

**IN THE MATTER OF THE *REAL ESTATE SERVICES ACT*
S.B.C. 2004, c. 42 as amended
AND IN THE MATTER OF
JACOB GIESBRECHT SIEMENS**

REASONS FOR DECISION REGARDING SANCTION

DATE AND PLACE OF HEARING:	April 22, 2020 (deliberations) The Committee conducted the sanction hearing via written submissions, with the agreement of the parties.
DISCIPLINE COMMITTEE:	Len W. Hrycan, Chair David Peerless Robert Gialloreto
INDEPENDENT LEGAL COUNSEL:	Lisa C. Fong, Q.C.
SOLICITOR FOR THE REAL ESTATE COUNCIL:	David T. McKnight
LICENSEE / RESPONDENT:	Jacob Giesbrecht Siemens, appearing on his own behalf
Court Reporter:	Not applicable; hearing via written submissions

1.0. INTRODUCTION

1. For the reasons set out in the decision regarding liability of October 2, 2019 (the “Liability Decision”), this discipline hearing committee (the “Committee”) found that Jacob Giesbrecht Siemens (“Mr. Siemens”, or the “Respondent”) committed professional misconduct within the meaning of s. 35 (1)(a) of the *Real Estate Services Act*, S.B.C. 2004, c. 42 (“RESA” or the “Act”).

2. In summary, the Committee concluded Jacob Giesbrecht Siemens committed professional misconduct, by engaging in conduct that contravened the Rules, pursuant to section 35(1)(a) of the RESA. Specifically, he contravened Rule 3-3(1)(b) of the Real Estate Rules (the “Rules”) in his capacity as a managing broker.

3. The details of the Committee’s findings are set out in the Liability Decision, but may be briefly summarized. In his capacity as a managing broker, Mr. Siemens committed professional

misconduct by contravening Rule 3-3(1)(b) [ensure business of the brokerage is carried out competently] in relation to the 2014 listing of a property (the “Property”). He did so through the following acts and omissions. Mr. Siemens suggested to the listing agent for the Property, Mr. EXXXXXX, that he provide a loan to his client to be secured by a mortgage against the Property, which would have placed Mr. EXXXXXX in a conflict of interest (Notice Item #1(a)). Mr. Siemens failed to properly advise Mr. EXXXXXX that the loan could place him in a potential conflict of interest and to take reasonable and appropriate steps to avoid the conflict of interest, or to disclose it, so that Mr. EXXXXXX could comply with Rules 3-3(a) [act in best interest of client], 3-3(i) [take reasonable steps to avoid a conflict of interest], 3-3(j) [fully disclose the conflict to the client] and by extension Rule 3-4 [act with reasonable care and skill] (Notice Item #1(b)). Mr. Siemens failed to advise Mr. EXXXXXX to advise the Client to seek independent legal advice on the loan and related matters, so that he could comply with Rule 3-3(d) [advise client to seek independent professional advice on matters outside expertise] (Notice Item #1(c)). Mr. Siemens also failed to ensure Mr. EXXXXXX documented the terms of the loan before the client proceeded with the loan, so he would comply with Rule 3-4 (Notice Item #1(c)).

2.0. PENALTY SUBMISSIONS AND REPRESENTATION

4. The Real Estate Council of British Columbia (“RECBC” or the “Council”) was represented by Mr. McKnight (“Mr. McKnight”).

5. Mr. Siemens represented himself during the sanction hearing.

2.1. Sanction and Reply Submissions of RECBC

6. Mr. McKnight provided the Committee with one set of written penalty submissions and one set of written reply submissions.

7. Mr. McKnight submitted the misconduct of Mr. Siemens was serious, as it resulted in an actual conflict between the Client’s interests and those of Mr. EXXXXXX, and warranted a significant penalty.

