

**FILED**

**JUL 25 2018**

BEFORE THE DEPARTMENT OF REAL ESTATE  
STATE OF CALIFORNIA

DEPARTMENT OF REAL ESTATE

By K. Krapp

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In the Matter of the Accusation of )  
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JAMES WILLIAM KUYKENDALL and )  
PARADIGM PROPERTIES AND PROPERTY )  
MANAGEMENT SERVICES INC., )  
 )  
Respondents. )

DRE No. H-6570 SAC

OAH No. 2017120957

DECISION

The Proposed Decision dated June 26, 2018, 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 AUG 15 2018.

IT IS SO ORDERED July 24, 2018

DANIEL J. SANDRI  
ACTING REAL ESTATE COMMISSIONER

*Daniel J. Sandri*

BEFORE THE  
BUREAU OF REAL ESTATE  
DEPARTMENT OF CONSUMER AFFAIRS  
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JAMES WILLIAM KUYKENDALL;  
PARADIGM PROPERTIES AND  
PROPERTY MANAGEMENT  
SERVICES, INC.,<sup>1</sup>

Respondents.

Case No. H-6570 SAC

OAH No. 2017120957

**PROPOSED DECISION**

Administrative Law Judge Coren D. Wong, Office of Administrative Hearings (OAH), State of California, heard this matter on April 17, 2018, in Sacramento, California.

Adriana Z. Badilas, Counsel, represented complainant Tricia Parkhurst, a Supervising Special Investigator of the State of California.

Attorney Osby Davis of the Law Office of Osby Davis represented respondents James William Kuykendall and Paradigm Properties and Property Management Services, Inc. Mr. Kuykendall was present throughout the hearing.

Evidence was received, and the record was left open for respondents to submit evidence that the shortage in the trust fund account has been cured and to allow complainant to respond to such evidence. Complainant's Reply to Respondent's [*sic*] Proof that the Shortage was Cured is marked as Exhibit 8. Attached thereto as Exhibit A were 16 pages of "proof" that the shortage was cured respondents submitted to complainant.<sup>2</sup> Also attached were an analysis of the documents in Exhibit A by a supervising auditor with the Bureau of Real Estate (Bureau) (Exhibit B), and an e-mail exchange between counsel for the parties

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<sup>1</sup> The evidence at hearing established respondents are licensed by the Bureau in the names indicated in the caption above, rather than as listed in the Accusation. Respondents did not raise any objection to the manner in which they are named in the Accusation at hearing, and any such objection is deemed waived.

<sup>2</sup> Respondents did not file such evidence directly with OAH.

(Exhibit C).<sup>3</sup> Respondents' Reply to Complainant's Reply to Respondent's [sic] Proof that the Shortage was Cured is marked as Exhibit 9.<sup>4</sup> Exhibits A and B to Exhibit 8 are admitted for all purposes, without objection. The record was closed, and the matter was submitted for decision on May 31, 2018.

## SUMMARY

An audit of Mr. Kuykendall's and Paradigm Properties's real estate activities between June 1, 2014, and March 31, 2017 (audit period), revealed the latter had a shortage of trust funds in the amount of \$120,403.12 as of December 31, 2016. Complainant seeks to discipline Mr. Kuykendall's and Paradigm Properties's real estate broker licenses because Mr. Kuykendall did not reconcile the Paradigm Properties's Separate Records and Control Records of trust funds on a monthly basis during the audit period, and did not obtain the written consent of all the owners of those funds prior to making the disbursement that resulted in the shortage. Complainant further alleges Mr. Kuykendall violated his duty to supervise Paradigm Properties's real estate activities during the audit period.

Cause exists to discipline Mr. Kuykendall's and Paradigm Properties's broker licenses based on the trust fund violations only. When all the evidence is considered, Mr. Kuykendall did not produce sufficient evidence of his continued ability to perform the duties authorized under his or Paradigm Properties's broker license in a manner consistent with public health, safety, and welfare, even on a restricted basis. Therefore, all licenses and licensing rights Mr. Kuykendall and Paradigm Properties have under the Real Estate Law (Bus. & Prof. Code, § et seq.) should be revoked.

