UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PURSHE KAPLAN STERLING INVESTMENTS, INC., INDIVIDUALLY AND AS ASSIGNEE OF THE CLAIMS OF THE SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN AGAINST GOPI K. VUNGARALA,	)	Case No. 4:21-cv-889
Petitioner,	)	
v.	)	
GOPI K. VUNGARALA,	)	
Respondent.	)	

DECLARATION OF LEWIS S. FISCHBEIN IN SUPPORT OF THE PETITION TO CONFIRM AND CORRECT ARBITRATION AWARD

Lewis S. Fischbein, declares pursuant to 28 U.S.C. § 1746:

1. I am a member of the bar of the State of New York and my law firm, Lewis S. Fischbein, P.C., represented Petitioner Purshe Kaplan Sterling Investments, Inc. ("PKS"), Individually and as Assignee of the Claims of the Saginaw Chippewa Indian Tribe of Michigan against Gopi K. Vungarala in the Financial Industry Regulatory Authority ("FINRA") arbitration entitled *Purshe Kaplan Sterling Investments, Inc., Individually and as Assignee of the Claims of the Saginaw Chippewa Indian Tribe of Michigan Against Gopi K. Vungarala vs. Gopi K. Vungarala and Trevor S. Sutterfield*, FINRA Case No. 19- 03153 (the "Arbitration Proceeding").

2. I have knowledge of the facts set forth herein based on the record of the Arbitration Proceeding and I submit this affidavit in support of PKS's Motion to Confirm and Correct the Arbitration Award rendered in the Arbitration Proceeding (the "Arbitration Award") and served on the parties on June 8, 2021.

3. Annexed to this affidavit as Exhibits are true and correct copies of the following documents:

Exhibit A The Arbitration Award

Exhibit B PKS's Corrected Second Amended Statement of Claim

4. To my knowledge, the Arbitration Award has not previously been vacated, modified or corrected.

5. I declare under penalty of perjury that the foregoing is true and correct.

Dated: Riverdale, New York
July 26, 2021

Lewis S. Fischbein

Lewis S. Fischbein

Exhibit A

Award
FINRA Dispute Resolution Services

In the Matter of the Arbitration Between:

Claimant
Pursche Kaplan Sterling Investments, Inc., Individually and as Assignee of the Claims of Saginaw Chippewa Indian Tribe of Michigan
Against Gopi K. Vungarala

Case Number: 19-03153

vs.

Respondents
Gopi K. Vungarala and Trevor S. Sutterfield

Hearing Site: Detroit, Michigan

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

Nature of the Dispute: Member vs. Associated Persons

REPRESENTATION OF PARTIES

For Claimant Pursche Kaplan Sterling Investments, Inc., Individually ("PKS Investments") and as Assignee of the Claims of Saginaw Chippewa Indian Tribe of Michigan Against Gopi K. Vungarala ("Assignee PKS") (collectively "PKS"): Lewis S. Fischbein, Esq., Lewis S. Fischbein, P.C., Riverdale, New York and Devin W. Bone, Esq. Paesano Akkashian Apkarian, PC, Bloomfield Hills, Michigan.

Respondent Trevor S. Sutterfield ("Sutterfield") did not appear.

Respondent Gopi K. Vungarala ("Vungarala") did not appear.

CASE INFORMATION

Statement of Claim filed on or about: December 9, 2019.
Amended Statement of Claim filed on or about: April 16, 2020.
Corrected Amended Statement of Claim filed on or about: April 23, 2020.
PKS signed the Submission Agreement: October 18, 2019.

Sutterfield did not file a Statement of Answer or sign the Submission Agreement.

Vungarala did not file a Statement of Answer or sign the Submission Agreement.

CASE SUMMARY

In the Corrected Amended Statement of Claim, PKS asserted the following causes of action: misrepresentations and omissions of material facts in connection with the sale of securities – commissions fraud; misrepresentations and omissions of material facts in connection with the sale of securities – volume discounts fraud; common law fraud; RICO violations – Section 1962(c); breach of indemnity provisions; breach of common law indemnity; unjust enrichment; breach of fiducary duty; and breach of contract. The causes of action related to PKS's allegation that Vungarala was barred from association with any FINRA member in any capacity, as a result of false and misleading statements made to Saginaw Chippewa Indian Tribe of Michigan. PKS further alleged that, pursuant to the terms of an Independent Contractor Agreement and Security Sales Agreement for Registered Representative, Vungarala is liable for amounts paid and to be paid under an arbitration settlement and FINRA Order Accepting Settlement Offer.

RELIEF REQUESTED

In the Corrected Amended Statement of Claim, PKS requested that the Panel:

A. Make findings of fact and conclusions of law that Vungarala committed the misconduct charged in the Corrected Amended Statement of Claim;

B. Award to PKS Investments $14,029,656.00 in compensatory damages, such damages to be trebled under RICO, 18 U.S.C. § 1964(c), for a total of $42,088,968.00 in RICO treble damages, together with pre-judgment interest/pre-award interest, also to be trebled under RICO;

C. Award to PKS Investments punitive damages in the amount of $14,029,656.00;

D. Award to Assignee PKS $6,838,217.00 in compensatory damages, such damages to be trebled under RICO, 18 U.S.C. § 1964(c), for a total of $20,514,651.00 in RICO treble damages, together with pre-judgment interest/pre-award interest, also to be trebled under RICO;

E. Award to Assignee PKS punitive damages in the amount of $6,838,217.00;

F. Order that Vungarala be assessed and bear PKS' filing fees, member fees, hearing session fees, any other arbitration fees, and attorneys' fees; and

G. Award to PKS such other and further relief as the Arbitrator deems just and proper.

OTHER ISSUES CONSIDERED AND DECIDED

The Arbitrator acknowledges having read the pleadings and other materials filed by the parties.

Vungarala and Sutterfield did not file a Statement of Answer or properly executed Submission Agreement but are required to submit to arbitration pursuant to the Code of Arbitration Procedure ("Code").

On April 1, 2021, Claimant filed a notice of dismissal with prejudice for Sutterfield. Therefore, the Arbitrator made no determination with respect to any of the relief requests related to Sutterfield.

The Arbitrator determined that Vungarala was served with the Claim Notification letter dated December 10, 2019 by regular mail and the Overdue Notice (including the Statement of Claim) dated April 1, 2021 by regular and FedEx mail, as evidenced by the FedEx tracking information available online. The Arbitrator also determined that Vungarala was served with the Notification of Arbitrator dated April 27, 2021 by regular mail.

The Claim Notification letter notified Vungarala that FINRA rules require parties to use the online DR Portal on a mandatory basis (except pro se investors) and that failure to register for the DR Portal will prevent the submission of pleadings, selection of arbitrators, and receipt of notification relating to case information and deadlines. Vungarala failed to register for the DR Portal.

The Arbitrator determined that Vungarala is, therefore, bound by the Arbitrator's ruling and determination.

On April 16, 2021, Claimant filed a Request for Default Proceedings against Vungarala pursuant to Rule 12801 of the Code ("Request for Default").

Pursuant to Rule 12801 of the Code, the Chairperson appointed in this matter became the sole arbitrator to consider the Request for Default.

AWARD

After considering the pleadings and Claimant's submissions, the Arbitrator has decided in full and final resolution of the issues submitted for determination as follows:

1. Vungarala is liable for and shall pay to PKS Investments the sum of $14,029,656.00 in compensatory damages.

2. Vungarala is liable for and shall pay to PKS Investments interest on the above-stated compensatory damages sum pursuant to MCL § 600.6013(8).

3. Vungarala is liable for and shall pay to Assignee PKS the sum of $6,838,217.00 in compensatory damages.

4. Vungarala is liable for and shall pay to Assignee PKS interest on the above-stated compensatory damages sum pursuant to MCL § 600.6013(8).

5. Vungarala is liable for and shall pay to PKS the sum of $2,500.00 to reimburse PKS for the non-refundable portion of the filing fee previously paid to FINRA Dispute Resolution Services.

6. Any and all claims for relief not specifically addressed herein, including any requests for punitive damages, treble damages, and attorneys' fees, are denied.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees
FINRA Dispute Resolution Services assessed a filing fee* for each claim:

Initial Claim Filing Fee	=$	4,000.00

**The filing fee is made up of a non-refundable and a refundable portion.*

Member Fees
Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. Accordingly, as a party, PKS Investments is assessed the following:

Member Surcharge	=$	4,025.00
Member Process Fee	=$	7,000.00

Hearing Session Fees and Assessments
The Panel has assessed hearing session fees for each session conducted. A session is any meeting between the parties and the Arbitrator(s), including a pre-hearing conference with the Arbitrator(s), which lasts four (4) hours or less. Fees associated with these proceedings are:

Decision on the papers:	=$	300.00
Total Hearing Session Fees	=$	300.00

The Arbitrator has assessed the total paper decision fee to Vungarala.

All balances are payable to FINRA Dispute Resolution Services and are due upon receipt.

ARBITRATOR

Jeffry M. Bauer - Sole Public Arbitrator

I, the undersigned Arbitrator, do hereby affirm that I am the individual described herein and who executed this instrument, which is my award.

Arbitrator's Signature

Jeffry M. Bauer **06/07/2021**

Jeffry M. Bauer
Sole Public Arbitrator

Signature Date

Awards are rendered by independent arbitrators who are chosen by the parties to issue final, binding decisions. FINRA makes available an arbitration forum—pursuant to rules approved by the SEC—but has no part in deciding the award.

June 08, 2021
Date of Service (For FINRA Dispute Resolution Services use only)

Exhibit B

BEFORE THE FINANCIAL INDUSTRY REGULATORY AUTHORITY

CUSTOMER ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN

PURSHE KAPLAN STERLING INVESTMENTS, INC., INDIVIDUALLY AND AS ASSIGNEE OF THE CLAIMS OF SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN AGAINST GOPI K. VUNGARALA,

Claimant,

-against-

GOPI K. VUNGARALA,

Respondent.

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FINRA Case No. 19-03153

CORRECTED SECOND AMENDED STATEMENT OF CLAIM

Pursuant to Rules 12200, 12302(a) and 12309(a) of the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes, Claimant Purshe Kaplan Sterling Investments, Inc. ("PKS"), a FINRA member firm, individually and as assignee of the claims of Saginaw Chippewa Indian Tribe of Michigan (the "Tribe") against Gopi K. Vungarala ("Vungarala") ("as assignee of the claims of the Tribe"), an associated person, by its undersigned attorneys, as and for its Corrected Second Amended Statement of Claim (the "Second Amended Statement of Claim") against respondent Vungarala, an associated person, alleges as follows:

INTRODUCTION AND SUMMARY

1. From at least June 2011 through in or about late December 2014, respondent Vungarala, then a registered representative of claimant PKS, a broker-dealer, regularly lied to his customer, the Tribe, a native American tribe, in a long con regarding

investments he recommended and commissions (actually the supposed lack of commissions) thereon. In addition to serving as the Tribe's PKS registered representative, Vungarala was simultaneously employed by the Tribe as its Treasury Investment Manager and participated in decisions regarding the Tribe's investments.

2. Operating out of an independent branch office located in Midland, Michigan (the "Midland branch office") affiliated with PKS, Vungarala fraudulently induced the Tribe to invest hundreds of millions of dollars in non-traded real estate investment trusts ("REITs") and business development companies ("BDCs") without revealing that he and PKS received commissions on the sales (usually seven percent) or the availability of certain volume discounts.

3. Acting in his own self-interest, through intentionally or recklessly false and misleading representations or omissions, Vungarala led the Tribe to believe that neither he nor PKS received commissions on the Tribe's transactions, which he took steps to conceal; that he had no conflict of interest; and that the Tribe was not eligible to receive volume discounts on its purchases. Vungarala intentionally or recklessly misrepresented to the Tribe that he would not receive or was not receiving commissions and intentionally or recklessly omitted to disclose his receipt of commissions to increase substantially his compensation, abusing his position of trust with the Tribe.

4. When the Tribe hired Vungarala as its investment manager in November 2008, it looked to him to handle every aspect of investment management for the Tribe. For over two and a half years, Vungarala seemingly did his job without incident – recommending investments and facilitating their purchase. During that time, he gained the trust of the Tribe's Investment Committee and its governing body, the Tribal Council.

5. Starting in 2011, however, Vungarala worked to eliminate the normal

checks and balances over his investment decisions, making him the lone authority on investment matters for the Tribe. Vungarala knew that he had centralized investment power within his control and insulated himself from the questions of other Tribal Treasury Department and Investment Committee members. He used that power for his own spectacular gain for more than three and a half years.

6. Vungarala knew that the Tribe prohibited its employees, such as himself, from engaging in business activities that could constitute a conflict of interest with the Tribe, or that could impair an employee's ability to make impartial decisions on behalf of the Tribe. Notwithstanding these prohibitions, and knowing that Tribal leaders relied upon his recommendations as Treasury Investment Manager, Vungarala recommended that the Tribe invest more than $220 million in non-traded REITs and BDCs over the course of more than three and a half years, generating $13,338,217 in commissions for PKS, $11,604,079 of which PKS paid to Vungarala and $971,045 of which PKS paid to Trevor S. Sutterfield ("Sutterfield"), who was a registered representative of PKS and the branch manager of the PKS-affiliated Midland branch office.

7. To induce the Tribe to make these purchases, notwithstanding the Tribe's prohibitions against conflicts of interest, Vungarala intentionally or recklessly misrepresented to the Tribe that he would not receive or was not receiving any commissions on purchases of the non-traded REITs and BDCs made in the Tribe's PKS accounts and intentionally or recklessly omitted to disclose his receipt of such commissions. On several occasions, Vungarala specifically intentionally or recklessly misrepresented to the Tribe that he earned no commissions from the sale of those products.

8. Vungarala also intentionally or recklessly omitted to disclose to the Tribe that PKS would receive or was receiving commissions on those transactions, allowing the

Tribe to believe that PKS would not receive or was not receiving any commissions on those transactions either. Vungarala had a duty to make such disclosures to the Tribe arising out of his employment as its Treasury Investment Manager, his status as the Tribe's PKS registered representative receiving commissions on those transactions, his conflict of interest as a result of such dual role and as spelled out in the Tribe's written Investment Policy, and his superior knowledge not available to the Tribe.

9. Vungarala was also aware of, but intentionally or recklessly omitted to disclose to the Tribe, that the Tribe was eligible to receive volume discounts on its non-traded REIT and BDC purchases based upon the fact that multiple bank accounts owned by the Tribe purchased the same offerings through PKS. As a result, the Tribe failed to receive more than $3.3 million in volume discounts for which it was eligible. Vungarala had a duty to make such disclosures to the Tribe for the reasons set forth above. All of these funds, instead, went to Vungarala, Sutterfield and PKS in the form of commissions. In particular, Vungarala received $2.8 million more in commissions than he otherwise would have if the Tribe had taken the volume discounts. Indeed, on more than one occasion, Vungarala intentionally or recklessly misrepresented to the Tribe that it was not eligible for these discounts.

10. In or about early 2013 and in or about year-end 2013, Vungarala intentionally or recklessly misrepresented to PKS that the Tribe did not wish to aggregate the purchases of the same non-traded REIT or BDC by multiple trust accounts because the Tribe did not wish to commingle funds and wished to keep the accounts separate. No one on behalf of the Tribe made such a statement to Vungarala or anyone else. Vungarala caused PKS to believe this false narrative to justify the Tribe's purported waiver of millions in benefits.

11. Throughout the entire period, Vungarala intentionally or recklessly omitted to disclose to PKS that Vungarala represented to the Tribe that he would not receive or was not receiving any commissions on purchases of the non-traded REITs and BDCs made in the Tribe's PKS accounts; that Vungarala omitted to disclose to the Tribe that he would receive or was receiving commissions on those transactions; that Vungarala omitted to disclose to the Tribe that PKS would receive or was receiving commissions on those transactions; that Vungarala omitted to disclose to the Tribe that the Tribe was eligible to receive volume discounts on its non-traded REIT and BDC purchases; and that Vungarala represented to the Tribe that it was not eligible for these discounts. Vungarala had a duty to PKS to make such disclosures as its registered representative.

12. As a result of or in connection with his intentional or reckless misrepresentations and omissions, Vungarala inter alia willfully violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder as to the Tribe and PKS; committed common law fraud as to the Tribe and PKS; and committed violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961 et seq.) ("RICO") as to the Tribe and PKS. Vungarala also breached contractual and common law indemnification obligations to PKS; was unjustly enriched as to the Tribe and PKS; breached his fiduciary duty to the Tribe; and breached his employment agreements with the Tribe.

The FINRA Enforcement
Decisions Against Vungarala

13. In an Extended Hearing Panel Decision, dated October 25, 2017 (the "EHP Decision," **Exhibit A**), in a FINRA Department of Enforcement proceeding against Vungarala (and originally against PKS as well, the "FINRA Enforcement Proceeding"),

Vungarala was found inter alia (a) to have made intentionally false and misleading statements of material fact that he did not receive commissions on the Tribe's REIT and BDC investments and to have intentionally omitted to disclose that he received such commissions, thereby violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, i.e., committing securities fraud; and (b) to have made intentionally false and misleading statements of material fact concerning the availability of volume discounts to the Tribe and to have intentionally omitted to disclose such discounts were available, thereby violating Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder. The EHP Decision barred Vungarala from association with any FINRA member in any capacity.

14. The findings made in the EHP Decision are expressly incorporated by reference here.

15. The EHP Decision was affirmed in all respects by a FINRA National Adjudicatory Counsel Decision, dated October 2, 2018 (the "NAC Decision," **Exhibit B**).

16. The findings made in the NAC Decision are also expressly incorporated by reference here.

17. The NAC Decision was affirmed in all respects by the SEC in a Decision dated November 20, 2020 (the "SEC Decision," **Exhibit C**).

18. Vungarala is collaterally estopped from contesting the findings made in the EHP Decision, the NAC Decision and the SEC Decision.

The Tribal-PKS Settlement Agreement

19. On or about April 5, 2017, the Tribe filed an Arbitration Statement of Claim against PKS and Vungarala.

20. Subsequently, PKS and the Tribe, among others, entered into a Settlement

Agreement, made as of May 10, 2019 (the "Tribal-PKS Settlement Agreement"), consensually resolving the Tribe's claims against PKS asserted in its Arbitration Statement of Claim.

21. The Tribal-PKS Settlement Agreement requires payment to the Tribe of $9.5 million plus interest, of which PKS already paid $6 million to the Tribe on May 10, 2019, and another $500,000 was paid to the Tribe on February 4, 2020 on PKS' behalf.

22. Under the Tribal-PKS Settlement Agreement, the Tribe assigned to PKS all of the Tribe's claims and causes of action against Vungarala, including without limitation those asserted here. Excerpts of the Tribal-PKS Settlement Agreement containing the assignment provision are **Exhibit D**.

PKS' Damages

23. Under the Tribal-PKS Settlement Agreement, PKS paid the Tribe $6 million on May 10, 2019, as noted; another $500,000 was paid to the Tribe on February 4, 2020 on PKS' behalf, as also noted; and an additional $3 million is required to be paid to the Tribe plus interest, for a total of $9.5 million plus interest (sometimes the "$9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement"). In addition, PKS (a) paid FINRA a fine of $750,000 on March 2, 2017 (sometimes the "FINRA $750,000 fine amount"), and (b) paid the Tribe $3,779,656 on March 13, 2017 in volume discount restitution and statutory interest (sometimes the "$3,779,656 restitution with interest amount") (the vast bulk of which Vungarala is independently liable for as a "renege"), pursuant to a FINRA Order Accepting Offer of Settlement, dated February 21, 2017 (the "FINRA Order Accepting Settlement Offer"), consensually resolving the FINRA Enforcement Proceeding as against PKS without admitting or denying the allegations of the underlying Complaint of the FINRA Department of Enforcement, dated February 4,

2016 (the "FINRA Enforcement Proceeding Complaint"), against PKS and Vungarala. PKS is entitled to prejudgment/pre-award interest on the foregoing amounts.

The Vungarala-PKS Agreement and Its Indemnity and Venue Provisions

24. Vungarala entered into an Independent Contractor Agreement and Security Sales Agreement for Registered Representative with PKS, dated January 24, 2008 (the "Vungarala-PKS Agreement," **Exhibit E**), providing inter alia that (a) Vungarala is liable for inter alia any awards and/or damages incurred by PKS, or settlements made by PKS, as a result of the inclusion of PKS in inter alia any arbitration, action or any other legal process arising out of any alleged act or omission of Vungarala occurring inter alia directly as a result of his association by licensure with PKS (p. 5, ¶ 11); (b) Vungarala is liable for all "reneges and losses" incurred by PKS by the failure of his clients to meet their obligations, as well as any expenses or legal costs that occur in connection therewith (p. 2, ¶ 4); and (c) independently, Vungarala is responsible for the payment of inter alia claims related to his alleged errors or omissions in the event of any insurance coverage deficiency, which here was 100% (p. 3, ¶ 6) (the foregoing three liability and responsibility provisions are collectively the "Indemnity Provisions").

25. The Vungarala-PKS Agreement also provides for arbitration before FINRA, at a venue to be determined by PKS, of any and all disputes that may arise between Vungarala and PKS pursuant to that Agreement or in connection with any matter covered by that Agreement. PKS selected Detroit, Michigan as the venue of this arbitration, which is also the place nearest to where the relevant events took place. In addition, the Vungarala-PKS Agreement provides that it is governed by New York law without giving effect to its choice of law or conflicts of law principles (p. 4, ¶ 8).

The Tribe's Damages

26. The Tribe paid PKS $13,338,217 in commissions to be offset by the $6.5 million the Tribe received to date under the Tribal-PKS Settlement Agreement, which results in $6,838,217 in damages. PKS as assignee of the claims of the Tribe is entitled to prejudgment/pre-award interest on the latter amount.

Vungarala's Liability to PKS Under the Indemnity Provisions of the Vungarala-PKS Agreement

27. Pursuant to the Vungarala-PKS Agreement, respectively, Vungarala is liable to PKS inter alia for the amounts paid and to be paid to the Tribe pursuant to the Tribal-PKS Settlement Agreement, which total $9.5 million plus interest, of which $6.5 million has already been paid, as noted; for the amount of the $750,000 fine PKS paid FINRA pursuant to the FINRA Order Accepting Settlement Offer; and for the $3,779,656 PKS paid to the Tribe in restitution and statutory interest pursuant thereto (sometimes collectively the "Indemnified Amounts"). PKS is entitled to prejudgment/pre-award interest on the Indemnified Amounts.

28. Vungarala's foregoing liability arises under the Vungarala-PKS Agreement because (a) the foregoing amounts, fines and restitution amounts comprise awards and/or damages incurred by PKS, or settlements made by PKS, as a result of the inclusion of PKS in the Tribal Arbitration and the FINRA Enforcement Proceeding, which arose, directly or indirectly, out of an alleged act or omission of Vungarala, which occurred directly as a result of the association of Vungarala by licensure with PKS; (b) the foregoing amounts comprise "reneges and losses" incurred by PKS by the Tribe's being effectively relieved from meeting their commission obligations to PKS; and (c) Vungarala is responsible for the payment of claims related, directly or indirectly, to his alleged errors or

omissions in the event of any insurance coverage deficiency, which here was 100%, as noted.

THE PARTIES, THE TRIBE AND JURISDICTION

29. PKS is a broker-dealer and financial services firm based in Albany, New York, and has been a FINRA member since April 15, 1994.

30. Vungarala was at all times relevant here associated with PKS and upon information and belief is a resident of Texas.

31. Vungarala first entered the securities industry on September 22, 2004, and was associated with PKS as a General Securities Representative from December 13, 2007 to February 10, 2016, when he resigned in the face of the FINRA Enforcement Proceeding Complaint. Vungarala held Series 7 and 66 licenses until the EHP Decision barred him from the securities industry.

32. The Tribe is a federally recognized Indian tribe organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. §§ 5123, and headquartered in Mt. Pleasant, Michigan, on the Reservation reserved for it in the Treaties between the Tribe and United States of 1855 and 1864.

33. PKS, which is a member firm, and Vungarala, who is an associated person, are subject to FINRA's jurisdiction under FINRA's By-Laws Article IV, Section 1 and Article V, Sections 2 and 4, as well as under the Vungarala-PKS Agreement. FINRA considers this arbitration a customer arbitration in view of PKS' claims against Vungarala as assignee of the claims of the Tribe, the customer, against Vungarala.

STATEMENT OF FACTS

Vungarala's Employment With the Tribe

34. On November 17, 2008, while associated with PKS as a General Securities Representative, Vungarala entered into a three-year employment contract with the Tribe to serve as its first in-house Treasury Investment Manager; he had extensive experience as a registered representative and as an investment adviser at Sutterfield Financial Group, Inc. The Tribe renewed that contract when it expired on November 17, 2011, for another three years. The renewal was extended for two months in early November 2014; it expired on or about January 15, 2015 and Vungarala's employment with the Tribe ceased.

35. As the Tribe's Treasury Investment Manager, Vungarala was responsible for managing the Tribe's investment portfolio in accordance with the Tribe's strategic goals as set forth in its written Investment Policy. His position fell under the Tribe's Treasury Administrator, who from 2008 to 2014 was Angela Osterman ("Osterman"). Osterman held a business administration degree but did not possess the training, expertise or necessary securities licenses to serve as an investment manager.

36. Vungarala knew that Osterman and other members of the Treasury Department lacked sophistication, and that they relied upon and trusted him for guidance.

37. Vungarala told Osterman that in order for him to keep his broker's license, a brokerage firm had to "hold" it. He referred to PKS as the broker-dealer where he "parked" his broker's license, and this is how members of the Tribe understood his relationship with PKS.

38. Vungarala advised and made recommendations to the Tribe's governing body, the Tribal Council, about which investments the Tribe should chose to achieve its

strategic goals.

39. In order to present his proposed investments to the Tribal Council, Vungarala first had to have the sign-off of at least one member of the Tribe's Investment Committee. Once he obtained this signature, Vungarala was able to present his proposed investments at the next Tribal Council meeting.

40. The members of the Investment Committee and the Tribal Council relied heavily upon Vungarala's recommendations when approving proposed investments.

41. Vungarala increasingly cut the Investment Committee out of the process as time went on. Further, Vungarala routinely increased the size of the Tribe's investment in REITs without consulting the Investment Committee. These increases were substantial, representing in some cases additional investments of more than 2000%.

Non-Traded REITs and BDCs

42. A REIT is a corporation, trust or association that owns or manages income-producing real estate. There are two types of public REITs: those that trade on a national securities exchange and those that do not. REITs in the latter category are generally referred to as publicly registered non-exchange traded, or simply, non-traded REITs.

43. A BDC is a closed-end investment company that invests in private or thinly traded public companies. As with non-traded REITs, non-traded BDCs are not traded on a national securities exchange.

44. Investments in non-traded REITs and BDCs typically involve payment of relatively high commissions, and the Tribe's REIT and BDC investments through Vungarala were generally subject to commissions of around seven percent.

45. Non-traded REITs and BDCs may offer volume discounts to investors. A

volume discount is a discounted price per share received by the investor when the investor reaches an accumulated level of investment. The discount is funded by reducing the selling commission paid by the investment product's wholesaler to the broker-dealer by the amount of the share purchase price discount.

Vungarala's Commissions Fraud on the Tribe and PKS

46. In addition to providing investment objectives and parameters for the various accounts owned by the Tribe, its Investment Policy set forth the standard of care and conduct to which the Tribe's employees, including the Treasury Investment Manager, are required to adhere.

47. During the time Vungarala was employed by the Tribe, the Investment Policy provided that "managers and employees involved in the investment process shall refrain from personal business activity that could conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions."

48. Beginning in 2011, in his role as the Tribe's Treasury Investment Manager, Vungarala solicited the Tribe to invest in non-traded REITs and BDCs.

49. As part of his solicitation, Vungarala informed his tribal supervisor and the Tribe's Investment Committee that the Tribe could purchase the non-traded REITs and BDCs through PKS, where Vungarala was registered.

50. In or about May or June 2011, knowing that the Tribe prohibited him from engaging in personal business activities that would constitute a conflict of interest when making investments on behalf of the Tribe, and to induce the Tribe to purchase these high-commission products and omit disclosure of the lucrative commissions he would receive in

selling such high-commission products, Vungarala intentionally or recklessly misrepresented to his Tribal supervisor Osterman that he would not receive any commissions from the REIT and BDC transactions.

51. Osterman repeated Vungarala's foregoing misrepresentation to the entire Investment Committee at its meeting on June 27, 2011. Rather than correct Osterman before the Investment Committee, and inform its members he would receive commissions from those transactions, Vungarala remained silent, intentionally or recklessly omitting the truth, which was material.

52. At subsequent Investment Committee meetings, the multiple times Vungarala was asked, he intentionally or recklessly misrepresented that he was not receiving commissions from those transactions.

53. Vungarala made a number of white board presentations to the Investment Committee explaining fees and costs related to the Tribe's purchases in a generic way, which were intentionally or recklessly misleading because they omitted any information concerning the commissions he would receive or was receiving on those transactions. Moreover, during these presentations, Dustin Davis, another tribal employee, asked Vungarala numerous times about the fee structure for the REIT and BDC purchases; each time, Vungarala intentionally or recklessly misrepresented that he was not receiving commissions.

54. Until the final months of his tenure with the Tribe, Vungarala also intentionally or recklessly failed to disclose to the Investment Committee and the Tribal Council that PKS would receive or was receiving commissions on those transactions, even though he was aware (or reasonably should have been aware) that they understood to the contrary and also understood that he would not receive or was not receiving commissions.

55. As noted, Vungarala intentionally or recklessly omitted to disclose to PKS that Vungarala represented to the Tribe that he would not receive or was not receiving any commissions on purchases of the non-traded REITs and BDCs made in the Tribe's PKS accounts; that Vungarala omitted to disclose to the Tribe that he would receive or was receiving commissions on those transactions; that Vungarala omitted to disclose to the Tribe that PKS would receive or was receiving commissions on those transactions; that Vungarala omitted to disclose to the Tribe that the Tribe was eligible to receive volume discounts on its non-traded REIT and BDC purchases; and that Vungarala represented to the Tribe that it was not eligible for these discounts. As also noted, Vungarala had a duty to PKS to make such disclosures as its registered representative.

56. Beginning in July 2011, Vungarala opened multiple PKS accounts in the names of the Tribe's "trust" accounts and began purchasing non-traded REITs and BDCs through PKS in these accounts.

57. Over the course of more than three and a half years, from 2011 through in or about late December 2014, Vungarala continued to open PKS accounts in the name of eight tribal "trust" accounts and purchase non-traded REITS and BDCs on behalf of the "trusts."

58. Each purported Tribal "trust" had the same tax identification number – the Tribe's.

59. The purpose for each Tribal "trust" account was to benefit the Tribe.

60. Though labeled "trusts," these accounts were ordinary deposit accounts, which at a minimum Vungarala knew.

61. Vungarala, Sutterfield and PKS received commissions for each transaction.

62. Despite Vungarala's allowing the Tribe to believe that neither Vungarala

nor PKS would receive or was receiving any commissions for the non-traded REIT and BDC purchases Vungarala made on behalf of the Tribe as its PKS registered representative, PKS received the high-selling commissions typical for these types of investments, and Vungarala received a payout of over 85 percent, and Sutterfield approximately 7 percent of these commissions.

63. At Vungarala's direction, the Tribe purchased more than $220 million in non-traded REITs and BDCs over the course of more than three and a half years.

64. Between 2011 and 2014, PKS received $13,338,217 in commissions from non-traded REITs and BDCs purchased in the Tribe's PKS accounts; PKS paid Vungarala $11,604,079 of those commissions; and PKS paid Sutterfield $971,045 of those commissions.

65. Customer confirms and account statements from the issuers of the Tribe's non-traded REIT and BDC investments, although addressed to the tribal chief, were internally routed to Vungarala for review. Moreover, none of these documents revealed that commissions were paid to PKS, Vungarala or Sutterfield.

66. Vungarala did not disclose to the Tribe that PKS received commissions on the Tribe's investments until on or about October 27, 2014 at an Investment Committee meeting, after being confronted by Osterman regarding the source of funds Vungarala used to open various personal businesses. Even then, Vungarala continued to deliberately lie, falsely stating that he himself did not receive commissions.

67. After the Investment Committee meeting, Vungarala circulated a follow-up email to various members of the Investment Committee and Tribal Council. Despite Osterman's pointed questions, Vungarala intentionally or recklessly omitted to disclose even in this email that he received commissions on the Tribe's investments through PKS.

68. Vungarala did not disclose to the Tribe that he *personally* received commissions on the Tribe's investments until on or about December 21, 2014 at a Tribal Council meeting, doing so only after being confronted by the Council after Osterman had expressed concerns to it that Vungarala might be getting a portion of the commissions PKS received.

Vungarala's Volume Discount Fraud on the Tribe and PKS

69. Most or all of the non-traded REITs and BDCs purchased by the Tribe offered volume discounts for purchases above a certain dollar value.

70. The discounts were funded by reducing the selling commission to PKS by the share purchase price discount.

71. Based upon certain parameters, multiple "trust" accounts owned by the Tribe that purchased the same non-traded REIT or BDC through PKS within a certain time frame qualified as a single purchaser for the purpose of aggregating purchases to maximize the volume discount available to the Tribe.

72. Vungarala, however, did not request on the Tribe's behalf that the issuers aggregate the purchases by the Tribe's multiple accounts; in fact, he intentionally or recklessly misrepresented to Tribal Treasury Department staff that the Tribe was not eligible for volume discounts.

73. Vungarala requested volume discounts for purchases by each individual "trust" account but did not request volume discounts based on the aggregation of purchases of the same non-traded REIT or BDC by multiple accounts, even though the Tribe was the actual purchaser for all of the investments. By keeping the purchases separate, Vungarala ensured greater commissions for inter alia himself based on the separate transactions.

74. Vungarala also intentionally or recklessly omitted to disclose to the Tribe that it was eligible for these additional volume discounts.

75. In fact, when Melanie Burger, a Tribal employee, asked Vungarala at a Treasury Department meeting in or about June 2013 why he was not requesting additional discounts based on purchases of the same non-traded REITs and BDCs by multiple "trust" accounts, Vungarala intentionally or recklessly misrepresented to her that the Tribe was not eligible for these discounts because each "trust" was a separate entity and could not be combined for purposes of volume discounts.

76. Vungarala intentionally or recklessly misrepresented to Donald J. Guilder, a regional supervisor at PKS, in or about early 2013, and to Lisa Evans, Chief Compliance Officer at PKS, in or about the end of 2013, that the Tribe did not wish to aggregate the purchases of the same non-traded REIT or BDC by multiple trust accounts because the Tribe did not wish to commingle funds and wished to keep the accounts separate. No one on behalf of the Tribe made such a statement to Vungarala or anyone else. Moreover, aggregating the purchases of the same product by the various accounts would not result in some improper commingling of "trust" funds. In reality, the money from the various accounts was pooled together before it was wired to PKS.

77. Had the purchases by the "trust" accounts been correctly aggregated, the Tribe would have received additional volume discounts of more than $3 million over the course of more than three-and-one-half years. PKS's commissions would have been reduced by the same amount; Vungarala's portion of those commissions would have been reduced by a nearly equivalent amount; and Sutterfield's portion of those commissions would have been reduced as well.

78. As also noted, throughout the period, to protect his share of commissions,

Vungarala intentionally or recklessly omitted to disclose to PKS that Vungarala omitted to disclose to the Tribe that the Tribe was eligible to receive volume discounts on its non-traded REIT and BDC purchases, and that Vungarala represented to the Tribe that it was not eligible for these discounts. As noted, Vungarala had a duty to PKS to make such disclosures as its registered representative.

FIRST CLAIM

MISREPRESENTATIONS AND OMISSIONS OF MATERIAL FACT IN CONNECTION WITH THE SALE OF SECURITIES TO THE TRIBE – COMMISSIONS FRAUD
(Willful violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, asserted by PKS individually and in its capacity as assignee of the claims of the Tribe)

79. PKS individually and as assignee of the claims of the Tribe realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

80. Section 10(b) of the Securities Exchange Act of 1934 prohibits "any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange…[t]o use or employ, in connection with the purchase or sale of any security…any manipulative or deceptive device or contrivance…."

81. Rule 10b-5 promulgated thereunder prohibits "any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, (a) to employ any device, scheme or artifice to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the

circumstances under which they were made, not misleading; or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

82. The non-traded REITs and BDCs purchased by the Tribe are securities.

83. From at least June 2011 through in or about late December 2014, Vungarala made intentional or reckless misrepresentations of material facts and intentionally or recklessly failed to disclose material facts to the Tribe in connection with the sale of non-traded REITs and BDCs as set forth above and as follows.

84. On or about June 27, 2011, Vungarala misled members of the Tribe's Investment Committee into believing that he would not receive commissions on the non-traded REITs and BDCs that he recommended the Tribe purchase through PKS, when, in fact, he would and did receive commissions on these transactions. At subsequent Investment Committee meetings, the multiple times Vungarala was asked, he intentionally or recklessly misrepresented that he was not receiving commissions from those transactions.

85. Vungarala intentionally or recklessly failed to disclose to members of the Tribe's Investment Committee and Tribal Council the fact that he would receive or was receiving commissions on the sale of the non-traded REITs and BDCs that he recommended the Tribe purchase through PKS, when he knew that the Tribe believed that he would not receive or was not receiving commissions on these transactions because of his position as the Tribe's Treasury Investment Manager and the Tribe's prohibitions against conflicts of interest with the Tribe.

86. Vungarala also intentionally or recklessly failed to disclose to members of the Tribe's Investment Committee the fact that PKS would receive or was receiving

commissions on the sale of the non-traded REITs and BDCs that he recommended the Tribe purchase through PKS, when he knew that the Tribe believed that PKS would not receive or was not receiving commissions on these transactions because of the lack of investment sophistication by members of the Investment Committee and Tribal Council.

87. As the Tribe's dual PKS registered representative and Tribal employee, among other reasons, Vungarala had a duty to disclose the material facts that he and PKS would receive or were receiving commissions on the sale of the non-traded REITs and BDCs, when he knew that the Tribe was under the impression that neither would receive or was receiving commissions on these transactions.

88. The fact that Vungarala, in his capacity as a PKS registered representative, would receive or was receiving commissions on the non-traded REITs and BDCs that he purchased on behalf of the Tribe in his capacity as Treasury Investment Manager was material because, under the terms of the Tribe's Investment Policy, as the Tribe's Treasury Investment Manager, Vungarala was prohibited from engaging in any transaction that would constitute a conflict of interest between him and the Tribe. Under these circumstances, a reasonable investor would have considered this fact important when deciding to invest in the non-traded REITs and BDCs, and knowledge of this fact would have significantly altered the total mix of information available to the Tribe.

89. The fact that PKS would receive or was receiving commissions on the non-traded REITs and BDCs that the Tribe purchased in its PKS accounts was material because the Tribe might consider any economic benefit by PKS from the Tribe's investments to also constitute a conflict of interest by Vungarala, especially given the high-commission investments Vungarala purchased, and likely would not have made the investments otherwise. Under these circumstances, a reasonable investor would have considered this

fact important when deciding to invest in the non-traded REITs and BDCs, and knowledge of this fact would have significantly altered the total mix of information available to the Tribe.

90. Vungarala acted with scienter in that he intentionally or recklessly misrepresented to the Tribe that he would not receive or was not receiving commissions from the non-traded REIT and BDC purchases he made on the Tribe's behalf, and in that he intentionally or recklessly failed to disclose to the Tribe that he would receive or was receiving commissions on the purchases, to ensure the Tribe purchased these high commission investments.

91. Vungarala also acted with scienter in that he intentionally or recklessly failed to disclose to the Tribe that PKS would receive or was receiving commissions on the non-traded REIT/BDC purchases, when he knew the Investment Committee and the Tribal Council did not know PKS would receive or was receiving commissions, to ensure the Tribe purchased these high-commission investments.

92. Acting with scienter, Vungarala intentionally or recklessly omitted to disclose to PKS that Vungarala represented to the Tribe that he would not receive or was not receiving any commissions on purchases of the non-traded REITs and BDCs made in the Tribe's PKS accounts; that Vungarala omitted to disclose to the Tribe that he would receive or was receiving commissions on those transactions; and that Vungarala omitted to disclose to the Tribe that PKS would receive or was receiving commissions on those transactions.

93. As PKS' registered representative, knowing of Vungarala's dual role, among other reasons, Vungarala had a duty to PKS to disclose the representations and omissions set forth in the immediately preceding paragraph above of this Second Amended

Statement of Claim, which were material for the same reasons set forth above as to the Tribe or for similar reasons.

94. Both the Tribe and PKS reasonably relied on Vungarala's representations or omissions.

95. In connection with his misconduct, Vungarala employed the means of interstate commerce and use of the mails and wires in connection with the sales of the non-traded REITs and BDCs to the Tribe by inter alia mailing the Tribe's subscription agreements and/or applications; engaging in emails with the Tribe; speaking on the phone to issuers, wholesalers, the Tribe and/or PKS; causing the Tribe to wire funds; and causing confirmations and account statements reflecting the subject trades to be sent to the Tribe.

96. Directly and proximately as a result of Vungarala's misconduct, PKS suffered damages in the following amounts: (a) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement, and (b) the FINRA $750,000 fine amount, for a total of $10,250,000. PKS is entitled to prejudgment/pre-award interest on (a) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (b) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; and (c) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a).

97. Directly and proximately as a result of Vungarala's misconduct, the Tribe suffered damages in the amount of $13,338,217 in commissions from non-traded REITs and BDCs purchased in the Tribe's PKS accounts, less the $6.5 million the Tribe received to date under the Tribal-PKS Settlement Agreement, which results in $6,838,217 in

damages. PKS as assignee of the claims of the Tribe is entitled to prejudgment interest/pre-award interest on the latter amount from March 15, 2013, which is the midpoint of the period June 2011 through December 2014 encompassing Vungarala's misconduct, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a).

98. Based upon the foregoing, Vungarala willfully violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder as to the Tribe and PKS.

SECOND CLAIM

MISREPRESENTATIONS AND OMISSIONS OF MATERIAL FACT IN CONNECTION WITH THE SALE OF SECURITIES TO THE TRIBE – VOLUME DISCOUNTS FRAUD
(Willful violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, asserted by PKS individually)

99. PKS individually realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

100. From at least June 2011 through in or about late December 2014, Vungarala made intentional or reckless misrepresentations of material facts and intentionally or recklessly failed to disclose material facts to the Tribe in connection with the sale of non-traded REITs and BDCs as set forth above and as follows.

101. Vungarala intentionally or recklessly failed to disclose to the Tribe the material fact that it was eligible to receive more than $3.3 million in additional volume discounts based upon the purchase through PKS of the same non-traded REITs and BDCs by multiple "trust" accounts owned by the Tribe. Vungarala also intentionally or recklessly misrepresented to the Tribe that the Tribe was not eligible for these discounts.

102. Based upon Vungarala's dual role as the Tribe's PKS registered representative and Tribal employee, among other reasons, he had a duty to disclose that the Tribe was eligible to receive these additional volume discounts.

103. The fact that the Tribe could have obtained an additional $3.3 million in discounts on its purchases was a material fact in that there is a substantial likelihood that a reasonable investor would have considered this fact important with respect to deciding to invest in the nontraded REITs and BDCs, and knowledge of this fact would have significantly altered the total mix of information available to the Tribe.

104. Vungarala acted with scienter in that he was aware of the volume discounts, and he intentionally or recklessly failed to disclose them and intentionally or recklessly misrepresented to the Tribe that the Tribe was not eligible for them.

105. Acting with scienter, Vungarala intentionally or recklessly misrepresented to PKS that the Tribe did not wish to aggregate the purchases of the same non-traded REIT or BDC by multiple trust accounts because the Tribe did not wish to commingle funds and wished to keep the accounts separate. No one on behalf of the Tribe made such a statement to Vungarala or anyone else.

106. Acting with scienter, Vungarala also intentionally or recklessly omitted to disclose to PKS that Vungarala omitted to disclose to the Tribe that the Tribe was eligible to receive volume discounts on its non-traded REIT and BDC purchases, and that Vungarala represented to the Tribe that it was not eligible for these discounts.

107. As PKS' registered representative, Vungarala had a duty to PKS to disclose the representations and omissions set forth in the two immediately preceding paragraphs above of this Second Amended Statement of Claim, which were material for the same reasons set forth above as to the Tribe or for similar reasons.

108. Both the Tribe and PKS reasonably relied on Vungarala's misrepresentations or omissions.

109. In connection with his misconduct, Vungarala employed the means of interstate commerce and use of the mails and wires in connection with the sales of the non-traded REITs and BDCs to the Tribe by inter alia mailing the Tribe's subscription agreements and/or applications; engaging in emails with the Tribe; speaking on the phone to issuers, wholesalers, the Tribe and/or PKS; causing the Tribe to wire funds; and causing confirmations and account statements reflecting the subject trades to be sent to the Tribe.

110. Directly and proximately as a result of Vungarala's misconduct, PKS suffered damages in the following amounts: (a) the FINRA $750,000 fine amount, and (b) the $3,779,656 restitution with interest amount, for a total of $4,529,656. PKS is entitled to prejudgment/pre-award interest on (a) $750,000 thereof from March 2, 2017, which is the date when the FINRA $750,000 fine amount was paid, and (b) the $3,779,656 restitution with interest amount thereof from March 13, 2017, which is when the latter amount was paid to the Tribe, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a).

111. Based upon the foregoing, Vungarala willfully violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder as to PKS.

THIRD CLAIM

COMMON LAW FRAUD – COMMISSIONS FRAUD AND VOLUME DISCOUNTS FRAUD (asserted by PKS individually and in its capacity as assignee of the claims of the Tribe)

112. PKS individually and as assignee of the claims of the Tribe realleges and

incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

113. Vungarala made representations and omissions of material existing fact to the Tribe, as set forth above, that were false and known to be false or intentionally or recklessly made by him, to induce the Tribe to rely on those representations and omissions, which the Tribe did, resulting in injury to the Tribe.

114. Vungarala made representations or omissions of material existing fact to PKS, as set forth above, that were false and known to be false or intentionally or recklessly made by him, to induce PKS to rely on those representations or omissions, which PKS did, resulting in injury to PKS.

115. Directly and proximately as a result of Vungarala's misconduct, PKS suffered damages in the following amounts: (a) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (b) the FINRA $750,000 fine amount; and (c) the $3,779,656 restitution with interest amount, for a total of $14,029,656. PKS is entitled to prejudgment/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually.

116. Directly and proximately as a result of Vungarala's misconduct, the Tribe suffered damages in the amount of $13,338,217 in commissions from non-traded REITs and BDCs purchased in the Tribe's PKS accounts, less the $6.5 million the Tribe has received to date under the Tribal-PKS Settlement Agreement, which results in $6,838,217

in damages. PKS as assignee of the claims of the Tribe is entitled to prejudgment interest/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8) as set forth in the immediately preceding paragraph above of this Second Amended Statement of Claim.

117. PKS individually is also entitled to punitive damages, as Vungarala acted with malice, wantonly or with reckless indifference with respect to PKS. The aggregate amount of Damages set forth in the section above of this Second Amended Statement of Claim entitled PKS' Damages is also an appropriate amount of punitive damages to be awarded, i.e., $14,029,656.

118. PKS as assignee of the claims of the Tribe is entitled to punitive damages as well, as Vungarala acted with malice, wantonly or with reckless indifference with respect to the Tribe. The aggregate amount of Damages set forth in the section above of this Second Amended Complaint entitled The Tribe's Damages is also an appropriate amount of punitive damages to be awarded, i.e., i.e., $6,838,217.

FOURTH CLAIM

RICO VIOLATIONS - SECTION 1962(c)
(asserted by PKS individually and in its capacity as assignee of the claims of the Tribe)

119. PKS individually and as assignee of the claims of the Tribe realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

Enterprise and Predicate Acts

120. From at least June 2011 through in or about late December 2014, Vungarala headed an association-in-fact enterprise, as defined in 18 U.S.C. § 1961(4), to fraudulently induce the Tribe to invest hundreds of millions of dollars in non-traded REITs and BDCs

without revealing that Vungarala, Sutterfield and PKS received commissions on the sales or the availability of certain volume discounts, and to fraudulently induce PKS to believe that the Tribe was aware that Vungarala, Sutterfield and PKS were receiving such commissions and that the Tribe did not wish to aggregate the purchases of the same non-traded REIT or BDC by multiple trust accounts because the Tribe did not wish to comingle funds. Such association-in-fact enterprise will be referred to as the "Commissions Enterprise."

121. The Commissions Enterprise consisted of Vungarala, whose role also consisted of collecting commissions and withholding the truth from the Tribe and PKS by fraudulent misrepresentations and omissions; unwittingly the Tribe, whose purchases of non-traded REITs and BDCs generated the commissions paid; and unwittingly PKS, which paid out the commissions to Vungarala, Sutterfield and itself.

122. Vungarala as a member of the Commissions Enterprise worked to commit various predicate acts of mail or wire fraud for a common purpose. That purpose or dual mission has been to harm the Tribe by causing it to make purchases of non-traded REITs and BDCs and thereby generating $13.3 million in commissions, which caused the Tribe to suffer damages as set forth in the section above of this Second Amended Statement of Claim entitled The Tribe's Damages, and to harm PKS by withholding the truth from it, which caused PKS to suffer damages as set forth in the section above of this Second Amended Statement of Claim entitled PKS' Damages.

123. Vungarala's repeated fraudulent misrepresentations and omissions on behalf of the Commissions Enterprise thus comprised a scheme or artifice to defraud or for obtaining the Tribe and PKS' property by means of false or fraudulent pretenses.

124. Each member of the Commissions Enterprise had some part in directing the

affairs of the Commissions Enterprise in connection with the matters complained of here, and he or it used his or its own methods and means and exercised discretion over the particular aspect of the operations of the Commissions Enterprise with which he or it was involved.

125. As an amalgam of Vungarala, PKS and the Tribe, the Commissions Enterprise is distinct from respondent Vungarala as to the Tribe's section 1962(c) RICO claim, and distinct from respondent Vungarala as to PKS' section 1962(c) RICO claim.

Culpable Persons

126. As to the Tribe and PKS's section 1962(c) RICO claims, Vungarala is an individual as defined by 18 U.S.C. § 1961(3) and a "Culpable Person" under RICO.

Interstate Commerce

127. The activities of the Commissions Enterprise affected interstate commerce through the use of the wires, mails or other instrumentalities of interstate commerce in carrying out each of the predicate acts set forth above and in furtherance of its mission. Vungarala could reasonably foresee that the wires and mails would be used in furtherance of that mission.

Pattern of Racketeering

128. Vungarala as to the Tribe and PKS's section 1962(c) RICO claims has violated the provisions of 18 U.S.C. § 1962(c) by conducting or participating, directly or indirectly, in the conduct of the affairs of an enterprise – the Commissions Enterprise – through a pattern of racketeering activity.

129. The pattern of racketeering activity commenced at least in June 2011 and continued through in or about late December 2014, which was at least two years, thus satisfying the "closed end" continuity aspect of a pattern of racketeering activity.

130. The pattern of racketeering activity has consisted of multiple predicate acts which are related and continuous and have the same or similar purposes, results, participants, victims, methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated events, the last of which occurred within 10 years after the commission of a prior act of racketeering activity as described above, and as such constitute a "pattern of racketeering" as defined in 18 U.S.C. § 1961(5).

Racketeering Activity

131. The predicate acts set forth above constitute "racketeering activity" as defined in 18 U.S.C. § 1961(1) in that they involve mail fraud and/or wire fraud in violation of 18 U.S.C. §§ 1341, 1343.

Injury

132. PKS and the Tribe are each a "person" who sustained injury to its business or property by reason of respondents' violations of 18 U.S.C. § 1962(c).

