BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, DC

In the Matter of the Application of

Gopi Krishna Vungarala

For Review of Disciplinary Action Taken by

FINRA

File No. 3-18881

FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

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FINRA'S BRIEF IN OPPOSITION TO APPLICATION FOR REVIEW

I. INTRODUCTION

Gopi Krishna Vungarala lied to and deceived his customer and employer, the Saginaw Chippewa Indian Tribe (the "Tribe"). During a three-year period, Vungarala falsely and repeatedly informed the Tribe, and led it to believe that, he would not personally receive any commissions on more than $190 million in non-traded real estate investment trusts ("REITs") and business development companies ("BDCs") that he recommended. Vungarala falsely assured the Tribe that his dual-role, as both the broker for the Tribe's accounts in which the securities at issue were purchased and the full-time Tribal employee managing the Tribe's investments, would not create a conflict of interest because he would not receive compensation on the transactions. The Tribe readily believed Vungarala, whom it relied upon as the "expert" with respect to its investments.

Vungarala, however, betrayed the Tribe's trust. Not only did Vungarala personally earn a commission on each recommended purchase (on top of his six-figure salary as a Tribal

employee), by the time the Tribe discovered Vungarala's deception he had earned more than $9.6 million in commissions on the Tribe's investments. Adding insult to injury, Vungarala also lied to and hid from the Tribe that it was eligible to receive more than $3.3 million in volume discounts on his recommendations. The reason is clear: the Tribe's missed volume discounts would have directly reduced Vungarala's total payout.

FINRA's National Adjudicatory Council ("NAC") concluded—based upon the credible and consistent testimony of three separate Tribal employees intimately involved with the Tribe's non-traded REIT and BDC purchases, documents corroborating that testimony, and the Tribe's various actions during the relevant period—that Vungarala willfully made false and misleading statements and omissions of material facts in connection with his recommendations to the Tribe, in violation of the Securities Exchange Act of 1934 ("Exchange Act") and FINRA's rules. For Vungarala's egregious misconduct, the NAC barred him twice—once for his fraud related to his commissions and again for his fraud related to the Tribe's missed volume discounts. In so doing, the NAC found that Vungarala abused his position of trust as the Tribe's investment manager to line his own pockets during a multi-year period, and ordered that he disgorge the entirety of his commissions as ill-gotten gains directly resulting from his misconduct.

On appeal, Vungarala has not presented any persuasive arguments to overturn the NAC's well-supported decision. Importantly, he has failed to present substantial evidence to overturn the extensive credibility determinations of the initial fact finder upon which the NAC's findings are based (including its findings that Vungarala's testimony on all pertinent matters was not credible). Instead, on appeal Vungarala theorizes that each of the Tribal witnesses lied, the Tribe fabricated documents to support their testimony, and it either pretended not to know that Vungarala personally earned commissions on each non-traded REIT and BDC investment or

must have known that he earned commissions because it purportedly was sophisticated and it had access to prospectuses. He speculates that the Tribe did these things to increase its likelihood of success in a 2017 arbitration claim filed against him and his former firm alleging that the REITs and BDCs were unsuitable investments. The various prongs of Vungarala's conspiracy theory defy logic, and each is easily disproved by abundant evidence in the record. Moreover, the fact that the REIT and BDC prospectuses disclosed fees generally and discussed the availability of volume discounts does not negate Vungarala's affirmative misrepresentations to the Tribe to the contrary. The Commission should therefore reject Vungarala's arguments.

The Commission should also reject Vungarala's arguments that FINRA's proceeding against him was unfair. Vungarala complains that the Tribe only produced to FINRA evidence supporting a case against him, failed to produce unspecified evidence allegedly in existence exonerating him, and he was unable to obtain this information or compel the testimony of other Tribal witnesses. This too is a false narrative. Customers, including the Tribe, are never subject to FINRA's jurisdiction or control, and it is well-established that this fact does not render FINRA proceedings unfair. Further, nothing in the extensive record suggests that FINRA failed to produce documents received by it from the Tribe or that it abused its discretion in bringing a disciplinary proceeding against Vungarala. Moreover, although Vungarala continues to suggest that documents exist proving his innocence, he fails to identify a single document or relevant witness that supports his version of events. His failure to do so is telling given the abundant documentary and testimonial evidence in the record in this proceeding, and his receipt of "more than 100,000 pages of documents" from the Tribe in connection with its 2017 arbitration claim.

Finally, the Commission should affirm the NAC's bars of Vungarala and order that he disgorge his ill-gotten gains. Vungarala engaged in a pattern of fraud and deceit for more than

three years by taking advantage of the Tribe's trust in him and reliance upon his management of its investments. He amassed substantial personal gains as a result of his fraud, caused harm to his customer, and attempted to conceal his misconduct. Vungarala is unfit to continue servicing securities customers, and the bars and disgorgement order are neither excessive nor oppressive. In sum, Vungarala has not presented any legitimate reason to disturb the NAC's appropriately remedial sanctions. Accordingly, FINRA urges the Commission to dismiss Vungarala's application for review.

II. BACKGROUND

A. Vungarala

Vungarala first registered as a general securities representative in September 2004. (RP 3852.) He became a registered representative with Purshe Kaplan & Sterling Investments, Inc. ("PKS") in December 2007, when he also registered as an investment adviser with Sutterfield Financial Group ("Sutterfield"). (RP 3851-52.)

In November 2008, the Tribe hired Vungarala as its first-ever, in-house Investment Manager.[1] (RP 1792, 1916, 2094, 2137, 2902.) Although the job description for this full-time position required the Series 7 and Series 63 "certifications," the Tribe did not fully understand the significance of these registrations or why these registrations were necessary to perform the job. (RP 2019-20, 3425-26, 3893.) When Vungarala explained to the Tribe his relationship with PKS, he simply told the Tribe that a broker-dealer had to "hold" his licenses for him to maintain

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[1] The Tribe previously used an outside adviser to manage its investments. (RP 2136-37.)

them, and that he "parked" his licenses at PKS (a firm that he stated that he was "familiar with").[2] (RP 1933-34, 2012-13, 2142, 2169, 3368, 5797.)

As the Tribe's Investment Manager, Vungarala's job was to manage, evaluate, and monitor the Tribe's portfolio of investments and to consider alternative investments. (RP 2132, 3887, 3893, 4611.) The Tribe relied upon, and trusted Vungarala, to provide it with objective advice concerning its investments. Vungarala admitted that the Tribe's leaders expected him to make investments that were in the Tribe's best interest. (RP 2905-06, 2939, 2969.) Consistent with this admission, the Tribe's Investment Policy, which governed Vungarala's conduct and activities as the Tribe's Investment Manager, prohibited him from any "personal business activity that could conflict with the proper execution and management of the [Tribe's] investment program, or that could impair [his] ability to make impartial decisions." (RP 2939, 3898.) Vungarala acknowledged that there "definitely was a conflict" with him being on both sides of the Tribe's transactions as a PKS registered representative and a Tribal employee, which he believed could be resolved by fully disclosing to the Tribe these divergent roles. (RP 3533-34.)

The Tribe initially paid Vungarala an annual salary of $99,500, although it subsequently increased his salary and offered him a modest performance bonus (shortly after he started earning, unbeknownst to the Tribe, millions in commissions on the Tribe's investments). (RP 2254-55, 3887, 3893, 4611.) Despite his salary as a full-time Tribal employee and other perks,

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[2] Vungarala's characterization of his relationship with PKS as passive made sense to the Tribe because it knew that he only had a few other customers. (RP 2205, 2300-01, 2907, 2951.) Vungarala did not have a large book of business because he was focused on helping his special needs son, which caused him to experience financial strain around the time the Tribe hired him. (RP 2907-12, 2951.)

Vungarala felt undercompensated. (RP 2913). Indeed, he characterized himself as working "pro bono" for the Tribe. (RP 2913.) Vungarala also felt mistreated by other Tribe employees because he was not a Tribal member. (RP 2915, 2986-87.)

B. The Tribe

The Tribe is a federally recognized, sovereign Native American tribe occupying a federal Indian reservation in Michigan. The Tribe has several thousand enrolled members. Among other things, the Tribe operates a resort and several casinos.

The Tribe invests funds from its operations in various accounts, each of which is designated to fund a specific Tribal function.[3] (RP 1919-21.) Prior to hiring Vungarala, the Tribe purchased stocks and bonds upon the advice of its outside investment manager through Charles Schwab & Co. ("Schwab"). (RP 2136-37, 2931.) After hiring Vungarala and based upon his recommendations, the Tribe also began to purchase non-traded REITs and BDCs through PKS.[4] (RP 1921-22.)

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[3] Although the Tribe referred to its accounts as "trusts," they were not legal trusts; rather, they were established simply as a convenience for accounting purposes. (RP 1122, 2110, 2503, 2794.) The Tribe's Investment Policy provided that each account "is considered separate with respect to transactions" and securities could only be moved between accounts to settle a related obligation. (RP 3901.)

[4] A REIT "is a company that owns – and typically operates – income-producing real estate or real estate-related assets. . . . In addition, there are REITs that are registered with the SEC, but are not publicly traded. These are known as non-traded REITs (also known as non-exchange traded REITs)." *See Fast Answers, Real Estate Investment Trusts*, https://www.sec.gov/fast-answers/answersreitshtm.html. BDCs "are a category of closed-end funds that are operated for the purpose of making investments in small and developing businesses and financially troubled businesses." *See Fast Answers, Investment Company Registration and Regulation Package*, https://www.sec.gov/investment/fast-answers/divisionsinvestmentinvcoreg121504htm.html.

C. Vungarala Recommends Non-Traded REITs and BDCs

Vungarala began recommending to the Tribe non-traded REITs and BDCs in mid-2011 to replace bonds in the Tribe's portfolio that were maturing or had been called. (RP 1793, 2140, 2267, 2932). The Tribe had no prior experience investing in non-traded REITs or BDCs. (RP 2142.) From July 2011 through the end of 2014, however, the Tribe invested $190,375,000 in non-traded REITs and BDCs in approximately 272 separate transactions. (RP 0033-43.) The Tribe's purchases were extremely lucrative for Vungarala. In fact, PKS paid Vungarala $9,682,629 of the approximately $11.4 million in commissions that it earned on the Tribe's non-traded REIT and BDC transactions.[5] (RP 1793.)