## FACTUAL FINDINGS

### *Procedural History*

1. On September 18, 1978, the Bureau issued Real Estate Salesperson License Number S/00684116 to James William Kuykendall. The license was converted to Real Estate Broker License Number B/00684116 on January 4, 1985. The broker license was revoked and a restricted broker license was issued on June 10, 1991. An unrestricted broker license was issued on June 17, 1997. The broker license expires on June 16, 2021, unless renewed or revoked.

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<sup>3</sup> The documents referenced in the e-mail exchange were not attached.

<sup>4</sup> Generally, complainant would use exhibit numbers, and respondents would use exhibit letters. However, respondents did not introduce any documents at hearing, and they did not file their evidence after hearing directly with OAH. Therefore, their reply is marked as Exhibit 9 to avoid any confusion with the lettered exhibits attached to Exhibit 8.

2. The prior discipline of Mr. Kuykendall's real estate broker license arose out of an Accusation the Department of Real Estate (the Bureau's predecessor) filed against him and Waco Property Management Services, Inc., on September 20, 1990. The Accusation alleged Mr. Kuykendall was the designated broker-officer under Waco Property Management Services, Inc.'s, real estate broker license and performed services as a real estate broker on its behalf. While performing those services, he allowed a shortage to occur in Waco Property Management Services, Inc.'s, trust fund account without the prior written consent of all the owners of those funds. Furthermore, he failed to maintain adequate records of all trust funds received and disbursed from the trust account, and to perform monthly reconciliations of the funds in the trust account.

3. On May 6, 1991, the Department of Real Estate issued a Proposed Decision recommending that Mr. Kuykendall's real estate broker license be revoked, and that he be issued a restricted broker license. The Proposed Decision was adopted by a Decision issued on May 20, 1991, and effective on June 10, 1991. Mr. Kuykendall's subsequent petition for reinstatement of an unrestricted real estate broker license was granted on December 4, 1996.

4. On September 18, 1990, the Bureau issued Real Estate Broker License Number C/01087858 to Paradigm Properties and Property Management Services, Inc. (Paradigm Properties). The fictitious name "Paradime Property Management" was added to the license on the same date. Mr. Kuykendall has been the designated officer on the license since its issuance. His designation was revoked and a restricted designation was issued on June 10, 1991. He was issued an unrestricted designation on December 4, 1996. The broker license and officer designation expire on March 19, 2022, unless renewed or revoked.

5. On November 21, 2017, complainant filed an Accusation seeking to discipline all licenses and licensing rights respondents have under the Real Estate Law. The Accusation alleges they violated the Real Estate Law and regulations adopted pursuant to it.

#### *Audit of Respondents' Real Estate Activities*

6. On February 6, 2017, Bosco Li, an auditor with the Bureau, contacted Mr. Kuykendall and told him the Bureau wanted to audit his and Paradigm Properties's real estate activities. Mr. Li conducted a routine audit intermittently between April 19 and 27, 2017. This involved his traveling to Paradigm Properties's office in Vallejo, California, meeting with Mr. Kuykendall, and obtaining and reviewing bank records, other accounting records, and property management and lease agreements for the audit period.

7. Mr. Li started his audit by meeting with Mr. Kuykendall and obtaining background information about his and Paradigm Properties's real estate activities. During the audit period, Mr. Kuykendall owned 51 percent of Paradigm Properties, and his wife owned the remaining 49 percent. She was not licensed by the Bureau, and was not involved in the day-to-day operations of Paradigm Properties.

8. At all times relevant, no real estate licensees have been affiliated or associated with Paradigm Property's real estate broker license, other than Mr. Kuykendall, and none have been affiliated or associated with Mr. Kuykendall's real estate broker license. Therefore, all real estate activities performed during the audit period on behalf of Paradigm Properties were performed by Mr. Kuykendall. Additionally, all of Mr. Kuykendall's real estate activities discussed below were performed on behalf of Paradigm Properties.

