modified the Tribe's approach to the volume discounts. Reed's conduct corroborated Vungarala's view that each trust was treated as a separate entity. This reassurance by counsel belies any finding that Vungarala intended to deceive the Tribe regarding volume discounts.

Similarly, the Tribe certified to the world, on over 200 separate occasions, that it met the definition of a sophisticated investor.[47] Vungarala was entitled to rely upon the Tribe's representations as to its sophistication. Certainly, FINRA cannot be heard to urge now that those representations were meaningless.

In the face of this wealth of information, FINRA crafts this argument: the Tribe, a sophisticated institutional investor with assets in the billions, its Chief Financial Officer and its General Counsel, together with the legions of employees under their command, would not have made these investments had it known Vungarala was earning commissions on them.[48] Even in the absence of the critical Tribal witnesses, this theory does not hold water.[49]

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[45] RXV 57, 59, 60, and 61.
[46] RXV 72 at 6.
[47] Id.; see also RXV 20 at 15 and RXV 27 at 16.
[48] The Tribe monitored the REITs/BDCs after the investments were made. TR 568:1-22.
[49] U.S. v. Mittelstaedt, 31 F.3d 1208, 1216 (2d Cir.1994); see also DOE v. Niekras, No. 2013037401001 (10/2/17) at 15 (DOE failed to prove misrepresentation by not calling clients affected by alleged misrepresentation). FINRA's casual treatment of Mittelstaedt (FINRA Br. at 42, n.29) is designed to hide its inability to distinguish away Niekras.

B. THE ALLEGED OMISSION CANNOT BE DEEMED MATERIAL

FINRA repeats the flawed premise of the decisions below that Vungarala committed securities fraud by not disclosing he was earning commissions. NAC Decision at 33. This is not the law.

"No SEC rule requires the registered representatives who deal with the customers to disclose their own compensation, whether pegged to a particular trade or otherwise." See U.S. v. Skelly, 442 F.3d 94, 97 (2d Cir. 2006) (citation omitted). Only "[w]here a broker-dealer has a self-interest (*other than the regular expectation of a commission*) in serving the issuer that could influence its recommendation, [is it] material and should be disclosed." In re Kevin D. Kunz, 55 S.E.C. 551, 565 (2002), aff'd, 64 Fed. Appx. 659 (10th Cir. 2003). FINRA failed to address these cases at all.

Recognizing that the materiality of a given omission is whether it substantially altered the total mix of information available to the investor, FINRA argues that "Vungarala's affirmative, verbal misrepresentations to Tribal members" trumped the prospectuses. In doing so, it cites SEC v. Morgan Keegan & Co., 678 F. 3d 1233 (11th Cir. 2012), and In re Larry Ira Klein, 52 S.E.C. 1030 (1996). FINRA Br. at 38-39. Neither case is strong enough to support FINRA's argument.

Morgan Keegan arose in context of a scandal involving auction rate securities. Morgan Keegan brokers had orally misrepresented the securities' liquidity risk to several customers. Morgan Keegan defended by pointing to its written disclosures regarding illiquidity. The Court, however, noted that those written disclosures had been only haphazardly distributed to customers. In concluding that summary judgment for Morgan Keegan was inappropriate, the Court stated the unremarkable proposition that "whether written disclosures should trump oral misrepresentations is highly fact-specific and therefore is not amenable to bright-line rules." Morgan Keegan, supra, at 1252. The Court specifically noted that Morgan Keegan failed to prove it provided written disclosures to these investors. The case is simply inapplicable here.

FINRA's reliance on Klein is equally inapposite and even more misplaced. Klein is a garden-variety suitability proceeding involving one unscrupulous representative and three elderly clients on fixed incomes.

63 S.E.C. Docket 52, 1996 WL 597776 (Oct. 17, 1996). The SEC found that Klein failed to inform those customers about the risks of his recommended investments. Id. Klein provided the prospectus for a high-yield bond fund to an eighty year-old retired teacher and conservative fixed income investor but told her orally that he wouldn't recommend the investment unless the fund was safe. In so doing, the panel held that Klein's oral statement contradicting the prospectus failed to convey the risks to this unsophisticated investor. Id. Klein thus sheds no light on this situation.

Moreover, FINRA has mischaracterized the evidence. The most that can be said of Vungarala's conduct is a sin of omission: that Vungarala's silence during a June 2011 Investment Committee meeting was improper. FINRA has now transformed that evidence on appeal into "Vungarala's affirmative, verbal misrepresentations to Tribal members." FINRA Br. at 38. This is not what the proof shows, however. There are no affirmative misrepresentations ascribed to him anywhere in the record.

FINRA's evidence is a single ambiguous sentence contained in imperfect notes from that meeting. Those notes are unreliable -- even the Tribe's witnesses disagreed as to their meaning. Br. at 27-30. The single sentence is insufficient proof to support FINRA's argument that Vungarala's silence (not misrepresentation) was so powerful as to overcome the language of 200 prospectuses and 130,000 pages of documents delivered over a period of years to the seventy-plus people involved in the Tribe's investment process.

Further, the fact that Vungarala earned commissions proved to be immaterial to the Tribe, as it made several more REIT investments after it allegedly first became aware of those commissions. FINRA admits that commissions were disclosed on October 27, 2014. FINRA Br. at 15. The 2013 Osterman memorandum demonstrates that the Tribe actually knew it was paying commissions years earlier. Armed with this

"damning" information, the Tribe invested another $4.12 Million in REITS in November 2014, and more than $134 Million after the April 20123 Osterman memorandum.[50] Commissions were clearly not material.