The Tribe made each purchase based upon Vungarala's recommendation to do so. (RP 2950.) Whereas Vungarala had discretion to trade stocks and bonds in the Tribe's Schwab accounts in accordance with the parameters set forth in the Investment Policy, the Tribe's investment process for non-traded REITs and BDCs involved a multi-step approval process. Vungarala, however, initiated and directed the process of vetting proposed non-traded REIT and BDC investments through the Tribe's various committees. In so doing, he exploited the Tribe's reliance upon him as the expert on investment-related matters to earn millions in commissions that he would not have otherwise received absent his deception.

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[5] Selling commissions for the non-traded REITs and BDCs were generally 7% to managing dealers and participating brokers. (RP 2649.) Vungarala received 85% of PKS's commissions on non-traded REITs and BDCs.

D. The Tribe's Investment Process

Vungarala would first bring a specific recommendation to purchase a non-traded REIT or BDC to the Tribe's Treasury Department, of which he was a part. (RP 1916, 2130, 2147.) Vungarala would explain his recommendation to the other relevant Treasury Department members—his supervisor (Angela Osterman ("Osterman")) and two research analysts that worked under Vungarala's direction (including Melanie Burger ("Burger")). (RP 1915, 2130-31, 2147.) These individuals had very little experience with, or background in, any kind of investments, let alone with REITs or BDCs, which they initially found to be "confusing." (RP 2134-35, 2139, 2217, 2295, 2514-15, 2519, 3229-30, 3279-80, 3355.) Osterman, the Treasury Department's supervisor, never read any of the non-traded REIT or BDC prospectuses, and the research assistants did not independently research Vungarala's recommendations. (RP 2295, 2520.) Osterman and the other department members relied upon and trusted Vungarala's recommendations because he was the "expert" and the "professional," and they believed what he told them. (RP 2182, 2291, 2348-49, 2451, 2522, 3436.) Indicative of Vungarala's influence over the process, no member of the Treasury Department *ever* overruled one of Vungarala's hundreds of recommendations. (RP 2151.)

Vungarala trained these individuals to assist him in obtaining approval of his recommendations from other Tribal committees, and he eventually taught them how to draft short summaries for each proposed non-traded REIT or BDC based upon their marketing materials and prospectuses. The summaries did not contain information regarding Vungarala's commissions or any information concerning volume discounts. (RP 2133, 2148, 2150, 2236-37, 2451-52, 2517-20, 2594, 2611.)

After the Treasury Department, Vungarala's recommendations would be reviewed by the Tribe's Investment Committee. (RP 1912, 2131, 2138.) The Investment Committee consisted of five or six individuals, including Osterman and Dustin Davis ("Davis"), who served as the Tribal Administrator. (RP 1908, 1911-12.) No special qualifications were required to serve on the Investment Committee, and its review of Vungarala's recommendations was at a "high level." (RP 1912, 2094-95.) Vungarala would provide the summaries prepared by the Treasury Department and would often make presentations at Investment Committee meetings concerning the non-traded REITs and BDCs he was recommending. Other members of the Treasury Department would sometimes attend with Vungarala. (RP 2521.)

In considering Vungarala's recommendations, the Investment Committee focused on the forecast interest rate for each proposed non-traded REIT or BDC, the number of shares that the Tribe would purchase, the investment's offering price, and what investment the REIT or BDC would be replacing. (RP 1963-64.) The Investment Committee relied upon Vungarala, as the Tribe's Investment Manager, to review the prospectuses for each investment and decide whether to recommend to the Tribal Council that the Tribe invest in a non-traded REIT or BDC.[6] (RP 2094, 2106.)

The Tribal Council, a 12-person body that included the Tribe's Chief, Sub-Chief, and several members of the Investment Committee, made the final decision on any recommended investment in a non-traded REIT or BDC sent to it by the Investment Committee. (RP 1919-20, 2084.) The Tribal Council received the summaries prepared by the Treasury Department, REIT and BDC marketing materials, a proposed resolution or motion to approve the investment, and

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[6] Similar to Osterman, Davis never read a prospectus for any of Vungarala's recommendations. (RP 1962.)

the investment application.[7] The Tribal Council almost always accepted Vungarala's recommendations. In fact, of Vungarala's approximately 272 recommendations to the Tribe that it invest in non-traded REITs and BDCs, it only rejected two (and it did so for reasons unrelated to the financial or economic merits of the investments). (RP 2151, 2608.)

E. Vungarala's Misrepresentations and Deceit

1. Vungarala's First Series of Misrepresentations and Omissions Concerning His Commissions

Vungarala began his misrepresentations around mid-2011, just prior to the Tribe's first non-traded REIT investment. Vungarala encouraged the Tribe to use PKS to buy non-traded REITs and BDCs, where he would earn a commission on each investment, instead of Schwab, where he would not receive commissions. To further this goal, Vungarala falsely told Osterman that purchasing these products through Schwab would be prohibitively expensive, whereas "PKS does not charge a fee." (RP 2274-78, 2936). He then told Osterman that there would be no conflict of interest if the Tribe utilized PKS to purchase non-traded REITs or BDCs "because he would not make any money off of" the purchases. (RP 2142-43, 3417 (Osterman Testimony); RP 6819-20 (Hearing Panel finding her testimony credible and Vungarala's contrary testimony incredible).) This too was false.

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[7] The Tribal Council and the Investment Committee periodically received a "glossary of investment terms" prepared by the Treasury Department. (RP 2344.) In connection with each recommendation, the Tribal Council also received from the Tribe's Legal Department a memorandum expressing its opposition to each investment (based upon the Legal Department's concern that purchasing non-traded REITs and BDCs would jeopardize the Tribe's sovereign immunity by subjecting it to arbitration in connection with any dispute). (RP 2148-49, 2233-35, 2331.) Although the Legal Department reviewed the prospectuses, it did not review the merits of the investments, the fees paid, or whether Vungarala's assertions concerning his commissions and volume discounts were true. (RP 1142 (affidavit of Tribe's General Counsel).)

Shortly after this conversation, Osterman informed the Investment Committee at a June 2011 meeting that Schwab did not offer non-traded REITs or BDCs and the Tribe would need to use another broker-dealer to purchase them. (RP 2273-74, 2279-80.) Osterman then told the Investment Committee the same falsity that Vungarala had previously told her—that there would be no conflict of interest using PKS for this purpose because Vungarala "would not be making any money" on the Tribe's purchases.[8] (RP 2145-46 (Osterman's testimony); 1928, 1954-55 (Davis's testimony); 4017 (meeting minutes corroborating testimony).) Vungarala, who was present during Osterman's statements, did not correct Osterman's mistaken beliefs. (RP 3417, 4017.) Instead, he let the Investment Committee falsely believe that he would not receive commissions on his recommendations, in compliance with the Tribe's Investment Policy. The Investment Committee recommended approval of Vungarala's recommendation, the Tribal Council accepted the recommendation, and the Tribe began to purchase non-traded REITs and BDCs shortly thereafter.

2. Vungarala Repeatedly Misleads the Investment Committee Concerning His Commissions

Vungarala continued his fraudulent misconduct at periodic presentations to the Investment Committee during the relevant period, where he always used "white boards" to explain certain aspects of the non-traded REITs and BDCs that he recommended. (RP 2181, 2573-75, 3048, 3238-39.) Although Vungarala claimed, without any support, that he fully and

[8] Vungarala testified that he repeatedly told Osterman and the Tribe that he would receive commissions on the Tribe's purchases, but never informed them how much he would receive because Osterman and the Tribe "never asked." (RP 3048-49.) The Hearing Panel found this testimony to be not credible. (RP 6819-20.) It found that Osterman would have sought the Investment Committee's and Tribal Council's approval for Vungarala's commissions had she known, as was her custom with other investment-related issues and because she viewed the receipt of commissions as unethical and contrary to the Investment Policy. (RP 6820.)

completely disclosed to the Investment Committee that PKS would receive commissions on the Tribe's non-traded REIT and BDC purchases and that PKS in turn would pay him, the evidence showed that he described fees generically, at a "higher level," and without any reference to PKS or himself. (RP 2576, 3238-39.) Indeed, during these presentations Davis often asked Vungarala about the fee structure for the Tribe's REIT and BDC purchases, and "every time [Vungarala] was asked he stated that he was not receiving commission, and fees would go toward packaging of REITs, due diligence, expenses." (RP 1928-29, 1951, 1987.) Vungarala's statements to the Investment Committee were false.

Davis also testified that Vungarala never disclosed to the Investment Committee that he would receive commissions on the Tribe's investments. (RP 1925.) Similarly, Osterman and Burger testified that during these presentations, Vungarala never explained that he would receive commissions, but instead he generally summarized information about fees and costs that was contained in the prospectuses. (RP 6826 (Hearing Panel finding Osterman's, Burger's, and Davis's testimony concerning white board presentations credible).)

3. Vungarala Misleads the Tribe About Volume Discounts

Vungarala also never explained to the Tribe that it could aggregate its purchases of non-traded REITs and BDCs across its various accounts to receive volume discounts on its purchases.[9] (RP 1945, 2152-54, 3224-23.) To the contrary, several years into the Tribe's purchases of non-traded REITs and BDCs, Burger directly asked Vungarala during a Treasury

[9] The prospectuses contained information concerning volume discounts, which a customer could receive when its purchases of a non-traded REIT or BDC reached a breakpoint, and the applicability of such discounts to various accounts held by the same entity. The discount would reduce the total commissions paid and allow the customer to buy more of the security. (RP 2492-93.) On appeal, Vungarala does not dispute the Tribe's eligibility to receive volume discounts across its accounts.