8. Mr. McKnight submitted that the Committee should:

- Suspend the licence of Mr. Siemens for 14 days pursuant to s. 43(2)(b) of the RESA;

- Impose a discipline penalty in the amount of \$7,500 pursuant to s. 43(2)(i) of the RESA;
- Require Mr. Siemens, at his own expense, to register for and successfully complete the Broker's Remedial Education Course as provided by the Real Estate Division, Sauder School of Business at the University of British Columbia pursuant to s. 43(2)(f) of RESA; and,
- Order that Mr. Siemens pay enforcement expenses in the amount of \$27,637.90 pursuant to s. 43(2)(h) and s. 44 of RESA.

9. Mr. McKnight further submitted that the Committee should assess the penalty facing Mr. Siemens on the bases of seriousness of the misconduct, character and discipline history, acknowledgement of the misconduct and remedial action, public confidence in the real estate industry, and other aggravating factors.

10. In reply to the penalty submissions of Mr. Siemens, Mr. McKnight submitted that the loan resulted in actual harm to the Client because of the two lawsuits Mr. EXXXXXX filed against the Client and the related certificate of pending litigation, and this harm is an aggravating factor. Mr. McKnight further submitted that Mr. Siemens' acknowledgement of misconduct in his penalty submissions can be called into question, given Mr. Siemens is only making this acknowledgement after the Committee has found that he committed professional misconduct and is facing serious consequences. Finally, Mr. McKnight submitted that listed enforcement costs were necessary and that the cost of prosecuting Mr. Siemens at the liability hearing should not be borne by innocent members of the profession.

11. Mr. McKnight also objected to Mr. Siemens' introduction of additional evidence in his penalty submissions (Mr. Siemens' Exhibit "B" (1-3) and Exhibit "D" (2-4)) on the basis that this evidence was not introduced by Mr. Siemens at the Liability Hearing, despite the fact that he had the opportunity to do so, and that the evidence is not relevant to the issue of penalty. Mr. McKnight submitted that these Exhibits and Mr. Siemens' submissions related to them should not be admitted into the record as part of the penalty submissions.

12. Finally, Mr. McKnight submitted that the RESA provides no authority for Mr. Siemens' submission that his consent order proposal ("COP"), in which he proposed only a reprimand, should have been presented to the Consent Order Review Committee ("CORC"), and the

Committee should “set aside the hearing and a consent order can be revisited as previously suggested.” Mr. McKnight submits that section 41 of RESA makes it clear that a consent order proposal must be presented prior to a discipline hearing, and Council may decline to refer the proposal to a discipline committee. In this case, the Council declined to present the proposal to the discipline committee, due to Council’s view that, based on the evidence and applicable precedents, a more significant penalty was appropriate in the circumstances.

2.2. Sanction Submissions of Mr. Siemens

13. Mr. Siemens, representing himself, provided the Committee with one set of written penalty submissions. He submitted the Committee should take into consideration a multitude of factors, including:

- Mr. Siemens has been licensed as a real estate agent for over 33 years, and licensed as a managing broker since 2007; prior to this complaint he had no complaints filed against him;
- Mr. Siemens takes responsibility for the fact that he did not advise Mr. EXXXXXX that if he chose to make the loan, there might be the potential for a conflict of interest; and
- No member of the public was harmed by Mr. Siemens actions; instead, the client benefitted by making a profit of approximately \$60,000 on the sale of her home due to the actions of Mr. EXXXXXX.

14. Mr. Siemens further submitted with respect to penalty as follows:

- a. A 14-day suspension is not supported in his case as there is no proof that the public is at risk by him being licenced. Further, if Mr. Siemens was suspended, this would make it difficult for his Brokerage to maintain its branch offices, put the career of over 60 realtors at risk, and likely put his job at risk.
- b. Mr. Siemens appears to suggest an appropriate penalty could be his completing a CPE course, “What Brokerages and Realtors Need to Know about Agency”; enforcement costs of between \$1,500 and \$3,683; and a maximum fine of \$2,000 (based on *Kehler v Valley Realty*, 2009 CanLII 46825 (BC REC) and *Roberts (Re)*, 2013 CanLII 14176 (BC REC)).

c. Mr. McKnight's submission regarding enforcement fees is not reasonable.

15. Finally, Mr. Siemens submitted that his COP, in which he proposed the sanction of a reprimand, should have been presented to the CORC, and the Committee should "set aside the hearing and a consent order can be revisited as previously suggested."

