FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS

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

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

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

Respondent is ordered to pay costs.

Appearances

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

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

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I. INTRODUCTION

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

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

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

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

B. Vungarala Had a Conflict of Interest

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

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

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

C. Vungarala Misled the Tribe Regarding His Commissions

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

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

D. Vungarala Misled the Tribe Regarding Volume Discounts

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

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

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

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

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

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

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

II. FINDINGS OF FACT

A. Background

1. Volume Discounts and the Origin of the Investigation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] Stip. ¶ 22; Hearing Tr. (PG) 646.

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

[9] Hearing Tr. (PG) 635.

[10] Hearing Tr. (PG) 636.

[11] Hearing Tr. (PG) 636.

[12] Hearing Tr. (PG) 636.

[13] Hearing Tr. (PG) 646.

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

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

2. Proceeding

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

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

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

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

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

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

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

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

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

3. Respondent

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

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

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

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

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

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

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

[23] Hearing Tr. (Vungarala) 1105.

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

4. The Tribe

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

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

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

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

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

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

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

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

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

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

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

[32] Hearing Tr. (AO) 296.

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

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

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

a. Treasury Department

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

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

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

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

[35] Hearing Tr. (AO) 284.

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

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

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

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

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

[41] Hearing Tr. (AO) 449.

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

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

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

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

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

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

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

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

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

[47] Hearing Tr. (MB) 670.

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

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

[50] Hearing Tr. (MB) 767.

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

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

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

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

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

b. Investment Committee

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

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

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

[55] Hearing Tr. (MB) 765.

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

[57] Hearing Tr. (MB) 674.

[58] Hearing Tr. (MB) 676.

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

[60] Hearing Tr. (AO) 445.

[61] Hearing Tr. (MB) 676.

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

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

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

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

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

c. Legal Department

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

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

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

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

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

[67] Hearing Tr. (DD) 66.

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

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

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

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

d. Tribal Council

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

e. Execution of Approved Transactions

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

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

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

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

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

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

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

[74] Hearing Tr. (MB) 762.

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

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

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

[78] Hearing Tr. (MB) 692.

7. The Tribe's Policy Regarding Conflicts of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

8. Vungarala's Employment Contracts

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

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

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

[85] CX-77, at 3.

[86] Hearing Tr. (Vungarala) 1096.

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

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

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

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

a. 2008—Vungarala's First Contract

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

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

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

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

[90] Hearing Tr. (DD) 249.

[91] RXV-3.

[92] CX-5.

[93] CX-5.

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

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

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

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

b. 2008–2010—Amendments to the First Contract

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

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

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

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

[96] Hearing Tr. (AO) 1521.

[97] RXV-73.

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

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

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

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

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

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

c. 2011—Vungarala's Second Contract

i. Basic Terms

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

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

ii. New Provision for Minimum Production Fee Reimbursement

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

[102] RXV-3, at 5.

[103] RXV-3, at 6.

[104] RXV-3, at 7.

[105] RXV-3, at 9.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[116] RXV-10.

[117] Hearing Tr. (AO) 1569.

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

[119] Hearing Tr. (AO) 1393.

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

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

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

9. Vungarala's Duties to the Tribe

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

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

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

[121] RXV-4, at 7.

[122] Hearing Tr. (Vungarala) 1195.

[123] Hearing Tr. (MB) 765.

[124] Hearing Tr. (Vungarala) 1607.

[125] Hearing Tr. (Vungarala) 1060.

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

[127] Hearing Tr. (Vungarala) 1318.

[128] Hearing Tr. (Vungarala) 1059.

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

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

B. Vungarala Misleads the Tribe About His Commissions

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

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

2. Vungarala Retains His Registration with PKS

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

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

[129] Hearing Tr. (Vungarala) 1355.

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

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

[132] CX-11.

[133] Hearing Tr. (Vungarala) 1100.

[134] Hearing Tr. (Vungarala) 1100.

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

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

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

3. Vungarala Feels Underpaid and Resentful

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

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

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

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

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

[138] Hearing Tr. (Vungarala) 1068.

[139] Hearing Tr. (Vungarala) 1067.

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

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

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

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

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

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

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

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

[144] CX-12, at 2.

[145] CX-12, at 2.

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

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

a. Initial Recommendation to AO

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

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

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[146] Hearing Tr. (Vungarala) 1077.

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

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

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

[150] Hearing Tr. (AO) 296.

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

[152] Hearing Tr. (MB) 760.

[153] Hearing Tr. (AO) 1382.

[154] Hearing Tr. (AO) 293.

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

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

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

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

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

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

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

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

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

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

[159] Hearing Tr. (Vungarala) 1090.

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

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

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

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

[164] Hearing Tr. (Vungarala) 1203.

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

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

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

b. June 27, 2011 Investment Committee Meeting

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

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

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[165] Hearing Tr. (AO) 1427.

[166] CX-13.