Besides, although NAC faulted Vungarala for earning commissions while a Tribe employee, it ignored the significance of the Tribe's contractual requirement to compensate Vungarala if he did not earn sufficient commissions for PKS. As PKS's employee, Vungarala had to meet certain sales targets or pay a penalty. The Tribe agreed to reimburse him should he not meet those targets. Clearly, the parties contemplated that Vungarala might or might not earn commissions.

Until the first REIT purchase, the Tribe regularly reimbursed Vungarala, but ceased immediately once Vungarala started earning commissions on the REIT investments.[51] This reimbursement policy – crafted well-before the first REIT purchase -- proves the parties contemplated that Vungarala might earn commissions.[52]

Similar blinders led DOE to conclude that it was "inconceivable" that an investor like the Tribe would not take advantage of volume discounts.[53] Its lead investigator, however, admitted the Tribe may have had sufficient privacy concerns that they would willingly forego volume discounts to maintain that privacy. Even so, she never asked why the Tribe decided not to pursue volume discounts, and she did not discuss the Tribe's privacy concerns during her investigation. Each subscription agreement contained a proviso whereby the Tribe held itself out as sophisticated and expressly recited that, for privacy reasons, the Tribe chose not to disclose their holdings.[54] DOE's other investigator testified that ***he could not obtain a copy of the Tribe's Investment Policy Statement***: the Tribe "had privacy concerns from their perspective for not providing certain documents."[55]

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[50] RXV 1. Even after the disclosures of December 2014 (which FINRA claims were explosive), the Tribe continued to negotiate with Vungarala for his continued employment. That relationship continued into 2015. TR 1254:17-1256:6.
[51] RXV 4; RXV10; RXV 11;; TR 474:12-475:3; RXV 12; TR 452:3-453:20.
[52] Vungarala maintains his commission based compensation structure was discussed with Osterman around May 2010, when PKS requested a 407 letter from Schwab. CX-11.
[53] TR 1015:11-23.
[54] TR 1018:18 and 994:3-22; TR 954:3-5.TR 899:11-15; TR 903:18-21; TR 953:2-9; TR 1003:13-24; see CX 50.
[55] TR 783:11-21; see also TR 787:7-21.

NAC barely acknowledged the Tribe's privacy concerns. Properly considered, however, those concerns corroborate not only Vungarala's testimony but also his behavior.

C. SCIENTER CANNOT BE SHOWN HERE

At worst, Vungarala was negligent in not volunteering that he received commissions from the Tribe's investments in REITs/BDCs. Br. at 34. In the securities field, regulations establish the appropriate standard of care. There is, however, no securities regulation requiring a registered representative to disclose his commissions. Vungarala's conduct, then, cannot be said to be highly unreasonable.

As for volume discounts, Vungarala had a good faith basis for segregating the Tribe's investments by trusts. That good faith basis bars a finding of fraud.[56] Scienter cannot be shown where respondent did not conceal his actions and possessed a good faith but incorrect belief in the propriety of his conduct. See Dep't of Market Reg. vs. Singh, Disc. Proc. No. 20100226911-02 (Aug. 24, 2016). [57]

The availability of volume discounts on commissions was transparent, and discussed by the Tribe on multiple occasions. NAC concedes that the prospectuses describe volume discounts. NAC Decision, fn. 52. Sean Reed, the Tribe's counsel, agreed. None of the individuals participating in those conversations -- all of whom were familiar with the Tribe's Investment Policy Statement's mandate to keep trust transactions separate, to observe the Tribe's organizational structure as to its investments, and to protect the Tribe's privacy – disagreed and suggested that the volume discounts should be applied differently.[58]

After delivering the prospectuses, Vungarala cannot have committed fraud where the Tribe was presented with the facts yet is willfully blind. Investors who have been provided with written materials are to be deemed to have knowledge of same, even if they did not read them. Br. at 36. FINRA nowhere addresses the cases cited in our brief.[59]

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[56] Br. at 34-36 and cases cited therein.

[57] Id.

[58] TR 505:5-14

[59] NAC erroneously rejected these cases as not applying to enforcement proceedings. NAC Decision, fn. 47. The materiality analysis, however, is the same as in private civil matters. See Morgan Keegan, supra, cited by FINRA.

III. DUE PROCESS REQUIRES THAT THE DECISION BE VACATED OR ALTERNATIVELY THAT THE PUNISHMENT BE MODIFIED

When an enforcement proceeding results in a punitive penalty, the punishment warrants constitutional review. Kokesh v. SEC, 137 S. Ct. 1635 (2017). We will not repeat the argument made in our initial brief.[60] We respectfully submit that the SEC should consider Kokesh as invalidating the punishment below.

CONCLUSION

For the foregoing reasons, Respondent Gopi Krishna Vungarala respectfully requests that the Decisions below be vacated. Alternatively, Vungarala requests this Panel reverse the imposition of a permanent bar and order of disgorgement and instead impose sanctions appropriate to this record.

Dated: April 5, 2019

Respectfully submitted,

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[60] Br. at 42-44.

CERTIFICATION REGARDING WORD COUNT

I, Sharron E. Ash, of full age certifies as follows:

1. I am an attorney with the Hamburger Law Firm, counsel to the appellant Gopi Krishna Vungarala.

2. I certify pursuant to Rule 450(d) of the Rules of Practice before the United States Secuirities and Exhange Commission that Appellant's Reply Brief, dated April 5, 2019, complies with Rule 450(c)'s limitation on the length of briefs and contains 6992 words, per the word-count feature of Microsoft Word.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to punishment.

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