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STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE PETER J. McBRIEN, No. 185	NOTICE OF FORMAL PROCEEDINGS

COMES NOW the Honorable Peter J. McBrien and, pursuant to Rule 119 of the Rules of the Commission on Judicial Performance, hereby answers the Notice of Formal Proceedings.

COUNT 1

Count 1, Paragraph A, *Mona Lee Carlsson v. Olf Johann Carlsson*

1. Judge McBrien admits that *Carlsson v. Carlsson* was a contested marital dissolution action, and the trial of March 2006 primarily involved the distribution of the family residence and a rental property. Judge McBrien admits that he presided over the Carlsson court trial on March 2, March 3 and March 9, 2006, and that Patricia Huddle was counsel for Olf Carlsson during trial. Judge McBrien admits that the judgment he entered in the Carlsson case was reversed by the Third District Court of Appeal with an

the case be assigned to a different judge. Judge McBrien denies that he "entered judgment in favor of Ms. Mona Carlsson on almost every issue."

Judge McBrien admits the recitation set forth in the Notice of Formal Proceedings regarding events occurring on March 9, 2006 in *Carlsson v. Carlsson* is an accurate recitation of the court reporter's transcript of the record on appeal in *Carlsson v. Carlsson.*

Judge McBrien denies that the trial terminated, as the allegation implies, while Mr. Carlsson's expert appraiser witness was on the stand, nor while Mr. Carlsson was presenting his case in chief. The record reflects, and Judge McBrien understood, that each party had already presented their respective case in chief. Mr. Carlsson's expert witness, Paktun Shah, had already testified under direct examination by Ms. Huddle and under cross-examination by Mona Carlsson's attorney, Charlotte Keeley. After Mr. Shah testified and in her rebuttal case, Mona Carlsson recalled her expert witness to rebut the testimony of Mr. Shah. At approximately 4:27 p.m. on June 9, 2006, Mr. Shah was called as a sur-rebuttal witness by Mr. Carlsson in his sur-rebuttal case.

At numerous times during the course of the trial, the parties were admonished that evidence needed to be completed and argument made before 4:30 p.m. on the last day of trial; otherwise, a mistrial could and/or would be declared. The parties in their estimate of trial listed the case as having a trial length not to exceed two days. Pursuant to the Local Rules of Court for the Family Law Division of the Sacramento Superior Court, Rule 14.18(3), "Attorneys and self-represented parties are required to provide the court with reasonable and accurate time estimates for contested trials. If the trial estimate of either party is exceeded, the court may, in its discretion, continue the matter to a new trial

date or declare a mistrial." The court session on March 9, 2006 was scheduled to end at 4:30 p.m. At 4:29 p.m., Judge McBrien received a call regarding an Emergency Protective Order. Among his other duties, for many years and at least since 2002, Judge McBrien has been responsible for responding to the Court's Emergency Protective Order phone (EPO) during the day. The EPO phone is a telephone that Judge McBrien carries on his person, including the time when he is on the bench. It is common knowledge of lawyers appearing before him that Judge McBrien has this duty. Judge McBrien's judicial duties require that when he is interrupted during court proceedings with an EPO request, he immediately cease the proceedings, take and then handle the EPO call. Generally speaking, if a matter being heard is interrupted, Judge McBrien will apologize to the parties, excuse himself, and take the call in chambers. When Judge McBrien returns to court, he will again apologize and explain for the benefit of the litigants and public generally what an EPO is and why he is obligated to handle such calls. Although by their very nature intrusive, EPO requests typically cause only a brief interruption in the court proceedings. The record reflects that this particular EPO request was received at approximately 4:29 on March 9, 2006, which was at the very end of the trial day. One minute of trial was left when Judge McBrien took the EPO call. Although Judge McBrien does not recall the circumstances of this particular EPO request, presumably it would have been extensive and time consuming and must have lasted beyond the time counsel remained in the courtroom; otherwise, he would have returned from chambers and personally addressed counsel and the litigants.