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

[168] CX-13.

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

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

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

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

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

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

[169] CX-13.

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

[171] CX-13.

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

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

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

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

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

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

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

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

[174] Hearing Tr. (AO) 1570.

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

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

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

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

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

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

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

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[177] Hearing Tr. (DD) 249.

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

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

6. The Tribe Purchases REITs and BDCs

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

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

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

7. Vungarala Makes Misleading Presentations

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

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

[180] Hearing Tr. (AO) 294.

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

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

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

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

[185] Stip. ¶¶ 20, 21.

[186] CX-14.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[191] Hearing Tr. (Vungarala) 1202.

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

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

[194] Hearing Tr. (MB) 730.

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

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

8. Vungarala Restricts Communications with the Tribe

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

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

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

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

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

[198] Hearing Tr. (Vungarala) 1157.

[199] CX-32.

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

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

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

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

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

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

10. Vungarala's Relationship with AO Sours

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

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

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[202] CX-60; CX-61.

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

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

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

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

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

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

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

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

11. AO and Others Become Suspicious of Vungarala

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

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

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

[208] Hearing Tr. (Vungarala) 1132.

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

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

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

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

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

12. FINRA Staff Contact the Tribe Regarding Volume Discounts

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

13. FINRA Staff Contact PKS Regarding Volume Discounts

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

14. Vungarala Learns of FINRA Inquiry to PKS

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

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

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

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

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

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

[216] CX-85.

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

[218] CX-86.

a. October 27, 2014 Investment Committee Meeting

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

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

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

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

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

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

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

[222] Hearing Tr. (Vungarala) 1288.

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

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

[225] CX-17.

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

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

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

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

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

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

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

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

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

[228] Hearing Tr. (AO) 322.

[229] Hearing Tr. (AO) 342.

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

[231] Hearing Tr. (Vungarala) 1151.

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

b. Vungarala's Follow-Up Email

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

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

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

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

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

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

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

c. AO Persists in Asking Questions

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

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

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

a. November 2014 Meeting with Executive Council

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

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

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

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

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

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

b. December 14, 2014 Meetings

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

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

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

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

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

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

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

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

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

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

[243] CX-24.

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

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

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

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

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

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

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[244] CX-24, at 3.

[245] CX-24, at 3.

[246] CX-24, at 3.

[247] CX-24, at 2.

[248] CX-24, at 1.

[249] CX-24, at 1.

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

d. December 21, 2014 Tribal Council Meeting

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

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

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

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

e. December 30, 2014 Letter to Tribe from PKS

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

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

[252] Hearing Tr. (Vungarala) 1304.

[253] Hearing Tr. (Vungarala) 1303.

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

[255] Hearing Tr. (Vungarala) 1306.

[256] RXV-56.

f. AO's Complaints Against Vungarala

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

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

g. Tribe's Written Responses to FINRA Staff Questions

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

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

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

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

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

[258] RXV-71.

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

[260] CX-76.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Vungarala Does Not Disclose Availability of Volume Discounts

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

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

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

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

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

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

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

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

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

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

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

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

a. Vungarala Misleads AO

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

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

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

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

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

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

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

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

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

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

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

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

[280] Hearing Tr. (Vungarala) 1164.

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

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

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

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

b. Vungarala Misleads MB

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

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

c. Vungarala Manipulates DJG at PKS into Misleading AO

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[289] Hearing Tr. (DJG) 1858.

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

[291] RXV-49, at 2.

[292] RXV-49, at 2.

[293] *See* CX-88.

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

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

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

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

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

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

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[294] CX-88.

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

[296] Hearing Tr. (Vungarala) 1157.

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

1. December 15, 2011—Letter

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

2. January 16, 2013—Letter

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

3. April 22, 2013—Meeting

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

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

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

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

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

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

[301] RXV-48; RXV-49.

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

[303] Hearing Tr. (DJG) 1836.

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

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

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

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

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

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

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

[306] RXV-49, at 2.

[307] RXV-48, at 2.

[308] Hearing Tr. (DJG) 1835.

[309] Hearing Tr. (DJG) 1835.

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

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

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

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

4. February 10, 2014—Letter

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

5. October 17, 2014—Letter

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

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

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

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

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

[314] Hearing Tr. (Vungarala) 1170.

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

[316] RXV-51, at 3.

[317] RXV-51, at 5.

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

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

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

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

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[318] RXV-51, at 7.

[319] RXV-51, at 7.

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

[321] RXV-51, at 7.

[322] RXV-51, at 7.

E. Vungarala Obtained a Financial Benefit from His Misconduct

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

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

F. Credibility

1. Vungarala

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

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

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

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

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

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

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

[327] Hearing Tr. 1094.

[328] Hearing Tr. 1094.

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

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

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

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

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

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

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

[331] Hearing Tr. (Vungarala) 1068.

[332] Hearing Tr. (Vungarala) 1675.