9. Paradigm Properties collected rents, paid expenses, and screened tenants for compensation for approximately 180 rental properties owned by about 100 property owners during the audit period. Paradigm Properties maintained a trust account at Bank of the West in the name of "Paradigm Properties & Property Management Services Inc. dba Paradime Property Management Client Trust" for the deposit of trust funds (Trust Account Number 1). Deposits consisted of rents and security deposits collected from tenants, and disbursements including payments for expenses related to the properties managed, reimbursements of security deposits, owner proceeds, and Paradigm Properties's management fees.

10. Mr. Li performed a bank reconciliation for Trust Account Number 1 as of December 31, 2016. He explained at hearing that the bank reconciliation required him to calculate the adjusted cash balance in the account, compare that amount with Paradigm Properties's accountability to the property owners, and determine if the two amounts matched.<sup>5</sup>

11. Mr. Li determined Trust Account Number 1's adjusted bank balance to be \$166,718.68, and Paradigm Properties's accountability to property owners to be \$287,121.80. Therefore, there was a shortage of trust funds Paradigm Properties held on behalf of the property owners in the amount of \$120,403.12.

12. Mr. Li did not find any monthly account reconciliations of the funds held in Trust Account Number 1 that were prepared during the audit period. While he did find two monthly account reconciliations covering two months during that period, they were prepared after March 31, 2017. He also found no evidence that any of the property owners who owned funds in the account at any time during the audit period consented in writing to a shortage in the account prior to the disbursement that caused the shortage, or were notified of the shortage after the fact.

13. After completing his audit, Mr. Li conducted an exit interview with Mr. Kuykendall, during which they discussed the shortage in Trust Account Number 1. Mr. Kuykendall did not dispute the shortage determined by Mr. Li. Instead, he explained that his

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<sup>5</sup> The adjusted bank balance was calculated by adjusting the available balance in the account on December 31, 2016, to account for deposits (an upward adjustment) and payments (a downward adjustment) that had not posted to the account. The account's accountability was the amount Paradigm Properties was holding in trust on behalf of the property owners, and was calculated based on information in Paradigm Properties's Separate Records and General Ledger.

accounting software “crashed” in 2012, he had to re-create a lot of his accounting records, and he made numerous erroneous entries during his re-creation of records which resulted in the shortage. He also explained he hired a certified public accountant, Brenda Bryant, to reconcile and fix his accounting records and determine the amount of the shortage in Trust Account Number 1 in March 2017.

14. Mr. Li also discussed with Mr. Kuykendall \$8,466.45 in bank fees debited from Trust Account 1 during the audit period. Mr. Kuykendall explained he paid those fees by depositing Paradigm Properties’s own money into the account. However, he explained he made the deposits two or three months after the fees were debited from the account. When asked about specific deposits, he was unable to provide more specific information other than that he deposited a “flat amount” to cover bank fees.

*Mr. Kuykendall’s Testimony*

15. Mr. Kuykendall provided contradictory testimony at hearing. Initially, he explained he first learned of problems with his accounting software in December 2012 when he lost all accounting data from the end of April 2012 forward. Later, he testified he could not recall when he first realized there was a problem with his accounting software, and estimated it was sometime in 2012.

16. The data lost included all information about the properties managed, including owners’ names, property addresses, the amounts of rent received, and the amounts of money disbursed. When Mr. Kuykendall learned of the loss, he instructed his staff to pull hardcopies of the documents from which the computer entries were originally made so he could re-create the data. He explained he was able to successfully re-create the lost data. But he also explained he did not trust the monthly reconciliations he performed after re-creating the lost data, because they sometimes showed an overage in Trust Account Number 1 and sometimes showed a shortage.

17. With regard to monthly reconciliations of Trust Account Number 1, Mr. Kuykendall initially stated he performed them by hand each month throughout the audit period, and kept hardcopies. He further stated he told Mr. Li he had hardcopies of all his monthly reconciliations, but could not recall if Mr. Li asked to see them. Later, however, Mr. Kuykendall stated he did not begin performing monthly reconciliations until he realized he lost the accounting data. He also stated he believed he provided copies of his monthly reconciliations to Mr. Li. But then he explained he did not believe he was asked for copies of his reconciliations, and did not believe he provided copies.

