



**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE
REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C**

BETWEEN:

REAL ESTATE COUNCIL OF ONTARIO

- AND -

YI-SAN LIU (trading as SAM LIU)

DISCIPLINE DECISION AND REASONS FOR DECISION

The Panel met on May 11, 2023, to discuss the written submissions by all Parties with respect to Penalty and Costs. The Panel decided as follows:

ORDER:

Fine of \$5,000.00 payable to RECO within 90 days of RECO sending this decision.

Successful completion of the RECO Mandatory Continuing Education Compliance and Ethics courses part 1 and 2 with confirmation of successful completion of the courses to be provided to RECO within 90 days of sending this Decision.

WRITTEN REASONS:

REASONS FOR DECISION ON PENALTY

INTRODUCTION

1. The Discipline Panel convened, on May 19, 2023, to deliberate on written submissions from the Prosecution (the “Registrar” / ”RECO”) and the Respondent, Yi-San LIU (a.k.a. Sam LIU) (the “Respondent” and/or “LIU”) on the issue of penalty and costs of the Parties.

2. Submissions for the Registrar were done by Michael Collis, Legal Counsel for Real Estate Council of Ontario and submissions for the Respondent were done by Michael Suria (“Counsel for the Respondent”).
3. The Discipline Panel was comprised of Devon Saunders, Filippo Sbrocchi, Sara Rowshanbin (the “Panel”). Viktoria Anteby was present as Independent Legal Counsel to the Discipline Panel.

The Discipline Decision:

4. In its Decision, the Discipline Panel found that Yi-San LIU (“LIU”) had contravened Section 2(1), in respect of Section 25(1), and Sections 38 and 41(2) of Ontario Regulation 580/05 (the “Code of Ethics”), to the *Real Estate and Business Brokers Act (REBBA)*, 2002, as follows:
 - i. Sections 2(1) in respect of Section 25(1) (*disclosure of agreements relating to remuneration*), and Section 38 (*best efforts to prevent error, misrepresentation, fraud or any unethical practice*) through failing to communicate the existence of the commission reduction agreement between Liu’s brokerage and seller client.
 - ii. Section 41(2) (*broker of record to ensure the brokerage complies with this Regulation*) through failing to provide full disclosure and information to all concerned in a trade in real estate as the broker of record.
5. **Written Material Considered by the Panel for the Penalty Decision:**
 1. Submissions of Yi-San LIU regarding Penalty, submitted by Michael Suria, Lawyer for Yi-San LIU (“Counsel for the Respondent”).
 2. Book of Authorities of Yi-San LIU, submitted by Counsel for the Respondent.
 3. Registrar’s Submissions Regarding Penalty and Costs, Michael Collis, submitted by Legal Counsel, Real Estate Council of Ontario (“Counsel for the Registrar”).

4. Registrar's Reply Submissions Regarding Penalty and Costs, submitted by Counsel for the Registrar.

Penalty being Sought by RECO:

6. RECO is seeking the following penalty:
 - a) An Order that Liu pay a fine of \$17,000, payable within 90 days of the Decision of the Panel.
 - b) an Order that Liu successfully complete the Parts 1 and 2 of the RECO MCE Compliance and Ethics in Real Estate course and provide RECO with proof of successful completion within 90 days of the Decision of the Panel.
7. RECO is not seeking an order of costs.

SUBMISSION ON PENALTY BY THE REGISTRAR

8. Counsel for the Registrar relied upon the nine (9) factors set out in the decided case, *Registrar v. Suzette Thompson, Appeals Committee of RECO, May 31, 2012*. [RECO Book of Authorities – Penalty Submissions ("BOA"), TAB 1, p. 4], for their submission.
9. Counsel for the Registrar submits as follows:
 - i. ***The Nature and Gravity of the Breaches***
10. In this instant case, the nature and gravity of the breaches of the Code of Ethics by the Registrant, fall in the moderate-high of the range of seriousness.
11. The Code of Ethics requires realtors to disclose agreements related to remuneration as part and parcel of ensuring the fairness of real estate transactions and the legitimacy of how those transactions take place. Commission reduction agreements fall in the category of agreements related to remuneration.
12. Misrepresentations or failures to disclose agreements related to remuneration, undermine the obligations set out in the Code of Ethics, for transaction fairness

and plays into registrants failing to protect consumers. Not complying with these obligations undermines public trust in property transactions and respect and trust for registrants and it is particularly egregious when a broker is the violator.

13. Failure to comply with the obligations set out in the Code of Ethics, undermines public trust in the role of registrants and the conduct of property transactions in Ontario.

ii. *The Role of the Registrant in the Breaches*

14. Counsel for the Registrar implores the Panel to look at the registrant's role in relation to the breaches (i.e., central vs peripheral), and also consider whether the registrant's conduct was active/deliberate versus more negligent in nature.
15. Counsel for the Registrar submits that, in this instance, Liu's role was central because the breaches were directly the result of Liu's actions and/or omissions.
16. Further, Liu, through his failures to ensure that he disclosed his reduced commission agreement accurately and in a timely manner, contributed to the breaches occurring.

iii. *Whether the Registrant Suffered or Gained, as a Result of the Breaches*

17. It is RECO's submission that, in this factor, Liu earned the commission on the sale from the Seller and had an unfair advantage for his buyer client by knowing what the other offer stipulated regarding the commission amount.
18. Further, Liu had more to gain by not disclosing his reduced commission agreement, and therefore, moderate-high weight should be given to this factor when considering penalty.
19. Counsel for the Registrar submits that Liu unfairly brokered a deal between his buyer and seller clients, by failing to disclose that the Seller would be awarded a reduced commission amount by accepting the offer of Liu's buyer client.

iv. The Impact of the Breaches on the Complainant

20. It is RECO's submission that, the impact on the Complainant in this case was significant, because the Complainant's client was not successful in the purchase of the subject property.

v. The Need for Specific Deterrence

21. Counsel for the Registrar challenges the Panel to ensure that the penalty be sufficiently meaningful, to dissuade the Respondent from recommitting the offence(s) in the future and refers the Panel to the decided case of *R. v. McGill*, [2016] O.J. No. 1346 (Ont. Ct Jus.) at para 97. [BOA, TAB 2, p. 84].
22. To that end, Counsel for the Registrar requests that the penalty imposed by the Panel must be more than just 'the cost of doing business' because the message to the Respondent must be that his actions fell below the standard expected of him.

vi. The Need for General Deterrence

23. Counsel for the Registrar reiterates that, failures to disclose commission reduction agreements lead to failures to protect consumers and not complying with these obligations undermines public trust in property transactions and respect and trust for registrants.
24. Counsel for the Registrar reminds the Panel that General Deterrence is a particularly relevant penalty consideration in cases of professional discipline and the principle of general deterrence requires that the penalty imposed should be a deterrence to *other registrants* against engaging in similar conduct similar to the Respondent and refers the Panel to the decided case of *R. v. Thies*, 2014 CM 3007 at para 11 [BOA, TAB 3, p. 99].
25. Further, the penalty imposed by a discipline committee is a communication to the profession about a) what conduct is inappropriate, and b) the severity of different

types of breaches of the Code of Ethics and that in this case, the penalty imposed by the Panel has a particularly important general deterrence component.

vii. *The Need to Maintain the Public's Confidence*

26. Counsel for the Registrar submits that a primary consideration in imposing a penalty for unprofessional conduct is the collective reputation of the profession which includes the legitimacy/reputation of the profession's ability to self-regulate its members and points the Panel to the decided case of *Merchant v. Law Society of Saskatchewan*, [2014] S.J. No. 245, (Sask. C.A.) at para 119. [BOA, TAB 4, p. 151-152].
27. Counsel for the Registrar reminds the Panel of its findings which show that the Respondent breached provisions of the Code of Ethics that are specifically directed at ensuring fairness and continuing public confidence in the profession.
28. Counsel for the Registrar further submits that the public should have confidence that, when they retain and engage with real estate professionals, they will be treated fairly, conscientiously, and in accordance with the rules and that when a registrant breaches the ethical standards of the profession, that the self-disciplinary system will appropriately address the breaches.

viii. *The Degree to Which the Breaches are Outside the Range of Acceptable Conduct*

29. Counsel for the Registrar submits that this factor requires the Panel to assess where Respondent's actions fall on a sliding scale of misconduct from least serious to most serious.
30. Counsel for the Registrar reiterates that, as noted at the outset, it is RECO's position that the misconduct in this case falls towards the moderate-high of the spectrum of conduct which is outside the range of what is acceptable.