16. The Committee ordered that the written submissions of the parties be marked as exhibits in these proceedings.

3.0. ANALYSIS

3.1. Analysis Regarding the COP

17. The Committee agrees that Council is not bound to proceed with a COP to a CORC if the COP proposes a penalty that Council does not agree is appropriate. In this case, the Council had no obligation to refer Mr. Siemens' suggested COP to a CORC.

3.2. Analysis Regarding New Evidence in Written Penalty Submissions

18. In its written reply submissions, the Council asked that the Committee reject new evidence from the Respondent, on the basis the new evidence is not relevant, and Mr. Siemens' could have provided it during the Liability hearing.

19. When a Committee proceeding is divided into a Liability hearing and a Sanction hearing, the two hearings are still notionally part of a one discipline hearing. As a matter of procedural fairness, the respondent Mr. Siemens has a right to respond to the case against him. In the context of a divided hearing, this right includes a right to tender evidence relevant to sanctions during the Sanction hearing, unless a need to tender all evidence during the Liability hearing is made clear in advance.

20. Every Committee panel controls the process for its Sanction hearings, and if it approves a proposal of the parties to proceed directly to written submissions, it will ordinarily ensure that all parties first understand they are electing to forego tendering new evidence relating to sanctions. In this case, where the parties have proceeded by their own agreement to written penalty submissions, it is unclear whether Mr. Siemens knew they that by doing so, he would relinquish his right to tender new evidence related to sanctions. In this circumstance, given the uncertainty, the Committee elects to accept Mr. Siemens' additional evidence. This course of

action errs on the side of ensuring the Respondent has had an opportunity to respond with respect to sanctions. The Committee decided against directing that the evidential portion of the sanction hearing be reopened, as the Council did not request an opportunity to cross-examine the Respondent on this evidence, or tender reply evidence, in the event the Committee accepts the new evidence.

21. While the Committee elects, in this particular case, to accept Mr. Siemens' additional evidence into evidence, the Committee concludes that Mr. Siemens' additional evidence has little relevance or significance to its sanction decision.

3.3. Analysis Regarding Sanction

22. The criminal sentencing principles accepted by the Commercial Appeals Commission ("CAC") as guiding the imposition of penalty in RECBC disciplinary proceedings were outlined by the CAC in *Wong v. Real Estate Council of BC*, [2003] B.C.C.O. No. 3 (Commercial Appeals Commission) [July 25, 2003] as follows:

[19] We accept for present purposes the appellant's reliance on principles governing sentencing under the *Criminal Code*. As set out in *R. v. Hinch and Salanski* (1967), 62 W.W.R. 205 (B.C.C.A.), there are four considerations: (1) the safety of the public; (2) the deterrent effect of a sentence; (3) punishment of the offender; and (4) reformation and rehabilitation of the offender (p. 209). However, it is also beyond dispute that the primary purpose of legislation governing professional bodies is protection of the public: James T. Casey, *The Regulation of Professionals in Canada* (Carswell: 2001), at p. 14-4. Thus, in determining the appropriate penalty in professional discipline cases, "the emphasis must clearly be upon the protection of the public interest": *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 (B.C.C.A.), p. 376.

23. The many factors to be considered in assessing penalty or sanctions in a professional regulation context were helpfully consolidated in *Law Society of British Columbia v. Dent*, 2016 LSBC 5, [2016] L.S.D.D. No. 25 (Disc. Hearing Panel) ("Dent"), as follows:

Nature, gravity and consequences of conduct

[20] This would cover the nature of the professional misconduct. Was it severe? Here are some of the aspects of severity: For how long and how many times did the misconduct occur? How did the conduct affect the victim? Did the lawyer obtain any financial gain from the misconduct? What were the consequences for the lawyer? Were there civil or criminal proceedings resulting from the conduct?

Character and professional conduct record of the respondent

[21] What is the age and experience of the respondent? What is the reputation of the respondent in the community in general and among his fellow lawyers? What is contained in the professional conduct record?

