SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 90476 / November 20, 2020

Admin. Proc. File No. 3-18881

In the Matter of the Application of

GOPI KRISHNA VUNGARALA

For Review of Disciplinary Action Taken by

FINRA

OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION—REVIEW OF DISCIPLINARY PROCEEDING

Former registered representative of FINRA member firm appeals from FINRA disciplinary action finding that he made fraudulent misrepresentations and omissions regarding his receipt of commissions and his customer's eligibility for volume discounts. *Held*, FINRA's findings of violations and imposition of sanctions are sustained.

APPEARANCES:

Sharron E. Ash, *Brian S. Hamburger*, and *Frank E. Derby*, *Hamburger Law Firm, LLC*, for Gopi Vungarala.

Alan Lawhead, Colleen Durbin, and Andrew Love, for FINRA.

Appeal filed: November 1, 2018
Last brief received: April 5, 2019

Gopi Krishna Vungarala, formerly associated with FINRA member firm Purshe Kaplan & Sterling Investments, Inc. ("PKS"), seeks review of FINRA disciplinary action. FINRA found that Vungarala violated the federal securities laws and FINRA rules by making fraudulent misrepresentations and omissions regarding the commissions he received and his customer's eligibility for volume discounts. FINRA imposed a bar from associating with a FINRA member for each violation, ordered him to disgorge $9,682,629 in commissions plus interest, and assessed hearing and appeal costs. FINRA also found that Vungarala is subject to a statutory disqualification because he acted willfully. We sustain FINRA's findings of violations, determination of a statutory disqualification, and imposition of sanctions.

I. Background

Vungarala first associated with a FINRA member firm in 2004. From December 2007 through January 2015, which is the relevant period here, Vungarala was a registered representative with PKS, a registered broker-dealer, and an investment adviser representative with Sutterfield Financial Group, an SEC-registered investment adviser. In November 2008, Vungarala began working as an in-house investment manager for a sovereign Native American Tribe (the "Tribe").[1] The Tribe operates a resort and several casinos.

At the time of Vungarala's hiring, the Tribe primarily invested in stocks and investment-grade bonds, and had previously relied upon the advice of an outside investment manager to select specific investments. The Tribe had nine separate accounts, which it referred to as "trusts,"[2] to fund its operations, education and health programs, and member benefits. The separate accounts were set up for accounting purposes and the beneficiary of each account was the Tribe. The Tribe's Investment Policy stated that each account "is considered separate with respect to transactions" and that securities could only be moved between accounts to "settle a related obligation."

Vungarala was responsible for managing, evaluating, and monitoring the Tribe's investment portfolio. He worked in the Tribe's Treasury Department and reported to Angela Osterman, who was appointed the Tribe's Treasury Administrator less than a month before Vungarala was hired. Osterman did not analyze or select investments or read prospectuses. She focused on managing the Tribe's budget, authorizing leave for department employees, and ensuring that policies and procedures were followed. Her prior investment experience was limited to her personal retirement account. The Treasury Department also had two research analysts with little investment experience and no professional certifications. Vungarala gave the research analysts assignments and taught them how to put information together for presentations to the Investment Committee. Osterman and the research analysts did little independent research and viewed Vungarala as the expert on investments.

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1 The Tribe's contract with Vungarala required him to have Series 7 and Series 63 licenses.

2 The accounts were not held by a trustee and did not meet the legal definition of a trust.

Vungarala's employment contract and position description gave him responsibility for "perform[ing] all investment transactions" for the Tribe's investment portfolio, "develop[ing] and implement[ing] investment strategies" for the investment portfolio, and "manag[ing], evaluat[ing], and monitor[ing] the investment portfolio." From 2008 through mid-2011, Vungarala traded on behalf of the Tribe through Charles Schwab & Co. At that time, he had authority to invest without seeking prior approval from the Tribe. The Tribe initially paid Vungarala a salary of $99,500, which it subsequently increased to $120,000, with the potential for a 10% bonus if the Tribe's portfolio return exceeded the market return for the fiscal year. At Vungarala's request, the Tribe reimbursed him for the cost of renewing his securities licenses and his errors and omissions insurance. Vungarala testified that, upon being hired, he had no expectation of being paid commissions in connection with recommending the Tribe's investments.

At some point, Vungarala learned that the Tribe's previous outside financial adviser earned more than $1 million a year. In comparison, Vungarala believed his salary amounted to him working "pro bono." Vungarala also believed that the Tribe treated him poorly because he was not a tribal member, and felt that his office was too small and that his colleagues treated him as an underling.

The Tribe had an Investment Policy, and Vungarala testified that he knew he was supposed "to follow the investment policy and make decisions that basically adhere to the policy and the needs of the Tribe." The Investment Policy contained a conflict-of-interest provision prohibiting employees involved in the investment process from "personal business activity that could conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions." The Investment Policy also required employees involved in the investment process to "disclose any material interests in financial institutions with which they conduct business" and to "disclose any personal financial/investment positions that could be related to the performance of the investment portfolio." Vungarala testified that, as the Tribe's employee, he had a duty of good faith and fair dealing to the Tribe and was expected to make investments in the Tribe's best interest.

A. Vungarala misrepresented and omitted facts about his receipt of commissions while recommending that the Tribe invest in non-traded REITs and BDCs.

1. Vungarala recommended that the Tribe invest in non-traded REITs and BDCs and that it do so through PKS rather than Schwab.

As the Tribe's casino revenues declined over time, Vungarala faced pressure to increase the returns of the Tribe's investment portfolio. In mid-2011, Vungarala recommended that the Tribe invest in non-traded Real Estate Investment Trusts ("REITs")[3] and Business Development

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[3] REITs are companies that own and typically operate income-producing real estate or real estate-related assets. REITs provide a way for individual investors to earn a share of the income produced through commercial real estate ownership without having to buy commercial real estate. Non-traded REITs are registered with the SEC but are not publicly traded. *See*

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Companies ("BDCs")[4] to replace bonds that were maturing or had been called. He said that the Tribe could not invest in REITs and BDCs through Schwab and recommended PKS. Vungarala told Osterman that there would be no conflict of interest if the Tribe went through PKS because Vungarala "would not make any money" from doing so. But the prospectuses for the non-traded REITs and BDCs provided that selling commissions of around 7% would be paid to unspecified managing dealers and participating brokers. PKS was one of the participating brokers and the only broker the Tribe used to purchase these products. The parties stipulated that Vungarala received 85% of commissions paid to PKS.

2. Vungarala misrepresented and omitted facts about the commissions he would receive from the purchases of the non-traded REITs and BDCs.

