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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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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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,

[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.

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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.

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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."

[cont'd]

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.*

[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

[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

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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

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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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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).

[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,

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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.