Acknowledgement of the misconduct and remedial action

[22] Does the respondent admit his or her misconduct? What steps, if any, has the respondent taken to prevent a reoccurrence? Did the respondent take any remedial action to correct the specific misconduct? Generally, can the respondent be rehabilitated? Are there other mitigating circumstances, such as mental health or addiction, and are they being dealt with by the respondent?

Public confidence in the legal profession including public confidence in the disciplinary process

[23] Is there sufficient specific or general deterrent value in the proposed disciplinary action? Generally, will the public have confidence that the proposed disciplinary action is sufficient to maintain the integrity of the legal profession? Specifically, will the public have confidence in the proposed disciplinary action compared to similar cases?

A discipline committee accepted and applied *Dent* sentencing factors in *Goodwin*, 2018 CanLII 11327 (RECBC) [Jan. 15, 2018] at para. 5.

24. In February 2018, the RECBC published *Sanction Guidelines*. The *Sanction Guidelines* provide principled guidance to discipline committees, licensees, and others for applying disciplinary sanctions under the RESA, to enhance transparency, consistency of approach, and fairness. The *Sanction Guidelines* incorporate the sentencing factors addressed in *Dent* and in other leading discipline cases.

25. The *Sanction Guidelines* speak to the use of sanctions as serving several purposes, all within the overarching goal of protecting the public. These specific purposes include,

- a. denouncing misconduct, and the harms caused by misconduct;
- b. preventing future misconduct by rehabilitating specific respondents through corrective measures;
- c. preventing and discouraging future misconduct by specific respondents through punitive measures (i.e. specific deterrence);
- d. preventing and discouraging future misconduct by other licensees (i.e. general deterrence);

- e. educating respondents, licensees and the public about rules and standards; and
- f. maintaining public confidence in the real estate industry.

26. Further, the *Sanction Guidelines* note other relevant sanction principles that discipline committees should consider, including:

- a. proportionality (between the nature and severity of sanctions and the seriousness of the misconduct, resulting harms, and the responsibility or blameworthiness of the licensee);
- b. progressive discipline (such as where a licensee's prior disciplinary record shows a pattern of misconduct);
- c. the effectiveness of suspensions and fines in specific contexts;
- d. any need to prevent profit from wrongdoing (so that sanctions achieve a deterrent effect); and
- e. a need to consider a variety of mitigating and aggravating factors, including the following:
 - i. the respondent's age and experience;
 - ii. the respondent's discipline history;
 - iii. the nature and gravity of the misconduct, including whether the conduct involved fraud, dishonesty, or deception;
 - iv. the extent to which the respondent attempted to obtain a financial benefit through the misconduct;
 - v. harm to clients or others;
 - vi. voluntary measures, prior to or during investigation, to accept responsibility for misconduct, to compensate for or mitigate harm to others, or to avoid a recurrence;
 - vii. whether the respondent has attempted to frustrate, delay and undermine Council investigations; and

- viii. parity with sanctions previously imposed by discipline committees for similar misconduct.

27. The Committee has considered all these principles and factors, in deciding what sanctions are most appropriate for the Respondent in the circumstances. The Committee will address these principles and factors, using the *Dent* categories for convenience.

Nature, gravity and consequences of the conduct

28. The Council has submitted that Mr. Siemens' misconduct, when viewed as a whole, is properly characterized as serious in nature because it resulted in an actual conflict between the Client's interests and those of Mr. EXXXXXX, and resulted in Mr. EXXXXXX commencing two lawsuits. Further, Mr. Siemens' obligations in this case were heightened by the relative inexperience of Mr. EXXXXXX, who had only been licensed for approximately 12 months when the events at issue occurred.

29. With respect to consequences of the conduct, Mr. Siemens submitted that no member of the public was harmed, and the Client received a fairly large financial benefit of \$60,000 from the sale of her home. In reply, the Council submitted that the loan resulted in actual harm to the client because Mr. EXXXXXX filed two lawsuits against the client and registered a certificate of pending litigation against her property.