133. The pattern of racketeering activity conducted by Vungarala in violation of 18 U.S.C. § 1962(c) has directly and proximately caused injury to the business and property of PKS and the Tribe contemplated by 18 U.S.C. § 1964(c).

Standing to Sue

134. The standing of PKS individually and as assignee of the claims of the Tribe to bring civil RICO claims is established by showing violations of 18 U.S.C. § 1962 by Vungarala with such violations directly and proximately causing injury to PKS and the Tribe's business or property.

Damages

135. Directly and proximately as a result of Vungarala's misconduct, PKS suffered damages in the following amounts: (a) the $9.5 million amount paid and/or owing

under the Tribal-PKS Settlement Agreement; (b) the FINRA $750,000 fine amount; and (c) the $3,779,656 restitution with interest amount, for a total of $14,029,656. PKS is entitled to prejudgment/pre-award interest on (a) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (b) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (c) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (d) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a).

136. As a direct and proximate result of Vungarala's violations of 18 U.S.C. § 1962(c) as to the Tribe, the Tribe has been damaged in the amount of $13,338,217 in commissions from non-traded REITs and BDCs purchased in the Tribe's PKS accounts, less the $6.5 million the Tribe has received to date under the Tribal-PKS Settlement Agreement, which results in $6,838,217 in damages. PKS as assignee of the claims of the Tribe is entitled to prejudgment interest/pre-award interest on the latter amount from March 15, 2013, which is the midpoint of the period June 2011 through December 2014 encompassing Vungarala's misconduct, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a).

137. 18 U.S.C. § 1964(c) creates a private right of action for treble damages for the wrongs complained of here.

FIFTH CLAIM

BREACH OF INDEMNITY PROVISIONS OF THE VUNGARALA-PKS AGREEMENT (asserted by PKS individually)

138. PKS in its individual capacity realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

139. Vungarala entered into the Vungarala-PKS Agreement with PKS, which contains inter alia the Indemnity Provisions.

140. Pursuant to the Indemnity Provisions, Vungarala is liable to PKS for the Indemnified Amounts, but has failed to perform those obligations, despite demand by PKS for performance.

141. PKS has performed all of the terms and conditions of the Vungarala-PKS Agreement on its part to be performed.

142. Directly and proximately as a result of Vungarala's breach of the Indemnity Provisions, PKS suffered damages in the following amounts: (a) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (b) the FINRA $750,000 fine amount; and (c) the $3,779,656 restitution with interest amount, for a total of $14,029,656. PKS is entitled to prejudgment/pre-award interest at the rate of 9% per annum on (a) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (b) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (c) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (d) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with New York law, i.e., CPLR § 5004, which calls for pre-judgment interest at the rate of 9% per annum.

SIXTH CLAIM

BREACH OF COMMON LAW INDEMNITY
(asserted by PKS individually)

143. PKS in its individual capacity realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

144. To the extent that PKS has paid or will pay the amounts set forth in the section above of this Amended Statement of Claim entitled "PKS' Damages," PKS is entitled to common law indemnification from Vungarala, because his tortious and other misconduct resulted in or will result in the payment of those amounts.

145. Vungarala has failed to perform those common law indemnification obligations, despite demand by PKS for performance.

146. Directly and proximately as a result of Vungarala's breach of his common law indemnification obligations, PKS suffered damages in the following amounts: (a) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (b) the FINRA $750,000 fine amount; and (c) the $3,779,656 restitution with interest amount. PKS is entitled to prejudgment/pre-award interest at the rate of 9% per annum on (a) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (b) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (c) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (d) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with New York law, i.e., CPLR § 5004, which calls for pre-judgment interest at the rate of 9% per annum.

SEVENTH CLAIM

UNJUST ENRICHMENT
(asserted by PKS individually and in its capacity as assignee of the claims of the Tribe)

147. PKS individually and as assignee of the claims of the Tribe realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

148. Vungarala has been enriched by receiving a substantial benefit via his retention of $11,604,079 in commissions paid by PKS out of the $13,338,217 in commissions generated by the Tribe's purchase of non-traded REITs and BDCs purchased in its PKS accounts.

149. Vungarala's enrichment was at PKS' expense and he is liable for it as a "renege."

150. Vungarala's enrichment was also at the Tribe's expense.

151. Vungarala's retention of the enrichment would be against equity and good conscience.

152. By reason of Vungarala's unjust enrichment, PKS has been damaged in the amount of $11,604,079. PKS is entitled to prejudgment/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually.

153. By reason of Vungarala's unjust enrichment, the Tribe has been damaged in

the amount of $11,604,079 less the $6.5 million the Tribe has received to date under the Tribal-PKS Settlement Agreement, which results in $5,104,079 in damages here. PKS as assignee of the claims of the Tribe is entitled to prejudgment interest/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8) as set forth in the immediately preceding paragraph above of this Second Amended Statement of Claim.

EIGHTH CLAIM

BREACH OF FIDUCIARY DUTY
(asserted by PKS in its capacity as assignee of the claims of the Tribe)

154. PKS as assignee of the claims of the Tribe realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

155. As a Tribal employee who made investment decisions, Vungarala was subject to the Investment Policy's ethical standards that required him to "refrain from personal business activity that could conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions" and "disclose any material interests in financial institutions with which they conduct business."

156. By reaping over 85 percent of the commissions of the REIT and BDC sales that he routed through PKS without disclosing his (or PKS' or Sutterfield's) commissions to the Tribe, Vungarala breached his fiduciary duty to the Tribe to act impartially and outside of his own interests.

157. By structuring the purchase of REITs and BDCs in small transactions and without pooling the Tribe's resources, Vungarala increased his own commissions while robbing the Tribe of volume purchasing discounts to which it was entitled – all of which he did in breach of his fiduciary duty to the Tribe to act impartially and outside of his own

interests.

158. Directly and proximately as a result of Vungarala's breach of fiduciary duty, the Tribe has been damaged in the minimum amount of $13,338,217 in commissions from non-traded REITs and BDCs purchased in the Tribe's PKS accounts, less the $6.5 million the Tribe has received to date under the Tribal-PKS Settlement Agreement, which results in $6,838,217 in damages. PKS as assignee of the claims of the Tribe is entitled to prejudgment interest/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually.

159. PKS as the assignee of the claims of the Tribe is also entitled to punitive damages, as Vungarala acted with malice, wantonly or with reckless indifference with respect to the Tribe. The aggregate amount of Damages set forth in the section above of this Second Amended Complaint entitled The Tribe's Damages is also an appropriate amount of punitive damages to be awarded, i.e., $6,838,217.

NINTH CLAIM

BREACH OF CONTRACT
(asserted by PKS in its capacity as assignee of the claims of the Tribe)

160. PKS as assignee of the claims of the Tribe realleges and incorporates by reference the preceding paragraphs of this Second Amended Statement of Claim.

161. Vungarala and the Tribe entered into a series of employment contracts and extensions from 2008 through mid-January 2015 through which he rendered investment

management services to the Tribe in exchange for a salary, benefits and bonus compensation from the Tribe.

162. Each of these contracts required Vungarala to be "honest and confidential" in his work for the Tribe.

163. By reaping over 85 percent of the commissions of the REIT and BDC sales that he routed through PKS without disclosing his (or PKS' or Sutterfield's) commissions to the Tribe, Vungarala breached his contractual duty to be honest to the Tribe.

164. By structuring the purchase of REITs and BDCs in small transactions and without pooling the Tribe's resources, Vungarala increased his own commissions while robbing the Tribe of volume purchasing discounts to which it was entitled – all of which he did in further breach of his contractual duty to be honest to the Tribe.

165. The Tribe performed all of the terms and conditions of the employment contracts and extensions on its part to be performed.

166. Directly and proximately as a result of Vungarala's breach of contract, the Tribe has been damaged in the minimum amount of $13,338,217 in commissions from non-traded REITs and BDCs purchased in the Tribe's PKS accounts, less the $6.5 million the Tribe has received to date under the Tribal-PKS Settlement Agreement, which results in $6,838,217 in damages. PKS as assignee of the claims of the Tribe is entitled to prejudgment interest/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually.

RELIEF REQUESTED

WHEREFORE, claimant PKS individually and as assignee of the claims of the Tribe respectfully requests that the Panel:

A. make findings of fact and conclusions of law that Vungarala committed the misconduct charged here;

B. on the First Claim, award PKS individually the damages suffered as a result of Vungarala's commissions securities fraud: (i) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement, and (ii) the FINRA $750,000 fine amount, for a total of $10,250,000, together with prejudgment/pre-award interest on (i) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (ii) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; and (iii) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

C. on the First Claim, award PKS as assignee of the claims of the Tribe the damages suffered as a result of Vungarala's commissions securities fraud in the amount of $6,838,217, together with prejudgment interest/pre-award interest on that amount from March 15, 2013, which is the midpoint of the period June 2011 through December 2014 encompassing Vungarala's misconduct, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

D. on the Second Claim, award PKS individually the damages suffered as a result of Vungarala's volume discount securities fraud: (i) the FINRA $750,000 fine amount,

and (ii) the $3,779,656 restitution with interest amount, for a total of $4,529,656, together with prejudgment/pre-award interest on (i) $750,000 thereof from March 2, 2017, which is the date when the FINRA $750,000 fine amount was paid, and (ii) the $3,779,656 restitution with interest amount thereof from March 13, 2017, which is when the latter amount was paid to the Tribe, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

E. on the Third Claim, award PKS individually the damages suffered as a result of Vungarala's common law fraud: (i) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (ii) the FINRA $750,000 fine amount; and (iii) the $3,779,656 restitution with interest amount, for a total of $14,029,656, together with prejudgment/pre-award interest on the latter amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually;

F. on the Third Claim, award PKS as assignee of the claims of the Tribe the damages suffered as a result of Vungarala's common law fraud in the amount of $6,838,217, together with prejudgment interest/pre-award interest on that amount in accordance with Michigan law, i.e., under MCL § 600.6013(8) as set forth in the immediately preceding paragraph above of this Second Amended Statement of Claim;

G. on the Third Claim, award PKS individually punitive damages in the amount of

$14,029,656;

H. On the Third Claim, award PKS as assignee of the claims of the Tribe punitive damages in the amount of $6,838,217;

I. On the Fourth Claim, award PKS individually the damages suffered as a result of Vungarala's RICO violations: (i) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (ii) the FINRA $750,000 fine amount; and (iii) the $3,779,656 restitution with interest amount, for a total of $14,029,656, such damages to be trebled under RICO, 18 U.S.C. § 1964(c), together with prejudgment/pre-award interest, also to be trebled under RICO, on (i) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (ii) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (iii) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (iv) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

J. On the Fourth Claim, award PKS as assignee of the claims of the Tribe the damages suffered as a result of Vungarala's RICO violations in the amount of $6,838,217, such damages to be trebled under RICO, 18 U.S.C. § 1964(c), together with prejudgment interest/pre-award interest, also to be trebled under RICO, on that amount from March 15, 2013, which is the midpoint of the period June 2011 through December 2014 encompassing Vungarala's misconduct, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

K. on the Fifth Claim, award PKS individually the damages suffered as a result of Vungarala's breach of the Indemnity Provisions of the Vungarala-PKS Agreement: (i) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (ii) the FINRA $750,000 fine amount; and (iii) the $3,779,656 restitution with interest amount, for a total of $14,029,656, together with prejudgment/pre-award interest at the rate of 9% per annum on (i) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (ii) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (iii) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (iv) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with New York law, i.e., CPLR § 5004, which calls for pre-judgment interest at the rate of 9% per annum;

L. On the Sixth Claim, award PKS individually the damages suffered as a result of Vungarala's breach of common law indemnity obligations: (i) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (ii) the FINRA $750,000 fine amount; and (iii) the $3,779,656 restitution with interest amount, for a total of $14,029,656, together with prejudgment/pre-award interest at the rate of 9% per annum on (i) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (ii) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (iii) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (iv) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with New York law, i.e., CPLR § 5004, which calls for pre-judgment interest at the rate of 9% per annum;

M. On the Seventh Claim, award PKS individually the damages suffered as a result of Vungarala's unjust enrichment in the amount of $11,604,079, together with prejudgment/pre-award interest on that amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually;

N. On the Seventh Claim, award PKS as assignee of the claims of the Tribe the damages suffered as a result of Vungarala's unjust enrichment in the amount of $5,104,079, together with prejudgment interest/pre-award interest on that amount in accordance with Michigan law, i.e., under MCL § 600.6013(8) as set forth in the immediately preceding paragraph above of this Second Amended Statement of Claim;

O. On the Eighth Claim, award PKS as assignee of the claims of the Tribe the damages suffered as a result of Vungarala's breach of fiduciary duty in the amount of $6,838,217, together with prejudgment interest/pre-award interest on that amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually;

P. On the Eighth Claim, award PKS as assignee of the claims of the Tribe punitive

damages in the amount of $6,838,217;

Q. On the Ninth Claim, award PKS as assignee of the claims of the Tribe the damages suffered as a result of Vungarala's breach of contract in the amount of $6,838,217, together with prejudgment interest/pre-award interest on that amount in accordance with Michigan law, i.e., under MCL § 600.6013(8), which calls for interest calculated at 6-month intervals from the date of filing the complaint – here the Statement of Claim was filed on October 21, 2019 – at a rate of interest equal to 1% plus the average interest rate paid at auction of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually;

R. On all Claims asserted by PKS individually without differentiation and in view of overlapping damage claims, **award PKS individually the highest amount of damages suffered**, i.e., as a result of Vungarala's RICO violations: (i) the $9.5 million amount paid and/or owing under the Tribal-PKS Settlement Agreement; (ii) the FINRA $750,000 fine amount; and (iii) the $3,779,656 restitution with interest amount, for **a total of $14,029,656 in compensatory damages**, such damages to be trebled under RICO, 18 U.S.C. § 1964(c), for **a grand total of $42,088,968 in RICO treble damages**, together with prejudgment/pre-award interest, also to be trebled under RICO, on (i) $6 million thereof from May 10, 2019, which is the date such amount was paid to the Tribe; (ii) $500,000 thereof from February 4, 2020, which is the date such amount was paid to the Tribe; (iii) $750,000 thereof from March 2, 2017, which is the date such amount was paid to FINRA; and (iv) $3,779,656 thereof from March 13, 2017, which is the date such amount was paid to the Tribe, in accordance with federal law for federal claims, i.e., at the rate established for the

underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

S. As noted above, on the Third Claim asserted by PKS individually, **award PKS individually punitive damages in the amount of $14,029,656**;

T. On all Claims asserted by PKS as assignee of the claims of the Tribe without differentiation and in view of overlapping damage claims, **award PKS as assignee of the claims of the Tribe the highest amount of damages suffered**, i.e., as a result of Vungarala's RICO violations in the amount of **$6,838,217 in compensatory damages**, such damages to be trebled under RICO, 18 U.S.C. § 1964(c), for **a grand total of $20,514,651 in RICO treble damages**, together with prejudgment interest/pre-award interest, also to be trebled under RICO, on that amount from March 15, 2013, which is the midpoint of the period June 2011 through December 2014 encompassing Vungarala's misconduct, in accordance with federal law for federal claims, i.e., at the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a);

U. As noted above, on the Third Claim and/or Eighth Claim asserted by PKS as assignee of the claims of the Tribe, **award PKS as assignee of the claims of the Tribe punitive damages in the amount of $6,838,217;**

V. order that respondent Vungarala be assessed and bear what would otherwise be PKS' filing fees, member fees, hearing session fees and any other arbitration fees and that PKS be awarded its attorneys' fees; and

W. award PKS individually and as assignee of the claims of the Tribe such other and further relief as the Panel deems just and proper.

Dated: April 23, 2021

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EXHIBIT A

FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT, Complainant, v. GOPI KRISHNA VUNGARALA (CRD No. 4856193), Respondent.	Disciplinary Proceeding No. 2014042291901 Hearing Officer–LOM **EXTENDED HEARING PANEL DECISION** October 25, 2017

Respondent, Gopi Krishna Vungarala, was employed by a Native American tribe to manage its investment portfolio. He persuaded the Tribe to invest in Real Estate Investment Trusts and Business Development Companies through a broker-dealer firm where he told the Tribe he "parked" his registration. As a result, he received over $9 million in commissions. Through false and misleading statements, he led the Tribe to believe that he did not receive commissions on the Tribe's transactions and that he had no conflict of interest. In so doing, he willfully committed fraud, as charged in the First Cause of Action, for which he is barred and ordered to disgorge the $9,682,629 in commissions that he obtained by the fraud, plus pre-judgment interest.

Respondent also misled the Tribe regarding its eligibility for volume discounts, failing to disclose to the Tribe that it was eligible to receive more than $3.3 million in volume discounts. He personally benefited, because the discounts would have reduced his commissions. He willfully committed fraud, as charged in the Second Cause of Action, for which he is separately barred. He would be ordered to disgorge the $2.8 million in commissions that he obtained by this fraud, but these monies are included in the order to disgorge all his commissions.

Respondent is ordered to pay costs.

Appearances

For the Complainant: Suzanne H. Bertolett, Esq., Sean W. Firley, Esq., and David B. Klafter, Esq., Department of Enforcement, Financial Industry Regulatory Authority.

For the Respondent: Sharron E. Ash, Esq., Brian S. Hamburger, Esq., Irwin Pronin, Esq., Hamburger Law Firm, LLC.

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I. INTRODUCTION

In November 2008, a Native American tribe (the "Tribe") hired Respondent, Gopi Vungarala ("Vungarala"), as its first in-house Investment Manager to manage its investment portfolio. He joined the staff of the Tribe's Treasury Department, which manages the Tribe's investments. Members of the Tribe relied on Vungarala as their in-house investment professional. They did not have much investment experience and were not familiar with securities brokerage-industry terminology and practices. He was the only Treasury Department employee who had any significant investment experience beyond having a 401(k) account. Vungarala took advantage of the Tribe's trust and lack of sophistication by making false and misleading statements that concealed his personal financial interest in steering the Tribe to investing in Real Estate Investment Trusts ("REITs") and Business Development Companies ("BDCs").

A. Vungarala Steered the Tribe to Invest in REITs and BDCs

Before creating the in-house position of Investment Manager in November 2008, the Tribe had used an outside investment adviser and traded through Charles Schwab ("Schwab"), which had custody of the Tribe's assets. At the time Vungarala became the Tribe's employee, it was primarily invested in stocks and investment-grade bonds. For the first two and a half years he was employed by the Tribe, Vungarala traded on its behalf through Schwab on a fiduciary basis.

In the summer of 2011, Vungarala began recommending that the Tribe invest in REITs and BDCs. By the time Vungarala left his employment with the Tribe in January 2015, REITs and BDCs represented 22.8% of the Tribe's portfolio.

B. Vungarala Had a Conflict of Interest

Prior to joining the Tribe, Vungarala had been a registered representative with Purshe Kaplan & Sterling Investments, Inc. ("PKS") and an investment adviser representative with Sutterfield Financial Group ("Sutterfield"). After joining the Tribe, he continued to maintain his registrations, servicing only a few small accounts. He told the Tribe that he "parked" his registration at PKS.

As the Tribe's employee and a member of its Treasury Department, Vungarala was subject to its Investment Policy. That policy contained a conflict of interest provision that prohibited him from engaging in any personal business activity that could impair his ability to make impartial decisions on behalf of the Tribe.

In violation of the Tribe's conflict of interest policy, and ignoring the inherent conflict of interest, Vungarala secretly received more than $9 million in commissions on the REITs and BDCs he purchased for the Tribe. He made all the REIT and BDC investments through PKS and received commissions as though he were an ordinary registered representative and not the Tribe's employee.

C. Vungarala Misled the Tribe Regarding His Commissions

Vungarala led his supervisor at the Tribe to believe that he would not receive commissions in connection with the Tribe's investments in REITs and BDCs through PKS and therefore he would have no conflict of interest. Vungarala's tribal supervisor then told other members of the Tribe at an Investment Committee meeting that Vungarala would have no conflict of interest if the Tribe purchased REITs and BDCs through PKS. Vungarala was present when she made that statement, but he did not correct her. By his silence, he implicitly—and falsely—represented that he would not personally benefit financially from the REIT and BDC investments that he recommended to the Tribe. Moreover, he perpetuated the Tribe's misunderstanding by repeatedly making misleading and obfuscatory statements to members of the Tribe in presentations about the fees and expenses associated with their REIT and BDC investments.

Although it had been investing in REITs and BDCs through PKS for over three years, in the fall of 2014 the Tribe did not yet understand who received what commissions on its REIT and BDC investments. Tribal members began asking pointed questions. In response, Vungarala explained the general structure of fees and expenses for REITs and BDCs and disclosed that PKS and an "XYZ sales team" received commissions. But he did *not* disclose that *he* received the majority of the commissions on the Tribe's transactions.

D. Vungarala Misled the Tribe Regarding Volume Discounts

Vungarala additionally misled the Tribe regarding its eligibility for volume discounts. He created the false impression that only physically "comingled" purchases qualified for volume discounts, and that the Tribe's multiple purchases in different tribal accounts did not qualify. He failed to disclose that, in fact, volume discounts only required a calculation of the total amount of purchases in different accounts. He also failed to disclose that some REITs had expressly offered the Tribe volume discounts. Unbeknownst to the Tribe, Vungarala refused the proffered volume discounts. Because volume discounts reduce commissions, it was to Vungarala's advantage not to disclose the availability of volume discounts. He received $2.8 million more in commissions than he otherwise would have if the Tribe had taken the volume discounts. The Tribe lost $3.3 million in missed volume discounts.

In concealing the Tribe's eligibility for volume discounts, Vungarala acted in his own self-interest to the detriment of the Tribe. Vungarala's receipt of millions of dollars in commissions on the Tribe's investments was a business activity for his personal benefit that not only "could" impair his objectivity in managing the Tribe's portfolio—it did.

E. Vungarala's Claim that He Made Full Disclosure Is Contrary to the Evidence

Vungarala claims that he disclosed to the Tribe that he was receiving commissions on the Tribe's REIT and BDC transactions. He claims that he wore "two hats"—his employee hat when he dealt with stocks and bonds through Schwab, and his registered representative hat when he

dealt with REITs and BDCs through PKS, where he "parked" his license. He claims that the Tribe knew that he was wearing his registered representative hat, not his employee hat, when discussing REITs and BDCs, and that the Tribe therefore knew that he received commissions.

As to volume discounts, Vungarala separately claims that he disclosed the availability of the volume discounts, but the Tribe declined to take advantage of them, in part because it made the purchases in separate accounts devoted to different purposes, and in part because of privacy concerns. The Tribe did not want to disclose to the public what its investment holdings were or the size of its portfolio.

The record does not support Vungarala's assertions. The evidence demonstrates that he purposely misled members of the Tribe about his commissions on its REIT and BDC investments, both by affirmative misrepresentation and material omissions necessary to make what he said about fees and expenses not misleading. The evidence further establishes that Vungarala purposely misled the Tribe regarding its eligibility for volume discounts and failed to disclose that it qualified for such discounts. Vungarala willfully committed fraud. For his misconduct, he is barred from associating with any FINRA member firm in any capacity and ordered to disgorge his ill-gotten gains.

II. FINDINGS OF FACT

A. Background

1. Volume Discounts and the Origin of the Investigation

This proceeding arose out of a local examination in Florida relating to volume discounts that evolved into a 2014 national review of certain FINRA member firms.[1] The purpose of the national review was to determine whether customers purchasing non-traded REITs and BDCs received all the volume discounts to which they were entitled.[2]

A customer receives a volume discount when its purchases of a particular non-traded REIT or BDC reach a threshold amount, sometimes referred to as a breakpoint. In almost all of the REITs involved in this case, the first threshold was $500,000. If the customer purchased more, it might obtain larger volume discounts as its purchases reached higher threshold amounts. In connection with a hypothetical investment of $1.5 million, the customer might be charged 7% on the first $500,000, 6% on the next $500,000, and 3% on the last $500,000. The volume discount allowed a customer to buy more units of the investment for the same dollar amount.[3] If

[1] Hearing Tr. (PG) 632-38.

[2] Hearing Tr. (PG) 632-33.

[3] Hearing Tr. (PG) 645-46; Hearing Tr. (KE) 858-59.

the Tribe had taken advantage of the volume discounts at issue it would have netted a higher return, which would have factored significantly in analyzing a proposed investment.[4]

The prospectus for a REIT or BDC sets forth the circumstances in which an investor may receive a volume discount.[5] Generally, a single investor may combine purchases in different accounts to achieve more of a volume discount. A prospectus will define who is a single investor for purposes of such discounts. Typically, any accounts owned by an individual, entity, or trust may be combined to receive a greater volume discount.[6]

There is a direct relationship between the volume discount and any commissions paid to the broker. A volume discount is funded by reducing the selling commission paid by the investment product's wholesaler to the selling broker-dealer; that is, not applying volume discounts directly results in higher commissions for the broker.[7]

In connection with the national review, FINRA Staff issued requests for information pursuant to FINRA Rule 8210 to the top five wholesalers of non-traded REITs for 2013.[8] When studying the first two responses from the wholesalers in June 2014, the Staff noted that a majority of the $200,000 in potential missed volume discounts during the two-year period then under investigation, perhaps as much as 90%, was attributable to investments made by the Tribe.[9] Subsequent responses showed that a large portion of the missed volume discounts was for accounts controlled by the Tribe, and the amount of missed volume discounts for the period under review was nearly $1.5 million.[10] All of the Tribe's investments that the Staff reviewed were made through PKS, and Vungarala was the registered representative of record.[11]

FINRA Staff reviewed Vungarala's Form U4 and noted that, in addition to being the Tribe's PKS registered representative, Vungarala was also employed by the Tribe.[12] The Staff considered the direct correlation between the volume discounts and Vungarala's commissions a potential conflict of interest.[13]

FINRA Staff then sent the Tribe a letter in August 2014, referred to by the Staff as a "call me" letter, asking the Tribe to contact FINRA for a brief telephone discussion. The letter was

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[4] Hearing Tr. (KE) 858-59; Hearing Tr. (DD) 98-100.

[5] Stip. ¶ 8; Hearing Tr. (PG) 646-47, 653-55; Hearing Tr. (KE) 849-50, 853-55; CX-39, at 2-3; CX-46, at 5-8.

[6] Hearing Tr. (PG) 645-47.

[7] Stip. ¶ 22; Hearing Tr. (PG) 646.

[8] Hearing Tr. (PG) 633-34; CX-84.

[9] Hearing Tr. (PG) 635.

[10] Hearing Tr. (PG) 636.

[11] Hearing Tr. (PG) 636.

[12] Hearing Tr. (PG) 636.

[13] Hearing Tr. (PG) 646.

addressed to the Chief and Sub-Chief of the Tribe and referenced Realty Capital Securities, one of the non-traded REIT wholesalers from which the Staff had obtained information. The letter made no reference to Vungarala, or his broker-dealer firm, PKS, or non-traded REITs or BDCs.[14]

The Tribe did not immediately respond to the letter. However, FINRA Staff later spoke to the Tribe's general counsel, after which the Tribe conducted its own investigation into Vungarala's receipt of commissions, meeting with Vungarala and seeking information from PKS. Subsequently, the Staff posed written questions to the Tribe and received a written response from the general counsel.[15] The Tribe's internal investigation, the general counsel's response to the FINRA Staff's questions, and other events leading to the initiation of this proceeding will be discussed below in the context of Vungarala's employment with the Tribe.

2. Proceeding

FINRA's Department of Enforcement ("Enforcement") filed the Complaint on February 4, 2016, charging Vungarala with fraud (First and Second Causes of Action) and PKS with supervisory violations (Third and Fourth Causes of Action). The relevant time period covered by the Complaint runs from June 2011 through January 2015. Respondents filed an Amended Answer on October 4, 2016. On February 21, 2017, a settlement resolved the claims against the Firm, leaving Vungarala as the only Respondent.

The hearing was held over eight days in April 2017. Eight witnesses testified.[16] The parties entered into stipulations[17] and introduced exhibits into evidence.[18] Simultaneous post-hearing briefs were filed on June 2, 2017, and simultaneous response briefs were filed on

[14] Hearing Tr. (PG) 637-38; CX-97.

[15] Hearing Tr. (PG) 638-40; CX-76; CX-77.

[16] In addition to Vungarala, the following persons testified: DD, the current Tribal Administrator; AO, the Treasury Administrator for the Tribe from October 2008 to October 2014, and Vungarala's supervisor at the Tribe for most of his employment; PG, a FINRA examiner involved in the national sweep regarding volume discounts that led to this proceeding; MB, a research analyst with the Tribe; KE, a FINRA examiner who compiled information on the volume discounts the Tribe should have received; LE, the Firm's Chief Compliance Officer; and DJG, a former PKS regional supervisor who worked with Vungarala on the Tribe's investments in REITs and BDCs.

References to hearing testimony are in the following format: "Hearing Tr. (last name or initials of witness), page of transcript." For example, Vungarala's testimony is cited as "Hearing Tr. (Vungarala) 1082-84, and the Treasury Administrator's testimony is cited as "Hearing Tr. (AO) 1570."

[17] References to the stipulations, which are numbered paragraphs, are in the following format: "Stip. ¶ 13."

[18] Complainant's exhibits are referred to with the prefix "CX," an identifying number, and sometimes a particular page. For example, "CX-6, at 4" refers to the page of the Tribe's Investment Policy relating to ethics and conflicts of interest. Similarly, Respondent's exhibits are referred to with the prefix "RXV." For example, Vungarala's first personal services contract with the Tribe is "RXV-3."

June 12, 2017.[19] After reviewing the briefs and evidentiary record, the Extended Hearing Panel deliberated. This decision reflects the Panel's reasoning and conclusions.

3. Respondent

From June 1998 to June 2003, Vungarala was a financial analyst and credit manager for Dow Chemical. After approximately a year of unemployment, Vungarala became a registered representative with American General Securities Inc. in September 2004. At the same time, he became an agent for AIG American General Life Insurance Company. In December 2007 he left that position, and in January 2008, he became a registered representative with PKS and an investment adviser representative with Sutterfield.[20] Throughout the events at issue, Vungarala was registered with PKS. He resigned as a registered representative with PKS two weeks before the hearing in this matter.[21]

Although he denies it, Vungarala was experiencing financial difficulties when he joined PKS. In October 2008, about nine months after Vungarala joined PKS, and about a month before he started working for the Tribe, the State of Michigan entered a tax lien against him for $1,256.53. After he paid the tax amount in full the State released the lien on June 15, 2009. Vungarala has a son with special needs, and he and his family went through a difficult time with the costs of treatments and the time and energy required to care for his son. Vungarala testified that he had withdrawn all the funds from his and his wife's 401(k) accounts to meet these demands. Before the Tribe hired Vungarala, he had been registered with PKS about 11 months, but he had few clients and did not have a large book of business.[22] He testified that he was unable to focus on obtaining new clients because of his son's illness, and that the only clients he had were his church and 401(k) plans for two county governments.[23]

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[19] References to the post-hearing briefs are as follows: Department of Enforcement's Post-Hearing Brief ("Enf. PH Br."); Respondent Gopi Krishna Vungarala's Post-Hearing Brief ("Resp. PH Br."); Department of Enforcement's Reply to Respondent's Post-Hearing Brief ("Enf. Reply"); and Respondent Gopi Krishna Vungarala's Post-Hearing Reply Brief ("Resp. Reply").

References to the pre-hearing briefs are as follows: Department of Enforcement's Pre-Hearing Brief ("Enf. Pre. Br."); Respondent Gopi Krishna Vungarala's Pre-Hearing Brief ("Resp. Pre. Br.").

[20] CX-1, at 5. The commissions Vungarala earned at PKS flowed through Sutterfield to him, with Sutterfield taking a small portion. Hearing Tr. (Vungarala) 1191-92.

[21] CX-1, at 5; Hearing Tr. (representation by defense counsel) 1709. Although Vungarala is no longer registered, FINRA has jurisdiction to bring this proceeding against him. The Complaint charges him with misconduct committed while he was registered, and it was filed within two years of the termination of his registration. FINRA By-Laws, Art. IV, Section 6; Art. V, Section 4.

[22] CX-1, at 17-18; Hearing Tr. (Vungarala) 1061-66.

[23] Hearing Tr. (Vungarala) 1105.

When Vungarala became the Tribe's employee in November 2008, his salary of $99,500 was a significant amount of his income.[24] When he left the Tribe in mid-January 2015, his salary was $120,000, with the potential for an annual bonus of 10%.[25]

4. The Tribe

The Tribe is governed by a twelve-member Tribal Council, including a Chief and Sub-Chief, who are elected for a two-year term. The Tribal Council is assisted by employees and a number of advisory boards and committees, including, of most importance here, an Investment Committee.[26]

The Investment Committee is responsible for reviewing recommendations by the Tribe's Treasury Department for investing monies derived from the Tribe's casino operations and other business activities. These monies fund the Tribe's government operations, education programs, health programs, and other tribal member benefits. One important tribal trust through which the Tribe makes investments is the "per capita trust." It funds a substantial member benefit available to all enrolled members, a periodic per capita distribution of monies to members of the Tribe. The Tribe invests through nine trust accounts that serve these different purposes.[27] Through the trusts, the Tribe's investment portfolio is structured in a way that ties to its organizational structure.[28] The trusts are a convenience for accounting purposes.[29] Generally assets in one trust cannot be moved to another. Investment transactions occur separately in the various trusts.[30]

During the period that Vungarala managed the Tribe's investments, a decline in casino revenues created pressure to maximize the performance of the Tribe's investment portfolio. As its bonds at Schwab matured, the Tribe was concerned about achieving the same level of performance when it reinvested. Vungarala saw his job as looking for yield.[31] Prior to the events at issue, the Tribe had no previous experience with investing in non-traded REITS or BDCs, but, as discussed below, Vungarala recommended the REITs and BDCs as the best choice to obtain the yield that the Tribe sought.[32]

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[24] Hearing Tr. (Vungarala) 1056, 1066-68; RXV-3.

[25] Stip. ¶¶ 10, 12; Hearing Tr. (Vungarala) 1055-58, 1061; CX-4.

[26] Hearing Tr. (DD) 64-66.

[27] Hearing Tr. (DD) 64-65, 73-75; Hearing Tr. (AO) 364-67, 372-79.

[28] Hearing Tr. (DD) 177-79.

[29] Hearing Tr. (DD) 263-64.

[30] Hearing Tr. (AO) 377-79.

[31] Hearing Tr. (DD) 120-23; Hearing Tr. (Vungarala) 1086-89.

[32] Hearing Tr. (AO) 296.

5. The Tribe's Investment Process for REITs and BDCs Through PKS

For REITs and BDCs, the Tribe's investment process generally involved the Treasury Department, the Investment Committee, the Legal Department, and the Tribal Council.[33] Vungarala argues that the Tribe's multi-step process for approving the REIT and BDC investments demonstrates its sophistication and that it must have known that he received commissions on the Tribe's REIT and BDC investments.[34]

While the process might appear substantial on paper, tribal members involved in the process were not sophisticated investors. They were not familiar with basic brokerage terminology and practices, and they had never dealt with the complexities of the REIT and BDC products that Vungarala recommended that they purchase. The Tribe depended on its in-house investment professional, Vungarala.

a. Treasury Department

As the Tribe's Investment Manager, Vungarala was part of the Tribe's Treasury Department. The Department included an administrative assistant, a cash manager, and two research analysts, along with the Treasury Department Administrator ("Treasury Administrator"), AO.[35]

For most of the time that Vungarala was an employee of the Tribe, he and the other Treasury Department members reported to AO. She was appointed the Tribe's Treasury Administrator in October 2008, less than a month before Vungarala became an employee of the Tribe.[36] AO made sure that the Tribe's policies and procedures were followed,[37] managed the budget,[38] and authorized leave for Treasury Department employees.[39] She provided forecasts of the Tribe's cash flows, which helped the Tribe to determine how investments should be allocated among the trusts.[40] AO did not analyze investments independently from Vungarala. She never read a prospectus for the REITs or BDCs the Tribe purchased.[41]

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[33] Hearing Tr. (AO) 301-02; Hearing Tr. (DD) 66-70.

[34] Resp. PH Br. 4-9; Resp. Reply 5-6; Hearing Tr. (Vungarala) 1250-56.

[35] Hearing Tr. (AO) 284.

[36] Hearing Tr. (AO) 281, 285, 1507-08.

[37] Hearing Tr. (AO) 282-84.

[38] Hearing Tr. (DD) 167-69.

[39] Hearing Tr. (Vungarala) 1138-40.

[40] Hearing Tr. (Vungarala) 1114-15.

[41] Hearing Tr. (AO) 449.

Despite holding an M.B.A. and the title of Treasury Administrator, AO did not have a sophisticated business background. Her investment experience was limited to holding a 401(k).[42] Her work experience was limited to two years as the Tribe's café supervisor and two years as its tax director.[43] Even after she became Treasury Administrator and worked with Vungarala on the REIT and BDC investments, AO had a limited understanding of the securities industry. Because the Tribe's Schwab statements specifically identified commissions, she expected all commissions on all statements to be broken out as separate charges. The REIT and BDC statements, however, did not show commissions that way, which allowed Vungarala to mislead AO regarding his commissions.[44]

Like AO, the research analysts had little investment experience. They had bachelor's degrees but no professional certifications.[45] Prior to becoming an analyst, MB had been an accounting intern, a black jack dealer, an enrollment clerk, and a concession cashier.[46] She joined the Treasury Department approximately six months after Vungarala.[47]

Vungarala gave the analysts their assignments and taught them how to assist him. When they worked on stocks and bonds, for instance, he would ask them to provide 52-week high and low prices on a list of stocks he prepared.[48] When the Tribe started buying REITs, Vungarala explained the REITs to the research analysts.[49] MB had never heard of REITs before working at the Treasury Department.[50] Vungarala provided the analysts with marketing brochures from the REIT issuers and showed them what information to put together for a presentation to the Investment Committee.[51]

Prior to taking investment recommendations to the Investment Committee for review, Vungarala, AO, and the two analysts would sit together and go through the investments Vungarala recommended. He would discuss the REIT marketing brochures with them.[52] Later, after the analysts had some experience, Vungarala had them do summaries for presentations to the Investment Committee.[53] Each summary was a single sheet of paper with the name of the

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[42] Hearing Tr. (AO) 281, 289, 589.

[43] Hearing Tr. (AO) 280-81.

[44] Hearing Tr. (AO) 286-88, 332-37, 453-57, 1390, 1392-94, 1428-29.

[45] Hearing Tr. (MB) 666-69.

[46] Hearing Tr. (MB) 666-68.

[47] Hearing Tr. (MB) 670.

[48] Hearing Tr. (AO) 284-88; Hearing Tr. (MB) 671-73, 732-33.

[49] Hearing Tr. (AO) 294-95.

[50] Hearing Tr. (MB) 767.

[51] Hearing Tr. (MB) 671-73, 732-33.

[52] Hearing Tr. (AO) 301-05; Hearing Tr. (MB) 671-73, 732-33.

[53] Hearing Tr. (AO) 302, 304-05; Hearing Tr. (MB) 671-74, 732-33.

REIT, what the REIT was about, the offering price, the expected return, and the expected exit strategy. Vungarala told the analysts what to include in the summaries.[54] The summaries did not mention volume discounts or commissions.[55] Vungarala identified potential investments, and the research analysts would complete their analysis and determine in which trusts the investments should be placed.[56] The analysts did no independent research.[57] MB testified that she viewed Vungarala as the "expert" responsible for giving an opinion on the merits of a proposed investment. She did not view the summaries that she created under his direction as her opinion, but rather a compilation of facts.[58]

In his testimony, Vungarala insisted that the four employees were equals, and that AO and the analysts did not rely on him.[59] That is inconsistent with the evidence. They relied on his professional expertise to select investments for the Tribe. At his instruction, the analysts collected information regarding the investments he selected, and AO provided information on cash flows. While they worked together, the others depended on Vungarala to help them to understand the investments. AO testified that she accepted whatever Vungarala said, and that she believed him. To her, he was the investment professional.[60] MB similarly described Vungarala as the "expert" making trades for the Tribe.[61] No one in the Treasury Department ever overruled a recommendation by Vungarala.[62]

b. Investment Committee

The Investment Committee met monthly to review the recommendations of the Treasury Department. According to DD, the Tribal Administrator, the review was at a "high level" and Committee members did not have specific knowledge of specific investments. In his capacity as a member of the Investment Committee since 2007, DD said that he has never reviewed a prospectus. Rather, the Investment Committee members relied on Vungarala as their Investment Manager.[63]

Vungarala would make a presentation to the Investment Committee on the investments he wished to purchase, using Power Point or a white board to explain the applicable fees and

[54] Hearing Tr. (MB) 671-73, 732-33.

[55] Hearing Tr. (MB) 765.

[56] Hearing Tr. (DD) 85-87.

[57] Hearing Tr. (MB) 674.

[58] Hearing Tr. (MB) 676.

[59] Hearing Tr. (Vungarala) 1112-13.

[60] Hearing Tr. (AO) 445.

[61] Hearing Tr. (MB) 676.

[62] Hearing Tr. (AO) 305. It is plain that Vungarala directed the whole process of determining what investments should be brought to the Investment Committee. Hearing Tr. (AO) 301-05; Hearing Tr. (MB) 671-73, 732-33.

[63] Hearing Tr. (DD) 247-48.

expenses in simplified terms.[64] The Committee focused on the forecasted interest rate, the number of shares, the initial offering price, and what the REIT would be replacing. Then the Committee made its decision, which was based on Vungarala's recommendation, without other research or study.[65]

According to Vungarala, when the Tribe began considering REITs a presentation for a proposed REIT investment might take 45 minutes and involve the review of a 14-page summary. About 95% of this summary was composed of marketing material from the REIT that was approved for presentation to a client. But, as the Investment Committee became more comfortable with the investments, the summaries shrank to four pages and then to a single page. Vungarala said that the Committee did not want to spend time on the details of each and every transaction.[66]

Service on the Investment Committee was not a sign of investment sophistication or knowledge of the financial industry. DD testified that no special qualifications are required to serve on the Tribe's Investment Committee.[67] For example, although he has now been on the Investment Committee for ten years, DD does not know how to define a registered representative, cannot tell the difference between a broker-dealer and a registered investment advisor, and does not know who FINRA regulates.[68]

c. Legal Department

After the Investment Committee listened to Vungarala's presentation regarding a REIT or BDC, the recommendation was sent to the Tribe's Legal Department for its review. The Legal Department generally opposed the Tribe's purchases of REITs based on the Tribe's sovereign immunity and a desire to avoid arbitration if a dispute were to arise. A memorandum reflecting the Legal Department's opposition would accompany the other material supporting the investment recommendation sent to the Tribal Council.[69]

The Legal Department reviewed the prospectuses for the REITs and BDCs and would comment from time to time on aspects of a proposed investment.[70] Vungarala argues that the

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[64] Hearing Tr. (Vungarala) 1114-18, 1135-37, 1198-1202.

[65] Hearing Tr. (DD) 66, 116-18.

[66] Hearing Tr. (Vungarala) 1097-99, 1115-17, 1206-09.

[67] Hearing Tr. (DD) 66.

[68] Hearing Tr. (DD) 262-63. DJG, the PKS former regional supervisor who worked with Vungarala, testified that he thought the Tribe was sophisticated because it was structured like a major corporation and had a due diligence process. He thought that the fact that tribal members were on the Investment Committee implied, as it would in a major corporation, that they were qualified. However, he did not know the qualifications of the people on the Investment Committee. Hearing Tr. (DJG) 1851-53.

[69] Hearing Tr. (AO) 387-95, 484-86.

[70] Hearing Tr. (AO) 305; Hearing Tr. (Vungarala) 1212-18.

Legal Department's review of the prospectuses constituted disclosure of his commissions.[71] That is incorrect. A prospectus disclosed generically that the broker-dealer manager for the offering would receive commissions. Nothing in the prospectus informed the reader that the Tribe's own employee would be paid commissions on investments the Tribe made on his recommendation.[72]

d. Tribal Council

The Tribal Council then received the recommendations and accompanying material and made the final investment decisions.[73] In the three and a half years that the Tribe invested in REITs and BDCs, the Tribe rejected only two of the more than 200 investments Vungarala proposed, one because a director of the issuer was involved in litigation, and the other because the investment involved fracking and the Tribe was opposed to fracking.[74]

e. Execution of Approved Transactions

Typically, once a REIT or BDC investment was approved, the Treasury Department administrative assistant filled out the subscription agreement, collected signatures, and gave the package to Vungarala for his final review. After his review, he sealed the envelope and gave it to the administrative assistant to send to PKS. AO was not involved at this stage.[75]

6. The Tribe's Investment Process with Respect to Stocks and Bonds at Schwab

The investment process for the Tribe's stocks and bonds with Schwab was different than for REITs and BDCs. AO, the Tribe's Treasury Administrator, would tell Vungarala the Tribe's cash flow needs, based on expected revenues from the casino. Vungarala would identify potential investments, and the analysts would research the price history of those investments. Then the four of them would discuss the investments. At that point, Vungarala could then make the investment.[76]

Vungarala informed PKS that he had trading authority on a fiduciary basis in the Tribe's accounts at Schwab.[77] He had authority to invest without seeking approval through the Investment Committee or the Tribal Council.[78]

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[71] Resp. PH Br. 6-7.

[72] CX-95, at 19-24; RXV-90, at 71-73.

[73] Hearing Tr. (DD) 73-74; Hearing Tr. (AO) 302.

[74] Hearing Tr. (MB) 762.

[75] Hearing Tr. (Vungarala) 1120-24, 1260-61, 1264; Hearing Tr. (MB) 733; Hearing Tr. (AO) 370, 584.

[76] Hearing Tr. (Vungarala) 1114-15; Hearing Tr. (MB) 692.

[77] Hearing Tr. (KE) 1038-41; CX-11.

[78] Hearing Tr. (MB) 692.

7. The Tribe's Policy Regarding Conflicts of Interest

The Tribe has an Investment Policy that governs the types of investments it can make and the activities of the persons involved in making the investments. Vungarala knew what the Investment Policy said and that he had to adhere to it.[79] Vungarala personally worked on drafts each time the Investment Policy was revised, and the final versions were circulated to the staff of the Treasury Department, including Vungarala, and to the Investment Committee and Tribal Council.[80]

We find that the Tribe's Investment Policy prohibited Vungarala from receiving commissions on the Tribe's investments. Throughout the relevant period, the Investment Policy, under the heading "Standards of Care" and the sub-heading "Ethics and Conflicts of Interest," specified the following:

> Managers and employees involved in the investment process shall refrain from personal business activity … that could impair their ability to make impartial decisions.[81]

This broadly written provision prohibited Vungarala from engaging in any business activity for his personal benefit that could impair his ability to make impartial decisions. Vungarala's receipt of commissions could—and did—impair Vungarala's ability to be impartial.

Vungarala argues, however, that the Investment Policy did not cover his commissions from the Tribe's purchases of REITs and BDCs. He contends that other language in the Ethics and Conflicts of Interest section of the Investment Policy shows that the prohibition was narrower: the Investment Policy directs that employees involved in the investment process should disclose any "material interests in financial institutions with which they conduct business," and disclose any "personal financial interest/investment positions" that could relate to performance of the Tribe's investments; and the Investment Policy prohibits the Tribe's employees from engaging in personal investment transactions with someone with whom the Tribe does business. These provisions, Vungarala asserts, are focused on ownership interests and investments, and therefore do not cover Vungarala's receipt of commissions on the Tribe's transactions.[82]

As further proof that the Investment Policy did not cover his conduct while he was a tribal employee, Vungarala points out that the Tribe revised its Investment Policy in September 2015, after the events at issue, to expressly require disclosure of commissions or other

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[79] Hearing Tr. (DD) 72-73, 249-50; Hearing Tr. (Vungarala) 1092-94, 1096, 1164.

[80] Hearing Tr. (DD) 67-68, 266-67.

[81] CX-6, at 4; CX-7, at 4; CX-8, at 4; CX-9, at 4; CX-10, at 4.

[82] Resp. Pre. Br. 18-21; Hearing Tr. (Vungarala) 1092-93, 1322-24.

compensation from any third party in connection with the management of the Tribe's investments. He reasons that the new provision covers conduct that was not covered before.[83]

We reject Vungarala's interpretation of the Tribe's Investment Policy. Vungarala's receipt of commissions constituted a conflict of interest within the meaning of the Investment Policy. DD, the Tribal Administrator, and AO, the Treasury Administrator, interpreted the Investment Policy to prohibit Vungarala from personally benefiting from the Tribe's investments.[84] The Tribe's general counsel interpreted the Investment Policy to require at a minimum that Vungarala make full disclosure of the commissions.[85] The narrower descriptions of prohibited conflicts of interest can be viewed as specific examples; they do not limit the broader initial prohibition. The fact that the Tribe revised its Investment Policy to explicitly address compensation from third parties to tribal employees in connection with tribal investments does not show that the prior Investment Policy allowed such a conflict of interest. It only shows that the Tribe wanted to make the Investment Policy clearer.

Finally, regardless of one's interpretation of the conflict of interest provision in the Tribe's Investment Policy, that provision put Vungarala on notice that the Tribe was concerned about conflicts of interest. He admitted as much, saying that he knew that (i) the Investment Committee and Tribal Council were concerned about conflicts of interest, and (ii) that concern was memorialized in the Investment Policy.[86] He also testified that there was a conflict of interest "from day one" with his being a registered representative with PKS and simultaneously being an employee of the Tribe.[87] Vungarala's receipt of commissions on the transactions he recommended to the Tribe was an inherent conflict of interest. In light of that fact, he could not reasonably go forward with the transactions through PKS without giving notice to the Tribe so that it could determine how it wanted to proceed. He claims that he did give that notice to AO.[88] As discussed below, we find that he did not.

8. Vungarala's Employment Contracts

Because Vungarala asserts that he was not acting as the Tribe's employee when he solicited the Tribe to invest in REITs and BDCs, and he claims that the Tribe knew that,[89] it is important to understand the terms and conditions of his employment with the Tribe. The reasonableness of Vungarala's assertions must be evaluated in that context.

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[83] Resp. PH Br. 33-34; Hearing Tr. (DD) 147-52; RXV-6 (Sept. 22, 2015 version of Investment Policy).

[84] Hearing Tr. (DD) 83-85; Hearing Tr. (AO) 1427.

[85] CX-77, at 3.

[86] Hearing Tr. (Vungarala) 1096.

[87] Hearing Tr. (Vungarala) 1686-87.

[88] Hearing Tr. (Vungarala) 1102-03, 1202-03, 1231-32, 1296-1302, 1686-87.

[89] Resp. Pre. Br. 10-12; Resp. PH Br. 8, 13-15; Hearing Tr. (Vungarala) 1101-05, 1150, 1202-03, 1659-63.

We find that even though the Tribe knew that Vungarala maintained his registration with PKS, and members of the Tribe knew that he continued to do some investing for himself and a few existing clients through PKS, the Tribe did not view him as wearing "two hats" when he managed the Tribe's portfolio. DD, the Tribal Administrator, said the Tribe "absolutely" considered Vungarala an employee when advising the Tribe about its investments.[90]

a. 2008—Vungarala's First Contract

In November 2008, Vungarala became a full-time employee of the Tribe as its Treasury Investment Manager ("Investment Manager"). The terms of his employment were set forth in a personal services contract that he signed on November 17, 2008. The contract ran until November 16, 2011, a three-year term. It detailed his compensation ($99,500 per year), fringe benefits, and leave time. It specified an eight-hour work day and 40-hour work week, and explicitly provided that he was not entitled to additional compensation if he worked additional hours. The contract incorporated the position description for the Tribe's Investment Manager to define his duties.[91]

The position description for the Investment Manager contained a dozen "Essential Job Duties and Responsibilities," including, among other things, performing all investment transactions; analyzing daily investment activities to ensure the success of the portfolio; "managing, evaluating and monitoring the [Tribe's] investment portfolio" and considering "alternative investment selections with respect to overall investment performance." Other duties might be added "as assigned."[92]

Nothing in Vungarala's employment contract or the position description suggested that the position of Investment Manager was part-time or that it was limited only to certain types of investing. It gave him broad responsibility for all the activities necessary for successful investment performance of the entire investment portfolio.