Department meeting whether the Tribe could purchase non-traded REITs and BDCs "all at once and then delegate ourselves which trusts that they belong to" so that the Tribe could receive a discount. (RP 2523-25.) Vungarala falsely responded that the Tribe was not eligible to receive volume discounts because its accounts were separate and needed to remain that way. (RP 2152-54, 2523.) Osterman deferred to Vungarala on this issue because she trusted and believed him, and Burger testified that there was no further discussion of the matter. (RP 2349-50, 2524.) Because of Vungarala's misrepresentations, the Tribe paid approximately $3.3 million in commissions to PKS that it was not required to (of which Vungarala received approximately $2.8 million). (RP 2706-08, 4273.)

Further, despite Vungarala's unsupported claims to the contrary, Osterman never informed Vungarala that the Tribe did not want to take advantage of such discounts. (RP 2351, 3422, 3422.) These facts are supported by Osterman's testimony, which stood in stark contrast to Vungarala's incredible and unsupported testimony that he spoke to Osterman twice about volume discounts and she unilaterally waived them on behalf of the Tribe because of concerns with keeping its affairs private and its various accounts separate. (RP 3001-12 (Osterman's testimony); 6842 (Hearing Panel's findings that Vungarala's testimony was not credible).) Vungarala further caused PKS to believe this false narrative to justify the Tribe's purported waiver of millions in benefits.[10] (RP 3650-51 (testimony of former regional PKS supervisor Donald Guider ("Guider")); 7349-50, 7371.)

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[10] In October 2014, PKS also asked that Vungarala obtain from the Tribe documentation confirming that it wished to "keep the REIT transactions separate and not mixed," which is what Vungarala had previously told PKS to justify the Tribe's purported waiver of discounts. (RP 1168-76, 5395.) At Vungarala's request, Osterman drafted a letter on behalf of the Tribe stating that "[e]ach of [the Tribe's] trusts has its own purpose and funding obligations and cannot be co-mingled between each other." (RP 5396.) PKS twice sought additional clarification from the

[Footnote continued on next page]

4. Vungarala Continues His Deception as FINRA, PKS, and the Tribe Begin Their Inquiries

Vungarala continued to regularly recommend non-traded REITs and BDCs to the Tribe without the Tribe discovering his numerous misrepresentations and omissions. Beginning in August 2014, however, Vungarala's relationship with Osterman soured. Tribal members began to speculate about Vungarala's personal finances and whether he had been receiving commissions on the Tribe's investments. (RP 2114, 2169.) Osterman did internet research and discovered that PKS and Sutterfield employed Vungarala and that he owned multiple businesses and foundations. (RP 2165-67.) Also around this time, Vungarala became aware that FINRA was investigating the Tribe's missed volume discounts.[11]

Vungarala's lies began to unravel at an October 2014 Investment Committee meeting (which Osterman, Burger, and Davis attended). Vungarala purportedly wanted to discuss at this meeting fees and expenses related to the Tribe's non-traded REIT and BDC purchases because of a FINRA rule—not effective until April 2016—that would require the true cost of investments to be shown on customer statements.[12] Vungarala made a presentation to the Investment

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[cont'd]

Tribe regarding the separate nature of the accounts. None of this correspondence refers to volume discounts or the Tribe's waiver of discounts. (RP 5399-5401.)

[11] In September 2014, after a national review of its member firms to determine whether customers purchasing non-traded REITs and BDCs had received all volume discounts to which they were entitled, FINRA requested information from PKS concerning Vungarala, volume discounts, and his commissions. (RP 2479-82, 4209.) PKS responded to FINRA's request, with Vungarala's assistance, in October 2014. (RP 2978-79, 3012-13, 4249.) FINRA also asked similar questions of the Tribe, and the Tribe's General Counsel responded in writing to FINRA's questions in mid-2015. (RP 4179.)

[12] Vungarala's purported rationale for putting this item on the Investment Committee's agenda in October 2014 is suspect, as the rule was not going to become effective for another 18 months. The NAC thus observed that Vungarala appeared to have initiated this discussion "to

[Footnote continued on next page]

Committee similar to his prior white board presentations, during which Osterman asked him whether PKS received a commission on the Tribe's purchases. (RP 2168.) In response, Vungarala revealed, for the first time, that PKS received a 7% commission and his supervisor made half of that.[13] (RP 2168, 2178-79.) Osterman testified that Vungarala twice denied personally receiving any commissions on the Tribe's investments. (RP 1935, 2168, 2170, 2179.)

According to Burger, Vungarala was evasive, did not answer Osterman's questions about whether he was receiving commissions, and he told the Investment Committee that "a supervisor at PKS is getting [the commission], and then the sales team gets the rest." (RP 2542, 2568-71, 2612.) Davis's testimony was consistent with Burger's testimony. (RP 1935-38, 1943.) Moreover, written minutes from this meeting corroborated the credible testimony of Osterman, Burger, and Davis that Vungarala did not inform the Investment Committee that he personally was receiving commissions. (RP 4029 (meeting minutes); 6832 (Hearing Panel finding Tribal witnesses credible and Vungarala's claim that Osterman knew he received commissions, but pretended not to know, not credible).)

[cont'd]

provide cover for his numerous misrepresentations and omissions of material facts concerning his personal receipt of commissions." (RP 7351.)

[13] Osterman explained that, prior to Vungarala's disclosure, she did not believe that PKS earned commissions on the Tribe's purchases. She thought the Tribe did not have any agreement with PKS, and she viewed PKS as "just [Vungarala's] brokerage firm that would allow us to buy REITs through them." (RP 2143-44.) Osterman also testified that statements from the REITs and BDCs showed the Tribe's total investments without backing out any commissions or fees, whereas statements received from Schwab clearly listed commissions and fees. (RP 2179-80, 3237-38.) Similarly, Davis testified that he understood that PKS would receive fees "based upon their packaging, their legal costs, and any due diligence costs that they may incur," but not commissions. (RP 1934-35, 1959.)

Davis found Vungarala's presentation "very confusing." (RP 1936.) He therefore asked Vungarala to email the Investment Committee a detailed explanation. (RP 1936.) In Vungarala's email response, he continued to intentionally mislead the Investment Committee. (RP 4031.) While his email contained information about commissions, fees, and expenses related to non-traded REIT and BDC purchases, Vungarala admittedly did not disclose that he personally was receiving, and had received, commissions on the Tribe's purchases. Vungarala incredibly explained that he did not disclose this information in this email because he had allegedly already disclosed this to the Investment Committee at the meeting, which is contrary to all of the evidence.[14] (RP 2991-93 (Vungarala testimony); 6833 (Hearing Panel finding Vungarala's testimony incredible).) Vungarala's explanation is also at odds with his initial testimony that he did not specifically disclose that he received a portion of commissions that PKS received because the Investment Committee frequently interrupted him with questions during the meeting, which required him to go off on "tangents."[15] (RP 2982-83.)

5. The Truth is Finally Revealed

On December 21, 2014, almost three-and-a-half years after the Tribe first purchased a non-traded REIT, the Tribe finally discovered that Vungarala had been earning commissions on every non-traded REIT and BDC purchase that Vungarala had recommended. Even leading to

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[14] Osterman sent Vungarala follow-up questions because Vungarala's email failed to identify the supervisor who Vungarala stated was paid half of PKS's 7% and the "sales team." Even at this late stage, neither Osterman nor Davis believed that Vungarala was receiving a commission on the Tribe's purchases. (RP 1943, 2188.)

[15] Underscoring Vungarala's lack of credibility, he later changed his story again and testified that he did disclose during the October 2014 Investment Committee meeting that PKS paid him 85% of the commissions it received. (RP 3134.)

this point, however, Vungarala continued to obfuscate his compensation on the Tribe's investments.

For instance, in November 2014, Vungarala met with a subgroup of the Tribal Council to tell them that, among other things, he had disclosed everything about his receipt of commissions when he joined the Tribe in 2008. (RP 3142-48.) This was untrue.[16] The Tribe scheduled a meeting of the full Tribal Council to discuss the matter towards the end of December 2014.

Just days prior to that meeting, the Tribe's General Counsel asked PKS about commissions on the Tribe's purchases and exactly who received the commissions. (RP 4037-39.) PKS sought input from Vungarala to answer these questions. In an email exchange, the General Counsel complained to Vungarala that he was preventing the Tribe from obtaining this information, and emphasized that the Tribe had "legitimate questions about commissions and to whom and how they are paid. . . . The Tribal Council deserves answers so that they can move forward in the best interests of the Tribe." (RP 4037.)

The Tribal Council met on December 21, 2014. Vungarala used a white board to explain fees and commissions related to the Tribe's non-traded REIT and BDC purchases. (RP 3148-52.) At this time, Vungarala *finally* disclosed that he received 85% of the commissions paid to PKS. (RP 1978, 2789, 4184.) Vungarala also informed the Tribal Council that he allegedly donated to charity the bulk of his commissions. (RP 3149). The rest of the meeting was acrimonious. (RP 3151-52, 3520.) Several days later, PKS informed the Tribe what it had earned in commissions, but did not include a breakdown of Vungarala's commissions. Several

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[16] Vungarala, however, also testified that when he first joined the Tribe, he did not have any expectation that he would be selling products to the Tribe and earning commissions on those transactions. (RP 3504-05.) It is unclear why Vungarala would have disclosed everything about his receipt of commissions if he had no expectation that he would be selling the Tribe securities.

weeks later, Vungarala's employment contract with the Tribe expired. The Tribe did not renew it. (RP 3041.)

F. FINRA's Complaint

After an investigation in which FINRA interviewed Vungarala, several PKS employees, and Tribal members, FINRA filed a four-count complaint against PKS and Vungarala in February 2016. (RP 0001, 2693.) Prior to the hearing, PKS settled the two causes of action against it that alleged supervisory failures in connection with Vungarala's fraudulent misconduct. (RP 1637.)