18. Respondent did not dispute that Trust Account Number 1 was short trust funds in the amount of \$120,403.12 as of December 31, 2016. Instead, he claimed to have reduced the balance of the shortage since Mr. Li completed his audit to \$94,451. He estimated he began attempting to cure the shortage in April 2013 by withdrawing \$1,000 per month from his Social Security account and depositing those amounts into Trust Account Number 1, even though he did not know the exact amount of the shortage until after Mr. Li completed his

audit. He estimated he has made at least 12 payments. He also claimed to have further reduced the shortage by depositing other personal funds into the account. Finally, he claimed his certified public accountant found credits in Paradigm Properties's records for which Mr. Li's audit did not account.

19. On May 9, 2018, Mr. Kuykendall took out a home equity line of credit with First Bank. (Exhibit A to Exhibit 8.) The following week, he withdrew \$94,451.31 from the line of credit and deposited that amount into an account with First Bank in the name of "Trust Paradigm Prop." There was no admissible evidence of the relationship, if any, between that account and Trust Account Number 1.<sup>6</sup> Therefore, there was no evidence that sum was applied to reduce the shortage in Paradigm Properties's trust funds.

20. Respondent presented no documentary evidence in support of his testimony that he performed monthly reconciliations of Trust Account Number 1 during the audit period. Nor did he present any documentary evidence in support of his claim that his certified public accountant found credits for which Mr. Li did not account in his audit. The only documentary evidence submitted in support of Mr. Kuykendall's claim to have paid off the shortage in trust funds was Exhibit A to Exhibit 8, and such evidence only established that he deposited \$94,451.31 into a checking account in the name of "Trust Paradigm Prop." as explained above. He did not present any documentary evidence in support of any other payments he purportedly made to reduce the shortage. He did not testify or submit documentary evidence that any of the owners of the trust funds in Trust Account Number 1 provided written consent to a shortage in the account prior to the disbursement that caused the shortage, or that they were notified of the shortage after the fact.

### *Discussion*

21. The clear and convincing evidence established Mr. Kuykendall did not perform monthly reconciliations of the trust funds held in Trust Account Number 1 during the audit period. The evidence also established he caused a shortage in the account in the amount of \$120,403.12 as of December 31, 2016, and did not obtain written consent to a shortage from all the owners of those funds prior to making the disbursement that caused the shortage. The evidence further established he failed to properly supervise the real estate activities performed on behalf of Paradigm Properties by failing to ensure that monthly reconciliations of the trust funds held in Trust Account Number 1 were performed, causing a shortage of trust funds in that account, and failing to obtain written consent to a shortage from all the owners of those funds prior to incurring the shortage.

22. According to Mr. Kuykendall, the shortage in Trust Account Number 1 was the result of the loss of all of Paradigm Properties's accounting data from the end of April through December 2012. He learned of the loss in 2012, and immediately instructed his staff to pull hardcopies of the documents originally used to create the data lost. While he said he

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<sup>6</sup> Mr. Osby purported to explain the relationship in Exhibit 9. However, an attorney's argument is not evidence. (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1281.)



successfully re-created the lost data, he also explained he had no faith in the re-created data because he showed a shortage of trust funds for some months and an overage for others. He took no steps to determine Paradigm Properties's actual trust fund liability for more than four years, and then hired Ms. Bryant in March 2017 after receiving notice of Mr. Li's audit. Mr. Kuykendall failed to offer any explanation why he did not take steps to determine that liability sooner. He also failed to explain why he was unable to accurately re-create the lost data, even though he had the documents originally used to create that which was lost. Furthermore, he failed to explain why he never notified the owners of the trust funds of the shortage, let alone attempted to obtain their written consent to the shortage. Any time on or after December 31, 2016, an owner could have requested his or her trust funds, and Mr. Kuykendall would have been precluded by law from giving that owner his or her money without first obtaining the written consent of all other owners to creating an even greater shortage in trust funds.