The position description for the Investment Manager contained a requirement that later became Vungarala's tool to commit fraud. The position description specified that, as one of the minimum qualifications for the job, the Investment Manager should have Series 7 and Series 63 "certifications."[93] There is nothing in the record to explain why holding Series 7 and Series 63 securities licenses was a job requirement for the Investment Manager, or who thought it should

[90] Hearing Tr. (DD) 249.

[91] RXV-3.

[92] CX-5.

[93] CX-5.

be a job requirement. DD, who has been on the Investment Committee since 2007, testified that he does not know what a Series 7 or Series 63 is.[94]

Vungarala had a Series 7 license and was a registered representative with PKS, his broker-dealer firm. He told the Tribe that he also had a Series 65 and Series 66 and that they were the equivalent of a Series 63.[95]

Vungarala told AO, the Treasury Administrator, that in order for him to keep his broker's license, a brokerage firm had to "hold" it.[96] He referred to PKS as the broker-dealer where he "parked" his broker's license,[97] and this is how members of the Tribe understood his relationship with PKS.[98]

The language Vungarala used to describe his relationship with PKS suggests passivity. It does not suggest that Vungarala was employed by PKS and working to generate business for it. As discussed below, AO only learned that Vungarala was a PKS employee years later, in the fall of 2014.[99]

b. 2008–2010—Amendments to the First Contract

Between 2008 and 2010, Vungarala obtained modifications to his employment contract with the Tribe. None of the modifications, as embodied by signed amendments, changed Vungarala's job duties or status as an employee of the Tribe. They did increase Vungarala's benefits in connection with his employment.

Vungarala requested that the Tribe reimburse him for the yearly costs of renewing his securities licenses.[100] AO, the Treasury Administrator, sought and obtained Tribal approval for the requested reimbursement.[101] Amendment 1 to Vungarala's employment contract, dated December 2008, provided that the Tribe would reimburse him for up to $1,000 per year in licensing renewal fees and up to $1,400 per year for errors and omissions insurance. He was also

[94] Hearing Tr. (DD) 173-74. AO testified that she was unsure why there was a requirement that the Tribe's Investment Manager hold a Series 7 and Series 63. Sometime later, she asked the Tribe's representative at Schwab whether an in-house investment manager such as Vungarala was required to be licensed. The Schwab representative told her that most companies do not usually have somebody working for them who has a license. Hearing Tr. (AO) 1579.

[95] Hearing Tr. (Vungarala) 1336-37.

[96] Hearing Tr. (AO) 1521.

[97] RXV-73.

[98] Hearing Tr. (Vungarala) 1191-92; Hearing Tr. (DD) 166-70.

[99] Hearing Tr. (AO) 319-21.

[100] Hearing Tr. (Vungarala) 1056-57.

[101] Hearing Tr. (AO) 357-62.

granted up to three days paid administrative leave to attend continuing education seminars required to maintain his licenses.[102]

Amendment 2, dated March 2009, increased the payment for errors and omissions insurance to $2,400 per year.[103] Amendment 3, dated March 2010, changed the arrangements for vacation and sick leave, granting him 56 additional hours of paid vacation. It also contained indemnifications relating to his performance of his job duties.[104] Amendment 4, dated December 2010, increased the reimbursement for the costs of renewing his securities licenses to $7,250 per year.[105]

c. 2011—Vungarala's Second Contract

i. Basic Terms

Vungarala entered into a second personal services contract with the Tribe for another three-year term. That contract ran from November 17, 2011, to November 16, 2014. The Tribe had already begun purchasing REITs in July 2011, as further described below. Even so, the second personal services contract did not differentiate between Vungarala's role in connection with the Tribe's REIT purchases and his role with respect to other investments he made on behalf of the Tribe through Schwab. Nowhere did the contract suggest or create a "two-hat" role for Vungarala.

The second contract again referred to the job description as setting forth the Investment Manager's responsibilities. Vungarala was responsible for managing the entire portfolio. He continued under the supervision of AO, the Treasury Administrator. His compensation increased to a yearly base salary of $120,000, with a potential for a performance bonus of 10% of his base salary. The reimbursements previously provided in connection with the amendments to the first personal services contract were incorporated into the second contract and increased. The Tribe agreed to pay Vungarala for the actual costs of renewing his securities licenses up to $10,000 per year, and to pay him up to $5,000 per year for costs he incurred for errors and omissions insurance. It also agreed again to give him up to three days paid leave for him to attend continuing education courses.[106]

ii. New Provision for Minimum Production Fee Reimbursement

The second personal services contract also added, at Vungarala's request, a new provision that Vungarala now relies upon in his defense. That provision states that upon receipt

[102] RXV-3, at 5.

[103] RXV-3, at 6.

[104] RXV-3, at 7.

[105] RXV-3, at 9.

[106] RXV-4, at 2-3.

of an invoice by the "licensing agency," the Tribe would reimburse Vungarala "an amount not to exceed $2,000 per fiscal quarter for the Minimum Production Fee."[107]

Vungarala told AO that PKS charged him the minimum production fee because he was no longer doing a large amount of transactions with the firm. He told her he was only doing some investing for himself and for a couple of church members. She went to the Investment Committee to obtain permission to reimburse him.[108] She explained to the Investment Committee that Vungarala was not doing much investing with PKS because he was an employee of the Tribe, and so PKS was charging him a fee.[109]

Each month, Vungarala provided the Tribe with a copy of his commission statement from PKS, which showed the expenses he had incurred and for which he sought reimbursement. AO may have reviewed the first one or two, but she did not review the commission statements thereafter. She would give the document to an administrative assistant to fill out a purchase order, which the Tribal Council had to approve and then send to the accounts payable department, which would issue the check.[110] Although there were many steps involved in obtaining reimbursement for the expenses Vungarala incurred, and the commission statement passed through many hands, no one was analyzing the document except to see that there was documentation for the charge to be reimbursed.

From examination of the collection of commission statements and checks by which the Tribe reimbursed Vungarala for various charges, it appears that the Tribe began reimbursing Vungarala for the minimum production fee in December 2010 and continued through the third quarter of 2011, when the Tribe began purchasing REITs and BDCs. It is unclear why the Tribe began reimbursing Vungarala for the minimum production fee before the contract required it.[111]

Sometime in the third quarter of 2011,Vungarala told AO that he did not have to pay the minimum production fee because the Tribe had started buying REITs.[112] Vungarala contends that this, coupled with providing the Tribe his commission statements every month, constituted disclosure that he was receiving commissions on the Tribe's purchases.[113]

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[107] RXV-4, at 2; Hearing Tr. (Vungarala) 1057-58.

[108] Hearing Tr. (AO) 453-57.

[109] Hearing Tr. (AO) 454-55.

[110] Hearing Tr. (AO) 457-62.

[111] RXV-10. Vungarala claims that the minimum production fee was initially treated as part of the licensing fee for which the Tribe was already reimbursing him. This was done, he claims, so the Tribe could pay it at the end of 2010 without having to create another line item in the Treasury Department budget. Hearing Tr. (Vungarala) 1298-99. AO could not remember whether anyone treated the minimum production fee as a licensing fee. Hearing Tr. (AO) 478-80.

[112] Hearing Tr. (AO) 474-75.

[113] Resp. PH Br. 1, 14-15; Hearing Tr. (Vungarala) 1148-49; RXV-10, at 1-32.

Contrary to Vungarala's contention, neither AO nor the Tribe understood that the termination of the minimum production fee meant that Vungarala was receiving commissions on the Tribe's REIT and BDC transactions. Vungarala told AO there was a connection between the minimum production fee and the Tribe's transactions, but he did not directly mention commissions. She did not have the background to infer from his comments that the termination of a fee meant he would receive commissions. AO thought of the minimum production fee as just that—a fee—that was no longer being charged.[114]

If AO reviewed any of Vungarala's commission statements from PKS, it was only the first one or two.[115] She would have seen only those that reflected the imposition of the minimum production fee, and not the statements reflecting Vungarala's commissions after that fee ended. However, even if AO had studied more closely the commission statements Vungarala submitted after the minimum production fee ended, she still would not have learned that Vungarala was receiving commissions on the Tribe's transactions. Although the statements were labeled "Commission Statements," they did not otherwise identify any amount as "commissions." Nor did they identify any particular transactions, refer to the Tribe, or use the terms REIT or BDC. Rather, the Commission Statements indicated under the label "Trade Source" that Vungarala's production was from "Packaged Products," providing a single figure each month as a "Production Credit," and a single figure for a "Base Payout."[116] None of these terms would have signified anything to AO. Indeed, she testified that she did not know what "Base Payout" meant.[117]

The REIT and BDC monthly statements the Tribe received also did not inform AO that Vungarala was receiving commissions on the Tribe's investments. Those statements did not even contain the term "commissions." They showed a $1 million investment as a $1 million investment without subtracting or adding any fee or commission. AO's only point of comparison was the kind of statement Schwab sent, which broke out the commissions and fees being charged.[118] Explaining her interpretation of the REIT and BDC monthly statements, AO said,

> I guess I don't understand why the statement[s] that we're getting from the REIT company aren't showing the million-dollar investment minus commission because that's exactly how it's shown through Schwab. And so that's why I'm saying I had—there was no indication to me that we were paying a commission to PKS because it was not being presented that way on the statements.[119]

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[114] Hearing Tr. (AO) 1587-89.

[115] Hearing Tr. (AO) 453-62, 1568.

[116] RXV-10.

[117] Hearing Tr. (AO) 1569.

[118] Hearing Tr. (AO) 1390-98.

[119] Hearing Tr. (AO) 1393.

The Tribe's conduct from 2011, when it started buying REITs and BDCs, until the fall of 2014, when the truth began to emerge, is consistent with its lack of understanding about the commissions paid to Vungarala. The Tribe would have behaved differently if it had understood that Vungarala was making millions of dollars on its transactions. It is difficult to believe, for instance, that it would have given him a $12,000 performance bonus, or that it would have reimbursed him several hundred dollars each month for his errors and omissions insurance if it had known. AO said that if she had known that Vungarala was receiving commissions from the Tribe's transactions she would have had a duty to tell the Tribe and would have reported it to the Investment Committee.[120] In fact, as discussed below, the Tribe was still asking Vungarala questions about commissions in the fall of 2014.

d. 2014—The Tribe Extends Vungarala's Contract for Two Months

By an Amendment dated November 5, 2014, which Vungarala signed the next day, Vungarala's contract was extended for two months to January 18, 2015.[121] He left the Tribe's employ at the end of the extension.[122] After he left, the Tribe stopped buying REITs and BDCs.[123]

9. Vungarala's Duties to the Tribe

Vungarala admitted that he had an undefined "duty" in his capacity as the Tribe's employee;[124] and he agreed with the statement that as the Tribe's employee he owed the Tribe a duty of good faith and fair dealing.[125] He acknowledged that the Chief and Sub-Chief expected him to make investments that were in the Tribe's best interest.[126]

Vungarala attempted to draw a distinction, however, between the duties he owed the Tribe when he was investing on its behalf as its investment adviser and the duties he owed it when acting as a registered representative. Essentially, he asserted that the duties he owed to the Tribe depended on which "hat" he was wearing. He testified that he had a fiduciary duty when he was acting as an investment adviser to his client, meaning that he would "keep the client up front at all times" and that "[t]heir needs always come first."[127] He also testified that "[a]s an investment manager the Tribe's needs would always—front of everything I did."[128] He said he

[120] Hearing Tr. (AO) 548-56.

[121] RXV-4, at 7.

[122] Hearing Tr. (Vungarala) 1195.

[123] Hearing Tr. (MB) 765.

[124] Hearing Tr. (Vungarala) 1607.

[125] Hearing Tr. (Vungarala) 1060.

[126] Hearing Tr. (Vungarala) 1123. Vungarala's counsel later asked him whether he understood the legal significance of the phrase "best interest," and he said he was unsure. Hearing Tr. (Vungarala) 1317-18.

[127] Hearing Tr. (Vungarala) 1318.

[128] Hearing Tr. (Vungarala) 1059.

was acting as an employee of the Tribe when dealing with Schwab.[129] However, he asserted that as a PKS registered representative he only had an obligation to ensure that an investment was suitable for his client. In that context, he treated the Tribe's Investment Policy as a tool to assist him in making suitable decisions and to know his client.[130]

As explained in the legal discussion below, whether Vungarala made false and misleading statements to the Tribe in violation of antifraud provisions does not turn on whether, for purposes of evaluating the quality of his investment recommendations, he was subject to a fiduciary standard (as Enforcement argues) or a suitability standard (as Vungarala argues). One can commit fraud without being a fiduciary.

B. Vungarala Misleads the Tribe About His Commissions

1. Vungarala Becomes the Tribe's First In-House Investment Manager

The Tribe had never had an in-house investment manager before it hired Vungarala in November 2008. Prior to his arrival, the Tribe worked with an outside investment adviser. The outside investment adviser worked with Schwab in managing investments on the Tribe's behalf, and Schwab held custody of its assets, mostly stocks and investment grade bonds. Schwab also held custody of the Tribe's employee 401(k) plan, which was administered by the Tribe's Chief Financial Officer, MJ, not Vungarala.[131]

2. Vungarala Retains His Registration with PKS

Within the first two months of Vungarala's employment with the Tribe, PKS sought disclosure from Schwab of activity in the Tribe's Schwab accounts because Vungarala had trading authority "on a fiduciary basis" over those accounts. The Tribe declined to permit the disclosure to PKS, citing privacy concerns, and PKS withdrew its request to Schwab for the information.[132]

The PKS request gave rise to the Tribe's suggestion that Vungarala move his registration to Schwab. Vungarala resisted. He told the Tribe that he had to take care of his "clients on the PKS side" and needed to be sure that he received the "same commission structure."[133] In any event, Schwab declined to register Vungarala through it, saying "you" are our client.[134] Then

[129] Hearing Tr. (Vungarala) 1355.

[130] Hearing Tr. (Vungarala) 1318-19.

[131] Hearing Tr. (AO) 290-91, 1576-77; Hearing Tr. (DD) 70, 248; Hearing Tr. (Vungarala) 1069, 1082-84.

[132] CX-11.

[133] Hearing Tr. (Vungarala) 1100.

[134] Hearing Tr. (Vungarala) 1100.

someone with the Tribe suggested that Vungarala give up his licenses, but Vungarala refused to do that.[135]

PKS's withdrawal of the request for information about the Tribe's trading at Schwab resolved the immediate issue. Vungarala retained his registration with PKS. AO, the Tribe's Treasury Administrator and Vungarala's supervisor, understood that, although Vungarala was employed with the Tribe, he continued to trade for himself and for a few members of his church through PKS.[136]

Because Vungarala mentioned a "commission structure" in this context, we find that the Tribe knew that he was receiving commissions on the transactions he handled for his other PKS clients. However, as discussed below, we find that the Tribe did *not* know later, when he began investing in REITs and BDCs for the Tribe, that he was receiving commissions on the Tribe's investments purchased through PKS.

3. Vungarala Feels Underpaid and Resentful

Vungarala thought that he was underpaid. At some point he learned that the Tribe had paid its previous financial adviser much more to manage the portfolio than the Tribe was paying Vungarala. He testified that the previous adviser, who was not a tribal employee, received more than a million dollars a year, plus travel leave, and reimbursement for registrations.[137] Vungarala claims that money did not motivate him, but when he found out how much the previous portfolio manager had made, he testified that he "took it to prayer,"[138] signifying an intensity of feeling in connection with the discovery that he was making much less than the previous financial adviser. He equated his six-figure salary from the Tribe with working "pro bono."[139]

At the hearing, Vungarala expressed feelings of grievance and dislike for his colleagues in the Treasury Department. He said that he felt like he had four bosses instead of one. He felt that tribal members treated him badly because he was not a member of the Tribe. He complained that he was held to a different standard than anyone else. He cited as an example that his office was smaller than the office of the Treasury Department cash manager, and he complained that he was given less flexibility with regard to leave than other employees. He believed that his colleagues treated him as an underling and looked at him as though he were "an animal in a cage."[140]

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[135] Hearing Tr. (Vungarala) 1100-01.

[136] Hearing Tr. (AO) 357-62, 453-57; Hearing Tr. (Vungarala) 1105.

[137] Hearing Tr. (Vungarala) 1066-68.

[138] Hearing Tr. (Vungarala) 1068.

[139] Hearing Tr. (Vungarala) 1067.

[140] Hearing Tr. (Vungarala) 1067-69, 1138-41.

4. Vungarala Urges the Tribe to Move Its Assets to Sutterfield

In late 2009 or early 2010, Vungarala tried to persuade the Tribe to move its assets from Schwab to the advisory firm with which he was affiliated, Sutterfield.[141] Vungarala complained that Schwab was charging too much for trades and was not providing good service. He talked to AO about the proposed move, and told her he was "familiar" with Sutterfield. He did not tell her that he was employed as a Registered Investment Advisor with Sutterfield.[142] At the hearing, he denied that he would have been compensated by Sutterfield based on a percentage of the Tribe's assets under management, saying he was not going to be a registered investment advisor. He testified that his plan at that time was to remain an employee of the Tribe, even if it transferred its accounts to Sutterfield.[143]

A branch office questionnaire dated May 26, 2010, memorializing a conversation with TS, the head of Sutterfield, corroborates Vungarala's testimony about his plan to remain an employee of the Tribe. Handwritten notes on the questionnaire indicate that Vungarala treated his full-time employment with the Tribe as an outside business activity and that he was hoping to open an account at Sutterfield for the Tribe with TS as the registered representative.[144]

The questionnaire, however, undercuts Vungarala's contention in this proceeding that it was appropriate and acceptable to the Tribe for him to receive commissions on the Tribe's investment transactions. The notes on the questionnaire indicate that the reason TS was to be the registered representative was because Vungarala could not receive commissions on the Tribe's account. After indicating that TS would be the "RR" on the Tribe's account, the notes state in parentheses, "Gopi can't receive comm."[145] Since the information was about Vungarala's plan, it is reasonable to infer that the information reported on the questionnaire came from Vungarala—including the information that he was prohibited from receiving commissions if the Tribe opened such an account. This evidence suggests that Vungarala recognized in 2009 or 2010—well before he recommended that the Tribe invest in REITs and BDCs through PKS—that it would be inappropriate for him to receive commissions in connection with the Tribe's investments while he was an employee of the Tribe.

[141] CX-12; Hearing Tr. (DD) 133-34; Hearing Tr. (AO) 311-12; Hearing Tr. (KE) 877-78; Hearing Tr. (Vungarala) 1069-72, 1074-77.

[142] Hearing Tr. (AO) 311-12; Hearing Tr. (Vungarala) 1074-78.

[143] Hearing Tr. (Vungarala) 1070-72, 1077-78.

[144] CX-12, at 2.

[145] CX-12, at 2.

TS made a presentation to the Tribe,[146] but the Tribe did not move to Sutterfield. AO analyzed the proposal and determined that it was not cost effective.[147] The Tribe decided to stay with Schwab; Schwab reduced its fees and arranged access to online services for the Tribe.[148]

5. Vungarala Steers the Tribe to Investing in REITs and BDCs Through PKS

a. Initial Recommendation to AO

The Tribe had bonds that were maturing in 2011, and Vungarala recommended that the Tribe replace them with REITs and BDCs.[149] The Tribe had no previous experience with investing in non-traded REITs,[150] and originally REITs were not on the approved list of investments in the Tribe's Investment Policy.[151] However, Vungarala told tribal members that they were not going to obtain the return they wanted by investing in bonds.[152]

Vungarala first introduced the concept of REITs to AO in May or June 2011. AO did not know much about REITS (or the BDCs that Vungarala later recommended).[153] Vungarala showed her a marketing brochure for a REIT and explained what a REIT was. He had to go over the explanation several times, because she found it confusing.[154] He described REITs as an alternative to bond purchases. He said that the Tribe should not purchase a bond with a low interest rate in a low interest rate environment because the Tribe could be stuck with those bonds for 20 to 30 years. The REITs were a replacement that would pay out much more quickly. He thought that the Tribe could make 7–10% and would be able to exit in four to seven years.[155] He also mentioned junk bonds as a way of earning higher yields, but he did so in terms that discouraged AO from making that choice, focusing on the risks.[156] The Tribe's Investment Policy required that bonds be investment grade, and AO was concerned that junk bonds were risky. She thought of junk bonds as a sign that the issuing company could go bankrupt.[157]

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[146] Hearing Tr. (Vungarala) 1077.

[147] Hearing Tr. (AO) 311-12.

[148] Hearing Tr. (Vungarala) 1077-78.

[149] Hearing Tr. (DD) 76-78.

[150] Hearing Tr. (AO) 296.

[151] Hearing Tr. (AO) 434-36.

[152] Hearing Tr. (MB) 760.

[153] Hearing Tr. (AO) 1382.

[154] Hearing Tr. (AO) 293.

[155] Hearing Tr. (AO) 293-94, 1384; Hearing Tr. (Vungarala) 1086-89, 1226-30.

[156] Hearing Tr. (Vungarala) 1086-89.

[157] Hearing Tr. (AO) 1441-43.

AO testified that Vungarala told her that Schwab did not offer the REITs, and for it to add the REITs to its platform would cost the Tribe $50,000 for Schwab to conduct due diligence on them. Vungarala suggested that the Tribe use PKS instead.[158]

Vungarala denies that he told AO that the Tribe could not purchase the REITs through Schwab. He claims that AO spoke to Schwab, and that Schwab told her it could offer the REITs and it would charge $5,000 to $8,000 for due diligence.[159] According to Vungarala, AO then asked whether PKS would charge a fee for due diligence on the REITs, and he told her that PKS would not charge a fee.[160]

We credit AO's testimony that Vungarala told her that Schwab did not offer REITs and, if it did, it would charge an exorbitant sum for due diligence. As discussed below, that is what she later relayed to the Investment Committee when it considered the first REIT purchase. There would be no reason for her to make such a statement to the Investment Committee unless Vungarala told her that. Certainly, she would not make such a statement if she had learned something different herself in a conversation with Schwab.

In any event, even if Vungarala's testimony were true, his own description of his conversation shows that he misled AO. As she was trying to assess the costs involved in choosing between Schwab or PKS, Vungarala led her to believe that Schwab would charge a fee but PKS would not. He did not further explain to her how PKS would be compensated, leaving her with the mistaken impression that it would not be compensated.[161]

AO testified that Vungarala also told her that there would be no conflict of interest if the Tribe went to his firm instead of Schwab because he would not make money on the Tribe's transactions.[162]

Vungarala denies that he told AO that he and PKS would not receive compensation if the Tribe purchased REITs through PKS. He claims that he expressly stated that PKS would receive commissions and that PKS would pay him commissions. He testified, "Exact statement I used was that if we go through PKS, PKS is going to receive the 7% commission and PKS will pay me."[163] When asked if he disclosed how much his commissions would be, he responded "They never asked me."[164]

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[158] Hearing Tr. (AO) 296-97, 428-34, 441-42.

[159] Hearing Tr. (Vungarala) 1090.

[160] Hearing Tr. (Vungarala) 1089-90.

[161] Hearing Tr. (AO) 296-97.

[162] Hearing Tr. (AO) 297-98.

[163] Hearing Tr. (Vungarala) 1202-03.

[164] Hearing Tr. (Vungarala) 1203.

Vungarala's testimony that he expressly and clearly told AO that he and PKS would receive commissions—and that she never asked him how much his commissions would be—is not credible. If he had told AO that PKS would receive 7% on the transactions and PKS would then pay him commissions, she would have asked more questions, and she would have sought the Investment Committee's review and the Tribal Council's approval. That is how she handled other issues related to the Tribe's investments. AO testified,

> I can guarantee you that if I knew that Gopi was making a commission, I would have disclose[d] that immediately to the [T]ribal [C]ouncil and made sure that he was fired on the spot because that was absolutely – that is unethical and completely against the [I]nvestment [P]olicy.[165]

Furthermore, AO's actions following her discussion with Vungarala are inexplicable if he made full, clear disclosure to her—but her actions are understandable and consistent if he misled her. As discussed below, when the Investment Committee discussed the first proposed REIT purchases, AO repeated to the Investment Committee what she understood from her discussion with Vungarala—there would be no conflict of interest because Vungarala would receive no compensation. While it is possible that Vungarala avoided saying in so many words, "I will not receive commissions," we find that, at a minimum, he purposely misled AO and created the false impression he would not receive commissions.

b. June 27, 2011 Investment Committee Meeting

We find that at an Investment Committee meeting on June 27, 2011, Vungarala created the false impression that he would have no conflict of interest if the Tribe invested in REITs through PKS. At that meeting, the Investment Committee considered the first proposal to buy REITs. The Treasury Department administrative assistant (at that time, NS) took minutes.[166] Going into the meeting, based on her previous discussion with Vungarala, AO believed that neither PKS nor Vungarala would be compensated for handling the Tribe's REIT investments.[167]

The minutes show that after the Investment Committee discussed another topic, Vungarala entered the meeting at the beginning of their discussion of a proposal to buy two REITs. The Committee discussed REITs generally and one of the REITs specifically. Vungarala spoke on those subjects. A Committee member asked Vungarala how much he proposed the Tribe should invest in the REIT under discussion. He said that he usually invested $1 million in bonds and that the same amount should be invested in the REITs.[168]

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[165] Hearing Tr. (AO) 1427.

[166] CX-13.

[167] Hearing Tr. (AO) 447-48.

[168] CX-13.

AO then spoke. She said that the next "obstacle" was how to pay the money to be invested to the REIT. She told the Investment Committee that the Tribe "needs to go through a broker/dealer," but that "Schwab does not do that." She said that the Tribe instead could "utilize" PKS, Vungarala's brokerage firm, without having to "sign any agreements" with the firm and "with no strings attached."[169]

In the minutes, the next sentence is not attributed to any particular person. However, AO testified that she was the person who told the Investment Committee, "There will be no conflict of interest on Gopi's behalf since he is not getting paid by with [sic] company."[170]

A Committee member then asked whether the recommendation could be prepared in time to be presented for Tribal Council approval the following Wednesday. AO said that it could.

The minutes then reflect a discussion of a second specific REIT. Vungarala described the REIT's business for the Committee, after which he left the meeting. The minutes show that Vungarala exited the meeting at 11:26 a.m., but that the meeting continued to 11:57 a.m. The minutes of what happened after his exit are redacted and do not indicate what occurred after he left the meeting.[171]

On the face of the minutes, it appears that AO told the Investment Committee what she understood from her earlier discussions with Vungarala: there would be no conflict of interest if the Tribe used Vungarala's brokerage firm as the conduit to pay for the REITs because Vungarala would not be compensated in connection with the transactions. It appears that she made the statement in his presence and that he silently allowed AO and the tribal members at the Investment Committee meeting to be misled. He did not tell them, "No, that is incorrect." He did not say, "I will receive commissions on the transactions you do through PKS." He purposely let them all believe that he would not be compensated, eliminating any apparent conflict of interest.

Vungarala attempts to cast doubt on the reliability of the minutes, pointing out typographical errors and ambiguities such as the words "paid by with the company" in the sentence declaring that there would be no conflict of interest. He also notes that witnesses from the Tribe admitted that minutes of Investment Committee meetings were not always accurate and were not subject to review for accuracy. He hypothesizes that the discussion of the logistics of payment for the REITs is out of order.[172] He testified that he left the meeting before those logistics were discussed, and, thus, he did not hear AO say that Schwab could not do the REIT transactions or that there would be no conflict of interest if the Tribe used PKS for the REIT

[169] CX-13.

[170] Hearing Tr. (AO) 299-300; CX-13.

[171] CX-13.

[172] Resp. PH Br. 17-20.

transactions.[173] In this fashion he denies making an implicit misrepresentation through his silence during AO's remarks.

Vungarala's hypothesis that the timeline of the minutes is mixed up—so that the minutes make him appear to be present when he was not present—is no more than a hypothesis. And the hypothesis is not persuasive. Given that the minutes carefully record when Vungarala was present for a discussion and when he was not, even to the point of recording the time he exited the meeting, we do not think it plausible that the person keeping the minutes would carelessly mix together discussions for which he was present and discussions for which he was not.

Furthermore, the timeline in the minutes does not appear mixed up to us. When the Investment Committee heard the presentation on the first REIT and expressed interest in it, then AO brought up the issue of how to pay the REIT and explained that PKS could be used as the conduit for the payment. At that point, she reassured the Committee that Vungarala would not have a conflict of interest. Having resolved the logistics issues in the context of the discussion of the first REIT, the Committee moved on to hear Vungarala's presentation on the second REIT. It would not have made sense to discuss the second REIT if the logistical issues could not have been resolved when first raised in connection with the first REIT. The minutes reflect a natural flow of discussion.

AO's testimony also undercuts Vungarala's hypothesis that the critical statement—that he would receive no compensation in connection with the Tribe's REIT investments through PKS—was made after he exited the meeting. She testified that Vungarala did not step out of the room at any time during which the REIT investment was discussed.[174]

We find that the minutes accurately reflect that AO told the Investment Committee that there would be no conflict of interest because Vungarala was not going to be compensated in connection with the Tribe's investments. We also find that she made her remarks to the Investment Committee in Vungarala's presence, and that he failed to correct her misunderstanding. It was to his advantage for the Tribe to believe he would not receive commissions on its investments.

Vungarala asserts that he was acting as a registered representative when he attended the Investment Committee meeting where he recommended the first REIT purchase. He claims he was not acting as the Tribe's employee.[175] He says he "made it very, very, clear" that he represented PKS, and that he would not participate in the investment process if the Tribe decided to go through Schwab or anybody else to make the REIT investments.[176]

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[173] Resp. PH Br. 18; Hearing Tr. (Vungarala) 1235-40.

[174] Hearing Tr. (AO) 1570.

[175] Hearing Tr. (Vungarala) 1097-99, 1101-03.

[176] Hearing Tr. (Vungarala) 1102-03.

The minutes of the meeting, as described above, discredit his assertion. Although the person keeping the minutes might not have recorded every word that was said, the minutes are detailed and flow logically. Nowhere do they indicate that Vungarala told the Tribe he was not acting as its employee when he made the recommendation to purchase the REITs. Vungarala was a full-time Tribe employee earning a six-figure annual salary. As DD, the Tribal Administrator, testified, the Tribe believed he was its employee at all times when he advised the Tribe about its portfolio,[177] which would include when he made the REIT recommendation and when he participated in the Investment Committee's internal deliberations.

To the extent that Vungarala may have told the Investment Committee that he would be the registered representative for the Tribe's REIT purchases, that statement did not hold the significance for the Tribe that it had for Vungarala. Vungarala seems to equate the statement that he would be the registered representative on the transaction with disclosing that he would be receiving commissions. He frequently testified that the Tribe knew the REITs were a "commissionable" product.[178] However, saying that he was going to be the registered representative in connection with "commissionable" products did not mean the same to the Tribe as saying "I am going to receive commissions on the Tribe's transactions."

The minutes of the June 27, 2011 Investment Committee meeting also support our finding that the Tribe's members were not sophisticated investors. The Investment Committee readily accepted that PKS would be a conduit for their payments to the REITs "with no strings attached" and without signing any agreements. The Tribe's members did not understand that it was highly unlikely that PKS would agree to handle millions of dollars of the Tribe's investment funds without any documents reflecting the terms and conditions of the arrangement, and without being compensated. AO did not seem to view PKS as performing services on behalf of the Tribe. She testified,

> [T]he way that I was interpreting the use of PKS was we were just using them as Gopi's brokerage firm to purchase the REITs. So it wasn't like an agreement that we were entering into like, say, we entered into with Wells Fargo when we changed our banking or we entered into with Charles Schwab.[179]

As AO noted, the Tribe had written agreements with Schwab and its bank. It would have insisted on a written agreement with PKS if it had understood its dealings with PKS to be the same type of professional relationship.

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[177] Hearing Tr. (DD) 249.

[178] Hearing Tr. (Vungarala) 1101, 1232, 1242, 1300, 1612, 1659, 1675-76.

[179] Hearing Tr. (AO) 1386. AO said that the Tribe was "just using them [PKS] as a stepping stone to purchase REITs." Hearing Tr. (AO) 1387. *See also* Hearing Tr. (AO) 1391.

6. The Tribe Purchases REITs and BDCs

The Tribe purchased its first two REITs in July 2011.[180] REITs were not then named as a permitted investment in the Investment Policy, so the Tribe classified REITs as fixed income securities, which were permitted under the policy.[181]

From 2011 through 2014, the Tribe accumulated more and more REITs and BDCs. Vungarala explained to AO that he wanted to increase the Tribe's holdings of those investments because that was what endowment funds were doing. The portion of the Tribe's portfolio devoted to REITs and BDCs went from 5% to 10% to 20% and more. The Investment Policy was repeatedly changed to permit increases in the amount invested in REITs.[182] In 2014, the Tribe also added REITs to the Investment Policy as their own separate asset class because it was getting difficult to manage the asset allocation.[183] By the time Vungarala left the Tribe, REITs and BDCs were 22.8% of the Tribe's portfolio, amounting to nearly $200 million.[184]

Vungarala obtained a significant financial benefit from steering the Tribe to purchase REITs through PKS. PKS received $11,391,329 in commissions from the Tribe's REIT and BDC purchases, and Vungarala received a payout of 85% of that amount,[185] approximately $9,682,629. By early 2014, Vungarala was predicting in private email correspondence with TS at Sutterfield that he would make between $2.5 million and $5 million a year based on an expected increase in the Tribe's investments in REITs.[186]

7. Vungarala Makes Misleading Presentations

REITs were a new type of investment for the Tribe, and tribal members wanted to understand how they were purchased and what the fee structure was. Furthermore, because of the periodic changes in the membership of the Tribal Council and the Investment Committee, new members also had to be educated about the investments. Whenever he was asked about fees and expenses, Vungarala used a white board to explain.[187] Vungarala claims that he plainly told the Tribe in his white board presentations that PKS would receive commissions and then pay him a portion. The evidence does not support his claim.

Vungarala claims that when he wrote on a white board he broke down the costs in detail for tribal members. He asserts that he expressly told them every time a new Investment

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[180] Hearing Tr. (AO) 294.

[181] Hearing Tr. (AO) 421-26, Hearing Tr. (Vungarala) 1091.

[182] Hearing Tr. (MB) 689-90.

[183] Hearing Tr. (AO) 434-36.

[184] Hearing Tr. (Vungarala) 1091-92.

[185] Stip. ¶¶ 20, 21.

[186] CX-14.

[187] Hearing Tr. (Vungarala) 1614-15.

Committee was formed that PKS would receive commissions and then pay him. He claimed that he always told them that he was paid by PKS.[188] In one description of his presentation, he said,

> I was called in to explain the REIT. And I went through it, basically drew it on the white board every single piece, here's $10, here's where it goes. Step by step. And I would draw it and say 7 percent go to PKS, and I am paid by PKS. And I put a line underneath and I put my name underneath.[189]

In this description of his white board presentation, Vungarala made his disclosure sound very specific.

When Vungarala described his white board presentation at length, however, it became clear that it was largely a regurgitation of the generic description of fees and expenses contained in the REIT prospectuses. He testified,

> I put it on the white board, took the $10, went through the REIT structure, showed them exactly what the different upfront costs were which is basically I drew a line to the broker-dealer saying they get the 7 percent commission which is the 70 cents. Then I went to the next line which is again following the prospectus which is the selling commissions to the REIT company which is the 3 percent which is the 30 cents. And about half of it typically is paid back to the broker-dealer to compensate them for the marketing costs.
>
> And then I went down to the next step where I showed them the operational costs which is a 1.5 percent which is basically for the REIT company to get the REIT into – basically for the review and the SEC review and what other costs they have, upfront costs to bring the document to the public so the public can invest it.
>
> And then I further went down and shared with them all the other costs, the maintenance costs, the acquisition costs, the disposal cost, and any other – and then how they shared the profit when if this REIT was disposed. … [S]o I think everybody there understood English.[190]

Neither of these descriptions of what Vungarala told the Tribe in a typical white board presentation includes the simple words, "I receive commissions." Although in the first description, Vungarala says he told the Tribe that he was "paid" by PKS, there is no corroboration that he made that statement. Even if he did, the statement is ambiguous as to what was paid and why. It is not a clear reference to commissions on the Tribe's investments.

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[188] Hearing Tr. (Vungarala) 1117-18, 1135-37.

[189] Hearing Tr. (Vungarala) 1117-18.

[190] Hearing Tr. (Vungarala) 1614-15.

Vungarala admitted that there is no hard copy anywhere of these white board presentations.[191] Tribal members recall the generic disclosures, and not the purported specific disclosure that Vungarala was receiving commissions on investments he was recommending to the Tribe.

AO recalled that Vungarala would show fees going to the REIT company's law firm, and other portions going to marketing or accounting and other "disciplines." She said that he might show in a generic way that someone was receiving 7% and someone else 3%—but he never said that 7% went to PKS, or that 3% went to a sales team.[192]

MB testified that she recalled one or two times Vungarala being asked how the fee structure worked and using a white board to explain.[193] He would speak generically, something along the lines of "you minus the 7%, minus the 3%, that's what the fees are. It was just a blanket description. It wasn't saying who gets it or where it goes. It was just this is how it works. Somebody's getting 7, somebody's getting 3."[194]

DD similarly remembered asking Vungarala during Investment Committee meetings about the fee structure and the commissions. According to DD, every time Vungarala was asked, he stated that he was not receiving commissions. He said the fees would go towards the packaging of the REITs, due diligence, and expenses.[195] Vungarala never disclosed in DD's presence that he was receiving commissions in connection with the Tribe's purchases of REITs and BDCs.[196]

The Tribe's conduct also is consistent with a belief that Vungarala received no compensation in connection with the transactions. The Tribe made the REIT and BDC investments without raising any issue concerning the inherent conflict of interest or the violation of the conflict of interest provision in its Investment Policy.

Based on the credible testimony of AO, MB, and DD, the totality of the circumstances, and the lack of any corroboration for Vungarala's version of the facts, we find that the white board presentations were misleading. When he made them, Vungarala failed to disclose in a clearly understandable manner that he was receiving commissions on the Tribe's REIT and BDC investments.

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[191] Hearing Tr. (Vungarala) 1202.

[192] Hearing Tr. (Vungarala) 1287; Hearing Tr. (AO) 1391.

[193] Hearing Tr. (MB) 727-30.

[194] Hearing Tr. (MB) 730.

[195] Hearing Tr. (DD) 82-83.

[196] Hearing Tr. (DD) 134-35.

8. Vungarala Restricts Communications with the Tribe

Although he denies it, we find that Vungarala structured and controlled his communications with PKS, Sutterfield, and the REIT and BDC issuers to minimize the risk that the Tribe would learn about his commissions and about the Tribe's eligibility for volume discounts.

Vungarala used his email address with the Tribe for internal communications with the Tribe, but he used his Sutterfield email address for his external communications. All his correspondence with the REIT companies, for instance, was through Sutterfield. PKS would capture the mail to and from the Sutterfield address for compliance purposes.[197] So although the Tribe monitored email on his cell phone,[198] the Tribe only had access to internal emails and some external email communications that Vungarala chose to send from his Sutterfield address to his tribal address. He could filter out any email that could create problems for him with the Tribe. Use of the two email addresses also allowed him to present himself to REIT and BDC companies as an ordinary registered representative, rather than as the Tribe's employee.

An example of how Vungarala could avoid the Tribe's scrutiny by using a non-Tribe email address occurred in connection with volume discounts. One of the REITs informed Vungarala by email to his Sutterfield email address that four purchases were made by the Tribe's trusts but at the wrong discount or breakpoint. The REIT company informed him that it was going to correct the mistake and give the Tribe the better volume discount. Vungarala wrote back the same day saying that all four trusts "need to be treated as separate clients and should not be combined for volume discount." There is no indication that he consulted anyone at the Tribe before instructing the REIT not to provide the Tribe with the volume discount. Because he sent the message from his Sutterfield account, no one at the Tribe would have ever seen it. The Tribe had no opportunity to make its own determination whether to accept or decline the volume discount.[199]

Vungarala also made an effort to keep issuers from contacting AO. For example, in 2013, when he was traveling out of the country, he gave AO's tribal email address to a REIT issuer so that the REIT issuer could email her to confirm receipt of a wire of funds for an investment. However, Vungarala warned, "No other communication should be sent to her."[200] When he was away on another vacation, a REIT company contacted AO with questions. She could not answer the questions and called Vungarala. Upon his return, he wrote the REIT company an email saying that it should not have called AO, and instructing it to "make sure the client is not contacted directly."[201] All the emails to and from Vungarala attempting to restrict the REIT

[197] Hearing Tr. (KE) 1005-07; Hearing Tr. (Vungarala) 1188-89.

[198] Hearing Tr. (Vungarala) 1157.

[199] CX-32.

[200] Hearing Tr. (Vungarala) 1125; CX-60.

[201] Hearing Tr. (Vungarala) 1129; CX-61.

companies from contacting AO were to and from his Sutterfield email address,[202] and therefore AO, his tribal supervisor, could not review them. She had no way of knowing that Vungarala was restricting her access to information regarding the Tribe's investments.

9. Vungarala Tries to Persuade the Tribe to Move Its 401(k) Assets to Sutterfield

The Tribe's 401(k) was managed by its Chief Financial Officer, MJ, not Vungarala. The 401(k) investments were not doing well, and MJ asked Vungarala for help. Vungarala told MJ that Sutterfield would be a better choice as a platform. He told MJ that the Tribe did not need Schwab to oversee the 401(k) plan.[203]

Email correspondence reveals that Vungarala viewed himself as working for Sutterfield, not the Tribe. He would not assist the Tribe in connection with its 401(k) plan unless the Tribe moved its assets to Sutterfield, where he would be compensated as a registered investment advisor on a percentage of the Tribe's assets. He wrote to TS at Sutterfield on February 6, 2014, "I told [MJ] that I am not going to evaluate schwab as it is not part of my job responsibilities. I will only look at it only if they hires our services….no more freebies."[204]

10. Vungarala's Relationship with AO Sours

In connection with his performance review in February 2014, Vungarala discussed with AO, the Treasury Administrator, the possibility that he might leave the Tribe. He told her he wanted to do charity work in India. She felt it was her duty to inform the Investment Committee, which she did, suggesting that they should consider hiring a second investment manager to learn Vungarala's position. She did not want to be unprepared if he did decide to leave.[205]

Vungarala did a lot of traveling to REIT and BDC issuers on what he termed "due diligence" trips. These trips were paid for by the issuers after the Tribe purchased a REIT or BDC. Vungarala testified that he went on these due diligence trips in his capacity as a registered representative. In the meantime, there was work to be done for the Tribe, as its employee. Vungarala taught AO how to execute trades in stocks and bonds held at Schwab while he was away. In advance of a trip, he would create a list of transactions for her to execute. AO thought she was doing a substantial amount of his work, and in July 2014 she sought a bonus from the Tribal Council for the portion of the trades she performed.[206]

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[202] CX-60; CX-61.

[203] Hearing Tr. (Vungarala) 1078-79, 1082-84; CX-14; CX-63.

[204] CX-63; Hearing Tr. (Vungarala) 1082-84.

[205] Hearing Tr. (AO) 316, 354

[206] Hearing Tr. (AO) 355-56, 396-401, 1480-81; Hearing Tr. (Vungarala) 1662-63.

Vungarala was unaware of either of AO's actions until August 2014, when AO was absent on a trip to take her son to college. While AO was gone, SB, the Tribe's Council Treasurer, talked to Vungarala. SB asked him if he was planning to leave his employment with the Tribe. He said no, although he acknowledged that he had told AO that he wanted to be more involved in mission work in India. He said that he planned to transition to that work over the next three years. SB explained that AO had gone to the Investment Committee to discuss hiring a second investment manager who could be prepared to take over if Vungarala left. SB also told Vungarala that AO had sought to receive part of his bonus for doing part of his work.[207]

Vungarala denies that it made him unhappy to hear that the Tribe was considering hiring a second investment manager.[208] But his denial is not credible. If a knowledgeable investment professional joined the Treasury Department, that person would create a risk that Vungarala's self-dealing would be exposed.

In reaction to the information that AO was seeking a bonus for doing some of his work, Vungarala argued that her work was ministerial. He told SB that AO was not actually involved in the trading decisions. She was only helping him by inputting the trades from his trade list.[209] Vungarala's reaction reveals the true nature of AO's role—she performed administrative functions, not investment analysis. She depended on Vungarala to select, analyze, and recommend investments.

AO testified that she viewed her relationship with Vungarala up to this point as friendly. After Vungarala's conversation with SB, however, the relationship between him and AO soured. He was removed from her supervision in August 2014.[210]

11. AO and Others Become Suspicious of Vungarala

Some members of the Tribe began to be suspicious of Vungarala in 2014 after he invited members of the Investment Committee and Tribal Council to the grand opening of a yogurt shop called Cherry Berry—the second such store he opened that year. He also would discuss the significant charitable donations he was making.[211] Tribe members began to wonder how he could do all that he was doing based solely on his employment with the Tribe.[212]

After Vungarala was removed from AO's supervision, she did some Google research on him. From BrokerCheck, she learned for the first time that he was an employee of PKS and

[207] Hearing Tr. (AO) 315-18; Hearing Tr. (Vungarala) 1131, 1140-42.

[208] Hearing Tr. (Vungarala) 1132.

[209] Hearing Tr. (Vungarala) 1140-41.

[210] Hearing Tr. (AO) 319-21; Hearing Tr. (Vungarala) 1137.

[211] Hearing Tr. (DD) 267-68; Hearing Tr. (AO) 319-21.

[212] Hearing Tr. (DD) 267-68; Hearing Tr. (AO) 319-21.

Sutterfield. She also learned that he had multiple businesses and foundations.[213] The Treasury Department staff began to speculate among themselves that Vungarala might be receiving commissions.[214]

12. FINRA Staff Contact the Tribe Regarding Volume Discounts

As noted above, in August 2014 FINRA Staff sent the Tribe's Chief and Sub-Chief a "call me" letter relating to the review of volume discounts. The Chief and Sub-Chief did not respond, but afterward FINRA Staff spoke to the Tribe's general counsel. He asked for questions in writing to be put in front of the Tribal Council, which was done, but only much later, after the Tribe pursued its own inquiries in the fall of 2014.[215]

13. FINRA Staff Contact PKS Regarding Volume Discounts

On September 16, 2014, FINRA Staff sent a letter pursuant to Rule 8210 to LE, the Chief Compliance Officer of PKS, asking questions regarding its REIT and BDC business. The letter asked for details regarding the amount of commissions paid to PKS for purchases of particular products and the amount of and basis for any volume discounts. It also asked for information regarding the customers and the registered representatives for REITs and BDCs sold by the firm. In particular, the letter sought details as to who determined whether a customer was entitled to a volume discount and how the determination was made.[216]

14. Vungarala Learns of FINRA Inquiry to PKS

Vungarala learned of FINRA Staff's review of volume discounts in September or October, when PKS asked for his assistance in responding to the Staff's Rule 8210 letter.[217] By a letter dated October 20, 2014, PKS responded to the Staff's request for information.[218] As discussed below, in mid-October PKS also contacted the Tribe asking for reassurance that the Tribe did not want to "comingle" its Trusts.

15. Vungarala Discloses PKS's Commissions, but Not His Own

When the truth began to emerge in the fall of 2014, it came out slowly in the form of ambiguous and generic statements. Even when Vungarala was pressed to disclose exactly who was receiving commissions on the Tribe's investments through PKS, he did not clearly state that *he* was.

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[213] Hearing Tr. (AO) 319-21.

[214] Hearing Tr. (AO) 1571-72.

[215] Hearing Tr. (PG) 637-39; CX-76 (May 15, 2015 letter to the general counsel asking questions about the Tribe and its investments); CX-77 (the general counsel's July 23, 2015 response).

[216] CX-85.

[217] Hearing Tr. (Vungarala) 1132-34, 1166-67; Hearing Tr. (KE) 866; CX-85; CX-86.

[218] CX-86.

a. October 27, 2014 Investment Committee Meeting

The Investment Committee met on October 27, 2014, a week after PKS responded to FINRA's Rule 8210 letter. During the meeting, Vungarala reviewed with the Committee the fees and expenses associated with the Tribe's REIT and BDC investments. He testified that he put the item on the agenda because he anticipated that a new rule would require that the true cost be shown on statements. As a result, the $1 million investment that currently appeared on the Tribe's statements would appear as a smaller investment, with the fees and expenses subtracted. He said that he needed them to understand that the investment would be shown as $8.85 in the future, and not $10. He did not want them to think it was an unrealized loss.[219]

According to Vungarala, he made the same kind of presentation that he had before.[220] He walked the Investment Committee members through the breakdown of a $10 investment. He says he told them that PKS received 7% and that 3% went to the REIT sales team.[221] He claims that he told them he got 85% of the commissions received by PKS.[222]

The minutes for this meeting (taken by DP) are less complete than the minutes for the June 27, 2011 meeting at which the Committee considered the first REIT purchases. However, these minutes are generally consistent with Vungarala's testimony—up to the point of his claim that he told the Committee that he received 85% of the commissions PKS received on the Tribe's investments.[223] Neither the minutes, nor the testimony of others who attended, nor the events that followed are consistent with Vungarala's claim that he told them that *he* received commissions on the Tribe's transactions.

Both Vungarala and AO testified that the meeting became contentious between them.[224] According to the minutes, AO asked Vungarala questions relating to the "PKS fee," and Vungarala initially told them that "the team at PKS makes the commission." He said that the PKS commission was 7% and that 3–4% went "to the office." AO further pursued the subject, specifically saying that she wanted to know *who* received money from the 7%. In response, Vungarala did not tell AO and the Investment Committee that the majority of the 7% went to *him*. Instead, he continued in disjointed fashion to say that 3.5% went to the "Kohl guys" and 1.5–2% went to lawyers.[225]

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[219] Hearing Tr. (Vungarala) 1287-91.

[220] Hearing Tr. (Vungarala) 1135-36.

[221] Hearing Tr. (Vungarala) 1287-88, 1293.

[222] Hearing Tr. (Vungarala) 1288.

[223] CX-17; Hearing Tr. (Vungarala) 1135-37, 1281-91.

[224] Hearing Tr. (Vungarala) 1281; Hearing Tr. (AO) 319-20.

[225] CX-17.

The minutes reflect that when Vungarala discussed "his 30,000 page rule book and rule #4016," DD asked him to email an example of what he was trying to show them. DD, the Tribal Administrator, testified that Vungarala's presentation was confusing, so he asked for an email that they could review.[226]

Because of her research on Vungarala, AO had grown suspicious. She testified that she specifically asked Vungarala at the meeting whether PKS received a commission on the Tribe's investments. He responded that PKS received 7% and that his supervisor made half of that. This was the first time that Vungarala had disclosed that PKS was receiving commissions on the Tribe's investments.[227] According to AO, Vungarala said twice that he himself did not receive commissions.[228]

AO testified that the meeting would have been the "perfect time" for Vungarala to disclose that he was receiving commissions, since they were asking about PKS and his supervisor and the details. But he did not.[229]

MB also attended the meeting. She described Vungarala as evasive. She said he did not answer AO's questions about whether he was receiving fees and commissions.[230]

We credit the testimony of AO, DD, and MB that Vungarala failed to disclose at this meeting that he was receiving commissions on the Tribe's transactions. Their testimony is consistent with the minutes. It is also consistent with the Tribe's conduct. No one at the meeting asked questions regarding the inherent conflict of interest or what they would have viewed as a violation of the Tribe's Investment Policy. Investment Committee members continued to be confused about fees and commissions and sought a written example of the breakdown for clarification.