Judge McBrien cannot respond to the allegation that the parties and counsel sat in the courtroom for several minutes, uncertain of how to proceed since Judge McBrien was

not present. Judge McBrien denies that his departure to take the EPO call and to terminate the proceedings "precluded Ms. Huddle from completing her expert's testimony, from calling certain other witnesses and from presenting closing argument in person." First, her expert witness had already completely testified and was providing sur-rebuttal testimony on matters to which he had already testified. Second, Ms. Huddle never identified any other witnesses she intended to call. Third, all testimony and argument had to be concluded by 4:30 p.m., and it is doubtful that Ms. Huddle would have completed the testimony of Mr. Shah, called another witness, and provided a closing argument in 60 seconds.

Judge McBrien denies that he abandoned "the trial in the middle of Mr. Carlsson's case in chief" and, in fact, the Carlsson case was in sur-rebuttal. Judge McBrien denies that he abandoned the trial. Judge McBrien took an EPO call one minute before conclusion of the court day, and he was inclined to declare a mistrial because the case had not been completed within the time estimate provided by the parties. Judge McBrien denies that he denied Mr. Carlsson his constitutional right to due process and a fair trial. Mr. Carlsson's attorney, Ms. Huddle, presumably knows the Sacramento County Family Law Local Rules of Court, specifically with respect to trial estimates, knew Judge McBrien had the right to declare a mistrial if trial exceeded the estimate, knew that Judge McBrien had advised the parties on multiple occasions that he would declare a mistrial if the case was not completed within the estimate, and most importantly, Mr. Carlsson was given the opportunity to present additional evidence on his request for attorneys' fees and a written closing argument before judgment was entered.

The "contested" *Carlsson* trial related to the valuation of two properties, one a residence and the other an investment property, and how those properties were to be disposed. The parties disputed the fair market value, and Mr. Carlsson had taken conflicting positions on how the properties should be disposed or held. In his judgment, Judge McBrien ordered both properties sold with the proceeds dispersed between the parties. The issue of a fair market determination on the basis of expert testimony became irrelevant because the properties were to be sold, which would, by definition, determine the fair market value. When trial was ended, the experts had already opined on value. That evidence became irrelevant when both properties were ordered sold.

2. Judge McBrien denies that he made a "sua sponte" request for Mr. Carlsson to produce statements of economic interest that were located at his place of employment, the State of California Department of General Services.

During Olf Carlsson's direct examination, his lawyer, Ms. Huddle, elicited testimony relating to a loan obtained by Olf Carlsson on the investment property which was in dispute. The loan had been made by an acquaintance of Mr. Carlsson named Donald Minkoff. Apparently, this loan was a non-interest bearing loan. Under cross-examination, the following testimony, without objection, was elicited:

Q. You also testified, I believe, that Mr. Minkoff borrowed money on his equity loan, gave it to you, and you paid him back the money he borrowed plus the interest he would have paid on the money; correct?

A. That's what I was told.

Q. So, Mr. Minkoff would have been working his money for free?

A. That's correct, which was very hard for me to believe.

Q. How long have you known Mr. Minkoff

A. For at least 10 years.

Q. Where do you work?

A. At the Department of General Services.

Q. In which division?

A. Real Estate Services Division.

[RT 347:18-348:4]

. . .

Q. How did you come to meet Mr. Minkoff?

A. On a project that we worked on.

Q. Did Mr. Minkoff also work for General Services?

A. No, he didn't work for General Services.

Q. Did he work for the State of California?

A. No, he doesn't work for the State of California.

Q. Who does Mr. Minkoff work for?

A. He works for himself.

Q. What does Mr. Minkoff do?

A. He's a developer.

Q. A real estate developer?

A. Correct.

Q. What project did you and he work on together?

A. It was a project down in West Covina.

Q. You worked on it as the representative of the State General Services Department?

A. I was assigned to the project, but I was not the only person assigned to the project.

Q. What were your assignments for that project?

A. I was a space planner. I was laying out the design work.

Q. What was Mr. Minkoff's interest in that project?

A. He owned the building. He had owned it for 30 years, and there had been a long lease on it.

Q. Who was the lessee?

A. The State of California.

Q. The General Services Department specifically?

A. Correct.

Q. So there was a contractual relationship between the General Services Department of which you are an employee and Mr. Minkoff?