23. Mr. Kuykendall's claim that he has cured the shortage in Trust Account Number 1, while dubious at best for the reasons previously explained, misses the point. He violated the Real Estate Law and regulations adopted pursuant to it once he failed to perform the required reconciliations and created the shortage. Whether or not he cured all or part of the shortage is irrelevant to whether a violation occurred. And even if he did in fact cure all or part of the shortage, he stated he first began doing so without knowing the actual amount of the shortage. His commingling of personal funds with trust funds reflects a fundamental misunderstanding of the nature of trust funds and the requirements for handling them. This misunderstanding was further evidenced by his testimony that he reimbursed monthly account fees debited from Trust Account Number 1 by depositing Paradigm Properties's own money two or three months after the fact.

### *Conclusion*

24. Cause exists to discipline Mr. Kuykendall's real estate broker license based on his improper handling of Paradigm Properties's trust funds. Because he engaged in the real estate activities previously discussed on behalf of Paradigm Properties and is the sole real estate licensee legally authorized to perform real estate activities on its behalf, his conduct also constitutes cause to discipline Paradigm Properties's real estate broker license. When all the evidence is considered, Mr. Kuykendall did not produce sufficient evidence of his continued ability to perform the duties authorized by his or Paradigm Properties's real estate license in a manner consistent with public health, safety, and welfare, even on a restricted basis. His failure to take immediate steps to obtain an accurate accounting of Paradigm Properties's trust funds and to notify the owners of the trust funds of the shortage creates the appearance that he was trying to hide the shortage. Such conduct reflects poorly on his honesty and integrity. (See, *Harrington v. Department of Real Estate* (1989) 214 Cal.App.3d 394, 402 ["Honesty and truthfulness are two qualities deemed by the Legislature to bear on one's fitness and qualification to be a real estate licensee"].) Therefore, all licenses and licensing rights Mr. Kuykendall and Paradigm Properties have under the Real Estate Law should be revoked.

25. No cause exists to discipline Mr. Kuykendall's or Paradigm Properties's real estate broker license based on allegations the former failed to supervise the latter's real estate activities. Paradigm Properties had no real estate salespersons affiliated or associated with its license. And while Business and Professions Code section 10159.2 required Mr. Kuykendall as the designated officer on Paradigm Properties's broker license to supervise all real estate activities performed on its behalf, the statute does not provide for discipline if he failed to do so.

#### *Request for Costs of Audit*

26. At hearing, complainant requested that Mr. Kuykendall and Paradigm Properties be ordered to pay the cost of Mr. Li's audit. Evidence of the cost of that audit — \$2,612.52 — was admitted, without objection. As explained in Legal Conclusions 13 and 14, Mr. Kuykendall and Paradigm Properties are required to pay such costs within 60 days of the Bureau's mailing a notice of billing.

#### *Request for Costs of Investigation and Enforcement*

27. Complaint also requested costs of investigation and enforcement in the total amount of \$2,078.75 pursuant to Business and Professions Code section 10106. At hearing, complainant introduced, without objection, a Certified Statement of Investigation Costs, certifying under penalty of perjury that the Bureau incurred \$743.75 investigating Mr. Kuykendall and Paradigm Properties's real estate activities. Attached to the Certified Statement of Investigation Costs is a document entitled "Good Faith Estimate of Reasonable Costs For: 4-17-0501-008," which itemizes those costs by activity date, activity type, number of hours, hourly pay rate, and cost amount. Complainant also introduced, without objection, a Certified Statement of Costs certifying under penalty of perjury that the Bureau incurred costs of enforcement in the amount of \$1,335, and itemizing those costs by date, activity, and number of hours.

28. Mr. Kuykendall introduced no evidence that the amount of costs of investigation and enforcement requested by complainant is unreasonable, and he did not introduce any evidence of his inability to pay those costs. The entire amount of the costs of investigation and enforcement requested by complainant is reasonable in light of the issues involved in this matter as explained in Legal Conclusions 15 and 16 below.