31. Further, in this instance, the Respondent breached his obligations to the members of the profession and the public, both as a broker and an agent.

ix. The Range of Sanction in Similar Cases

32. Counsel for the Registrar reminds the Panel that previous cases are helpful guides to determining appropriate penalty. Therefore, a comparison of similar cases is an important factor when considering the appropriateness of a disciplinary penalty and Counsel for the Registrar points the Panel to the case of *Duval v. College of Nurses Ontario*, [2007] O.J. No. 3992, (Ont. Div. Ct.). [BOA, TAB 5, p. 168].

33. Counsel for the Registrar submits that there are several decisions of the Discipline Committee which involve the failure to disclose commission reduction agreements and most of these types of cases were resolved by way of an Agreed Statement of Facts and Penalty (“**ASFP**”).

34. Counsel for the Registrar submits the following table which shows comparable decisions involving the failure to disclosure commission reduction agreements:

Date of Decision	Registrant	ASFP/Decision	Sections	Penalty	
				Fine	Courses
April 6, 2018	Monica Thapar	Decision	2(1), 3, 5, 25(1), 38, 39	\$15,000	REIC: Ethics and Business Practice course
December 1, 2017	Marta Castelhano	ASFP	2(1), 3, 5, 25(1), 38, 39	\$10,000	REIC 2600: Ethics and Business Practice course
November 7, 2022	Marvin Newman	ASFP	2(1), 17, 25(1), 38	\$9,000	RECO MCE Compliance and Ethics in Reals Estate, Parts 1 and 2
June 10, 2022	Thi Hien Nguyen	ASFP	2(1), 3, 25(1), 27(1), 38	\$11,500	
May 28, 2018	Samira Shahbazian	ASFP	2, 25(1), 3, 38, 39	\$7,500	

35. Counsel for the Registrar further submits that because penalties imposed by way of a settlement generally result in a reduced penalty for a registrant (the reduction/discount reflecting that the registrant has accepted some responsibility for their actions and, in addition, saved the time and costs that would otherwise be expended on a contested hearing), the penalty in this case should be greater than in the cases that resolved by way of an ASFP and fall more closely in line with cases where there was a contested hearing and a decision made by the Panel.
36. Counsel for the Registrar further points out that, the Discipline Committee has previously held in *RECO v. Monica Thapar*, Disciple Decision, December 7, 2017, [BOA, TAB 6, p. 172] that a settlement-based resolution can make a difference in the determination of the appropriate penalty.
37. In the *Thapar* penalty decision released on April 6, 2018, a panel of the Discipline Committee ordered a penalty of a fine of \$15,000 and the completion of the REIC Ethics and Business Practice course.
38. RECO submits that the penalty in this instance should be similar or slightly higher to that of the *Thapar* case for two reasons.
39. First, because the penalty imposed in *Thapar* was one of the more recent decisions involving similar facts heard by the Discipline Committee, in a contested hearing, however, it was released five (5) years ago.
40. Second, because in this instant case (like the *Thapar* case) there is the aggravating factor of a broker failing to take responsibility or accountability for the conduct.
41. Counsel for the Registrar also brings to the Panel's attention that there was one recent instance in which a penalty determination was made by a panel of the Discipline Committee, after a contested hearing (RECO and Marvin Newman, Discipline Decision and Reasons for Decisions, November 7, 2022).

Penalty Options Available to the Panel:

42. Counsel for the Registrar points the Panel to the options set out in subsection 21(4) of the *Real Estate and Business Brokers Act, 2002*, that include ordering the registrant to take educational courses, and/or imposing a fine as the Panel considers appropriate. Counsel for the Registrar was careful to note that the maximum available fine is \$50,000.

Penalty Sought by the Prosecution:

43. RECO's position is that a significant penalty is warranted in this case and submits that the following considerations are particularly important in this case and support a significant penalty:
 - i. ensuring through general deterrence that it is clear to the profession that the disclosure obligations required by the Code of Ethics are of utmost importance and must be complied with;
 - ii. ensuring that the public's confidence in the integrity of the profession and the self-disciplinary regime established by the *Act* is maintained where the provisions of the Code of Ethics that have been addressed are particularly aimed at preserving public confidence in the existing system; and
 - iii. Liu's role as the listing representative and buyer's representative and his failure to treat the process fairly for all consumers by failing to disclose his commission reduction agreement.

SUBMISSION ON PENALTY BY THE RESPONDENT

44. The Respondent, through counsel, submits that he accepts the factors set out in paragraph 12 of the Registrar's Penalty Submissions, as the appropriate factors to consider when determining an appropriate penalty - Per: *Registrar v. Suzette Thompson*, Appeals Committee of RECO, May 31, 2012, [RECO Book of Authorities – Penalty Submissions ("BOA"), TAB 1, p. 4].

45. The Respondent's submissions with respect to the application of the *Suzette Thompson, 2012* factors are set out below.

i. Nature and Gravity of the Breaches

46. The Respondent submits that the nature and the gravity of the Respondent's breaches fall upon the low range of seriousness as it pertains to the subject transaction because the change in the Commission Agreement between the Seller and the Respondent did not impact Registrant A and Business A's ability to present an offer prior to the deadline the Seller had imposed with respect to the presentation of offers, and ultimately, did not impact Business A's ability to purchase the subject property.

ii. Role of the Registrant in the Breaches

47. The Respondent acknowledges that he was central to the change in the Commission Agreement and acknowledges that his error led to the failure to disclose the Commission Agreement to Registrant A.

iii. Whether the Registrant suffered or gained as a result of the Breaches

48. The Respondent did not benefit from the failure to disclose the change in the Commission Agreement because he incurred a reduction of his commission, because of the change in the Commission Agreement.

49. Counsel for the Respondent submits that, by the time that the Seller was ready to accept an offer, Registrant A and Business A had not presented a revised offer for the Seller to consider, and the only offer that could be accepted was from Consumer A.

iv. Impact of the Breaches on the Complainant

50. Counsel for the Respondent submits that there is no evidence as to impact that the change in the Commission Agreement had on Business A's offer and disputes the

submission of the Registrar set out in paragraph 23 of its submissions that the change in the Commission Agreement impacted Business A's ability to purchase the subject property. There is no evidence or finding to suggest that this is the case.