[333] Hearing Tr. (Vungarala) 1675.

[334] Hearing Tr. (Vungarala) 1676-77.

[335] Hearing Tr. (Vungarala) 1682-83.

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

duties to consider alternative investment selections for the portfolio. Nor has he offered an explanation for why the Tribe would agree to continue paying him an annual salary of $120,000, plus a $12,000 performance bonus, when it could have received his services as a PKS registered representative without his being its employee.

2. AO, DD, and MB

As discussed above, with respect to particular testimony, repeatedly Vungarala's version of the facts was inconsistent with the testimony of AO, DD, and MB. He maintains that AO, DD, and MB all lied in their testimony at the hearing, but he offers no explanation aside from their alleged animosity toward him.[337] While it is clear that the members of the Tribe who testified feel betrayed by Vungarala, that sense of betrayal is not sufficient reason to doubt their testimony. Their testimony was consistent with the other evidence and made sense in light of the Tribe's conduct during the relevant period. We find all three to be credible.

III. CONCLUSIONS OF LAW

A. Applicable Law

Both Causes of Action allege fraud in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, along with violations of FINRA Rule 2020 and 2010.[338] Section 10(b) makes it unlawful, directly or indirectly, to use "any manipulative or deceptive device or contrivance" in contravention of a rule prescribed by the Securities and Exchange Commission ("SEC") to protect investors.[339] SEC Rule 10b-5 is such a rule. It prohibits the making of "any untrue statement of a material fact" or the omission of a material fact that is necessary in order to correct the statements that, in "light of the circumstances under which they were made," are misleading.[340]

A civil enforcement action for violation of Section 10(b) and Rule 10b-5 requires proof by a preponderance of the evidence of the following: (i) a false statement or misleading omission

[337] Resp. Reply 4 & n.16; Hearing Tr. (Vungarala) 1151.

[338] Because we find that Vungarala willfully violated Section 10(b) and Rule 10b-5, we do not separately discuss FINRA Rules 2020 and 2010. FINRA Rule 2020 protects investors by prohibiting the same conduct as Section 10(b) and Rule 10b-5. *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *26-27 (Mar. 27, 2017). FINRA Rule 2010 requires adherence to high standards of commercial honor and to just and equitable principles of trade. Violations of the securities laws and FINRA's rules violate that requirement. *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *13 n.3 (Sept. 30, 2016). Vungarala's misconduct violated these FINRA rules as well.

[339] 15 U.S.C. § 78j(b).

[340] *See* 17 C.F.R. § 240.10b-5.

by the respondent regarding a material fact; (ii) made with the requisite scienter or state of mind; (iii) using the jurisdictional means; (iv) in connection with the purchase or sale of a security.[341]

The parties have stipulated that each non-traded REIT and BDC at issue in this matter was a security,[342] and that Vungarala used the jurisdictional means of interstate commerce to do so.[343] Accordingly, the last two elements of securities fraud are not in dispute. The parties also stipulated that Vungarala solicited each of the Tribe's purchases of the securities.[344]

Each cause of action concerns two issues: (i) whether Vungarala's statements were false and misleading with regard to a material fact; and (ii) whether he made the statements with scienter.

B. Vungarala Committed Securities Fraud—Commissions (First Cause)

1. Vungarala Made Materially False and Misleading Statements to Conceal His Commissions on the Tribe's Investments

We conclude that Vungarala made multiple false and misleading statements to the Tribe regarding his receipt of commissions and the resulting conflict of interest in connection with its purchases of REITs and BDCs. He failed to disclose that he was making millions of dollars in commissions from the investments he recommended to the Tribe, a blatant conflict of interest.

- In steering the Tribe to make its purchases of REITs and BDCs through his broker-dealer firm, Vungarala falsely told AO that Schwab did not offer the products and would charge $50,000 to conduct due diligence if it did.

- Either through affirmative false statements, or misleading statements that omitted disclosing the simple fact that Vungarala would receive commissions, Vungarala led AO to believe that there would be no conflict of interest if the Tribe made its investments through PKS. He led her to believe that neither he nor PKS would be compensated.

- Vungarala sat silent at the Investment Committee meeting where REITs were first discussed when AO passed on her mistaken belief that Vungarala would have no conflict of interest because he would not be compensated.

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[341] *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1467 (2d Cir. 1996); *Grandon v. Merrill Lynch & Co*., 147 F.3d 184, 189 (2d Cir. 1998); *Dep't of Enforcement v. Ottimo*, No. 2009017440201, 2017 FINRA Discip. LEXIS 10, at *11 (NAC Mar. 15, 2017).

[342] Stip. ¶ 18.

[343] Stip. ¶ 19.

[344] Stip. ¶ 17.

- Vungarala made multiple white board presentations purporting to explain the costs of the REIT and BDC investments, but he omitted to say that he received the majority of the commissions paid.