## LEGAL CONCLUSIONS

#### *Applicable Standard/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 Law*

2. Business and Professions Code section 10145 provides the following regarding the handling of trust funds:

(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.

3. 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).)

4. 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).)

5. The balance of all Separate Records shall be reconciled with the Control Records, at a minimum, each month, 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.*)

6. 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.)

7. "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).)

### *Cause for Discipline*

8. A real estate license may be disciplined if the licensee has “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.” (Bus. & Prof. Code, § 10177, subd. (d).) Mr. Kuykendall failed to reconcile Paradigm Properties’s Separate Records with its Control Records on a monthly basis throughout the audit period. Therefore, cause exists to discipline Mr. Kuykendall’s and Paradigm Properties’s real estate broker licenses pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to California Code of Regulations, title 10, section 2831.2.

9. Mr. Kuykendall caused a shortage of trust funds in Trust Account Number 1 in the amount of \$120,403.12 as of December 31, 2016. He did not obtain the written consent to a shortage of any of the owners of those funds prior to making the disbursement that caused the shortage. Therefore, cause exists to discipline Mr. Kuykendall’s and Paradigm Properties’s real estate broker licenses pursuant to Business and Professions Code section 10177, subdivision (d), as that statute relates to California Code of Regulations, title 10, section 2832.1.

10. Complainant alleged in the Accusation that Mr. Kuykendall’s violations of California Code of Regulations, title 10, sections 2831.2 and 2832.1, constitute cause to discipline his and Paradigm Properties’s real estate broker licenses pursuant to Business and Professions Code section 10145. While that statute requires brokers to handle trust funds in a certain manner, it does not authorize the discipline of a real estate broker license for failing to handle trust funds in the manner required. Therefore, no cause exists to discipline Mr. Kuykendall’s or Paradigm Properties’s real estate broker license pursuant to Business and Professions Code section 10145.

11. Complainant also alleged in the Accusation that Mr. Kuykendall’s violations of California Code of Regulations, title 10, sections 2831.2 and 2832.1, constitute cause to discipline his and Paradigm Properties’s real estate broker licenses pursuant to Business and Professions Code section 10159.2, in conjunction with California Code of Regulations, title 10, section 2725. California Code of Regulations, title 10, section 2725, pertains to a real estate broker’s duty to supervise real estate salespersons affiliated or associated with his broker license. Here, there were no real estate salespersons affiliated or associated with Mr. Kuykendall’s or Paradigm Properties’s real estate broker licenses. And while Business and Professions Code section 10159.2 required Mr. Kuykendall to supervise Paradigm Properties’s real estate activities, it does not authorize discipline for his failure to do so. Therefore, no cause exists to discipline Mr. Kuykendall’s or Paradigm Properties’s real estate

broker license pursuant to Business and Professions Code section 10159.2, in conjunction with California Code of Regulations, title 10, section 2725.

### *Conclusion*

12. Cause exists to discipline Mr. Kuykendall's and Paradigm Properties's real estate broker licenses for the reasons explained in Legal Conclusions 8 and 9, individually and collectively. When all the evidence is considered, Mr. Kuykendall did not introduce sufficient evidence of his continued ability to perform the duties authorized by his or Paradigm Properties's broker license in a manner consistent with public health, safety, and welfare, even on a restricted basis, for the reasons explained in Factual Findings 21 through 24. Therefore, all licenses and licensing rights Mr. Kuykendall and Paradigm Properties have under the Real Estate Law should be revoked.

### *Award of Costs of Audit*

13. A real estate broker shall reimburse the Bureau for the cost of an audit after the Bureau issues a final decision finding that the broker violated Business and Professions Code section 10145 or any rule or regulation interpreting that statute:

(b) The commissioner shall charge a real estate broker for the cost of any audit, if the commissioner has found, in a final desist and refrain order issued under Section 10086 or in a final decision following a disciplinary hearing held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code that the broker has violated Section 10145 or a regulation or rule of the commissioner interpreting Section 10145.