The fact that AO was asking pointed questions about who exactly was receiving commissions on the Tribe's investments is further evidence that Vungarala had not previously revealed that he was receiving commissions on the Tribe's investments. There would have been no reason for her to ask such questions if she and the other Investment Committee members already knew about his commissions.

Vungarala contends that AO knew about his commissions but was pretending that she did not when she questioned him at this meeting.[231] His contention is not credible. He has offered no explanation for why she would have hidden her knowledge for more than three years, and there

[226] Hearing Tr. (DD) 89-94.

[227] Hearing Tr. (AO) 322, 332-37.

[228] Hearing Tr. (AO) 322.

[229] Hearing Tr. (AO) 342.

[230] Hearing Tr. (MB) 722-23, 725.

[231] Hearing Tr. (Vungarala) 1151.

is no evidence to support his contention. Moreover, even if it were true, and he did inform AO that he was receiving commissions on the Tribe's investments, that did not constitute notice to the Tribe, and he knew it. All other issues of any significance relating to the Tribe's investments were reviewed by the Investment Committee and approved by the Tribal Council. DD testified that Vungarala should have "disclosed officially" that he was earning a commission, and that there should have been a "documented opportunity" for all parties to be informed of Vungarala's commissions.[232]

b. Vungarala's Follow-Up Email

After the Investment Committee meeting, Vungarala prepared, as DD requested, a follow-up email. Vungarala circulated the email to various members of the Investment Committee and Tribal Council.[233] This is the only documented example in the record of how Vungarala explained to the Tribe the fees and expenses associated with its REIT and BDC investments. Despite AO's pointed questions, Vungarala failed to disclose even in this email that he received commissions on the Tribe's investments through PKS.

In the October 27, 2014 email, Vungarala wrote that "[i]f we buy XYZ company REIT at $10/share, the following expenses are deducted before the $10 is invested…." He said that 7% was paid to PKS, and that 3% was paid to the "XYZ sales team." He also explained that operating expenses covered REIT preparation, review and submission to the SEC, and legal costs. He concluded that total costs would reduce the $10 investment to $8.85. The email then continued with a description of how earnings over time would be distributed and the details of how the accounting would work under the new SEC Rule that he had discussed at the Investment Committee meeting. Vungarala failed to identify himself anywhere in the email as a recipient of commissions on the Tribe's investments.[234]

Vungarala claimed at the hearing that he did not state in the email that he was receiving commissions because he had already disclosed that at the Investment Committee meeting earlier the same morning. He testified, "[H]ow much I was getting paid was already addressed in the morning meeting because I did disclose to them how much Sutterfield was getting, how much I was getting, how much PKS kept."[235] We reject Vungarala's explanation for not disclosing in the email that he received commissions on the Tribe's transactions. It is inconsistent with the record and not credible.

[232] Hearing Tr. (DD) 131-33.

[233] CX-19, at 2-3.

[234] Hearing Tr. (Vungarala) 1144-47; Hearing Tr. (DD) 94-98; CX-19.

[235] Hearing Tr. (Vungarala) 1143-46.

c. AO Persists in Asking Questions

In light of her specific questions at the Investment Committee meeting, AO was surprised at Vungarala's reference in his email to the generic "XYZ sales team" and his failure to identify his supervisor at PKS.[236] She drafted an email that she circulated on October 29, 2014, to give the Tribe some perspective on how much money might be involved, and, once again, to pursue the specific identity of the persons Vungarala had referred to only in a generic way. She listed all of the Tribe's REIT, BDC, and PPM purchases for four fiscal years, beginning in fiscal year 2011. The Tribe spent more than $215 million on such purchases. Then she explained that the 7% in commissions that PKS had received on those transactions would amount to slightly more than $15 million. She asked the identity of Vungarala's supervisor at the firm, and who was the "XYZ sales team."[237] Given that Vungarala had also identified the REIT company as the "XYZ company," the reference to the "XYZ sales team" was particularly obscure.

Vungarala did not answer AO's questions. He spoke to SB and then told AO to talk to SB. AO was fired from her position as Tribal Administrator later that same afternoon.[238]

16. Vungarala Falsely Asserts that He Made Full Disclosure from the Outset

a. November 2014 Meeting with Executive Council

In November 2014, Vungarala met with the Executive Council, a sub-group of the Tribal Council. SB, the Chief, the Sub-Chief, and the secretary attended the meeting. Vungarala testified that he told them he had previously disclosed everything about his commissions from the first moment he joined the Tribe in 2008. According to Vungarala, he reminded them that he had disclosed at the beginning of his employment that he had clients other than the Tribe, that he needed to be able to continue servicing those other clients, and that he would be paid by PKS when he acted as a registered representative. According to his hearing testimony, he discussed the minimum production fee and how he had submitted papers to obtain reimbursement for his errors and omissions insurance. He told them that AO was well aware of his commissions. He maintained that this sub-group was "very aware that [he] had disclosed" and that he did "not hide anything."[239]

No one who attended this meeting gave testimony at the hearing. We have no documents to corroborate Vungarala's testimony on what happened at this meeting.

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[236] Hearing Tr. (AO) 342-43; CX-19.

[237] Hearing Tr. (AO) 343-44; CX-19.

[238] Hearing Tr. (AO) 344-46; RXV-43.

[239] Hearing Tr. (Vungarala) 1296-1302. Resp. PH Br. 23.

b. December 14, 2014 Meetings

Sometime in December 2014, the Tribe's general counsel told DD, the Tribal Administrator, that a meeting of the Tribal Council was scheduled for December 14, 2014, at which Vungarala was expected to disclose the details of his commissions.[240] That meeting, however, had to be rescheduled because a tribal elder died.

However, another meeting went forward that day, during which Vungarala introduced people from Sutterfield, his advisory firm, who made a pitch for moving the Tribe's business from Schwab to Sutterfield.[241] Vungarala had a self-interest in Sutterfield's proposal. He intended to become an investment adviser for the Tribe's portfolio if it made the move to Sutterfield. No management fee would be charged on the Tribe's REIT and BDC purchases, but Vungarala, as the investment adviser for the entire portfolio, would have received a management fee of .55% on the rest of the portfolio, which amounted to approximately $800 million. This meant he would receive more than $4 million a year for managing the portfolio.[242]

c. Vungarala Thwarts the General Counsel's Attempts to Obtain Information

A few days later, the Tribe's general counsel contacted PKS directly to ask questions about who received how much in commissions on the Tribe's investments. We find that Vungarala orchestrated the way in which PKS responded to the general counsel, and that the response was purposefully vague and uninformative. The general counsel became frustrated when answers were not forthcoming.

An email string from December 18 and 19, 2014, begins with an email from KF, the COO of PKS, to Vungarala at his Sutterfield address. KF's email contains what subsequently became the response to the general counsel. It is followed by an email from Vungarala to KF, directing that "per our conversation" the "clarification" should be sent to the Chief, Sub-Chief, SB, and the general counsel. That same day KF then forwarded both her email and Vungarala's to the general counsel.[243]

It is instructive to examine the "clarification" that KF sent to the Tribe's general counsel. Nowhere does it say that either PKS or Vungarala received commissions on the Tribe's transactions. To the contrary, it makes only generic statements that identify no firm or individual. KF first wrote,

> The Dealer Manager fee is paid to the Broker Dealer that is responsible for the purpose of participating in and facilitating the distribution of the REIT or BDC

[240] Hearing Tr. (DD) 132-34.

[241] Hearing Tr. (Vungarala) 1070-74, 1079-80.

[242] Hearing Tr. (Vungarala) 1313-15, 1606-07.

[243] CX-24.

> product. The Dealer Manager typically is the affiliated broker dealer to the REIT or BDC sponsor.[244]

KF then made a statement that would appear to mean the registered representative on the Tribe's investments received no compensation. She wrote, "This fee does not get paid out to the registered representative in any manner."[245] Finally, KF attached an example from a REIT prospectus outlining the types of compensation.[246]

When he received the "clarification" and saw that Vungarala had reviewed it before instructing KF to send it, the general counsel accused Vungarala of impeding his efforts to obtain information. The general counsel wrote to Vungarala, the Chief, Sub-Chief, and SB that PKS had initially promised to provide the requested information but later provided only a fraction of what was requested. The general counsel attributed the failure to provide the information to Vungarala's intervention. [247]

The next day, on December 19, 2014, Vungarala responded to the general counsel with copies to the Chief, Sub-Chief, and SB. Vungarala wrote that only the Chief and Sub-Chief were authorized to receive the information, so Vungarala had consulted SB and SB had obtained authorization for the information to be released to the general counsel. Vungarala argued that PKS was following "industry standards" to protect customer data.[248]

Vungarala's email prompted the general counsel to respond by email that PKS had raised no issue until Vungarala had become involved. He noted that he would be interested in a precise citation to the rule that would prevent disclosure to the Tribe's general counsel.[249]

The testimony of Vungarala's own witness, DJG, belies Vungarala's assertion to the general counsel that information could only be disclosed to the Chief and Sub-Chief. In connection with the issue of volume discounts, DJG contacted AO directly. He said he wanted to provide another line of communication between the Tribe and PKS in addition to Vungarala. Neither DJG nor AO thought that the exchange of information between PKS and the Tribe was restricted to the Chief and Sub-Chief.[250]

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[244] CX-24, at 3.

[245] CX-24, at 3.

[246] CX-24, at 3.

[247] CX-24, at 2.

[248] CX-24, at 1.

[249] CX-24, at 1.

[250] Hearing Tr. 1801-05, 1841-47, 1857-58; Resp. PH Br. 1 (DJG had dealings with AO on "multiple occasions").

d. December 21, 2014 Tribal Council Meeting

On December 21, 2014, Vungarala met with the full Tribal Council. According to Vungarala, he made another white board presentation and told the Tribe that Sutterfield received 5% and Vungarala received 85% of the commissions. He also explained that he used 55% to give to missions and missionaries around the world, paid taxes with 25%, and retained only 15%. In this meeting he asserted that he had previously disclosed everything by signing off as the registered representative on the Tribe's investments, by his white board explanations, and by providing prospectuses in which commissions were disclosed. Vungarala claims that some tribal members confirmed his story that AO knew all about the commissions.[251]

Vungarala also asserted that a letter sent to PKS by the Chief and Sub-Chief confirmed that he had made full disclosure.[252] For that reason, we analyze below the correspondence and contacts between PKS and the Tribe, concluding that none of the interactions between PKS and the Tribe informed the Tribe that Vungarala was receiving commissions and had an actual conflict of interest.

One of the tribal members at the December 21, 2014 meeting had Vungarala's record from BrokerCheck. She asked him about his outside business activities and why BrokerCheck did not show the Tribe as his employer when it showed PKS as his employer and his foundation and charities and other businesses. Vungarala said PKS was his employer, and the Tribe was only an outside business activity.[253]

At least as portrayed by Vungarala, the meeting was heated and chaotic. Various tribal members accused other tribal members of causing trouble and placing the Tribal Council in a bad light. Political issues concerning tribal enrollment were raised. Vungarala continued to assert that AO had known about his commissions. She was not there to refute his assertion, but another tribal member who was there disputed his story.[254] The meeting ended in anger, with the Chief and Chaplain concluding "we know [AO] knew about it."[255]

e. December 30, 2014 Letter to Tribe from PKS

KF, PKS's COO, sent an email on December 30, 2014, to the Chief, Sub-Chief, SB, and the general counsel. In the email, she provided them with the total figures for REIT and BDC investments through PKS, a little over $219.8 million, and the total gross selling commissions, a little over $13.825 million. Nowhere did she inform them who had received the commissions.[256]

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[251] Hearing Tr. (Vungarala) 1302-06.

[252] Hearing Tr. (Vungarala) 1304.

[253] Hearing Tr. (Vungarala) 1303.

[254] Hearing Tr. (Vungarala) 1302-06.

[255] Hearing Tr. (Vungarala) 1306.

[256] RXV-56.

f. AO's Complaints Against Vungarala

AO, the Tribe's former Treasury Administrator and Vungarala's former supervisor, submitted a complaint to FINRA in spring 2015, describing her suspicion that Vungarala had received commissions on the Tribe's investments while he was the Tribe's employee. She spoke with FINRA Staff and provided some documents.[257] She noted in a cover email that a majority of the trades done by Vungarala at Schwab were sells and that "[h]e rarely bought anything other than those that he had a personal interest in."[258]

AO also filed a lawsuit in state court against Vungarala. She blames him for losing her job, and wants him to be "held accountable."[259]

g. Tribe's Written Responses to FINRA Staff Questions

In May 2015, FINRA Staff sent a letter to the Tribe with questions regarding the Tribe's relationship with Vungarala. Among other things, the letter asked whether Vungarala had informed the Tribe that he would make commissions on the Tribe's investments. It also asked what he had told the Tribe about volume discounts and whether the Tribe had waived them.[260]

On July 23, 2015, through its general counsel, the Tribe responded in writing. It said that Vungarala was not allowed to receive commissions on the Tribe's investments, and that he had led the Tribe to believe that he did not. The Tribe said that the first time Vungarala disclosed that he received commissions on its investments was at the December 21, 2014 Tribal Council meeting. With respect to volume discounts, the Tribe said that Vungarala had told it that discounts were available on a per trust basis. The Tribe never waived volume discounts on its transactions.[261]

17. Vungarala's Undisclosed Commissions Were Significant to the Tribe

DD, the Tribal Administrator, testified at the hearing that it would have been important to the Tribe to know that Vungarala received commissions in connection with its REIT and BDC investments. He said that, as the Tribe's employee, Vungarala was prohibited from receiving commissions on investments that he made on behalf of the Tribe. If Vungarala had disclosed that he received commissions on the investments, he said, the Tribe would have had "no interest in his recommendations." DD explained that the Tribe would not want Vungarala to represent

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[257] Hearing Tr. (AO) 528-29; Hearing Tr. (PG) 662; RXV-71.

[258] RXV-71.

[259] Hearing Tr. (AO) 1561-62.

[260] CX-76.

[261] CX-77. The Tribe's general counsel said that the Investment Committee, Tribal Council, and former Treasury Administrator (referring to AO) did not recall any disclosure by Vungarala that he received commissions until the December 21, 2014 Tribal Council meeting. CX-77.

himself in connection with the investments because he could potentially harm the Tribe by guiding it "wrongly in its investment strategy."[262]

Indeed, as discussed below, in connection with volume discounts on the Tribe's investments, Vungarala acted in his self-interest to the detriment of the Tribe.

C. Vungarala Misleads the Tribe Regarding the Availability of Volume Discounts

1. Availability of Volume Discounts Across the Tribe's Trusts

As discussed above, REITs and BDCs permit multiple purchases by the same person, entity, or group to be treated as one large purchase for purposes of obtaining a volume discount. The discount is reflected in the customer's ability to buy more units of the investment with its money than it would be able to buy without the volume discounts.[263] The purchases to be combined might be the accumulated purchases over time, without a time limit, or, in some cases, the accumulation of purchases over a specified period.[264]

The prospectus for a particular REIT or BDC defines who is entitled to a volume discount. From the prospectuses for the REITs and BDCs in which the Tribe invested, Enforcement created a compilation of the language that defines who is entitled to a volume discount. The compilation reveals that the definition of who is entitled to volume discounts is typically very broad.[265] For example, many of the prospectuses permitted volume discounts to be given to a "corporation, partnership, association, joint-stock company, trust fund" or even "any organized group of persons, whether incorporated or not."[266] Other prospectuses provided volume discounts to "[a]ll funds and foundations maintained by a given corporation, partnership or other entity."[267] Some prospectuses said that different accounts could be aggregated for purposes of the discount if the account holder had the same tax identification number or if the accounts were controlled by the same beneficial owner or owners.[268]

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[262] Hearing Tr. (DD) 83-85. In his July 23, 2015 letter to FINRA Staff, the Tribe's general counsel expressed the Tribe's unhappiness upon learning that Vungarala had received commissions on the Tribe's investments. He wrote that the Tribe had been satisfied with the performance of the portfolio when Vungarala managed it, but that the Tribe was "not satisfied" after it learned about his commissions. CX-77.

[263] Hearing Tr. (PG) 645-46; Hearing Tr. (KE) 858-59.

[264] Hearing Tr. (KE) 855, 859; CX-90.

[265] Hearing Tr. (KE) 851-53; CX-89.

[266] CX-89, at 5 (CNL, various investment funds), at 9-10 (Hines, various investment funds; ICON, various investment funds), at 13 (KBS, various investment funds; Northstar, various investment funds), at 15 (Resource Real Estate, various investment funds), at 16-17 (Strategic Storage, various investment funds).

[267] CX-89, at 2 (American Realty Capital, various investment funds), at 14-15 (Phillips Edison, various funds).

[268] CX-89, at 3 (Behringer Harvard).

We find that the Tribe qualified for volume discounts as an "organized group of persons" and as an "entity." We also find that the trusts together qualified for volume discounts as accounts held under the same tax identification number. Finally, we find as a factual matter that the Tribe qualified as the beneficial owner of the assets held by the various trusts. Although the trusts were separate and devoted to different purposes, they were all owned, controlled, and directed by the Tribe, and the Tribe was the ultimate beneficiary.[269]

We reject Vungarala's assertion in his post-hearing brief that only the individual trusts qualified for volume discounts because they held separate bank accounts.[270] If eligibility were limited to multiple purchases using a single bank account, then the prospectuses could easily have said so. They did not. The prospectuses focus on the entity or group making multiple purchases and evidence of a linkage between accounts, not on individual accounts in isolation. Furthermore, the subscription agreements for such investments expressly state that, for purposes of volume discounts, different accounts of any purchaser may be combined as long as they are through the same broker-dealer.[271] Vungarala's assertion also is inconsistent with evidence that REITs offered the Tribe volume discounts based on all its purchases by different trusts.[272]

2. Vungarala Does Not Disclose Availability of Volume Discounts

Vungarala discussed volume discounts with the Tribe, but he explained them as though they were only available on a per trust basis. He did not discuss with the Investment Committee the possibility of adding together purchases in the different Trusts in order to maximize volume discounts.[273] While making purchases of REITs and BDCs through PKS, pursuant to Vungarala's recommendations, the Tribe obtained at least a few volume discounts on qualifying REIT purchases through individual trusts.[274] The Investment Committee was unaware that it had missed out on millions of dollars in other volume discounts.[275]

We reject Vungarala's claim that he disclosed to the Tribe its eligibility for volume discounts across the different trusts, and that the Tribe declined to take advantage of the discounts because of privacy concerns. No evidence in the record other than his own testimony supports his claim. Rather, the record shows that he sowed confusion and cultivated the Tribe's misunderstanding of what he was talking about when he discussed volume discounts.

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[269] Hearing Tr. (KE) 948. Our conclusion that the Tribe qualified for volume discounts as the beneficial owner of the REITs and BDCs is consistent with the definition of "beneficial ownership" applied in the context of the disclosure of securities holdings. See the legal discussion below at p. 65.

[270] Resp. PH Br. 16 & n.72.

[271] Hearing Tr. (KE) 931-32; CX-39, at 2-3.

[272] Hearing Tr. (KE) 879-82; CX-32.

[273] Hearing Tr. (DD) 98-100.

[274] Hearing Tr. (KE) 1033-36.

[275] Hearing Tr. (DD) 241-45.

As discussed below, instead of speaking of volume discounts, he spoke of "comingling" funds in the different tribal trusts, something that he knew the Tribe would not want to do. Vungarala's substitution of words like "comingling" and "aggregation" for the term volume discounts created an impression that volume discounts were not available unless the trusts were combined.

That impression was false. It is apparent from the ability to combine purchases made at different times, as well as the ability to combine purchases in different accounts, that funds and assets need not be physically combined to secure a volume discount. Rather, the multiple purchases for a given period can be simply added together and the breakpoints or discounts calculated on the total, enabling the purchaser to purchase more of the investment for the same amount of money. Illustrative of the point, in this case more than once a REIT recognized after separate purchases were made for different tribal trusts that the Tribe was entitled to a better volume discount, offering to correct the mistake.[276] The REITs did not suggest that the Tribe had to unwind and redo the transactions as a single purchase. The correction could be made by recalculating the discount and the increased units of the investment each trust would receive on its purchase.

In his testimony, when Vungarala was asked several times the direct question whether, in fact, the Tribe could have obtained volume discounts on the purchases by various trusts without comingling their funds, he never answered the question posed. He said instead, "I was told to keep it separate, keep it private. So I did not look at anything else other than those two."[277] His refusal to answer the question strongly suggests that he knew that comingling was not required and he did not want to admit it.

a. Vungarala Misleads AO

According to Vungarala, while AO was serving as the Tribe's Treasury Administrator and his supervisor, he spoke to her twice on the subject of volume discounts. Afterward, he claims he simply followed her instructions when he refused offers by REITs to give a volume discount on multiple purchases by the Tribe in various trust accounts. Vungarala claims that AO told him that the Tribe did not want the volume discounts because of privacy concerns.

Vungarala claims he discussed volume discounts with AO for the first time while he was at a REIT conducting due diligence. An attorney for the REIT asked him if the Tribe was the beneficial owner of two tribal trusts. The attorney said that if the Tribe was the beneficial owner then the REIT would have to disclose on its 10K that the Tribe owned more than 5% of the REIT. Vungarala said that he called AO and discussed the issue. According to him, she said we cannot disclose the Tribe as the beneficial owner or the amount that the Tribe holds. She was adamant, Vungarala said, about keeping the trusts separate. Afterward, he said, "we did not look

[276] Hearing Tr. (KE) 879-82; CX-32.

[277] Hearing Tr. (Vungarala) 1158-59.

at aggregation." He continued, "[E]ven if there was a chance for anything because of privacy concerns we cannot do it."[278]

The second time Vungarala says he discussed volume discounts with AO was when another REIT saw the single tax identification on multiple trusts and wanted to aggregate their purchases. Vungarala said he talked to AO and she said "same issue is privacy, there's a chance it can be disclosed." He concluded that she had given him "instructions" not to aggregate the trusts.[279]

On its face, we do not find Vungarala's story that AO rejected millions of dollars in volume discounts on her own, without consulting anyone else at the Tribe, credible. If she had understood the issue, she would have taken it to the Investment Committee and the Tribal Council. Even when small amounts of money were involved, such as the reimbursements for Vungarala's errors and omissions insurance, she obtained review and approval. Vungarala's own testimony demonstrates as much. At one point he said,

> My boss was [AO]. And every time I needed something I would go to her and if she would—she would never make it on her own. … [S]he took every single thing that I brought up to the [I]nvestment [C]ommittee.[280]

AO in fact denies that she discussed aggregation for purposes of volume discounts with Vungarala.[281] She testified that Vungarala never told her that the Tribe could potentially obtain discounts of several million dollars if it aggregated trust investments for this purpose, and she never told Vungarala that the Tribe did not want volume discounts because of privacy concerns. AO was not even aware that the Tribe was receiving volume discounts on purchases made by a single trust because she did not understand the monthly and quarterly statements. She testified that she would have thought such discounts would be reflected in them, but the statements always showed a $1 million investment. She does not remember any mention of volume discounts until, as discussed below, one of the analysts, MB, brought up the issue.[282]

Even if Vungarala had the discussions with AO that he claims he had, he misled her and failed to disclose the availability of volume discounts across trusts. As he described his discussions with AO in his testimony, he did not talk about volume discounts with her using the term "volume discount." He talked to her about the "aggregation" of the trusts and spoke to her of "comingling." These are terms that he knew would trigger her reaction that the trusts had to be kept separate. He also asserted to her that the "aggregation" of the trusts would increase the risk

[278] Hearing Tr. (Vungarala) 1155-56, 1196-97.

[279] Hearing Tr. (Vungarala) 1156-57, 1159-60.

[280] Hearing Tr. (Vungarala) 1164.

[281] Hearing Tr. (AO) 306, 308.

[282] Hearing Tr. (AO) 498-05, 1575-76.

that the Tribe could not keep private its financial holdings. He knew privacy was another important tribal concern.[283]

His own testimony shows that he did not explain what was at stake—millions of dollars in volume discounts. He did not explain that those volume discounts could be obtained without comingling the physical assets held by the separate trusts. And he did not explain that, as the beneficial owner of the trusts, the Tribe's disclosure obligations were the same regardless of whether the Tribe obtained the volume discounts.[284] He made it seem to AO that the separate, private nature of the trusts would be threatened.

b. Vungarala Misleads MB

Over time, as she gained experience as a research analyst for the Tribe, MB became familiar with the concept of volume discounts from seeing the term in REIT and BDC prospectuses. She understood that, if a person bought more than a threshold amount of a REIT or BDC, the offering price dropped.[285] She then began to wonder if the Tribe was entitled to volume discounts. She and the other analyst maintained a spreadsheet that Vungarala had set up to show the initial purchase and costs of the REITs and BDCs. The spreadsheet showed the initial purchase and costs, and when the Tribe bought an additional amount that would go over the threshold, then the price would decrease. They would average the cost of a particular REIT or BDC across purchases by a particular trust.[286]

MB asked Vungarala why the Tribe couldn't buy the REITs all at once and then "delegate" the purchases between the trusts themselves. That way they could get the discount on everything above the threshold amount. Vungarala flatly told her it was not possible to obtain the volume discounts across the trusts, which was untrue. He told her that the trusts had to be kept "separate," and did not inform her that the volume discounts could be obtained even while keeping the trusts physically separate. He thus deprived the Tribe of the opportunity to consider whether it wanted to do what MB suggested.[287]

c. Vungarala Manipulates DJG at PKS into Misleading AO

A REIT contacted PKS about giving volume discounts to the Tribe for purchases by the trusts in the aggregate. DJG, a former PKS regional supervisor, talked to Vungarala, who told him that the Tribe did not want the discounts because it wanted to keep the trusts separate and

[283] Hearing Tr. (Vungarala) 1155-57, 1159-60, 1196-97.

[284] See the legal discussion of beneficial ownership, below at p. 65.

[285] Hearing Tr. (MB) 676-77.

[286] Hearing Tr. (MB) 676-77.

[287] Hearing Tr. (MB) 677-78, 686-87.

not comingle the funds. DJG understood that it would be a problem if the funds did not remain separate.[288]

After talking with Vungarala, DJG called AO. He called it a "trust but verify type thing."[289] As DJG described his call with AO, he used the same language that Vungarala had used. He discussed whether the trusts needed to remain separate funds. She confirmed that they did. According to DJG, AO told him that the Tribe did not want to pool the funds together to take advantage of breakpoints. He testified that he did not, in this or any other conversation, quantify for AO the amount of money the Tribe was passing up by not taking advantage of the volume discounts.[290]

We find that DJG did not disclose what precisely was at stake during this conversation with AO. He used language suggesting that the inquiry was about a physical combining of the trusts, and he did not tell her that the Tribe was foregoing millions of dollars in discounts.

3. Vungarala Manipulates the Tribe's Purchases to Minimize Its Volume Discounts

There is additional evidence that Vungarala purposefully concealed the availability of volume discounts across trusts. He manipulated the Tribe's purchases to minimize its volume discounts, thereby maximizing his commissions.

PKS regional supervisor DJG and CCO LE met with the Tribe on April 22, 2013. Each of them afterward created a summary of the meeting. In his summary, DJG recorded that AO presented a short description of the Tribe's investment process for REITs and BDCs. Among other things, she explained that the Tribe would usually invest between $500,000 and $1 million in each product—even if the Tribe would eventually like to invest more. AO said that the Tribe did not want to allocate the entire amount that it intended to invest right away because it wanted to "watch" and "see how it goes."[291] DJG summarized what AO said as follows:

> For example; if The Tribe decides they want to invest $1 million in a product; they will initially open it with $500k. At some time in the future they will re-review it and decide if they want to proceed with the additional $500k.[292]

The description of how the Tribe invested is corroborated by a summary chart of the Tribe's REIT and BDC purchases.[293] It shows a pattern of making individual purchases for each

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[288] Hearing Tr. (DJG) 1802-05, 1857-58.

[289] Hearing Tr. (DJG) 1858.

[290] Hearing Tr. (DJG) 1802-05, 1857-58.

[291] RXV-49, at 2.

[292] RXV-49, at 2.

[293] *See* CX-88.

trust of no more than $1 million and frequently no more than $500,000. Rarely did a trust invest more than $1 million in a single REIT.[294] Occasionally, the Tribe would make another investment in the same REIT in the same trust the next month for another $500,000 or $1 million. There is no explanation for this pattern of splitting up the investments.[295]

Buying in increments of $500,000 to $1 million and spreading the purchases among the tribal trusts minimized the Tribe's volume discounts even on a per trust basis. Furthermore, buying in such increments, even if one intends ultimately to buy more of a particular REIT, may diminish the volume discount that would be obtained if the whole intended investment were made all at once. Some REITs impose a time limit on the purchases to be combined for volume discounts. Delaying some of the intended investment until the beginning of a new period, would decrease volume discounts. There is no evidence that the Tribe knew that it was potentially giving up millions of dollars in volume discounts to "see how it goes." Because AO and the Investment Committee depended on Vungarala as the securities professional, we find that he caused the Tribe to buy in multiple small increments, and to do so even while intending to invest more, thereby minimizing the volume discounts—and maximizing his commissions.

Vungarala directly benefited from failing to obtain volume discounts for the Tribe. The volume discounts would have reduced commissions to PKS and, therefore, to Vungarala. Vungarala would have received $2.8 million less in commissions, approximately 30% less than he actually received.[296]

D. The Tribe Was Unaware of Vungarala's Commissions or the Volume Discounts from Its Contacts with PKS

Several times during Vungarala's tenure with the Tribe, PKS contacted or met with the Tribe. Most of its contacts focused on the generic risks of the REIT and BDC investments and issues relating to suitability.[297] Although PKS sometimes asked *if* the Tribe thought there was a conflict of interest with Vungarala being its employee and also being registered through PKS, it never said, "There *is* a conflict of interest, and we need to know that you are comfortable with it." PKS never clearly articulated to the Tribe why it was asking about a conflict of interest. Like Vungarala when he made his white board presentations, PKS obscured the critical fact that gave rise to the conflict of interest issue—Vungarala was receiving commissions on the Tribe's transactions.

Similarly, in the fall of 2014, when PKS sought reassurance from the Tribe that it had determined not to take advantage of millions of dollars in volume discounts, PKS did not make clear what the issue was. Like Vungarala, PKS never used the term "volume discounts."

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[294] CX-88.

[295] *See, e.g.*, CX-88, at 1 (May and June 2014 investments in ARC Global by same trusts).

[296] Hearing Tr. (Vungarala) 1157.

[297] Hearing Tr. (DJG) 1828-31.

1. December 15, 2011—Letter

On December 15, 2011, DJG, a former PKS regional supervisor, wrote a letter on behalf of PKS to the new Chief and Sub-Chief of the Tribe. DJG testified that the purpose was to make sure the Tribe understood the risks of the REITs it had begun purchasing and to give the Tribe a person at PKS other than Vungarala who the Tribe could contact if it had questions. The letter recited what Vungarala had told PKS that the Tribe was comfortable with the risks of the investments and that the Tribe's Investment Committee had performed comprehensive due diligence before making the purchases. It declared that Vungarala had demonstrated to PKS that the "Tribe possesses the risk tolerance, investment objectives and sophistication necessary to make these purchases." The only reference to the expenses associated with the investments was the caution that "upfront fees can be high and can dilute share value." Nowhere did the letter refer to Vungarala's commissions. At the end, the letter said that "[i]f we do not hear from you, PKS will assume that you are comfortable with the disclosures made in this letter."[298]

2. January 16, 2013—Letter

On January 16, 2013, DJG sent a letter to the Tribe's Chief and Sub-Chief that was nearly identical to the earlier letter. The 2013 letter noted that the Tribe had by then invested over $50 million in REITs and BDCs purchased through PKS. DJG testified that the purpose was the same as for the earlier letter.[299]

3. April 22, 2013—Meeting

As mentioned above, on April 22, 2013, LE and DJG of PKS met with the Tribe at the Tribe's offices. It was not typical for PKS to visit a customer in that way, but PKS thought that the volume, amount, and complexity of the Tribe's investments made it appropriate. DJG and LE each created a detailed summary of what was said at the meeting.[300]

According to both summaries, AO discussed the Tribe's process for investing in REITs and BDCs. DJG again discussed the general nature of REITs and BDCs and the risks associated with them, covering the same topics set forth in the January 16, 2013 letter to the Tribe.[301] DJG said he viewed the Tribe as knowledgeable and sophisticated, both before and after the meeting.[302]

At the April 2013 meeting, there was no discussion of volume discounts because DJG thought the issue was resolved.[303] As discussed above, he was satisfied by Vungarala's

[298] Hearing Tr. (DJG) 1783-90; RXV-46.

[299] Hearing Tr. (DJG) 1791-93; RXV-47.

[300] Hearing Tr. (DJG) 1793-1820; RXV-48; RXV-49.

[301] RXV-48; RXV-49.

[302] Hearing Tr. (DJG) 1793-1820; RXV-49.

[303] Hearing Tr. (DJG) 1836.

explanation that the Tribe did not want to comingle trust funds, and by the conversation he later had with AO, which DJG viewed as confirming Vungarala's explanation.[304]

Toward the end of the April 2013 meeting, LE raised a question. DJG recorded her as asking whether the Tribe felt there was a conflict of interest because of Vungarala's "association with the Tribe as well as PKS."[305] According to his summary, the Tribe indicated that it saw no conflict and was "comfortable."[306] LE described her question slightly differently. She made it sound more precise. She said that she asked whether the Tribe felt there were any conflicts of interest with Vungarala being a "Registered Representative of PKS and an employee of the Tribe."[307]

There is no indication in either summary that Vungarala's commissions were mentioned.[308] DJG said that the conflict of interest was discussed was because the relationship involved commissions, whether or not the word "commission" was spoken.[309] DJG testified that the Tribe knew that Vungarala was wearing two hats—employee of the Tribe and registered representative of PKS.[310] DJG thought that the Tribe, as a sophisticated institutional investor, had to know that Vungarala, as a registered representative of PKS, would receive commissions on products sold through PKS.[311]

DD, the Tribal Administrator, testified that there was no discussion of commissions received by Vungarala or PKS, and no discussion of volume discounts. The Tribe had no idea before or after that meeting that Vungarala was receiving commissions, that PKS was receiving commissions, or that the Tribe might have the ability to aggregate its purchases in different trusts to receive greater volume discounts.[312]

We find that the Tribe did not understand the significance of the question posed by LE about the conflict of interest. Nothing in DJG's summary of the meeting or in his testimony indicates that PKS disclosed to the Tribe what it meant for Vungarala to be "associated" with PKS or to be wearing "two hats." Nothing in LE's summary indicates that PKS disclosed the precise reason that being a registered representative of PKS might pose a conflict of interest with being the Tribe's employee.

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[304] Hearing Tr. (DJG) 1801-05.

[305] Hearing Tr. (DJG) 1806-07; RXV-49, at 3.

[306] RXV-49, at 2.

[307] RXV-48, at 2.

[308] Hearing Tr. (DJG) 1835.

[309] Hearing Tr. (DJG) 1835.

[310] Hearing Tr. (DJG) 1806-07.

[311] Hearing Tr. (DJG) 1818-20.

[312] Hearing Tr. (DD) 101-05.

Vungarala and PKS knew that there was an inherent conflict of interest because they knew that Vungarala had a financial interest in the transactions he was recommending to his employer, the Tribe. The Tribe did not think that there was a conflict of interest because it did not know that he was receiving commissions in connection with the Tribe's investments.

4. February 10, 2014—Letter

On February 10, 2014, DJG wrote another letter to the new Chief and Sub-Chief. The content was substantially the same as the prior letters. It did not disclose that Vungarala was receiving commissions on the Tribe's investments.[313]

5. October 17, 2014—Letter

By the fall of 2014, as discussed above, PKS and Vungarala were involved in responding to FINRA Staff inquiries about volume discounts on the Tribe's REIT and BDC investments. In mid-October 2014, Vungarala asked AO to draft a letter for the Chief and Sub-Chief to sign confirming the separate nature of the trusts. He testified that he did so because PKS had contacted him and asked for a document confirming that the Tribe wanted "to keep the REIT transactions separate and not mixed."[314]

AO drafted a letter, "per Gopi," and forwarded a draft by email to the Chief, Sub-Chief, and several other tribal members, including SB, DD, and MJ. Vungarala was copied on it. The subject line of the cover email is "FINRA_PKS Compliance Letter." Both the draft and the final letter declare, "Each of these trusts has its own purpose and funding obligations and cannot be co-mingled between each other." Both conclude that the REIT and BDC investments "have been purchased solely for each respective Trust Fund Account."[315] The final letter was dated October 17, 2014, placed on tribal letterhead, and signed by the Chief and Sub-Chief.[316] Nothing in the draft or final of this letter refers to commissions or volume discounts.

6. December 17–22, 2014—PKS-Tribe Correspondence

On December 17, 2014, a second letter on tribal letterhead, signed by the Chief alone, was apparently sent to PKS. The second letter said that the Chief had been informed that PKS wanted a clarification of the earlier letter. The Chief responded by saying that each of the Tribe's trusts "has its own allocation and each is the sole purchaser of the assets in that trust."[317] Nothing in the second letter refers to commissions or volume discounts. It is unclear why the Chief provided a second letter or why this letter is not signed by the Sub-Chief.

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[313] Hearing Tr. (DJG) 1822-25. The letter was offered into evidence but inadvertently not ruled upon. The testimony is sufficient without its admission.

[314] Hearing Tr. (Vungarala) 1170.

[315] Hearing Tr. (Vungarala) 1167-72; RXV-51, at 2 (draft) and 3 (signed copy on letterhead).

[316] RXV-51, at 3.

[317] RXV-51, at 5.

By email dated December 18, 2014, PKS requested still more "clarification" from the Tribe. The email was sent only to the Chief, SB, and Vungarala, although it was addressed to the Chief and Sub-Chief in the body of the email. In this email, KF, the COO of PKS, sought to confirm that PKS's understanding of the October letter was correct.[318] KF said that its understanding was that "purchases on behalf of a certain Trust could not result in a benefit to another Trust that were [sic] not shared by the Trust making the initial purchase."[319] She continued as follows:

> Also, it is our understanding that the Tribe wished to avoid communications with outside persons and entities that might result in disclosure of the relationship between the various Trusts and the Tribe or each other.[320]

The Chief apparently responded to the December 18 email by email on December 22, 2014, although there are several oddities about the December 22 email. It opens in a very informal and familiar way with "Hi Kathy"—the same way that Vungarala typically addressed KF in emails. In contrast, both letters sent previously to PKS in connection with the "clarification" are addressed "To Whom It May Concern." The December 22 email appears to be sent by the Chief alone. The email shows no sign that it was copied to anyone else at the Tribe, while the draft of the first letter was circulated by AO to ten people at the Tribe and the final version was copied to several people. The text of the December 22 email does not show that it was prepared with the same care and attention to detail as the previous letters. Even though the email is very short, it contains a mistake. The email, in its entirety, reads, "Sorry for the confusing [sic] I'm confirming the clarification as the Chief of the […] Tribe." The email has no signature or address block.[321] Given that the Tribe initially responded to PKS in a formal way, circulating a draft for review by a number of people, using letterhead, and providing the signatures of both the Chief and Sub-Chief, the authority of the December 22, 2014 email is suspect.[322]

The overall impression left by the October and December correspondence between the Tribe and PKS is that Vungarala and PKS were attempting to shape an after-the-fact record to demonstrate, as Vungarala claimed, that the Tribe had waived volume discounts. The correspondence, however, does not even mention volume discounts. Nor does it disclose that Vungarala received commissions on the Tribe's investments.

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[318] RXV-51, at 7.

[319] RXV-51, at 7.

[320] Hearing Tr. (Vungarala) 1173-76; RXV-51, at 7.

[321] RXV-51, at 7.

[322] RXV-51, at 7.

E. Vungarala Obtained a Financial Benefit from His Misconduct

Between July 2011 and July 2015, the Tribe invested close to $200 million through PKS in REITs and BDCs. PKS received $11,391,329 in commissions on the transactions. Vungarala received 85% of the commissions received by PKS—for a total of $9,682,629.[323]

The money to fund volume discounts would have come directly out of the commissions that PKS received and would have reduced the commissions that PKS paid Vungarala.[324] If the volume discounts had been applied across the Tribe's trusts, PKS would have received approximately $3.3 million less in commissions,[325] and Vungarala would have received $2.8 million less.[326]

F. Credibility

1. Vungarala

We find Vungarala not credible. His testimony was repeatedly evasive, inconsistent, and misleading. It is easy to see how he confused AO and other tribal members, who had little prior investment experience and were unfamiliar with the significance of many of the terms he used. Vungarala's testimony also frequently did not square with other evidence in the record. His lack of credibility has been discussed in detail above in the context of particular evidence, and examples previously discussed will not be repeated here.

We additionally note, however, that Vungarala's testimony was not credible when he denied understanding concepts basic to the securities industry, such as "self-dealing"and "financial benefit." When asked whether the Tribe's Investment Policy was intended to prevent self-dealing, he said, "I don't know—I don't know the word self-dealing. I don't know. I don't know what self-dealing is."[327] When asked whether the Tribe's conflict of interest policy was meant to prevent an employee from reaping a financial benefit from the Tribe's investments, he said, "Again, financial benefit, I don't know what that means."[328]

Vungarala's testimony was generally untrustworthy even about the most basic facts. As noted above, according to Vungarala, he told the Tribe that he had Series 7, Series 65, and Series 66 licenses and that the Series 65 plus the Series 66 were equivalent to a Series 63. There was discussion during his testimony regarding his Series 7 and Series 63. When it was pointed out

[323] PKS received $11,391,329 in commissions on the Tribe's purchases of REITs and BDCs. Stip. ¶ 20. Vungarala received 85% of the commissions PKS received. Stip. ¶ 21. Vungarala's commissions are calculated based on those figures. *See also* Hearing Tr. (KE) 864-65; CX-88.

[324] Hearing Tr. (Vungarala) 1157; Stip. ¶ 22.

[325] Hearing Tr. (KE) 864-65; CX-88.

[326] Again, Vungarala's commissions were 85% of the commissions PKS received. Stip. ¶ 21.

[327] Hearing Tr. 1094.

[328] Hearing Tr. 1094.

that his record in the Central Record Depository ("CRD") did not show that he had a Series 63, he said he meant his Series 65. He also spoke of "parking" his Series 65 at Sutterfield.[329] But Vungarala's CRD record indicates that he does not have a Series 65 either. In fact, he never even took the qualifying exam.[330]

Vungarala denied being motivated by the money he received from commissions when he recommended the REITs and BDCs to the Tribe,[331] but the record shows otherwise. He had a strong motive to take advantage of the Tribe and enrich himself.

Vungarala felt underpaid by the Tribe and had a sense of entitlement to the money he received in connection with the Tribe's investments. When he was asked questions regarding why he did not seek to eliminate the conflict of interest by waiving his commissions on the Tribe's investments or reimbursing the Tribe for those commissions, he rejected any suggestion of a way for him to give up the money and eliminate the conflict of interest.

He admitted that he could have waived his commissions, but noted that it would not have benefited the Tribe; rather, he said, it would only "make PKS very rich."[332] He thought that he would make better use of the money to fund more charities. He said "my legacy" of charitable work was a better use of the money than to "fund somebody's profitability."[333] With respect to the idea of reimbursing the Tribe, he maintained that he could not have done that because that would be "rebating the product," which is forbidden as an attempt to influence a customer to buy more of the product.[334] He rejected the idea that another PKS broker could have acted as the registered representative for the Tribe's investments, saying that that person would not have had access to the private concerns of the Tribe the way he did.[335] In essence, Vungarala rationalized keeping the money for himself, reasoning that someone was going to have it—and it might as well be him.

Ultimately, Vungarala's overall story is not credible. Although the Tribe hired him to manage its entire portfolio, which was at Schwab when Vungarala began his employment, he claims that he told the Tribe he would not work on REIT and BDC transactions if they chose to make their purchases through Schwab. He claims that he told the Tribe that he would step away and not be involved.[336] He has offered no explanation why the Tribe would accept its employee's refusal to do the job he was hired to do. His employment contract specifically made it one of his

[329] Hearing Tr. (Vungarala) 1191-92.

[330] Hearing Tr. (Vungarala) 1185-86; CX-1, at 7.

[331] Hearing Tr. (Vungarala) 1068.

[332] Hearing Tr. (Vungarala) 1675.

[333] Hearing Tr. (Vungarala) 1675.

[334] Hearing Tr. (Vungarala) 1676-77.

[335] Hearing Tr. (Vungarala) 1682-83.

[336] Hearing Tr. (Vungarala) 1102-03.

duties to consider alternative investment selections for the portfolio. Nor has he offered an explanation for why the Tribe would agree to continue paying him an annual salary of $120,000, plus a $12,000 performance bonus, when it could have received his services as a PKS registered representative without his being its employee.

2. AO, DD, and MB

As discussed above, with respect to particular testimony, repeatedly Vungarala's version of the facts was inconsistent with the testimony of AO, DD, and MB. He maintains that AO, DD, and MB all lied in their testimony at the hearing, but he offers no explanation aside from their alleged animosity toward him.[337] While it is clear that the members of the Tribe who testified feel betrayed by Vungarala, that sense of betrayal is not sufficient reason to doubt their testimony. Their testimony was consistent with the other evidence and made sense in light of the Tribe's conduct during the relevant period. We find all three to be credible.

III. CONCLUSIONS OF LAW

A. Applicable Law

Both Causes of Action allege fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, along with violations of FINRA Rule 2020 and 2010.[338] Section 10(b) makes it unlawful, directly or indirectly, to use "any manipulative or deceptive device or contrivance" in contravention of a rule prescribed by the Securities and Exchange Commission ("SEC") to protect investors.[339] SEC Rule 10b-5 is such a rule. It prohibits the making of "any untrue statement of a material fact" or the omission of a material fact that is necessary in order to correct the statements that, in "light of the circumstances under which they were made," are misleading.[340]

A civil enforcement action for violation of Section 10(b) and Rule 10b-5 requires proof by a preponderance of the evidence of the following: (i) a false statement or misleading omission

[337] Resp. Reply 4 & n.16; Hearing Tr. (Vungarala) 1151.

[338] Because we find that Vungarala willfully violated Section 10(b) and Rule 10b-5, we do not separately discuss FINRA Rules 2020 and 2010. FINRA Rule 2020 protects investors by prohibiting the same conduct as Section 10(b) and Rule 10b-5. *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *26-27 (Mar. 27, 2017). FINRA Rule 2010 requires adherence to high standards of commercial honor and to just and equitable principles of trade. Violations of the securities laws and FINRA's rules violate that requirement. *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *13 n.3 (Sept. 30, 2016). Vungarala's misconduct violated these FINRA rules as well.

[339] 15 U.S.C. § 78j(b).

[340] *See* 17 C.F.R. § 240.10b-5.

by the respondent regarding a material fact; (ii) made with the requisite scienter or state of mind; (iii) using the jurisdictional means; (iv) in connection with the purchase or sale of a security.[341]

The parties have stipulated that each non-traded REIT and BDC at issue in this matter was a security,[342] and that Vungarala used the jurisdictional means of interstate commerce to do so.[343] Accordingly, the last two elements of securities fraud are not in dispute. The parties also stipulated that Vungarala solicited each of the Tribe's purchases of the securities.[344]

Each cause of action concerns two issues: (i) whether Vungarala's statements were false and misleading with regard to a material fact; and (ii) whether he made the statements with scienter.

B. Vungarala Committed Securities Fraud—Commissions (First Cause)

1. Vungarala Made Materially False and Misleading Statements to Conceal His Commissions on the Tribe's Investments

We conclude that Vungarala made multiple false and misleading statements to the Tribe regarding his receipt of commissions and the resulting conflict of interest in connection with its purchases of REITs and BDCs. He failed to disclose that he was making millions of dollars in commissions from the investments he recommended to the Tribe, a blatant conflict of interest.

- In steering the Tribe to make its purchases of REITs and BDCs through his broker-dealer firm, Vungarala falsely told AO that Schwab did not offer the products and would charge $50,000 to conduct due diligence if it did.

- Either through affirmative false statements, or misleading statements that omitted disclosing the simple fact that Vungarala would receive commissions, Vungarala led AO to believe that there would be no conflict of interest if the Tribe made its investments through PKS. He led her to believe that neither he nor PKS would be compensated.

- Vungarala sat silent at the Investment Committee meeting where REITs were first discussed when AO passed on her mistaken belief that Vungarala would have no conflict of interest because he would not be compensated.

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[341] *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1467 (2d Cir. 1996); *Grandon v. Merrill Lynch & Co*., 147 F.3d 184, 189 (2d Cir. 1998); *Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2017 FINRA Discip. LEXIS 10, at *11 (NAC Mar. 15, 2017).

[342] Stip. ¶ 18.

[343] Stip. ¶ 19.

[344] Stip. ¶ 17.

- Vungarala made multiple white board presentations purporting to explain the costs of the REIT and BDC investments, but he omitted to say that he received the majority of the commissions paid.

- At the October 27, 2014, meeting of the Investment Committee and Tribal Council, Vungarala was pointedly asked who received commissions on the Tribe's investments, but he did not reveal that *he* did.

- In the email that Vungarala wrote after the October 27, 2014 meeting to explain the fees and commissions associated with the Tribe's investments, he also did not reveal that he received commissions on the Tribe's investments. He obscured the truth by speaking of the "XYZ sales team."

- When AO replied to Vungarala's email, again asking who received commissions, Vungarala did not provide the answer. Instead, he went to SB, who relieved him of any obligation to respond. AO was fired that same day.

- At the Executive Council meeting in November 2014, Vungarala falsely told the Chief, Sub-Chief, SB, and the secretary that he had previously disclosed everything about his commissions and that AO was well aware of his commissions.

- At the December 21, 2014 meeting, Vungarala claimed that he had previously disclosed his commissions in detail. That statement was false. Whatever Vungarala previously said to AO and others, he never informed the Tribe that he personally received commissions on the Tribe's investments, and that was what an effective disclosure required.

Even if one were to accept Vungarala's own descriptions of his conversations with AO and other tribal members—which we do not—at best, he communicated to them "half-truths" that they did not understand. He failed to disclose facts that would have made his self-dealing clear to them. For example, the statement that he would be the registered representative on the Tribe's REIT and BDC purchases was literally true, as was the statement that the investments were commissionable products. But those statements obscured the truth and misled the Tribe. Those statements did not inform tribal members that their full-time employee was also acting as an employee of PKS and receiving commissions on the Tribe's investments.[345]

We further conclude that the fact Vungarala failed to disclose—that he was making millions of dollars on the Tribe's investments—was material. In the context of Rule 10b-5, "Information is material 'if there is a substantial likelihood that a reasonable [investor] would

[345] *Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2000 (2016); *SEC v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011), *rev'd on other grounds*, 568 U.S. 442 (2013); *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977); *Lubbers v. Flagstar Bancorp Inc.*, 162 F. Supp. 3d 571, 577-78 (E.D. Mi. 2016).

consider it important in deciding how to [invest] … [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[346] When recommending a security to a customer, a registered representative has a duty to disclose material adverse facts of which he or she is aware, including an "economic self-interest," because such facts could influence the representative's recommendation.[347]

Any reasonable investor would want to know that the person recommending an investment has a significant personal financial interest in the transaction. The conflict of interest could influence the recommendation.[348] For that reason, the Tribe had a policy prohibiting personal financial interests that could influence its Investment Manager's recommendations and render him unable to be impartial. In fact, DD, the Tribal Administrator, testified that Vungarala's self-interest in the recommended transactions would have caused the Tribe not to purchase the REITs and BDCs. DD recognized that there would be a potential for the recommendation to serve the interest of the person making the recommendation—Vungarala—instead of the Tribe's interest.