Vungarala guided his recommendations of non-traded REITs and BDCs through the Tribe's various committees.[5] He first discussed the applicable REIT or BDC with Osterman and the research analysts in the Treasury Department, who never rejected a recommendation Vungarala made with respect to REITs and BDCs. He then presented summaries, consisting mostly of marketing materials from the non-traded REIT or BDC, to the Investment Committee. After the Tribe invested in several REITs and BDCs, Vungarala directed the research analysts in the Treasury Department to reduce the summaries to provide only the name of the proposed investment, its offering process, the expected return, and the Tribe's exit strategy. The summaries never contained information regarding commissions or volume discounts.

Vungarala first presented non-traded REITs and BDCs to the Investment Committee in June 2011. Meeting minutes read into the record reflect that Osterman told the committee that, because Schwab did not offer non-traded REITs and BDCs, the Tribe could "utilize PKS, Gopi's brokerage firm." Osterman said that "the Tribe will not have to sign any agreements with them, PKS has agreed to allow the Tribe to use them with no strings attached." She added that "[t]here will be no conflict of interest on Gopi's behalf since he is not getting paid by with [sic] the company." Although Vungarala was present, he did not correct Osterman's statements.

Whenever the Investment Committee asked Vungarala to explain the fees and expenses associated with a particular non-traded REIT or BDC, he would use a white board and make only generic disclosures that did not include his receipt of commissions. Dustin Davis, a member of the Investment Committee, specifically asked Vungarala about the fee structure for the non-

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https://www.investor.gov/introduction-investing/investing-basics/investment-products/real-estate-investment-trusts-reits

4 BDCs are a category of closed-end investment companies that make capital more readily available to small, developing, or troubled businesses. *See* www.sec.gov/info/smallbus/secg/rule2a-46-secg.htm

5 Although Vungarala had the authority to invest through Schwab without prior approval from the Tribe, the Tribal Council had to approve every investment in REITs and BDCs.

traded REITs and BDCs several times. Vungarala told Davis that he was not receiving a commission, and that fees went toward "the packaging of REITs, due diligence, and expenses."

After the Investment Committee approved a recommendation from Vungarala, the recommendation went to the Legal Department for review. Although the Legal Department did not raise any concerns about fees, the Legal Department opposed each investment based upon its concern that purchasing REITs and BDCs would jeopardize the Tribe's sovereign immunity by subjecting it to arbitration in connection with any dispute. Notwithstanding the Legal Department's opposition, over the three-and-a-half years that Vungarala recommended that the Tribe invest in non-traded REITS and BDCs, the Tribal Council rejected only two out of more than 200 recommendations.[6]

From 2011 through 2014, the portion of the Tribe's portfolio devoted to non-traded REITs and BDCs increased from 0% to almost 23%—amounting to nearly $200 million. The REIT and BDC statements that PKS generated did not itemize commissions. Vungarala received $9,682,629 in commissions from PKS as a result of the sales of non-traded REITs and BDCs to the Tribe.

3. Vungarala continued to misrepresent and omit facts about his commissions even after disclosing that PKS received commissions from the purchases.

On October 27, 2014, the Investment Committee met and reviewed the fees and expenses associated with the REIT and BDC investments. Vungarala disclosed for the first time that PKS was receiving commissions. The meeting became contentious when Osterman said that she wanted to know who specifically received the commissions paid to PKS. Vungarala responded by referencing unnamed lawyers, a supervisor at PKS, and other recipients he did not specifically identify. An Investment Committee member asked Vungarala to send an email explaining the commissions. Vungarala sent an email explaining that 7% was paid to "PKS," and 3% went to the "XYZ sales team."[7] Vungarala did not disclose that he was a recipient of 85% of the commissions paid to PKS. Osterman then asked Vungarala to identify the sales team and Vungarala's supervisor. Vungarala did not respond. Although Vungarala testified that the Tribe's Council Treasurer, an individual who also served on the Investment Committee, told him to direct Osterman's inquiry to the Treasurer, no other evidence corroborates this testimony. In early November 2014, the Tribe extended Vungarala's contract through January 2015.

In mid-December 2014, the Tribe's general counsel contacted PKS to ask who received commissions on the Tribe's REIT and BDC purchases. Vungarala spoke with PKS's Chief Operating Officer and asked her to respond to the Tribe's general counsel that "[t]his fee does not get paid out to the registered representative in any manner." The Tribe's general counsel told Vungarala that PKS was only providing a fraction of the information that the general counsel had

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[6] The Tribal Council rejected one investment because the director of the issuer was involved in litigation, and one investment because it involved fracking, which the Tribe opposed.

[7] The "XYZ sales Team" does not appear to refer to any actual sales team.

requested and attributed the failure to Vungarala's intervention. Vungarala told the general counsel that, for privacy reasons, PKS could not release the information to him but only to the Chief and Sub-chief.

On December 21, 2014, Vungarala met with the Tribal Council and for the first time disclosed that he received 85% of the commissions paid to PKS. Vungarala told the Tribal Council that he had donated most of his commissions to charity. On January 18, 2015, Vungarala's contract with the Tribe expired.

B. Vungarala misrepresented and omitted facts about the Tribe's eligibility for volume discounts with respect to its purchases of non-traded REITs and BDCs.

The Tribe was eligible for volume discounts across the Tribe's non-traded REIT and BDC accounts if the total amount of purchases reached a threshold amount. Generally, a single investor may combine purchases in different accounts for purposes of reaching the threshold. Aggregating accounts for this purpose does not require any actual commingling of the accounts. As an investor's purchases reach higher threshold amounts, the investor obtains larger volume discounts, allowing the investor to buy more units of the investment for the same dollar amount. A volume discount is funded by reducing the commission to the selling broker-dealer. In other words, when a client forgoes a volume discount the selling broker-dealer will obtain higher commissions.

In 2013 and 2014, several REITs contacted Vungarala to discuss giving the Tribe volume discounts for purchases made across the Tribe's different accounts. Vungarala told the REITs and PKS that the Tribe did not want volume discounts because it wanted to keep the accounts "separate" and could not "commingle" the funds in the accounts. At some point after the Tribe made significant investments in non-traded REITs and BDCs, a Treasury Department research analyst asked Vungarala why the Tribe did not buy the REITs and BDCs all at once and then "delegate" them amongst the trust accounts in order to take advantage of volume discounts. Vungarala told the research analyst that the Tribe could not do that because it must keep the accounts "separate," and told Osterman that the Tribe could not do that because the Tribe's "trust accounts are separate and have separate governing documents." By forgoing volume discounts, the Tribe lost $3.3 million while Vungarala made an additional $2.8 million in commissions.

In 2014, PKS asked Vungarala to obtain documentation from the Tribe confirming that it wished to "keep the REIT transactions separate and not mixed," which was the justification Vungarala provided for declining volume discounts across accounts. Vungarala asked Osterman to draft a letter for the Chief and Sub-chief to sign that would confirm for PKS the separate nature of the trusts. Osterman drafted a letter stating that "[e]ach of [the Tribe's] trusts has its own purpose and funding obligations and cannot be co-mingled between each other." The letter did not reference volume discounts, and Vungarala did not explain to the Tribe that PKS's inquiry concerned volume discounts. Osterman circulated the letter to the Investment Committee and then to the Chief and Sub-chief, both of whom signed it.