51. Further submission is that Registrant A and Business A were aware that the Seller had imposed a deadline with respect to a revised offer to be provided by Business A. They did not make a revised offer prior to the deadline imposed by the Seller and did not present an offer until after the Seller accepted the offer from Consumer A. Therefore, Business A's failure to acquire the subject property was due to its failure to submit an offer prior to the deadline imposed by the Seller.

v. Specific Deterrence and General Deterrence

52. Counsel for the Respondent submits that the contravention of the Code of Ethics on the part of the Respondent was due to error and negligence therefore, the need for deterrence, either specific or general, is lower.
53. The Respondent supports this submission by indicating that, there is no evidence or finding of fraudulent or malicious intent on the part of the Respondent, or that the Respondent was acting with the intent to enrich himself at the expense of Registrant A, Business A or the Seller.

vi. Need to maintain Public Confidence

54. The Respondent acknowledges that a nominal financial penalty is warranted and would achieve the result of maintaining the public's confidence in RECO's ability to regulate its professionals, however, given that:
 - a) The breach of the code of ethics was not deliberate, but was done in error;
 - b) There is no evidence of intent to defraud any party or to enrich himself;
and
 - c) The impact of the breach on Business A and Registrant A was minor.

55. Further the Respondent submits that any penalty imposed should not be so draconian, so as to call into question the fairness and proportionality of the penalties imposed by RECO, but instead, should focus on correcting the registrant's behaviour.

vii. The Degree to which the Breaches are Outside the Range of Acceptable Conduct

56. Counsel for the Respondent submits that the conduct of the Respondent was improper, but the contravention of the Code of Ethics falls within the less serious range of improper conduct, because it was minor in nature and done in error, not with intent or malice.

viii. The Range of Sanctions in Similar Cases

57. Counsel for the Respondent submits the following decisions that involve failure to disclose changes in commissions agreements:

Date of Decision	Registrant	ASFP/Decision	Sections	Penalty	
				Fine	Courses
May 11, 2018	Donna Jamieson	ASFP	3, 17, 25(1) and 39	\$7,500.00	
May 28, 2018	Samira Shahbazian	ASFP	2, 3, 25(1), 38 and 39	\$7,500.00	
October 21, 2019	Nazhia Nasir	ASFP	2(1), 3, 4, 17, 25(1), 27(1), 37(1) and 38	\$10,000.00	Completion of REIC 2600
September 18, 2020	Laura Lynn Colligan	ASFP	3, 17, 25 and 26	\$5,000.00	
December 17, 2020	William Beauge	ASFP	2(1), 3, 25(1) and 39	\$10,000.00	Completion of REIC 2600
July 13, 2021	Vijay Sole	ASFP	2(1), 3, 4, 5, 14, 15, 17, 25(1), 26 and 38	\$10,000.00	

58. Counsel for the Respondent submits regarding the referenced cases that:
- a) In each of the above noted decisions, the registrants admitted to multiple breaches, including breaching the duty to act with *fairness, honesty and integrity* and goes on to point out that the Discipline Panel found that the Respondent did not breach this duty.
 - b) The decisions that are most similar to Liu's situation are the matters involving *Laura Lynn Colligan, Donna Jamieson and Samira Shahbazian*.
 - c) The penalties in these decisions range from \$5,000.00 to \$7,500.00, with no requirement for professional education.
 - d) Any penalties levied should be similar to the referenced decisions, as the contraventions of the Code of Ethics in those cases are similar to the contraventions in this matter.
59. Counsel for the Respondent submits that the position taken by the Registrar that Liu should face an increased penalty for failing to resolve this matter by way of an agreed statement of facts, and for asserting his right to have any contraventions of the Code of Ethics determined by the Panel by way of a hearing, is not in the interests of justice or procedural fairness or for the benefit of the profession and would result in damage to the registrants' reputations and would lead to a decrease in the public's confidence in the profession as a whole.

Penalty Suggested by the Respondent:

60. The Respondent submits that a penalty is warranted, given that he was found in breach of the Code of Ethics, however, the breach was minor in nature and had little impact on the complainant or the complainant's client. As such, the Respondent submits that a fine of \$5,000.00, payable within 120 days of the decision of the Panel is appropriate in the circumstances.

PANEL'S DECISION ON PENALTY

61. After carefully considering the submissions of both parties and the guiding factors set out in *Registrar v. Suzette Thompson, 2012*, this Panel makes the following findings:

i. The Nature and Gravity of the Breaches of the Code of Ethics

62. The failure to disclose a commission reduction agreement, as occurred in this case is viewed by the Panel as falling into the moderate-low range of severity.

- a) Without minimizing the Respondent's disclosure obligation under the Code of Ethics, the Panel has taken the following into consideration in arriving to its conclusion: That the non-disclosure was not done in malice, it was more inaction;
- b) The non-disclosure did not impact Registrant A and Business A's ability to present an offer prior to the deadline the Seller had imposed with respect to the presentation of offers; and
- c) The non-disclosure did not impact Business A's ability to purchase the subject property.

ii. The Role of the Offending Member in the Breaches

63. The Panel finds that the Respondent's role was central because he was solely responsible for breaching the Code of Ethics, by failing to disclose the reduced commission agreement. The breaches were directly the result of the Respondent's actions and/or omissions.

64. The Panel notes that the Respondent acknowledges that he was central to the change in the Commission Agreement and acknowledges that his error led to the failure to disclose the said Agreement and thus was responsible for the breaches occurring.

iii. **Whether the Offending Member Suffered or Gained because of the Breaches**

65. The Respondent clearly gained financially because he earned the full commission on the subject transaction. The commission was not shared, because there was no cooperating broker.
66. However, there is no evidence to suggest whether the Respondent would have suffered or gained, had the Respondent disclosed the Reduced Commission Agreement, because the potential competing offer did not materialize.

iv. **The Impact of the Breach on the Complainant and Others**

67. The Panel has determined that the breach had no transactional/financial impact on the Complainant because the Complainant did not submit the improved offer.
68. The Panel notes that the Complainant could not have expected any success in the purchasing of the subject property because the Complainant failed to submit the improved offer and there is nothing to demonstrate that given the knowledge of the Reduced Commission Agreement, the improved offer would have been submitted in time for the presentation.

v. **The Need for there to be Specific Deterrence to Protect the Public**

69. The Panel is mindful that the penalty in this matter ought to be sufficiently meaningful, to dissuade the Respondent from recommitting the offence(s) in the future and pays attention to the decided case of *R. v. McGill, 2016*.
70. To that end, the Panel agrees that the penalty imposed by the Panel ought to be more than just 'a cost of doing business', because the message to the Respondent must be that his actions fell below the standard expected of him. This must be so,

especially because the Respondent is a broker of record and is held to a higher standard in the profession.

71. The Panel accepts that the contravention of the Code of Ethics on the part of the Respondent was due to negligence and was neither deliberate nor malicious. There was no finding of fraudulent or malicious intent on the part of the Respondent, or that the Respondent was acting with the intent to enrich himself at the expense of the other parties to the transaction.
72. The Panel has noted that the Respondent has acknowledged the issue and his failure and has accepted responsibility for his actions, therefore he has already commenced a change towards his professional responsibility therefore whatever the penalty is, it will serve as a reminder and specific deterrent to the Registrant from repeating a similar breach of the Code of Ethics.

vi. **The Need for a General Deterrence to Protect the Public**

73. The Panel agrees that failures to disclose commission reduction agreements can lead to failures to protect consumers and not complying with these obligations, undermines public trust in real estate transactions and registrants.
74. Further, the penalty imposed by a discipline committee is a communication to the profession about a) what conduct is inappropriate, and b) the severity of different types of breaches of the *Code of Ethics*.
75. The Panel notes that the conduct in this matter, while not egregious, still gives rise to a contravention of the *Code of Ethics* and as such requires the Panel to pay attention to the fact that the public must be protected from 'bad actors' in order to maintain public confidence in the real estate profession.
76. The Panel therefore agrees that General Deterrence is a relevant penalty consideration in this case, to deter other registrants against engaging in conduct,

similar to the Respondent's and pays attention to the decided case of *R. v. Thies, 2014*, referenced by Counsel for the Registrar.

vii. The Need to Maintain the Public's Confidence in the Integrity of the Profession