2. Vungarala Acted with Scienter

We conclude that Vungarala acted with scienter when he made false and misleading statements and failed to disclose that he was receiving commissions on the Tribe's investments. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[349] Scienter is established by showing either intentional or reckless misconduct.[350] "Reckless conduct includes 'a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'"[351] A reckless action "is one that departs so far from the standards

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[346] *Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *29 (NAC Oct. 2, 2013) (quoting *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988)), *aff'd in relevant part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142 (May 27, 2015).

[347] *See, e.g., RichMark Capital Corp.*, Exchange Act Release No. 48758, 2003 SEC LEXIS 2680, at *9 (Nov. 7, 2003) (internal quotation omitted); *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *16-17 & n.22 (Mar. 31, 2016) (citing cases).

[348] *See, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972); *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970); *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992).

[349] *Tellabs Inc. v. Makor Issues & Rights., Ltd.*, 551 U.S. 308, 319 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

[350] *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *33 (NAC Dec. 29, 2015) (citing *Tellabs, Inc.*, 551 U.S. at 319 n.3), *aff'd*, 2016 SEC LEXIS 3769; *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *petition for review denied*, 595 F.3d 1034 (9th Cir. 2009).

[351] *Fillet*, 2013 FINRA Discip. LEXIS 26, at *35 (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)) (internal quotation omitted).

of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing."[352]

Vungarala intentionally misled the Tribe, or, at a minimum, was reckless. Vungarala claims that he disclosed his commissions because he told AO and the Tribe that he would be the registered representative on the purchases and the REITs and BDCs were "commissionable products."[353] But those words fail to convey the specific information that PKS and Vungarala were receiving commissions. The Tribe did not understand what the terms meant, and he knew it. Vungarala also persisted in using generic language such as "XYZ team" at the October 27, 2014 meeting, despite pointed questions demanding to know the identity of the persons receiving commissions. Vungarala's carefully crafted language to avoid the simple disclosure that he was receiving commissions, demonstrates a high level of deliberate deception.

Further evidencing deliberate deception, Vungarala made an effort to restrict issuers' communications with AO, and he used his tribal email account and his Sutterfield email account in such a way as to evade oversight by the Tribe. He also tried to impede the general counsel's attempt to gather information from PKS about who received commissions on the Tribe's investments.

Vungarala had motive to deceive the Tribe. He needed money, was highly motivated by money, and felt no loyalty to the Tribe. Despite his six-figure income, he considered himself underpaid to the point he was working for the Tribe "pro bono" and was giving the Tribe "freebies."

Moreover, Vungarala knew that if he made full disclosure, the Tribe would not have followed his recommendations. He knew that the Tribe was concerned about conflicts of interest and had an Investment Policy that broadly prohibited him from having a financial interest that could affect the impartiality of his investment recommendations. He had to conceal the truth in order to receive the commissions.

3. Vungarala's Arguments Are Without Merit

We reject Vungarala's contention that he was transparent and that he disclosed that he was receiving commissions on the Tribe's transactions by providing commission statements every month and by giving tribal members involved in the investment process access to prospectuses and subscription agreements.[354] Access to voluminous documents from which one might puzzle out a fact is not the same as disclosure of that fact. Furthermore, none of those documents actually disclosed that Vungarala personally was receiving commissions on the Tribe's transactions. They spoke in generic terms, using words that were not familiar or readily

[352] *First Commodity Corp. v. CFTC*, 676 F.2d 1, 6-7 (1st Cir. 1982).

[353] Hearing Tr. (Vungarala) 1069-70, 1231-32, 1242, 1659-63.

[354] Resp. PH Br. 4-9.

understandable to the unsophisticated people with whom Vungarala was dealing—and he knew it.

Vungarala's assertion that the Tribe qualifies as an accredited investor and should be presumed to be a sophisticated investor[355] does not advance his cause. Any presumption of sophistication was rebutted by abundant evidence that tribal members involved in reviewing Vungarala's recommendations did not have the experience to understand Vungarala's evasive explanations or to suspect what he meant by signing documents as a registered representative of PKS.

Vungarala accuses Enforcement of "cherry-picking" witnesses from the Tribe to present a distorted view of the Tribe's sophistication. He asserts that the other members of the Tribe who did not appear were sophisticated, "savvy" persons.[356] Because FINRA does not have subpoena power,[357] it could not compel any of the Tribe's members to appear at the hearing. There is no evidence that Enforcement engaged in any kind of "cherry-picking." Nor is there any evidence to suggest that we would draw any different conclusions if we heard from other tribal members. Vungarala's accusation has no substance.

Vungarala argues that he, like any other registered representative when soliciting securities transactions, was subject to the suitability standard, not a fiduciary standard.[358] He makes the argument to counter Enforcement's assertion that as an employee Vungarala was a fiduciary.[359] The dispute is beside the point here. We determine in this matter whether Vungarala violated Section 10b and Rule 10b-5. That is the standard to be addressed. Whether Vungarala committed fraud does not depend upon whether he was a fiduciary.

Finally, Vungarala argues that he had a good-faith belief that he was acting appropriately and that there is no requirement that a registered representative disclose his compensation to his customers.[360] We conclude that Vungarala did not act in good faith. He engaged in self-dealing despite knowing of the Tribe's concern with conflicts of interest. His effort to impede the efforts of the Tribe's general counsel to investigate the situation is only one among many actions Vungarala took to conceal his financial interest in the Tribe's investments. Vungarala's argument also fails to recognize that his relationship with the Tribe was no ordinary broker-customer relationship. The parties have pointed to no other instance in the case law in which a registered representative was employed by his customer.

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[355] Resp. PH Br. 11-12.

[356] Resp. PH Br. 12.

[357] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007).

[358] Resp. PH Br. 13-14.

[359] Enf. PH Br. 31-32 & n.29.

[360] Resp. PH Br. 31-32.

In sum, we find that Vungarala made false and misleading statements of material fact and failed to disclose that he received commissions on the Tribe's REIT and BDC investments, as alleged in the First Cause of Action. In so doing, he violated Section 10(b), Rule 10b-5, and FINRA Rules 2020 and 2010.

4. Vungarala's Misconduct Was Willful

We also find that Vungarala's misconduct was willful, which subjects him to statutory disqualification. Pursuant to Sections 3(a)(39)(F) and 15(b)(4)(D) of the Exchange Act, broker-dealers and associated persons are subject to disqualification from the securities industry for willful violations of the federal securities laws.[361] A willful violation of the securities laws means that the violator knew what he was doing when he committed the violative act.[362]

Vungarala knew what he was doing when he crafted his language to conceal that he was receiving commissions on the Tribe's investments, pretended in his white board presentations to inform the Tribe about the fees and expenses associated with the investments, and evaded AO's questions at the October 27, 2014 meeting. Even when the Tribe was pointedly asking *who* received fees and commissions in connection with its investments, he persisted in speaking of the "XYZ team." He did not disclose that *he* received commissions.

C. Vungarala Committed Securities Fraud—Volume Discounts (Second Cause)

1. Vungarala Failed to Disclose Availability of Volume Discounts, a Material Fact

Vungarala made both false statements and misleading statements that omitted material information regarding volume discounts. He falsely stated to MB that the purchases by the Tribe's various trusts could not be combined for purposes of volume discounts, and he misled AO into thinking that volume discounts required physical "comingling" of the trusts. He discussed volume discounts with the Investment Committee only in terms of purchases in the individual Trusts.[363] He did not disclose to the Tribe the truth about the availability of volume discounts. The Tribe lost approximately $3.3 million as a result. If the Tribe had obtained the volume discounts, its rate of return on the investments would have been better. Given that the Tribe was particularly concerned about achieving a high yield to make up the shortfall in casino revenues, the volume discounts were important to the Tribe. The availability of millions of dollars in volume discounts would have been important to any reasonable investor. We conclude that Vungarala failed to disclose a material fact when he misleadingly discussed volume discounts as though they were only available for purchases by a given trust, and when he told MB flatly that the trust purchases could not be combined for purposes of volume discounts.

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[361] *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(D).

[362] *See Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000).

[363] Resp. PH Br. 10; RXV-72, at 6-7.

2. Vungarala Acted with Scienter

Vungarala's failure to disclose volume discounts was purposeful. He had scienter. He intentionally and falsely told REITs that offered the Tribe larger discounts that the Tribe did not want the discounts. He rejected MB's idea that purchases be made on behalf of the Tribe and then distributed to the different trusts. He told PKS that the Tribe had waived any volume discounts across trusts when, in fact, it had not.

We do not accept Vungarala's claim that he discussed volume discounts with AO and then followed her instruction to waive them, but, even if we did, his scienter is manifest. To the extent that Vungarala talked about volume discounts with AO, he did so in a manner to lead her to believe incorrectly that the discounts were unavailable without physically combining the trusts and that combining the trusts would put the Tribe's privacy at greater risk. In leading her to that belief, Vungarala provided bogus reasons for rejecting volume discounts across the trusts.

First, as discussed above, the trusts did not have to be physically combined and the funds did not have to be comingled in order for the Tribe to take advantage of volume discounts. All that was involved was calculating the total purchases of a particular REIT or BDC across the trusts and then applying the discounts so that each trust would receive its proportional share of the additional units of investment.

Second, obtaining the volume discounts across the trusts also did not increase the threat to the Tribe's privacy. Regardless of whether the trusts' purchases were treated as separate purchases or were combined in order to obtain volume discounts, the Tribe held beneficial ownership of the trusts' assets and the disclosure requirements remained the same. The Securities Exchange Act does not define "beneficial ownership," but the SEC has set forth a definition in Rule 13d-3, which is used when analyzing whether securities holdings must be publicly disclosed in regulatory filings. Under Rule 13d-3, a person is the beneficial owner of securities if that person directly or indirectly has the power to direct the voting of a security or the power to direct the disposition of the security. The Tribe had those powers. Vungarala, as the Investment Manager, worked for the Tribe, followed its directions, and managed the Tribe's entire portfolio; he did not work for individual trusts. Beneficial ownership by an entity is ordinarily attributable to a control person of the entity and any parent company in a control relationship with that entity.[364]

It is unclear whether Vungarala did not understand the definition of beneficial ownership that is used in determining whether a person is the beneficial owner of securities or whether he did understand it but purposely took advantage of AO's lack of sophistication. However, we have no trouble concluding that he knew that the Tribe was entitled to volume discounts without comingling the trusts, something he avoided admitting at the hearing.

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[364] *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 SEC LEXIS 63, at *26 (Jan. 12, 1998). *See, e.g.*, *Brian Potiker*, Exchange Act Release No. 74503, 2015 SEC LEXIS 994, at *8 n.2 (Mar. 13, 2015) (order settling proceeding and discussing beneficial ownership).

Most telling with regard to scienter, Vungarala manipulated the purchases by the Tribe's individual trusts to minimize the Tribe's volume discounts even on an individual trust basis. He thereby maximized his commissions at the expense of the Tribe. There was nothing inadvertent or accidental about Vungarala's misconduct.

3. Vungarala's Arguments Are Without Merit

Vungarala argues that he treated each trust separately for purposes of volume discounts because Schwab aggregated trades of stocks and bonds each trading day only on a per trust basis. Vungarala asserts that he had a good-faith belief that handling the trusts separately was consistent with the Tribe's structure.[365]

The manner in which Schwab offered the Tribe daily trading discounts is irrelevant. The REITs and BDCs offered volume discounts to the Tribe across trusts. To obtain the volume discounts, the Tribe did not have to alter its structure; it just had to calculate the total purchases. Vungarala did not have a good faith belief that he was acting as the Tribe would want—his manipulation of the Tribe's purchases to minimize the volume discounts even in the individual trusts belies any claim of good faith.

4. Vungarala's Misconduct Was Willful

Vungarala knew what he was doing when he cut off communications between AO and the REIT and BDC companies to diminish the chance she might learn of his deceit. He also knew what he was doing when he rejected volume discounts when REITs told him they were going to correct their calculations to provide better volume discounts across trusts—without consulting the Tribe. He knew that he misled AO and that she did not understand that millions of dollars in volume discounts were at stake. If she had understood, she would have taken the issue to the Investment Committee and Tribal Council.

IV. SANCTIONS

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA's Sanction Guidelines ("Guidelines"). The Guidelines contain recommendations for sanctions for many specific violations, depending on the circumstances. They also contain overarching Principal Considerations and General Principles, which are applicable in all cases.[366] The Guidelines are intended to be applied with attention to the regulatory mission of FINRA—to protect investors and strengthen market integrity.[367] Disciplinary sanctions should be designed to protect the investing public.[368]

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[365] Resp. PH Br. 15-16.

[366] FINRA Sanction Guidelines (2017), http://www.finra.org/industry/sanction-guidelines.

[367] Guidelines at 1, Overview.

[368] Guidelines at 2, General Principle 1.

The Guidelines have specific recommendations for violations of Section 10(b) and FINRA Rules 2010 and 2020 that involve fraud, misrepresentations, or omissions of material fact. Intentional or reckless misconduct such as we have found in this case may result in a fine ranging from $10,000 to $146,000. Adjudicators also may order disgorgement. The Guidelines instruct that adjudicators should strongly consider barring an individual for intentional or reckless misconduct. Only if mitigating factors predominate should a suspension be imposed instead of a bar.[369]

A. First Cause of Action—Commissions

We have found that Vungarala's failure to disclose that he was receiving commissions on the Tribe's investments was intentional or, at a minimum, reckless. There are no mitigating factors, but there are aggravating factors.

Among the aggravating factors is that Vungarala took no responsibility for his misconduct.[370] To the contrary, his statement that he did not waive his commissions because he thought his charitable "legacy" was a better use of the money than "someone else's profitability" revealed a complete lack of understanding that what he did was wrong.

Another aggravating factor is that Vungarala engaged in numerous wrongful acts and a pattern of misconduct that extended over three and a half years.[371] The numerous REIT and BDC investments involved millions of dollars and resulted in over $9.5 million in ill-gotten gains that accrued to Vungarala.[372] Vungarala repeatedly deceived the Tribe and took steps to conceal that he was receiving commissions.[373] While the Tribe would have had to pay commissions if it had bought the REITs and BDCs from Schwab or another broker-dealer firm, Vungarala's misconduct nevertheless harmed the Tribe by depriving it of impartial advice and recommendations. In a sense, because he was the Tribe's employee, the Tribe paid twice for the advice it could have gotten from him if he was only its registered representative.[374]

Although Vungarala denies it, the tribal members with whom he worked were not sophisticated investors.[375] Their lack of sophistication and their trusting dependence on him for his professional expertise permitted him to exercise undue influence over the Tribe. He took advantage of rifts between members of the Tribe and shifted blame onto AO.[376]

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[369] Guidelines at 89.

[370] Guidelines at 7, Principal Consideration 2.

[371] Guidelines at 7, Principal Considerations 8 and 9.

[372] Guidelines at 8, Principal Consideration 16.

[373] Guidelines at 7, Principal Consideration 10.

[374] Guidelines at 7, Principal Consideration 11.

[375] Guidelines at 8, Principal Consideration 18.

[376] Guidelines at 8, Principal Consideration 19.

Vungarala's misconduct directly resulted in a large monetary gain for him.[377] He made more than $9 million from his wrongdoing.[378]

We bar Vungarala from associating with a FINRA member firm in any capacity. He was oblivious to the blatant self-dealing in which he engaged, and that is cause for great concern if he were permitted to remain in the securities industry. He presents a danger to public investors.

We further order Vungarala to disgorge the total amount of commissions he received in connection with the Tribe's REIT and BDC investments, $9,682,629. He should not be permitted to retain a financial benefit from his wrongdoing. Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct.[379] The amount to be disgorged need not be precise, but it should be a reasonable approximation of the wrongdoer's ill-gotten gains.[380] In this case, the amount of unjust enrichment Vungarala obtained can be reasonably approximated by calculating 85% of the amount of commissions PKS received on the Tribe's investments. Vungarala received 85% of the $11,391,329 in commissions that PKS obtained in connection with the Tribe's investments.

In addition, we order that Vungarala pay pre-judgment interest beginning on January 18, 2015, until disgorgement is paid.[381] Pre-judgment interest is a matter of discretion for an adjudicator. Where a violator has enjoyed access to funds over a period of time as a result of his wrongdoing, requiring the violator to pay pre-judgment interest is consistent with the equitable purpose of disgorgement.[382]

B. Second Cause of Action—Volume Discounts

With respect to volume discounts, we conclude that Vungarala acted deliberately to prevent the Tribe from receiving volume discounts to which it was entitled. His intentional misconduct in connection with the volume discounts separately warrants a bar from the industry. There are no mitigating factors, and many of the same aggravating factors apply to this misconduct.

FINRA Staff provided a chart that listed transactions that should have been aggregated for purposes of volume discounts but which were not. The Staff calculated how much the Tribe

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[377] Guidelines at 8, Principal Consideration 16.

[378] Guidelines at 4-5.

[379] *SEC v. Spongetech Delivery Sys., Inc.*, 2015 U.S. Dist. LEXIS 134233, at *7 (E.D.N.Y. Aug. 3, 2015); *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991).

[380] *SEC v. Hughes Capital Corp*., 917 F. Supp. 1080, 1085 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997); *The Dratel Group, Inc*., Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *73 (Mar. 17, 2016); *Dep't of Enforcement v. Evans*, No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *40 n.42 (NAC Oct. 3, 2011); *Laurie Jones Canady*, 54 S.E.C. 65, 84 (1999), *petition for review denied*, 230 F.3d 362 (D.C. Cir. 2000).

[381] This date is when the extension to Vungarala's final employment contract with the Tribe ended. RXV-4, at 7.

[382] *Hughes Capital*, 917 F. Supp. at 1090.

lost in volume discounts—$3,373,303.68.[383] Of that amount, Vungarala received approximately $2.8 million. We would order Vungarala to disgorge the amount he received, but it is already included in the order in connection with the First Cause to disgorge all the commissions that he obtained by his fraud.[384]

V. ORDER

As alleged in the First Cause, Respondent Gopi Krishna Vungarala violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, along with FINRA Rules 2010 and 2020, by making false and misleading statements to the Tribe regarding his receipt of commissions on the Tribe's transactions. For his misconduct he is barred from association with any FINRA member in any capacity. He is also ordered to disgorge his unlawful gain in the amount of $9,682,629, together with pre-judgment interest from January 18, 2015, until paid.[385]

As alleged in the Second Cause, Vungarala failed to disclose to the Tribe that it was eligible to receive volume discounts across trusts. For this misconduct, he is separately barred from association with any FINRA member in any capacity. We would order disgorgement of the additional commissions he obtained from this fraud, but they are included in the order to disgorge all his commissions.

Respondent is also ordered to pay costs in the amount of $15,937.31, which includes a $750 administrative fee and $15,187.31 for the cost of the transcript. If this decision becomes FINRA's final disciplinary action, Vungarala's bars will take immediate effect.

Lucinda O. McConathy
Hearing Officer
For the Extended Hearing Panel

Copies to: Gopi Krishna Vungarala (via overnight courier and first-class mail)
Sharron E. Ash, Esq. (via email and first-class mail)
Brian S. Hamburger, Esq. (via email)
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Suzanne H. Bertolett, Esq. (via email and first-class mail)
Sean Firley, Esq. (via email)
David B. Klafter, Esq. (via email)
Jeffrey D. Pariser, Esq. (via email)

[383] CX-88.

[384] The Extended Hearing Panel has considered and rejected without discussion any other arguments made by the Parties that are inconsistent with this decision.

[385] The pre-judgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), the same rate that is used for calculating interest on restitution awards. Guidelines at 11.

EXHIBIT B

BEFORE THE NATIONAL ADJUDICATORY COUNCIL

FINANCIAL INDUSTRY REGULATORY AUTHORITY

In the Matter of Department of Enforcement, Complainant, vs. Gopi Krishna Vungarala Midland, MI, Respondent.	DECISION Complaint No. 2014042291901 Dated: October 2, 2018

Registered representative willfully made fraudulent misrepresentations and omissions concerning commissions and customer's eligibility for volume discounts. Held, findings and sanctions affirmed.

Appearances

For the Complainant: Payne L. Templeton, Esq., Suzanne H. Bertolett, Esq., and Leo F. Orenstein, Esq., Department of Enforcement, Financial Industry Regulatory Authority

For the Respondent: Sharron E. Ash, Esq., and Brian S. Hamburger, Esq.

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Decision

I. Introduction

Gopi Krishna Vungarala appeals an October 25, 2017 Extended Hearing Panel decision. The Hearing Panel found that Vungarala, an employee hired by a Native American tribe (the "Tribe") to manage its investment portfolio, willfully made fraudulent misrepresentations and omissions to the Tribe concerning commissions that he earned on the Tribe's investments as a registered representative of a broker-dealer. Specifically, the Hearing Panel found that Vungarala repeatedly led the Tribe to believe that he did not receive any commissions on the Tribe's approximately $190 million of investments in non-traded real estate investment trusts ("REITs") and business development companies ("BDCs"), and had no conflict of interest in connection with the Tribe's investments as both the Tribe's full-time employee and its broker. In reality, and unbeknownst to the Tribe, Vungarala personally earned more than $9.6 million in commissions on the Tribe's non-traded REIT and BDC investments, all of which he recommended.

The Hearing Panel also found that Vungarala, through false and misleading statements and omissions, willfully misled the Tribe concerning its eligibility for volume discounts in connection with its purchases of non-traded REITs and BDCs. The Hearing Panel found that Vungarala made affirmative misrepresentations concerning, and failed to disclose to the Tribe, its eligibility to receive more than $3.3 million in volume discounts. Vungarala personally benefited from his misconduct because such discounts would have directly reduced his commissions by more than $2.8 million.

For Vungarala's misconduct, the Hearing Panel imposed two bars—one for his fraudulent misconduct related to his commissions and one for his fraudulent misconduct concerning the Tribe's missed volume discounts. The Hearing Panel also ordered that he disgorge approximately $9.6 million in commissions that he earned from his misconduct, which included $2.8 million in commissions earned as a result of the Tribe's missed volume discounts.

We affirm the Hearing Panel's findings, which are supported by the record and the Hearing Panel's extensive credibility findings. The Hearing Panel found three Tribal employees, who were extensively involved with the Tribe's non-traded REIT and BDC investments, credibly and consistently testified that, among other things, Vungarala falsely informed the Tribe that he would not make money on the Tribe's investments that he recommended, and he never disclosed that he would receive commissions on these investments. In contrast, the Hearing Panel found not credible Vungarala's testimony that he expressly and clearly disclosed that he would receive commissions on the Tribe's investments and that the Tribe rejected volume discounts after Vungarala explained them. Indeed, the Hearing Panel found that Vungarala's testimony "was repeatedly evasive, inconsistent, and misleading," and it was "easy to see how he confused" members of the Tribe in connection with these matters. Vungarala has not demonstrated that substantial evidence in the record exists to overturn the Hearing Panel's credibility determinations, which are corroborated by documents in the record and various actions of the Tribe.

We also reject Vungarala's numerous arguments on appeal. For example, he argues that the Tribe knew (or had to have known) that Vungarala was earning commissions on the Tribe's non-traded REIT and BDC purchases, and was aware that it was eligible for volume discounts, because it is a sophisticated, institutional investor with a multi-step investment process. While at first glance the Tribe appears to be sophisticated, the weight of the evidence shows that the individuals most involved with the Tribe's investment process related to non-traded REITs and BDCs were not sophisticated, relied heavily upon Vungarala for his advice and guidance, and did not know that Vungarala was earning commissions on the Tribe's investments or that it could receive millions of dollars in discounts on its purchases. Further, contrary to Vungarala's assertions, neither a customer's alleged sophistication, nor disclosures in prospectuses and other documents concerning fees, costs, and volume discounts, absolve Vungarala of his fraudulent misrepresentations and omissions.

Similarly, we reject Vungarala's claim that the commissions he received as the Tribe's registered representative—while also serving as the Tribe's full-time investment manager and advising it to purchase all of the securities at issue—were not material and he had no duty to disclose this information to the Tribe. Vungarala was not merely the Tribe's registered representative (the implications of which the Tribe did not fully understand). Rather, he also served as the Tribe's trusted, full-time employee hired to provide it with objective investment advice. Vungarala's dual role presented conflicts of interests, and a reasonable investor would have considered important Vungarala's receipt of significant commissions in connection with each recommended non-traded REIT or BDC in deciding whether to invest. Under the circumstances, Vungarala had a duty to disclose this information to the Tribe.

We further reject Vungarala's various claims that the proceedings below were unfair because, among other things, the Tribe did not provide FINRA with all relevant documents and access to all relevant witnesses. It is well-established that FINRA lacks subpoena power over customers such as the Tribe, and FINRA's Department of Enforcement ("Enforcement") acted well within its prosecutorial discretion in bringing a case against Vungarala based upon the evidence it had (including evidence turned over to it by the Tribe). And despite Vungarala's suggestions to the contrary, he has not pointed to any evidence showing that Enforcement failed to produce to him any documents in its possession pursuant to FINRA's rules.

Finally, we affirm the bars the Hearing Panel imposed on Vungarala for his egregious misconduct. Vungarala intentionally made numerous misrepresentations and omissions of material facts during a several-year period. He profited handsomely from his misconduct, and the Tribe—which trusted Vungarala and depended upon him for objective investment advice—suffered financial harm as a result of its lost volume discounts. Vungarala has taken no responsibility for his actions, and instead believes that he was a better steward of the funds he received in commissions than his employing broker-dealer would have been. Vungarala is unfit to continue in the securities industry, and barring him is necessary to protect the investing public. We also affirm the Hearing Panel's order that Vungarala disgorge the approximately $9.6 million in ill-gotten gains that he received from his misconduct.

II. General Background

The following describes the backgrounds of Vungarala and the Tribe, as well as the Tribe's investment process for non-traded REITs and BDCs, which provide context for Vungarala's misconduct and his alleged defenses thereto.[1]

A. Vungarala's Background

Vungarala first registered as a general securities representative in September 2004.[2] He became a registered representative with Purshe Kaplan & Sterling Investments, Inc. ("PKS") in December 2007, when he also became registered as an investment adviser with Sutterfield Financial Group ("Sutterfield"). Vungarala was registered with Sutterfield until February 2016, and remained registered at PKS until February 2017. He is not currently associated with a broker-dealer.

When Vungarala joined PKS, he had few customers (consisting of several members of his church and 401(k) plans for two local county governments). Vungarala testified that he did not have a large book of business because he was focused on helping his special needs son. To pay for his son's treatment and care, Vungarala withdrew all of the funds from his retirement account, his wife's retirement account, and liquidated personal assets. He stated that when he joined the Tribe as an employee in November 2008, his priority "was to build back my security."[3]

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[1] A REIT "is a company that owns – and typically operates – income-producing real estate or real estate-related assets. REITs provide a way for individual investors to earn a share of the income produced through commercial real estate ownership – without actually having to go out and buy commercial real estate. . . . In addition, there are REITs that are registered with the SEC, but are not publicly traded. These are known as non-traded REITs (also known as non-exchange traded REITs)." *See Fast Answers, Real Estate Investment Trusts*, https://www.sec.gov/fast-answers/answersreitshtm.html. BDCs "are a category of closed-end funds that are operated for the purpose of making investments in small and developing businesses and financially troubled businesses." *See Fast Answers, Investment Company Registration and Regulation Package*, https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504htm.html.

[2] From June 1998 until June 2003, Vungarala served as a financial analyst and credit manager for Dow Chemical.

[3] Illustrating Vungarala's financial condition at the time, in October 2008, the State of Michigan filed a tax lien against him in the amount of $1,256. The state released this lien when Vungarala paid it in June 2009, after his cash flow had improved and he had the funds to satisfy the lien.

At the hearing, Vungarala downplayed his testimony concerning his financial state (which he first gave during a June 2015 FINRA on-the-record interview), and denied that he had

[Footnote continued on next page]

B. The Tribe

The Tribe is a federally recognized, sovereign Native American tribe occupying a federal Indian reservation in Michigan. The Tribe has several thousand enrolled members. Among other things, the Tribe operates a resort and several casinos.

C. The Tribe's Various Accounts and Investment Policy

The monies earned by the Tribe, from among other things, its casino operations fund its government operations, education programs, health programs, and other benefits provided to the Tribe's members. The Tribe invested these funds through a number of "trust" accounts, each with a specific purpose. These so-called trust accounts were simply a convenience for accounting purposes, and the beneficiary of each account was the Tribe. The Tribe's formal Investment Policy provided that each account "is considered separate with respect to transactions" and securities could only be moved between accounts to settle a related obligation.

The Investment Policy also prescribed the types of investments that the Tribe could make. Its purpose was to "formalize the framework for the [Tribe's] investment activities" and help the Tribe manage its investment portfolio. The Investment Policy provided guidelines for the types of investments that could be made in each of the Tribe's accounts depending upon the account's purpose, time horizon, need for liquidity, and risk tolerance. The Investment Policy also governed the activities and conduct of employees involved in making investments on behalf of the Tribe. During the relevant period, the Investment Policy contained the following prohibition under the headings "Standards of Care" and "Ethics and Conflicts of Interest":

> Managers and employees involved in the investment process shall refrain from personal business activity that could conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions.

D. The Tribe Hires Vungarala as Its Full-Time Investment Manager

Prior to November 2008, the Tribe used an outside investment adviser to provide it with investment advice. The Tribe invested through Charles Schwab & Co. ("Schwab"), which had custody of the Tribe's investments. In November 2008, the Tribe decided to bring this position in house, and it hired Vungarala as its full-time Treasury Investment Manager pursuant to a personal services contract dated November 17, 2008 (the "First Contract"). The First Contract

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[cont'd]

depleted his savings prior to becoming a Tribe employee. Vungarala testified that his cash flow was suffering, but he owned illiquid assets such as rental property and land. As a general matter, the Hearing Panel found that Vungarala was "highly motivated" by money, and it found Vungarala's "overall story" to be not credible. *See infra* Part III.C.

ran for three years, paid Vungarala an annual salary of $99,500, and provided that he was not entitled to additional compensation for hours above and beyond an eight-hour workday or a 40-hour workweek. Under the First Contract, Vungarala's duties included "managing, evaluating and monitoring the [Tribe's] investment portfolio and . . . consider[ing] alternative investment selections with respect to overall investment performance," performing on behalf of the Tribe all investment transactions, and analyzing the Tribe's daily investment activities to ensure the success of its portfolio.[4]

The Tribe also required that the Tribe's Investment Manager have the Series 7 and Series 63 "certifications."[5] Vungarala told his supervisor (AO) that a brokerage firm had to "hold" his licenses for him to retain them, and that he "parked" his licenses at PKS. Other Tribal members understood his relationship with PKS in a similar way.[6]

When Vungarala first joined the Tribe, he did not have any expectation that he would be selling products to the Tribe and earning a commission on those transactions. Vungarala testified that he had a duty to the Tribe as one of its employees, agreed that as an employee he owed the Tribe a duty of good faith and fair dealing, and acknowledged that the Tribe's leaders expected him to make investments that were in the Tribe's best interest. He testified that, as the Tribe's Investment Manager, "the Tribe's need would always—front of everything I did."[7]

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[4] Vungarala obtained several modifications of the First Contract to increase his benefits, although his job duties and status as a full-time Tribal employee did not change. For example, Vungarala requested that the Tribe reimburse him for the yearly costs of renewing his securities registrations, which the Tribe agreed to do. The Tribe also agreed to reimburse Vungarala for errors and omissions insurance.

[5] There is nothing in the record explaining why the Tribe required that its Investment Manager hold these registrations.

[6] Shortly after Vungarala became a Tribe employee, PKS sought from Schwab disclosure of the Tribe's trading activity in its Schwab accounts because Vungarala had trading authority over the accounts on a fiduciary basis. The Tribe declined, citing privacy concerns, and PKS dropped its request. PKS's request, however, prompted the Tribe to suggest to Vungarala that he move his registrations to Schwab. Vungarala resisted this move, and he told the Tribe that he had "clients on the PKS side, and if I move to Schwab I need to make sure that my clients are taken care of and I also get the same commission structure." Regardless, Schwab refused to register Vungarala because it viewed him as its client.

[7] Vungarala also testified, however, that notwithstanding his fiduciary duty to the Tribe when he acted as its investment adviser (such that he would "keep the client up front at all times" and the Tribe's "needs always come first"), as a PKS registered representative, he only needed to ensure that a recommendation was suitable for the Tribe. Vungarala testified that he was acting as a Tribe employee only when dealing with the Tribe's accounts at Schwab.

After the Tribe hired Vungarala as its in-house Investment Manager, Vungarala on behalf of the Tribe traded stocks and bonds through Schwab (as the Tribe's outside adviser had done). Vungarala had authority to invest for the Tribe in the Schwab accounts without seeking approval through any committee or individual at the Tribe. Vungarala created lists of securities that he wished to purchase or sell in the Tribe's Schwab accounts, and he or other Tribal employees would execute transactions on behalf of the Tribe based upon his list. Vungarala's activities with respect to the Tribe's Schwab accounts are not at issue in this appeal.

E. Vungarala Believes That He Is Underpaid and Mistreated

Despite Vungarala's salary and other compensation from the Tribe, he felt underpaid as a Tribal employee. He testified that at some point, he discovered that the Tribe's previous adviser, who was not a Tribe employee, received compensation of more than $1 million per year plus other benefits and reimbursements. Although Vungarala testified that he was not unhappy upon learning this and money was not important to him, he also testified that when he discovered this information he "took it to prayer." He also characterized himself as working "pro bono" for the Tribe, and he felt that he was mistreated by other Tribe employees because he was not a Tribal member.

F. Summary of the Tribe's Investments in Non-Traded REITs and BDCs

Prior to mid-2011, when Vungarala began recommending to the Tribe that it purchase non-traded REITs and BDCs through PKS, the Tribe's investments consisted mostly of stocks and investment-grade bonds held in its Schwab accounts.[8] From July 2011 through the end of 2014, however, the Tribe invested $190,375,000 in non-traded REITs and BDCs. The Tribe made all of these investments upon Vungarala's recommendations. The portion of the Tribe's investment portfolio invested in non-traded REITs and BDCs steadily increased through the end of 2014, at which time these assets comprised almost 23% of the Tribe's portfolio. PKS received approximately $11.4 million in commissions on the Tribe's non-traded REIT and BDC transactions, and PKS paid Vungarala $9,682,629, 85% of this total.

The prospectuses for the non-traded REITs and BDCs purchased by the Tribe described the costs and fees associated with an investment in the product (including selling commissions, which were generally at or around 7%, to managing dealers and participating brokers). The prospectuses also contained information concerning volume discounts and the applicability of such discounts (which a customer could receive when its purchases of a non-traded REIT or BDC reached a breakpoint; the discount would then reduce the total commissions paid and allow the customer to buy more of the particular security). Although the definition of who was entitled to a volume discount varied from investment to investment, the definitions were generally broad. Some prospectuses provided that volume discounts could be given to a "corporation, partnership,

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[8] In connection with Vungarala's initial recommendation that the Tribe invest in non-traded REITs and BDCs, the Tribe modified the Investment Policy to include these products as approved investments for all of the Tribe's accounts.

association, joint-stock company, trust fund, or any organized group of persons, whether incorporated or not." Others provided that volume discounts could be given to "[a]ll funds and foundations maintained by a given corporation, partnership or other entity," and others stated that different accounts could be aggregated to receive the discount if the account holder had the same tax identification number or if the accounts were controlled by the same beneficial owner.

G. The Tribe's Investment Process for Non-Traded REITs and BDCs

The following describes the Tribe's investment process for Vungarala's recommendations of non-traded REITs and BDCs, the roles of the various employees and committees of the Tribe, and Vungarala's extensive role in the Tribe's investment process and its reliance upon him throughout that process.

1. Treasury Department

A recommendation for the Tribe to invest in a non-traded REIT or BDC would originate with the Tribe's Treasury Department, which was responsible for the Tribe's investment functions and cash management. Vungarala was part of the Tribe's Treasury Department, as was an administrative assistant, a cash manager, two research analysts (including MB), and AO, a member of the Tribe during the relevant period who became the Treasury Department Administrator in October 2008.[9] Treasury Department employees, including Vungarala, reported to AO.[10] She ensured that the Tribe's policies and procedures were followed, managed the budget, and authorized leave for department employees.

Vungarala recommended all of the non-traded REITs and BDCs purchased by the Tribe. Before taking any of his recommended investments to the Tribe's Investment Committee for its consideration, Vungarala would meet with AO and the two Treasury Department analysts to

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[9] In the summer of 2014, AO and other Tribal members faced disenrollment from the Tribe in proceedings unrelated to her employment and the matters described herein. Prior to becoming the Treasury Department Administrator, AO served for two years as the Tribe's café supervisor and for two years as its tax director. Although AO holds an MBA, her investment experience was limited to her 401(k) account, and REITs and BDCs were new concepts to her.

Similarly, the Treasury Department research analysts had little investment experience. For example, prior to joining the Treasury Department in 2009, MB was an accounting intern, a black jack dealer, an enrollment clerk, and a concession cashier. She testified that she had never heard of REITs before working in the Treasury Department. MB holds a bachelor's degree in Business.

[10] Vungarala reported to AO until August 2014, when he was removed from her supervision and he began to report directly to the Tribe's Council Treasurer. *See infra* Part IV.A.7. Several months later, the analysts were also removed from AO's supervision. They then reported directly to Vungarala.

discuss the particular investment and the information contained in its marketing brochure. Vungarala taught the research analysts how to assist him. With Vungarala's direction and guidance, the analysts eventually learned to prepare summaries of the investments for the Investment Committee.[11] Vungarala testified that initially, these summaries were more than 10 pages (and consisted almost entirely of the marketing material from the REITs or BDCs). Eventually, and after the Tribe had invested in a number of non-traded REITs and BDCs, the summaries were reduced to a single-page, setting forth the name of the proposed investment, its offering process, the expected return, and the Tribe's exit strategy. The summaries did not contain any information regarding commissions or volume discounts.

AO testified that she did not analyze investments independently from Vungarala, and she never read a prospectus for any of the non-traded REITs or BDCs purchased by the Tribe. Similarly, the analysts did no independent research on any of Vungarala's recommended investments, and Vungarala directed their preparation of summaries for the Investment Committee. AO testified that she believed what Vungarala told her, and that he was the "professional" and the "expert." MB shared this view. AO testified that no one in the Treasury Department ever overruled a recommendation made by Vungarala.[12]

2. Investment Committee

The Tribe's Investment Committee met regularly to review Vungarala's recommendations for investing the Tribe's funds in non-traded REITs and BDCs, and would make recommendations to the Tribal Council for its ultimate approval. Vungarala would often make presentations to the Investment Committee concerning the non-traded REITs and BDCs he was recommending, and other members of the Treasury Department would sometimes attend Investment Committee meetings.[13] The Tribal Administrator (DD), the Tribe's Chief Financial Officer, the Chief Investment Officer, the Treasury Portfolio Manager, and the Tribal Council Treasurer were all on the Investment Committee during the relevant time period. DD testified that no special qualifications were required to serve on the Investment Committee.[14] DD also

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[11] AO testified that Vungarala prepared the summaries until the research analysts learned to do so.

[12] The Hearing Panel rejected Vungarala's testimony that the employees of the Treasury Department were equals, and that AO and the other employees did not rely upon him. Instead, it found, "[i]t is plain that Vungarala directed the whole process of determining what investments should be brought to the Investment Committee." The record supports the Hearing Panel's view.

[13] Vungarala used a "white board" or PowerPoints for his presentations. Although the record does not contain any copies of these presentations, several witnesses testified concerning their content. We discuss these presentations in detail, below. *See infra* Part IV.A.4.

[14] For example, despite DD's 10 years of service on the Investment Committee, he did not know what a registered representative was, did not know what the Series 7 or Series 63 were,

[Footnote continued on next page]

testified that the Investment Committee's review of the Treasury Department's recommendations was at a "high level."[15] DD never reviewed a prospectus, and the members of the Investment Committee did not have specific knowledge of Vungarala's recommended investments.

In considering Vungarala's recommendations, DD testified that the Investment Committee focused on the forecast interest rate, the number of shares that the Tribe would purchase, the investment's offering price, and what investment the REIT or BDC would be replacing. The Investment Committee would then decide whether to recommend to the Tribal Council that the Tribe invest in a REIT or BDC. DD further testified that the Investment Committee relied upon Vungarala, as the Tribe's Investment Manager, in making this decision.

3. Legal Department

After the Investment Committee's review of a proposed investment in a non-traded REIT or BDC, the Tribe's Legal Department would review the recommendation. As a general matter, the Legal Department opposed each of the Tribe's purchases of non-traded REITs and BDCs (based upon the Tribe's sovereign immunity and a desire to avoid arbitration in connection with any dispute). The 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 would earn a commission on any purchase, or the Tribe's eligibility to receive volume discounts. A memorandum reflecting the Legal Department's opposition would accompany the material sent to the Tribal Council for its final approval of the recommendation.

4. The Tribal Council

The Tribe's 12-member Tribal Council made the final decision on any recommended investment in a non-traded REIT or BDC. The Tribal Council included the Tribe's Chief and Sub-Chief (who were each elected to these positions, along with the Tribal Council's other 10 members). During the relevant period, several members of the Investment Committee also served on the Tribal Council. The Tribal Council received the summaries prepared by the Treasury Department, the Legal Department's memorandum opposing the investment, marketing materials from the non-traded REITs or BDCs, a proposed resolution or motion to approve the investment, and the application to invest in the REIT or BDC.

[cont'd]

and did not know the difference between a registered representative and an investment adviser. DD holds a bachelor's degree in Entrepreneurship.

[15] Similarly, Vungarala testified that after the Tribe had started investing in non-traded REITs and BDCs, the Investment Committee wanted "high level" summaries on proposed investments from the Treasury Department.

If the Tribal Council approved a proposed investment in a non-traded REIT or BDC, the Treasury Department's administrative assistant would fill out the subscription agreement, obtain all necessary signatures, and give the package to Vungarala for his final review. The Tribe almost always accepted Vungarala's recommendations. Indeed, of Vungarala's more than 200 recommendations to the Tribe that it invest in non-traded REITs and BDCs, it only rejected two (and it did so for reasons unrelated to the financial or economic merits of the investments).

H. Vungarala's Second Employment Contract and the Minimum Production Fee

In November 2011, after the Tribe had begun to invest in non-traded REITS and BDCs, Vungarala and the Tribe entered into a second personal services contract (the "Second Contract"). The Second Contract ran from November 17, 2011, to November 16, 2014. Vungarala's role at the Tribe remained the same under the Second Contract, although his compensation increased to $120,000 per year (with the potential to earn a performance bonus of 10% of his base salary).[16] The Second Contract also increased reimbursements for renewing his securities registrations and errors and omissions insurance.

Further, the Second Contract added a provision providing that, upon receipt of an invoice by the "licensing agency," the Tribe would reimburse Vungarala "an amount not to exceed $2,000 per fiscal quarter for the Minimum Production Fee." AO testified that Vungarala told her that PKS charged him this fee because he was not doing many transactions with PKS (only some investing for himself and several members of his church). She further testified that Vungarala never explained to her that, if the Tribe made investments through PKS, he would receive a commission. She viewed the Minimum Production Fee, similar to the other items that the Tribe agreed to reimburse Vungarala, as a cost of keeping his license at PKS. She viewed Vungarala's reimbursements as akin to bar dues paid by the Tribe's in-house attorneys and reimbursed by the Tribe. AO obtained permission from the Investment Committee to reimburse Vungarala because, as she explained, he was not doing much investing with PKS as a Tribe employee.

Although the Minimum Production Fee was not formally a part of Vungarala's employment contract until November 2011, a copy of his monthly "Commission Statement" (which Vungarala would submit to the Tribe each month to obtain reimbursement of expenses pursuant to his employment contract) began listing this fee in December 2010 (for the period November 2010).[17] Other than the title of the document, the phrase "commissions" did not appear anywhere on these statements; nor did the statements identify specific customers, transactions, products, or trades. Rather, the statements generally listed three broad categories of

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[16] AO negotiated the 10% bonus on Vungarala's behalf as part of the Second Contract.

[17] Vungarala testified that, around this time, he and the Tribe agreed to modify the First Contract to increase his allowed reimbursements for other items to cover reimbursement for the Minimum Production Fee. Vungarala explained that this was done so the Tribe could reimburse him for this fee beginning at the end of 2010, without having to create a separate item for the Treasury Department's budget.

information: "Production," "Overrides," and "Adjustments." Under "Production" and "Overrides," the statements had columns entitled "Trade Source," "Pay Type," "Production Credit," "Allowed Gross," "Clearing Fees, and "Base Payout."[18] Any Minimum Production Fee assessed to Vungarala by the Firm was listed under "Adjustments."

AO testified that she might have reviewed the first statement or two sent by Vungarala, but thereafter she did not review them, and she would simply give them to an administrative assistant to fill out a purchase order. The assistant would ensure that the request contained supporting documentation for Vungarala's reimbursements, and then send the purchase order to the Tribal Council. Once approved, the Tribe's account payable department would issue Vungarala a check.

III. Procedural History

A. FINRA's Investigation of Missed Volume Discounts

In 2014, FINRA conducted a national review of its member firms to determine whether customers purchasing non-traded REITs and BDCs had received all volume discounts to which they were entitled. FINRA determined that the vast majority of missed volume discounts during the period under investigation related to the Tribe's investments, which were made through PKS and Vungarala as the Tribe's registered representative. A FINRA examiner testified that she reviewed Vungarala's Uniform Application for Securities Industry Registration or Transfer and found that he was both a Tribe employee and a PKS registered representative. In light of this information, she considered the missed volume discounts, and Vungarala's receipt of commissions on the transactions, as a potential conflict of interest.

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[18] The first statement submitted by Vungarala (for November 2010) contained no information in the Production and Overrides sections, but under Adjustments listed two charges for Minimum Production Fees (for the second and third quarters of 2010). The December 2010 statement listed a "production credit" of $159.66 and a "base payout" of $138.50. The Trade Source for this credit was described as "Packaged Products." Entries for base payout amounts of a similar magnitude appeared on some ensuing statements (the others contained no information in the Production and Overrides sections).

It was not until the July 2011 statement (when Vungarala began purchasing non-traded REITs and BDCs on behalf of the Tribe) that a much more substantial dollar amount appeared on the statements. The July 2011 statement listed a production credit of $130,312.50 and a base payout of $113,371.88, with the Trade Source described as Packaged Products. AO testified that sometime in the third quarter of 2011, Vungarala told her that he did not have to pay PKS the Minimum Production Fee because the Tribe had started to purchase REITs. She further testified that she did not understand that the cessation of the Minimum Production Fee was connected to Vungarala's receipt of commissions on the Tribe's purchases of REITs and BDCs. Nor did she understand what a production credit or base payout was.

FINRA conducted an investigation of PKS and Vungarala, and it contacted the Tribe concerning these matters. *See infra* Parts IV.A.8 and 15. The Tribe also conducted its own investigation of Vungarala and his receipt of commissions.

B. Enforcement Files a Complaint Against PKS and Vungarala

Enforcement filed a four-count complaint against PKS and Vungarala in February 2016.[19] In the two causes of action specific to Vungarala, Enforcement alleged that he: (1) willfully made misrepresentations of material facts, and failed to disclose material facts, to the Tribe in connection with its purchases of non-traded REITs and BDCs from June 2011 through December 2014, by falsely informing the Tribe that he would not receive commissions on these transactions and failing to inform the Tribe that he would receive commissions; and (2) willfully made misrepresentations of material facts, and failed to disclose material facts, to the Tribe with respect to its eligibility to receive volume discounts on its purchases of non-traded REITs and BDCs. Enforcement alleged that Vungarala's misconduct, in both instances, violated Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.

Vungarala denied the complaint's allegations, and the Hearing Panel conducted an eight-day hearing in April 2017. In addition to Vungarala, seven witnesses testified: three Tribe employees during the period in question (AO, MB, and DD); two FINRA examiners; PKS's Chief Compliance Officer (LE); and a former PKS regional supervisor (DJG).

C. The Hearing Panel Makes Extensive Credibility Findings and Concludes that Vungarala Engaged in Fraud

The Hearing Panel in its decision found that Vungarala willfully made fraudulent misrepresentations and omissions in connection with his receipt of commissions on the Tribe's non-traded REIT and BDC investments, as well as in connection with the availability of volume discounts. In so concluding, the Hearing Panel found the three testifying Tribe employees credible and that their testimony was consistent with documentary evidence and "made sense in light of the Tribe's conduct during the relevant period." As described herein, the Hearing Panel also made numerous findings that specific testimony of the Tribe employees was credible with respect to Vungarala's misrepresentations and omissions.

In contrast, the Hearing Panel found that Vungarala was not credible. It held that Vungarala's "testimony was repeatedly evasive, inconsistent, and misleading," and found his "overall story" to be not credible. It further found that Vungarala's testimony that he did not understand basic financial concepts (such as self-dealing and financial benefit) was not credible, and found that he was generally untrustworthy. It also found not credible that Vungarala was not motivated by money in making his recommendations to the Tribe, and as discussed below, the

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[19] In February 2017, PKS settled the two causes of action that concerned its misconduct and alleged supervisory failures in connection with Vungarala's alleged fraudulent misconduct.

Hearing Panel made multiple, specific findings that Vungarala's testimony concerning what he allegedly told the Tribe was not credible. *See infra* Part IV.A.

The Hearing Panel twice barred Vungarala for his fraudulent misconduct—once for his misrepresentations and omissions related to his commissions and again for his misrepresentations and omissions concerning volume discounts. It also ordered that he disgorge $9,682,629, which represented the commissions he earned in connection with the Tribe's purchases of non-traded REITs and BDCs and included the commissions he earned on the Tribe's missed volume discounts. The Hearing Panel also ordered that Vungarala pay $15,937.31 in costs. This appeal followed.

IV. Discussion

A. Factual Background Concerning Vungarala's Fraudulent Misrepresentations and Omissions

The following describes the events surrounding Vungarala's recommendations to the Tribe that it purchase non-traded REITs and BDCs, the Tribe's investments in these products, and what Vungarala disclosed—and failed to disclose—to the Tribe concerning commissions that he would earn on the Tribe's purchases and the availability of volume discounts on the Tribe's purchases.

1. Vungarala Recommends that the Tribe Invest in Non-Traded REITs and BDCs

In late 2010 and early 2011, a number of bonds held by the Tribe were maturing or had been called. During this period, revenue from the Tribe's casino operations declined substantially, and the Tribe sought to maximize its investment portfolio's performance. Vungarala testified that he needed to search for investments with yields higher than the maturing bonds. To accomplish this goal, he recommended to the Tribe non-traded REITs and BDCs.

Around this time, Vungarala first introduced to AO these potential investments. He described these products as an alternative to buying bonds.[20] Vungarala testified that he told AO that the Tribe should think more like an institutional investor and that "[t]hey were going more into the non-traded REIT alternate investment to basically meet their needs." AO testified that Vungarala approached her with a REIT marketing brochure and wanted to start investing in REITs on behalf of the Tribe. She further testified that Vungarala stated that the Tribe could earn returns ranging from 7% to 10% (compared to 2% on a 30-year bond) and would be able to

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[20] Vungarala also informed AO that the Tribe could increase the yield on its investment portfolio by "go[ing] down the junk bond ladder," although he disclosed that there were risks to doing so. The Tribe's Investment Policy, however, generally required that any bonds purchased be investment grade. AO also testified that she viewed junk bonds as particularly risky.

exit the investments in several years. AO found REITs to be "confusing." Vungarala had to explain to her what they were several times.