In December 2014, PKS twice sought additional clarification from the Tribe regarding the decision to decline the volume discounts, specifically inquiring about the separate nature of the accounts. Although the record does not indicate to whom the first request for clarification was directed, the Chief sent a letter to PKS on December 17, 2014, in which he stated that he was responding to PKS's request for clarification. The second request for clarification came by email from PKS on December 18, 2014, to Vungarala, the Council Treasurer, and the Chief. The Tribe's additional responses did not mention volume discounts.

In 2014, FINRA conducted a national review to determine whether customers purchasing non-traded REITs and BDCs were receiving the volume discounts to which they were entitled. FINRA staff issued requests for information to the top five wholesalers of non-traded REITs for 2013. In June 2014, FINRA staff noted that a majority of the potential missed volume discounts uncovered during the investigation were connected to investments made by the Tribe. All of these investments were made by Vungarala as the registered representative through PKS. When FINRA staff discovered that Vungarala was both an employee of the Tribe and a PKS registered representative, they viewed it as a potential conflict of interest.

In August 2014, FINRA sent a letter to the Tribe Chief and Sub-chief about one of the non-traded REIT wholesalers and asked that the Tribe contact FINRA. The Tribe did not initially respond to the letter; however, FINRA staff later spoke to the Tribe's general counsel. FINRA's inquiry caused the Tribe to question the recommendations that Vungarala had made.

C. FINRA found that Vungarala violated the federal securities laws and FINRA rules.

On February 4, 2016, FINRA's Department of Enforcement ("Enforcement") charged Vungarala with violating Section 10(b) of the Securities Exchange Act of 1934, Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010 by: (1) willfully misrepresenting material facts and failing to disclose material facts to the Tribe by falsely informing the Tribe that he would not receive commissions in connection with its purchases of non-traded REITs and BDCs; and (2) willfully misrepresenting material facts and failing to disclose material facts to the Tribe with respect to its eligibility to receive volume discounts on purchases of non-traded REITs and BDCs.[8] After a hearing, a FINRA Hearing Panel found that Enforcement proved the charged violations. The Hearing Panel barred Vungarala from associating with a FINRA member firm for each violation and imposed disgorgement of $9,682,629 plus pre-judgment interest and hearing and appeal costs.

Vungarala appealed to FINRA's National Adjudicatory Council ("NAC"). The NAC affirmed the Hearing Panel's findings of liability and sanctions. The NAC also found that because Vungarala acted willfully he was subject to a statutory disqualification under Exchange Act Sections 3(a)(39)(F) and 15(b)(4)(D).[9] Vungarala timely filed this appeal.

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[8] PKS was charged with supervisory violations and subsequently settled with FINRA.

[9] 15 U.S.C. §§ 78c(a)(39)(F); 78o(b)(4)(D).

II. Analysis

Under Exchange Act Section 19(e)(1), we review FINRA disciplinary action to determine whether the associated person engaged in the conduct that FINRA found, whether such conduct violates the statutes and rules that FINRA specified, and whether FINRA's rules are, and were applied in a manner, consistent with the purposes of the Exchange Act.[10] We base our findings on an independent review of the record and apply the preponderance of the evidence standard.[11]

A. Vungarala committed fraud when he misled the Tribe about his commissions.

We find that Vungarala's misleading statements and omissions to the Tribe about the commissions he received from its investments in non-traded REITs and BDCs violated Exchange Act Section 10(b), Rule 10b-5 thereunder, and FINRA Rules 2020 and 2010.

Exchange Act Section 10(b) makes it unlawful "to use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in contravention of" Commission rules.[12] Exchange Act Rule 10b-5(b) prohibits "any untrue statement of a material fact or [omission of] a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security."[13] To establish a violation under these provisions, a preponderance of the evidence must demonstrate that Vungarala, acting with scienter and using the means or instrumentalities of interstate commerce, misrepresented a material fact, or omitted a material fact necessary to make a statement that he made not misleading, in connection with the purchase or sale of securities.[14]

FINRA Rule 2020 prohibits FINRA members from "effect[ing] any transaction in, or induc[ing] the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance."[15] FINRA Rule 2010 prohibits conduct inconsistent with just and equitable principles of trade.[16] A violation of Exchange Act Section 10(b) and Exchange Act Rule 10b-5 constitutes a violation of FINRA Rules 2020 and 2010.[17] Vungarala does not

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10 *See* 15 U.S.C. § 78s(e)(1).

11 *Robert Marcus Lane*, Exchange Act Release No. 74269, 2015 WL 627346, at *5 (Feb. 13, 2015).

12 15 U.S.C. § 78j(b).

13 17 C.F.R. § 240.10b-5(b).

14 *William Scholander*, Exchange Act Release No. 77492, 2016 WL 1255596, at *4 (Mar. 31, 2016), *petition denied*, *Harris v. SEC*, 712 F. App'x. 46 (2d Cir. 2017).

15 FINRA Rule 2020.

16 FINRA Rule 2010.

17 *Scholander*, 2016 WL 1255596, at *4.

dispute that he recommended each of the non-traded REITs and BDCs, that his statements or omissions were in connection with the purchase or sale of securities, and that he used the means of interstate commerce. The remaining issues are whether Vungarala made misleading statements or omitted information about his commissions, whether Vungarala's receipt of commissions was material and required disclosure, and whether he acted with scienter.

1. Vungarala made misstatements about his commissions and omitted facts necessary to make statements he made about his commissions not misleading.

The record establishes that Vungarala made misstatements about his commissions in his communications with the Tribe and omitted facts necessary to make statements he made to the Tribe about his commissions not misleading. The Hearing Panel found that three Tribal employees testified credibly and consistently that Vungarala falsely told the Tribe he would not make money on investments that he recommended and that he never disclosed that he would receive commissions on the Tribe's investments prior to December 2014. Conversely, the Hearing Panel found not credible Vungarala's testimony that he disclosed commissions on the Tribe's investments that he recommended. The Hearing Panel found that Vungarala's testimony was "repeatedly evasive, inconsistent, and misleading," and that it was "easy to see how he confused" members of the Tribe. Such credibility determinations are entitled to considerable weight.[18] Our de novo review of the record finds nothing to contradict the Hearing Panel, and we find that the NAC's reliance on the Hearing Panel's credibility determinations was appropriate.