A. Correct.

Q. When you met him?

A. Correct.

Q. Did Mr. Minkoff continue to have other contractual relationships with the Department of General Services?

A. Yes, he did.

[RT 348:12-349:21]

. . .

Q. But is it your testimony that Mr. Minkoff borrowed money and had loaned it to you at no cost to you for no reason, other than he was a nice guy?

A. He loaned it to Scott Moore and I.

Q. For no compensation?

A. That is correct. No compensation.

Q. Is it possible that Mr. Minkoff was hoping for compensation in the form of continuing to have a good business relationship with the State of California?

A. He does lots of work with lots of people in the office.

Q. Does your supervisor know that you and Mr. Minkoff were on title to real property together from 2001 to 2004?

A. I don't know.

Q. Did you ever tell him?

A. I don't know. We don't discuss it.

Q. Do you fill out any forms, for example a document required by the Office of Fair Political Practices, as a State employee?

A. Yes.

[RT 350:7-351:3]

Towards the end of the Court day on March 3, 2006, after it had been determined that the trial would continue to March 9, 2006, Judge McBrien stated to Mr. Carlsson's counsel and Mr. Carlsson:

I would ask you to bring a copy of your 2004, whatever this document is, that you file with the Fair Political Practices Commission, with the Secretary of State.

THE WITNESS: Okay.

THE COURT: Thank you.

MS. KEELEY: Your Honor, would we need copies of that document for 2002 and 2003?

THE COURT: You should probably bring them for those years, but you also might want to talk to an attorney who specializes in that area because there are potential penalties far beyond what we're talking about today.

[RT 363:28-364:12]

The Notice of Formal Proceedings does not cite the entire passage of Judge McBrien's statement, making the allegation misleading and inaccurate. The complete passage shows Judge McBrien's comment related to consulting a lawyer

conversant with the Fair Political Practices Act which Carlsson implicated by his testimony.

Judge McBrien admits the recitation in the Notice for March 9, 2006 accurately quotes from the reporter's transcript of that date.

Judge McBrien admits he suggested that Mr. Carlsson "send somebody to his workplace to get those documents before we conclude this trial." When Judge McBrien overruled Ms. Huddle's objection to producing the documents on relevancy grounds, he did not, as the Notice alleges, agree "that the documents you asked Mr. Carlsson to produce were irrelevant to the trial over which you were presiding." Judge McBrien's exact words were, "I am not indicating that they are relevant. They are going to clarify his testimony." [RT 367:19-21]

The allegation in the Notice suggests that Judge McBrien threatened Ms. Huddle with contempt because she was "advising Mr. Carlsson to assert his Fifth Amendment rights." That allegation is denied. The transcript of the *Carlsson* case shows that Judge McBrien did not threaten Ms. Huddle with contempt, and therefore that allegation is also denied. Mr. Carlsson was instructed to produce his FPPA documents for trial because the testimony elicited by his counsel was pertinent on several issues to the investment property the parties were litigating. The disclosure statements were what they were. When asked questions under direct and under cross-examination Olf Carlsson potentially implicated himself in a violation of the Fair Political Practices Act, his lawyer did not interpose any objections, and he effectively waived whatever Fifth Amendment rights against self-incrimination he may have had. The disclosure statements are filed with the Secretary of State and are not protected by any privilege whatsoever. When

Ms. Huddle continued in an endeavor to claim a Fifth Amendment protection regarding publicly filed documents, the following appears on the record:

MS. HUDDLE: Are you indicating that he can't take the Fifth Amendment now?

THE COURT: I'm not indicating anything. I'm indicating that you need to send somebody to his employment to pick up those documents.

MS. HUDDLE: If he's taking the Fifth Amendment, then those documents would be part of it.

THE COURT: Those documents are on file with the Secretary of State. I could go to the Secretary of State's office and get a copy of them.

MS. HUDDLE: Ms. Keeley never raised this issue. If she believed it was really an issue, why didn't Ms. Keeley get those documents? We're here at trial now, and –

THE COURT: Ms. Huddle, you are out of the [sic] order. It was my request, not Ms. Keeley's request.