30. The Committee has concluded that Mr. Siemens' misconduct was in fact serious, and direct harm to the public resulted. The loan created a situation where an actual or potential conflict of interest arose, and in fact resulted in litigation against the client.

Character and professional conduct record of the respondent

31. Mr. Siemens is an experienced licensee who has been a licensed managing broker since 2007, and he has no previous discipline history.

32. The Council submitted the absence of a disciplinary history is not sufficient to mitigate against a significant penalty given the nature of the wrongdoing, and as an experienced managing broker Mr. Siemens ought to have known the loan gave rise to a potential conflict of interest.

33. Mr. Siemens submitted he has a clean disciplinary record after practicing real estate for 33 years. He further submits he has served his profession through many volunteer positions in order to help further the professionalism of the real estate industry.

34. The Committee found that these factors are somewhat relevant to the appropriate level of sanction in this case, and has considered Mr. Siemens' clean disciplinary record in fashioning an appropriate sanction.

Acknowledgement of the conduct and remedial action

35. The Council submitted Mr. Siemens has vehemently denied any misconduct throughout the proceedings. Council further submitted Mr. Siemens' evidence at the hearing demonstrated that Mr. Siemens did not understand what constitutes a conflict of interest or the nature or gravity of his misconduct, and he showed a cavalier attitude throughout the course of the matter. The Council submitted these factors, in addition to the seriousness of the misconduct, weigh heavily in favour of both a penalty and a suspension. The Council further submitted that Mr. Siemens' conduct at the hearing, whereby he refused to accept responsibility for his actions and focused on deflecting responsibility onto others, ought to be considered as an aggravating factor and garner a more significant penalty.

36. Mr. Siemens submitted he takes full responsibility for the fact that he did not advise Mr. EXXXXXX the loan could lead to the potential for a conflict of interest. Mr. Siemens further submitted that while his conduct at the hearing may have been misunderstood as denial or arrogance, in reality he was frustrated because his wife was at a cancer clinic receiving treatment that day and he was not able to be with her, due to the hearing. He acknowledges he should have considered requesting a new hearing date.

37. In reply, the Council submitted Mr. Siemens' acceptance of responsibility in his written penalty submissions is the first instance of his acknowledging misconduct. The Council questions the timing and veracity of Mr. Siemens' statement, now that the Committee has found that he committed professional misconduct and faces serious consequences.

38. The Committee considered these arguments, and concludes that while Mr. Siemens did take some responsibility in his written submissions, his admission has come late in the disciplinary process, and the Committee gives it little weight as a mitigating factor.

Public confidence in the profession including public confidence in the disciplinary process

39. The Committee considered many factors to decide the appropriate weight that public confidence in the profession, and in the disciplinary process, has on this case.

40. The Committee took into account the Report of the Independent Advisory Committee, On Conduct and Practices in the Real Estate Industry in British Columbia (June 2016), which stated: “Alleged misconduct, combined with the perception that the Real Estate Council is unable or unwilling to take strong action to address it, has resulted in the loss of public trust”. The report found that the failure of licensees to identify and address conflicts was a public concern, causing some to put “their own interests ahead of those of their clients”.

41. The Committee also considered *Faminoff v Law Society of British Columbia*, 2017 BCCA 373, an appeal from a decision of the Law society of British Columbia which applies a similar list of factors as the RECBC Sanction Guidelines. The court emphasized the important role of public confidence in the disciplinary process:

“The weight given to factors will vary and in some cases not all will come into play. However, the factors of protection of the public, including maintaining public confidence in the disciplinary process and in the profession generally, and the rehabilitation of the member will play an important role in most cases (...)”

42. The Committee concluded that the issue of public confidence in the disciplinary process is of importance to the sanction decision for this case.

Sanction precedents

43. The Committee considered the various precedents provided by both parties.

44. Mr. McKnight referred the Committee to *Hachey (Re)*, 2015 CanLII 41250 (BC REC) and *Magnus (Re)*, 2015 CanLII 90646 (BC REC). Mr. McKnight submitted that *Hachey* and *Magnus* provide guidance to the Committee with respect to the appropriate penalty.