2. Vungarala Misleads AO Regarding the Costs of the Tribe's Investments and His Compensation

In connection with Vungarala's suggestion to AO that the Tribe consider investing in non-traded REITs and BDCs, AO testified that Vungarala told her that Schwab—the broker-dealer where the Tribe held its securities accounts—did not offer these products. Vungarala stated that for Schwab to add them to its platform would cost the Tribe approximately $50,000 ("in order for them to do their due diligence because they would charge [the Tribe] for all the legal fees for them to review each REIT"). AO further testified that Vungarala suggested that the Tribe instead purchase the REITs and BDCs through PKS.

Vungarala, however, denied that he told AO that the Tribe could not purchase REITs and BDCs through Schwab. He testified that he informed AO that Schwab "did not have any REITs on their platform but they have a process by which they can" add them. Vungarala further testified that he gave her contact information at Schwab because he could not "be involved because I am a registered rep" at PKS, and "I am going to stay on the other side, I am not going to be involved." Vungarala stated that AO did research and discovered that Schwab would charge the Tribe $5,000 to $8,000 (and not $50,000). Vungarala further testified that, when AO asked him whether PKS would charge a fee for due diligence in connection with the REITs, he informed her that "PKS does not charge a fee."

AO also repeatedly testified that Vungarala told her that there would be no conflict of interest if the Tribe used PKS, instead of Schwab, to purchase REITs "because he would not make any money off of" the Tribe's transactions. She further testified that Vungarala never told her that PKS would make a commission on the Tribe's transactions.[21] In contrast, Vungarala testified that he expressly told AO that PKS would receive commissions and PKS would pay him in connection with the Tribe's investments. He stated that he told AO "that if we go through PKS, PKS is going to receive the 7% commission and PKS will pay me." He further testified that he did not disclose how much his commissions would be because AO and the Tribe "never asked me."

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[21] AO explained that she "didn't believe that [PKS] ever made a commission . . . [b]ecause I thought that what happened—the way I interpreted it is that we were—because we had no agreement with PKS. They didn't—we didn't have to provide any financial information to them. So my interpretation was that they were just his brokerage firm that would allow us to buy REITs through them." In further support of her understanding that PKS was not receiving a commission on the Tribe's purchases, AO testified that statements from the REITs and BDCs showed the Tribe's total investments without backing out any commissions or fees, whereas statements received from Schwab clearly listed commissions and fees.

The Hearing Panel found AO's testimony on these points credible and Vungarala's testimony not credible. Specifically, the Hearing Panel found AO's testimony that Vungarala informed her that Schwab did not offer REITs and BDCs—and if it did offer them, it would charge a large fee—credible. It further held that Vungarala misled AO into believing that Schwab would charge a fee but PKS would not. Moreover, the Hearing Panel found Vungarala's claim that he told AO that he and PKS would receive commissions on the Tribe's transactions was not credible. And, contrary to Vungarala's testimony that AO did not ask the follow up question regarding how much PKS would be paying him, the Hearing Panel found that AO would have sought the Investment Committee's and Tribal Council's approval for the commissions had she known about them (as was her custom with other issues related to the Tribe's investments). AO also testified unequivocally that she would have immediately disclosed to the Tribal Council the fact that Vungarala would receive commissions, because she viewed his receipt of commissions as unethical and against the Tribe's Investment Policy.

3. Vungarala Fails to Disclose His Commissions During a June 2011 Investment Committee Meeting

The Treasury Department brought its first proposal for the Tribe to invest in non-traded REITs to the Investment Committee at its June 27, 2011 meeting. The record contains the minutes from this meeting. The following individuals attended the meeting: AO; DD; the Tribe's Chief Financial Officer; and two other members of the Investment Committee.

The minutes show that after the Investment Committee discussed another topic, Vungarala entered the meeting as a "guest" in connection with the Treasury Department's proposal that the Tribe purchase two non-traded REITs.[22] The minutes show that AO and Vungarala spoke about the proposal during the ensuing discussion. Vungarala, in response to a question, recommended that the Tribe invest $1 million in the REITs. AO then informed the Investment Committee that the "next obstacle would be how to get them the money; the Tribe needs to go through a broker/dealer, and Schwab does not do that." AO further informed the Investment Committee that:

> [T]hey can utilize PKS, Gopi's brokerage firm; the Tribe will not have to sign any agreements with them, PKS has agreed to allow the Tribe to use them with no strings attached. There will be no conflict of interest on Gopi's behalf since he is not getting paid by with [sic] the company.

The minutes further reflect that after AO responded to an Investment Committee member's question concerning when this proposal could be ready for approval by the Tribal Council, Vungarala discussed the second of the two proposed REITs before he exited the meeting (approximately 30 minutes before it ended). The Tribe purchased the two REITs discussed at the meeting on July 14, 2011.

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22 The Tribe redacted certain portions of the meeting minutes before providing them to Enforcement.

AO testified that, going into the June 27, 2011 Investment Committee meeting, she did not believe that Vungarala or PKS would be paid if the Tribe purchased REITs through PKS. AO testified, consistent with the meeting minutes, that she informed the Investment Committee that there would be no conflict of interest using PKS to purchase non-traded REITs and BDCs because Vungarala "would not be making any money" on the Tribe's purchases, as she claimed Vungarala had told her prior to the meeting.[23] AO further testified that Vungarala was present at the meeting when she made these statements.

DD testified that the meeting minutes were consistent with his memory of the Investment Committee meeting. DD testified that Vungarala did not disclose to the Investment Committee that he had a conflict of interest (which DD believed Vungarala would have had under the Investment Policy if he received commissions), or that he would receive commissions on the Tribe's investments. He further testified that "[i]nitially there was discussion that PKS would assist the [T]ribe with no strings attached and that they were a brokerage firm that would assist in packaging of REITs and BDCs."

In contrast, Vungarala testified that the Investment Committee "knew at all times when I was making REIT purchases I was making commissions. It was a commission product and that I was making—I would be paid by PKS." He further testified that he "made it very, very, clear" to AO that he was acting as a PKS registered representative when he attended this Investment Committee meeting and that he would not participate in the investment process if the Tribe used Schwab or another broker-dealer to purchase REITs or BDCs.[24]

4. Vungarala's Misleading White Board Presentations

Vungarala testified that, whenever the composition of the Investment Committee changed, he would describe to the committee the fees and expenses incurred by the Tribe in connection with its purchases of non-traded REITs and BDCs. He testified that he always used a white board to explain in detail these fees and expenses, and he asserted that he fully informed

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[23] The Hearing Panel found AO's statement to the Investment Committee that Vungalara would have no conflict in connection with the Tribe's purchases because he would not receive compensation was consistent with her testimony that Vungarala had previously told her this. In contrast, it found that her actions before the Investment Committee would be "inexplicable if he made full, clear disclosure to her" that he would receive commissions on the Tribe's non-traded REIT and BDC investments.

[24] Although Vungarala claimed that the Investment Committee knew that he was acting as a PKS registered representative at this meeting, he admitted that his exact role was never discussed (and the committee never asked). He further testified that, notwithstanding these facts, "I never doubted that I was not a registered representative." In contrast, DD testified that the Tribe believed that Vungarala (a full-time employee of the Tribe earning a salary of approximately $100,000 per year from the Tribe in 2011) was at all times its employee when he advised the Tribe about its investments.

the Investment Committee about commissions paid to him and PKS in connection with these presentations. For example, he described a white board presentation as follows:

> I was called in to explain the REIT. And I went through it, basically drew it on the white board every single piece, here's $10, here's where it goes. Step by step. And I would draw it and say 7 percent go[es] to PKS, and I am paid by PKS. And I put a line underneath and I put my name underneath.

Vungarala later described his presentation in more detail:

> I put it on the white board, took the $10, went through the REIT structure, showed them exactly what the different upfront costs were which is basically I drew a line to the broker-dealer saying they get the 7 percent commission which is the 70 cents. Then I went to the next line which is again following the prospectus which is the selling commissions to the REIT company which is the 3 percent which is the 30 cents. And about half of it typically is paid back to the broker-dealer to compensate them for the marketing costs.
>
> And then I went down to the next step where I showed them the operational costs which is [ ] 1.5 percent which is basically for the REIT company to get the REIT into – basically for the review and the SEC review and what other costs they have, upfront costs to bring the document to the public so the public can invest it.
>
> And then I further went down and shared with them all the other costs, the maintenance costs, the acquisition costs, the disposal cost, and any other – and then how they shared the profit when if this REIT was disposed.

Vungarala testified that, based upon these white board presentations, and because he "think[s] everybody there understood English," the Investment Committee had full knowledge of the costs and expenses related to the Tribe's purchases of non-traded REITs and BDCs, including his commissions on the purchases.

Tribal members, however, did not recall Vungarala ever disclosing during these presentations that he was receiving commissions on the Tribe's purchases. For example, AO testified that Vungarala's white board presentations would show "pieces going to [a REIT's] law firm, pieces going to marketing, pieces going to accounting, whatever all their disciplines were." She also testified, however, that Vungarala never showed that PKS earned 7% and that a sales team earned 3%, but rather his presentations showed fees at a higher level.

MB testified that she recalled Vungarala two or three times using a white board to explain the fee structure for the Tribe's non-traded REIT and BDC purchases. She stated that his presentations would "draw out how the fees and commission worked" and "[h]e would just take the cost, you minus the 7 percent, minus the 3 percent, that's what the fees are. It was just a

blanket description. It wasn't saying who gets it or where it goes. It was just this is how it works. Somebody's getting 7, somebody's getting 3."[25] Moreover, DD testified that, numerous times during Investment Committee meetings, he asked Vungarala about the fee structure for REIT and BDC purchases and "every time [Vungarala] was asked he stated that he was not receiving commission, and fees would go towards packaging of REITs, due diligence, expenses." DD further testified that Vungarala never disclosed in DD's presence that he was receiving commissions on the Tribe's REIT and BDC investments.

The Hearing Panel found that AO, MB, and DD testified credibly regarding Vungarala's white board presentations, and it concluded that the Tribe's failure to raise any issue concerning a conflict of interest related to Vungarala's receipt of commissions is consistent with this testimony. In comparison, the Hearing Panel found that Vungarala's testimony concerning these presentations lacked any corroboration.

5. Vungarala Misleads AO Regarding Volume Discounts

Vungarala asserts that he spoke with AO twice about volume discounts and, each time, AO informed him that the Tribe did not want to take advantage of them. Vungarala claims that their first discussion about volume discounts occurred while he was traveling and conducting due diligence on a REIT. According to Vungarala, the REIT's attorney asked him if the Tribe was the beneficial owner of two tribal accounts. The attorney informed him that, if the Tribe was the beneficial owner, the REIT would be required to aggregate the accounts and disclose in public filings that the Tribe owned more than 5% of the REIT. Vungarala called AO to discuss the issue. He testified that AO told him that the Tribe's investment in the REIT, and its status as the beneficial owner of the REIT, could not be disclosed. Vungarala asserted that AO was adamant about keeping the trusts separate because of the Tribe's concerns with keeping its affairs private. Vungarala testified that, thereafter, "we did not look at aggregation because the instructions to me were separate, and even if there was a chance for anything because of privacy concerns we cannot do it."

Vungarala testified that he again spoke with AO concerning volume discounts after another REIT noticed that the Tribe's various accounts all had the same tax identification number. The REIT wanted to aggregate the Tribe's purchases to give the Tribe a discount. Similar to Vungarala's first alleged conversation with AO, he asserted that AO raised the same privacy concerns in rejecting the REIT's request to aggregate the accounts. Vungarala stated that AO again instructed him to keep everything separate and the Tribe's financial information private.

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[25] MB testified that Vungarala's presentations were similar to descriptions of the fees contained in various prospectuses of the REITs and BDCs that were shown to her at the hearing. The Hearing Panel characterized Vungarala's presentations as "largely a regurgitation of the generic description of fees and expenses contained in the REIT prospectuses."

In contrast, AO testified that she never discussed with Vungarala aggregation for purposes of receiving a volume discount. AO stated that Vungarala never informed her that the Tribe could obtain significant discounts if it aggregated the investments of the various Tribal trusts for this purpose.[26] AO further testified that she never told Vungarala that the Tribe did not want to take advantage of volume discounts because of privacy concerns. She testified that the only time volume discounts came up was in a Treasury Department meeting that occurred after the Tribe had already been investing in non-traded REITs and BDCs for approximately two years, when MB asked Vungarala why the Tribe was not receiving volume discounts on these investments. AO testified that Vungarala told them the Tribe does not get these discounts "because our trust funds or our trust accounts are separate and have separate governing documents." AO testified that she did not follow up on, or confirm the accuracy of, Vungarala's answer because she trusted him.

The Hearing Panel found Vungarala's testimony that AO rejected volume discounts, which would have provided the Tribe a financial benefit of several million dollars, without consulting other members or committees of the Tribe, to be not credible. The Hearing Panel noted that Vungarala's testimony was inconsistent with AO's prior actions of taking even small financial matters to the Investment Committee and Tribal Council (such as modifying Vungarala's employment contracts to include reimbursements for errors and omissions insurance). The Hearing Panel further found that Vungarala himself admitted that "every time I needed something I would go to [AO] and if she would—she would never make it on her own . . . she took every single thing that I brought up to the [I]nvestment Committee."

6. Vungarala Misleads MB Regarding Volume Discounts

MB testified that she became familiar with the concept of volume discounts because they were discussed in the prospectuses. She further testified that the Treasury Department had spreadsheets to track the Tribe's non-traded REIT and BDC purchases, and when the Tribe made additional purchases in the same REIT or BDC, the average price would go down. MB testified that sometime after the Tribe had already made significant investments in non-traded REITs and BDCs, she asked Vungarala, out of curiosity, if the Tribe could purchase the REITs and BDCs "all at once and then delegate ourselves which trusts that they belong to because then we'd get the discount on all the rest above the first amount." Like AO, MB testified that Vungarala informed her that the Tribe could not do that because it had "to keep [the accounts] separate," without any further explanation. Vungarala provided similar rationales to PKS.[27]

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[26] Indeed, AO was not aware that the Tribe received volume discounts on purchases made in the same Tribal account.

[27] For example, sometime in early 2013, a REIT contacted PKS to discuss giving the Tribe volume discounts for purchases made in the Tribe's different accounts. DJG, a regional supervisor at PKS, spoke with Vungarala about the matter. DJG testified that Vungarala told him that the Tribe did not want the volume discounts because it wanted to keep the trusts separate and not commingle the funds in the accounts. DJG then called AO to confirm what Vungarala told him, and they discussed whether the trusts needed to remain separate. AO

[Footnote continued on next page]

7. The Tribe Switches Vungarala's Supervisor

Until August 2014, AO and Vungarala had a good working relationship. At that time, however, the Tribe changed Vungarala's direct supervisor from AO to the Tribe's Council Treasurer. The Council Treasurer informed Vungarala that AO sought a bonus from the Tribal Council because she believed that she was doing a significant amount of work while Vungarala traveled on REIT and BDC due diligence trips (by executing Vungarala's list of stock and bond transactions in the Tribe's Schwab accounts that he would prepare prior to leaving the office). Vungarala characterized AO's work in his absence, and on his behalf, as ministerial, and he asserted that AO was merely inputting trades from the list that he had created.

Further, the Council Treasurer informed Vungarala that AO told the Investment Committee that Vungarala was thinking of leaving the Tribe to do charity work, and that AO raised the possibility of hiring a second investment manager to learn Vungarala's job in the event that he left. The Hearing Panel found not credible Vungarala's testimony that he was not bothered to hear that the Tribe was considering hiring a second investment manager.

After Vungarala learned this information, AO and Vungarala had a strained relationship, and AO believed that Vungarala was trying "to get rid" of her. Around this time, AO and several other Tribal employees also began to question Vungarala's personal finances. He had recently invited members of the Investment Committee to the grand opening of a yogurt shop that he owned (the second store he had opened that year). In addition, Vungarala often discussed his significant charitable donations. AO and DD testified that people questioned how he could afford these things based solely upon his employment with the Tribe. Consequently, AO did internet research (including reviewing BrokerCheck), and she discovered that Vungarala was an employee of PKS and Sutterfield, and that he had multiple businesses and foundations. AO stated that Treasury Department staff speculated that Vungarala had been receiving commissions on the Tribe's investments.

8. FINRA and PKS Seek Information about Volume Discounts

Around this time, FINRA began to investigate PKS and Vungarala in connection with what appeared to be the Tribe's missed volume discounts. In August 2014, FINRA sent the Tribe's Chief and Sub-Chief a "call me" letter in connection with FINRA's review of volume

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confirmed that they did, and DJG testified that she said that the Tribe did not want to pool the funds together "or take advantage of the breakpoints because they would have to comingle the funds and that the trusts had to stay separate." DJG, however, testified that he did not quantify for AO the potential amount of the volume discounts. At this point, DJG believed the issue of volume discounts had been resolved.

discounts. FINRA staff spoke with the Tribe's General Counsel, who asked that any questions be put in writing so that he could bring them to the Tribal Council.[28]

In mid-September 2014, FINRA also sent to PKS a request for information pursuant to FINRA Rule 8210. FINRA sought information concerning PKS's REIT and BDC business, including details about commissions paid to PKS for purchases of particular products, the customers who purchased REITs and BDCs (and their registered representatives), and volume discounts. Subsequent to PKS's receipt of FINRA's Rule 8210 request, it asked Vungarala to assist with responding (which PKS did in mid-October 2014).

PKS also asked that Vungarala obtain from the Tribe documentation confirming that it wished to "keep the REIT transactions separate and not mixed," which is what Vungarala had previously told PKS to justify the Tribe's purported refusal of volume discounts for its non-traded REIT and BDC purchases. In turn, Vungarala asked AO to draft a letter on behalf of the Tribe's Chief and Sub-Chief to confirm for PKS the separate nature of the trusts. AO drafted a letter that stated "[e]ach of [the Tribe's] trusts has its own purpose and funding obligations and cannot be co-mingled between each other." AO explained that the purpose of the letter was to state that the Tribe's accounts "are separate, have their own purpose, have their own obligations, and cannot be co-mingled." AO circulated the draft letter to the Investment Committee, and she testified that no one raised any objections so the letter was forwarded to, and executed by, the Chief and Sub-Chief, on October 17, 2014, and sent to PKS. Neither the letter nor AO's accompanying explanatory email to the Investment Committee references volume discounts.[29]

9. Vungarala Fails to Disclose His Receipt of Commissions at an October 2014 Investment Committee Meeting

The Investment Committee met on October 27, 2014. At this meeting, Vungarala discussed the fees and expenses related to the Tribe's purchases of non-traded REITs and BDCs. Vungarala testified that he put this discussion item on the meeting agenda because of a forthcoming FINRA rule that would require the true cost of investments be shown on customer statements.[30]

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[28] FINRA did not send a written request to the Tribe until May 2015. *See infra* Part IV.A.15.

[29] In December 2014, PKS twice requested that the Tribe provide additional clarification regarding the separate nature of the Tribe's accounts. These communications also did not reference volume discounts.

[30] In October 2014, the SEC approved FINRA's proposed rule to modify the information contained in customer account statements for non-traded REITs. Among other things, the proposed rule required firms to provide more accurate per share estimated values for non-traded REITs. *See Order Approving Proposed Rule Change Relating to Per Share Estimated Valuations for Unlisted DPP and REIT Securities*, Exchange Act Release No. 34-73339 (Oct. 10, 2014). These amendments, however, were not to become effective until April 11, 2016—18

[Footnote continued on next page]

Vungarala made a presentation similar to the white board presentations he had previously made to the Investment Committee. He testified that he informed the committee that PKS received 7%, 3% went to the "REIT sales team," and he was paid 85% of the commissions received by PKS. Vungarala testified that the meeting was contentious.

AO similarly testified that the meeting was contentious, although she described Vungarala as acting normally and non-aggressively. She further testified that based upon her recent suspicions that Vungarala was receiving commissions on the Tribe's transactions, she specifically asked Vungarala whether PKS received a commission on the Tribe's investments (to which he responded that PKS received 7% and his supervisor made half of that). AO testified that this was the first time that Vungarala had disclosed that PKS was receiving commissions on the Tribe's purchases of non-traded REITs and BDCs. AO further testified, however, that Vungarala twice stated that he did not receive commissions on the Tribe's purchases.

MB described Vungarala as evasive at this meeting, and she testified that Vungarala did not answer AO's questions about whether he was receiving commissions and fees. MB elaborated that Vungarala "just didn't want to answer [AO's questions]. After that – or he tried to explain it. You know, a supervisor at PKS is getting it, and then the sales team gets the rest." DD testified that Vungarala's presentation was "very confusing," so he asked that Vungarala set forth in an email details that the Investment Committee could review.[31]

The unredacted portion of the minutes from this meeting reflect that AO, DD, MB, and Vungarala were all present. Vungarala discussed "his 30,000 page rule book and rule #4016." They also show that he "discuss[ed] how this will change how we see our cost basis/price on our statements." The minutes provide that Vungarala will email an example to DD, and further state:

> [AO] has questions on PKS fees. Gopi states that the team at PKS makes the commission.
>
> 7% profit/commission to PKS (3-4% to the office* Check to see who it is, [AO] would like to know exactly who get[s] the money* out of the 7%)
>
> Gopi stated that 3.5% on top go[es] to the Kohl guys and 1.5 to 2% lawyers.

[cont'd]

months after Commission approval. *See Amendment No. 1 to Rule Change*, at 5, http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2014-006_Amendment_1_0_0.pdf (July 11, 2014); *FINRA Regulatory Notice* 15-02, 2015 FINRA LEXIS 1, at *1-2 (Jan. 2015).

[31] DD testified that the meeting was "a little tense" and that Vungarala was evasive, agitated, and had a difficult time describing the new FINRA rule. He also testified that no one asked Vungarala if he personally received commissions during the meeting.

The Hearing Panel expressly found that AO, MB, and DD testified credibly that Vungarala failed to disclose at this meeting that he was receiving commissions on the Tribe's transactions. It further found that the meeting minutes were consistent with their testimony, and the Tribe's questions and apparent confusion concerning fees and commissions further corroborated their testimony that Vungarala never disclosed that he was receiving commissions.

10. Vungarala Fails to Disclose His Receipt of Commissions in a Follow-Up Email

Pursuant to DD's request at the Investment Committee meeting, Vungarala sent a follow-up email to the Investment Committee, several members of the Tribal Council, AO, and MB on October 27, 2014. The subject of the email was "FINRA Rule 40-16," and he provided an example of how fees and expenses would appear on the Tribe's statements once the new rule became effective.[32] It states:

> For example if we buy XYZ company REIT at $10/Share, the following expenses are deducted from the $10 before the money is invested in the buildings, loans etc.
>
> Broker-Dealer Commission is 7% or $0.70. This is paid to PKS currently
> XYZ sales commission is 3% or $0.30. This is paid to XYZ sales team
> Operating Expenses is 1.5% or $0.15. This is to cover the REIT preparation, review and submission to SEC and legal upfront costs.
>
> So the dollars that go to buy the property is $10 – (0.70+0.30+0.15) = $8.85....This price will be reflected on the statements starting January 1, 2016.

Vungarala testified that he did not state anywhere in the email that he personally was receiving commissions because "how much I was getting paid was already addressed in the morning meeting because I did disclose to them how much Sutterfield was getting, how much I was getting, how much PKS kept." The Hearing Panel found not credible Vungarala's explanation for failing to disclose in the email that he received commissions on the Tribe's purchases of non-traded REITs and BDCs.

AO testified that she was "surprised" by the portion of Vungarala's email showing that a sales commission was being paid to the "XYZ sales team," but nothing in Vungarala's email made her believe that he was receiving any portion of the 7% commission paid to PKS. Similarly, DD testified that, after reviewing the email, he still believed that Vungarala was not receiving commissions because he had not disclosed this fact. AO further testified that Vungarala's email did not identify the supervisor who was paid half of PKS's 7% commission, as stated by Vungarala at the meeting. Consequently, AO responded to Vungarala's email on

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[32] This email is the only written document in the record where Vungarala explained the Tribe's fees and expenses related to its purchases of non-traded REITs and BDCs.

October 29, 2014. In her email, AO estimated that, to date, PKS earned approximately $15 million in commission on the Tribe's REIT and BDC purchases. AO stated "[f]rom what I understand, we would be paying this commission to any broker dealer as long as we are buying these Alternate Investments. Is this correct, Gopi?"

AO's email also asked Vungarala to identify his supervisor (because he "mentioned that PKS splits the 7% to [sic] your Supervisor") and "who is the Sales Team that we are paying the 3% Sales Commission too [sic]?" Vungarala testified that the Tribal Council Treasurer (his new supervisor) instructed him to tell AO to direct any questions to her. The Tribe terminated AO later that day.[33]

11. Vungarala Falsely Asserts to the Chief and Sub-Chief That He Disclosed His Commissions

Sometime in November 2014, Vungarala met with a subgroup of the Tribal Council (consisting of the Chief, the Sub-Chief, the Secretary, and the Treasurer). He testified that he informed this group that he disclosed everything about his receipt of commissions when he joined the Tribe in 2008, and he reminded them (in the context of potentially moving his registrations to Schwab) that PKS was paying him and he had customers other than the Tribe that he needed to be able to service. He further testified that he discussed with this group the Minimum Production Fee and how the Tribe reimbursed him for certain other expenses related to his registrations as a registered representative. Vungarala stated that this group was "very aware that I had disclosed and that I do not hide anything. And they said we need to bring this whole thing to the full council so that they are also completely made aware."[34]

12. The Tribe's General Counsel Seeks Information Concerning Commissions

A meeting of the Tribal Council was scheduled to occur in December 2014 to discuss commissions on the Tribe's non-traded REIT and BDC purchases.[35] Prior to this meeting, the

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[33] AO subsequently complained to FINRA about Vungarala's receipt of commissions while a Tribal employee. She also filed a lawsuit against him and PKS in state court, alleging that they caused her to lose her job with the Tribe.

[34] Nothing in the record corroborates Vungarala's description of this meeting, and no members of the Tribe who attended this meeting testified before the Hearing Panel.

[35] The meeting was originally scheduled for December 14, 2014, but the Tribe rescheduled it to the following week. Instead, another meeting took place during which Vungarala introduced individuals from his advisory firm, Sutterfield, who made a presentation concerning potentially moving the Tribe's business from Schwab to Sutterfield. If the Tribe moved its investment accounts to Sutterfield, Vungarala would have served as the Tribe's adviser. Vungarala testified that although no management fees would be charged on the Tribe's REIT and BDC purchases, he would receive a management fee on the remainder of the Tribe's portfolio (with such fee totaling approximately $4 million).

[Footnote continued on next page]

Tribe's General Counsel contacted PKS to ask about commissions on the Tribe's investments, who received the commissions, and how commissions were paid. PKS's Chief Operating Officer responded to the request after consulting with Vungarala, and stated that:

> The Dealer Manager fee is paid to the Broker Dealer that is responsible for the purpose of participating in and facilitating the distribution of the REIT or BDC product. The Dealer Manager typically is the affiliated broker dealer to the REIT or BDC sponsor. This fee does not get paid out to the registered representative in any manner. . . .
>
> Gopi has requested that we provide you with total sales of REITs and BDCs for the various Trusts and total gross selling commissions. We are gathering that information and will provide it to you shortly.

In response, the Tribe's General Counsel complained to Vungarala that he had recently requested information regarding commissions, had not received a response, and that PKS had only "provide[d] a fraction of the requested information apparently due to your intervention. I am still waiting for [PKS] to comply with my request as promised."[36] Vungarala replied that only the Tribe's Chief and Sub-Chief were authorized to receive the information that the General Counsel had requested, and that Vungarala needed to obtain his supervisor's approval to release the information. Vungarala asserted that he had obtained the necessary approval, and that "PKS is following industry standards to protect customer data . . . [and] is releasing the other information soon as they are compiling the other information ie commissions."

The General Counsel expressed skepticism concerning Vungarala's explanation why PKS had not released the requested information to him, and he stated that "[t]he council has legitimate questions about commissions and to whom and how they are paid. . . . The Tribal Council deserves answers so that they can move forward in the best interests of the Tribe."

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This was not the first time that Vungarala attempted to get the Tribe to move its business to Sutterfield. AO testified that sometime in 2009 or 2010, Vungarala suggested that the Tribe use Sutterfield as custodian of the Tribe's assets and then use a trading platform offered by Fidelity. She further testified that Vungarala never informed her that he was employed by Sutterfield as a registered investment adviser; AO only discovered this in 2014, when she performed background research on Vungarala. The Tribe did not move its assets from Schwab because it was not cost-effective. Later, Vungarala suggested that the Tribe move its 401(k) account from Schawb to Sutterfield, and told Sutterfield's owner that he informed the Tribe's Chief Financial Officer that "I am not going to evaluate [S]chwab as it is not part of my job responsibilities. I will only look at it only if they hires [sic] our services . . . no more freebies."

[36] The Chief, Sub-Chief, members of the Tribal Council, and the Council Treasurer were copied on the General Counsel's response and all exchanges thereafter.

13. The December 21, 2014 Tribal Council Meeting

Several days later, on December 21, 2014, Vungarala met with the Tribal Council. Vungarala testified that he explained to the Tribal Council the same facts as he explained to a smaller group in November 2014. *See supra* Part IV.A.11. He claimed that he showed the Tribal Council prospectuses disclosing commissions, "the application where I signed off as a registered rep and I told them this went to legal," and various PKS letters discussing the risks involved with investing in non-traded REITs and BDCs.[37]

At this meeting, Vungarala also explained fees and commissions using a white board, and testified that he showed the Tribal Council that Sutterfield received 5% and he received 85%.[38] He further informed the Tribal Council that he donated most of his commissions to charity and he retained only 15% of his earnings. Vungarala also testified that he explained all of his outside business activities. Vungarala stated that certain members of the Tribal Council argued back and forth during the meeting. According to Vungarala, one council member claimed that she never knew about the commissions and neither did AO. Vungarala claimed that another council member and the Tribal Chief asserted that AO knew, and the Chief blamed tribal politics for the alleged ignorance of Vungarala's commissions. Vungarala claimed that the Chief then stated that the Tribe had all the information they needed and "we know [AO] knew about it."[39]

14. PKS Provides the Tribe with Its Gross Selling Commissions and Vungarala's Employment Ends

In an email dated December 30, 2014, PKS's Chief Operating Officer informed the Chief, Sub-Chief, Treasurer, and General Counsel that the Tribe's various accounts had made

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[37] Although PKS occasionally communicated with the Tribe during the relevant period concerning the non-traded REITs and BDCs at issue (and identified Vungarala as the Tribe's registered representative in these communications and asked generally whether the Tribe felt there were any conflicts of interest with Vungarala serving in this role), it never mentioned in its communications Vungarala's receipt of commissions or the Tribe's eligibility for volume discounts on its purchases. In fact, and in connection with an in-person meeting with DJG and LE in April 2013, DD testified that Vungarala's commissions were not discussed, and the Investment Committee did not know that Vungarala or PKS was receiving commissions as a result of this meeting.

[38] Vungarala explained that Sutterfield essentially served as a conduit for commissions paid to PKS, with Sutterfield retaining a small percentage.

[39] In contrast, a FINRA examiner testified that the Chief informed her that he was unaware until the end of 2014 that Vungarala was receiving commissions on the Tribe's purchases of non-traded REITs and BDCs.

investments in REITs and BDCs totaling $219,805,000, and that the gross selling commissions paid to PKS were $13,285,159.[40] No additional information was provided in this email.

Vungarala's contract (which had been extended for two months in early November 2014) expired in mid-January 2015. Vungarala testified that the Tribe negotiated for several months thereafter with Sutterfield for Vungarala and Sutterfield to provide investment advisory services to the Tribe, but the Tribe eventually decided not to hire Sutterfield. He further described his contacts with the Tribe during this period as cordial.

15. The Tribe Responds to FINRA's Questions

In May 2015, FINRA asked the Tribe, in writing, whether Vungarala had informed the Tribe that he would make commissions on the Tribe's investments. The Tribe's General Counsel informed FINRA that "[c]omments by Mr. Vungarala during an Investment Committee meeting lead [sic] the Tribe to believe that no commissions were paid to Mr. Vungarala." The Tribe's General Counsel cited to meeting minutes dated April 22, 2009, June 27, 2011, and October 27, 2014, in support.[41] He also stated that the Investment Committee, Tribal Council, and AO did not recall any disclosure by Vungarala that he was receiving commissions on the Tribe's investments until the December 21, 2014 Tribal Council meeting. The Tribe's General Counsel wrote that, "at a minimum," Vungarala was required to disclose any commissions paid to Vungarala pursuant to the Tribe's Investment Policy.

FINRA also asked the Tribe whether Vungarala informed it that it was eligible for volume discounts on its investments, and whether the Tribe waived the right to receive volume discounts. The Tribe's General Counsel informed FINRA that Vungarala discussed volume discounts at Investment Committee meetings and stated that the Tribe was eligible to receive volume discounts on a per trust account basis. He further informed FINRA that the Tribe did not waive its rights to volume discounts.

B. Vungarala Intentionally Made Misrepresentations and Omissions of Material Facts in Connection with Commissions and Volume Discounts

We find that Vungarala intentionally made misrepresentations and omissions of material facts in connection with his recommendations to the Tribe of non-traded REITs and BDCs. Specifically, we find that Vungarala fraudulently misrepresented and failed to disclose to the Tribe material information concerning the commissions he earned on the Tribe's non-traded REIT and BDC purchases and the availability of volume discounts. Vungarala's misconduct violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and

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[40] These totals appear to include private placements and investments by the Tribe in products other than non-traded REITs or BDCs.

[41] The Tribe's General Counsel later clarified that the reference to the April 2009 minutes was in error.

2010. We further find that Vungarala's misconduct was willful, which renders him subject to statutory disqualification.

1. Applicable Law

Exchange Act Section 10(b) prohibits individuals from using or employing, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance. *See* 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 further prohibits individuals from making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." *See* 17 CFR § 240.10b-5.

To establish a violation under Exchange Act Rule 10(b) and Exchange Act Rule 10b-5, a preponderance of the evidence must demonstrate that Vungarala misrepresented a material fact (or omitted a material fact for which he had a duty to disclose), with scienter, in connection with the purchase or sale of securities.[42] *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *25 (Sept. 28, 2017); *see also William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *16 (Mar. 31, 2016) ("When recommending securities to a prospective investor, a securities professional must not only avoid affirmative misstatements but also must disclose material adverse facts, including any self-interest that could influence the salesman's recommendation."); *Bernard McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *17-18 (Mar. 27, 2017) (holding that a respondent violates Exchange Act Section 10(b) and Exchange Act Rule 10b-5 when, acting with scienter, he omits a material fact despite a duty to speak in connection with the purchase or sale of a security), *aff'd*, 2018 U.S. App. LEXIS 12112 (2d Cir. May 9, 2018); *Dep't of Enforcement v. Brookstone Sec., Inc.*, Complaint No. 2007011413501, 2015 FINRA Discip. LEXIS 3, at *69 (FINRA NAC Apr. 16, 2015) (same).

FINRA Rule 2020 is FINRA's anti-fraud rule. It prohibits FINRA members and their associated persons from effecting "any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." "[C]onduct that violates [Exchange Act] Rule 10b-5 also violates FINRA Rule 2020." *Ahmed*, 2017 SEC LEXIS 3078, at *53. A violation of the Exchange Act, the rules promulgated

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[42] Violations of these provisions also must involve the use of any means or instrumentalities of communication in interstate commerce, the mails, or of any national security exchange. *See* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. The parties agree that this element is satisfied here. The parties also agree that the non-traded REITs and BDCs at issue are securities and that Vungarala solicited each of the Tribe's purchases of these securities. Further, there is no dispute that the misrepresentations and omissions at issue here were made in connection with the Tribe's purchases of non-traded REITs and BDCs.

thereunder, or FINRA's rules constitutes a violation of FINRA Rule 2010.[43] *See Scholander*, 2016 SEC LEXIS 1209, at *14-15.

2. Vungarala's Fraud Concerning His Commissions

We find that Vungarala made misrepresentations and omissions of material fact concerning his commissions during a several-year period, and did so with scienter.

a. Vungarala Made Misrepresentations and Hid Facts from the Tribe

First, the record shows that Vungarala made misrepresentations and omissions concerning his commissions. Vungarala, in an effort to get the Tribe to use PKS to purchase non-traded REITs and BDCs (where he would earn commission) instead of Schwab (where he would not), misrepresented to AO that Schwab did not offer REITs, and for Schwab to offer such products would cost the Tribe an exorbitant sum. Vungarala also falsely told AO that there would be no conflict of interest with the Tribe purchasing non-traded REITs and BDCs through PKS because he would not make any money off of the Tribe's transactions. AO then repeated Vungarala's misstatements to the entire Investment Committee at its June 27, 2011 meeting, when she told the committee, among other things, that Vungarala would not be getting paid in connection with the Tribe's transactions. Rather than correct AO before the Investment Committee, and inform its members he would receive commissions on the Tribe's non-traded REIT and BDC purchases, Vungarala remained silent.

We also find that Vungarala's white board presentations to the Investment Committee were misleading because they omitted any information concerning the commissions Vungarala would receive on the Tribe's non-traded REIT and BDC purchases. Rather than state as much in a clear and understandable way to the Investment Committee, Vungarala explained fees and costs related to the Tribe's purchases in a generic way, without mentioning his personal financial gains from the Tribe's investments in these products. DD also testified that, during these presentations, he asked Vungarala numerous times about the fee structure for REIT and BDC purchases, and "every time [Vungarala] was asked he stated that he was not receiving commission."

We further find that Vungarala again failed to disclose that he was earning commissions on the Tribe's non-traded REIT and BDC investments at the October 27, 2014 Investment Committee meeting. Although he explicitly disclosed, for the first time to the Tribe, that PKS was receiving a commission on the Tribe's purchases, he continued to omit that he personally was receiving commissions. Instead, he referred to unnamed supervisors and "sales teams" as being the recipients of commissions. Even in Vungarala's follow-up email to the Investment

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[43] FINRA Rule 2010 requires FINRA members to observe high standards of commercial honor and just and equitable principles of trade in conducting their businesses. FINRA Rule 0140 provides that all of FINRA's rules shall apply equally to members and associated persons, and that associated persons shall have the same duties and obligations as member firms.

Committee after this meeting, he still did not disclose that he was receiving commissions on the Tribe's non-traded REIT and BDC purchases.

The Hearing Panel found that, as a general matter, the testimony of AO, MB, and DD was credible. It also expressly found that their testimony was credible in connection with specific testimony regarding the particular salient facts related to these misrepresentations and omissions. In contrast, the Hearing Panel found that Vungarala was not credible and his claims that he at all times disclosed that he was earning a commission was not credible. It also found that: (1) the meeting minutes from the June 27, 2011 Investment Committee meeting support the Hearing Panel's credibility findings, generally corroborate the testimony of AO and DD concerning what happened at this meeting, and undercut Vungarala's testimony; (2) the October 27, 2014 meeting minutes corroborate the testimony of AO, MB, and DD, and undercut Vungarala's testimony; and (3) the Tribe's various actions support its credibility findings.

On appeal, Vungarala has not presented substantial evidence sufficient to overturn the Hearing Panel's extensive credibility findings. *See Daniel D. Manoff*, 55 S.E.C. 1155, 1162 n.6 (2002) (holding that "[c]redibility determinations by a fact-finder deserve special weight" and can be overcome only when "substantial evidence" exists for doing so). Vungarala argues that the Tribal witnesses were not trustworthy because of several contradictions in their testimony. He states that AO testified that, at DD's suggestion, she began keeping a journal towards the end of her employment to have a record of her interactions with the Tribal Council (whereas DD did not recall giving that advice to AO). AO also described Vungarala as "normal" at the October 27, 2014 Investment Committee meeting, whereas DD described him as "agitated." Vungarala points to one other instance where AO's and DD's testimony differed in connection with the unrelated termination of another Tribal employee, and Vungarala asserts that AO lied when she testified that she never referred to the Tribe as "the company" (which he notes she did in several places in the record).

Vungarala's asserted contradictions in the witnesses' testimony, however, fall well short of the substantial evidence necessary to overturn the Hearing Panel's extensive credibility determinations on appeal. The testimony of AO, DD, and MB was generally consistent on the issues germane to this appeal. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *16 (Sept. 30. 2016) (finding a lack of substantial evidence to overturn credibility determinations where witnesses testified similarly); *Alvin W Gebhart*, Exchange Act Release No. 53136, 2006 SEC LEXIS 93, at *19 n.18 (Jan. 18, 2006) (holding that similarities among investors' testimony strengthens the reliability of that testimony), *rev'd in part and remanded on other grounds*, 255 F. App'x 254 (9th Cir. 2007). We reject Vungarala's claim that the Tribe's witnesses were biased and their testimony cannot serve as the basis for findings of fraud. The Hearing Panel had ample information concerning the Tribe's witnesses and any potential biases (such as AO's termination from the Tribe and belief that Vungarala caused her to be fired), and it nonetheless found that, "[w]hile it is clear that the members of the Tribe who testified feel betrayed by Vungarala, that sense of betrayal is not sufficient reason to doubt their testimony."

We also agree that the Investment Committee meeting minutes support the Hearing Panel's credibility findings. We reject Vungarala's attempts to undermine this corroborating

evidence. For example, Vungarala argues that the June 27, 2011 minutes are fabricated and out of order because "very little was discussed" during the final 30 minutes, as allegedly evidenced by the small amount of text that was redacted in connection with this discussion (and which would support his claim that he was not present when AO stated that he would not get paid on the Tribe's transactions). We agree with the Hearing Panel that the minutes do not appear to be out of order, and they corroborate the testimony of the Tribal witnesses. Vungarala's speculation that little was discussed in the redacted section because of the small amount of redacted text is not supported by the record, and contradicted by the witnesses' testimony.[44]

We also reject Vungarala's argument that the typographical error in the minutes that Vungarala "is not getting paid by with [sic] the company," and that "the company" refers to the Tribe, show that he did not make any misrepresentations or omissions because it was true that Vungarala was not getting paid by the Tribe for the purchases. Even assuming that a reference to the company refers to the Tribe (which is not generally supported by the record), Vungarala's argument fails to address the inherent conflict of him receiving commissions on products that he was recommending to his employer, and it ignores the fact that the Tribe was paying Vungarala a salary as a full-time employee. It also ignores AO's testimony that, prior to the June 27, 2011 Investment Committee meeting, Vungarala told her that there would be no conflict if the Tribe used PKS because Vungarala "would not make any money off of" the Tribe's transactions.

Importantly, we also find that the Tribe's behavior subsequent to Vungarala's initial misrepresentations and omissions further supports the Hearing Panel's findings that the Tribe did not know that Vungarala was earning commissions on the Tribe's transactions. For example, later in 2011, AO advocated before the Tribal Council for a 10% bonus for Vungarala in connection with his employment contract's renewal. She testified that there "would be absolutely no reason for [her] to go and fight" for a bonus if she knew that Vungarala was earning millions of dollars in commissions on the Tribe's purchases. Similarly, the questions of AO and the Investment Committee during the October 27, 2014 Investment Committee meeting, the Tribe's questions in December 2014 (through its General Counsel) concerning exactly who was receiving commissions, and the Tribe's 2015 responses to FINRA's questions are all inconsistent with Vungarala's claim that he fully disclosed to the Tribe that he was earning commissions on its purchases. Conversely, Vungarala's efforts to conceal his commissions from the Tribe through multiple and repeated misrepresentations and omissions, and his refusal on

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[44] We acknowledge that the October 27, 2014 meeting minutes are not as thorough as the June 27, 2011 meeting minutes. They do, however, corroborate the testimony of AO, DD, and MB that Vungarala did not disclose that he personally was receiving commissions on the Tribe's non-traded REIT and BDC purchases. Further, we reject Vungarala's argument that ambiguities in the minutes, such as the statement that "PKS has agreed to allow the Tribe to use them with no strings attached," render them unreliable. Although AO believed that phrase meant that the Tribe had no agreement with PKS, and DD believed that PKS would not earn a fee, this has no bearing on Vungarala's misstatements and omissions concerning his commissions. Rather, it illustrates that the Tribal employees involved in the investment process were unsophisticated, as discussed herein. *See infra* Part IV.B.2.d.

several occasions to directly answer questions about whether he was receiving commissions on the Tribe's REIT and BDC purchases, further bolster the Hearing Panel's findings that Vungarala was not credible.

b. Vungarala's Misrepresentations and Omissions Were Material

Second, we find that Vungarala's misrepresentations and omissions were material, and he had a duty to disclose his receipt of commissions on the Tribe's non-traded REIT and BDC purchases. A fact is considered material if there is a substantial likelihood that a reasonable investor would have considered the misrepresentation important in making an investment decision and disclosure of the misstated fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *Dep't of Enforcement v. Fillet*, Complaint No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *29 (FINRA NAC Oct. 2, 2013) ("[i]nformation is material if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]" and it would be viewed as having significantly altered the total mix of information available), *aff'd in rel. part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142 (May 27, 2015).

Further, and in connection with Vungarala's omissions, the duty to disclose material facts arises "whenever a disclosed statement would be misleading in the absence of the disclosure of additional material facts needed to make it *not* misleading," and "is unambiguous where a securities professional holds a position of trust and confidence with, or is a fiduciary to, their customer." *See Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *70-71. Further, "[w]hen recommending a security to a customer, a representative has a duty to disclose material adverse facts of which [he] is aware such as an economic self-interest because such facts could influence the representative's recommendation." *McGee*, 2017 SEC LEXIS 987, at *19. "Investors must be permitted to evaluate overlapping motivations through appropriate disclosures, especially where one motivation is economic self-interest." *Scholander*, 2016 SEC LEXIS 1209, at *16-17.

Here, the fact that Vungarala would be earning commissions (generally 85% of the 7% commission paid to PKS) on any purchases of non-traded REITs or BDCs by the Tribe through PKS, while he was also serving as the Tribe's full-time Investment Manager, was a material fact that Vungarala had a duty to disclose. A reasonable investor would have considered important the fact that one of its full-time employees, who was advising it to purchase approximately $190 million worth of a particular product, was earning a commission on each and every such recommendation (above and beyond his salary and other compensation as a Tribal employee). DD testified that it would have been important for the Tribe to know about Vungarala's commissions when determining whether to purchase non-traded REITs or BDCs. In fact, he stated that the Investment Committee would not have supported Vungarala's recommendations had it known he would be receiving commissions because the Tribe would not have wanted Vungarala to potentially wrongly guide the Tribe to increase his financial gain. *Cf. Scholander*, 2016 SEC LEXIS 1209, at *20-21 (finding that at a minimum, payment by an issuer to a registered representative had the potential to influence the representative's recommendation "and it casts doubt on the sincerity" of the recommendation).

Vungarala misrepresented that he would not make money on the Tribe's transactions and that there would be no conflict with using PKS, subsequently failed to disclose that he was earning commissions on the Tribe's transactions, and repeatedly misled the Tribe during numerous presentations concerning the Tribe's investments where he discussed fees and expenses related to a REIT or BDC investment, but not his own receipt of commissions. Vungarala was required to disclose to the Tribe this information, and his failure to do so rendered misleading his general statements concerning fees and costs associated with the purchases by implying that he was not personally receiving commissions. Vungarala's dual-role as a Tribe employee and the Tribe's registered representative also required him to affirmatively disclose the conflict presented by his receipt of commissions on the Tribe's investments, and distinguishes this case from authorities holding that a registered representative's ordinary compensation is not a material fact that he is obliged to disclose. *See McGee*, 2017 SEC LEXIS 987, at *20 (stating that "[w]hen a broker-dealer has a self-interest (other than the regular expectation of a commission) in serving the issuer that could influence the recommendation, it is material and should be disclosed" and finding that broker fraudulently failed to disclose compensation from issuer); *cf. United States v. Skelly*, 442 F. 3d 94, 97-98 (2d Cir. 2006) (holding that a registered representative "is under no inherent duty to reveal his compensation" and only must disclose his compensation if he had assumed a duty to do so); *United States v. Alvarado*, 2001 U.S. Dist. LEXIS 21100, at *27 (S.D.N.Y. 2001) (stating that "[i]n ordinary circumstances, the compensation of a registered representative is not a material fact to the transaction being entrusted to him"), *aff'd*, 84 F. App'x 162 (2d Cir. 2003).

We also find that the Tribe's Investment Policy, which prohibited employees from engaging in activity that could conflict with "the proper execution and management of the investment program, or that could impair their ability to make impartial decisions," supports our finding that Vungarala's commissions were a material fact that he was required to disclose.[45] *Cf.*

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[45] Although Vungarala tried to distinguish those occasions when he was acting as the Tribe's investment adviser from when he was acting as its registered representative, he testified that there "definitely was a conflict because I was a PKS registered rep and an employee. I disclosed that to [AO]. And I disclosed that to the [Investment Committee] and right from the beginning that conflict of interest from day one because I was a registered rep of PKS the day I entered my employment." We reject Vungarala's attempt to avoid liability for his fraudulent misrepresentations and omissions based upon his purported role when serving the Tribe (a distinction that was lost on the Tribe and not supported by Vungarala's employment contracts, which made no such distinction).

We also reject Vungarala's arguments that the Hearing Panel relied on employment law, and Vungarala's breach of his employment contract, to find him liable for fraudulent misrepresentations and omissions. The fact that Vungarala was employed as the Tribe's full-time Investment Manager, while also serving as the Tribe's registered representative, is relevant to the materiality of Vungarala's misrepresentations and omissions and whether Vungarala had to disclose his economic self-interest in his recommendations to the Tribe. He was so required, but failed to do so.

Scholander, 2016 LEXIS 1209, at *17 (finding that applicants' failure to disclose their business relationship with issuer of securities that they recommended violated their duty to disclose conflicts of interest to their customers). At a minimum, Vungarala's receipt of commissions on his recommendations to the Tribe that it purchase non-traded REITs and BDCs could have impaired his impartiality in giving the Tribe this investment advice. Further, AO and DD believed that the Investment Policy prohibited Vungarala from personally benefitting from the Tribe's investments by receiving commissions, and the Tribe's General Counsel believed that at a minimum, the Investment Policy required Vungarala to fully disclose to the Tribe that he was earning commissions on the Tribe's investments.

c. Vungarala Acted with Scienter

Third, Vungarala acted with the requisite scienter in making his misrepresentations and omissions. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (defining scienter as a "mental state embracing intent to deceive, manipulate, or defraud"); *see also Dep't of Enforcement v. Ahmed*, Complaint No. 2012034211301, 2015 FINRA Discip. LEXIS 45, at *77 n.78 (FINRA NAC Sept. 25, 2016) (holding that scienter may be established through reckless conduct) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3), *aff'd*, 2017 SEC LEXIS 3078; *Fillet*, 2013 FINRA Discip. LEXIS 26, at *35 ("Reckless conduct includes a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.").

When Vungarala began his fraudulent misconduct, he had worked at the Tribe for approximately two-and-a-half years. He knew that AO and other members of the Treasury Department lacked sophistication, and they relied upon and trusted him for guidance.[46] With this knowledge, Vungarala initially told AO that Schwab did not offer REITs, and that if the Tribe wanted to use Schwab, it would charge the Tribe a large fee. Vungarala intentionally misrepresented these facts to encourage the Tribe to use PKS to purchase non-traded REITs and BDCs so that he would earn commissions, and he then intentionally misrepresented to AO that there would be no conflict of interest if the Tribe used PKS because he would not make any money from the Tribe's transactions. He then allowed AO to repeat these misstatements to the Investment Committee. Thereafter, Vungarala repeatedly obfuscated his receipt of commissions through general statements about fees and costs that excluded any disclosure that he personally received commissions. Even when directly confronted with questions concerning his commissions in October 2014, Vungarala concealed from the Tribe that he had been receiving

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[46] Vungarala states "[h]ow could [he] have dared to hope that, in the face of the Tribe's internal review procedure" his receipt of commissions "would have been shielded from view?" Vungarala's argument ignores his role as the Tribe's Investment Manager, the Tribe's reliance upon Vungarala to provide it with investment advice and guidance, his false statements and omissions concerning his commissions, and Vungarala's awareness that the Tribe's process appeared more robust on paper than it was in practice.

millions of dollars in commissions on the Tribe's purchases. Vungarala knew that the Tribe did not understand that he was receiving commissions (indeed, it did not appear to even understand that PKS was earning commissions on its purchases until October 2014), and he continued to keep the Tribe in the dark regarding the financial benefit he received from his recommendations. Vungarala made his misrepresentations and omissions with full awareness and knowledge of the Tribe's Investment Policy and its prohibition on engaging in activities that would impair his ability to make impartial decisions with respect to the Tribe's investments.