- At the October 27, 2014, meeting of the Investment Committee and Tribal Council, Vungarala was pointedly asked who received commissions on the Tribe's investments, but he did not reveal that *he* did.

- In the email that Vungarala wrote after the October 27, 2014 meeting to explain the fees and commissions associated with the Tribe's investments, he also did not reveal that he received commissions on the Tribe's investments. He obscured the truth by speaking of the "XYZ sales team."

- When AO replied to Vungarala's email, again asking who received commissions, Vungarala did not provide the answer. Instead, he went to SB, who relieved him of any obligation to respond. AO was fired that same day.

- At the Executive Council meeting in November 2014, Vungarala falsely told the Chief, Sub-Chief, SB, and the secretary that he had previously disclosed everything about his commissions and that AO was well aware of his commissions.

- At the December 21, 2014 meeting, Vungarala claimed that he had previously disclosed his commissions in detail. That statement was false. Whatever Vungarala previously said to AO and others, he never informed the Tribe that he personally received commissions on the Tribe's investments, and that was what an effective disclosure required.

Even if one were to accept Vungarala's own descriptions of his conversations with AO and other tribal members—which we do not—at best, he communicated to them "half-truths" that they did not understand. He failed to disclose facts that would have made his self-dealing clear to them. For example, the statement that he would be the registered representative on the Tribe's REIT and BDC purchases was literally true, as was the statement that the investments were commissionable products. But those statements obscured the truth and misled the Tribe. Those statements did not inform tribal members that their full-time employee was also acting as an employee of PKS and receiving commissions on the Tribe's investments.[345]

We further conclude that the fact Vungarala failed to disclose—that he was making millions of dollars on the Tribe's investments—was material. In the context of Rule 10b-5, "Information is material 'if there is a substantial likelihood that a reasonable [investor] would

[345] *Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 2000 (2016); *SEC v. Gabelli*, 653 F.3d 49, 57 (2d Cir. 2011), *rev'd on other grounds*, 568 U.S. 442 (2013); *First Va. Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977); *Lubbers v. Flagstar Bancorp Inc*., 162 F. Supp. 3d 571, 577-78 (E.D. Mi. 2016).

consider it important in deciding how to [invest] … [and] the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[346] When recommending a security to a customer, a registered representative has a duty to disclose material adverse facts of which he or she is aware, including an "economic self-interest," because such facts could influence the representative's recommendation.[347]

Any reasonable investor would want to know that the person recommending an investment has a significant personal financial interest in the transaction. The conflict of interest could influence the recommendation.[348] For that reason, the Tribe had a policy prohibiting personal financial interests that could influence its Investment Manager's recommendations and render him unable to be impartial. In fact, DD, the Tribal Administrator, testified that Vungarala's self-interest in the recommended transactions would have caused the Tribe not to purchase the REITs and BDCs. DD recognized that there would be a potential for the recommendation to serve the interest of the person making the recommendation—Vungarala—instead of the Tribe's interest.

2. Vungarala Acted with Scienter

We conclude that Vungarala acted with scienter when he made false and misleading statements and failed to disclose that he was receiving commissions on the Tribe's investments. Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[349] Scienter is established by showing either intentional or reckless misconduct.[350] "Reckless conduct includes 'a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.'"[351] A reckless action "is one that departs so far from the standards

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[346] *Dep't of Enforcement v. Fillet*, No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *29 (NAC Oct. 2, 2013) (quoting *Basic v. Levinson*, 485 U.S. 224, 231-32 (1988)), *aff'd in relevant part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142 (May 27, 2015).

[347] *See, e.g., RichMark Capital Corp.*, Exchange Act Release No. 48758, 2003 SEC LEXIS 2680, at *9 (Nov. 7, 2003) (internal quotation omitted); *William Scholander*, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *16-17 & n.22 (Mar. 31, 2016) (citing cases).

[348] *See, e.g., Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153 (1972); *Chasins v. Smith, Barney & Co.*, 438 F.2d 1167, 1172 (2d Cir. 1970); *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y. 1992).

[349] *Tellabs Inc. v. Makor Issues & Rights., Ltd.*, 551 U.S. 308, 319 (2007); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976).

[350] *Dep't of Enforcement v. Akindemowo*, No. 2011029619301, 2015 FINRA Discip. LEXIS 58, at *33 (NAC Dec. 29, 2015) (citing *Tellabs, Inc.*, 551 U.S. at 319 n.3), *aff'd*, 2016 SEC LEXIS 3769; *Alvin W. Gebhart, Jr.*, Exchange Act Release No. 58951, 2008 SEC LEXIS 3142, at *26 (Nov. 14, 2008), *petition for review denied*, 595 F.3d 1034 (9th Cir. 2009).