45. Both *Hachey* and *Magnus* were consent orders. As such, the Committee must be cautious in applying the outcomes of such cases, as their outcomes are the product of agreements between parties and not decisions of discipline committees after hearings on the merits. That said, consent order cases can provide a degree of guidance.

46. In the *Hachey* case, the licensee provided a \$11,100 loan to a buyer for the down payment on a property, while acting as dual agent for both the seller and buyer of the property. The licensee did not advise the buyer to seek independent professional advice respecting the loan; failed to document the terms of the loan; did not disclose to the seller that she was providing the loan to the buyer; and did not disclose to the seller that she was in a conflict of interest by acting for both seller and buyer and providing the loan. She then performed further services for the buyer outside of her brokerage that were not documented. The licensee agreed to a \$5,000 monetary sanction, a course requirement, and enforcement expenses of \$1,250.

47. In the *Magnus* case, the managing broker of a brokerage gave a short-term loan of \$37,500 (plus 12% annual interest) to one of the brokerage's clients, so that the client could pay a deposit for a property in order to purchase it subject-free. When the client did not repay the loan, the managing broker started a lawsuit to recover the loan funds and interest. The managing broker entered into a consent order whereby he admitted to committing professional misconduct. Specifically, he admitted that upon entering into the loan agreement with the client, through which he benefitted by charging interest, he failed to take reasonable steps to avoid or promptly and fully disclose the potential conflict of interest. The managing broker agreed to pay a \$2,500 monetary sanction and enforcement expenses of \$750 before becoming relicensed.

48. Both *Hachey* and *Magnus* concern conflicts of interest arising out of loaning funds to a client. Mr. McKnight acknowledges that Mr. Siemens did not provide a loan to the Client, rather he suggested Mr. EXXXXXX provide the loan and then failed to advise him properly, e.g., by not advising him the loan could place him in a conflict of interest. However, Mr. McKnight submits Mr. Siemens was the managing broker and most experienced licensee, and as such his obligations and responsibilities should be judged at a higher standard. Mr. McKnight further submits that while *Hachey* and *Magnus* had lower discipline penalties than the one Mr. McKnight is proposing, these cases involved licensees who acknowledged their misconduct and agreed to a resolution prior to a hearing.

49. Mr. Siemens referred the Committee to the following four consent orders: *Kehler v Valley Realty*, 2009 CanLII 46825 (BC REC), *Haladin (Re)*, 2012 CanLII 27061 (BC REC), *Loiselle (Re)*, 2012 CanLII 57394, and *Macdonald (Re)*, 2009 CanLII 14371 (BC REC). The Committee finds

that *Haladin* and *Loiselle* do not assist with determining the sanction in this matter as they did not involve a conflict of interest. The cases of *Kehler* and *Macdonald* involved conflicts of interest, yet the conflict of interest did not involve a loan, and the managing broker did not provide advice to a licensee that they place themselves in a conflict of interest. In both cases, the managing broker simply failed to take reasonable steps to avoid or deal with conflicts of interest created by other representatives at the managing broker's brokerage, which the managing broker was aware of or should have been aware of. In both cases, the managing broker was reprimanded, ordered to complete a course requirement, and ordered to pay enforcement expenses (which in both cases were below \$1,500). In *Macdonald*, the managing broker was also ordered to pay a \$2,000 monetary sanction.

50. Mr. Siemens also referred the Committee to the *Roberts (Re)*, 2013 CanLII 14176 (BC REC) penalty decision. This decision involved a licensee who was a managing broker. The managing broker was disciplined for failing to avoid a conflict of interest in relation to an equity share agreement that he entered into with former clients and his assistant. The managing broker said that he advised the two former clients to obtain independent legal advice, although they said they were not provided this opportunity. The managing broker was suspended for 14 days, but immediately eligible to be licensed as an associate broker during the period of suspension; ordered to pay a \$2,000 monetary sanction; ordered to complete a course requirement; and ordered to pay enforcement costs of \$3,683.80.