We agree with the Hearing Panel that Vungarala had a motive to deceive the Tribe, which further supports our finding that he acted with scienter. *See Dep't of Enforcement v. Nicolas*, Complaint No. CAF040052, 2008 FINRA Discip. LEXIS 9, at *48 (FINRA NAC Mar. 12, 2008) (holding that while it is not necessary to show a motive to prove that a respondent acted with scienter, the profits earned by respondent as a result of his fraud were "obvious motive" to support findings of liability). Vungarala, despite his nearly six-figure salary from the Tribe upon becoming an employee, characterized himself as working "pro bono," and he "took it to prayer" when he discovered that the individual who had previously managed the Tribe's investments made significantly more money than he did. Vungarala also felt that he was an outsider at the Tribe and that the Tribe's other employees mistreated him. Further, Vungarala was admittedly attempting to improve his financial situation after he and his wife liquidated their non-real estate assets. Based upon all of the foregoing, we find that Vungarala acted intentionally (or, at a minimum, recklessly).

d. Vungarala's Arguments Are Without Merit

On appeal, Vungarala makes numerous arguments that he did not engage in fraudulent misconduct with respect to his commissions. For example, he asserts that he did not make any fraudulent misrepresentations or omissions because the Tribe knew—or should have known—that he was receiving commissions. He points to disclosures in the prospectuses and other documents received by the Tribe, such as the "Commission Statements" that he submitted to the Tribe to be reimbursed for the Minimum Production Fee charged by PKS and other reimbursable expenses. The credible testimony and other evidence showed, however, that the Tribe did not know that Vungarala was receiving commissions on the Tribe's purchases. Moreover, we find that Vungarala's liability for his misrepresentations and omissions does not hinge on the Tribe's receipt of documents disclosing generally the fees received by the broker-dealer manager for the offering and costs associated with an investment in the non-traded REITs and BDCs. *Cf. Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *81 (rejecting respondents' argument that a broker's misrepresentations are rendered immaterial when written risk disclosures are made available to customers); *cf. also Larry Ira Klein*, 52 S.E.C. 1030, 1036 (1996) ("Klein's delivery of a prospectus to [the customer] does not excuse his failure to inform her fully of the risks of the investment package he proposed."); *Dep't of Mkt. Regulation v. Field*, Complaint No. CMS040202, 2008 FINRA Discip. LEXIS 63, at *36 (FINRA NAC Sept. 23, 2008) ("[E]ven

assuming . . . that he had sent official statements to each customer prior to the customer's purchase, this does not excuse his fraudulent misrepresentations.").[47]

Further, with respect to the Commission Statements and Minimum Production Fee, AO testified that, other than the first one or two Commission Statements, she did not review or process them and they were reviewed by administrative staff simply to ensure that Vungarala had adequate documentation to support his requests for reimbursement. AO's testimony also made it clear that she did not understand the information disclosed in the statements or the significance of the Minimum Production Fee. Further, nothing on the statements revealed that any payout was related to the Tribe's investments.

Vungarala further posits that because the Tribe was sophisticated, it knew, or had to have known, that he was receiving commissions on the Tribe's investments in non-traded REITs and BDCs. In support of this argument, Vungarala points to the Tribe's multi-step investment process (including review by the Tribe's Legal Department). Based upon the record before us, we reject Vungarala's argument concerning the Tribe's sophistication. Setting aside that Vungarala's argument again ignores the credible testimony of AO, MB, and DD, and other corroborating evidence in the record that the Tribe did not know that Vungarala was earning a commission, sophisticated and experienced investors are entitled to the protections of the anti-fraud provisions of the Exchange Act and FINRA's rules. *See Lester Kuznetz*, 48 S.E.C. 551, 554 (1986) (rejecting argument that customers' experience negated registered representative's liability for fraud and holding that customers' investment experience did not give him "license to make fraudulent representations"), *petition for review denied*, 828 F.2d 844 (D.C. Cir. 1987).

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[47] Vungarala argues that the Tribe "was presented with all the facts" in the prospectuses and was "willfully blind" to such facts. He points to several cases declining to find liability on these grounds. These cases, however, are inapplicable to this matter. In *Myers v. Finkle*, the court reversed the lower court's decision granting summary judgment in favor of the defendant in a private securities action because it found that the plaintiffs had presented genuine issues of material fact concerning whether they were justified in relying on the defendant's oral misrepresentations that conflicted with documents provided to them in connection with the investment. 950 F.2d 165, 167 (4th Cir. 1991). Whether the Tribe was justified in relying upon Vungarala's misstatements and omissions in light of the prospectuses language, however, is not relevant to our analysis. *See Fillet*, 2013 FINRA Discip. LEXIS 26, at *19 n.7 ("Unlike a private litigant, however, FINRA need not show justifiable reliance upon the alleged misrepresentation, omission or fraudulent device, nor damages resulting from such reliance."). Similarly, *Nettles v. Childs*, 100 F.2d 952 (4th Cir. 1939), involved the potential liability of preferred shareholders, who indirectly and unknowingly owned shares in a bank under South Carolina law. It did not involve a regulator's claim for misrepresentations and omissions under the Exchange Act. Likewise, *U.S. Bank, N.A. v. UBS Real Estate Sec., Inc.*, 205 F. Supp. 3d 386, 425 (S.D.N.Y. 2016), involved a claim for breach of contract and whether the defendant had knowledge that certain representations and warranties had been breached under state law.

Regardless, the evidence shows that the Tribe (and in particular the individuals involved in the investment process who testified at the hearing) was not sophisticated. For example, AO's investment experience was limited to her 401(k) account, and MB similarly had little investment experience prior to joining the Treasury Department. REITs and BDCs were new concepts to both AO and MB, and Treasury Department employees did not understand the exact relationship between Vungarala and PKS. AO also did not understand the few Commission Statements that she reviewed, and the Treasury Department relied upon, and deferred to, Vungarala's judgment. Similarly, DD testified that, the Investment Committee relied upon Vungarala, that it generally reviewed the proposed REIT and BDC investments at a high level, and that no specific qualifications were required to be a member of the Investment Committee. DD further testified that he did not know what a registered representative was or what several FINRA registrations were, and he did not know the difference between a registered representative and an investment adviser. Vungarala himself testified that when he joined the Tribe, the way in which it traded in its account through Schwab was not what he would have expected from an institutional investor.[48] For example, he testified that the Tribe had no electronic research capabilities or access to research, had to call in every trade, and had no online access.[49]

Further, although the Tribe had a multi-layer process in place to review Vungarala's recommendations of non-traded REITs and BDCs, the record generally does not show that the Tribe was focused on the granularity of the specific REIT and BDC investments, other than at the beginning of the process where Vungarala brought a recommendation to the Treasury Department and then presented it to the Investment Committee (and it was at these levels where Vungarala repeatedly made his misrepresentations and omissions concerning his commissions). And although the Legal Department reviewed prospectuses, there is no evidence that it reviewed the prospectuses with a view towards assessing Vungarala's commissions, and the Legal

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[48] We also reject Vungarala's argument that the Tribe is sophisticated because it is deemed an institutional account for purposes of a registered representative's customer specific suitability requirements under FINRA Rule 2111. Enforcement did not allege that Vungarala violated his obligations to recommend to the Tribe suitable securities, and we make no findings in connection therewith.

[49] Vungarala argues that a letter and a chain of emails in the record demonstrate the "sophistication and knowledge" of the Firm's Chief Financial Officer, "a licensed CPA" and member of the Investment Committee and Tribal Council, in discharging his Tribal duties. These documents, however, do not provide evidence that the Chief Financial Officer was a sophisticated investor. The letter appears to be a form letter concerning the Tribe's tax-exempt status. Further, the 2010 emails between the Chief Financial Officer and the Tribe's representative at Schwab ask for additional fund recommendations for the Tribe to replace a fund that charged high fees, to set up a meeting to discuss the Tribe's 401(k) plan, and a question concerning the exact participants in one of the funds available through the 401(k). We also note that in one email, the Chief Financial Officer states that Vungarala was out of the office and he would recommend to the Investment Committee a replacement fund when he returned, which bolsters our findings that the Tribe relied upon Vungarala for its investment decisions.

Department as a matter of course recommended against the Tribe's purchase of non-traded REITs and BDCs on grounds not related to costs or commissions. We further note that the Tribe went along with Vungarala's more than 200 recommendations in all but two instances during the three-and-a-half year period in question.

Vungarala also argues that four instances in 2014, where the Tribe purchased non-traded REITs with the understanding that PKS was not recommending the investment, demonstrate the Tribe's sophistication and that it exercised independent judgment in determining whether to invest. We disagree and find that these purchases are not relevant to Vungarala's liability. Moreover, these purchases do not negate the abundant evidence showing that the Tribe was not sophisticated. In each instance, the Tribe sent a letter to PKS stating that its Investment Committee and Treasury Department had reviewed the investment and that the Tribe understood the risks associated with the investment. Vungarala's argument concerning these four purchases ignores that the Investment Committee and Treasury Department relied upon Vungarala to advise them concerning these and the other non-traded REIT and BDC purchases; the fact that PKS also did not recommend these four investments is not germane to whether the Tribe is sophisticated or Vungarala's fraudulent misconduct.[50]

Vungarala next argues that the fact that he earned commissions was immaterial to the Tribe, as evidenced by his assertion that it made several more REIT purchases after it discovered he had been earning commissions. Vungarala's argument lacks factual support. The evidence shows that, although the Tribe purchased non-traded REITs on four dates in November 2014, it did not make any additional REIT or BDC purchases after Vungarala finally disclosed to the Tribe that he was earning commissions at the December 21, 2014 Tribal Council meeting. Similarly, the fact that he may have maintained cordial relations with the Tribe in the several months after his disclosure (and that the Tribe did not immediately terminate him upon learning that he had been receiving commissions), even if true, does not impact our determination that Vungarala made fraudulent misrepresentations and omissions. At the time the Tribe learned that Vungarala had been earning commissions on its non-traded REIT and BDC purchases, only several weeks remained on his employment contract. Further, the Tribe's General Counsel informed FINRA that, while the Tribe was satisfied with the performance of the Tribe's portfolio during Vungarala's tenure as its Investment Manager, it was not satisfied when it learned that he received commissions on the Tribe's purchases.

Finally, in an attempt to undercut a finding that he acted intentionally in connection with his fraudulent misstatements and omissions, Vungarala argues that he could not have committed fraud because he placed the matter of his commissions on the Investment Committee's agenda in October 2014 (in connection with FINRA's new rule governing account statements for non-traded REITs and BDCs). We disagree. As set forth above, Vungarala did not disclose that he was earning commissions on the Tribe's transactions during this meeting (or any time prior to

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[50] Moreover, neither these letters from the Tribe nor PKS's various letters to the Tribe discussed herein demonstrate that Vungarala disclosed to the Tribe that he was receiving commissions; to the contrary, these communications are silent on the issue.

this meeting). Further, prior to this meeting, Vungarala learned that FINRA was examining his interactions with the Tribe. He did not explain why he wanted to discuss with the Investment Committee FINRA's new rule (which was not effective until April 2016) in October 2014. Instead, Vungarala appears to have initiated a general discussion with the Investment Committee concerning fees and expenses related to non-traded REITs and BDCs to provide cover for his numerous misrepresentations and omissions of material facts concerning his personal receipt of commissions.

* * *

In sum, we affirm the Hearing Panel's findings that Vungarala intentionally made misrepresentations and omissions of material facts in connection with his receipt of commissions on the Tribe's purchases of non-traded REITs and BDCs, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.

3. Vungarala's Fraud Concerning Volume Discounts

We also find that Vungarala intentionally or recklessly made misrepresentations and omissions of material fact concerning the Tribe's eligibility to receive volume discounts, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2110.

Vungarala failed to inform AO that the Tribe was eligible for volume discounts on its purchases of non-traded REITs and BDCs in different accounts held by the Tribe.[51] The Hearing Panel found his testimony to the contrary to be not credible, and on appeal Vungarala has not presented substantial evidence to overturn this finding. *See Manoff*, 55 S.E.C. at 1162 n.6. Indeed, instead of clearly informing AO that the Tribe could receive volume discounts across the Tribe's various accounts (which would decrease his commissions), he capitalized on AO's and the Tribe's reluctance to physically comingle funds in the Tribe's accounts by implying that this was necessary for the Tribe to receive volume discounts (it was not). Similarly, DD testified that Vungarala did not discuss with the Investment Committee the possibility of aggregating purchases across the different Tribal accounts to obtain volume discounts.

Vungarala also affirmatively misled MB when she asked him if the Tribe was eligible for volume discounts, and he informed her that the Tribe could not receive volume discounts because it had "to keep [the accounts] separate." Vungarala points to this discussion with MB as evidence that he disclosed the availability of volume discounts and that he and the Tribe

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[51] In his appellate briefs, Vungarala does not contest the fact that the Tribe was eligible to receive volume discounts across its different accounts. Regardless, a plain reading of the various prospectuses—as well as the actions of at least several REITs seeking to apply discounts across various Tribal accounts until advised by Vungarala that the Tribe did not wish to do so—demonstrates that it was.

"discussed and debated" the issue. This argument is contrary to the Hearing Panel's credibility findings and AO's and MB's testimony. We therefore reject it.[52]

Further, information concerning the Tribe's eligibility to receive volume discounts across the different Tribal accounts, which would have amounted to approximately $3.3 million for the Tribe to directly invest (versus paying PKS and Vungarala), was material information that Vungarala was obligated to disclose. A reasonable investor would have considered the availability, and purported waiver, of these discounts important when purchasing REITs and BDCs. *Cf. Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 541 (2d Cir. 1996) (stating that "[c]ases in which we have refused to find that representations were not material as a matter of law have involved misstatements or omissions that did, or at least had the potential to, cause the plaintiff financial harm"); *Dean Witter Reynolds, Inc.*, Exchange Act Release No. 43215, 2000 SEC LEXIS 1772, at *3 (Aug. 28, 2000) (stating that "[m]utual fund switching violates the antifraud provisions of the federal securities laws when registered representatives, in order to increase their compensation, induce investors to incur the costs" associated with switching funds); *Russell L. Irish*, 42 S.E.C. 735, 740-42 (1965) (holding that broker violated anti-fraud provisions of the Exchange Act where he, among other things, failed to disclose savings available to customers of combining purchases to exceed break point amount), *aff'd*, 367 F.2d 637 (9th Cir. 1966). DD testified that this information would have been "quite significant" to the Investment Committee in connection with its analysis of a particular recommendation because it would have maximized the Tribe's purchasing power and led to higher returns.

We further find that Vungarala acted with scienter in connection with these material misrepresentations and omissions. Vungarala knew, or was reckless in not knowing, that the Tribe was eligible to receive volume discounts across accounts; indeed, at a minimum, the REITs themselves put him on notice that the Tribe was eligible when several of them contacted him about giving the Tribe a discount. Despite this knowledge, and instead of clearly explaining to the Tribe its eligibility to receive these discounts, Vungarala failed to disclose such information to the Tribe (and misrepresented to MB the availability of the discounts). Vungarala also misled DJG concerning the Tribe's purported waiver of volume discounts to alleviate PKS's concerns. The Tribe's failure to receive volume discounts directly correlated to an increase in Vungarala's commissions.[53]

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[52] Vungarala argues that the prospectuses describe the availability of volume discounts. This fact, however, does not render immaterial Vungarala's misrepresentations to the contrary. *Cf. Brookstone Sec.*, 2015 FINRA Discip. LEXIS 3, at *81; *Klein*, 52 S.E.C. at 1036; *Field*, 2008 FINRA Discip. LEXIS 63, at *36. Moreover, AO testified that she did not read the prospectuses. Similarly, DD testified that the Investment Committee did not review prospectuses. And, although MB reviewed the prospectuses, she did so at Vungarala's direction, and like the rest of the Tribe, she relied upon Vungarala's advice and trusted him when he falsely told her that the Tribe was not eligible for volume discounts across its accounts.

[53] In addition, AO testified that the Tribe generally would invest between $500,000 and $1 million in a REIT or BDC, even if the Tribe intended to purchase more shares because the Tribe

[Footnote continued on next page]

Vungarala argues that he was merely negligent in connection with any misrepresentations or omissions, and acted upon his good faith belief that the Tribe's desire to keep each account separate (which he asserts was required by the Tribe's Investment Policy), as well as its privacy interests, required that it waive any volume discounts. We disagree, as the evidence shows that Vungarala intentionally or recklessly misrepresented the availability of these discounts across the Tribe's various accounts. Notwithstanding Vungarala's implications to the contrary, no physical commingling of these accounts was necessary in order for the Tribe to receive a discount.

Moreover, the Investment Policy did not preclude the Tribe's receipt of volume discounts across accounts, and the Tribe's interest in protecting its privacy and avoiding disclosure of its ownership interests in various non-traded REITs and BDCs would not have been protected by waiving volume discounts. The Exchange Act provides that any person who directly or indirectly owns 5% or more of a class of any equity security for a registered entity must file a statement of such ownership. *See* 15 U.S.C. § 78m(d)(1); 15 U.S.C. § 78m(g)(1) (providing that "[a]ny person who is directly or indirectly the beneficial owner of more than five per centum of any security of a class described in subsection (d)(1) . . . shall file with the Commission" a statement identifying itself and the number of shares it owns). Exchange Act Rule 13d-3 defines "beneficial owner" to include any person who directly or indirectly has the power to vote or direct the vote of such security or the power to dispose of such security. It is undisputed that the Tribe, as the beneficial owner of each account, had such powers. Thus, the Tribe's disclosure obligations were the same regardless of whether it received a volume discount.[54]

Finally, Vungarala argues that because Schwab purportedly aggregated trades on a per account basis to determine commissions (rather than across the Tribe's various accounts), he lacked the necessary scienter to demonstrate fraud. Regardless of how Schwab may have aggregated the Tribe's trades for calculating commissions, the non-traded REITs and BDCs purchased by the Tribe offered volume discounts across the various Tribe accounts. If this was not clear to Vungarala upon his review of the documents, it should have been once several REITs began to contact him regarding offering the Tribe discounts across its accounts.

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wanted to "see how it goes." In several instances, however, this pattern of purchasing benefited Vungarala and harmed the Tribe because it caused the Tribe to miss volume discounts across accounts because several of the REITs and BDCs had 90-day time limits on the purchases to be combined for volume discounts. Further, in one instance, the Tribe lost a volume discount on a per account basis because the Tribe's second purchase fell outside of the 90-day time limitation.

[54] Even in light of the Tribe's concerns with protecting its privacy, and setting aside that Vungarala insinuated to the Tribe that these concerns would somehow be addressed by waiving volume discounts (despite the Tribe's beneficial ownership of all the various accounts), Vungarala had a duty to truthfully and fully disclose material information to the Tribe to let it make an informed decision whether its privacy concerns outweighed the substantial monetary savings. He failed to do so.

4. Vungarala Is Statutorily Disqualified

We also affirm the Hearing Panel's findings that Vungarala acted willfully when he intentionally made misrepresentations and omissions of material facts, in violation of the Exchange Act and the rules promulgated thereunder. "A willful violation under the federal securities laws simply means 'that the person charged with the duty knows what he is doing.'" *Robert D. Tucker*, Exchange Act Release No. 68210, 2012 SEC LEXIS 3496, at *41 (Nov. 9, 2012) (citing *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000)). Vungarala knew his representations that he would not receive commissions on the Tribe's purchases of non-traded REITs and BDCs were not true, and he intentionally failed to disclose—on numerous occasions—that he was receiving commissions. He also failed to inform the Tribe that it was eligible for volume discounts, and he made misrepresentations that the Tribe was not so eligible, so that he could maximize his financial gain. Vungarala acted willfully, and he is therefore subject to statutory disqualification. *See* 15 U.S.C. § 78c(a)(39)(F) (incorporating by reference Exchange Act Section 15(b)(4)(D), which together provide that a person is subject to statutory disqualification if he has willfully violated any provision of, among other things, the Exchange Act and its rules and regulations); FINRA By-Laws, Art. III Sec. 4 (providing that a person is subject to statutory disqualification if he is disqualified pursuant to Exchange Act Section 3(a)(39)).

V. Vungarala's Procedural Arguments Lack Merit

Vungarala makes several procedural arguments on appeal. For instance, he argues that the proceeding was unfair because the Tribe "controlled the flow of information" in the case and he could not subpoena Tribal witnesses to testify. We disagree. Exchange Act Section 15A(b)(8) provides that FINRA disciplinary proceedings must be conducted in accordance with fair procedures. *See Scott Epstein*, Exchange Act Release No. 59328, 2009 SEC LEXIS 217, at *51 (Jan. 30, 2009), *aff'd*, 416 F. App'x 142 (3d Cir. 2010). The Exchange Act requires that FINRA "bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record." *See* 15 U.S.C. § 78o-3(h)(1). The proceedings before the Hearing Panel were fair, conducted in accordance with FINRA rules, and Vungarala had ample opportunity to present evidence and cross-examine the Tribal witnesses that testified. Vungarala's inability to subpoena witnesses from the Tribe does not render these proceedings unfair.[55] *See James Elderidge Cartwright*, 50 S.E.C. 1174, 1179 n.10 (1992) (stating that "we

[55] Vungarala, citing to criminal case law concerning "missing witness charges" to juries, states that missing Tribal witnesses (such as the Tribe's General Counsel and Chief Financial Officer) "were so central to the Tribe's investment practices" that the Hearing Panel should have inferred that the witnesses' testimony would have been contrary to Enforcement's positions. We reject Vungarala's argument. FINRA proceedings are not criminal in nature, and such case law is inapplicable here. *See Pac. On-Line Trading & Sec., Inc.*, 56 S.E.C. 1111, 1123 n.21 (2003) (holding that FINRA proceedings are not criminal matters). Moreover, Enforcement had no authority or power to subpoena Tribal witnesses and procure their testimony, which renders any such inference inappropriate. *See U.S. v. Mittelstaedt*, 31 F.3d 1208, 1216 (2d Cir. 1994) (holding that the district court did not abuse its discretion in refusing to give the jury a missing

[Footnote continued on next page]

are not persuaded by Cartwright's argument that the NASD's disciplinary procedures are unfair because they do not confer on respondents discovery power and the right to subpoena witnesses"); *Dep't of Enforcement v. Casas*, Complaint No. 2013036799501, 2017 FINRA Discip. LEXIS 1, at *37 (FINRA NAC Jan. 13, 2017) (same).

Vungarala also argues, as he did before the Hearing Panel, that Enforcement "cherry-picked" its witnesses and should not have filed the complaint against Vungarala based upon the evidence that it had (which he claims was one-sided and "spoon-fed" to it by the Tribe).[56] We find that Enforcement did not abuse its prosecutorial discretion by bringing charges against Vungarala. *See Dep't of Enforcement v. Wedbush Sec., Inc.*, Complaint No. 20070094044, 2014 FINRA Discip. LEXIS 40, at *80-81 (FINRA NAC Dec. 11, 2014) ("It is well established that Enforcement has broad prosecutorial discretion when deciding who and what violation to charge."), *aff'd*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794 (Aug. 12, 2016), *aff'd*, 719 F. App'x 724 (9th Cir. 2018). Further, Enforcement was entitled to present the evidence that it believed supported its case, including selecting which witnesses to testify. *See Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *18 n.18 (June 2, 2016) (rejecting argument that FINRA improperly failed to call certain individuals as witnesses). We therefore reject Vungarala's suggestion that Enforcement's failure to call the Tribal Chief as a witness was improper.

Finally, Vungarala argues that Enforcement's case "turns on a less than complete airing of the facts" and this proceeding is "antithetical to the Brady doctrine." *See Brady v. Maryland*, 373 U.S. 83 (1963) (generally requiring that prosecutors turn over any exculpatory evidence to defendants). The Brady doctrine, however, is inapplicable to FINRA disciplinary proceedings. *See Dep't of Enforcement v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *44 (FINRA NAC Dec. 29, 2014), *aff'd*, 2016 SEC LEXIS 1209. "Instead, FINRA rules set forth the scope of Enforcement's responsibilities concerning exculpatory evidence." *Id.* (citing FINRA Rule 9251(b)(3)). There is no evidence that Enforcement failed to

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[cont'd]

witness charge and stating that "[a] missing witness charge inviting the jury to infer that the testimony of an uncalled witness might have favored a specified party is appropriate if production of that witness is peculiarly within [the] power of the other party"). Finally, Vungarala's argument that the General Counsel and Chief Financial Officer were vital to the Tribe's investment process and the allegations of Enforcement's complaint is not supported by the record.

[56] Vungarala asserts that the Tribe selectively provided Enforcement with evidence so that it could prevail in an arbitration claim that it filed against Vungarala and PKS (which claims that Vungarala's recommendations were unsuitable). There is no evidence supporting Vungarala's assertion. Moreover, Enforcement did not charge Vungarala with suitability violations in this disciplinary proceeding. Vungarala has not articulated how any findings in this proceeding that Vungarala violated anti-fraud rules and regulations would bear upon the Tribe's pending arbitration claim.

turn over to Vungarala any exculpatory evidence in its possession concerning this matter pursuant to FINRA's rules.[57]

VI. Sanctions

The Hearing Panel barred Vungarala for his fraudulent misrepresentations and omissions related to his commissions. It also ordered that he disgorge $9,682,629, which represents the total amount of commissions he received in connection with the Tribe's non-traded REIT and BDC purchases. The Hearing Panel separately barred Vungarala for his fraudulent misrepresentations and omissions related to the Tribe's eligibility for volume discounts, and it stated that it would have ordered Vungarala to disgorge the amount of commissions he received on volume discounts that the Tribe lost on account of Vungarala's misconduct (approximately $2.8 million), but this sum was already included in the $9.6 million disgorgement order. For the reasons set forth below, we affirm these sanctions.

A. Bars Are Appropriate for Vungarala's Misconduct

Conduct that violates the antifraud provisions of the federal securities laws is "especially serious and subject to the severest of sanctions under the securities laws." *Scholander*, 2016 SEC LEXIS 1209, at *36 (citing *Marshall E. Melton*, 56 S.E.C. 695, 713 (2003)). In determining the appropriate sanctions for this misconduct, we have considered FINRA's Sanction Guidelines ("Guidelines"), including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions.[58] For intentional misrepresentations or material omissions of fact, the Guidelines recommend that the adjudicator strongly consider barring an individual.[59] Where mitigating facts predominate, the guidelines

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[57] On appeal, Vungarala filed a motion to adduce additional evidence pursuant to FINRA Rule 9346. Vungarala based his motion not upon any specific document in his possession, but rather upon his belief that he would receive documents relevant to this appeal (such as meeting minutes and correspondence between Tribe members serving on committees) in connection with discovery related to the Tribe's pending arbitration action against him and PKS. The subcommittee empaneled to hear this matter denied Vungarala's motion because he failed to satisfy the standards set forth in Rule 9346(b). We find that the subcommittee properly denied Vungarala's motion, and we adopt its ruling as our own. *See* Rule 9346(b) (providing that a party seeking to adduce additional evidence must describe each item of proposed new evidence with specificity, show good cause for failing to introduce it below, and demonstrate that the evidence is material); *Dep't of Mkt. Regulation v. Burch*, Complaint No. 2005000324301, 2011 FINRA Discip. LEXIS 16, at *21-22 (FINRA NAC July 28, 2011) (rejecting respondent's motion to adduce additional evidence and finding that he failed to demonstrate that extraordinary circumstances existed to grant such relief).

[58] *See FINRA Sanction Guidelines* (2017), http://www.finra.org/sites/default/files/2017_Sanction_Guidelines.pdf [hereinafter "Guidelines"].

[59] *Guidelines*, at 90.

recommend suspending an individual in any or all capacities for a period of six months to two years.[60]

Based upon abundant aggravating factors, and the lack of any mitigating factors, we affirm the Hearing Panel's bars of Vungarala for his fraudulent misrepresentations and omissions. With respect to Vungarala's misrepresentations and omissions concerning his commissions, Vungarala engaged in a pattern of misconduct during a several-year period, which involved approximately $190 million in non-traded REIT and BDC purchases—all recommended by Vungarala.[61] Vungarala made affirmative misrepresentations in order to convince the Tribe to use PKS instead of Schwab, and he informed AO that there was no conflict of interest in using PKS because he would not make any money from the Tribe's non-traded REIT and BDC purchases. Vungarala then sat silently when AO repeated this falsity to the Investment Committee, and his subsequent presentations to the Tribe omitted any mention that he was earning commissions on the Tribe's investments. He also falsely told DD, in response to his questions, that he would not receive commissions on the Tribe's purchases. Even in the fall of 2014, when it was abundantly clear that the Investment Committee did not know that Vungarala received commissions on the Tribe's non-traded REIT and BDC purchases, Vungarala continued to obfuscate this fact (and did the same with the Tribe's General Counsel several months later).

Vungarala intentionally misrepresented and concealed his commissions to increase substantially his compensation; indeed, during the relevant period, Vungarala earned more than $9.6 million in commissions.[62] Vungarala abused his position of trust with the Tribe, a customer that he knew intimately from his two-and-a-half years of employment prior to the start of his misconduct, and Vungarala did not show any remorse for his misconduct.[63] Rather, he attempted to justify his misconduct, and his failure to waive commissions on the Tribe's purchases, by arguing that his charitable giving was a better use of the funds than increasing "someone else's profitability," and asserting that he "spent a lot of [his] personal time after hours, on the weekends" doing work for the Tribe and this was not what he "signed up for" when he became an employee of the Tribe.

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60 *Id.*

61 *See id.* at 7-8 (Principal Considerations in Determining Sanctions, Nos. 8, 9, 17).

62 *See id.* (Principal Considerations in Determining Sanctions, Nos. 10, 13, 16).

63 *See id.* (Principal Considerations in Determining Sanctions, Nos. 2, 19); *see also Dep't of Enforcement v. Newport Coast Sec., Inc.*, Complaint No. 2012030564701, 2018 FINRA Discip. LEXIS 14, at *196 (FINRA NAC May 23, 2018) (finding aggravating that respondent "abused the trust of these customers who relied on him to trade in their best interest"), *appeal docketed*, SEC Admin. Pro. No. 3-18555 (June 22, 2018).

Similarly, Vungarala intentionally or recklessly made misrepresentations concerning the Tribe's eligibility for volume discounts, and he concealed from the Tribe that it could receive millions of dollars in discounts. He likewise misled PKS that he had discussed volume discounts with the Tribe and that it had knowingly and voluntarily waived such discounts. These misrepresentations and omissions increased substantially Vungarala's payout, and he again capitalized upon his knowledge of the Tribe and its interest in keeping its financial matters private for his own financial gain. Rather than clearly explain to the Tribe exactly what was at stake (i.e., substantial discounts with no requirement that the Tribe physically comingle its accounts), he instead used words and phrases that he knew the Tribe would reject out-of-hand to falsely explain what was required for the Tribe to obtain such discounts, and the alleged risks of doing so.

In sum, Vungarala engaged in egregious misconduct by repeatedly misleading the Tribe over an extended period, for his own personal gain. Only aggravating factors exist here, and we find that Vungarala has demonstrated that he is unfit to continue in the securities industry and that bars from the securities industry are necessary to protect investors from future misconduct at his hands.

B. Disgorgement of Vungarala's Ill-Gotten Gains Is Appropriate

We also order Vungarala to disgorge the ill-gotten gains he earned on the Tribe's purchases of non-traded REITs and BDCs. The Guidelines provide that, where a respondent has obtained a financial benefit from his misconduct, we should consider ordering disgorgement of his ill-gotten gains when determining appropriate sanctions.[64] Here, Vungarala earned $9,682,629 in commissions in connection with the Tribe's non-traded REIT and BDC purchases. We find that disgorgement of Vungarala's commissions will serve to remediate his misconduct by eliminating the financial benefit directly resulting from it. Further, it will deter others from engaging in similar misconduct. We therefore order that Vungarala disgorge $9,682,629, plus interest from November 25, 2014 (the date of the Tribe's last purchase of non-traded REITs and BDCs) until paid.[65]

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[64] *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6); *see also Dep't of Enforcement v. Akindemowo*, Complaint No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *50-51 (FINRA NAC Dec. 29, 2015) (ordering disgorgement and stating that "[d]isgorgement seeks to prevent a respondent's unjust enrichment"), *aff'd*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769 (Sept. 30, 2016).

[65] The Hearing Panel stated that it would have ordered Vungarala to disgorge the amount he received in commissions (approximately $2.8 million) related to the Tribe's missed volume discounts, but that such amount is already included in the order that he disgorge all commissions that he obtained by his fraud. We agree.

C. *Kokesh* Is Inapplicable to This Appeal

Finally, we reject Vungarala's argument that *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), requires that we vacate the bars and disgorgement order because they are punitive penalties. We recently held that *Kokesh* is inapplicable to FINRA's imposition of sanctions, and Vungarala has provided no persuasive argument to the contrary. *See Newport Coast Sec.*, 2018 FINRA Discip. LEXIS 14, at *201 n.98 (holding that *Kokesh* "considered the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to Commission disgorgement actions filed in federal district courts" and "leaves intact Section 15A of the Exchange Act, which mandates FINRA to have rules allowing it to impose bars, suspensions, fines, and other fitting sanctions in its disciplinary proceedings").

Moreover, and contrary to Vungarala's argument, we are not ordering that Vungarala disgorge his ill-gotten gains under § 2462 (such that a five-year statute of limitations would make us unable to reach back to all of Vungarala's commissions), but rather pursuant to Exchange Act Section 15A to prevent Vungarala from gaining a financial benefit from his fraudulent misconduct and to deter others from engaging in similar misconduct. *See, e.g.*, *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *103 (July 2, 2013) (sustaining a FINRA disgorgement order and stating that FINRA may impose that sanction to "serve[ ] the remedial purpose of depriving [a respondent] of the benefit of his misconduct"), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472, 482 (7th Cir. 2014); *Kenneth L. Lucas*, 51 S.E.C. 1041, 1046 (1994) (rejecting argument that FINRA cannot order disgorgement and holding that FINRA is authorized to do so under Exchange Act Section 15A); *see also Krull v. SEC*, 248 F.3d 907, 914 & n.9 (9th Cir. 2001) (holding that § 2462 does not apply to SRO-imposed sanctions).[66] Even were we to assume that the five-year limit set forth in § 2462 applied here (it does not), Enforcement satisfied this time limitation by filing the complaint in February 2016 (i.e., within five years of the start of Vungarala's misconduct in June 2011).

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[66] Vungarala also cites to *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), for the proposition that "*Kokesh* means the lifetime bar imposed against Mr. Saad [by FINRA] is an impermissible penalty." We disagree. The D.C. Circuit in *Saad* merely directed the Commission "to address, in the first instance, the relevance—if any—of the Supreme Court's" *Kokesh* decision to the bar imposed upon the respondent in that case. *Id.* at 304.

VII. Conclusion

We affirm the Hearing Panel's findings that Vungarala made fraudulent misrepresentations and omissions, in willful violation of Section 10(b) of the Exchange Act, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. Accordingly, we bar Vungarala in all capacities for his misconduct, and we order that he disgorge $9,682,629, plus interest.[67] Vungarala is also ordered to pay hearing costs in the amount of $15,937.31, plus appeal costs of $1,421.63.

On Behalf of the National Adjudicatory Council,

Jennifer Piorko Mitchell,
Vice President and Deputy Corporate Secretary

[67] Interest shall accrue from November 25, 2014, until paid. The prejudgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a). *See Guidelines*, at 9 (Technical Matters). The bars are effective upon service of this decision.

EXHIBIT C

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 90476 / November 20, 2020

Admin. Proc. File No. 3-18881

In the Matter of the Application of

GOPI KRISHNA VUNGARALA

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDING

Former registered representative of FINRA member firm appeals from FINRA disciplinary action finding that he made fraudulent misrepresentations and omissions regarding his receipt of commissions and his customer's eligibility for volume discounts. *Held*, FINRA's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

Sharron E. Ash, *Brian S. Hamburger*, and *Frank E. Derby*, *Hamburger Law Firm, LLC*, for Gopi Vungarala.

Alan Lawhead, *Colleen Durbin*, *and Andrew Love*, for FINRA.

Appeal filed: November 1, 2018
Last brief received: April 5, 2019

Gopi Krishna Vungarala, formerly associated with FINRA member firm Purshe Kaplan & Sterling Investments, Inc. ("PKS"), seeks review of FINRA disciplinary action. FINRA found that Vungarala violated the federal securities laws and FINRA rules by making fraudulent misrepresentations and omissions regarding the commissions he received and his customer's eligibility for volume discounts. FINRA imposed a bar from associating with a FINRA member for each violation, ordered him to disgorge $9,682,629 in commissions plus interest, and assessed hearing and appeal costs. FINRA also found that Vungarala is subject to a statutory disqualification because he acted willfully. We sustain FINRA's findings of violations, determination of a statutory disqualification, and imposition of sanctions.

I. Background

Vungarala first associated with a FINRA member firm in 2004. From December 2007 through January 2015, which is the relevant period here, Vungarala was a registered representative with PKS, a registered broker-dealer, and an investment adviser representative with Sutterfield Financial Group, an SEC-registered investment adviser. In November 2008, Vungarala began working as an in-house investment manager for a sovereign Native American Tribe (the "Tribe").[1] The Tribe operates a resort and several casinos.

At the time of Vungarala's hiring, the Tribe primarily invested in stocks and investment-grade bonds, and had previously relied upon the advice of an outside investment manager to select specific investments. The Tribe had nine separate accounts, which it referred to as "trusts,"[2] to fund its operations, education and health programs, and member benefits. The separate accounts were set up for accounting purposes and the beneficiary of each account was the Tribe. The Tribe's Investment Policy stated that each account "is considered separate with respect to transactions" and that securities could only be moved between accounts to "settle a related obligation."

Vungarala was responsible for managing, evaluating, and monitoring the Tribe's investment portfolio. He worked in the Tribe's Treasury Department and reported to Angela Osterman, who was appointed the Tribe's Treasury Administrator less than a month before Vungarala was hired. Osterman did not analyze or select investments or read prospectuses. She focused on managing the Tribe's budget, authorizing leave for department employees, and ensuring that policies and procedures were followed. Her prior investment experience was limited to her personal retirement account. The Treasury Department also had two research analysts with little investment experience and no professional certifications. Vungarala gave the research analysts assignments and taught them how to put information together for presentations to the Investment Committee. Osterman and the research analysts did little independent research and viewed Vungarala as the expert on investments.

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[1] The Tribe's contract with Vungarala required him to have Series 7 and Series 63 licenses.

[2] The accounts were not held by a trustee and did not meet the legal definition of a trust.

Vungarala's employment contract and position description gave him responsibility for "perform[ing] all investment transactions" for the Tribe's investment portfolio, "develop[ing] and implement[ing] investment strategies" for the investment portfolio, and "manag[ing], evaluat[ing], and monitor[ing] the investment portfolio." From 2008 through mid-2011, Vungarala traded on behalf of the Tribe through Charles Schwab & Co. At that time, he had authority to invest without seeking prior approval from the Tribe. The Tribe initially paid Vungarala a salary of $99,500, which it subsequently increased to $120,000, with the potential for a 10% bonus if the Tribe's portfolio return exceeded the market return for the fiscal year. At Vungarala's request, the Tribe reimbursed him for the cost of renewing his securities licenses and his errors and omissions insurance. Vungarala testified that, upon being hired, he had no expectation of being paid commissions in connection with recommending the Tribe's investments.

At some point, Vungarala learned that the Tribe's previous outside financial adviser earned more than $1 million a year. In comparison, Vungarala believed his salary amounted to him working "pro bono." Vungarala also believed that the Tribe treated him poorly because he was not a tribal member, and felt that his office was too small and that his colleagues treated him as an underling.

The Tribe had an Investment Policy, and Vungarala testified that he knew he was supposed "to follow the investment policy and make decisions that basically adhere to the policy and the needs of the Tribe." The Investment Policy contained a conflict-of-interest provision prohibiting employees involved in the investment process from "personal business activity that could conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions." The Investment Policy also required employees involved in the investment process to "disclose any material interests in financial institutions with which they conduct business" and to "disclose any personal financial/investment positions that could be related to the performance of the investment portfolio." Vungarala testified that, as the Tribe's employee, he had a duty of good faith and fair dealing to the Tribe and was expected to make investments in the Tribe's best interest.

A. Vungarala misrepresented and omitted facts about his receipt of commissions while recommending that the Tribe invest in non-traded REITs and BDCs.

1. Vungarala recommended that the Tribe invest in non-traded REITs and BDCs and that it do so through PKS rather than Schwab.

As the Tribe's casino revenues declined over time, Vungarala faced pressure to increase the returns of the Tribe's investment portfolio. In mid-2011, Vungarala recommended that the Tribe invest in non-traded Real Estate Investment Trusts ("REITs")[3] and Business Development

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[3] REITs are companies that own and typically operate income-producing real estate or real estate-related assets. REITs provide a way for individual investors to earn a share of the income produced through commercial real estate ownership without having to buy commercial real estate. Non-traded REITs are registered with the SEC but are not publicly traded. *See*

(continued…)

Companies ("BDCs")[4] to replace bonds that were maturing or had been called. He said that the Tribe could not invest in REITs and BDCs through Schwab and recommended PKS. Vungarala told Osterman that there would be no conflict of interest if the Tribe went through PKS because Vungarala "would not make any money" from doing so. But the prospectuses for the non-traded REITs and BDCs provided that selling commissions of around 7% would be paid to unspecified managing dealers and participating brokers. PKS was one of the participating brokers and the only broker the Tribe used to purchase these products. The parties stipulated that Vungarala received 85% of commissions paid to PKS.

2. Vungarala misrepresented and omitted facts about the commissions he would receive from the purchases of the non-traded REITs and BDCs.

Vungarala guided his recommendations of non-traded REITs and BDCs through the Tribe's various committees.[5] He first discussed the applicable REIT or BDC with Osterman and the research analysts in the Treasury Department, who never rejected a recommendation Vungarala made with respect to REITs and BDCs. He then presented summaries, consisting mostly of marketing materials from the non-traded REIT or BDC, to the Investment Committee. After the Tribe invested in several REITs and BDCs, Vungarala directed the research analysts in the Treasury Department to reduce the summaries to provide only the name of the proposed investment, its offering process, the expected return, and the Tribe's exit strategy. The summaries never contained information regarding commissions or volume discounts.

Vungarala first presented non-traded REITs and BDCs to the Investment Committee in June 2011. Meeting minutes read into the record reflect that Osterman told the committee that, because Schwab did not offer non-traded REITs and BDCs, the Tribe could "utilize PKS, Gopi's brokerage firm." Osterman said that "the Tribe will not have to sign any agreements with them, PKS has agreed to allow the Tribe to use them with no strings attached." She added that "[t]here will be no conflict of interest on Gopi's behalf since he is not getting paid by with [sic] the company." Although Vungarala was present, he did not correct Osterman's statements.

Whenever the Investment Committee asked Vungarala to explain the fees and expenses associated with a particular non-traded REIT or BDC, he would use a white board and make only generic disclosures that did not include his receipt of commissions. Dustin Davis, a member of the Investment Committee, specifically asked Vungarala about the fee structure for the non-

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(…continued)

https://www.investor.gov/introduction-investing/investing-basics/investment-products/real-estate-investment-trusts-reits

[4] BDCs are a category of closed-end investment companies that make capital more readily available to small, developing, or troubled businesses. *See* www.sec.gov/info/smallbus/secg/rule2a-46-secg.htm

[5] Although Vungarala had the authority to invest through Schwab without prior approval from the Tribe, the Tribal Council had to approve every investment in REITs and BDCs.

traded REITs and BDCs several times. Vungarala told Davis that he was not receiving a commission, and that fees went toward "the packaging of REITs, due diligence, and expenses."

After the Investment Committee approved a recommendation from Vungarala, the recommendation went to the Legal Department for review. Although the Legal Department did not raise any concerns about fees, the Legal Department opposed each investment based upon its concern that purchasing REITs and BDCs would jeopardize the Tribe's sovereign immunity by subjecting it to arbitration in connection with any dispute. Notwithstanding the Legal Department's opposition, over the three-and-a-half years that Vungarala recommended that the Tribe invest in non-traded REITS and BDCs, the Tribal Council rejected only two out of more than 200 recommendations.[6]

From 2011 through 2014, the portion of the Tribe's portfolio devoted to non-traded REITs and BDCs increased from 0% to almost 23%—amounting to nearly $200 million. The REIT and BDC statements that PKS generated did not itemize commissions. Vungarala received $9,682,629 in commissions from PKS as a result of the sales of non-traded REITs and BDCs to the Tribe.

3. Vungarala continued to misrepresent and omit facts about his commissions even after disclosing that PKS received commissions from the purchases.

On October 27, 2014, the Investment Committee met and reviewed the fees and expenses associated with the REIT and BDC investments. Vungarala disclosed for the first time that PKS was receiving commissions. The meeting became contentious when Osterman said that she wanted to know who specifically received the commissions paid to PKS. Vungarala responded by referencing unnamed lawyers, a supervisor at PKS, and other recipients he did not specifically identify. An Investment Committee member asked Vungarala to send an email explaining the commissions. Vungarala sent an email explaining that 7% was paid to "PKS," and 3% went to the "XYZ sales team."[7] Vungarala did not disclose that he was a recipient of 85% of the commissions paid to PKS. Osterman then asked Vungarala to identify the sales team and Vungarala's supervisor. Vungarala did not respond. Although Vungarala testified that the Tribe's Council Treasurer, an individual who also served on the Investment Committee, told him to direct Osterman's inquiry to the Treasurer, no other evidence corroborates this testimony. In early November 2014, the Tribe extended Vungarala's contract through January 2015.

In mid-December 2014, the Tribe's general counsel contacted PKS to ask who received commissions on the Tribe's REIT and BDC purchases. Vungarala spoke with PKS's Chief Operating Officer and asked her to respond to the Tribe's general counsel that "[t]his fee does not get paid out to the registered representative in any manner." The Tribe's general counsel told Vungarala that PKS was only providing a fraction of the information that the general counsel had

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[6] The Tribal Council rejected one investment because the director of the issuer was involved in litigation, and one investment because it involved fracking, which the Tribe opposed.

[7] The "XYZ sales Team" does not appear to refer to any actual sales team.

requested and attributed the failure to Vungarala's intervention. Vungarala told the general counsel that, for privacy reasons, PKS could not release the information to him but only to the Chief and Sub-chief.

On December 21, 2014, Vungarala met with the Tribal Council and for the first time disclosed that he received 85% of the commissions paid to PKS. Vungarala told the Tribal Council that he had donated most of his commissions to charity. On January 18, 2015, Vungarala's contract with the Tribe expired.

B. Vungarala misrepresented and omitted facts about the Tribe's eligibility for volume discounts with respect to its purchases of non-traded REITs and BDCs.

The Tribe was eligible for volume discounts across the Tribe's non-traded REIT and BDC accounts if the total amount of purchases reached a threshold amount. Generally, a single investor may combine purchases in different accounts for purposes of reaching the threshold. Aggregating accounts for this purpose does not require any actual commingling of the accounts. As an investor's purchases reach higher threshold amounts, the investor obtains larger volume discounts, allowing the investor to buy more units of the investment for the same dollar amount. A volume discount is funded by reducing the commission to the selling broker-dealer. In other words, when a client forgoes a volume discount the selling broker-dealer will obtain higher commissions.

In 2013 and 2014, several REITs contacted Vungarala to discuss giving the Tribe volume discounts for purchases made across the Tribe's different accounts. Vungarala told the REITs and PKS that the Tribe did not want volume discounts because it wanted to keep the accounts "separate" and could not "commingle" the funds in the accounts. At some point after the Tribe made significant investments in non-traded REITs and BDCs, a Treasury Department research analyst asked Vungarala why the Tribe did not buy the REITs and BDCs all at once and then "delegate" them amongst the trust accounts in order to take advantage of volume discounts. Vungarala told the research analyst that the Tribe could not do that because it must keep the accounts "separate," and told Osterman that the Tribe could not do that because the Tribe's "trust accounts are separate and have separate governing documents." By forgoing volume discounts, the Tribe lost $3.3 million while Vungarala made an additional $2.8 million in commissions.

In 2014, PKS asked Vungarala to obtain documentation from the Tribe confirming that it wished to "keep the REIT transactions separate and not mixed," which was the justification Vungarala provided for declining volume discounts across accounts. Vungarala asked Osterman to draft a letter for the Chief and Sub-chief to sign that would confirm for PKS the separate nature of the trusts. Osterman drafted a letter stating that "[e]ach of [the Tribe's] trusts has its own purpose and funding obligations and cannot be co-mingled between each other." The letter did not reference volume discounts, and Vungarala did not explain to the Tribe that PKS's inquiry concerned volume discounts. Osterman circulated the letter to the Investment Committee and then to the Chief and Sub-chief, both of whom signed it.

In December 2014, PKS twice sought additional clarification from the Tribe regarding the decision to decline the volume discounts, specifically inquiring about the separate nature of the accounts. Although the record does not indicate to whom the first request for clarification

was directed, the Chief sent a letter to PKS on December 17, 2014, in which he stated that he was responding to PKS's request for clarification. The second request for clarification came by email from PKS on December 18, 2014, to Vungarala, the Council Treasurer, and the Chief. The Tribe's additional responses did not mention volume discounts.

In 2014, FINRA conducted a national review to determine whether customers purchasing non-traded REITs and BDCs were receiving the volume discounts to which they were entitled. FINRA staff issued requests for information to the top five wholesalers of non-traded REITs for 2013. In June 2014, FINRA staff noted that a majority of the potential missed volume discounts uncovered during the investigation were connected to investments made by the Tribe. All of these investments were made by Vungarala as the registered representative through PKS. When FINRA staff discovered that Vungarala was both an employee of the Tribe and a PKS registered representative, they viewed it as a potential conflict of interest.

In August 2014, FINRA sent a letter to the Tribe Chief and Sub-chief about one of the non-traded REIT wholesalers and asked that the Tribe contact FINRA. The Tribe did not initially respond to the letter; however, FINRA staff later spoke to the Tribe's general counsel. FINRA's inquiry caused the Tribe to question the recommendations that Vungarala had made.

C. FINRA found that Vungarala violated the federal securities laws and FINRA rules.

On February 4, 2016, FINRA's Department of Enforcement ("Enforcement") charged Vungarala with violating Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by: (1) willfully misrepresenting material facts and failing to disclose material facts to the Tribe by falsely informing the Tribe that he would not receive commissions in connection with its purchases of non-traded REITs and BDCs; and (2) willfully misrepresenting material facts and failing to disclose material facts to the Tribe with respect to its eligibility to receive volume discounts on purchases of non-traded REITs and BDCs.[8] After a hearing, a FINRA Hearing Panel found that Enforcement proved the charged violations. The Hearing Panel barred Vungarala from associating with a FINRA member firm for each violation and imposed disgorgement of $9,682,629 plus pre-judgment interest and hearing and appeal costs.