[351] *Fillet*, 2013 FINRA Discip. LEXIS 26, at *35 (quoting *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977)) (internal quotation omitted).

of ordinary care that it is very difficult to believe the [actor] was not aware of what he was doing."[352]

Vungarala intentionally misled the Tribe, or, at a minimum, was reckless. Vungarala claims that he disclosed his commissions because he told AO and the Tribe that he would be the registered representative on the purchases and the REITs and BDCs were "commissionable products."[353] But those words fail to convey the specific information that PKS and Vungarala were receiving commissions. The Tribe did not understand what the terms meant, and he knew it. Vungarala also persisted in using generic language such as "XYZ team" at the October 27, 2014 meeting, despite pointed questions demanding to know the identity of the persons receiving commissions. Vungarala's carefully crafted language to avoid the simple disclosure that he was receiving commissions, demonstrates a high level of deliberate deception.

Further evidencing deliberate deception, Vungarala made an effort to restrict issuers' communications with AO, and he used his tribal email account and his Sutterfield email account in such a way as to evade oversight by the Tribe. He also tried to impede the general counsel's attempt to gather information from PKS about who received commissions on the Tribe's investments.

Vungarala had motive to deceive the Tribe. He needed money, was highly motivated by money, and felt no loyalty to the Tribe. Despite his six-figure income, he considered himself underpaid to the point he was working for the Tribe "pro bono" and was giving the Tribe "freebies."

Moreover, Vungarala knew that if he made full disclosure, the Tribe would not have followed his recommendations. He knew that the Tribe was concerned about conflicts of interest and had an Investment Policy that broadly prohibited him from having a financial interest that could affect the impartiality of his investment recommendations. He had to conceal the truth in order to receive the commissions.

3. Vungarala's Arguments Are Without Merit

We reject Vungarala's contention that he was transparent and that he disclosed that he was receiving commissions on the Tribe's transactions by providing commission statements every month and by giving tribal members involved in the investment process access to prospectuses and subscription agreements.[354] Access to voluminous documents from which one might puzzle out a fact is not the same as disclosure of that fact. Furthermore, none of those documents actually disclosed that Vungarala personally was receiving commissions on the Tribe's transactions. They spoke in generic terms, using words that were not familiar or readily

[352] *First Commodity Corp. v. CFTC*, 676 F.2d 1, 6-7 (1st Cir. 1982).

[353] Hearing Tr. (Vungarala) 1069-70, 1231-32, 1242, 1659-63.

[354] Resp. PH Br. 4-9.

understandable to the unsophisticated people with whom Vungarala was dealing—and he knew it.

Vungarala's assertion that the Tribe qualifies as an accredited investor and should be presumed to be a sophisticated investor[355] does not advance his cause. Any presumption of sophistication was rebutted by abundant evidence that tribal members involved in reviewing Vungarala's recommendations did not have the experience to understand Vungarala's evasive explanations or to suspect what he meant by signing documents as a registered representative of PKS.

Vungarala accuses Enforcement of "cherry-picking" witnesses from the Tribe to present a distorted view of the Tribe's sophistication. He asserts that the other members of the Tribe who did not appear were sophisticated, "savvy" persons.[356] Because FINRA does not have subpoena power,[357] it could not compel any of the Tribe's members to appear at the hearing. There is no evidence that Enforcement engaged in any kind of "cherry-picking." Nor is there any evidence to suggest that we would draw any different conclusions if we heard from other tribal members. Vungarala's accusation has no substance.

Vungarala argues that he, like any other registered representative when soliciting securities transactions, was subject to the suitability standard, not a fiduciary standard.[358] He makes the argument to counter Enforcement's assertion that as an employee Vungarala was a fiduciary.[359] The dispute is beside the point here. We determine in this matter whether Vungarala violated Section 10b and Rule 10b-5. That is the standard to be addressed. Whether Vungarala committed fraud does not depend upon whether he was a fiduciary.

Finally, Vungarala argues that he had a good-faith belief that he was acting appropriately and that there is no requirement that a registered representative disclose his compensation to his customers.[360] We conclude that Vungarala did not act in good faith. He engaged in self-dealing despite knowing of the Tribe's concern with conflicts of interest. His effort to impede the efforts of the Tribe's general counsel to investigate the situation is only one among many actions Vungarala took to conceal his financial interest in the Tribe's investments. Vungarala's argument also fails to recognize that his relationship with the Tribe was no ordinary broker-customer relationship. The parties have pointed to no other instance in the case law in which a registered representative was employed by his customer.

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[355] Resp. PH Br. 11-12.

[356] Resp. PH Br. 12.

[357] *Charles C. Fawcett, IV*, Exchange Act Release No. 56770, 2007 SEC LEXIS 2598, at *23 (Nov. 8, 2007).

[358] Resp. PH Br. 13-14.

[359] Enf. PH Br. 31-32 & n.29.

[360] Resp. PH Br. 31-32.

In sum, we find that Vungarala made false and misleading statements of material fact and failed to disclose that he received commissions on the Tribe's REIT and BDC investments, as alleged in the First Cause of Action. In so doing, he violated Section 10(b), Rule 10b-5, and FINRA Rules 2020 and 2010.