77. The primary consideration in imposing a penalty for unprofessional conduct is the collective reputation of the profession which includes the legitimacy and reputation of the profession's ability to self-regulate its members. The Panel pays attention to the decided case of *Merchant v. Law Society of Saskatchewan, 2014* and notes that the Respondent violated the provisions that are specifically directed at ensuring fairness and continuing public confidence in the profession.
78. It is the Panel's position that it is of the utmost importance that breaches of the Code of Ethics be dealt with, including imposition of penalties, in a manner that will restore and maintain the public's confidence, in the integrity of the real estate profession.

viii. Degree to which the Breaches are Regarded as Being Outside the Range of Acceptable Conduct

79. Taking the totality of the circumstances, the Panel finds that the Respondent's breach of the of the *Code of Ethics* falls within the moderate-low of the spectrum of conduct which is outside the range of what is acceptable.
80. The Panel reiterates that, while the Respondent breached his obligations to the members of the profession and the public, both as a broker and an agent, the conduct was not considered to be egregious.

ix. Range of Sanctions in Similar Cases

81. The Panel agrees that previous similar cases are helpful guides to determining appropriate penalty. The Panel therefore pays attention to the case of *Duval v. College of Nurses Ontario, 2007*.
82. Counsel for the Registrar submitted five (5) cases for consideration by the Panel. The penalties in the cases ranged from \$7,500.00 to \$15,000.00, with three (3) requiring the respondents to complete educational courses.
83. Four (4) out of the five cases were settled by Agreed Statement of Facts and Penalty (“ASFP”), where the respondents took responsibility for their actions and did not proceed to a hearing.
84. The one (1) case out of the five which proceeded to a hearing, the penalty was \$15,000.00 plus the completion of an educational course.
85. Counsel for the Registrar references the *RECO v. Monica Thapar*, Discipline Decision, December 7, 2017, [BOA, TAB 6, p. 172], that a settlement-based resolution can make a difference in the determination of the appropriate penalty.
86. The *Thapar* matter proceeded to a hearing and in the *Thapar* penalty decision released on April 6, 2018, a panel of the Discipline Committee ordered a penalty of a fine of \$15,000.00 and the completion of the REIC Ethics and Business Practice course.
87. RECO submits that the penalty in this instant matter should be similar or slightly higher to that of the *Thapar* case.
88. The Panel does not accept the Registrar’s submission that penalties imposed by way of a settlement, result in a reduced penalty for a registrant nor does it accept

that the Registrant ought to be penalized by having a higher penalty imposed by the Panel, where the matter proceeds to a hearing.

89. The Panel appreciates the options available to registrants for resolving discipline matters, either by way of a resolution by ASFP or proceeding to a hearing and sees the resolution options a matter of choice for registrants, not a norm.
90. The Panel is mindful of the legal principles of Natural Justice and Due Process:
 - a) Natural justice requires that a person receive a fair and unbiased hearing before a decision is made that will negatively affect them; and
 - b) Due process is related to the presumption of innocence. It involves a thorough examination of the facts of each case and recognition of the importance of protecting the legal rights of individuals against whom allegations are made.
91. The Panel understand the rationale and the thinking behind the of use of resources, the perceived “savings” and the perceived acceptance of responsibility, when a matter does not proceed to a hearing. Nevertheless, in the interest of natural justice and due process, the Respondent asserting his right to have any contraventions of the Code of Ethics determined by the Panel by way of a hearing, should not and cannot be used as a means to determine a higher penalty. Determining the quantum of penalty in this manner becomes subjective rather than objective.
92. Counsel for the Respondent submits six (6) decisions that involve failure to disclose changes in commissions agreements, namely *Donna Jamieson, 2018, Samira Shahbazian, 2018, Nazhia Nasir, 2019, Laura Lynn Colligan, 2020, William Beauge, 2020, Vijay Sole, 2021*.
93. In each of the decisions, the registrants admitted to multiple breaches, including breaching the duty to act with fairness, honesty and integrity, contraventions that the Respondent in this instant matter is not guilty of.

94. The penalties in the six (6) decisions ranged from \$5,000.00 to \$10,000.00, with two (2) requiring the respondents to complete educational courses.
95. All six (6) cases were settled by Agreed Statement of Facts and Penalty (“ASFP”).
96. The decisions that are most similar to Liu’s situation are the matters involving *Laura Lynn Colligan, Donna Jamieson and Samira Shahbazian*.
97. The Panel finds that a penalty of \$5,000.00 is appropriate in the circumstances.

PENALTY

Having carefully considered the Submission of the parties, the Panel has determined that the appropriate penalty for this case is as follows:

- a. fine of \$5,000.00 payable within 90 days of the release of this Decision, and
- b. successful completion of the RECO Mandatory Continuing Education Compliance and Ethics courses part 1 and 2 with confirmation of successful completion of the courses to be provided to RECO within 90 days of sending this Decision.

[Released: March 13, 2024]



**IN THE MATTER OF A DISCIPLINE HEARING HELD PURSUANT TO THE
REAL ESTATE AND BUSINESS BROKERS ACT, 2002, S.O. 2002, c. 30, Sch. C**

BETWEEN:

REAL ESTATE COUNCIL OF ONTARIO

- AND -

YI-SAN LIU (o/a SAM LIU)

DISCIPLINE DECISION AND REASONS FOR DECISION

APPEARANCES:

For the Registrant: Unrepresented

For the Real Estate Council of Ontario: Jay Blair, counsel

Heard in Toronto on: October 12, 2021

FINDINGS: In violation of Sections 2(1) in respect of Section 25(1) and Section 38 of the Code of Ethics.

ORDER: Counsel for the Registrar, *REBBA 2002* to deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The Respondent shall deliver to the Panel and to Counsel for the Registrar, *REBBA 2002* its written submissions on penalty and costs in response to Counsel for the Registrar, *REBBA 2002*'s submissions within 15 days of the date on which Counsel for the Registrar, *REBBA 2002*'s submissions on penalty and costs are delivered to the Respondent.

Counsel for the Registrar, *REBBA 2002* shall deliver to the Panel and to the Respondent its reply to the written submission on penalty and costs of the Respondent within 5 days of the date on which the Respondent's

submissions on penalty and costs are delivered to Counsel for the Registrar, *REBBA 2002*.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Hearings Coordinator.

COSTS AND EXPENSES: If appropriate, submissions to be made on costs and expenses with submissions on penalty.

WRITTEN REASONS:

REASONS FOR DECISION

INTRODUCTION

This Hearing took place on October 12, 2021, in the presence of the Respondent Yi-San Liu (aka Sam Liu) (the “Respondent” and/or “Liu”) and Jay Blair, counsel for the Real Estate Council of Ontario (“Counsel for RECO”). The Discipline Panel was comprised of Devon Saunders, Filippo Sbrocchi and Sara Rowshanbin (the “Panel”). Viktoria Anteby was present as Independent Legal Counsel to the Discipline Panel.

ALLEGATIONS BY THE REGISTRAR, REBBA 2002

In its Allegation Statement the Registrar, *REBBA 2002* alleged that Liu acted unprofessionally when he:

- 1) Failed to treat Registrant A, Business A, Individual A fairly, honestly and with integrity by not presenting Business A’s second offer for his client’s consideration, contrary to section 3 of the Code of Ethics.
- 2) Failed to promote his client’s best interests by presenting Business A’s offer to his client, and by discouraging his client from considering it, contrary to Section 4 of the Code of Ethics.
- 3) Failed to provide conscientious service to the Seller by not amending the Listing Agreement and MLS® Listing (broker’s remarks) to reflect that a Commission Reduction Agreement was in place, contrary to Sections 3, 5 and 37(1) of the Code of Ethics.