MS. HUDDLE: I think you would potentially, although I don't know –

THE COURT: Ms. Huddle, do you wish to ask your client to send somebody to get the records?

MS. HUDDLE: If he provides those and he gets charged with something for having provided them –

THE COURT: Yes or no?

MS. HUDDLE: Is the Court indicating that he cannot assert his Fifth Amendment?

THE COURT: I'm not indicating any such thing. The documents are not part of the Fifth Amendment. It's what he states out of his mouth that is a part of the Fifth Amendment. Those are public documents at this point. They are on file – assuming they are the ones that he described – on file with the Secretary of State's office. As a convenience to the Court, I have asked him to bring us a copy.

MS. HUDDLE: I suppose – this is all on the record. I don't know what to do in a situation like this when you're actually asking him to produce evidence which might incriminate him, and it's not even the opposing side presenting it.

THE COURT: Ms. Huddle, am I to take that as a "no," placing you in the possibility of contempt?

MS. HUDDLE: No. I will tell him to get the records –

THE COURT: I'm not suggesting that he needs to –

MS. HUDDLE: – if the Court is ordering him to produce him [sic].

THE COURT: – absent himself. I'm suggesting he needs to send somebody, given the fact that he hasn't done it in the week that's transpired, to go get it so he can also attend this trial.

[RT 368:11-370:5]

Whether Mr. Carlsson chose to assert Fifth Amendment rights in subsequent testimony was not the issue. The issue was whether The Court's order to produce the statement was going to be obeyed or not.

3. In or around May 12, 2006, in writing, Judge McBrien had prepared and filed in the *Carlsson* case a "Request for Partial Transcript." The request stated: "The Court requests a partial transcript of the proceedings to include respondent's testimony only given on this date; March 3, 2006." Judge McBrien did not instruct anyone to not tell the lawyers or parties in *Carlsson v. Carlsson* of his request for a partial transcript. Judge McBrien does not know what discussions, if any, occurred between his clerk and the court reporter regarding the partial transcript. It is believed that the written request for a partial transcript was copied and mailed to the court reporter at her residence in El

Dorado Hills, California. The court reporter was not an employee of the Sacramento County Superior Court but an independent contractor.

Judge McBrien did transmit the transcript of Olf Carlsson's testimony to Linda Cabatic, counsel at General Services, on September 11, 2006. In forwarding the transcript to General Services, it was Judge McBrien's concern that there was at least the possibility of a conflict of interest resulting from Mr. Carlsson's relationship with Donald Minkoff, the silent business partner in the investment property and that Mr. Carlsson had not properly disclosed this relationship to the people of the State of California as required. A failure to properly disclose this information could potentially be a misdemeanor under the disclosure requirements of the California Fair Political Practices Act, and Judge McBrien reasonably believed he had an obligation to report the issue to General Services under the circumstances. Judge McBrien does not believe, as alleged, that he "informed DGS that you believe Mr. Carlsson had failed to disclose certain information on his statements of economic interest about his real estate holdings."

Judge McBrien denies that "as a result of your actions, Mr. Carlsson's employment was terminated." It is believed that Olf Carlsson was terminated from his position with the Department of General Services due to his own actions and as the State of California determined Carlsson had an off-duty business relationship with Donald Minkoff, and after establishing this relationship, Mr. Carlsson oversaw and approved several contracts entered into between Minkoff and the Department of General Services without notifying the Department of his business relationship with Minkoff.

Mr. Carlsson thereafter appealed his termination to the California State Personnel Board. A hearing was conducted by Administrative Law Judge Shawn Cloughesy on March 5,