The record supports the Hearing Panel's credibility determinations. The Investment Committee's meeting minutes support Osterman's testimony that when the Treasury Department first presented REITs and BDCs to the Investment Committee she repeated Vungarala's assertion that he would have no conflict of interest if the Tribe used PKS because PKS was not paying Vungarala. Vungarala testified that he disclosed to Osterman that he would receive commissions from PKS, but Vungarala also testified that he did not disclose the amount of commissions because Osterman "never asked" him for it. Yet Osterman sought the Tribe's approval for even small reimbursements to Vungarala, such as errors and omissions insurance. We agree with the NAC's deference to the Hearing Panel's finding that Osterman testified credibly that had Vungarala disclosed his receipt of commissions to Osterman, she would have asked for the specific amount and, at a minimum, sought approval from the Tribe.

We also agree with the NAC that the Tribe's behavior subsequent to its investments in non-traded REITs and BDCs supports the finding that it was not aware of Vungarala's commissions. It is unlikely that the Tribe would increase Vungarala's salary to $120,000,

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18 *See Frank J. Custable, Jr.*, Exchange Act Release No. 32801, 1993 WL 328188, at *4 (Aug. 25, 1993); *see also Kay v. FCC*, 396 F.3d 1184, 1189 (D.C. Cir. 2005) (stating that "an agency is not required to accept the credibility determinations of an administrative law judge" but may give as much weight to them as warranted).

continue to pay for small fees like errors and omissions insurance, and authorize a potential 10% bonus had it been aware that he was making millions in commissions on its investments.

Finally, as discussed in the minutes of the October 27, 2014 Investment Committee meeting and the testimony of those present, Vungarala continued to be untruthful in the face of direct questions about the specific individuals receiving commissions. While Vungarala disclosed to the Investment Committee that PKS was receiving commissions, he did not reveal that he personally received commissions, instead claiming that an unnamed supervisor and sales team received the commissions. After the Investment Committee meeting, he sent an equally evasive email to a member of the committee vaguely referring to commissions received by PKS and the "XYZ sales team," without disclosing the commissions he personally had received.

Vungarala claims that he made it clear from the beginning to Osterman and the Investment Committee that he would receive commissions. But given the Tribal employees' consistent testimony that Vungarala misrepresented that he would not receive commissions, that he failed to disclose the commissions he received, and the other evidence consistent with that testimony, we reject Vungarala's claims. Because Osterman's testimony is corroborated both by the testimony of other Tribal employees and documentary evidence, we are unpersuaded by Vungarala's assertion that we should discount her testimony because she was biased against him and blamed him for the Tribe terminating her employment. We find that Vungarala both misrepresented to the Tribe that he would not receive commissions and failed to disclose his commissions when disclosure was necessary in order to make his other statements not misleading.

2. Vungarala's receipt of commissions was a material fact.

A fact is material if there is a substantial likelihood that a reasonable investor would consider the omitted fact important in making an investment decision.[19] A reasonable investor would find it important that a broker making recommendations on $200 million worth of investments stood to make millions in commissions on those recommendations.[20] Indeed, Davis testified that the Tribe would have considered the commissions important and would not have supported the recommendations had it been aware of Vungarala's commissions. Under these circumstances, we agree with the NAC that Vungarala's receipt of commissions was material.

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19 *Basic, Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

20 *See United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010) (noting that in "deciding whether to buy a given stock, a reasonable investor would consider it important that, in contrast to the purchase of most stocks, the broker would receive a 5% commission from the purchase of this particular (house) stock"); *SEC v. Hasho*, 784 F. Supp. 1059, 1110 (S.D.N.Y 1992) ("The failure to disclose such commission deprives the customer of the knowledge that his registered representative might be recommending a security based on the registered representative's own financial interest rather than the investment value of the recommended security").

Vungarala cites to cases holding that registered representatives' regular commissions need not be disclosed.[21] But the securities laws "do not permit affirmative misrepresentations to investors and potential investors."[22] And there is a "duty not to omit material facts whose omission, in light of what was stated, would be misleading."[23] Vungarala is liable not because he failed to disclose his commissions without a duty to do so but because he affirmatively misrepresented to the Tribe that he would not receive commissions on its purchases of non-traded REITs and BDCs and consistently omitted facts necessary to make the statements he made about his commissions not misleading.[24]

Vungarala's contention that the Tribe's continued purchases of non-traded REITs and BDCs through PKS after he disclosed his commissions demonstrates that the commissions were not material is unpersuasive and contrary to the facts. The evidence shows that the Tribe did not purchase additional non-traded REITs and BDCs after it learned, in December 2014, that Vungarala was earning commissions on those investments. Vungarala also argues that the Tribe did not view the commissions as material because it extended his contract in November 2014 after he claims he disclosed the existence of the commissions. But Vungarala initially disclosed only that PKS was receiving commissions, not that he himself received 85% of those commissions. The Tribe did not find out that Vungarala was receiving commissions until

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21 *See, e.g.*, *United States v. Skelly*, 442 F.3d 94, 97 (2d Cir. 2006) (stating that a registered representative "is under no inherent duty to reveal his compensation"). Although it is possible that Vungarala "could qualify as an investment adviser" with respect to the Tribe and "therefore have had heightened disclosure obligations, *see SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963) (investment advisers have 'an affirmative duty of utmost good faith, and full and fair disclosure of all material facts' (internal quotation marks omitted)), FINRA never made such a finding and never pursued fraud liability on this basis. Pursuant to Exchange Act Section 19(e)(1), we evaluate [Vungarala's] liability 'as [it] has been specified in [FINRA's] determination.' 15 U.S.C. § 78s(e)(1)(A)." *Louis Ottimo*, Exchange Act Release No. 83555, 2018 WL 3155025, at *13 n.47 (Jun. 28, 2018) (second and third alterations in original).

22 *SEC v. Lauer*, 478 F. App'x 550, 556 (11th Cir. 2012).

23 *Setzer v. Omega Healthcare Inv., Inc.*, 968 F.3d 204, 214 n.15 (2d Cir. 2020).

24 *See United States v. Lloyd*, 807 F.3d 1128, 1153 (9th Cir. 2015) ("'[A] broker cannot affirmatively tell a misleading half-truth about a material fact to a potential investor . . . [because] the duty to disclose in these circumstances arises from the telling of a half-truth, independent of any responsibilities arising from a truth relationship.' Baker's affirmative misrepresentations that he would receive no commissions until the investors received a profitable return supported his fraud conviction without the need to prove a fiduciary relationship.") (internal citation omitted and alterations and omissions in original); *see also In re Vivendi Secs. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016) (stating that the securities laws impose liability for a statement of material fact "that is either 'untrue' outright or 'misleading' by virtue of what it omits to state"); *SEC v. Curshen*, 372 F. App'x. 872, 880 (10th Cir. 2010) (stating that under the securities laws an individual "must speak fully and truthfully, and provide complete and non-misleading information with respect to the subjects on which he undertakes to speak").

December 2014. We therefore agree with the NAC that Vungarala's receipt of commissions was material.