4. Vungarala's Misconduct Was Willful

We also find that Vungarala's misconduct was willful, which subjects him to statutory disqualification. Pursuant to Sections 3(a)(39)(F) and 15(b)(4)(D) of the Exchange Act, broker-dealers and associated persons are subject to disqualification from the securities industry for willful violations of the federal securities laws.[361] A willful violation of the securities laws means that the violator knew what he was doing when he committed the violative act.[362]

Vungarala knew what he was doing when he crafted his language to conceal that he was receiving commissions on the Tribe's investments, pretended in his white board presentations to inform the Tribe about the fees and expenses associated with the investments, and evaded AO's questions at the October 27, 2014 meeting. Even when the Tribe was pointedly asking *who* received fees and commissions in connection with its investments, he persisted in speaking of the "XYZ team." He did not disclose that *he* received commissions.

C. Vungarala Committed Securities Fraud—Volume Discounts (Second Cause)

1. Vungarala Failed to Disclose Availability of Volume Discounts, a Material Fact

Vungarala made both false statements and misleading statements that omitted material information regarding volume discounts. He falsely stated to MB that the purchases by the Tribe's various trusts could not be combined for purposes of volume discounts, and he misled AO into thinking that volume discounts required physical "comingling" of the trusts. He discussed volume discounts with the Investment Committee only in terms of purchases in the individual Trusts.[363] He did not disclose to the Tribe the truth about the availability of volume discounts. The Tribe lost approximately $3.3 million as a result. If the Tribe had obtained the volume discounts, its rate of return on the investments would have been better. Given that the Tribe was particularly concerned about achieving a high yield to make up the shortfall in casino revenues, the volume discounts were important to the Tribe. The availability of millions of dollars in volume discounts would have been important to any reasonable investor. We conclude that Vungarala failed to disclose a material fact when he misleadingly discussed volume discounts as though they were only available for purchases by a given trust, and when he told MB flatly that the trust purchases could not be combined for purposes of volume discounts.

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[361] *See* 15 U.S.C. § 78c(a)(39)(F); 15 U.S.C. § 78o(b)(4)(D).

[362] *See Wonsover v. SEC*, 205 F.3d 408, 413 (D.C. Cir. 2000).

[363] Resp. PH Br. 10; RXV-72, at 6-7.

2. Vungarala Acted with Scienter

Vungarala's failure to disclose volume discounts was purposeful. He had scienter. He intentionally and falsely told REITs that offered the Tribe larger discounts that the Tribe did not want the discounts. He rejected MB's idea that purchases be made on behalf of the Tribe and then distributed to the different trusts. He told PKS that the Tribe had waived any volume discounts across trusts when, in fact, it had not.

We do not accept Vungarala's claim that he discussed volume discounts with AO and then followed her instruction to waive them, but, even if we did, his scienter is manifest. To the extent that Vungarala talked about volume discounts with AO, he did so in a manner to lead her to believe incorrectly that the discounts were unavailable without physically combining the trusts and that combining the trusts would put the Tribe's privacy at greater risk. In leading her to that belief, Vungarala provided bogus reasons for rejecting volume discounts across the trusts.

First, as discussed above, the trusts did not have to be physically combined and the funds did not have to be comingled in order for the Tribe to take advantage of volume discounts. All that was involved was calculating the total purchases of a particular REIT or BDC across the trusts and then applying the discounts so that each trust would receive its proportional share of the additional units of investment.

Second, obtaining the volume discounts across the trusts also did not increase the threat to the Tribe's privacy. Regardless of whether the trusts' purchases were treated as separate purchases or were combined in order to obtain volume discounts, the Tribe held beneficial ownership of the trusts' assets and the disclosure requirements remained the same. The Securities Exchange Act does not define "beneficial ownership," but the SEC has set forth a definition in Rule 13d-3, which is used when analyzing whether securities holdings must be publicly disclosed in regulatory filings. Under Rule 13d-3, a person is the beneficial owner of securities if that person directly or indirectly has the power to direct the voting of a security or the power to direct the disposition of the security. The Tribe had those powers. Vungarala, as the Investment Manager, worked for the Tribe, followed its directions, and managed the Tribe's entire portfolio; he did not work for individual trusts. Beneficial ownership by an entity is ordinarily attributable to a control person of the entity and any parent company in a control relationship with that entity.[364]

It is unclear whether Vungarala did not understand the definition of beneficial ownership that is used in determining whether a person is the beneficial owner of securities or whether he did understand it but purposely took advantage of AO's lack of sophistication. However, we have no trouble concluding that he knew that the Tribe was entitled to volume discounts without comingling the trusts, something he avoided admitting at the hearing.

