

BEFORE THE DEPARTMENT OF REAL ESTATE

STATE OF CALIFORNIA

FILED

OCT 02 2020

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In the Matter of the Accusation of:

HIGHWAY ONE RENTALS, INC.,
and ANDREW VINCENT LILLEY,

Respondents.

) DRE No. H-3290 FR

) OAH No. 2020020840

DEPARTMENT OF REAL ESTATE

By *K. Krupp*

DECISION

The Proposed Decision dated June 29, 2020, of the Administrative Law Judge of the Office of Administrative Hearings, is hereby adopted as the Decision of the Real Estate Commissioner in the above-entitled matter.

The Decision suspends or revokes one or more real estate licenses.

Pursuant to Government Code Section 11521, the Department of Real Estate may order reconsideration of this Decision on petition of any party. The party seeking reconsideration shall set forth new facts, circumstances, and evidence, or errors in law or analysis, that show(s) grounds and good cause for the Commissioner to reconsider the Decision. If new evidence is presented, the party shall specifically identify the new evidence and explain why it was not previously presented. The Department's power to order reconsideration of this Decision shall expire 30 days after mailing of this Decision, or on the effective date of this Decision, whichever occurs first.

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The right to reinstatement of a revoked real estate license or to the reduction of a penalty is controlled by Section 11522 of the Government Code. A copy of Sections 11521 and 11522 and a copy of the Commissioner's Criteria of Rehabilitation are attached hereto for the information of respondent.

This Decision shall become effective at 12 o'clock noon on OCT 23 2020.

IT IS SO ORDERED 8.4.20

DOUGLAS R. McCAULEY
REAL ESTATE COMMISSIONER

Douglas R. McCauley

**BEFORE THE
DEPARTMENT OF REAL ESTATE
STATE OF CALIFORNIA**

In the Matter of the Accusation against:

**HIGHWAY ONE RENTALS, INC. and ANDREW VINCENT
LILLEY, Respondents**

DRE Case No. H-3290 FR

OAH No. 2020020840

PROPOSED DECISION

Erin R. Koch-Goodman, Administrative Law Judge, Office of Administrative Hearings (OAH), State of California, heard this matter telephonically, on May 28, 2020, in Sacramento, CA.

Complainant Brenda Smith, Supervising Special Investigator, Department of Real Estate (DRE or Department), State of California, was represented by Jason Lazark, Counsel, DRE.

Respondent Highway One Rentals, Inc. was represented by its President, Michele Anne Lilley¹, and respondent Andrew Vincent Lilley (A. Lilley) represented himself (collectively, respondents).

Oral and documentary evidence was received. The record was closed and the matter was submitted for decision on May 28, 2020.

FACTUAL FINDINGS

Jurisdictional Matters

1. On September 15, 1988, the Department issued Real Estate Salesperson License Number S/01002028 to respondent A. Lilley. The license was converted to Real Estate Broker License Number B/01002028 on April 17, 1991. On January 10, 1995, respondent A. Lilley began doing business as (dba) Highway One Rentals. The broker license of A. Lilley expires on April 16, 2023, unless renewed or revoked.

2. On May 26, 2010, the Department issued Real Estate Corporate License Number C/01883037 to Highway One Rentals Inc. (Highway One). Respondent A. Lilley was listed as the designated officer (DO) on the corporate license. Beginning October

¹ "[T]he general common law rule requiring corporations to be represented by counsel in proceedings before courts of record other than small claims courts does not extend to proceedings before administrative agencies and their tribunals. (*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Board et al.* (2002) 99 Cal.App.4th 1094, 1103.)

12, 2018, Michele Anne Lilley² (M. Lilley) was listed as the corporate license holder and DO for Highway One. The corporate license expires on October 11, 2022, unless renewed or revoked. Today, Highway One is located at 148 N. Ocean Avenue, Cayucos, California.