51. Mr. McKnight acknowledged in his reply submissions that the facts of *Roberts* are more in line with the present matter. However, in *Roberts* the discipline committee commented on mitigating circumstances that are not present in this case. The managing broker in *Roberts* had taken steps to satisfy his former clients and address their concerns since the original complaint was filed, such as paying back a deposit to the clients, and paying a strata corporation special assessment against the property at issue.

52. Finally, the Committee notes that Mr. EXXXXXX has been sanctioned, as reported in *EXXXXXX (Re)*, XXXX CanLII XXXXX (BC REC). Mr. EXXXXXX agreed to a reprimand, a \$5,000 monetary sanction, a course requirement, and enforcement expenses of \$1,500.

53. The Committee considered the arguments of both parties to decide on appropriate sanctions. The Committee concluded that the precedents support a monetary sanction, a course requirement, and an order to pay enforcement costs are within the range of appropriate sanctions. While the Committee might also impose a sanction, it declines order a suspension in this case, for the reasons set out below.

4.0 SANCTION

4.1 Fine

54. Although the RESA now provides for discipline penalties of up to \$250,000 for a licensee (or up to \$500,000 for a brokerage), the provisions of the RESA at the time of this case provided for a maximum monetary discipline penalty of \$10,000. Taking into consideration the seriousness of Mr. Siemens misconduct, yet also taking into consideration the fact that Mr. Siemens has a clean disciplinary record, the Committee orders that Mr. Siemens pay a monetary discipline penalty of \$5,000 (the “Fine”), due sixty (60) days from the date of this decision.

4.2 Remedial Courses

55. The Council submitted Mr. Siemens should be required to undertake further education and training. The Committee had little difficulty agreeing this was appropriate, and orders that Mr. Siemens must, at his own expense, register for and successfully complete the *Broker’s Remedial Education Course* as provided by the Sauder School of Business at the University of British Columbia (the “Course”), within three (3) months of the date of this decision.

4.3 License Suspension

56. In considering whether to order a suspension, the Committee noted that suspensions were not consistently applied in the precedents. The Committee concluded that the other sanction measures referenced above are sufficient to provide a general deterrent for other licensees who might consider such misconduct in the future, and to maintain public confidence in the real estate industry. The Committee also considered the risk which a suspension could adversely have on the functioning of the Brokerage for which Mr. Siemens is managing broker. Having concluded that an additional sanction in the form of a suspension is not warranted, the Committee declines to order that Mr. Siemens’ licence be suspended.

57. The Committee addresses enforcement expenses under sections 43(2)(h) and 44 of the RESA in the next section.

5.0 **ENFORCEMENT EXPENSES**

58. S. 44 of RESA provides that:

44 (1) A discipline committee may, by an order under section 43 (2) (h) [*recovery of enforcement expenses*], require the licensee to pay the expenses, or part of the expenses, incurred by the real estate council in relation to either or both of the investigation and the discipline hearing to which the order relates.

(2) Amounts ordered as referred to in subsection (1)

(a) must not exceed the applicable limit prescribed by regulation in relation to the type of expenses to which they relate, and

(b) may include the remuneration expenses incurred in relation to employees, officers or agents of the real estate council, or members of the discipline committee, engaged in the investigation or discipline hearing.

59. Mr. McKnight submitted the Council incurred expenses in the amount of \$27,637.90, as set out in Appendix A of his submission, and that such expenses should be assessed against Mr. Siemens.

60. Mr. Siemens suggested that the enforcement fees are excessive. He did not, however, dispute that the Council incurred the expenses set out in the Council's Schedule A.

61. The RESA uses the term "expenses" instead of the term "costs". This choice of wording by the legislature, as well as the specifics of section 4.2 of the *Real Estate Services Regulation*, BC Reg 506/2004 (the "Regulation"), sets the RESA apart from "costs" systems used by courts.

62. Enforcement expenses are a matter of discretion. A discipline committee will ordinarily order expenses against a licensee who has engaged in professional misconduct or conduct unbecoming a licensee. Orders for enforcement expenses serve to shift the expense of disciplinary proceedings from all licensees to wrongdoing licensees. They also serve to encourage consent agreements, deter frivolous defenses, and discourage steps that prolong investigations or hearings.