In the two causes of action specific to Vungarala, FINRA's Department of Enforcement ("Enforcement") alleged that he: (1) willfully made misrepresentations of material facts, and failed to disclose material facts, to the Tribe in connection with its purchases of non-traded REITs and BDCs from June 2011 through December 2014, by falsely informing the Tribe that he would not receive commissions on these transactions and failing to inform the Tribe that he would receive commissions; and (2) willfully made misrepresentations of material facts, and failed to disclose material facts, to the Tribe with respect to its eligibility to receive volume discounts on its purchases of non-traded REITs and BDCs. Enforcement alleged that Vungarala's misconduct violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010.

G. The Hearing Panel and the NAC Find, Based Upon Abundant Evidence, that Vungarala Lied to and Misled the Tribe Concerning His Commissions and the Tribe's Eligibility for Volume Discounts

1. Hearing Panel Findings

The Hearing Panel conducted an eight-day hearing in April 2017.[17] *See generally* RP 1847-3848. Seven witnesses testified, including Osterman, Burger, Davis, and Vungarala.

The Hearing Panel found that Vungarala willfully made fraudulent misrepresentations and omissions in connection with his receipt of commissions on the Tribe's non-traded REIT and BDC investments, as well as in connection with the availability of volume discounts. (RP 6791-6863.) In so concluding, the Hearing Panel found Osterman, Burger, and Davis credible. It found that their testimony was consistent with documentary evidence and "made sense in light of the Tribe's conduct during the relevant period." (RP 6852.) As described above, the Hearing Panel also made numerous findings that specific testimony of the Tribe employees was credible concerning Vungarala's misrepresentations and omissions. (RP 6819, 6826, 6832.)

In contrast, the Hearing Panel found that Vungarala's testimony—that he fully disclosed to the Tribe his receipt of commissions and its eligibility for volume discounts across accounts on non-traded REIT and BDC purchases—was not credible. (RP 6820, 6829, 6832-33, 6842, 6850-52.) It held that Vungarala's "testimony was repeatedly evasive, inconsistent, and

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[17] Also in April 2017, the Tribe filed against PKS and Vungarala a FINRA arbitration claim, which asserted that Vungarala's recommendations were unsuitable. (RP 7025, 7280.) Vungarala asserts that he has received more than "100,000 pages of documents" from the Tribe in connection with its arbitration. *See* Vungarala's Opening Brief ("Brief"), at 1, 13. Although he cryptically asserts that a confidentiality order in the arbitration proceeding "bars him from relying upon that information here," Vungarala does not describe, either generally or specifically, any document received in that proceeding that supports his claim that he did not engage in fraud.

misleading," found his "overall story" to be not credible, and found that he was generally untrustworthy. (RP 6850-51.)

The Hearing Panel twice barred Vungarala for his fraudulent misconduct. (RP 6860-62.) It also ordered that he disgorge $9,682,629, which represented the commissions he earned in connection with the Tribe's purchases of non-traded REITs and BDCs and included the commissions he earned on the Tribe's missed volume discounts (approximately $2.8 million). (RP 6862.) Vungarala appealed the Hearing Panel's decision to the NAC.[18] (RP 6865.)

2. The NAC Finds that Vungarala Engaged in Fraudulent Misconduct

The NAC affirmed the Hearing Panel's findings of liability in totality. (RP 7327-78.) It found that the factual bases for Vungarala's misrepresentations and omissions were established by the credible and unbiased testimony of Osterman, Burger, and Davis (in contrast to Vungarala's incredible and self-serving testimony on all pertinent points). (RP 7331, 7360.) The NAC found that Vungarala's arguments seeking to undermine the Hearing Panel's credibility findings fell "well short" of the substantial evidence necessary to overturn them. (RP 7360.)

Moreover, the NAC found that the Tribal witnesses' consistent and credible testimony was buttressed by documents in the record, such as Investment Committee meeting minutes. It rejected Vungarala's efforts to undermine these documents. (RP 7361-62.) The NAC also found that various actions of the Tribe strongly supported the Tribal witnesses' credible version of events. (RP 7361-62.)

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[18] Throughout his brief, Vungarala takes issue with the Hearing Panel's decision. It is the NAC's decision, however, and not the Hearing Panel's, that is the final action of FINRA that is reviewable by the Commission. *See David Evansen*, Exchange Act Release No. 75531, 2015 SEC LEXIS 3080, at *51 (July 27, 2015).

Having determined that Vungarala made misrepresentations and omissions concerning his commissions and the Tribe's eligibility to receive volume discounts, the NAC then properly concluded that Vungarala's misrepresentations and omissions were material (and that he had a duty to disclose this information) and were made with the requisite scienter, in violation of federal securities laws and FINRA's rules. (RP 7362-65, 7369-71.) The NAC further found that Vungarala had a motive to deceive the Tribe. He felt mistreated by the Tribe and underpaid, while he admittedly was attempting to rebuild his finances because he had depleted all of his liquid assets. (RP 7365.)

In making its findings that Vungarala engaged in fraudulent misconduct, the NAC found meritless Vungarala's numerous arguments. *See generally* 7365-69, 7371. For example, the NAC rejected Vungarala's argument that the Tribe knew, or should have known, that he was receiving commissions and was eligible to receive volume discounts (thus negating his fraud) because the Tribe was sophisticated, as completely contrary to the evidence and the law. (RP 7366-68.) It also rejected Vungarala's arguments that his fraud should be excused because the various non-traded REIT and BDC prospectuses disclosed that certain generic entities and individuals would receive fees and expenses. (RP 7336, 7365-66.)

Similarly, it rejected Vungarala's argument that despite his lies to the Tribe that he would not be receiving commissions, he nonetheless made full and complete disclosure of such commissions based upon certain monthly expense reimbursement reports that he turned over to the Tribe (which the Tribe generally did not review or understand and that omitted any specific information concerning commissions Vungarala was earning on the Tribe's purchases). (RP 7340-41, 7365-66.) The NAC also thoroughly rejected Vungarala's claim that he acted in good faith, and believed he was carrying out the Tribe's wishes to keep its accounts separate and its

affairs private, by informing the Tribe that it could not receive volume discounts across its accounts. (RP 7371.) Finally, the NAC rejected Vungarala's procedural arguments, which all concern his claim that the Hearing Panel only heard half of the story because the Tribe limited the evidence that it provided to Enforcement and only produced documents and witnesses that supported claims against Vungarala. (RP 7372-73.)

The NAC found that Vungarala was unfit to continue in the securities industry, and imposed two bars for Vungarala's egregious misconduct—one for his misconduct related to the commissions he earned on the Tribe's purchases, and one for his deceit related to the Tribe's volume discounts. (RP 7376.) The NAC's bars are supported by "abundant aggravating factors." (RP 7375.) The NAC found that Vungarala engaged in a pattern of misconduct during a several-year period and intentionally misrepresented and concealed his commissions and the Tribe's eligibility for volume discounts for his own personal benefit. Importantly, the NAC found that Vungarala abused his position of trust with the Tribe and used his intimate knowledge of the Tribe and its operations to his advantage. It further found that Vungarala showed no remorse for his misdeeds, and instead attempted to justify his fraudulent misconduct by arguing that he deserved to be paid the commissions and was a better steward of those funds than PKS would have been. (RP 7375.)

The NAC also ordered that Vungarala disgorge the fruits of his fraudulent conduct—the $9,682,629 in commissions he earned on the Tribe's investments. (RP 7376.) It found entirely appropriate that he disgorge this amount, which represents the financial benefit he obtained through his misrepresentations and omissions, to remediate Vungarala's misconduct and deter others from behaving similarly. Finally, the NAC rejected Vungarala's argument, repeated here,

that FINRA's sanctions were punitive and recent case law constrains FINRA's ability to impose sanctions. (RP 7377.)

On November 2, 2018, Vungarala filed this appeal. (RP 7379.)

III. ARGUMENT

The Commission must dismiss this application for review if it finds that Vungarala engaged in conduct that violated the Exchange Act and FINRA rules, FINRA applied its rules in a manner consistent with the purposes of the Exchange Act, and FINRA imposed sanctions that are neither excessive nor oppressive and that do not impose an unnecessary or inappropriate burden on competition.[19] 15 U.S.C. § 78s(e).

The record conclusively supports the NAC's findings that Vungarala engaged in securities fraud. Moreover, barring Vungarala and ordering that he disgorge his ill-gotten gains are appropriately remedial sanctions and are neither excessive nor oppressive sanctions for Vungarala's egregious misconduct. Vungarala's arguments on appeal, which repeat arguments that he made to the NAC and Hearing Panel, do not serve as a basis for disturbing the NAC's findings or sanctions. The Commission should therefore dismiss Vungarala's application for review.

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[19] Vungarala does not contend that FINRA's sanctions impose an undue burden on competition.

A. Vungarala Engaged in Fraud in Violation of the Exchange Act and FINRA's Rules

Vungarala willfully made misrepresentations and omissions of material fact, in violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. He did so by repeatedly misrepresenting to the Tribe that he would not earn any commissions on the Tribe's non-traded REIT and BDC purchases, misrepresenting to the Tribe that it was not eligible to receive volume discounts across its accounts, and repeatedly failing to disclose his commissions and the Tribe's eligibility to receive volume discounts across accounts.

Exchange Act Section 10(b) prohibits individuals from using or employing, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance. *See* 15 U.S.C. § 78j(b). Exchange Act Rule 10b-5 further prohibits individuals from making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." *See* 17 C.F.R. § 240.10b-5.

FINRA Rule 2020 is FINRA's anti-fraud rule. It prohibits FINRA members and their associated persons from effecting "any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance." "[C]onduct that violates [Exchange Act] Rule 10b-5 also violates FINRA Rule 2020." *See Fuad Ahmed*, Exchange Act Release No. 81759, 2017 SEC LEXIS 3078, at *53 (Sept. 28, 2017). A violation of the Exchange Act or FINRA's rules constitutes a violation of FINRA Rule 2010.[20]

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[20] FINRA Rule 2010 requires FINRA members to observe high standards of commercial honor and just and equitable principles of trade in conducting their businesses.