3. On January 2, 2020, complainant filed an Accusation seeking to discipline all licenses and licensing rights respondents have under the Real Estate Law, as a result of violations found during a routine Department audit. More specifically, the Accusation alleges that, between February 1, 2017, and January 31, 2018 (audit period), respondents' real estate activities violated the Real Estate Law by: (a) permitting a shortage in the trust account, in the amount of \$32,601.28, without prior written consent of each owner/beneficiary; (b) failing to reconcile the monthly Separate Records and Control Records; (c) failing to maintain complete and accurate Control Records for the trust account; (d) failing to maintain monthly Separate Records for each owner/beneficiary; (e) failing to timely withdraw management fees (MF) from the trust account; and (f) allowing Nadine Lilley³ (N. Lilley) to be a signatory on the trust account, when she was not licensed under respondent Highway One. In addition, the Accusation alleges respondent A. Lilley failed to exercise reasonable supervision and

² On July 3, 1990, the Department issued Real Estate Salesperson License Number S/01080761 to M. Lilley. The license was converted to Real Estate Broker License Number B/01080761 on August 4, 1993. M. Lilley is the daughter of respondent A. Lilley.

³ At hearing, complainant amended the Accusation, without objection, removing the name Michele Anne Lilley and substituting the name Nadine Lilley, in paragraph 8, subdivision (f), lines 7 and 8. N. Lilley is mother to M. Lilley and wife to A. Lilley.

control over the activities of respondent Highway One, allowing the acts and omissions listed above to occur.

Department Audit

4. On February 26, 2018, Joshua Matkin, Department Auditor, met with M. Lilley at the offices of respondent Highway One. At the meeting, Mr. Matkin was told respondent A. Lilley had retired and was not available.

5. Mr. Matkin conducted a routine audit of respondent Highway One intermittently between February 26, and August 30, 2018. Mr. Matkin reviewed respondent Highway One's records for the period February 1, 2017, through January 31, 2018. After reviewing documents, Mr. Matkin wrote an Audit Report and submitted it to the Department and respondents. Mr. Matkin testified at hearing consistent with his Report.

PROPERTY MANAGEMENT ACTIVITIES

6. At all times relevant, respondent Highway One was involved in property management, collecting rent and security deposits, soliciting tenants, advertising, and providing for repairs and maintenance of rental properties. In total, respondent Highway One managed approximately 17 properties with 19 units for approximately 17 to 19 owners. Respondent Highway One also charged MF of five to 11 percent of the rents per unit per month. Annually, respondent Highway One collected approximately \$416,162.40.

7. In the course of business, respondent Highway One maintained a trust account at Rabobank, identified as "Highway One Rentals Inc. Trust Account, Trust Account Fulltime Rentals" (Trust Account 1), with three signatories: respondent A.

Lilley, M. Lilley, and N. Lilley. Trust Account 1 held rents, security deposits, and owner contributions, and disbursed owners' proceeds, security deposit disposition, repairs and maintenance payments, and MF.

DOCUMENTATION

8. Respondents provided Mr. Matkin with Trust Account 1 bank statements and signature cards, several monthly owners' operating statements, and cancelled checks and deposit slips for the audit period. Respondents did not provide Mr. Matkin with monthly Separate Records for each owner/beneficiary, monthly Control Records for Trust Account 1, and monthly reconciliations between the Separate and Control Records. Given the above, Mr. Matkin had to recreate records, to the best of his ability, in order to complete the audit.

AUDIT FINDINGS

9. Mr. Matkin performed a bank reconciliation for Trust Account 1, as of December 26, 2017, finding a shortage of \$32,601.28. First, Mr. Matkin determined the adjusted bank balance. Bank records showed a beginning negative balance of \$8,582.16, minus \$9,939.67 in outstanding checks (J. Cannon \$181.20 and \$88 (9/29/17), Tamoush \$438.47, T. Frietas \$6,840, and Funk Land Enterprises \$2,392 (12/12/17)), for a total of negative \$18,521.83. Second, Mr. Matkin determined the total accountability or the amounts that should have been in Trust Account 1. Bank records showed \$2,760.70 in owner/beneficiary proceeds (D. Borger \$321, J. & A. Fadel