3. Vungarala acted with scienter.

A violation of Section 10(b) and Rule 10b-5 requires a finding of scienter.[25] Scienter is "a mental state embracing intent to deceive, manipulate, or defraud."[26] Recklessness satisfies the scienter requirement, and is defined as conduct that constitutes "an extreme departure from the standards of ordinary care…to the extent that the danger [of deceiving investors] was either known to the [applicant] or so obvious that the [applicant] must have been aware of it."[27]

Vungarala knew he would earn lucrative commissions on the Tribe's investments in non-traded REITs and BDCs. He also knew that he was subject to the Tribe's Investment Policy, which required that he disclose any personal financial interest that could be related to the performance of the investment portfolio. Vungarala did not only fail to disclose his commissions; he affirmatively misrepresented to the Tribe that he would not receive any commissions and continued to mislead the Tribe even after he had received the commissions and the Tribe questioned him about who received commissions on its purchases. Under the circumstances, Vungarala must have been aware of the risk that the Tribe would be deceived.

Although a motive is not necessary to establish scienter,[28] we agree with the NAC that Vungarala had a motive to deceive the Tribe. Vungarala felt underpaid and mistreated by the Tribe and considered himself to be working "pro bono." We find that Vungarala acted intentionally, or at least recklessly, when he misled the Tribe about his commissions.[29]

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25 *Aaron v. SEC*, 446 U.S. 680, 697 (1980).

26 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

27 *Scholander*, 2016 WL 1255596, at *6 (internal citations omitted).

28 *SEC v. Koenig*, 557 F.3d 736, 740 (7th Cir. 2009).

29 *See SEC v. Pirate Investor LLC*, 580 F.3d 233, 243 (4th Cir. 2009) ("Given such a clear financial motive for the misrepresentations, the district court's conclusion that they were made with scienter is hardly surprising."); *SEC v. Seghers*, 298 F. App'x 319, 334 (D.C. Cir. 2008) (stating that "motive, although not alone sufficient, is relevant to showing scienter" and that it was relevant that defendant "stood to gain financially" from the misrepresentations).

B. Vungarala committed fraud when he misled the Tribe about the volume discounts.

1. Vungarala made misstatements about the Tribe's eligibility for volume discounts and omitted facts necessary to make his statements not misleading.

We agree with the NAC that Vungarala falsely told the Tribe that it could not receive volume discounts while keeping its accounts separate. Vungarala told both Osterman and one of the Tribe's research analysts that the Tribe could not purchase REITs and BDCs "all at once" and then distribute the purchase among the trust accounts in order to take advantage of volume discounts because the accounts had to be kept "separate." But aggregating the purchases from different accounts for the purpose of reaching the threshold for volume discounts did not require actually commingling the funds in the accounts. Although Vungarala testified that he disclosed the ability of the Tribe to take advantage of volume discounts to Osterman and the Investment Committee, the NAC properly deferred to the Hearing Panel's finding that Vungarala's testimony was not credible. We find, as did the NAC, that Vungarala misled the Tribe about its eligibility for volume discounts.

2. The Tribe's eligibility for volume discounts was a material fact.

The Tribe's eligibility for volume discounts was material. A reasonable investor would have considered the availability of discounts totaling $3.3 million to be important.[30] Indeed, a FINRA examiner testified that Tribe members told her the Tribe would have taken advantage of volume discounts had it been aware of them, and Davis testified that the Tribe's eligibility for volume discounts across accounts without commingling would have been quite significant.

Vungarala argues that the volume discounts are immaterial because the Tribe's privacy concerns outweighed its interest in volume discounts. According to Vungarala, volume discounts would put the Tribe's privacy at risk because they would require the Tribe to file disclosures with the Commission identifying itself and the number of shares it owns. Whether or not the volume discounts would have affected the Tribe's disclosure obligations, an issue we need not address here, the fact that the Tribe might have reasons to consider not using the volume discounts does not render the existence of the volume discounts immaterial. The Tribe was entitled to know that it was eligible for volume discounts without commingling its accounts. Had the Tribe known the truth, it could have made an informed decision about whether to take advantage of volume discounts. For the purposes of the materiality inquiry, the "false information need only be 'important' to the recipient's deliberations; proof that 'disclosure of the

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30 *See Russell L. Irish*, Exchange Act Release No. 7687, 1965 WL 87575, at *4-5 (Aug. 217, 1965), *aff'd*, 367 F.2d 637 (9th Cir. 1966) (finding broker committed fraud when he failed to disclose that customers could save money by combining purchases to exceed break points).

omitted fact would have caused' the recipient to actually change his or her behavior is not necessary."[31]

3. Vungarala acted with scienter.

We agree with the NAC that Vungarala acted intentionally, or at least recklessly, when he misled the Tribe about volume discounts. Two REITs specifically informed PKS and Vungarala that the Tribe was eligible for volume discounts across its accounts. Accordingly, Vungarala had actual knowledge of the Tribe's eligibility for volume discounts.

Vungarala also had a motive to deceive the Tribe. If the Tribe received volume discounts, his commissions would have been reduced by $2.8 million.[32]

Vungarala argues that he was relying on the Tribe's prior practice of each trust making its own investments and reasonably assumed that the trust accounts could not be aggregated for the purpose of volume discounts. But Vungarala had no basis for this assumption. Aggregating the purchases from different accounts to reach the threshold for volume discounts did not require commingling the funds in the different accounts. Nor did the prospectuses suggest that the funds would need to be commingled for the Tribe to take advantage of volume discounts. And the REITs told Vungarala that the Tribe was eligible for volume discounts across its accounts. Vungarala therefore must have known of the risk that the Tribe would be deceived when he told the Tribe that it could not receive volume discounts across accounts without commingling its accounts.[33]

C. Vungarala acted willfully, FINRA's action was consistent with the purposes of the Exchange Act, and Vungarala's arguments against liability are unavailing.

As indicated above, we agree with the NAC that Vungarala violated Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010. The NAC also found that Vungarala's violations subject him to a statutory disqualification under Exchange Act Section 3(a)(39).[34] That section provides that a person is subject to a statutory disqualification if

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[31] *Moshe Marc Cohen*, Exchange Act Release No. 78797, 2016 WL 4727517, at *6 (Sept. 9, 2016) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)), *sanctions vacated in part on other grounds*, Exchange Act Release No. 86318, 2019 WL 2913336 (July 8, 2019).

[32] *See supra* note 29.

[33] *See, e.g.*, *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1012 (11th Cir. 1985) (finding that defendant acted recklessly because his "representation was given without basis in reckless disregard of its truth or falsity") (citing *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 48 (2d Cir. 1978)); *SEC v. E-Smart Techs.*, 74 F. Supp. 3d 306, 322 (D.D.C. 2014) (same).