See William Scholander, Exchange Act Release No. 77492, 2016 SEC LEXIS 1209, at *14-15 (Mar. 31, 2016), *aff'd sub nom. Harris v. SEC*, 712 F. App'x 46 (2d Cir. 2017).

To establish a violation of these provisions, a preponderance of the evidence must demonstrate that Vungarala misrepresented a material fact (or omitted a material fact for which he had a duty to disclose), with scienter, in connection with the purchase or sale of securities. *See Ahmed*, 2017 SEC LEXIS 3078, at *25; *see also Scholander*, 2016 SEC LEXIS 1209, at *16 ("When recommending securities to a prospective investor, a securities professional must not only avoid affirmative misstatements but also must disclose material adverse facts, including any self-interest that could influence the salesman's recommendation."); *Bernard McGee*, Exchange Act Release No. 80314, 2017 SEC LEXIS 987, at *17-18 (Mar. 27, 2017) (holding that a respondent violates Exchange Act Section 10(b) and Exchange Act Rule 10b-5 when, acting with scienter, he omits a material fact despite a duty to speak in connection with the purchase or sale of a security), *aff'd*, 733 F. App'x 571 (2d Cir. 2018).

As described below, a preponderance of the evidence establishes each of these elements.[21]

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[21] Vungarala agrees that he recommended each of the non-traded REITs and BDCs, his statements or omissions were "in connection with the purchase or sale of securities," and that he employed "the means of interstate commerce and use of the mails" with respect to the Tribe's purchases of non-traded REITs and BDCs. *See* RP 1793.

The Commission should also sustain the NAC's findings that Vungarala willfully violated these provisions. A willful violation under the federal securities laws "simply means that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000).

1. Vungarala Misrepresented and Omitted Facts

The NAC properly found that Vungarala made misrepresentations, and repeatedly failed to make disclosures, concerning his receipt of commissions and the Tribe's eligibility to receive volume discounts across its accounts on its non-traded REIT and BDC purchases. Vungarala began his fraudulent misconduct by misrepresenting to Osterman that Schwab did not offer non-traded REITs or BDCs and that it would cost an excessive sum to use Schwab to purchase these securities. (RP 2274-78, 2936.) He then told Osterman that PKS did not charge a fee with respect to these securities, and using PKS to purchase them would not present any conflicts "because he would not make any money off of" the purchases. (RP 2142-43, 2936.) Shortly thereafter, Osterman told the Investment Committee—in Vungarala's presence—the same falsities. (RP 1954-55, 2145-46.) Instead of correcting Osterman, Vungarala sat silent and allowed the Investment Committee to believe that he would not receive from PKS commissions on the Tribe's investments.[22]

Vungarala continued his initial lies and deceit during periodic presentations to the Investment Committee. He would falsely respond to questions asking whether he received any commissions on the Tribe's investments, and he repeatedly failed to disclose that he did, in fact, receive commissions on each and every non-traded REIT and BDC purchase by the Tribe despite discussing generally fees and costs associated with these securities. (RP 1925, 1928-29, 1951, 1987, 2576, 3238-39.) This deception continued through the end of 2014, when Vungarala again failed to inform the Investment Committee at its October 2014 meeting that he was receiving commissions on the Tribe's purchases. (RP 2168, 2178-79, 2542, 2568-71, 2612.) Indeed, even

[22] In arguing that there is no proof that he was present for these comments, Vungarala ignores Osterman's express testimony that he was present, as well as the meeting minutes (which indicate the same). *See* Brief, at 28.

in an emailed response to specific questions about what commissions were being paid and to whom, Vungarala failed to disclose that he personally received commissions. (RP 4031.) Making matters worse, Vungarala falsely told Burger that the Tribe was ineligible to receive volume discounts across its accounts and failed to inform the Tribe that it could take advantage of these breakpoints. (RP 1945, 2152-59, 2152-54, 2523-25, 3224-23.)

Central to the NAC's findings that Vungarala made these various misrepresentations and omissions was the Hearing Panel's credibility findings, whereby it found that Osterman, Burger, and Davis testified credibly and consistently concerning these matters. *See Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 SEC LEXIS 3769, at *16 (Sept. 30, 2016) (affirming credibility determinations of witnesses who testified similarly regarding respondent's representations). The Hearing Panel also found that Vungarala's testimony that he fully and repeatedly disclosed these matters to the Tribe was not credible, found not credible Vungarala's story that the Tribe twice waived volume discounts, and found generally that Vungarala's testimony was "repeatedly evasive, inconsistent, and misleading," and he was untrustworthy. (RP 6850-51.) The NAC properly relied upon those credibility determinations, made over the course of eight days of testimony, in finding Vungarala liable. *See Scholander*, 2016 SEC LEXIS 1209, at *30 n.45 (explaining that credibility determinations "based on hearing the witness's testimony and observing demeanor . . . are entitled to considerable deference").

In addition to the credible and consistent testimony of three Tribal witnesses, minutes from Investment Committee meetings in June 2011 and October 2014, as well as Vungarala's October 2014 email to the Investment Committee, support the NAC's findings that Vungarala made misrepresentations and omissions. In addition, the Tribe's conduct during the relevant period demonstrates that Vungarala deceived it. For instance, Osterman testified that she would

not have advocated for and obtained from the Tribal Council a performance bonus for Vungarala in late 2011 had she known that Vungarala would be earning millions in commissions on the Tribe's investments. *See* RP 3274.

Likewise, Osterman, the Investment Committee, and the Tribe's General Counsel would not have asked Vungarala questions in late 2014 concerning how commissions on the Tribe's transactions were paid and to whom if they actually knew that he was receiving commissions. These actions by the Tribe completely undercut Vungarala's incredible assertion that he fully and repeatedly disclosed to the Tribe, from the beginning, that he would personally be receiving commissions on the Tribe's investments. Finally, the responses of the Tribe's General Counsel to FINRA's questions in mid-2015—that Vungarala made the misrepresentations described herein at the June 2011 and October 2014 Investment Committee meetings and the Tribe learned Vungarala was earning commissions in December 2014—underscore the weight of the evidence supporting the NAC's findings. *See* RP 4183. In light of the foregoing, Vungarala's repeated claim that the "sole evidence" of Vungarala's deception is a single sentence in the June 2011 meeting minutes is patently untrue. *See* Brief, at 27, 28, 30.

On appeal, Vungarala does not seriously contest the NAC's well-supported findings that he made misrepresentations and omissions concerning his commissions and volume discounts. Instead, and with respect to the credible testimony of the three Tribal witnesses, he argues that the NAC did not acknowledge the alleged bias of the Tribe's witnesses, Osterman's status as a "disgruntled" former employee, and several immaterial inconsistencies in the witnesses' testimony. *See* Brief, at 1-2, 5. The NAC, however, did consider these factors (as did the Hearing Panel) and nonetheless concluded that Vungarala fell "far short" of demonstrating that the Hearing Panel's credibility findings should be set aside. *See* RP 7360-61; *Daniel D. Manoff*,

55 S.E.C. 1155, 1162 n.6 (2002) (holding that "[c]redibility determinations by a fact-finder deserve special weight" and can be overcome only when "substantial evidence" exists for doing so); *see also Harry Gliksman*, 54 S.E.C. 471 (1999) (rejecting argument that witness was necessarily biased because she was a "dissatisfied customer"). Vungarala presents nothing here to disturb the Hearing Panel's extensive credibility findings and the NAC's reliance upon them.

Similarly, Vungarala's characterization of Davis as having only been "tangentially involved" in the investment process is contrary to the evidence and irrelevant to the determination that he testified credibly. *See* Brief, at 1. So too is his assertion that all three witnesses were "junior" members of the Tribe. *See* Brief, at 1, 13. Regardless, the evidence demonstrated that all three witnesses were intimately involved with the Tribe's purchases of non-traded REITs and BDCs, and it was at the Treasury Department and Investment Committee levels where Vungarala made his misrepresentations and omissions and convinced these bodies to move his recommendations to the Tribal Council for its ultimate approval (which it did more than 99% of the time).[23]

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In sum, the record strongly supports the NAC's findings that Vungarala made numerous misrepresentations and omissions concerning his receipt of commissions and the Tribe's eligibility for volume discounts across its accounts.

2. The Misrepresented and Omitted Facts Were Material

The NAC also properly found that Vungarala's misrepresentations and omissions were material. A fact is considered material if there is a substantial likelihood that a reasonable

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[23] Vungarala also repeats arguments that he made to the Hearing Panel and NAC concerning the reliability of the meeting minutes. *See* Brief, at 27-30. The NAC soundly rejected these unsupported arguments, and the Commission should do the same. (RP 7360-61.)

investor would have considered the misrepresentation important in making an investment decision, and disclosure of the misstated fact "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988); *Dep't of Enforcement v. Fillet*, Complaint No. 2008011762801, 2013 FINRA Discip. LEXIS 26, at *29 (FINRA NAC Oct. 2, 2013) ("[i]nformation is material if there is a substantial likelihood that a reasonable [investor] would consider it important in deciding how to [invest]" and it would be viewed as having significantly altered the total mix of information available), *aff'd in rel. part*, Exchange Act Release No. 75054, 2015 SEC LEXIS 2142 (May 27, 2015).

Further, and in connection with Vungarala's omissions, the duty to disclose material facts arises whenever a disclosed statement would be misleading in the absence of the disclosure of additional material facts needed to make it not misleading. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992). That duty arises whenever a registered representative is in a position of trust and confidence with, or is a fiduciary to, his customer. *See Chiarella v. United States*, 445 U.S. 222, 230 (1980) (holding that liability for failing to disclose material information is "premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction"); *SEC v. Zandford*, 535 U.S. 813, 823 (2002) ("[A]ny distinction between omissions and misrepresentations is illusory in the context of a broker who has a fiduciary duty to her clients.").