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[364] *See Amendments to Beneficial Ownership Reporting Requirements*, SEC Release No. 34-39538, 1998 SEC LEXIS 63, at *26 (Jan. 12, 1998). *See, e.g., Brian Potiker*, Exchange Act Release No. 74503, 2015 SEC LEXIS 994, at *8 n.2 (Mar. 13, 2015) (order settling proceeding and discussing beneficial ownership).

Most telling with regard to scienter, Vungarala manipulated the purchases by the Tribe's individual trusts to minimize the Tribe's volume discounts even on an individual trust basis. He thereby maximized his commissions at the expense of the Tribe. There was nothing inadvertent or accidental about Vungarala's misconduct.

3. Vungarala's Arguments Are Without Merit

Vungarala argues that he treated each trust separately for purposes of volume discounts because Schwab aggregated trades of stocks and bonds each trading day only on a per trust basis. Vungarala asserts that he had a good-faith belief that handling the trusts separately was consistent with the Tribe's structure.[365]

The manner in which Schwab offered the Tribe daily trading discounts is irrelevant. The REITs and BDCs offered volume discounts to the Tribe across trusts. To obtain the volume discounts, the Tribe did not have to alter its structure; it just had to calculate the total purchases. Vungarala did not have a good faith belief that he was acting as the Tribe would want—his manipulation of the Tribe's purchases to minimize the volume discounts even in the individual trusts belies any claim of good faith.

4. Vungarala's Misconduct Was Willful

Vungarala knew what he was doing when he cut off communications between AO and the REIT and BDC companies to diminish the chance she might learn of his deceit. He also knew what he was doing when he rejected volume discounts when REITs told him they were going to correct their calculations to provide better volume discounts across trusts—without consulting the Tribe. He knew that he misled AO and that she did not understand that millions of dollars in volume discounts were at stake. If she had understood, she would have taken the issue to the Investment Committee and Tribal Council.

IV. SANCTIONS

In considering the appropriate sanction for a violation, adjudicators in FINRA disciplinary proceedings look to FINRA's Sanction Guidelines ("Guidelines"). The Guidelines contain recommendations for sanctions for many specific violations, depending on the circumstances. They also contain overarching Principal Considerations and General Principles, which are applicable in all cases.[366] The Guidelines are intended to be applied with attention to the regulatory mission of FINRA—to protect investors and strengthen market integrity.[367] Disciplinary sanctions should be designed to protect the investing public.[368]

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[365] Resp. PH Br. 15-16.

[366] FINRA Sanction Guidelines (2017), http://www.finra.org/industry/sanction-guidelines.

[367] Guidelines at 1, Overview.

[368] Guidelines at 2, General Principle 1.

The Guidelines have specific recommendations for violations of Section 10(b) and FINRA Rules 2010 and 2020 that involve fraud, misrepresentations, or omissions of material fact. Intentional or reckless misconduct such as we have found in this case may result in a fine ranging from $10,000 to $146,000. Adjudicators also may order disgorgement. The Guidelines instruct that adjudicators should strongly consider barring an individual for intentional or reckless misconduct. Only if mitigating factors predominate should a suspension be imposed instead of a bar.[369]

A. First Cause of Action—Commissions

We have found that Vungarala's failure to disclose that he was receiving commissions on the Tribe's investments was intentional or, at a minimum, reckless. There are no mitigating factors, but there are aggravating factors.

Among the aggravating factors is that Vungarala took no responsibility for his misconduct.[370] To the contrary, his statement that he did not waive his commissions because he thought his charitable "legacy" was a better use of the money than "someone else's profitability" revealed a complete lack of understanding that what he did was wrong.

Another aggravating factor is that Vungarala engaged in numerous wrongful acts and a pattern of misconduct that extended over three and a half years.[371] The numerous REIT and BDC investments involved millions of dollars and resulted in over $9.5 million in ill-gotten gains that accrued to Vungarala.[372] Vungarala repeatedly deceived the Tribe and took steps to conceal that he was receiving commissions.[373] While the Tribe would have had to pay commissions if it had bought the REITs and BDCs from Schwab or another broker-dealer firm, Vungarala's misconduct nevertheless harmed the Tribe by depriving it of impartial advice and recommendations. In a sense, because he was the Tribe's employee, the Tribe paid twice for the advice it could have gotten from him if he was only its registered representative.[374]

Although Vungarala denies it, the tribal members with whom he worked were not sophisticated investors.[375] Their lack of sophistication and their trusting dependence on him for his professional expertise permitted him to exercise undue influence over the Tribe. He took advantage of rifts between members of the Tribe and shifted blame onto AO.[376]

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[369] Guidelines at 89.

[370] Guidelines at 7, Principal Consideration 2.

[371] Guidelines at 7, Principal Considerations 8 and 9.

[372] Guidelines at 8, Principal Consideration 16.

[373] Guidelines at 7, Principal Consideration 10.

[374] Guidelines at 7, Principal Consideration 11.