- 4) Failed to inform Registrant A of the Commission Reduction Agreement between Brokerage B and the Seller, contrary to Section 2(1) in respect of Section 25(1) of the Code of Ethics, and Section 38 of the Code of Ethics in respect of the obligation to use best efforts to prevent error and misrepresentation in the course of a trade in real estate.
- 5) Discouraged his client from considering a second, higher offer after having received Consumer A's offer, thereby engaging in unprofessional conduct, contrary to Section 39 of the Code of Ethics.
- 6) Failed, as broker of record, to disclose the terms of the CRA between Brokerage B and the Seller during the offer process to Registrant A, thereby denying Registrant A's client the opportunity to amend its offer for the Property to make it more competitive. In so denying this opportunity, Liu failed to ensure that his brokerage complied with Section 25(1) of the Act, and thereby breached Section 41(2) of the Code of Ethics.
- 7) And such other matters of ethical conduct that may arise during the hearing of this complaint and the Discipline Committee sees fit to entertain.

The Registrar, *REBBA 2002* alleged that Liu breached the following sections of the Code of Ethics:

Brokers and Salespersons

2. (1) A broker or salesperson shall not do or omit to do anything that causes the brokerage that employs the broker or salesperson to contravene this Regulation.

With respect to:

Agreements Relating to Commission

25. (1) If a brokerage has a seller as a client and an agreement between the brokerage and the seller contains terms that relate to a commission or other remuneration and that may affect whether an offer to buy is accepted, the brokerage shall disclose the existence of and the details of those terms to any person who makes

a written offer to buy, at the earliest practicable opportunity and before any offer is accepted.

Fairness, Honesty and Integrity

3. A registrant shall treat everyone the registrant deals within the course of a trade in real estate fairly, honestly and with integrity.

Best Interests

4. A registrant shall promote and protect the best interests of the registrant's clients.

Conscientious and Competent Service

5. A registrant shall provide conscientious service to the registrant's clients and customers and shall demonstrate reasonable knowledge, skill, judgement and competence in providing those services.

Inaccurate Representations

37. (1) A registrant shall not knowingly make an inaccurate representation in respect of a trade in real estate.

Error, Misrepresentation and Fraud, etc.

38. A registrant shall use the registrant's best efforts to prevent error, misrepresentation, fraud or any unethical practice in respect of a trade in real estate.

Unprofessional Conduct

39. A registrant shall not, in the course of trading in real estate, engage in any act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming a registrant.

Duty to Ensure Compliance

- 41.(2) A broker of record shall ensure that the brokerage complies with this Regulation.

EVIDENCE OF THE PARTIES

1. Allegation Statement dated May 22, 2019 and amended on October 12, 2021(Exhibit 1).
2. Notice of Hearing dated September 3, 2021 (Exhibit 2)
3. RECO Book of Documents dated September 24, 2019 (Exhibit 3).

WITNESSES FOR THE REGISTRAR, REBBA 2002

Registrant A, is a registrant and salesperson with Brokerage A. Registrant A testified that:

On August 8, 2016, Business A retained Brokerage A, represented by Registrant A, to purchase 1-A Street, City A, Unit 123-124 ("the Property") which was listed by Brokerage B, represented by Yi-San Liu (a.k.a. Sam Liu) ("Liu") on behalf of Seller A ("Seller"), with Individual A being the Seller's signing officer ("Seller's Signing Officer").

On August 8, 2016, at approximately 9:42 p.m., Registrant A submitted to Brokerage B, an offer via facsimile on behalf of Business A (the "Business A Offer"). Details of the Business A Offer was \$420,000.00 with two (2) conditions. Registrant A also faxed Liu to communicate that the Business A Offer was sent. After seventeen (17) hours, Liu responded to Registrant A, confirming that the Business A Offer was received.

On August 9, 2016, at approximately 7:39 p.m., Registrant A sent a cell phone text message to Liu, indicating that Business A would like to increase/improve its offer and that Registrant A wanted to present the improved offer (the "Improved Business A Offer") to the Seller, in person. Liu did not respond to the text message that day. Details of the increased/improved offer included an offer of \$500,000.00, with no condition.

The following day, August 10, 2016, at approximately 8:23 a.m., Registrant A contacted Liu, requesting confirmation on whether Business A could present the

Improved Business A Offer. Registrant A received a cell phone text message from Liu, indicating that the Property was “sold”. Again, Registrant A communicated to Liu that her client, Business A would like to present the Improved Business A Offer in person to the Seller, but Liu refused. Registrant A was of the opinion that Liu refused to allow her to present the Seller with the Improved Business A Offer without consulting the Seller.

Once again, Registrant A communicated to Liu that she wanted to present the Improved Business A Offer to the Seller and whatever offer(s) the Seller was contemplating, Business A was prepared to improve it’s offer and remove the conditions. To this, Liu told Registrant A that it was “too late”.

Once again, Registrant A communicated with Liu, asking for an appointment/time to present the Improved Business A Offer to the Seller. Liu did not respond.

Once again, Registrant A communicated with Liu and reiterated to Liu that Business A would increase/improve it’s offer and remove the conditions and insisted that she would like to present the Improved Business A Offer to the Seller. Liu in turn sent a cell phone text message to Registrant A indicating that the Seller would select which offer they wanted and also that the Seller had already accepted an offer.

Registrant A was not made aware of any offer presentation deadline. Registrant A did not receive any communication regarding an offer presentation deadline from Lui. Registrant A did not receive any communication from Liu regarding the Commission Reduction Agreement between Brokerage B and the Seller. Liu did not communicate to Registrant A that the commission would have been reduced if the property was sold to Liu’s client.

Registrant A found out about verification of the Status Certificate only on August 10, 2016, in the afternoon. While Registrant A could not remember the opening

hours of the building management office, she recalled that it was open only in the afternoon therefore, there was no way that the status of the Property could have been verified before noon on August 10, 2016.

Registrant A communicated with Lui via cell phone text messages only. Registrant A did not speak with Lui over the telephone. When Registrant A called Lui, Lui did not answer the phone at any time. Even on the day of the presentation of the offers, Registrant A and Lui communicated via cell phone text message only.

WITNESSES FOR THE RESPONDENT

Yi-San Liu (a.k.a. Sam Liu) ("Liu") gave evidence on his own behalf. Liu was at the relevant times:

- a. Employed by Brokerage B, the brokerage retained by Seller A, to sell 1-A Street, Unit 123-124, City A ("the Property");
- b. Was the listing agent for the Property on behalf of the Seller; and
- c. Was the agent representing Consumer A in Trust, Liu's client ("Liu's Buyer").

Liu testified that:

The Property was on the market for over 40 days and there were only four to five showings. Consumer A, Liu's Buyer, liked the Property and as a result, Liu prepared an offer for Consumer A (the "Consumer A Offer").

Liu received Registrant A's offer (the "Business A Offer") at night and Liu did not respond because the Seller was asking \$499,800.00, which was more than the \$420,000 offer submitted by Registrant A.

Registrant A had asked Lui's opinion on the Status Certificate for the Property but Liu did not give Registrant A any advice. Instead, Liu told Registrant A to make inquiries at the building management office.

On Aug 8, 2016, Liu sent a cell phone text message to Registrant A, indicating that the Business A Offer was too low.

On August 9, 2016, Liu sent the Business A Offer to the Seller and the Seller said that the Business A Offer was too low.

Liu subsequently received a message from Registrant A indicating that Business A will improve the offer but Business A needed to clarify the Status Certificate for the Property.

On August 10, 2016, at approximately 8:23 a.m., Liu advised Registrant A that there were two offers on the Property, including the Consumer A Offer.