Moreover, "[w]hen recommending a security to a customer, a registered representative has a duty to disclose material adverse facts of which [he] is aware such as [an] economic self-interest because such facts could influence the representative's recommendation." *McGee*, 2017 SEC LEXIS 987, at *19. "Investors must be permitted to evaluate overlapping motivations

through appropriate disclosures, especially where one motivation is economic self-interest." *Scholander*, 2016 SEC LEXIS 1209, at *16-17.

The fact that Vungarala would earn a large commission on each and every purchase of a non-traded REIT and BDC that he affirmatively recommended to the Tribe, while he also served as the Tribe's full-time Investment Manager, was a material fact for which he had a duty to disclose. Any reasonable investor would view Vungarala's dual role, and potential conflict of interest resulting from his economic self-interest in the Tribe's investments in these products, as important and as having significantly altered the total mix of information made available in connection with Vungarala's recommendation and whether to accept the recommendation. *See Basic, Inc.*, 485 U.S. at 231-32.

Davis testified that the Investment Committee would "absolutely" have considered Vungarala's commissions a significant fact in analyzing Vungarala's recommendations and the Tribe would not have supported Vungarala's recommendations had it known because of the potential for conflicts, in violation of the Tribe's Investment Policy. *See* RP 1930-31; *cf. Scholander*, 2016 SEC LEXIS 1209, at *20-21 (finding that at a minimum, payment by an issuer to a registered representative had the potential to influence the representative's recommendation "and it casts doubt on the sincerity" of the recommendation). Vungarala, as the Tribe's trusted Investment Manager, was required to disclose to the Tribe this economic self-interest that had at least the potential to influence his recommendations. *See McGee*, 2017 SEC LEXIS 987, at *19; *Scholander*, 2016 SEC LEXIS 1209, at *16-17. He affirmatively misrepresented and failed to disclose this material fact on numerous occasions.

Vungarala repeatedly argues that the Tribe's continued investments after he disclosed his commissions demonstrates that they were not material. *See* Brief, at 3, 32-33, 38-39. This

argument lacks merit. The Tribe did not purchase additional non-traded REITs or BDCs after it learned, in December 2014, that Vungarala was personally earning commissions on the transactions. *See* RP 0033-43.

Vungarala also argues that his commissions were not material because there is no Commission rule requiring registered representatives to disclose their compensation. *See* Brief, at 38. This argument is specious. The fact that Vungarala, in his dual role as the Tribe's broker and its trusted employee hired to provide it with objective investment advice, sat on both sides of each recommendation he made to the Tribe and would personally receive a large financial benefit each time the Tribe accepted his recommendation, distinguishes this case from precedent holding that a registered representative's *ordinary* compensation need not be disclosed. *See* RP 7363 (NAC distinguishing cases relied upon by Vungarala). Vungarala had an economic self-interest in the Tribe consummating each of his recommendations, which could have influenced his recommendations and needed to be disclosed.[24] *See McGee*, 2017 SEC LEXIS 987, at *20.

The Tribe's eligibility to receive volume discounts across its various accounts was also a material fact that Vungarala had a duty to disclose. A reasonable investor would have considered important the availability of discounts totaling $3.3 million, which would have enabled it to purchase more securities. *Cf. Feinman v. Dean Witter Reynolds, Inc.*, 84 F.3d 539, 541 (2d Cir. 1996) (stating that "[c]ases in which we have refused to find that representations

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[24] Vungarala claims that the NAC's reasoning "turned not on questions of securities law, but rather on issues of employment law." *See* Brief, at 11. The NAC properly determined that Vungarala's dual role as a Tribal employee and its registered representative was relevant to the materiality of his commissions, and appropriately analyzed Vungarala's numerous misrepresentations and omissions in context and pursuant to federal securities laws and well-established precedent. *See* RP 7363.

were not material as a matter of law have involved misstatements or omissions that did, or at least had the potential to, cause the plaintiff financial harm"); *Dean Witter Reynolds, Inc.*, Exchange Act Release No. 43215, 2000 SEC LEXIS 1772, at *3 (Aug. 28, 2000) (stating that "[m]utual fund switching violates the antifraud provisions of the federal securities laws when registered representatives, in order to increase their compensation, induce investors to incur the costs" associated with switching funds); *Russell L. Irish*, 42 S.E.C. 735, 740-42 (1965) (holding that broker violated anti-fraud provisions of the Exchange Act where he failed to disclose savings available to customers of combining purchases to exceed break points), *aff'd*, 367 F.2d 637 (9th Cir. 1966).

Further, Davis testified that the Tribe's eligibility for volume discounts across its accounts would have been "quite significant" because "if we could maximize purchas[ing] power for the [T]ribe, we could net a higher return." *See* RP 1947; *see also* 2750 (testimony of FINRA examiner that the Tribe indicated that it would have taken advantage of volume discounts across accounts had it known about them). Vungarala argues that the Tribe's privacy concerns outweighed its interest in obtaining volume discounts, which he asserts demonstrates the immateriality of the volume discounts. *See* Brief, at 39. Vungarala is mistaken. The evidence—including the Hearing Panel's finding that Vungarala's claim that the Tribe knowingly waived volume discounts was not credible—showed that the Tribe did not make an informed decision that its privacy interests outweighed its interests in obtaining discounts. The Tribe did not know, and Vungarala did not disclose, that it could receive volume discounts across its accounts worth millions. *See* RP 7335, 7371. Moreover, as the NAC properly found, Vungarala's claims that taking advantage of volume discounts across accounts would somehow require the Tribe's

accounts to be "commingled" and place the Tribe's privacy at risk was utterly unfounded. *See* RP 7371. On appeal, Vungarala ignores these inconvenient facts.

3. Vungarala Intentionally or Recklessly Made His Misrepresentations and Omissions

Finally, the evidence amply shows that Vungarala acted with the requisite scienter to sustain the NAC's findings that he made fraudulent misrepresentations and omissions. Scienter is a "mental state embracing intent to deceive, manipulate, or defraud." *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976). "This means that the defendants either knew that the representations they made to investors were false or were reckless in disregarding a substantial risk that they were false." *Ahmed*, 2017 SEC LEXIS 3078, at *43; *see also Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977) ("[R]eckless conduct may be defined as 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.").

Vungarala acted intentionally when he falsely told the Tribe and led it to believe that he did not receive commissions. Vungarala knew that he would earn, and did in fact earn, commissions on each purchase by the Tribe, but nonetheless told the Tribe that he did not. When Vungarala began his deception in mid-2011, he also knew the Tribe intimately and knew that they completely relied upon and trusted him. Moreover, despite his repeated claims to the contrary, he knew that the members of the Treasury Department lacked sophistication. He used his inside knowledge of the Tribe against it, and began making misrepresentations concerning the non-traded REITs and BDCs purchases that benefited him personally. Vungarala's misrepresentations and omissions concerning his receipt of commissions continued, and even

when the Tribe began to ask him pointed questions, he avoided answering them and continued his façade.

Vungarala also knew, or was reckless in not knowing, that the Tribe was eligible to receive volume discounts across accounts. As the NAC found, at a minimum, the REITs themselves put Vungarala on notice that the Tribe was eligible to receive discounts across accounts when several of them raised the issue. (RP 7371.) Instead of clearly explaining to Burger, Osterman, and the rest of the Tribe that it could receive millions in discounts by doing nothing more than informing the REITs and BDCs that it wished to aggregate its purchases solely for purposes obtaining a discount, he misrepresented that the Tribe could not do so. Vungarala intentionally played upon the Tribe's desire to keep the assets of its various accounts separate by falsely leading them to believe that commingling of the accounts would occur if they took advantage of the volume discounts. *See* RP 2854-55 (FINRA examiner's testimony that volume discounts do not require actually combining accounts). He also took advantage of the Tribe's admitted desire to keep its finances private by falsely suggesting that its privacy would somehow be placed at greater risk by taking advantage of volume discounts. Vungarala had numerous opportunities to explain the availability of volume discounts to the Tribe, but opted not to do so to further enrich himself at the Tribe's expense.

Further bolstering the NAC's findings that Vungarala acted intentionally or recklessly, Vungarala had a motive to engage in fraud to enrich himself. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 325 (2007) (stating that although absence of motive is not fatal to a claim of securities fraud, "motive can be a relevant consideration" [in making the scienter determination], and "personal financial gain may weigh heavily in favor of a scienter inference"). He felt underpaid and mistreated by the Tribe, and he admitted that he was trying to

reestablish his finances after he had used all of his liquid assets to pay for his son's expenses. Surreptitiously earning millions in commissions on the Tribe's purchases and causing the Tribe to miss out on millions in volume discounts (which would have directly reduced his commissions)—all while receiving a six-figure salary from the Tribe as its Investment Manager—furthered this goal. *See* RP 2492 (FINRA examiner's testimony that volume discounts directly reduce commissions and enable the investor to purchase more securities).

On appeal, Vungarala argues that he could not have acted intentionally with respect to his commissions because he "blew the whistle on himself" in October 2014 by voluntarily initiating a discussion with the Investment Committee concerning the costs and fees associated with the Tribe's investments. *See* Brief, at 30-31. The Commission should reject this argument. As set forth above, Vungarala did not disclose *anything* about his personal receipt of commissions in October 2014. Instead, he continued to mislead and deceive the Tribe during this meeting and beyond. Moreover, the NAC flatly rejected Vungarala's purported rationale for this meeting (to discuss a FINRA rule that would not be effective for another 18 months). (RP 7351.)