(c) If a broker fails to pay for the cost of an audit as described in subdivision (b) within 60 days of mailing a notice of billing, the commissioner may suspend or revoke the broker's license or deny renewal of the broker's license. The suspension or denial shall remain in effect until the cost is paid or until the broker's right to renew a license has expired.

(d) The commissioner may maintain an action for the recovery of the cost in any court of competent jurisdiction. In determining the cost incurred by the commissioner for an audit, the commissioner may use the estimated average hourly cost for all persons performing audits of real estate brokers.

(Bus. & Prof. Code, § 10148.)

14. Mr. Kuykendall violated Business and Professions Code section 10145, subdivision (a), by causing a shortage in Trust Account Number 1 in the amount of \$120,403.12 as of December 31, 2016. He also violated regulations interpreting that statute by failing to reconcile Paradigm Properties's Separate Records and Control Records of trust funds held in that account on a monthly basis throughout the audit period. Therefore, he and Paradigm Properties are required to reimburse the Bureau the sum of \$2,612.52 for the cost of Mr. Li's audit within 60 days of the Bureau's mailing a notice of billing. (Bus. & Prof. Code, § 10148, subs. (b) & (c).)

*Award of Costs*

15. Business and Professions Code section 10106 provides, in pertinent part:

(a) Except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before the department, the commissioner may request the administrative law judge to direct a licensee found to have committed a violation of this part to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

[¶] . . . [¶]

(c) A certified copy of the actual costs, or a good faith estimate of costs where actual costs are not available, signed by the commissioner or the commissioner's designated representative, shall be prima facie evidence of reasonable costs of investigation and prosecution of the case. The costs shall include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General.

California Code of Regulations, title 1, section 1042, subdivision (b), states, in pertinent part, the following about cost recovery:

Except as otherwise provided by law, proof of costs at the Hearing may be made by Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs, which shall be presented as follows:

(1) For services provided by a regular agency employee, the Declaration may be executed by the agency or its designee and shall describe the general tasks performed, the time spent on each task and the method of calculating the cost. For other

costs, the bill, invoice or similar supporting document shall be attached to the Declaration.

In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 10106. These factors include: 1) the licentiate's success in getting the charges dismissed or reduced; 2) the licentiate's subjective good faith belief in the merits of his or her position; 3) whether the licentiate raised a colorable challenge to the proposed discipline; 4) the licentiate's financial ability to pay; and 5) whether the scope of the investigation was appropriate in light of the alleged misconduct. (*Zuckerman v. Board of Chiropractic Examiners, supra*, 29 Cal.4th at p. 45.)

16. 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. (Factual Finding 27; Bus. & Prof. Code, § 10106, subd. (c); Cal. Code Regs., tit. 10, § 1042, subd. (b)(1).) Mr. Kuykendall did not introduce any evidence to rebut such evidence. (Factual Finding 28.) Therefore, 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 \$2,078.75 as set forth in the Order below.

#### ORDER

1. Real Estate Broker License Number B/00684116 issued to respondent James William Kuykendall 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/01087858 issued to respondent Paradigm Properties and Property Management Services, Inc., and all other licenses and licensing rights granted to it pursuant to the Real Estate Law are REVOKED.

3. Respondents shall reimburse the Bureau of Real Estate<sup>7</sup> the sum of \$2,612.52 for the cost of Bosco Li's audit within 60 days of the Bureau of Real Estate's mailing a notice of billing.

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<sup>7</sup> Effective July 1, 2018, the Bureau of Real Estate will become the Department of Real Estate. (Stats. 2017, ch. 828, §§ 3-12, eff. July 1, 2018.)



4. Respondents shall reimburse the Bureau of Real Estate the sum of \$2,078.75 for costs incurred investigating and enforcing this matter. Respondents may pay these costs according to a payment plan approved by the Bureau of Real Estate or its designee.

DATED: June 26, 2018

DocuSigned by:

*Coren D. Wong*

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**COREN D. WONG**  
Administrative Law Judge  
Office of Administrative Hearings