On August 10, 2016, at approximately 9:35 a.m., Liu informed Registrant A that offers on the Property would have been presented at noon on that day because the Seller's Signing Officer was only available during lunch time (i.e. at or about noon or shortly thereafter).

On August 10, 2016, at approximately noon, the Seller's Signing Officer attended Liu's office and Liu presented two offers to the Seller, including the Consumer A Offer. At that time, Liu asked Registrant A for the improved Business A Offer. Registrant A responded and indicated to Liu that she needed half an hour to send the improved Business A Offer. Liu indicated to Registrant A that there was no time. Liu still waited for the Business A Offer and kept telling the Seller's Signing Officer that the improved Business A Offer was coming. As time was of the essence, the Seller's Signing Officer could not wait any longer and accepted and signed the Consumer A Offer.

On August 10, 2016, after Registrant A learned that the Consumer A Offer was accepted, Registrant A sent the improved Business A Offer directly to the Seller.

The Seller's Signing Officer advised Registrant A that he had already accepted an offer and the matter was out of his control.

Under cross examination, Liu testified that he told Registrant A the time that the offers would have been presented. Liu then admitted that the Business A Offer did not expire because they had until 11:59 p.m. on August 10, 2016, before it expired. Liu reiterated that the Seller's Signing Officer could not wait for the improved Business A Offer because of time constraint.

Liu testified that he did not tell the Seller's Signing Officer that the Business A Offer was low. Even when the written response from the Seller's Signing Officer was presented to Liu, showing Liu's comment that the Business A Offer "...was probably being low, with conditions...", Liu vehemently denied ever communicating to the Seller's Signing Officer that the Business A Offer was low. Liu further testified that he did not disclose that the Business A Offer was low because he did not know if there was in fact an improved offer.

Liu did not communicate to Registrant A, that there was a Commission Reduction Agreement between Brokerage B and the Seller.

Liu admitted that, based on the Commission Reduction Agreement between Brokerage B and the Seller, the commission was reduced because of the acceptance of the Consumer A Offer.

When the question of whether it would not have been worth the wait if the Seller had the opportunity to make \$50,000.00 more on the sale of the Property was put to Liu, Liu's response was that the Seller's Signing Officer was waiting for the Improved Business A Offer and Registrant A should have submitted the improved Business A Offer on time. Liu further insisted that the Seller's Signing Officer could not wait any longer for the Improved Business A Offer because of time constraint.

SUBMISSIONS FOR THE REGISTRAR, REBBA 2002

Counsel for RECO submitted that the Property was on the market for over 40 days. After all that time, Liu found himself with only two (2) offers, therefore such a situation presented a perfect opportunity to entertain a third offer.

Nowhere in the detailed communication exchanges between Liu and Registrant A were there any discussion regarding deadline for the submission of offers.

Further, nowhere in the communication exchanges between Liu and Registrant A were there any communication regarding the Commission Reduction Agreement between Express and the Seller.

RECO further submitted that there was nothing preventing Liu from speaking with the Seller's Signing Officer and asking the Seller's Signing Officer to delay on accepting any of the two offers because an improved offer was anticipated.

RECO argued that Liu had the opportunity to communicate with the Seller and provide professional advice that there was the possibility of an improved offer coming from Business A. That did not happen. Overall, Liu could have waited to present all the offers, taking into consideration that Registrant A was unable to get in touch with the building management office to get the Property Status Report.

It is significant to note that the Seller's acceptance of the Consumer A Offer provided a better outcome for Liu's brokerage.

SUBMISSIONS FOR THE RESPONDENT

Liu argued that Registrant A had all the time and opportunity to submit the improved Business A Offer.

The Seller's Signing Officer had no confidence that the improved Business A Offer would have been submitted because Registrant A promised to submit the improved offer on August 9, 2016, the day before the offers were reviewed but Registrant A failed to do so.

The Seller's Signing Officer was not sure that the the improved Business A Offer was forthcoming and could not wait, so the Seller's Signing Officer proceeded to accept the Consumer A Offer.

Liu admitted that he should have waited and should have advised the Seller's Signing Officer to wait for the improved Business A Offer but the matter was out of his hands because the Seller's Signing Officer could not wait any longer.

Liu did not receive any blame for the Seller's Signing Officer accepting the Consumer A Offer which was \$50,000.00 less than the improved Business A Offer.

CODE OF ETHICS

The Registrant is governed by the *Real Estate and Business Brokers Act, 2002*, S.O. 2002, c.30, Schedule C ("*REBBA 2002*").

This Discipline Committee is established to hear and determine these issues, in accordance with the prescribed Regulations. The Discipline Committee must determine if the Registrant has failed to comply with the Code of Ethics established by the Minister in accordance with Section 21 of the *REBBA 2002*.

Section 50 of the *REBBA 2002* provides that the Minister may make Regulations establishing a Code of Ethics for the purposes of subsection 21(1).

Ontario Regulation 580/05 is the Code of Ethics pursuant to the *REBBA 2002* and is the Code of Ethics that governs these proceedings.

FINDINGS BY THE PANEL

Having carefully considered the testimonies of the witnesses at the Hearing, and the documentary evidence, the Panel has arrived at the following conclusions:

1. The Panel did not hear any evidence to support the allegation that Liu failed to treat Registrant A, Business A and Individual A, the Seller's Signing Officer fairly, honestly and with integrity by not presenting Business A's second or improved offer for his client's consideration, contrary to section 3 of the Code of Ethics.

At the time of presenting the offers to the Seller's Signing Officer, Liu did not receive the Improved Business A Offer and as a result was not in a position to present it to Seller's Signing Officer.

The Panel heard that Registrant A was given the opportunity to submit the Improved Business A Offer but failed to do so. Registrant A on the other hand, contends that she was not told when/what time the offers would have been reviewed. Further, the Panel heard that Registrant A was in dialogue with Liu at the time Seller's Signing Officer was reviewing the offers and at that time requested more time to submit the offer. Liu admitted that the offer time did not expire and also admitted that he could have asked the Seller's Signing Officer to wait. Liu also testified that the Seller's Signing Officer was the one in control of the situation and did not wish to wait to receive any other offer.

Apart from the viva voce evidence of Liu and Registrant A, the Panel reviewed the telephone text messages between Liu and Registrant A and the responses made by the Seller's Signing Officer to questions posed by Individual B, Compliance Officer for RECO, regarding the Business A Offer and the Improved Business A offer, vide E-mail from Individual A to Individual B, dated April 26, 2017, Questions 2 and 3, Pages 85, RECO's Book of Documents, Exhibit 3.

The Panel determines the following, that:

- i. Liu had presented the Business A Offer to the Seller's Signing Officer who reviewed it and did not accept it.
- ii. On August 10, 2016, at approximately 9:35 a.m., Registrant A promised to submit the Improved Business A Offer at noon.
- iii. On August 10, 2016, while the Seller's Signing Officer was at Brokerage B reviewing the offers, after not receiving the Improved Business A Offer, Liu contacted Registrant A at approximately 1:09 p.m., requesting the Improved Business A Offer. Registrant A again promised to submit the Improved Business A Offer within half an hour which would have been at 1:39 p.m.
- iv. At approximately 1:18 p.m., with the Improved Business A Offer not forthcoming, the Seller's Signing Officer, accepted the Consumer A Offer which did not have any financing condition.

The Panel did not get the benefit of hearing viva voce evidence from the Seller's Signing Officer as to whether there was any impact on the transaction because the Improved Business A Offer was not received.

One of the key factors the Panel considered in this allegation is that Registrant A did not submit the Improved Business A Offer and therefore Liu was not in a position to present it.