\$2,339.20, D. Garren \$100, and S. Loucks \$0.50); plus MF of \$9,968.75⁴; plus \$1,350 in unidentified funds, for a total of \$14,079.45. Mr. Matkin combined the adjusted bank balance (negative \$18,521.83) with the total accountability, or the amounts that should have been in Trust Account 1 (\$14,079.45), and found a total shortage of \$32,601.28. Mr. Matkin determined that the causes for the \$32,601.28 shortage in Trust Fund 1, included: outstanding amounts owed to owners/beneficiaries of \$6,550.59 (J. Cannon \$1,200, T. Frietas \$2,220, B. O'Sullivan \$1,795.59, and J. & S. Choboian \$1,335), an unassignable disbursement of \$3,402.90, and a negative account balance of \$18,521.83, totaling a negative \$28,475.32. He was unable to identify the remaining \$4,125.96 shortage (\$28,475.32 minus \$32,601.28).

10. After the audit, M. Lilley submitted Control Records, bank statements, and checks to the Department for Highway One for January through March 2020, but no Separate Records or trust reconciliation. Mr. Matkin reviewed the documents and prepared a trust reconciliation, finding a discrepancy/shortage of \$379.33. In preparation for hearing, M. Lilley filed and served Separate Records for 20 properties for the same period. Again, Mr. Matkin prepared a trust reconciliation and found a shortage of \$211.84.

⁴ MF should be removed from trust accounts within 25 days. (Bus. & Prof. Code, § 10176, subd. (e).) As of December 26, 2017, \$8,304.50 in MF should not have been maintained in Trust Account 1.

Respondents' Evidence

TESTIMONY OF RESPONDENT A. LILLEY

11. Respondent A. Lilley testified at hearing. He is 82 years old. He lives in Cayucos with his wife, N. Lilley, who is also a real estate licensee. At all times relevant, N. Lilley was listed as a real estate salesperson on respondent A. Lilley's broker license.

12. In 1995, respondent A. Lilley began Highway One. N. Lilley was a signatory on the Highway One Trust Account 1, but she has never been listed on the Highway One corporate license.

13. In 2017, respondent A. Lilley stopped working at Highway One, and turned the business over to his daughter, M. Lilley. On October 12, 2018, M. Lilley became the DO for Highway One.

14. Respondent A. Lilley acknowledged he was the DO for Highway One, from May 26, 2010, to October 11, 2018, and was responsible for all facets of the business during the audit period. Nonetheless, as of 2017, he had relinquished all control and responsibility for Highway One to his daughter, M. Lilley. Thereafter, respondent did not exercise any supervision or control over M. Lilley and/or respondent Highway One (i.e., he did not maintain any records for respondent Highway One; he did not supervise M. Lilley; and he did not provide her policies and procedures for the operation of respondent Highway One). Following the audit, respondent A. Lilley did not review any Highway One records. Instead, he spoke to his daughter, M. Lilley, who assured him that Trust Account 1 did not have a \$32,601.28 shortage. Because he trusts his daughter, respondent A. Lilley disputes the shortage found by Mr. Matkin. However, M. Lilley admitted that MF was left in the account for extended periods of time.

TESTIMONY M. LILLEY

15. M. Lilley testified at hearing. She began running Highway One in 2017. Since then, she admitted making some bookkeeping mistakes, by not maintaining all necessary records and failing to reconcile the same. However, in January 2020, she purchased property management computer software to help her maintain proper records for Highway One's property management activities.

16. After the audit, M. Lilley provided Control Records, bank statements, and checks to the Department for Highway One for January through March 2020; to represent her good faith attempts to comply with the Real Estate Law. At hearing, she offered Separate Records for 20 properties for the same time period. She believes everything is properly accounted for in her records and she is now in compliance with all Department recordkeeping requirements. She admitted maintaining MF in Trust Account 1 for extended periods of time, because "a lot of tenants were coming up short, so I left money in the account to help." Nonetheless, M. Lilley now understands she must timely withdraw MF from Trust Account 1. In addition, N. Lilley has been removed as a signatory on Trust Account 1.