[34] 15 U.S.C. § 78c(a)(39).

he has willfully violated any provision of the Exchange Act.[35] Because we agree with the NAC that Vungarala acted at least recklessly when he made misrepresentations and omissions about his receipt of commissions and the Tribe's eligibility for volume discounts, we find that he acted willfully.[36]

We find further, as we must under Exchange Act Section 19(e) to sustain FINRA's disciplinary action, that the provisions Vungarala willfully violated—Exchange Act Section 10(b), Exchange Act Rule 10b-5, and FINRA Rules 2020 and 2010—are, and were applied in a manner, consistent with the purposes of the Exchange Act. Section 10(b) is part of the Exchange Act, and Rule 10b-5, which implements Section 10(b), is consistent with the Exchange Act's purpose of protecting investors from fraudulent conduct.[37] FINRA Rule 2020 is consistent with the purposes of the Exchange Act because it protects investors by prohibiting the same conduct as Exchange Act Rule 10b-5.[38] FINRA applied Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Rule 2020 in a manner consistent with the purposes of the Exchange Act because a preponderance of the evidence supports FINRA's findings that Vungarala committed fraud.[39] FINRA Rule 2010 is consistent with the purposes of the Exchange Act because Exchange Act Section 15(b)(6) requires that FINRA's rules "promote just and equitable principles of trade."[40] FINRA's application of Rule 2010 to Vungarala's conduct furthered the objective of preventing conduct inconsistent with just and equitable principles of trade.[41]

Vungarala opposes liability on several grounds, but we reject all of his contentions.

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[35] 15 U.S.C. § 78c(a)(39)(F); 78o(b)(4)(D).

[36] *See, e.g.*, *Bennett Grp. Fin. Servs.*, Exchange Act Release No. 80347, 2017 WL 1176053, at *4 n.30 (Mar. 30 2017) ("Our finding of scienter . . . demonstrates that Bennett's violations were willful."); *see also Robare v. SEC*, 922 F.3d 468, 479-80 (D.C. Cir. 2019) (holding that a finding of recklessness is sufficient to prove a violation of Section 207 of the Investment Advisers Act of 1940, which prohibits willfully omitting to state in an investment adviser registration application a material fact that is required to be stated therein).

[37] *See Koch v. SEC*, 793 F.3d 147, 150 (D.C. Cir. 2015) (stating that the Exchange Act "'was intended principally to protect investors" from fraud in securities transactions).

[38] *Bernard G. McGee*, Exchange Act Release No. 80314, 2017 WL 1132115, *9 (Mar. 27, 2017) (finding FINRA Rule 2020 to be consistent with the purposes of the Exchange Act for this reason), *petition denied*, 733 Fed. App'x. 571 (2d Cir. 2018).

[39] *Id.*

[40] 15 U.S.C. 78o-3(b)(6).

[41] *Kenny Akindemowo*, Exchange Act Release No. 79007, 2016 WL 5571625, at *7 n.16 (Sept. 30. 2016).

1. Vungarala's argument that the Tribe was a sophisticated investor is irrelevant.

Vungarala asserts that the Tribe was a "sophisticated investor" that could not have believed that the REITs and BDCs carried no sales commissions. He argues that, when it invested in REITs and BDCs, the Tribe certified that it met the definition of a "sophisticated investor" because the Tribe Chief and Sub-chief signed a REIT suitability analysis indicating that they understood the risks associated with the investments. Vungarala also points to the testimony of a PKS employee who asserted that the Tribe held itself out as sophisticated during meetings with PKS. Assuming without deciding that Vungarala's assertions about the Tribe's sophistication are true, the Commission has "repeatedly rejected arguments that the antifraud provisions do not apply to customers who were experienced or sophisticated."[42] The Tribe could be a sophisticated investor, and Vungarala would still be "liable for misstating or omitting key information."[43] Moreover, even if the Tribe knew the REITs and BDCs generally carried sales commissions, there is no way the Tribe would have known that Vungarala was receiving a portion of the commissions because he told it explicitly that he was not receiving commissions and the PKS statements did not itemize the commissions or disclose that Vungarala was receiving them. The Tribe's alleged sophistication is not a defense to Vungarala's fraud.

2. Disclosures in prospectuses and other statements did not cure Vungarala's misstatements and omissions of material fact.

Vungarala argues that he gave the Tribe prospectuses and other statements that disclosed the existence of his commissions and the Tribe's eligibility for volume discounts. But the prospectuses did not disclose that Vungarala personally received commissions on the Tribe's purchases of REITs and BDCs, only that an unnamed broker-dealer would receive a commission. And while the prospectuses discussed volume discounts, they did not state explicitly that volume discounts were available without commingling accounts. In any case, Vungarala knew that the Tribe relied on him to read the prospectuses and provide it with relevant information. As discussed above, Osterman did not read any prospectuses, and Davis testified that the Investment Committee did not either. None of the other documents Vungarala cites stated that Vungarala was receiving commissions on the Tribe's investments or that the Tribe was eligible for volume discounts without commingling funds.

The Supreme Court has held that "[n]ot every mixture of the true will neutralize the deceptive."[44] Any corrective disclosures must be "'transmitted . . . with a degree of intensity and

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42 *Jay Houston Meadows*, Exchange Act Release No. 37156, 1996 WL 218638, *6 (May 1, 1996), *aff'd*, 119 F.3d 219 (5th Cir. 1997); *see also Brian A. Schmidt*, Exchange Act Release No. 8061, 2002 WL 89028, n.40 (Jan. 24, 2002) (finding that "a sophisticated person is entitled to the protection of the antifraud provisions of the securities laws").

43 *SEC v. True North Finance Corp.*, 909 F. Supp. 2d 1073, 1103 (D. Minn. 2012).

44 *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).

credibility sufficient to effectively counter-balance any misleading impression created by'" the misrepresentations.[45] As a result, a broker who misrepresents material facts "must sufficiently bring to investors' attention the information [he] contends cures [his] misrepresentations."[46] Vungarala did not sufficiently bring to the Tribe's attention the information he contends cures his falsehoods.[47] We thus agree with the NAC that Vungarala's delivery of prospectuses or other generic documentation did not negate his misleading statements.[48]

3. The proceedings against Vungarala were fair.

Vungarala asserts that FINRA's proceedings violated "traditional notions of fair play and substantial justice." The Exchange Act requires that FINRA proceedings be fair.[49] This requirement is met when FINRA brings specific charges, the respondent receives notice of the charges, the respondent has an opportunity to respond to the charges, and a record is kept.[50] Because these requirements were satisfied here, we agree with the NAC that Vungarala was afforded fair proceedings, and his assertions to the contrary are unavailing.

Vungarala asserts further that the charges were based on "incomplete" information that the Tribe controlled and that the Tribe, because of its status as a sovereign nation, is not subject to FINRA's jurisdiction. But the fact that Vungarala's customer was not subject to FINRA's jurisdiction is not unique to this case; the same is true for all disciplinary cases involving

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45 *SEC v. Brookstreet Secs. Corp.*, 584 F. App'x 689, 690-91 (9th Cir. 2014) (quoting *Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989)).