The Panel, having put its mind to the totality of the circumstances and the evidence before it, has concluded that there is no evidence to suggest that Liu failed to treat Registrant A, Business A and Individual A fairly, honestly and with integrity by not presenting Business A's second offer (Improved Business A Offer) for his client's consideration.

With the foregoing, the Panel concludes that Liu is not in breach of section 3 of the Code of Ethics, in relation to this allegation.

2. The Panel did not hear any evidence to support the allegation that Liu failed to promote his client's best interests by presenting Business A's offer to his client, and by discouraging his client from considering it, contrary to Section 4 of the Code of Ethics.

The evidence suggests that on August 9, 2016, at 5:07 p.m., Liu presented the Business A Offer to the Seller's Signing Officer via e-mail. This has been confirmed in the responses made by the Seller's Signing Officer to questions posed by Individual B, Compliance Officer for RECO, regarding the Business A Offer and the Improved Business A offer, vide E-mail from Individual A to Individual B, dated April 26, 2017, Questions 2, Pages 85, RECO's Book of Documents, Exhibit 3, as follows: Question from Individual B: "During the offer presentation period, the listing brokerage received an offer on August 8, 2016 from a Registrant A on behalf of her buyers Business A. Was this offer presented to you?" Response from Seller's Signing Officer: "Yes, the offer was presented to me via Email on August 9, 2016, at 5:07 p.m. BTW, Consumer A in Trust offer was presented to me via Email on August 9, 2016, at 5:41 p.m." The Panel notes that the Seller's Signing Officer did not accept the Business A Offer.

The Panel carefully considered whether Liu discouraged his client from considering the Business A Offer which was not accepted.

The only thing that the Panel could put its mind to regarding this allegation, is the comment which was allegedly made by Liu regarding the anticipated Improved Business A Offer "...the revised offer PROBBABLY would still be far below my expectation (the initial offer from Business A was \$420,000) with financing conditions for closing....". This comment was submitted by the Seller's Signing Officer in his response to Individual B (E-mail dated April 26, 2017, Question 3, Pages 85, RECO's Book of Documents, Exhibit 3.

The Panel holds that this hearsay comment included by the Seller's Signing Officer did not relate to the original Business A Offer but to the anticipated Improved Business A Offer.

In its final analysis, the Panel finds that it did not get the benefit of a *viva voce* evidence from the Seller's Signing Officer on this allegation, to hear whether Liu had discouraged his client from considering the Business A Offer. The Panel therefore finds that there is no evidence to support this allegation.

With the foregoing, the Panel concludes that RECO has failed to prove on the balance of probabilities that Liu has breached section 4 of the Code of Ethics, in relation to this allegation.

3. In contemplating the allegation that Liu failed to provide conscientious service to the Seller by not amending the Listing Agreement and MLS® Listing (Broker's Remarks) to reflect that a Commission Reduction Agreement was in place, the Panel is mindful of the timing of the Commission Reduction Agreement and whether the non-disclosure of the Commission Reduction Agreement caused any risk to the Seller and affected the quality of service provided by Liu.

The Panel is conscious of the fact that agreements relating to commission in real estate transactions is critical to all the parties involved. For the Seller, it hinges on the final amount that the Seller receives from the transaction. For the Buyer, it hinges on his or her ability to determine how much to offer and also how to negotiate. Commission many times becomes either a "deal-maker" or a "deal-breaker".

The evidence relating to this allegation informs the Panel that:

- i. The Listing Agreement and MLS® Listing (Broker's Remarks) does not reflect that a Commission Reduction Agreement was in place at the outset; and

- ii. The decision to reduce the commission was made only on August 10, 2016, while the Seller's Signing Officer was at Brokerage B reviewing the offers and was in the process of accepting an offer based on time constraints.

The Panel is mindful that while at the time of preparing the Listing Agreement and posting the MLS® Listing, a Commission Reduction Agreement was not contemplated and the Commission Reduction Agreement and apparently came about in a "rushed" manner. The Panel also notes that the Seller's Signing Officer did not express any concern regarding Liu not amending the Listing Agreement and MLS® Listing (Broker's Remarks) to reflect that a Commission Reduction Agreement was in place and the non-disclosure of the Commission Reduction Agreement to Registrant A and any other prospective buyer, in his responses to Individual B (E-mail dated April 26, 2017, Pages 84 - 85, RECO's Book of Documents, Exhibit 3).

In its final analysis, the Panel notes that it was not informed by any *viva voce* evidence from the Seller's Signing Officer on this allegation, as to whether the non-disclosure of the Commission Reduction Agreement had caused any risk to the transaction and thus affected the service provided by Liu.

The Panel accepts the fact that the decision to reduce the commission was made on the spur of the moment, as the Seller's Signing Officer made the decision to accept the Consumer A Offer and with no other evidence to inform the Panel.

The Panel concludes that there is no evidence to support the allegation that the failure by Liu to amend the Listing Agreement and MLS® Listing (Broker's Remarks) to reflect that a Commission Reduction Agreement was in place caused Liu not to have provided conscientious service to the Seller. As such, the Panel concludes that there is no breach of Sections 3, 5 and 37(1) of the Code of Ethics.

4. In contemplating the allegation that Liu failed to inform Registrant A of the Commission Reduction Agreement between Brokerage B and the Seller in respect of the obligation to use best efforts to prevent error and misrepresentation in the course of a trade in real estate, the Panel wishes to reiterate that agreements relating to commission in real estate transactions are critical to all the parties involved. Knowledge of a commission agreement puts the buyer in a better position to determine how much to offer and also how to negotiate. Again, commission many times, becomes either a “deal-maker” or a “deal-breaker” in real estate transactions.

Again, the Panel accepts the fact that the decision to reduce the commission and to arrive at a Commission Reduction Agreement was made on the spur of the moment, at the time the Seller’s Signing Officer made the decision to accept the Consumer A Offer.

Subsection 25(1) of the Code of Ethics specifically provides that, if a brokerage has a seller as a client and an agreement between the brokerage and the seller contains terms that relate to a commission that may affect the transaction, the brokerage shall disclose the existence of and the details of the agreement to any person who makes a written offer to buy, at the earliest opportunity and before any offer is accepted.

The evidence shows that even though the Commission Reduction Agreement was “rushed” it was done before the signing of the Consumer A Offer, Liu still had ample opportunity and the means to inform Registrant A before the Consumer A Offer was accepted. Furthermore, Liu had a statutory obligation to inform Registrant A, even without having received the Improved Business A Offer.

The Panel finds that Registrant A’s client was not made aware of the Commission Reduction Agreement before acceptance of the Consumer A Offer.

While the Panel cannot get into the mind of Liu to determine his intentions, the Panel finds that, *prima facie*, Liu did not use his best efforts to communicate the existence of the Commission Reduction Agreement, to prevent misrepresentation and unethical practice in respect of a trade in real estate.

The failure by Liu to communicate the existence of the Commission Reduction Agreement by Liu adds up to the omission of very important information regarding a trade in real estate. Such an omission has caused Liu to contravene the Regulation.

The Panel finds that cumulatively, Liu contravened Section 2(1) in respect of Section 25(1) of the Code of Ethics, and Section 38 of the Code of Ethics in respect of his obligations as a real estate professional.

5. The Panel has to consider whether Liu discouraged his client from considering a second, higher offer after having received Consumer A's offer, thereby engaging in unprofessional conduct, contrary to Section 39 of the Code of Ethics.

The evidence shows that Registrant A promised to submit the Improved Business A Offer but failed to do so, therefore Liu was not in a position to present it. For emphasis, Registrant A did not submit the Improved Business A Offer within the time when the offers were being reviewed by the Seller's Signing Officer, therefore, the Improved Business A Offer was never presented to the Seller's Signing Officer and the Seller's Signing Officer went on to accept the Consumer A Offer.