17. In sum, M. Lilley disputes the \$32,601.28 shortage in Trust Account 1. She does not understand how Mr. Matkin calculated the \$32,601.28 shortage; because Trust Account 1 never had a negative balance in that amount. She is equally confused by the discrepancies/unidentified shortages Mr. Matkin calculated for January through March 2020: \$379.33 and \$211.84. M. Lilley maintains that Trust Account 1 has been balanced since January 2020; because she began January 1, 2020 with a zero beginning balance. In fact, she believes she has "always balanced the account."

18. M. Lilley admitted making mistakes, including failing to document all transactions: no Separate Records, Control Records, or reconciliations. She believes she is now in compliance. Regardless, M. Lilley would like to continue to run Highway One.

Analysis

19. The facts in this case are not in dispute. At all times relevant, respondent A. Lilley was responsible for the management and supervision of respondent Highway One. In 2018, Mr. Matkin conducted a routine audit covering the period from February 1, 2017, through January 31, 2018. He found a shortage of trust funds, in the amount of \$32,601.28, without prior written consent of each owner/beneficiary; MF commingled with trust funds; N. Lilley listed as a signatory on the trust account, when she was not listed under respondent Highway One's license; and no monthly Separate and Control Records and no reconciliations between the two.

20. Respondents admit all allegations, except the Trust Account 1 shortage of \$32,601.28. M. Lilley adamantly denies the Trust Account 1 ever showed a negative balance of \$32,601.28; she is correct. However, the trust fund shortage is not determined by simply reviewing the trust fund account balance listed on the bank statement. Mr. Matkin's audit provides clear and undisputed evidence of the \$32,601.28 shortage, by calculating the adjusted balance of Trust Account 1, recreating the Separate and Control Records, and reconciling the two. Mr. Matkin also created additional reconciliations, for the 2020 records provided by respondent Highway One, and found more discrepancies, because M. Lilley "forced" the account to be balanced by starting with a zero balance on January 1, 2020. M. Lilley's "forced" account balance is inaccurate and does not provide a reliable and accurate accounting.

21. When all the evidence is considered, respondent A. Lilley did not introduce sufficient evidence of his continued ability to perform the duties authorized by his broker license in a manner consistent with public health, safety, and welfare, even on a restricted basis; nor did Highway One introduce sufficient evidence of its continued ability to perform the duties authorized by its corporate license in a manner consistent with public health, safety, and welfare, even on a restricted basis. As such, all licenses and licensing rights of A. Lilley and Highway One, under the Real Estate Law, should be revoked.

LEGAL CONCLUSIONS

Burden of Proof

1. Complainant has the burden of proving each of the grounds for discipline alleged in the Accusation, and must do so by clear and convincing evidence to a reasonable certainty. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536 ["When an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation"]; *Realty Projects, Inc. v. Smith* (1973) Cal.App.3d 204, 212 [the standard of proof applicable to proceedings for the discipline of real estate licenses is clear and convincing evidence to a reasonable certainty].) "The courts have defined clear and convincing evidence as evidence which is so clear as to leave no substantial doubt and as sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.] It has been said that a preponderance calls for probability, while clear and convincing proof demands a *high probability* [citations]." (*In re Terry D.* (1978) 83 Cal.App.3d 890, 899; italics original.)

Applicable Laws

TRUST FUNDS

2. Business and Professions Code section 10145 directs the handling of trust funds, requiring:

(a)(1) A real estate broker who accepts funds belonging to others in connection with a transaction subject to this part shall deposit all those funds that are not immediately placed into a neutral escrow depository or into the hands of the broker's principal, into a trust fund account maintained by the broker in a bank or recognized depository in this state. All funds deposited by the broker in a trust fund account shall be maintained there until disbursed by the broker in accordance with instructions from the person entitled to the funds.

[¶] . . . [¶]

(c) A real estate sales person who accepts trust funds from others on behalf of the broker under whom he or she is licensed shall immediately deliver the funds to the broker or, if so directed by the broker, shall deliver the funds into the custody of the broker's principal or a neutral escrow depository or shall deposit the funds into the broker's trust fund account.