46 *ZPR Inv. Mgmt., Inc.*, Advisers Act Release No. 4249, 2015 WL 6575683, at *14 (Oct. 30, 2015), *petition denied in relevant part*, 861 F.3d 1239 (11th Cir. 2017).

47 *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1252 (11th Cir. 2012) (rejecting argument that written disclosures rendered oral misrepresentations immaterial because the "oral misrepresentations at issue here were made directly to customer-investors who aver they never received or knew about the written disclosures at the time of their purchases" and "the oral misstatements must be considered in the factual context of a weak, or non-existent, distribution of the written disclosures"); *SEC v. Solow,* No. 06-81041, 2008 WL 11333854, at *3 (S.D. Fla. Mar. 26, 2008) (rejecting argument that written disclosures rendered oral misrepresentations immaterial where customers "did not always receive these written disclosures or prospectuses, or did not receive them before an investment had already been made," and where defendant, "when told by his customers that they did not understand the prospectuses, told them to trust him and that, essentially, he would handle it"), *aff'd* 308 F. App'x 364 (11th Cir. 2009).

48 *See ZPR Inv. Mgmt., Inc. v. SEC*, 861 F.3d 1239, n.6 (11 Cir. 2017) (finding that disclosure of accurate information on website did not render immaterial earlier misrepresentations when the investment adviser did not alert investors that they needed to look at the accurate information or that it contained information that was omitted earlier).

49 15 U.S.C. §§ 78o-3(b)(8); 78o-3(h)(1).

50 *Id.*

customers.[51] Vungarala's inability to subpoena or engage in discovery with the Tribe was no different from other respondents in FINRA proceedings, which do not provide participants with the ability to subpoena documents from or engage in discovery with customers and does not make the proceedings unfair.[52]

Although Vungarala argues that the Tribe withheld exculpatory evidence, the record does not support his contention.[53] Indeed, Vungarala did not identify a single document or record that could allegedly prove his defenses until his reply brief.[54]

For the first time in his reply brief,[55] Vungarala asserts that he has a "blockbuster document," which is under seal pursuant to the Tribe's civil proceeding, demonstrating that the Tribe was aware that it paid commissions on its non-traded REITs and BDCs. Even if this were so, it does not prove that the Tribe was aware that Vungarala received those commissions. In any case, Vungarala has not requested that the Commission introduce any additional evidence into the record let alone attempted to satisfy the standard for having the Commission do so.[56]

Vungarala argues that PKS's settlement with FINRA damaged Vungarala's defense because PKS witnesses could not "corroborate Vungarala's testimony or challenge the Tribe's selected witnesses." But Vungarala has failed to allege any specific testimony that, but for the settlement order, would have supported his position. Furthermore, Vungarala called a former

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51 *See Kevin Lee Otto*, Exchange Act Release No. 43296, 2000 WL 1335346, at *4 (Sept. 15, 200) (stating that NASD, FINRA's predecessor, could not "compel a customer . . . to appear at a hearing before it"), *aff'd*, 253 F.3d 960 (7th Cir. 2001).

52 *James Elderidge Cartwright*, 50 S.E.C. 1174, 1179 n.10 (1992) (rejecting the argument "that the NASD's disciplinary procedures are unfair because they do no confer on respondents discovery power and the right to subpoena witnesses").

53 Vungarala similarly argues that his inability to access the Tribe's evidence violates the *Brady* doctrine. *See Brady v. Maryland*, 373 U.S. 83 (1963) (requiring that prosecutors turn over any exculpatory evidence to criminal defendants). But *Brady* applies to criminal prosecutors, not private parties. In any event, regardless of its applicability, Vungarala has not alleged that FINRA failed to turn over any exculpatory material in its possession.

54 *Thomas Warren, III*, 51 S.E.C. 1015, 1020 n.22 (1994) (stating, in rejecting argument that proceeding was unfair, that the respondent "has not specified what evidence he was deprived from obtaining, other than to speculate that additional evidence could have substantiated his claim"), *aff'd*, 69 F.3d 549 (10th Cir. 1995). Moreover, we note that the Tribe also produced over 100,000 pages of documents to Vungarala in a related civil proceeding.

55 *See* Rule of Practice 450(b), 17 C.F.R. § 201.450(b) (providing that any argument raised for the first time in a reply brief will be deemed to have been waived).

56 *See* Rule of Practice 452, 17 C.F.R. § 201.452 (providing that a party may move the Commission to allow the submission of additional evidence upon a showing of materiality and reasonable grounds for failing to adduce the evidence previously).

PKS employee, with whom he worked closely on the Tribe's investments, to testify at the hearing. While the former employee testified that he thought the Tribe was sophisticated, his testimony did not support Vungarala's assertions that Vungarala was honest with the Tribe about his commissions or its eligibility for millions in volume discounts.

Vungarala also argues that FINRA only presented the lowest-level witnesses who were not representative of the Tribe's alleged financial sophistication. We agree with the NAC that FINRA was entitled to present the evidence that it believed supported its case, and to select which witnesses to present.[57] We reject Vungarala's suggestion that FINRA was required to call the Chief Financial Officer, Chief of the Tribe, or other more senior Tribe members; the witnesses that FINRA presented had direct and substantial knowledge of Vungarala's actions, statements, and omissions concerning non-traded REITs and BDCs.

III. Sanctions

Under Exchange Act Section 19(e)(2), we must sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive or impose an unnecessary or inappropriate burden on competition.[58] In doing so, we must consider any aggravating or mitigating factors.[59] We also consider whether the sanctions are remedial or punitive.[60] Although we are not bound by FINRA's Sanction Guidelines, we use them as a benchmark in conducting our review.[61] While Vungarala does not explicitly argue that the sanctions FINRA imposed are excessive or oppressive, he does contend that those sanctions violate due process and are impermissibly "punitive."

A. The bars FINRA imposed are neither excessive nor oppressive.

FINRA's Sanctions Guidelines state that an adjudicator should "strongly consider barring an individual" in response to intentional or reckless misrepresentations or omissions of material fact.[62] We agree with the NAC that a bar is warranted here because Vungarala "engaged in egregious misconduct by repeatedly misleading the Tribe over an extended period, for his own personal gain." Vungarala abused his position of trust as the Tribe's investment manager. His

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57 *Joseph R. Butler*, Exchange Act Release No. 77984, 2016 WL 3087507, at *6 n.18 (June 2, 2016) (affirming FINRA's discretion to decide which witnesses to call).

58 15 U.S.C. § 78s(e)(2). The record does not show, and Vungarala does not argue, that FINRA's sanctions impose an unnecessary or inappropriate burden on competition.

59 *Saad v. SEC*, 718 F.3d 904, 906 (D.C. Cir. 2013) (citing *PAZ Sec., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007)).

60 *McCarthy v. SEC*, 406 F.3d 179, 188–91 (2d Cir. 2005).