2007 and April 23, 2007. The Administrative Law Judge, in a written decision, a copy of which is attached hereto as Exhibit A, determined that Mr. Carlsson was guilty of misconduct in failing to disclose his business relationship with Mr. Minkoff and failing to disclose his interest with Mr. Minkoff in the subject rental property pursuant to the requirements of the State of California, and that his actions constituted inexcusable neglect, dishonesty, willful disobedience and/or failure of good behavior. The termination of Mr. Carlsson's employment was upheld. The findings of fact and conclusions of law of the Administrative Law Judge were adopted by the California State Personnel Board on January 8, 2008. Olf Carlsson was terminated because of his own actions or inactions, not what Judge McBrien did or did not do. If the Commission on Judicial Performance suggests that Olf Carlsson was not subject to termination because of his transgressions, this position is categorically denied and not supported by the decision of the California State Personnel Board. If the Commission alleges that Judge McBrien did not have the obligation to bring to the attention of the Department of General Services Mr. Carlsson's possible violation the Fair Political Practices Act, then we deny the allegation. Indeed, it is contended that Canon 3B(2) required Judge McBrien to disclose Mr. Carlsson's trial testimony to the Department of General Services. In fact, this very Commission, in 1991 Advisory Letter No. 9 at page 12, suggested that a judge has a duty to provide this very kind of information relating to potential criminal activity.

3. Judge McBrien denies that he displayed impatience with Sharon Huddle during the course of the *Carlsson* trial as alleged. Judge McBrien acknowledges that he admonished counsel on a number of occasions during the course of the *Carlsson* trial that they faced a potential mistrial if the case was not concluded within the time estimate

originally provided by counsel. As detailed *supra*, Rule 14.18(D)(3) of the Local Rules of Court for the Superior Court of the County of Sacramento provides that exceeding time estimates for contested trials can result in the declaration of a mistrial. As Rule 14.18(A) notes, "The purpose of this rule is to ensure that contested family law matters are thoroughly prepared and expeditiously tried and to avoid using the trial itself as a vehicle for what should be pretrial deposition, discovery and settlement procedures." The transcript of the *Carlsson* trial shows that Ms. Huddle had failed to comply with the duties imposed upon her by the Sacramento County Local Rules of Court. Plain and simple Ms. Huddle was not prepared for trial. The rights of the *Carlsson* parties were not curtailed by any actions of Judge McBrien. In fact, he constantly urged the parties to proceed expeditiously in order to present the evidence within the time estimated for trial. It wasn't Judge McBrien who provided the trial estimate. It was the parties through their counsel. It was the duty of counsel to meet and confer before trial to streamline the presentation of evidence. The record shows that the parties and counsel did not adhere to their responsibility, thereby threatening the orderly flow of judicial administration, not just violating the Sacramento County Superior Court Local Rules of Court.

Judge McBrien denies that he was discourteous to Sharon Huddle during the course of the *Carlsson* trial. While the recitation to the words "This is not a law school class" is accurate, it is taken out of context and misleading within the allegation made. During the course of her direct examination of Donald Minkoff, Sharon Huddle stopped her direct questioning, turned to Judge McBrien and stated, "Your Honor, because you do judge demeanor and I want the Court could [sic] to be aware of Mr. Minkoff's condition so that, that can be factored —." [RT 373:27-374:2] In response to Ms. Huddle's

statement made directly to Judge McBrien, he responded, "Ma'am, move on with the questioning. This is not a law school class. Move on with the questioning. You don't have to explain every one of your motives." [RT 374:3-6]

In the context of the statement directed to the Court and Judge McBrien's response thereto, it is clear that Judge McBrien was not being discourteous to Sharon Huddle. She unnecessarily wanted Judge McBrien to understand the reasoning for inquiry into preliminary matters which she intended to pursue on demeanor issues. Judge McBrien correctly pointed out that, unlike situations where you need to explain motives, such as in law school, that explanation was not necessary in the courtroom, especially as a preliminary matter without objection by opposing counsel. The response was neither discourteous nor demeaning in the context of how it was made, especially in view of the fact that it was in response to a statement directed to Judge McBrien by Patricia Huddle.

B. ***County of El Dorado v. John Chardoul***

At the time of the *Chardoul* matter, and for many years before, Judge McBrien had been acting as supervising judge or the supervising judge responsible, in part, for the trial calendar and the settlement conference calendar of the Sacramento County Family Court. Requests for continuances of settlement conferences were fairly routine, as were requests to appear by telephone. Most continuance requests were made in person on the day of the settlement conference and most requests for appearance by phone at a settlement conference were made by completing a form created by the settlement conference department. These latter requests were typically never opposed and generally routinely granted for good cause. The underlying policy was to encourage participation in the process and generally those requesting participation by phone resided some

distance from the court. As an added protection, a party appearing at the settlement conference at which the other party is appearing by phone would have the opportunity to object at that time and request a continuance if needed or wanted.