[¶] . . . [¶]

(g) The broker shall maintain a separate record of the receipt and disposition of all funds described in subdivisions (a) and (b), including any interest earned on the funds.

3. California Code of Regulations, Title 10, section 2834, limits withdrawals from trust accounts. For a corporate broker, withdrawals can be made only upon the signature of an officer or with a specific authorization in writing by the officer through whom the corporation is licensed and that the officer is an authorized signatory of the trust fund account."

DOCUMENTATION AND ACCOUNTING

4. A real estate broker is required to keep "Control Records" of all trust funds received. Such records must include the following information, in chronological sequence and in columnar form:

- (1) Date trust funds received.
- (2) From whom trust funds received.
- (3) Amount received.
- (4) With respect to funds deposited in an account, date of said deposit.
- (5) With respect to trust funds previously deposited to an account, check number and date of related disbursement.
- (6) With respect to trust funds not deposited in an account, identity of other depository and date funds were forwarded.

(7) Daily balance of said account.

(Cal. Code Regs., tit. 10, § 2831, subd. (a).)

5. A real estate broker is also required to keep "Separate Records" of each beneficiary or transaction for which trust funds are held, including the following information in chronological sequence and in columnar form:

- (1) Date of deposit.
- (2) Amount of deposit.
- (3) Date of each related disbursement.
- (4) Check number of each related disbursement.
- (5) Amount of each related disbursement.
- (6) If applicable, dates and amounts of interest earned and credited to the account.
- (7) Balance after posting transactions on any date.

(Cal. Code Regs., tit. 10, § 2831.1, subd. (a).)

6. The balance of all Separate Records must be reconciled with the Control Records, at least monthly, except in those months in which the bank account had no activity. (Cal. Code Regs., tit. 10, § 2831.2.) The broker is required to maintain a record of each reconciliation. (*Ibid.*)

7. A broker must obtain the written consent of every owner on whose behalf trust funds are held prior to making any disbursement of trust funds "if such a

disbursement will reduce the balance of funds in the account to an amount less than the existing aggregate trust fund liability of the broker to all owners of the funds." (Cal. Code Regs., tit. 10, § 2832.1.)

SUPERVISION

8. "A broker shall exercise reasonable supervision over the activities of his or her salespersons." (Cal. Code Regs., tit. 10, § 2725.) Additionally, "the officer designated by a corporate broker licensee . . . shall be responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees as necessary to secure full compliance with the provisions of this division, including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required." (Bus. & Prof. Code, § 10159.2, subd. (a).)

Causes for Discipline

9. Business and Professions Code section 10177 allows the Department to discipline any real estate license if the licensee has done any of the following:

(d) willfully disregarded or violated the Real Estate Law (Part 1 (commencing with Section 10000)) or Chapter 1 (commencing with Section 11000) of Part 2 or the rules and regulations of the commissioner for the administration and enforcement of the Real Estate Law and Chapter 1 (commencing with Section 11000) of Part 2;

[¶] . . . [¶]

(g) demonstrated negligence or incompetence in performing an act for which he or she is required to hold a license.

(h) As a broker licensee, failed to exercise reasonable supervision over the activities of his or her salespersons, or, as the officer designated by a corporate broker licensee, failed to exercise reasonable supervision and control of the activities of the corporation for which a real estate license is required.

10. In addition, Business and Professions Code section 10176, subdivision (e) allows the Department to discipline any real estate license, if the licensee, "in performing or attempting to perform any of the acts within the scope of this chapter has been guilty of any of the following: Commingling with his or her own money or property the money or other property of others which is received and held by him or her."