The only thing that the Panel could put its mind to regarding this allegation, is the comment which was allegedly made by Liu regarding the anticipated Improved Business A Offer, "...the revised offer PROBBABLY would still be far below my expectation (the initial offer from Business A was \$420,000) with financing conditions for closing....". This comment was part of written responses provided

by the Seller's Signing Officer to questions posed by Individual B, Compliance Officer for the Real Estate Council of Ontario during the course of gathering evidence based on the complaint vide E-mail from Individual A to Individual B, dated April 26, 2017, Question 3, Page 85, RECO's Book of Documents -Exhibit 3. To be fair, the Panel weighed the response of the Seller's Signing Officer along with the question that was posed by Individual B, Compliance Officer for RECO. Question by Individual B: "On the day you executed the offer from Consumer A In Trust on August 10, 2016, we note that Registrant A informed your listing brokerage that their buyers (Business A) would potentially submit a revised offer. What was your understanding of the competing offer situation when you decided to execute the offer from Consumer A In Trust at 1:18 p.m. on August 10, 2016?" Response by the Seller's Signing Officer: "I was told that Business A would submit a revised offer in the afternoon. When I was at Brokerage B office at around 12:45 p.m. (forgot the exact time), they did not receive the revised offer yet. There were text messages exchanged between Sam Liu and Business A representing agent, but I forgot the details. Sam Liu commented the revised offer PROBBABLY would still be far below my expectation (the initial offer from Business A was \$420,000) with financing conditions for closing. The one from Consumer A presented to me at that time did not have any financing condition for closing."

In his defence, Liu testified that he never told his client that the Improved Business A Offer was low because he did not know if there was in fact an improved offer. The Panel interpreted Liu's testimony to mean that he did not discourage his client from considering a second, higher offer, after having received the Consumer A Offer.

In weighing the evidence, the Panel is of the opinion on the one hand, that the Seller's Signing Officer's response was directly in relation to the question of *his understanding of the competing offer situation* and not whether Liu had discouraged him from considering any other offer. The Panel is also of the

opinion that the Seller's Signing Officer's *understanding of the competing offer situation* was that based on the offers he had reviewed, the Consumer A Offer was the best offer because it did not have any financing condition for closing. Nonetheless, the Panel finds the alleged hearsay comment made by Liu quite troubling. While the Panel is mindful that this is hearsay, the Panel recognizes that the Seller's Signing Officer had nothing to lose or gain or was not coerced into restating Liu's comment. The Panel considers that with Liu being in the position of a real estate professional, who was engaged by his client to provide professional advice, making such a statement could have been construed as professional advice, intended to discourage the consideration of the proposed Business A Offer. In a broader context, statements such as these that are made by real estate professionals could be taken by parties to the transactions as *professional advice*.

The Panel further contemplates that on the other hand, from the mere fact that the Seller's Signing Officer mentioned Liu's comment in his response, it may have had an impact on the Seller's Signing Officer decision.

The Panel however notes that neither RECO nor Liu chose to call the Seller's Signing Officer as a witness, which could have put some of these allegations to rest. As a result, the only evidence that the Panel has to consider is the *viva voce* evidence of Liu and what it can deduce from the documentary evidence.

In the final analysis, the Panel concludes that, having regards to the circumstances and on the balance of probability, there is no evidence to prove that Liu discouraged his client from considering a second, higher offer. Therefore, the Panel cannot find that Liu engaged in conduct that would reasonably be regarded as unprofessional or unbecoming of a registrant, in the course of trading in real estate, contrary to Section 39 of the Code of Ethics.

6. In considering the allegation that Liu failed to comply with the Code of Ethics when he failed, as broker of record, to disclose the terms of the Commission Reduction Agreement between Brokerage B and the Seller during the offer process to Registrant A, thereby denying Registrant A's client opportunity to amend its offer for the Property to make it more competitive, the Panel is mindful that at all material times during the transaction, Liu was the Broker of Record at Brokerage B which holds him to a very high standard. In the Real Estate Industry, the Broker of Record manages the brokerage, supervises, provides advice, reviews transaction details and serves as a resource to other real estate professionals at the brokerage.

As the Broker of Record at Brokerage B, Liu is held to a very high standard in the real estate profession. The non-disclosure of a Commission Reduction Agreement in a trade in real estate, is very serious. The broker of record is expected to set an example and should provide full disclosure and information to all concerned in a trade in real estate.

The evidence heard by the Panel indicates that Liu/Brokerage B had a Commission Reduction Agreement with the Seller which was never disclosed to Registrant A. In transactions where another brokerage is involved, the cooperating agent ought to be informed about the existence of any Commission Reduction Agreement, without reservation.

The Panel considered Liu's *viva voce* evidence. Liu testified that the Commission Reduction Agreement came into being at the time of the acceptance of the Consumer A Offer and further, he did not communicate to Registrant A that there was a Commission Reduction Agreement between Brokerage B and the Seller.

The Panel also considered the response provided by the Seller's Signing Officer, Individual A, in response to the query made by Individual B, Compliance Officer for RECO, regarding the Commission Reduction Agreement, vide E-mail from Individual A to Individual B, dated April 26, 2017, Paragraph 4, Page 85, RECO's

Book of Documents, Exhibit 3. The Seller's Signing Officer confirmed that a Commission Reduction Agreement was in place but he could not recall the details. He remembered that it came into being when he was at Brokerage B's office on August 10, 2016, before he decided to execute the Consumer A Offer.

The Panel also considered and accepted the evidence that the Commission Reduction Agreement was made at the spur of the moment. Never-the-less the Panel is mindful of the provisions of the Code of Ethics and the obligation(s) it puts on Brokers of Record to protect the integrity of the real estate profession.

Pursuant to Section 25(1) of the Code of ethics to the Real Estate and Business Brokers Act, 2002, Liu was obligated to advise Registrant A of the existence of the Commission Reduction Agreement between Brokerage B and the Seller and the terms therein, before the Seller's Signing Officer executed the Consumer A Offer.

The Panel believes that once the Commission Reduction Agreement came into existence, Liu should have immediately advised Registrant A, even if Registrant A did not send the Improved Business A Offer. In so doing, Liu/Brokerage B would have met the statutory obligation.

The Panel concludes that Liu failed, as Broker of Record, to disclose the terms of the Commission Reduction Agreement between Brokerage B and the Seller to Registrant A and by extension, the brokerage, Brokerage B failed in its obligation to disclose the existence of a Commission Reduction Agreement. As a result of the non-disclosure, Liu failed to ensure that his brokerage complied with Section 25(1) of the Act, and thereby breached Section 41(2) of the Code of Ethics.

PENALTY

Counsel for the Registrar, *REBBA 2002* to deliver written submissions to the Panel and to the Respondent on the issue of penalty and costs within 15 days of the date on which the Panel's decision and reasons are delivered.

The Respondent shall deliver to the Panel and to Counsel for the Registrar, *REBBA 2002* its written submissions on penalty and costs in response to Counsel for the Registrar, *REBBA 2002*'s submissions within 15 days of the date on which Counsel for the Registrar, *REBBA 2002*'s submissions on penalty and costs are delivered to the Respondent.

Counsel for the Registrar, *REBBA 2002* shall deliver to the Panel and to the Respondent its reply to the written submission on penalty and costs of the Respondent within five (5) days of the date on which the Respondent's submissions on penalty and costs are delivered to Counsel for the Registrar, *REBBA 2002*.

If appropriate, submissions to be made on costs and expenses with submissions on penalty.

Any inquiries relating to the delivery of the above-mentioned documents should be directed to the Manager, Discipline and Appeals Hearings.

[Released: March 16, 2023]