Vungarala appealed to FINRA's National Adjudicatory Council ("NAC"). The NAC affirmed the Hearing Panel's findings of liability and sanctions. The NAC also found that because Vungarala acted willfully he was subject to a statutory disqualification under Exchange Act Sections 3(a)(39)(F) and 15(b)(4)(D).[9] Vungarala timely filed this appeal.

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[8] PKS was charged with supervisory violations and subsequently settled with FINRA.

[9] 15 U.S.C. §§ 78c(a)(39)(F); 78o(b)(4)(D).

II. Analysis

Under Exchange Act Section 19(e)(1), we review FINRA disciplinary action to determine whether the associated person engaged in the conduct that FINRA found, whether such conduct violates the statutes and rules that FINRA specified, and whether FINRA's rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[10] We base our findings on an independent review of the record and apply the preponderance of the evidence standard.[11]

A. Vungarala committed fraud when he misled the Tribe about his commissions.

We find that Vungarala's misleading statements and omissions to the Tribe about the commissions he received from its investments in non-traded REITs and BDCs violated Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010.

Exchange Act Section 10(b) makes it unlawful "to use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in contravention of" Commission rules.[12] Exchange Act Rule 10b-5(b) prohibits "any untrue statement of a material fact or [omission of] a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security."[13] To establish a violation under these provisions, a preponderance of the evidence must demonstrate that Vungarala, acting with scienter and using the means or instrumentalities of interstate commerce, misrepresented a material fact, or omitted a material fact necessary to make a statement that he made not misleading, in connection with the purchase or sale of securities.[14]

FINRA Rule 2020 prohibits FINRA members from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."[15] FINRA Rule 2010 prohibits conduct inconsistent with just and equitable principles of trade.[16] A violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 constitutes a violation of FINRA Rules 2020 and 2010.[17] Vungarala does not

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10 *See* 15 U.S.C. § 78s(e)(1).

11 *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *5 (Feb. 13, 2015).

12 15 U.S.C. § 78j(b).

13 17 C.F.R. § 240.10b-5(b).

14 *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *4 (Mar. 31, 2016), *petition denied*, *Harris v. SEC*, 712 F. App'x. 46 (2d Cir. 2017).

15 FINRA Rule 2020.

16 FINRA Rule 2010.

17 *Scholander*, 2016 WL 1255596, at *4.

dispute that he recommended each of the non-traded REITs and BDCs, that his statements or omissions were in connection with the purchase or sale of securities, and that he used the means of interstate commerce. The remaining issues are whether Vungarala made misleading statements or omitted information about his commissions, whether Vungarala's receipt of commissions was material and required disclosure, and whether he acted with scienter.

1. Vungarala made misstatements about his commissions and omitted facts necessary to make statements he made about his commissions not misleading.

The record establishes that Vungarala made misstatements about his commissions in his communications with the Tribe and omitted facts necessary to make statements he made to the Tribe about his commissions not misleading. The Hearing Panel found that three Tribal employees testified credibly and consistently that Vungarala falsely told the Tribe he would not make money on investments that he recommended and that he never disclosed that he would receive commissions on the Tribe's investments prior to December 2014. Conversely, the Hearing Panel found not credible Vungarala's testimony that he disclosed commissions on the Tribe's investments that he recommended. The Hearing Panel found that Vungarala's testimony was "repeatedly evasive, inconsistent, and misleading," and that it was "easy to see how he confused" members of the Tribe. Such credibility determinations are entitled to considerable weight.[18] Our de novo review of the record finds nothing to contradict the Hearing Panel, and we find that the NAC's reliance on the Hearing Panel's credibility determinations was appropriate.

The record supports the Hearing Panel's credibility determinations. The Investment Committee's meeting minutes support Osterman's testimony that when the Treasury Department first presented REITs and BDCs to the Investment Committee she repeated Vungarala's assertion that he would have no conflict of interest if the Tribe used PKS because PKS was not paying Vungarala. Vungarala testified that he disclosed to Osterman that he would receive commissions from PKS, but Vungarala also testified that he did not disclose the amount of commissions because Osterman "never asked" him for it. Yet Osterman sought the Tribe's approval for even small reimbursements to Vungarala, such as errors and omissions insurance. We agree with the NAC's deference to the Hearing Panel's finding that Osterman testified credibly that had Vungarala disclosed his receipt of commissions to Osterman, she would have asked for the specific amount and, at a minimum, sought approval from the Tribe.

We also agree with the NAC that the Tribe's behavior subsequent to its investments in non-traded REITs and BDCs supports the finding that it was not aware of Vungarala's commissions. It is unlikely that the Tribe would increase Vungarala's salary to $120,000,

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[18] *See Frank J. Custable, Jr.*, Exchange Act Release No. 32801, 1993 WL 328188, at *4 (Aug. 25, 1993); *see also Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) (stating that "an agency is not required to accept the credibility determinations of an administrative law judge" but may give as much weight to them as warranted).

continue to pay for small fees like errors and omissions insurance, and authorize a potential 10% bonus had it been aware that he was making millions in commissions on its investments.

Finally, as discussed in the minutes of the October 27, 2014 Investment Committee meeting and the testimony of those present, Vungarala continued to be untruthful in the face of direct questions about the specific individuals receiving commissions. While Vungarala disclosed to the Investment Committee that PKS was receiving commissions, he did not reveal that he personally received commissions, instead claiming that an unnamed supervisor and sales team received the commissions. After the Investment Committee meeting, he sent an equally evasive email to a member of the committee vaguely referring to commissions received by PKS and the "XYZ sales team," without disclosing the commissions he personally had received.

Vungarala claims that he made it clear from the beginning to Osterman and the Investment Committee that he would receive commissions. But given the Tribal employees' consistent testimony that Vungarala misrepresented that he would not receive commissions, that he failed to disclose the commissions he received, and the other evidence consistent with that testimony, we reject Vungarala's claims. Because Osterman's testimony is corroborated both by the testimony of other Tribal employees and documentary evidence, we are unpersuaded by Vungarala's assertion that we should discount her testimony because she was biased against him and blamed him for the Tribe terminating her employment. We find that Vungarala both misrepresented to the Tribe that he would not receive commissions and failed to disclose his commissions when disclosure was necessary in order to make his other statements not misleading.

2. Vungarala's receipt of commissions was a material fact.

A fact is material if there is a substantial likelihood that a reasonable investor would consider the omitted fact important in making an investment decision.[19] A reasonable investor would find it important that a broker making recommendations on $200 million worth of investments stood to make millions in commissions on those recommendations.[20] Indeed, Davis testified that the Tribe would have considered the commissions important and would not have supported the recommendations had it been aware of Vungarala's commissions. Under these circumstances, we agree with the NAC that Vungarala's receipt of commissions was material.

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[19] *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

[20] *See United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (noting that in "deciding whether to buy a given stock, a reasonable investor would consider it important that, in contrast to the purchase of most stocks, the broker would receive a 5% commission from the purchase of this particular (house) stock"); *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y 1992) ("The failure to disclose such commission deprives the customer of the knowledge that his registered representative might be recommending a security based on the registered representative's own financial interest rather than the investment value of the recommended security").

Vungarala cites to cases holding that registered representatives' regular commissions need not be disclosed.[21] But the securities laws "do not permit affirmative misrepresentations to investors and potential investors."[22] And there is a "duty not to omit material facts whose omission, in light of what was stated, would be misleading."[23] Vungarala is liable not because he failed to disclose his commissions without a duty to do so but because he affirmatively misrepresented to the Tribe that he would not receive commissions on its purchases of non-traded REITs and BDCs and consistently omitted facts necessary to make the statements he made about his commissions not misleading.[24]

Vungarala's contention that the Tribe's continued purchases of non-traded REITs and BDCs through PKS after he disclosed his commissions demonstrates that the commissions were not material is unpersuasive and contrary to the facts. The evidence shows that the Tribe did not purchase additional non-traded REITs and BDCs after it learned, in December 2014, that Vungarala was earning commissions on those investments. Vungarala also argues that the Tribe did not view the commissions as material because it extended his contract in November 2014 after he claims he disclosed the existence of the commissions. But Vungarala initially disclosed only that PKS was receiving commissions, not that he himself received 85% of those commissions. The Tribe did not find out that Vungarala was receiving commissions until

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[21] *See, e.g., United States v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006) (stating that a registered representative "is under no inherent duty to reveal his compensation"). Although it is possible that Vungarala "could qualify as an investment adviser" with respect to the Tribe and "therefore have had heightened disclosure obligations, *see SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (investment advisers have 'an affirmative duty of utmost good faith, and full and fair disclosure of all material facts' (internal quotation marks omitted)), FINRA never made such a finding and never pursued fraud liability on this basis. Pursuant to Exchange Act Section 19(e)(1), we evaluate [Vungarala's] liability 'as [it] has been specified in [FINRA's] determination.' 15 U.S.C. § 78s(e)(1)(A)." *Louis Ottimo*, Exchange Act Release No. 83555, 2018 WL 3155025, at *13 n.47 (Jun. 28, 2018) (second and third alterations in original).

[22] *SEC v. Lauer*, 478 F. App'x 550, 556 (11th Cir. 2012).

[23] *Setzer v. Omega Healthcare Inv., Inc.*, 968 F.3d 204, 214 n.15 (2d Cir. 2020).

[24] *See United States v. Lloyd*, 807 F.3d 1128, 1153 (9th Cir. 2015) ("'[A] broker cannot affirmatively tell a misleading half-truth about a material fact to a potential investor . . . [because] the duty to disclose in these circumstances arises from the telling of a half-truth, independent of any responsibilities arising from a truth relationship.' Baker's affirmative misrepresentations that he would receive no commissions until the investors received a profitable return supported his fraud conviction without the need to prove a fiduciary relationship.") (internal citation omitted and alterations and omissions in original); *see also In re Vivendi Secs. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016) (stating that the securities laws impose liability for a statement of material fact "that is either 'untrue' outright or 'misleading' by virtue of what it omits to state"); *SEC v. Curshen*, 372 F. App'x. 872, 880 (10th Cir. 2010) (stating that under the securities laws an individual "must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak").

December 2014. We therefore agree with the NAC that Vungarala's receipt of commissions was material.

3. Vungarala acted with scienter.

A violation of Section 10(b) and Rule 10b-5 requires a finding of scienter.[25] Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[26] Recklessness satisfies the scienter requirement, and is defined as conduct that constitutes "an extreme departure from the standards of ordinary care…to the extent that the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[27]

Vungarala knew he would earn lucrative commissions on the Tribe's investments in non-traded REITs and BDCs. He also knew that he was subject to the Tribe's Investment Policy, which required that he disclose any personal financial interest that could be related to the performance of the investment portfolio. Vungarala did not only fail to disclose his commissions; he affirmatively misrepresented to the Tribe that he would not receive any commissions and continued to mislead the Tribe even after he had received the commissions and the Tribe questioned him about who received commissions on its purchases. Under the circumstances, Vungarala must have been aware of the risk that the Tribe would be deceived.

Although a motive is not necessary to establish scienter,[28] we agree with the NAC that Vungarala had a motive to deceive the Tribe. Vungarala felt underpaid and mistreated by the Tribe and considered himself to be working "pro bono." We find that Vungarala acted intentionally, or at least recklessly, when he misled the Tribe about his commissions.[29]

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25 *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

26 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

27 *Scholander*, 2016 WL 1255596, at *6 (internal citations omitted).

28 *SEC v. Koenig*, 557 F.3d 736, 740 (7th Cir. 2009).

29 *See SEC v. Pirate Investor LLC*, 580 F.3d 233, 243 (4th Cir. 2009) ("Given such a clear financial motive for the misrepresentations, the district court's conclusion that they were made with scienter is hardly surprising."); *SEC v. Seghers*, 298 F. App'x 319, 334 (D.C. Cir. 2008) (stating that "motive, although not alone sufficient, is relevant to showing scienter" and that it was relevant that defendant "stood to gain financially" from the misrepresentations).

B. Vungarala committed fraud when he misled the Tribe about the volume discounts.

1. Vungarala made misstatements about the Tribe's eligibility for volume discounts and omitted facts necessary to make his statements not misleading.

We agree with the NAC that Vungarala falsely told the Tribe that it could not receive volume discounts while keeping its accounts separate. Vungarala told both Osterman and one of the Tribe's research analysts that the Tribe could not purchase REITs and BDCs "all at once" and then distribute the purchase among the trust accounts in order to take advantage of volume discounts because the accounts had to be kept "separate." But aggregating the purchases from different accounts for the purpose of reaching the threshold for volume discounts did not require actually commingling the funds in the accounts. Although Vungarala testified that he disclosed the ability of the Tribe to take advantage of volume discounts to Osterman and the Investment Committee, the NAC properly deferred to the Hearing Panel's finding that Vungarala's testimony was not credible. We find, as did the NAC, that Vungarala misled the Tribe about its eligibility for volume discounts.

2. The Tribe's eligibility for volume discounts was a material fact.

The Tribe's eligibility for volume discounts was material. A reasonable investor would have considered the availability of discounts totaling $3.3 million to be important.[30] Indeed, a FINRA examiner testified that Tribe members told her the Tribe would have taken advantage of volume discounts had it been aware of them, and Davis testified that the Tribe's eligibility for volume discounts across accounts without commingling would have been quite significant.

Vungarala argues that the volume discounts are immaterial because the Tribe's privacy concerns outweighed its interest in volume discounts. According to Vungarala, volume discounts would put the Tribe's privacy at risk because they would require the Tribe to file disclosures with the Commission identifying itself and the number of shares it owns. Whether or not the volume discounts would have affected the Tribe's disclosure obligations, an issue we need not address here, the fact that the Tribe might have reasons to consider not using the volume discounts does not render the existence of the volume discounts immaterial. The Tribe was entitled to know that it was eligible for volume discounts without commingling its accounts. Had the Tribe known the truth, it could have made an informed decision about whether to take advantage of volume discounts. For the purposes of the materiality inquiry, the "false information need only be 'important' to the recipient's deliberations; proof that 'disclosure of the

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[30] *See Russell L. Irish*, Exchange Act Release No. 7687, 1965 WL 87575, at *4-5 (Aug. 217, 1965), *aff'd*, 367 F.2d 637 (9th Cir. 1966) (finding broker committed fraud when he failed to disclose that customers could save money by combining purchases to exceed break points).

omitted fact would have caused' the recipient to actually change his or her behavior is not necessary."[31]

3. Vungarala acted with scienter.

We agree with the NAC that Vungarala acted intentionally, or at least recklessly, when he misled the Tribe about volume discounts. Two REITs specifically informed PKS and Vungarala that the Tribe was eligible for volume discounts across its accounts. Accordingly, Vungarala had actual knowledge of the Tribe's eligibility for volume discounts.

Vungarala also had a motive to deceive the Tribe. If the Tribe received volume discounts, his commissions would have been reduced by $2.8 million.[32]

Vungarala argues that he was relying on the Tribe's prior practice of each trust making its own investments and reasonably assumed that the trust accounts could not be aggregated for the purpose of volume discounts. But Vungarala had no basis for this assumption. Aggregating the purchases from different accounts to reach the threshold for volume discounts did not require commingling the funds in the different accounts. Nor did the prospectuses suggest that the funds would need to be commingled for the Tribe to take advantage of volume discounts. And the REITs told Vungarala that the Tribe was eligible for volume discounts across its accounts. Vungarala therefore must have known of the risk that the Tribe would be deceived when he told the Tribe that it could not receive volume discounts across accounts without commingling its accounts.[33]

C. Vungarala acted willfully, FINRA's action was consistent with the purposes of the Exchange Act, and Vungarala's arguments against liability are unavailing.

As indicated above, we agree with the NAC that Vungarala violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. The NAC also found that Vungarala's violations subject him to a statutory disqualification under Exchange Act Section 3(a)(39).[34] That section provides that a person is subject to a statutory disqualification if

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31 *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 WL 4727517, at *6 (Sept. 9, 2016) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)), *sanctions vacated in part on other grounds*, Exchange Act Release No. 86318, 2019 WL 2913336 (July 8, 2019).

32 *See supra* note 29.

33 *See, e.g., Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1012 (11th Cir. 1985) (finding that defendant acted recklessly because his "representation was given without basis in reckless disregard of its truth or falsity") (citing *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 48 (2d Cir. 1978)); *SEC v. E-Smart Techs.*, 74 F. Supp. 3d 306, 322 (D.D.C. 2014) (same).

34 15 U.S.C. § 78c(a)(39).

he has willfully violated any provision of the Exchange Act.[35] Because we agree with the NAC that Vungarala acted at least recklessly when he made misrepresentations and omissions about his receipt of commissions and the Tribe's eligibility for volume discounts, we find that he acted willfully.[36]

We find further, as we must under Exchange Act Section 19(e) to sustain FINRA's disciplinary action, that the provisions Vungarala willfully violated—Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010—are, and were applied in a manner, consistent with the purposes of the Exchange Act. Section 10(b) is part of the Exchange Act, and Rule 10b-5, which implements Section 10(b), is consistent with the Exchange Act's purpose of protecting investors from fraudulent conduct.[37] FINRA Rule 2020 is consistent with the purposes of the Exchange Act because it protects investors by prohibiting the same conduct as Exchange Act Rule 10b-5.[38] FINRA applied Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Rule 2020 in a manner consistent with the purposes of the Exchange Act because a preponderance of the evidence supports FINRA's findings that Vungarala committed fraud.[39] FINRA Rule 2010 is consistent with the purposes of the Exchange Act because Exchange Act Section 15(b)(6) requires that FINRA's rules "promote just and equitable principles of trade."[40] FINRA's application of Rule 2010 to Vungarala's conduct furthered the objective of preventing conduct inconsistent with just and equitable principles of trade.[41]

Vungarala opposes liability on several grounds, but we reject all of his contentions.

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35 15 U.S.C. § 78c(a)(39)(F); 78o(b)(4)(D).

36 *See, e.g.*, *Bennett Grp. Fin. Servs.*, Exchange Act Release No. 80347, 2017 WL 1176053, at *4 n.30 (Mar. 30 2017) ("Our finding of scienter . . . demonstrates that Bennett's violations were willful."); *see also Robare v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019) (holding that a finding of recklessness is sufficient to prove a violation of Section 207 of the Investment Advisers Act of 1940, which prohibits willfully omitting to state in an investment adviser registration application a material fact that is required to be stated therein).

37 *See Koch v. SEC*, 793 F.3d 147, 150 (D.C. Cir. 2015) (stating that the Exchange Act "'was intended principally to protect investors" from fraud in securities transactions).

38 *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 WL 1132115, *9 (Mar. 27, 2017) (finding FINRA Rule 2020 to be consistent with the purposes of the Exchange Act for this reason), *petition denied*, 733 Fed. App'x. 571 (2d Cir. 2018).

39 *Id.*

40 15 U.S.C. 78o-3(b)(6).

41 *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 WL 5571625, at *7 n.16 (Sept. 30. 2016).

1. Vungarala's argument that the Tribe was a sophisticated investor is irrelevant.

Vungarala asserts that the Tribe was a "sophisticated investor" that could not have believed that the REITs and BDCs carried no sales commissions. He argues that, when it invested in REITs and BDCs, the Tribe certified that it met the definition of a "sophisticated investor" because the Tribe Chief and Sub-chief signed a REIT suitability analysis indicating that they understood the risks associated with the investments. Vungarala also points to the testimony of a PKS employee who asserted that the Tribe held itself out as sophisticated during meetings with PKS. Assuming without deciding that Vungarala's assertions about the Tribe's sophistication are true, the Commission has "repeatedly rejected arguments that the antifraud provisions do not apply to customers who were experienced or sophisticated."[42] The Tribe could be a sophisticated investor, and Vungarala would still be "liable for misstating or omitting key information."[43] Moreover, even if the Tribe knew the REITs and BDCs generally carried sales commissions, there is no way the Tribe would have known that Vungarala was receiving a portion of the commissions because he told it explicitly that he was not receiving commissions and the PKS statements did not itemize the commissions or disclose that Vungarala was receiving them. The Tribe's alleged sophistication is not a defense to Vungarala's fraud.

2. Disclosures in prospectuses and other statements did not cure Vungarala's misstatements and omissions of material fact.

Vungarala argues that he gave the Tribe prospectuses and other statements that disclosed the existence of his commissions and the Tribe's eligibility for volume discounts. But the prospectuses did not disclose that Vungarala personally received commissions on the Tribe's purchases of REITs and BDCs, only that an unnamed broker-dealer would receive a commission. And while the prospectuses discussed volume discounts, they did not state explicitly that volume discounts were available without commingling accounts. In any case, Vungarala knew that the Tribe relied on him to read the prospectuses and provide it with relevant information. As discussed above, Osterman did not read any prospectuses, and Davis testified that the Investment Committee did not either. None of the other documents Vungarala cites stated that Vungarala was receiving commissions on the Tribe's investments or that the Tribe was eligible for volume discounts without commingling funds.

The Supreme Court has held that "[n]ot every mixture of the true will neutralize the deceptive."[44] Any corrective disclosures must be "'transmitted . . . with a degree of intensity and

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42 *Jay Houston Meadows*, Exchange Act Release No. 37156, 1996 WL 218638, *6 (May 1, 1996), *aff'd*, 119 F.3d 219 (5th Cir. 1997); *see also Brian A. Schmidt*, Exchange Act Release No. 8061, 2002 WL 89028, n.40 (Jan. 24, 2002) (finding that "a sophisticated person is entitled to the protection of the antifraud provisions of the securities laws").

43 *SEC v. True North Finance Corp.*, 909 F. Supp. 2d 1073, 1103 (D. Minn. 2012).

44 *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).

credibility sufficient to effectively counter-balance any misleading impression created by'" the misrepresentations.[45] As a result, a broker who misrepresents material facts "must sufficiently bring to investors' attention the information [he] contends cures [his] misrepresentations."[46] Vungarala did not sufficiently bring to the Tribe's attention the information he contends cures his falsehoods.[47] We thus agree with the NAC that Vungarala's delivery of prospectuses or other generic documentation did not negate his misleading statements.[48]

3. The proceedings against Vungarala were fair.

Vungarala asserts that FINRA's proceedings violated "traditional notions of fair play and substantial justice." The Exchange Act requires that FINRA proceedings be fair.[49] This requirement is met when FINRA brings specific charges, the respondent receives notice of the charges, the respondent has an opportunity to respond to the charges, and a record is kept.[50] Because these requirements were satisfied here, we agree with the NAC that Vungarala was afforded fair proceedings, and his assertions to the contrary are unavailing.

Vungarala asserts further that the charges were based on "incomplete" information that the Tribe controlled and that the Tribe, because of its status as a sovereign nation, is not subject to FINRA's jurisdiction. But the fact that Vungarala's customer was not subject to FINRA's jurisdiction is not unique to this case; the same is true for all disciplinary cases involving

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45 *SEC v. Brookstreet Secs. Corp.*, 584 F. App'x 689, 690-91 (9th Cir. 2014) (quoting *Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989)).

46 *ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4249, 2015 WL 6575683, at *14 (Oct. 30, 2015), *petition denied in relevant part*, 861 F.3d 1239 (11th Cir. 2017).

47 *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1252 (11th Cir. 2012) (rejecting argument that written disclosures rendered oral misrepresentations immaterial because the "oral misrepresentations at issue here were made directly to customer-investors who aver they never received or knew about the written disclosures at the time of their purchases" and "the oral misstatements must be considered in the factual context of a weak, or non-existent, distribution of the written disclosures"); *SEC v. Solow*, No. 06-81041, 2008 WL 11333854, at *3 (S.D. Fla. Mar. 26, 2008) (rejecting argument that written disclosures rendered oral misrepresentations immaterial where customers "did not always receive these written disclosures or prospectuses, or did not receive them before an investment had already been made," and where defendant, "when told by his customers that they did not understand the prospectuses, told them to trust him and that, essentially, he would handle it"), *aff'd* 308 F. App'x 364 (11th Cir. 2009).

48 *See ZPR Inv. Mgmt., Inc. v. SEC*, 861 F.3d 1239, n.6 (11 Cir. 2017) (finding that disclosure of accurate information on website did not render immaterial earlier misrepresentations when the investment adviser did not alert investors that they needed to look at the accurate information or that it contained information that was omitted earlier).

49 15 U.S.C. §§ 78o-3(b)(8); 78o-3(h)(1).

50 *Id.*

customers.[51] Vungarala's inability to subpoena or engage in discovery with the Tribe was no different from other respondents in FINRA proceedings, which do not provide participants with the ability to subpoena documents from or engage in discovery with customers and does not make the proceedings unfair.[52]

Although Vungarala argues that the Tribe withheld exculpatory evidence, the record does not support his contention.[53] Indeed, Vungarala did not identify a single document or record that could allegedly prove his defenses until his reply brief.[54]

For the first time in his reply brief,[55] Vungarala asserts that he has a "blockbuster document," which is under seal pursuant to the Tribe's civil proceeding, demonstrating that the Tribe was aware that it paid commissions on its non-traded REITs and BDCs. Even if this were so, it does not prove that the Tribe was aware that Vungarala received those commissions. In any case, Vungarala has not requested that the Commission introduce any additional evidence into the record let alone attempted to satisfy the standard for having the Commission do so.[56]

Vungarala argues that PKS's settlement with FINRA damaged Vungarala's defense because PKS witnesses could not "corroborate Vungarala's testimony or challenge the Tribe's selected witnesses." But Vungarala has failed to allege any specific testimony that, but for the settlement order, would have supported his position. Furthermore, Vungarala called a former

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[51] *See Kevin Lee Otto*, Exchange Act Release No. 43296, 2000 WL 1335346, at *4 (Sept. 15, 200) (stating that NASD, FINRA's predecessor, could not "compel a customer . . . to appear at a hearing before it"), *aff'd*, 253 F.3d 960 (7th Cir. 2001).

[52] *James Elderidge Cartwright*, 50 S.E.C. 1174, 1179 n.10 (1992) (rejecting the argument "that the NASD's disciplinary procedures are unfair because they do no confer on respondents discovery power and the right to subpoena witnesses").

[53] Vungarala similarly argues that his inability to access the Tribe's evidence violates the *Brady* doctrine. *See Brady v. Maryland*, 373 U.S. 83 (1963) (requiring that prosecutors turn over any exculpatory evidence to criminal defendants). But *Brady* applies to criminal prosecutors, not private parties. In any event, regardless of its applicability, Vungarala has not alleged that FINRA failed to turn over any exculpatory material in its possession.

[54] *Thomas Warren, III*, 51 S.E.C. 1015, 1020 n.22 (1994) (stating, in rejecting argument that proceeding was unfair, that the respondent "has not specified what evidence he was deprived from obtaining, other than to speculate that additional evidence could have substantiated his claim"), *aff'd*, 69 F.3d 549 (10th Cir. 1995). Moreover, we note that the Tribe also produced over 100,000 pages of documents to Vungarala in a related civil proceeding.

[55] *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (providing that any argument raised for the first time in a reply brief will be deemed to have been waived).

[56] *See* Rule of Practice 452, 17 C.F.R. § 201.452 (providing that a party may move the Commission to allow the submission of additional evidence upon a showing of materiality and reasonable grounds for failing to adduce the evidence previously).

PKS employee, with whom he worked closely on the Tribe's investments, to testify at the hearing. While the former employee testified that he thought the Tribe was sophisticated, his testimony did not support Vungarala's assertions that Vungarala was honest with the Tribe about his commissions or its eligibility for millions in volume discounts.

Vungarala also argues that FINRA only presented the lowest-level witnesses who were not representative of the Tribe's alleged financial sophistication. We agree with the NAC that FINRA was entitled to present the evidence that it believed supported its case, and to select which witnesses to present.[57] We reject Vungarala's suggestion that FINRA was required to call the Chief Financial Officer, Chief of the Tribe, or other more senior Tribe members; the witnesses that FINRA presented had direct and substantial knowledge of Vungarala's actions, statements, and omissions concerning non-traded REITs and BDCs.

III. Sanctions

Under Exchange Act Section 19(e)(2), we must sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[58] In doing so, we must consider any aggravating or mitigating factors.[59] We also consider whether the sanctions are remedial or punitive.[60] Although we are not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review.[61] While Vungarala does not explicitly argue that the sanctions FINRA imposed are excessive or oppressive, he does contend that those sanctions violate due process and are impermissibly "punitive."

A. The bars FINRA imposed are neither excessive nor oppressive.

FINRA's Sanctions Guidelines state that an adjudicator should "strongly consider barring an individual" in response to intentional or reckless misrepresentations or omissions of material fact.[62] We agree with the NAC that a bar is warranted here because Vungarala "engaged in egregious misconduct by repeatedly misleading the Tribe over an extended period, for his own personal gain." Vungarala abused his position of trust as the Tribe's investment manager. His

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57 *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *6 n.18 (June 2, 2016) (affirming FINRA's discretion to decide which witnesses to call).

58 15 U.S.C. § 78s(e)(2). The record does not show, and Vungarala does not argue, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

59 *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (citing *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007)).

60 *McCarthy v. SEC*, 406 F.3d 179, 188–91 (2d Cir. 2005).

61 *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

62 FINRA Sanctions Guidelines at 90 (Mar. 2017).

misconduct occurred repeatedly over more than three years. When Tribe members asked direct questions about his commissions and the Tribe's eligibility for volume discounts, Vungarala lied to them and then tried to confuse them with vague answers. As a result of his misconduct, he made over $9.6 million in undisclosed commissions and cost the Tribe at least $3.3 million by forgoing volume discounts for which the Tribe was eligible. As the NAC stated, Vungarala "has demonstrated that he is unfit to continue in the securities industry and the bars from the securities industry are necessary to protect investors from future misconduct at his hands." A bar "will protect the public from [Vungarala's] willingness to place his own financial interests ahead of those of his customer."[63] Under these circumstances, with due regard for the public interest and the protection of investors, a bar is not excessive or oppressive but a necessary remedial measure.[64]

FINRA's Sanction Guidelines state that a sanction less than a bar should be considered "where mitigating factors predominate."[65] Although Vungarala challenges his liability and argues that imposing a bar is punitive, he does not raise any mitigating factors that suggest a sanction less than a bar should be imposed for the violations we have sustained.

Instead, Vungarala argues that the imposition of a lifetime bar on a registered representative is an impermissibly punitive penalty. But, as we recently explained, FINRA bars are not penalties where they are imposed "to protect the public."[66] We adhere to that reasoning here. As discussed above, it is necessary to bar Vungarala to protect the public, and the bar is therefore remedial. We therefore reject Vungarala's argument that the bar FINRA imposed on him is impermissibly punitive.

B. The disgorgement FINRA imposed is neither excessive nor oppressive.

The Sanction Guidelines state that disgorgement of ill-gotten gains may be an appropriate remedy for misconduct that resulted in a financial benefit to the respondent.[67] As discussed above, Vungarala obtained $9.6 million in commissions as a result of his misconduct—the Tribe invested $190 million in REITs and BDCs without taking advantage of volume discounts across accounts, PKS earned commissions of $11.4 million, and Vungarala received 85% of those

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63 *John D. Audifferen*, Exchange Act Release No. 58230, 2008 WL 2876502, at *15 (July 25, 2008).

64 *See, e.g.*, *McGee*, 2017 WL 1132115, at *13-14 (sustaining bar that FINRA imposed on broker who failed to disclose to his customer that he would receive compensation as a result of her investment in the security he recommended because the bar "will protect the public by preventing McGee from defrauding other customers").

65 Guidelines at 90.

66 *John M.E. Saad*, Exchange Act Release No. 86751, 2019 WL 3995968, at *2 (Aug. 23, 2019) (rejecting the argument that the Supreme Court's decision in *Kokesh v. SEC* means that FINRA bars are impermissibly punitive and may not be imposed).

67 Guidelines at 5.

commissions. We agree with the NAC that disgorgement of this amount would "remediate [Vungarala's] misconduct by eliminating the financial benefit directly resulting from it."

Vungarala does not suggest a different calculation of the amount to be disgorged; rather, he again argues that disgorgement is impermissibly punitive. But we recently held that "FINRA's disgorgement orders pursuant to which a violator must give up the ill-gotten gains causally connected to the violations" are "appropriately remedial."[68] Exchange Act Section 15A authorizes FINRA to impose any "fitting sanction," and disgorgement is a "fitting sanction in a FINRA disciplinary action where the disgorgement ordered is a reasonable approximation of the violator's ill-gotten gains causally connected to the violations."[69] In such circumstances, disgorgement is remedial because it is intended "to prevent unjust enrichment."[70] We again adhere to that reasoning here and find the disgorgement ordered to be remedial.[71]

The disgorgement ordered is the commissions Vungarala obtained as a result of his antifraud violations. As discussed above, the Tribe separately reimbursed Vungarala for expenses such as for the cost of renewing his securities licenses and his errors and omissions insurance, and those reimbursements are not included in the disgorgement order. As a result, the disgorgement is limited to Vungarala's net profits from his wrongdoing.[72]

As discussed above, we sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive. Disgorgement "furthers the Commission's public policy mission of protecting investors and

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68 *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 WL 605918, at *20 (Feb. 7, 2020) (rejecting the argument that the Supreme Court's decision in *Kokesh v. SEC* means that FINRA's disgorgement orders are impermissibly punitive).

69 *Id*.

70 *Id*. at 19.

71 *See generally Sanction Guidelines*, Regulatory Notice 11-13, 2011 WL 1099488, at *1-2 (Mar. 22, 2011) (announcing revisions to FINRA's Sanction Guidelines and stating that "General Principle 5 of the Sanction Guidelines recognizes that FINRA adjudicators may order restitution where necessary to remediate misconduct" and "restore the status quo ante where a respondent's victim would otherwise unjustly suffer loss"; that "General Principle 6 of the Sanction Guidelines instructs FINRA adjudicators to consider the disgorgement of a respondent's ill-gotten gains where the respondent has obtained a financial benefit from his wrongdoing"; and that "disgorgement seeks to remediate misconduct by depriving a respondent of his or her unlawful profits irrespective of the actual losses suffered by the respondent's victims").

72 *See* Restatement (Third) of Restitution § 51(4) (stating that disgorgement is a remedy that seeks to "eliminate profit from wrongdoing and that the "unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong"); *cf. Liu v. SEC*, 140 S. Ct. 1936, 1945 (2020) (stating that, for purposes of disgorgement ordered under Exchange Act Section 21(d)(5), courts should "limit[] awards to the net profits from wrongdoing").

safeguarding the integrity of the markets" by "mak[ing] violations unprofitable."[73] Because the disgorgement here is limited to Vungarala's net profits from his violations, it is not excessive or oppressive.

An appropriate order will issue.[74]

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

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[73] *Gordon Brent Pierce*, Exchange Act Release No. 71664, 2014 WL 896757, at *19 (Mar. 7, 2014), *petition denied*, 786 F.3d 1027 (D.C. Cir. 2015).

[74] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90476 / November 20, 2020

Admin. Proc. File No. 3-18881

In the Matter of the Application of

GOPI KRISHNA VUNGARALA

For Review of Disciplinary Action Taken by

FINRA

Order Sustaining Disciplinary Action Taken By Finra

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Gopi K. Vungarala is sustained.

By the Commission.

Vanessa Countryman
Secretary

EXHIBIT D

Settlement Agreement

This Settlement Agreement is made as of May _10__, 2019 by and among Saginaw Chippewa Indian Tribe of Michigan (the "**Tribe**"), Purshe Kaplan Sterling Investments, Inc., a New York corporation ("**PKS**"), Wentworth Management Services LLC, a Delaware limited liability company ("**Wentworth**"), MHC Securities LLC, a Delaware limited liability company ("**MHC**"), Wentworth Funding LLC ("**WF**") a Delaware limited liability company and TKM Funding, LLC , a Delaware limited liability company ("**TKM**;" each of TKM, WF, Wentworth and MHC, a "**Parent**").

Recitals

A. The Tribe is a federally recognized Indian tribe whose reservation is located in central Michigan.

B. Gopi K. Vungarala ("**Vungarala**") was employed by the Tribe as its first in-house Investments Manager from November 2008 – January 2015.

C. Vungarala was also a registered representative with PKS from December 2007 through February 2017, and served as such during the time he was employed by the Tribe.

D. The Tribe filed a Statement of Claim against PKS and Vungarala before a FINRA arbitration panel on April 5, 2017, in what became FINRA Arbitration No. 17-00885 (the "**Arbitration**") alleging, among other things, that Vungarala made millions in commissions by steering the Tribe into unsuitable investments and that PKS failed to

intend for this release to be a general release construed so as to provide its broadest effect.

4. Dismissal of Arbitration. Upon the execution of this Settlement Agreement, the Tribe will file with the Arbitration panel a document in the form attached hereto as **Exhibit A** providing that the Tribe is dismissing its Arbitration claims against PKS with prejudice and dismissing its Arbitration claims against Vungarala without prejudice, and that PKS is dismissing its Arbitration counterclaims against the Tribe with prejudice.

5. Assignment of Claims. The Tribe hereby assigns to PKS all of the Tribe's claims and causes of action against Vungarala, except that the Tribe does not assign any of its rights under the FINRA Department of Enforcement's Disciplinary Proceeding No. 2014042291901 attached hereto as **Exhibit B** (the "**FINRA Proceedings**").

6. Assumption of Defense; Indemnification. In the event Vungarala initiates or continues any proceeding against the Tribe, PKS agrees to assume the defense of, and indemnify and hold harmless, the Tribe against any and all losses, damages, judgments, awards, penalties or fees incurred by or imposed upon the Tribe arising out of such proceeding. In the event PKS assumes the defense of any such claim or PKS or a Parent initiates any proceeding against Vungarala, the Tribe shall reasonably cooperate with PKS or such Parent, at PKS or such Parent's sole expense, in support of such proceeding.

warrant that they are empowered and authorized to sign on behalf of and bind the Parties (as defined in paragraph 1 of this Settlement Agreement) for whom they have executed this Settlement Agreement in all respects.

15. Captions. The captions used for the paragraphs of this Settlement Agreement are inserted only as a matter of convenience and in way define, limit, or describe the scope or intent of this Settlement Agreement or any paragraph thereof.

[SIGNATURE PAGE FOLLOWS]

The Parties agreed to these terms on the date stated in the introductory clause.

Saginaw Chippewa Indian Tribe of Michigan

By: _____
Ronald Ekdahl, Chairman

Purshe Kaplan Sterling Investments, Inc.

By: _____
David Purcell, General Counsel

Wentworth Management Services LLC

By: _____
Ryan Morfin, President

MHC Securities LLC

By: _____

Wentworth Funding LLC

By: _____

TKM Funding, LLC

By: _____

The Parties agreed to these terms on the date stated in the introductory clause.

Saginaw Chippewa Indian Tribe of Michigan

By: _____
Ronald Ekdahl, Chairman

Pursche Kaplan Sterling Investments, Inc.

By: _____
David Purcell, General Counsel

Wentworth Management Services LLC

By: _____
Ryan Morfin, CEO

MHC Securities LLC

By: _____

Wentworth Funding LLC

By: _____
Ryan Morfin, Manager

TKM Funding, LLC

By: _____

The Parties agreed to these terms on the date stated in the introductory clause.

Saginaw Chippewa Indian Tribe of Michigan

By: _____
Ronald Ekdahl, Chairman

Pursche Kaplan Sterling Investments, Inc.

By: _____
David Purcell, General Counsel

Wentworth Management Services LLC

By: _____
Ryan Morfin, President

MHC Securities LLC

By: _____

Wentworth Funding LLC

By: _____

TKM Funding, LLC

By: _____

The Parties agreed to these terms on the date stated in the introductory clause.

Saginaw Chippewa Indian Tribe of Michigan

By: _____
Ronald Ekdahl, Chairman

Purshe Kaplan Sterling Investments, Inc.

By: _____
David Purcell, General Counsel

Wentworth Management Services LLC

By: _____
Ryan Morfin, President

MHC Securities LLC

By: _____
Alexander Markowits, Mgm

Wentworth Funding LLC

By: _____

TKM Funding, LLC

By: _____

The Parties agreed to these terms on the date stated in the introductory clause.

Saginaw Chippewa Indian Tribe of Michigan

By: _____
Ronald Ekdahl, Chairman

Purshe Kaplan Sterling Investments, Inc.

By: _____
David Purcell, General Counsel

Wentworth Management Services LLC

By: _____
Ryan Morfin, President

MHC Securities LLC

By: _____

Wentworth Funding LLC

By: _____

TKM Funding, LLC

By: _____

EXHIBIT E

PURSHE KAPLAN STERLING INVESTMENTS

Independent Contractor Agreement
and
Security Sales Agreement
for
Registered Representative

This agreement is between GOPI K. VUNGARALA
an independent contractor/registered representative (henceforth "Rep") of PKS located at, 2010 Fantasy Lane Midland, MI 48642
and Purshe Kaplan Sterling ("PKS"), a registered broker/dealer headquartered at 18 Corporate Woods Blvd., in Albany, NY 12211. PKS and Rep agree as follows:

1. ***Purpose of Agreement.***

   Rep is an Independent contractor who desires an association with PKS as a Registered Representative, as that term is defined under the rules of the FINRA.

2. ***Outside Business.***

   It is understood and agreed that Rep may have an affiliation with a registered investment advisory custodian company with respect to fee-based investment advisory (RIA) and other related financial services, and that, under these circumstances, PKS will not solicit and will not accept any of this RIA or fee based advisory business.

3. ***Commissions.***

   PKS agrees to pay Rep a percentage of commissions received by PKS for transactions Rep originates at the rates indicated in Schedule A herein. PKS is under no obligation to pay commissions to Rep unless and until such commission payments are actually received by PKS from the clearing entity.

4. ***Rep's Responsibilities.***

   As an independent contractor, Rep acknowledges responsibility for all expenses incurred by Rep, including but not limited to office, rent, advertising, telephone, transportation and supplies. Rep will obtain, at Rep's expense, business cards and stationary that show Rep's registration affiliation with PKS, subject to approval of PKS' Compliance Department as provided for in Section 5. Rep agrees to reimburse PKS for all monies expended in connection with licenses, registration and/or continuing legal education required by federal, state or local regulatory authority or self regulatory organization (SRO).

Rep understands and agrees that, notwithstanding his or her association with PKS, that Rep has no authority to obligate PKS or incur expense on PKS' behalf. Rep does not have any of the duties that might be expected of an employee, such as required attendance at meetings or specific office hours, except those required by securities regulation. Rep agrees to attend all mandated PKS compliance meetings. If Rep is attached to a branch office of PKS, Rep agrees to participate in any announced or unannounced audits of the branch office.

Rep will be financially responsible for all reneges and losses incurred by failure of Rep's clients to meet his/her obligations, as well as any expenses or legal costs that occur in the connection therewith.

5. ***Compliance.***

It is understood and agreed that PKS will supervise the conduct of Rep's brokerage sales activities in the manner PKS believes necessary to satisfy the rules, regulations and objectives of the various regulatory bodies. Rep will comply with the PKS Supervisory Procedures Manual and all rules and regulations of the regulatory bodies, and agrees to and understands the following requirements:

All advertising and sales literature pertaining to investments or related brokerage activities will be submitted to the PKS Compliance Department for regulatory filing, and Rep will not use or distribute said materials until Rep receives written approval from the PKS Compliance Department. Rep will submit to the Branch Office Manager, or, if not available, the PKS Compliance Department, or, if not available, the OSJ Registered Principal Manager for review and approval all incoming and outgoing correspondence.

When engaging in brokerage activities, Rep will represent himself as a registered representative of PKS, using business cards and stationary that shows Rep's registration affiliation with PKS. Rep will not solicit securities transactions, or accept compensation or fees except in accordance with the PKS Supervisory Procedures Manual. PKS has sole discretion to decline any transaction.

Rep will conduct no business in any jurisdiction in which Rep is not registered with the appropriate federal, state or local regulatory authority or SRO. Rep will not make any offer of new issues or newly registered securities in any jurisdiction in which the security and Rep are not each registered.

Rep agrees to comply with the provisions of the PKS Supervisory Procedures Manual with respect to any payment tendered by or received from any client. Rep will not, and is prohibited from accepting negotiable securities or cash from a client, and agrees to advise all clients to mail securities directly to PKS at PKS' offices as set forth in the PKS Supervisory Procedures Manual. Rep will not, and is prohibited

from, receiving client funds into, or paying client funds out of, bank accounts that are owned by Rep or which are under Rep's control. Rep will not, and is prohibited from borrowing money from clients, loaning money to clients, or arranging credit for clients.

Rep will not, and is prohibited from engaging in any other unrelated business, unless appropriate prior and ongoing disclosure to PKS is made in writing, the PKS Compliance Department grants specific written permission, and all requirements of the applicable rules and regulations are met. Rep agrees to execute an outside activities letter as required by FINRA rules.

6. ***Indemnity.***

Rep agrees that Rep is responsible for his or her actions, errors and omissions. PKS has no responsibility to indemnify or defend Rep for any claim made, or judgment rendered, by any court, administrative tribunal, arbitration forum, or any other entity, as a result of any alleged act or omission of Rep.

PKS may obtain an insurance policy ("policy") or other indemnity covering errors and omissions with respect to activities covered under this agreement. PKS will add Rep as a covered person under any such policy. However, Rep understands and acknowledges that, in the event of cancellation of the policy, or in the event of any changes in the policy affecting either the limits of liability or the deductible under the policy, or in the event that the aggregate of claims and/or judgments exceed the policy limits, the extent of such coverage, if any, may be limited. Rep acknowledges that coverage under the policy is available only to the extent that the policy deductible is exceeded. Rep understands and acknowledges that PKS may charge a fee for costs associated with indemnity coverage and related issues, and Rep agrees to pay such charges.

Rep understands that, in the event of any coverage deficiency as described in the preceding paragraph, Rep will be responsible for the payment of claims, judgments, attorneys fees and arbitration expenses related to the alleged errors or omissions of Rep. In the event that PKS becomes aware that liability may exist as a result of any alleged error or omission of Rep, PKS may, in its sole discretion, withhold commissions to which Rep may thereafter be entitled. Rep acknowledges that PKS may apply said withheld commissions toward payment and/or settlement of any potential liability, without Rep's consent.

PKS shall have sole discretion to control settlements of any matter giving rise to potential liability involving PKS, on behalf of both PKS and Rep. Rep acknowledges and agrees that any decision made by PKS, with respect to whether to litigate or settle potential liability, including but not limited to the amount of the settlement, shall be final and binding on Rep, and shall not be subject to the arbitration provisions of this or any other agreement, or subject to challenge in any court of record, or any other forum.

7. ***Termination of Agreement.***

Rep and PKS agree that either party may cancel this agreement and terminate the relationship by giving written notice to the other at any time. Such notice shall be effective when sent by PKS or, if given by Rep, effective upon receipt by PKS.

In the event of Rep's voluntary departure, as defined in Form U-5, Rep and PKS agree as follows. PKS will pay Rep his normal share of all commissions subsequently received on sales made by Rep for a period of sixty (60) days following departure. PKS will not pursue the clients of such departed registered representative. However, PKS can not be held responsible if another independent registered representative of PKS sells or offers to sell investments to a client of Rep. After termination of the agreement, no officer or employee of PKS will directly contact any of Rep's clients except as might be necessary for administrative or compliance reasons, or in the event of a potential error or omission of Rep which may give rise to liability. PKS shall cooperate without interference (excluding serious compliance issues, potential liability, or outstanding debt to PKS) in assisting in transfer of Rep's accounts to another broker/dealer, should Rep decide to transfer his business to another FINRA member Firm.

8. ***Choice of Law.***

To the extent not inconsistent with applicable federal law, this agreement shall be construed in accordance with and governed by the laws of the State of New York without giving effect to its choice of law or conflicts of laws principles.

9. ***Arbitration of Disputes.***

Except as otherwise set forth in this agreement, any and all disputes which may arise between Rep and PKS, pursuant to this agreement or in connection with any matter covered in this agreement, will be determined by arbitration at a venue to be determined by PKS pursuant to the Uniform Code of Arbitration of the National Association of Securities Dealers, Inc. and under the auspices of that organization.

10. ***General.***

If any provision of this Agreement is held to be invalid or unenforceable for any reason, the remaining provisions will continue in full force without being impaired or invalidated in any way. The parties of this Agreement are independent contractors, and no partnership, or employee-employer relationship is intended or created by this Agreement.

11. Prior Acts.

Rep is liable for any forum fees, arbitration fees, court costs, awards and/or damages incurred by PKS, or settlements made by PKS, as a result of the inclusion of PKS in any arbitration, action, lawsuit or any other legal process arising out of any alleged act or omission of Rep occurring prior to or directly as a result of Rep's association by licensure with PKS. PKS may, in its sole discretion, retain any and all commissions, compensation or other amount due Rep to the extent necessary to cover any and all of such fees, costs, awards, damages or settlements.

Prior Employment.

Rep will hold harmless and indemnify PKS for any award, damages or judgment of any court, administrative tribunal, arbitration forum, or any other entity, or for any settlement by PKS, of part or all of any claim arising from the termination of Rep's prior employment, including but not limited to breach of contract, breach of a non-compete or non-solicitation agreement, theft of trade secrets or customer lists and/or interference with contractual relations. PKS may, in its sole discretion, retain any and all commissions, compensation or other amount due Rep to the extent necessary to cover any and all of such any award, damages, judgment or settlement.

13. *Entire Agreement.*

This Agreement constitutes the entire understanding and agreement between Rep and PKS as of the date of this Agreement, and supercedes all prior and contemporaneous discussion, negotiation, agreement, understandings and communications with respect to the subject matter of this agreement.

Agreed to this 24 **day of** January **20**08**:**

Branch Manager

Registered Representative (Rep)

Trevor S Sutterfield
Print Branch Manager Name

GOPI K. VUNGARALA
Print RR (Rep) Name

For PKS

J. Peter Purcell
Print PKS Name

Revised Schedule A

The PKS payout rate is based on a gross commission less ticket charges of $30.50 per trade and direct clearing fees as applicable. Rep has authority to pass mutual fund ticket charges directly to the client. Direct funds and annuities have no ticket charges.

Registered Representative is to be paid at the following grid rate:

Annual Production	***Payout Rate***
$500,000 to $2,499,99	87% (retroactive to dollar one)
$2,500,000 to $3,999,999	88% (paid on $1,500,000)
$4,000,000 to $4,999,999	89% (paid on $1,000,000)
$5,000,000 and up	90% (paid on $1,000,000 +)
Year one payout will commence at 87% Each successive year will commence at 87% provided that the prior year production exceeds $1,000,000.00.	

Agreed to this 24 day of January, 2008 :

Branch Manager

Print Branch Manager Name

For PKS

J. Peter Purcell
Print PKS Name

PROOF OF SERVICE

Purshe Kaplan Sterling Investments, Inc. v. Gopi Krishna Vungarala, FINRA Office of Dispute Resolution Arbitration No. 19-03153

STATE OF NEW YORK, COUNTY OF BRONX

I am employed in the County of Bronx, State of New York. I am over the age of 18 and not a party to the above arbitration proceeding; my business address is Lewis S. Fischbein, P.C., 4455 Douglas Avenue, Suite 11B, Riverdale, New York 10471.

On April 23, 2021, I served the within Corrected Second Amended Statement of Claim with Exhibits upon respondent Gopi Krishna Vungarala ("Vungarala"), by emailing the Corrected Second Amended Statement of Claim with Exhibits to Vungarala at his designated email address, gopivun@gmail.com.

I am a resident or employed in the county where the foregoing emailing occurred. Executed on April 23, 2021 at Bronx, New York.

I declare under penalty of perjury under the laws of the State of New York and United States of America that the foregoing is true and correct.

I also declare that I am a member of the New York State Bar and have been admitted pro hac vice in Michigan for purposes of the above arbitration proceeding, at whose direction, through Ms. Akerly, the foregoing service was made.

Lewis S. Fischbein

Lewis S. Fischbein