In the *Chardoul* matter, the file reflects that Cynthia Galiano made a request to appear in a settlement conference by telephone. Ms. Galiano's return address on the request was in Hawaii. The request does not reflect a copy to anyone, including her attorney. Judge McBrien believes that the request was processed by the settlement department and presented to him for signature, which he then signed. It was never brought to Judge McBrien's attention by anyone at the time he signed the request that John Chardoul or his lawyer, Debra Eldridge, were not aware of Ms. Galiano's request.

Judge McBrien acknowledges that Local Rule 14.02 of the Sacramento County Rules of Court requires personal attendance at family law mandatory settlement conferences. However, the Court can exercise its discretion and relieve a party of personally attending the settlement conference as noted above. Admittedly, Judge McBrien did not advise John Chardoul or Debra Eldridge of the alleged ex parte request, because Judge McBrien did not know the request was made ex parte.

Whether or not Judge Sumner had previously considered and ruled upon a request by Ms. Galiano to appear by telephone is not reflected on Judge Sumner's Minute Order of July 17, 2006. The allegation that Judge Sumner already ordered the personal appearance of Ms. Galiano at an earlier hearing is not supported by the file, nor would Judge Sumner have reason to address the issue. He was not acting supervising judge at that time and thus was aware that this would be responsibility of the supervising judge.

C. *Dymora v. Dymora*

Other than the statement "She did not send a copy of her letter to respondent's counsel Debra Eldridge" regarding Donna T. DeCuir's letter submitting proposed findings in order after hearing, the allegations in this count are admitted. Judge McBrien does not know whether in fact a copy of the letter and proposed findings were sent to Ms. Eldridge by Donna DeCuir or not and at the time assumed that it had been. Upon review of the court file, the April 4, 2000 letter from attorney Donna DeCuir with her proposed order regarding the March 14, 2000 hearing did not have a "cc" to opposing counsel, Debra Eldridge. Ms. DeCuir's proposed order was apparently signed as a result of this communication. Admittedly, on April 19, 2000, Ms. Eldridge sent a letter to the court objecting to the order and the communication. Once the oversight was brought to Judge McBrien's attention, the DeCuir order was vacated and a corrected Order After Hearing was signed by Judge McBrien. In retrospect and based on further investigation, Judge McBrien acknowledges that the DeCuir communication was ex parte, assuming a copy had not gone to Ms. Eldridge, but at the time was unaware of the ex parte nature of the communication. Judge McBrien previously expressed a regret to the Commission that this ex parte communication occurred and pointed out that it was not intentional on his part and that prompt steps were taken to remedy the error when Ms. Eldridge brought the matter to Judge McBrien's attention.

Respectfully submitted,

DATED: October 10, 2008

MURPHY, PEARSON, BRADLEY & FEENEY

By _____
James A. Murphy
Attorneys for
HONORABLE JUDGE PETER J. MCBRIEN

VERIFICATION

I, PETER J. McBRIEN, declare that I am the Responding Judge in the instant inquiry. That I have read the foregoing RESPONDENT'S ANSWER TO NOTICE OF FORMAL PROCEEDINGS, and know the contents thereof. That I believe the same to be true, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

DATED: 10-10-08

PETER J. McBRIEN

CERTIFICATE OF SERVICE

I, Julie L. Mori, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is.

On October 10, 2008, I served the following document(s) on the parties in the within action:

RESPONDENT'S ANSWER TO NOTICE OF FORMAL PROCEEDINGS

Jack Coyle
Office of Trial Counsel
Commission on Judicial Performance
455 Golden Gate Avenue, Ste. 14400
San Francisco, CA 94102-3660

Janice Brickley
Commission on Judicial Performance
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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on October 10, 2008.

By _____
Julie L. Mori

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