61 *See, e.g.*, *John Joseph Plunkett*, Exchange Act Release No. 69766, 2013 WL 2898033, at *11 (June 14, 2013).

62 FINRA Sanctions Guidelines at 90 (Mar. 2017).

misconduct occurred repeatedly over more than three years. When Tribe members asked direct questions about his commissions and the Tribe's eligibility for volume discounts, Vungarala lied to them and then tried to confuse them with vague answers. As a result of his misconduct, he made over $9.6 million in undisclosed commissions and cost the Tribe at least $3.3 million by forgoing volume discounts for which the Tribe was eligible. As the NAC stated, Vungarala "has demonstrated that he is unfit to continue in the securities industry and the bars from the securities industry are necessary to protect investors from future misconduct at his hands." A bar "will protect the public from [Vungarala's] willingness to place his own financial interests ahead of those of his customer."[63] Under these circumstances, with due regard for the public interest and the protection of investors, a bar is not excessive or oppressive but a necessary remedial measure.[64]

FINRA's Sanction Guidelines state that a sanction less than a bar should be considered "where mitigating factors predominate."[65] Although Vungarala challenges his liability and argues that imposing a bar is punitive, he does not raise any mitigating factors that suggest a sanction less than a bar should be imposed for the violations we have sustained.

Instead, Vungarala argues that the imposition of a lifetime bar on a registered representative is an impermissibly punitive penalty. But, as we recently explained, FINRA bars are not penalties where they are imposed "to protect the public."[66] We adhere to that reasoning here. As discussed above, it is necessary to bar Vungarala to protect the public, and the bar is therefore remedial. We therefore reject Vungarala's argument that the bar FINRA imposed on him is impermissibly punitive.

B. The disgorgement FINRA imposed is neither excessive nor oppressive.

The Sanction Guidelines state that disgorgement of ill-gotten gains may be an appropriate remedy for misconduct that resulted in a financial benefit to the respondent.[67] As discussed above, Vungarala obtained $9.6 million in commissions as a result of his misconduct—the Tribe invested $190 million in REITs and BDCs without taking advantage of volume discounts across accounts, PKS earned commissions of $11.4 million, and Vungarala received 85% of those

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63 *John D. Audifferen*, Exchange Act Release No. 58230, 2008 WL 2876502, at *15 (July 25, 2008).

64 *See, e.g.*, *McGee*, 2017 WL 1132115, at *13-14 (sustaining bar that FINRA imposed on broker who failed to disclose to his customer that he would receive compensation as a result of her investment in the security he recommended because the bar "will protect the public by preventing McGee from defrauding other customers").

65 Guidelines at 90.

66 *John M.E. Saad*, Exchange Act Release No. 86751, 2019 WL 3995968, at *2 (Aug. 23, 2019) (rejecting the argument that the Supreme Court's decision in *Kokesh v. SEC* means that FINRA bars are impermissibly punitive and may not be imposed).

67 Guidelines at 5.

commissions. We agree with the NAC that disgorgement of this amount would "remediate [Vungarala's] misconduct by eliminating the financial benefit directly resulting from it."

Vungarala does not suggest a different calculation of the amount to be disgorged; rather, he again argues that disgorgement is impermissibly punitive. But we recently held that "FINRA's disgorgement orders pursuant to which a violator must give up the ill-gotten gains causally connected to the violations" are "appropriately remedial."[68] Exchange Act Section 15A authorizes FINRA to impose any "fitting sanction," and disgorgement is a "fitting sanction in a FINRA disciplinary action where the disgorgement ordered is a reasonable approximation of the violator's ill-gotten gains causally connected to the violations."[69] In such circumstances, disgorgement is remedial because it is intended "to prevent unjust enrichment."[70] We again adhere to that reasoning here and find the disgorgement ordered to be remedial.[71]

The disgorgement ordered is the commissions Vungarala obtained as a result of his antifraud violations. As discussed above, the Tribe separately reimbursed Vungarala for expenses such as for the cost of renewing his securities licenses and his errors and omissions insurance, and those reimbursements are not included in the disgorgement order. As a result, the disgorgement is limited to Vungarala's net profits from his wrongdoing.[72]

As discussed above, we sustain FINRA's sanctions unless we find, having due regard for the public interest and the protection of investors, that the sanctions are excessive or oppressive. Disgorgement "furthers the Commission's public policy mission of protecting investors and

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68 *Kimberly Springsteen-Abbott*, Exchange Act Release No. 88156, 2020 WL 605918, at *20 (Feb. 7, 2020) (rejecting the argument that the Supreme Court's decision in *Kokesh v. SEC* means that FINRA's disgorgement orders are impermissibly punitive).

69 *Id.*

70 *Id.* at 19.

71 *See generally Sanction Guidelines*, Regulatory Notice 11-13, 2011 WL 1099488, at *1-2 (Mar. 22, 2011) (announcing revisions to FINRA's Sanction Guidelines and stating that "General Principle 5 of the Sanction Guidelines recognizes that FINRA adjudicators may order restitution where necessary to remediate misconduct" and "restore the status quo ante where a respondent's victim would otherwise unjustly suffer loss"; that "General Principle 6 of the Sanction Guidelines instructs FINRA adjudicators to consider the disgorgement of a respondent's ill-gotten gains where the respondent has obtained a financial benefit from his wrongdoing"; and that "disgorgement seeks to remediate misconduct by depriving a respondent of his or her unlawful profits irrespective of the actual losses suffered by the respondent's victims").

72 *See* Restatement (Third) of Restitution § 51(4) (stating that disgorgement is a remedy that seeks to "eliminate profit from wrongdoing and that the "unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong"); *cf. Liu v. SEC*, 140 S. Ct. 1936, 1945 (2020) (stating that, for purposes of disgorgement ordered under Exchange Act Section 21(d)(5), courts should "limit[] awards to the net profits from wrongdoing").

safeguarding the integrity of the markets" by "mak[ing] violations unprofitable."[73] Because the disgorgement here is limited to Vungarala's net profits from his violations, it is not excessive or oppressive.

An appropriate order will issue.[74]

By the Commission (Chairman CLAYTON and Commissioners PEIRCE, ROISMAN, LEE, and CRENSHAW).

Vanessa A. Countryman
Secretary

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73 *Gordon Brent Pierce*, Exchange Act Release No. 71664, 2014 WL 896757, at *19 (Mar. 7, 2014), *petition denied*, 786 F.3d 1027 (D.C. Cir. 2015).

74 We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90476 / November 20, 2020

Admin. Proc. File No. 3-18881

In the Matter of the Application of

GOPI KRISHNA VUNGARALA

For Review of Disciplinary Action Taken by

FINRA

Order Sustaining Disciplinary Action Taken By Finra

On the basis of the Commission's opinion issued this day, it is

ORDERED that the disciplinary action taken by FINRA against Gopi K. Vungarala is sustained.

By the Commission.

Vanessa Countryman
Secretary