Vungarala argues that he acted in good faith with regard to his belief that the Tribe's privacy interests and the need to keep the Tribe's accounts separate outweighed its interest in volume discounts. *See* Brief, at 22, 35. The NAC gave this argument no weight and so too should the Commission.[25] *See* RP 7371. At a minimum, Vungarala should have known that accepting volume discounts would not impact the Tribe's privacy, did not require any physical

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[25] Vungarala's argument that Guider "confirmed" that the Tribe was not interested in obtaining volume discounts overlooks the fact that Vungarala told Guider that the Tribe was not interested because of privacy concerns and a desire to avoid commingling its accounts. *See* Brief, 8. Guider simply confirmed these facts with Osterman, without explaining the availability of volume discounts and exactly what the Tribe was giving up. (RP 3650-53.) Guider believed that Osterman "knew the way the investments worked [such that] she would have had this kind of knowledge." (RP 3653.)

commingling of the Tribe's accounts, and was not prohibited by the Tribe's Investment Policy. *See, e.g.*, 15 U.S.C. § 78m(d)(1); 15 U.S.C. § 78m(g)(1) (providing that the beneficial owner of more than 5% of any security must make filings with the Commission); RP 1946-47 (Davis's testimony that neither the Investment Policy nor any other Tribal policy prohibited aggregating purchases for purposes of volume discounts). Simply put, Vungarala never explained the availability of volume discounts across accounts to the Tribe because to do so would have substantially reduced his commissions.

Further, Vungarala's asserted belief that volume discounts were unavailable across accounts because Schwab purportedly aggregated trades on a per account basis to determine commissions, even if true, is undermined by the various prospectuses that permitted discounts across accounts. Moreover, his incorrect belief should have been dispelled once several REITs contacted Vungarala asking if the Tribe wanted to aggregate its purchases across accounts to take advantage of volume discounts.

4. Vungarala's Additional Arguments Lack Merit

Vungarala argues generally and repeatedly that the Tribe had to have known that it paid sales commissions on its non-traded REIT and BDC purchases and it was eligible to receive volume discounts because it was a sophisticated, institutional investor with a multi-step investment process. *See, e.g.*, Brief at 10, 12, 16, 23, 24, 25. The Commission should reject Vungarala's attempt to muddy the crux of his fraud. The issue germane to this case is whether the Tribe knew that *Vungarala* was personally receiving commissions on the Tribe's investments (and not whether the products carried sales commissions). The record clearly demonstrates that

the Tribe did not know that Vungarala received commissions and that it was eligible to receive volume discounts across accounts because he told the Tribe the exact opposite.[26]

Regardless, the NAC properly concluded that the Tribe was not sophisticated. This is especially true for the individuals intimately involved with the Tribe's non-traded REIT and BDC purchases and who were the target of Vungarala's misrepresentations and omissions.[27] *See* RP 7366-68. The Tribe's investment process does not alter this conclusion. Vungarala controlled what information to present and emphasize to the Tribe concerning his recommendations during crucial phases of the process, and only twice did the Tribe reject one of Vungarala's many recommendations.

Vungarala's arguments that Guider confirmed the Tribe's sophistication carry little weight. *See* Brief, at 8, 19-20. Guider based this assessment upon the Tribe's multi-layered investment process, without knowing anything about the qualifications of any members of the Investment Committee or Tribal Council. (RP 3698-701.) He also based it upon a brief meeting with the Tribe where Vungarala's commissions and the Tribe's eligibility for volume discounts never came up. (RP 3649-50, 3683.)

Finally, the Commission should reject Vungarala's argument that because the various prospectuses and related documents disclosed selling commissions and the availability of volume discounts, he could not have committed securities fraud. *See* Brief, at 10, 17, 37. Legally, the mere fact that the prospectuses contained general information concerning these matters does not

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[26] And, as described above, Osterman and Davis did not even understand that PKS earned commissions on the Tribe's purchases until Vungarala disclosed as much in October 2014.

[27] Even if the Tribe could be considered sophisticated (which is contrary to all the evidence), this did not give Vungarala "license to make fraudulent representations." *See Lester Kuznetz*, 48 S.E.C. 551, 554 (1986), *petition for review denied*, 828 F.2d 844 (D.C. Cir. 1987).

negate Vungarala's affirmative, verbal misrepresentations to Tribal members. *See SEC v. Morgan Keegan & Co., Inc.*, 678 F.3d 1233, 1250 (11th Cir. 2012) ("The way information is disclosed can be as important as its content."); *cf. Larry Ira Klein*, 52 S.E.C. 1030, 1036 (1996) ("Klein's delivery of a prospectus to [the customer] does not excuse his failure to inform her fully of the risks of the investment package he proposed."). This is especially true because the Tribe relied upon Vungarala, as its investment professional and expert, to review the prospectuses on its behalf. The authorities cited by Vungarala for his overly broad proposition that a fact disclosed somewhere in a prospectus renders any verbal misrepresentation or omission of that fact irrelevant are inapplicable to his matter. *See* Brief, at 37; RP 7366.

The same is true for Vungarala's so-called "Commission Statements" that he delivered to the Treasury Department to obtain reimbursement of certain fees and costs. The evidence showed that these statements did not disclose that Vungarala received commissions on the Tribe's purchases or its eligibility for volume discounts, and the Tribe generally did not review these statements or understand them. *See* RP 4648.5 (statements); 7340-41, 7365-66 (Osterman's testimony).

* * *

For all of these reasons, the Commission should sustain the NAC's findings that Vungarala engaged in securities fraud.

B. The Proceedings Against Vungarala Were Fair

Vungarala argues that the NAC's decision is the product of an unfair process and must be set aside. The Commission should reject these arguments and find that Vungarala received the "fair procedure" that the Exchange Act requires here, including notice of the specific charges

against him and multiple opportunities to be heard. *See* 15 U.S.C. § 78o-3(b)(8), (h)(1) (requiring that self-regulatory organizations provide fair procedures); *Sundra Escott-Russell*, 54 S.E.C. 867, 873-74 (2000) (finding requirements of the Exchange Act met when FINRA brought specific charges, respondent had notice of charges and an opportunity to defend himself, and FINRA kept a record of proceedings). Vungarala, through his counsel, participated fully in all stages of FINRA's proceedings, including an eight-day evidentiary hearing. He had ample notice of FINRA's charges and opportunity to present his defense, and the NAC properly rejected Vungarala's arguments to the contrary. *See* RP 7372-74.

Vungarala, however, continues to assert that FINRA's proceedings were unfair and he was unable to defend himself because FINRA brought its case against him based upon "incomplete" information fed to it by the Tribe. Vungarala asserts that the Tribe "controlled the flow of information" to help FINRA prove its fraud case against him to purportedly improve the Tribe's odds of success in its 2017 arbitration claim against Vungarala and PKS. He complains that he was unable to obtain information from the Tribe or compel Tribal members to testify in FINRA's proceeding because of its status as a sovereign nation. Vungarala concludes that the NAC thus based its decision on an "incomplete record" and its decision must be set aside. *See, e.g.*, Brief, at 1-3, 11-13, 25.

The Commission should reject Vungarala's unsubstantiated assertions. First, it is well-established that FINRA has broad discretion to bring its cases. *See Dep't of Enforcement v. Wedbush Sec., Inc.*, Complaint No. 20070094044, 2014 FINRA Discip. LEXIS 40, at *80-81 (FINRA NAC Dec. 11, 2014), *aff'd*, Exchange Act Release No. 78568, 2016 SEC LEXIS 2794 (Aug. 12, 2016), *aff'd*, 719 F. App'x 724 (9th Cir. 2018). Here, the record shows that FINRA properly filed its complaint after a thorough investigation (which included interviewing

Vungarala, PKS employees, Tribal witnesses, and reviewing documents received from the Tribe, Vungarala, and PKS). Vungarala has not, and cannot, show that FINRA abused its discretion in filing the complaint.

Second, the fact that the Tribe is not subject to FINRA's jurisdiction, and thus was not required to produce information or witnesses in connection with FINRA's proceeding, is not unique to this case; rather, the same is true for all FINRA disciplinary cases involving customers. Vungarala's inability to subpoena information or witnesses from the Tribe does not render these proceedings unfair. *See James Elderidge Cartwright*, 50 S.E.C. 1174, 1179 n.10 (1992) (rejecting argument "that the NASD's disciplinary procedures are unfair because they do not confer on respondents discovery power and the right to subpoena witnesses").

Third, Vungarala fails to explain how the NAC's findings concerning Vungarala's fraudulent misconduct benefit the Tribe in its 2017 arbitration claim against Vungarala and PKS alleging that Vungarala sold them unsuitable products. The relevant considerations for the two matters differ, as do the legal theories and proof required to demonstrate Enforcement's claims versus the Tribe's.

Finally, other than his broad suggestion that the Tribe withheld exculpatory evidence from FINRA in connection with these proceedings, Vungarala has not identified—either generally or specifically—a single document or record to prove his claims that he fully disclosed to the Tribe his commissions, disclosed the availability of volume discounts, and the Tribe knowingly waived those discounts. This is true despite the fact that Vungarala has admittedly received from the Tribe more than 100,000 pages of documents in connection with its arbitration proceeding (which it filed in April 2017). *See* Brief, at 1, 3; *Thomas Warren, III*, 51 S.E.C. 1015, 1020 n.22 (1994) (rejecting argument that proceeding was unfair because applicant could

not subpoena witnesses and finding that "Applicant has not specified what evidence he was deprived from obtaining, other than to speculate that additional evidence could have substantiated his claim"), *aff'd*, 69 F.3d 549 (10th Cir. 1995). Moreover, Enforcement produced the documents from the investigation to Vungarala (which it received from, among others, the Tribe) and these documents were available to be designated as exhibits at the hearing.[28]

Further, while Vungarala complains that more than 70 Tribal witnesses were involved with the Tribe's investment process and only three of them testified at the hearing, there is no evidence that testimony from individuals such as the Chief, General Counsel, Treasurer, or its CFO would have been any different than the testimony presented (or would have added details concerning Vungarala's fraudulent misrepresentations and omissions).[29] *See, e.g.*, RP 1138 (affidavit of Chief that he signed paperwork related to investments without reviewing it); 2789 (testimony of FINRA examiner that the Chief told her that he only learned that Vungarala earned

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[28] Despite Vungarala's arguments to the contrary, there is no evidence that Enforcement failed to turn over exculpatory evidence pursuant to FINRA's rules. *See Dep't of Enforcement v. Scholander*, Complaint No. 2009019108901, 2014 FINRA Discip. LEXIS 33, at *44 (FINRA NAC Dec. 29, 2014), *aff'd*, 2016 SEC LEXIS 1209.