63. The practice of discipline committees under the RESA has been to allow the Council to establish enforcement expenses through a schedule summarizing such expenses, subject to the

Committee requesting that the Council provide further documentation, either at the request of the Respondent or as part of the Committee's own discretion. The practice of discipline committees has also been to assess reasonableness of enforcement expenses by examining the total amounts in the context of the duration, nature, and complexity of the hearing and its issues. While a discipline committee may reduce any award of enforcement expenses to account for special circumstances, such as where the Council fails to prove one or more allegations corresponding to a significant and distinct part of a liability hearing, no such special circumstances arise in this case.

64. The Council has sought the following enforcement expenses, all of which are referenced by s. 4.2 of the Regulation:

- a. Investigation expenses (based on an hourly rate permitted by s. 4.2(a) of the Regulation): \$1,500;
- b. Legal services (involving two legal counsel for a liability hearing and a sanction hearings): \$22,375;
- c. Administrative expenses (for 1 day of liability hearing and 1 day of sanction deliberations by a three-member committee): \$3,000; and
- d. Disbursements (e.g., court reporter transcripts and copying): \$2,262.90.

The legal services expenses are based on hourly rates for legal counsel that fall beneath the \$400 maximum hourly rate for external legal services under s. 4.2(c)(ii) of the Regulation.

65. The Council's schedule (Appendix A of its submissions) contains a minor clerical error; while specifying a total of \$27,637.90, the individual expense items total \$29,137.90. The Committee accepts the latter total as the enforcement expenses at issue. Mr. Siemens received notice of the specific enforcement expenses through Appendix A.

66. The Committee considered the submissions of the parties and concluded that the expenses submitted by the Council reflect reasonably necessary expenses relating to the Council's investigation, the liability hearing, and the sanction hearing. However, the Committee exercises its discretion to order expenses at less than full indemnity. The Committee orders that

Mr. Siemens pay enforcement expenses in the amount of \$26,000, to be paid within six (6) months of this decision.

67. The Committee recognizes that the enforcement expenses are a large sum compared to the monetary sanction. However, unlike monetary sanctions, which are based in part on the nature of the respondent's misconduct, enforcement expenses are based on the resources the Council reasonably expends to address misconduct, including the expense of an investigation and the greater expenses arising from a discipline hearing.

6.0 ORDER

68. The Committee orders as follows:

- a. Mr. Siemens' shall pay a discipline penalty in the amount of \$5,000 within sixty (60) days of this decision, pursuant to s. 43(2)(i) of the RESA;
- b. Mr. Siemens must, at his own expense and within six (6) months of this decision, register for and successfully complete the *Broker's Remedial Education Course* as provided by the Sauder School of Business at the University of British Columbia (the "Course"), pursuant to s. 43(2)(f) of the RESA;
- c. Mr. Siemens shall pay enforcement expenses in the amount of \$26,000 within six (6) months of this decision, pursuant to s. 43(2)(h) and s. 44 of the RESA; and
- d. If Mr. Siemens fails to comply with any of the terms of the Order, the Discipline Committee may suspend or cancel the Respondent's license, without further notice, pursuant to sections 43(3) and 43(4) of the RESA.

7.0 RIGHT OF APPEAL

69. The Respondent has a right to appeal to the Financial Services Tribunal under RESA section 54(1)(d). The Respondent will have 30 days from the date of the sanction decision:

Financial Institutions Act, R.S.B.C. 1996, ch. 141, section 242.1(7)(d) and *Administrative Tribunals Act*, S.B.C. 2004, section 24(1).

DATED June 1, 2020

FOR THE COMMITTEE

“Len W Hrycan”

Len W. Hrycan
Committee Chair

“David Peerless”

David Peerless
Committee Member

“Robert Gialloreto”

Robert Gialloreto
Committee Member

List of Exhibits

Exhibit 1 – RECBC Written Penalty Submissions and Written Reply Submissions

Exhibit 2 – Mr. Siemens’ Written Penalty Submissions