11. Pursuant to Business and Professions Code sections 10177, subdivisions (d) and (g), and 10145, cause exists to discipline the licenses of respondents A. Lilley and Highway One because they:

- As of December 26, 2017, maintained a shortage of trust funds in Trust Account 1, totaling \$32,601.28, without prior written consent of each owner/beneficiary in violation of California Code of Regulations, Title 10, section 2832.1;
- failed to reconcile the monthly Separate Records and Control Records in violation of California Code of Regulations, Title 10, section 2831.2;

- failed to maintain complete and accurate Control Records for Trust Account 1 in violation of California Code of Regulations, Title 10, section 2831;
- failed to maintain monthly Separate Records for each owner/beneficiary in violation of California Code of Regulations, Title 10, section 2831.1; and
- allowed N. Lilley to be a signatory on the corporate trust account, when she was not licensed under respondent Highway One in violation of California Code of Regulations, Title 10, section 2834.

12. Pursuant to Business and Professions Code sections 10176, subdivision (e), cause exists to discipline the licenses of respondents A. Lilley and Highway One based upon their failure to timely withdraw MF from the Trust Account 1.

13. Pursuant to Business and Professions Code sections 10177, subdivisions (d), (g), and (h), and 10159.2, cause exists to discipline the license of respondent A. Lilley based upon his failure to exercise reasonable supervision and control over the activities of respondent Highway One and allowing the acts and omissions listed above to occur in violation of California Code of Regulations, Title 10, section 2725.

Costs

AUDIT

14. A real estate broker shall reimburse the Department for the cost of an audit after the Department issues a final decision finding that the broker violated Business and Professions Code section 10145 or any rule or regulation interpreting that statute. (Bus. & Prof. Code, § 10148.)

15. Respondents A. Lilley and Highway One committed multiple violations of Business and Professions Code section 10145 (Legal Conclusions 11, 12, and 13). As such, respondents A. Lilley and Highway One are required to reimburse the Department the sum of \$8,710.47 for the cost of Mr. Matkin's audit within 60 days of the Department's mailing a notice of billing. (Bus. & Prof. Code, § 10148, subds. (b) & (c).)

INVESTIGATION AND ENFORCEMENT

16. Business and Professions Code section 10106 allows the Department to seek reasonable costs of the investigation and enforcement when a licensee is found to have committed a violation of the Real Estate Law. Proof of costs may be made by declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the cost. (Cal. Code Regs., tit. 1, section 1042, subd. (b).)

17. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth factors to determine the reasonableness of costs sought, including: the licentiate's success in getting the charges dismissed or reduced; the licentiate's subjective good faith belief in the merits of his or her position; whether the licentiate raised a colorable challenge to the proposed discipline; the licentiate's financial ability to pay; and whether the scope of the investigation was appropriate in light of the alleged misconduct.

18. The evidence complainant introduced in support of her request for costs of investigation and enforcement constitutes prima facie evidence of the reasonableness of the costs incurred. (Bus. & Prof. Code, § 10106, subd. (c); Cal. Code Regs., tit. 1, § 1042, subd. (b)(1).) Respondents did not introduce evidence to rebut said

costs or of an inability to pay the same. As such, after considering the relevant evidence and the pertinent Zuckerman factors, the entire amount of costs of investigation and enforcement requested by complainant is reasonable. Complainant is awarded costs in the total sum of \$2,730 as set forth in the Order below.

ORDER

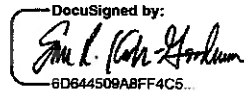
1. Real Estate Broker License Number B/01002028 issued to respondent Andrew Vincent Lilley and all other licenses and licensing rights granted to him pursuant to the Real Estate Law are REVOKED.

2. Real Estate Broker License Number C/01883037 issued to respondent Highway One Rentals Inc., and all other licenses and licensing rights granted to it pursuant to the Real Estate Law are REVOKED.

3. Respondents, individually and severally liable, shall reimburse the Department of Real Estate the sum of \$8,710.47 for the cost of Joshua Matkin's audit within 60 days of the Department of Real Estate's mailing of the notice of billing.

4. Respondents, individually and severally liable, shall reimburse the Department of Real Estate the sum of \$2,730 for costs incurred investigating and enforcing this matter. Respondents may pay these costs according to a payment plan approved by the Department of Real Estate or its designee.

DATE: June 29, 2020

DocuSigned by:

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ERIN R. KOCH-GOODMAN

Administrative Law Judge

Office of Administrative Hearing