[29] Although Enforcement originally listed the Chief as a witness, it did not ultimately call him to testify. This was Enforcement's prerogative. *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 SEC LEXIS 1989, at *18 n.18 (June 2, 2016) (rejecting argument that FINRA improperly failed to call certain individuals as witnesses). Further, contrary to Vungarala's argument that he was entitled to a "missing witness charge" for Tribal witnesses who did not testify, the Hearing Panel was not required to infer that the testimony of these individuals, who were not subject to Enforcement's control, would have been contrary to Enforcement's positions. *See U.S. v. Mittelstaedt*, 31 F.3d 1208, 1216 (2d Cir. 1994) ("A missing witness charge inviting the jury to infer that the testimony of an uncalled witness might have favored a specified party is appropriate if production of that witness is peculiarly within [the] power of the other party."); *see also Stephen J. Gluckman*, 54 S.E.C. 175, 187 (1999) ("SRO proceedings are governed by the SRO's own rules and not by state law."). The Commission should also reject Vungarala's argument that the Hearing Panel should have barred any Tribal witnesses from testifying under Michigan law. *Id.*

commissions on the Tribe's purchases at the end of 2014); 4183 (letter from General Counsel stating, among other things, that Vungarala made misrepresentations at relevant Investment Committee meetings and the Tribe discovered Vungarala was earning commissions in December 2014). This is especially true where the witnesses who testified were from the Treasury Department and Investment Committee, where Vungarala perpetrated his fraud, and were intimately involved with the investment process.

Finally, Vungarala broadly asserts that Enforcement "severely constrained" which PKS witnesses could testify on his behalf because of PKS's settlement agreement. *See* Brief, at 7-8. Again, the Commission should reject Vungarala's vague allegations of unfairness. Vungarala does not specify what PKS witnesses would have testified to, and the PKS representative with the most knowledge of Vungarala's interactions with the Tribe (Guider) was able to freely testify about these matters as a former PKS employee. Moreover, Vungarala conveniently omits that his attorney represented both PKS and Vungarala in this matter, that Enforcement raised concerns about potential conflicts that this dual representation might cause a year before the hearing, and that his attorney nonetheless continued to represent both parties, which included PKS's settlement. *See* RP 136-138.

C. The Sanctions Are Warranted and Are Neither Excessive Nor Oppressive

Exchange Act Section 19(e)(2) governs the Commission's review of FINRA's sanctions, and provides that the Commission may eliminate, reduce, or alter a sanction if it finds that the sanction is excessive, oppressive, or imposes a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. *See Jack H. Stein*, 56 S.E.C. 108, 120-21 (2003). In considering whether sanctions are excessive or oppressive, the Commission gives

significant weight to whether the sanctions are within the allowable range of sanctions under FINRA's Sanction Guidelines ("Guidelines"). *See Steven Grivas*, Exchange Act Release No. 77470, 2016 SEC LEXIS 1173, at *25 n.37 (Mar. 29, 2016).

Conduct that violates the antifraud provisions of the federal securities laws is "especially serious and subject to the severest of sanctions under the securities laws." *Scholander*, 2016 SEC LEXIS 1209, at *36. Reflecting this, the Guidelines recommend that adjudicators strongly consider barring an individual for intentional misrepresentations or material omissions of fact.[30]

The Commission should sustain in full the NAC's bars of Vungarala. The NAC considered the Guidelines, including the General Principles Applicable to All Sanction Determinations and the Principal Considerations in Determining Sanctions, and properly determined—based upon "abundant" aggravating factors—that bars for Vungarala's egregious and fraudulent misconduct were appropriate. The NAC concluded that Vungarala acted repeatedly over the course of more than three years to intentionally deceive the Tribe. It found that he tried to hide from the Tribe his commissions and its eligibility for volume discounts, especially when it became suspicious and started asking pointed questions. Vungarala's misconduct resulted in more than $9.6 million in personal gains. Importantly, the NAC held that Vungarala abused his position of trust with the Tribe as its Investment Manager, and used knowledge gained as a Tribal employee and its aversion to making public its financial information to deceive the Tribe concerning volume discounts.

Further, Vungarala's own testimony showed that he lacked remorse for his misconduct. Vungarala justified his $9.6 million in commissions by claiming that he worked late nights and

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[30] *See FINRA Sanction Guidelines*, 90 (2017), http://www.finra.org/sites/default/files/2017_ Sanction_Guidelines.pdf; *see also* RP 7374-77.

weekends, and these efforts were "not part of my compensation" and "not what I was signed up for when" he accepted employment with the Tribe. (RP 3507.) He also believed that absent his lies and deceit, he would have made PKS "very rich because they'll keep the 7 percent" instead of donating a portion to charity as Vungarala claimed to have done. (RP 3522.) Based on these numerous aggravating factors, the bars are fully warranted.

The Commission should also sustain the NAC's order that Vungarala disgorge $9,682,629 in commissions. The NAC considered the Guidelines' instruction that disgorgement of ill-gotten gains is appropriate where a respondent has obtained a financial benefit from his misconduct.[31] And the NAC found that Vungarala earned this sum in connection with the Tribe's non-traded REIT and BDC purchases because he concealed his commissions and the Tribe's eligibility for volume discounts across accounts. The NAC correctly held that disgorgement would "remediate his misconduct by eliminating the financial benefit directly resulting from it" and would deter others from acting in a similar manner. (RP 7376.)

On appeal, Vungarala does not contest that the NAC's sanctions are neither excessive nor oppressive. Nor does he dispute that numerous aggravating factors exist in connection with his egregious and fraudulent misconduct. Instead, he characterizes the NAC's sanctions as "punitive" (by simply stating that the disgorgement order is not remedial and "[t]here is nothing remedial" about the bars imposed upon him). *See* Brief, at 43. He does so in an attempt to argue that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), somehow applies to this matter and calls into question FINRA's ability to impose bars and other fitting sanctions, such as disgorgement, under Exchange Act Section 15A. Vungarala further points to a

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[31] *See Guidelines*, at 5 (General Principles Applicable to All Sanction Determinations, No. 6).

concurring opinion in *Saad v. SEC*, 873 F.3d 297 (D.C. Cir. 2017), to assert that under *Kokesh*, "the lifetime bar imposed against Mr. Saad [by FINRA] is an impermissible penalty" and, by implication, the NAC's bars of Vungarala must be vacated. *See* Brief, at 43.

Vungarala's arguments should be flatly rejected. In *Kokesh*, the Supreme Court considered the narrow question of whether the five-year statute of limitations in 28 U.S.C. § 2462 applies to Commission disgorgement actions filed in federal district courts. *See* 137 S. Ct. at 1642 n.3. *Kokesh* leaves intact Section 15A of the Exchange Act, which mandates that FINRA have rules allowing it to impose bars, suspensions, fines, and other fitting sanctions in its disciplinary proceedings. *See* 15 U.S.C. 78o-3(b)(7) (2018).

There are numerous federal court and Commission opinions that establish that FINRA may impose non-compensatory sanctions, like a bar, that serve to protect investors and the public interest from the violator. *See, e.g.*, *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175-76 (D.C. Cir. 2009) (sustaining debarment that was "to protect investors" and that redressed a "significant harm to the self-regulatory system"); *John D. Audifferen*, Exchange Act Release No. 58230, 2008 SEC LEXIS 1740, at *49 (July 25, 2008) (rejecting argument that a bar would serve no remedial purpose, and holding that "a bar [is] necessary to protect the investing public from harm").

It is also well-established that FINRA may order disgorgement under Exchange Act Section 15A to deprive wrongdoers of their ill-gotten gains connected to their misconduct. *See, e.g., Akindemowo*, 2016 SEC LEXIS 3769, at *40 (affirming disgorgement order, which "serves the remedial purpose of depriving [respondent] of his ill-gotten gains"); *William J. Murphy*, Exchange Act Release No. 69923, 2013 SEC LEXIS 1933, at *103 (July 2, 2013) (sustaining a FINRA disgorgement order and stating that FINRA may impose that sanction to "serve[ ] the

remedial purpose of depriving [a respondent] of the benefit of his misconduct"), *aff'd sub nom. Birkelbach v. SEC*, 751 F.3d 472, 482 (7th Cir. 2014). Nothing in *Kokesh* overrules these authorities.

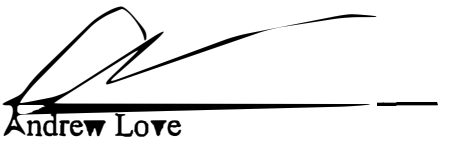
Moreover, nothing in *Saad* requires the Commission to set aside the NAC's sanctions. As the NAC correctly observed, the D.C. Circuit merely directed the Commission "to address, in the first instance, the relevance—*if any*—of the Supreme Court's" *Kokesh* decision to the bar imposed upon the respondent in that case. *See* 873 F.3d at 304 (emphasis added); RP 7377. Because *Kokesh* and the concurring opinion in *Saad* have no bearing on the NAC's sanctions against Vungarala, which are neither excessive nor oppressive, the Commission should sustain the bars and disgorgement order imposed upon Vungarala for his egregious and fraudulent misconduct.

IV. CONCLUSION

The Commission should sustain FINRA's action in all respects and dismiss Vungarala's application for review. The evidence overwhelmingly supports the NAC's findings that Vungarala engaged in fraudulent misconduct, and Vungarala has provided no legitimate reason to overturn these findings. Similarly, Vungarala has not, and cannot, demonstrate that the bars and disgorgement order imposed upon him for his multi-year pattern of lies and deceit are excessive or oppressive. Theses sanctions are encouraged by the Guidelines in a case such as this, and appropriately serve to remediate Vungarala's egregious misconduct and protect

investors. For all of these reasons, FINRA urges the Commission to dismiss Vungarala's application for review.

Respectfully submitted,



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