[375] Guidelines at 8, Principal Consideration 18.

[376] Guidelines at 8, Principal Consideration 19.

Vungarala's misconduct directly resulted in a large monetary gain for him.[377] He made more than $9 million from his wrongdoing.[378]

We bar Vungarala from associating with a FINRA member firm in any capacity. He was oblivious to the blatant self-dealing in which he engaged, and that is cause for great concern if he were permitted to remain in the securities industry. He presents a danger to public investors.

We further order Vungarala to disgorge the total amount of commissions he received in connection with the Tribe's REIT and BDC investments, $9,682,629. He should not be permitted to retain a financial benefit from his wrongdoing. Disgorgement serves to remedy securities law violations by depriving violators of the fruits of their illegal conduct.[379] The amount to be disgorged need not be precise, but it should be a reasonable approximation of the wrongdoer's ill-gotten gains.[380] In this case, the amount of unjust enrichment Vungarala obtained can be reasonably approximated by calculating 85% of the amount of commissions PKS received on the Tribe's investments. Vungarala received 85% of the $11,391,329 in commissions that PKS obtained in connection with the Tribe's investments.

In addition, we order that Vungarala pay pre-judgment interest beginning on January 18, 2015, until disgorgement is paid.[381] Pre-judgment interest is a matter of discretion for an adjudicator. Where a violator has enjoyed access to funds over a period of time as a result of his wrongdoing, requiring the violator to pay pre-judgment interest is consistent with the equitable purpose of disgorgement.[382]

B. Second Cause of Action—Volume Discounts

With respect to volume discounts, we conclude that Vungarala acted deliberately to prevent the Tribe from receiving volume discounts to which it was entitled. His intentional misconduct in connection with the volume discounts separately warrants a bar from the industry. There are no mitigating factors, and many of the same aggravating factors apply to this misconduct.

FINRA Staff provided a chart that listed transactions that should have been aggregated for purposes of volume discounts but which were not. The Staff calculated how much the Tribe

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[377] Guidelines at 8, Principal Consideration 16.

[378] Guidelines at 4-5.

[379] *SEC v. Spongetech Delivery Sys., Inc.*, 2015 U.S. Dist. LEXIS 134233, at *7 (E.D.N.Y. Aug. 3, 2015); *Michael David Sweeney*, 50 S.E.C. 761, 768 (1991).

[380] *SEC v. Hughes Capital Corp*., 917 F. Supp. 1080, 1085 (D.N.J. 1996), *aff'd*, 124 F.3d 449 (3d Cir. 1997); *The Dratel Group, Inc*., Exchange Act Release No. 77396, 2016 SEC LEXIS 1035, at *73 (Mar. 17, 2016); *Dep't of Enforcement v. Evans*, No. 2006005977901, 2011 FINRA Discip. LEXIS 36, at *40 n.42 (NAC Oct. 3, 2011); *Laurie Jones Canady*, 54 S.E.C. 65, 84 (1999), *petition for review denied*, 230 F.3d 362 (D.C. Cir. 2000).

[381] This date is when the extension to Vungarala's final employment contract with the Tribe ended. RXV-4, at 7.

[382] *Hughes Capital*, 917 F. Supp. at 1090.

lost in volume discounts—$3,373,303.68.[383] Of that amount, Vungarala received approximately $2.8 million. We would order Vungarala to disgorge the amount he received, but it is already included in the order in connection with the First Cause to disgorge all the commissions that he obtained by his fraud.[384]

V. ORDER

As alleged in the First Cause, Respondent Gopi Krishna Vungarala violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, along with FINRA Rules 2010 and 2020, by making false and misleading statements to the Tribe regarding his receipt of commissions on the Tribe's transactions. For his misconduct he is barred from association with any FINRA member in any capacity. He is also ordered to disgorge his unlawful gain in the amount of $9,682,629, together with pre-judgment interest from January 18, 2015, until paid.[385]

As alleged in the Second Cause, Vungarala failed to disclose to the Tribe that it was eligible to receive volume discounts across trusts. For this misconduct, he is separately barred from association with any FINRA member in any capacity. We would order disgorgement of the additional commissions he obtained from this fraud, but they are included in the order to disgorge all his commissions.

Respondent is also ordered to pay costs in the amount of $15,937.31, which includes a $750 administrative fee and $15,187.31 for the cost of the transcript. If this decision becomes FINRA's final disciplinary action, Vungarala's bars will take immediate effect.

Lucinda O. McConathy
Hearing Officer
For the Extended Hearing Panel

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[383] CX-88.

[384] The Extended Hearing Panel has considered and rejected without discussion any other arguments made by the Parties that are inconsistent with this decision.

[385] The pre-judgment interest rate shall be the rate established for the underpayment of income taxes in Section 6621(a) of the Internal Revenue Code, 26 U.S.C. § 6621(a), the same rate that is used for calculating interest on restitution awards. Guidelines at 11.