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FILED

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**Commission on
Judicial Performance**

Attorneys for THE HONORABLE JOSEPH W. O'FLAHERTY

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**INQUIRY CONCERNING
JUDGE JOSEPH W. O'FLAHERTY**

NO. 188

**RESPONDENT'S ANSWER TO
NOTICE OF FORMAL
PROCEEDINGS**

Comes now the Respondent Judge Joseph W. O'Flaherty and responds to the Notice of Formal Proceedings as follows:

Judge O'Flaherty admits that on December 8, 2008 he presided over the small claims matter of *Scott Herold v. Golden One Credit Union, et al.* (No. RSC13621), but contends that Scott Herold's claim against the Credit Union was based upon alleged defamation. Judge O'Flaherty admits that two employees of the credit union, Cynthia Rapozo and Melissa Burgess, appeared on its behalf. Judge O'Flaherty admits that while neither Ms. Burgess nor Ms. Rapozo made "allegations that Mr. Herold had harassed or threatened them at the credit union" during the proceeding, Mr. Herold did demonstrate an intimidating and threatening manner, including the following exchange:

HEROLD: That's okay, Your Honor, you can do what you want to do. I'm here because I believe I'm right, but they're all under oath – they have to sleep with it at night. And that's fine with me. I mean, that's you know, the way I see it is that's the way these court systems are, you know. I'm one hundred percent right.

COURT: See, right now, see how you're getting emotional? You were getting emotional –

HEROLD: I'm not emotional, I feel like –

COURT: – with these people.

HEROLD: No, no. I'm just feeling that when I'm a hundred percent right, I've been in business for over 25 years. I'm one hundred right. You think I have all this time to waste, to go over something like this? I believe in my principles. You know, if it wasn't a big deal I wouldn't be here. You know.

COURT: Well, I think you –

HEROLD: I just think the difficulty that we have here, Golden One is the issue. Ms. Davis here I was going to have her as a witness, but this was the only way I could get her in here. But now that they're all working on one side against me, and that's what it looks like, I'm being taken over, when I'm not even in the wrong. So I mean, it doesn't matter at this point anymore. I've said my

piece, I feel that everything's vented out of me. I feel like I did the best that I can. I know I'm one hundred percent right, so whatever your decision you make, great. Fine, but they have to sleep with it, especially the one in the middle that's swearing under oath that never she never said anything.

COURT: Well, the only thing I could tell you, sir, is that you've got to prove your case aside from the way you feel.

HEROLD: Well, that's okay. I mean life goes on. Tomorrow's another day.

COURT: All right. If that's the way you want it.

HEROLD: No. Because you already have your mind made up. I can already feel that.

COURT: Pardon me?

HEROLD: I feel that your mind's already made up, Your Honor, I mean –

COURT: Well, I –

HEROLD: You tell me I can't prove my case, but you won't even let me. Three months. I can't even tell you my whole story and, you know, you threw my whole case. You blew it up, you know, so it's fine. I got my one hundred dollar satisfaction and lost business. I'm satisfied now. Okay? You can dismiss the case. I mean, that's – I just feel –

Judge O'Flaherty did dismiss the case, but it was done after Mr. Herold said, "You can dismiss the case." At the conclusion of the hearing, without any prompting, all three witnesses, Bonnie Davis, Ms. Burgess, and Ms. Rapozo, expressed concerns regarding Scott Herold. Ms. Rapozo referred to Mr. Herold as "a lunatic" and noted that "He's (Herold) come back in and tried to confront me before." And Ms. Davis noted that "I got a demand letter from him. I mean I was fearful to tell the bank anything because –."

There was no question but that all three women were concerned about possible intimidating and threatening actions by Scott Herold. Judge O'Flaherty did tell the bailiff to "Bring that guy back," but denies that "no case was pending against Mr. Herold" when he was

brought back into the courtroom. In fact, *Herold v. Golden One* was still pending at this time. Judge O'Flaherty had the authority to have the bailiff return Mr. Herold to the courtroom under the circumstances present here.

Judge O'Flaherty has no reason to believe that the recitation of what was stated upon Mr. Herold's return to the courtroom is inaccurate but can neither admit nor deny its accuracy based on the audiotape of the proceedings reviewed.

Judge O'Flaherty instructed the bailiff to return Mr. Herold to the courtroom because of immediate concerns for the physical wellbeing of the three female witnesses. It was late in the afternoon on December 8, 2008 and it was getting dark outside. Judge O'Flaherty wanted to make sure there would not be a confrontation between Mr. Herold and any of the witnesses in the parking lot or anywhere else around the building and so the instruction issued.

While the "small claims minutes" of the subject action are correctly recited by the Commission, the Notice of Entry of Judgment is different. Judge O'Flaherty did not prepare either the small claims minutes or the Notice of Entry of Judgment and does not believe he reviewed either document at any time until the Commission initiated its investigation into this matter.

Judge O'Flaherty does not believe he was issuing any type of restraining order against Scott Herold on December 8, 2008, but the admonishment he did give to Scott Herold was based on remarks and statements made during the course of the proceeding, as well as remarks and statements made after Mr. Herold's return to the courtroom.

When Judge O'Flaherty admonished Mr. Herold to avoid contact with any of the individuals participating in the hearing, he attempted to explain to Mr. Herold that a restraining order was not being issued. Rather, Judge O'Flaherty was attempting to avoid what he perceived to be the real possibility of harassment or even physical violence that Scott Herold would direct

at the individuals with the hope that the witnesses would be protected physically and emotionally without the need to have a petition for a restraining order and a formal restraining order issued.

DATED: February 22, 2010

Respectfully submitted,

MURPHY, PEARSON, BRADLEY & FEENEY

By:

A handwritten signature in black ink, appearing to read "James A. Murphy", written over a horizontal line.

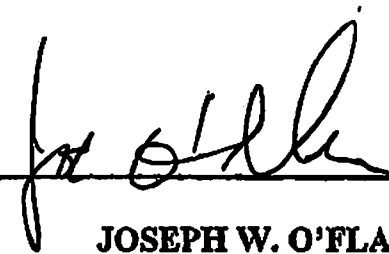
James A. Murphy

Attorneys for Honorable Joseph W. O'Flaherty

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VERIFICATION

I, **JOSEPH W. O'FLAHERTY**, declare that I am the Responding Judge in the instant inquiry. That I have read the foregoing ANSWER TO 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: 2/22/2010  _____
JOSEPH W. O'FLAHERTY

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 88 Kearny Street, 10th Floor, San Francisco, California 94108-5530.

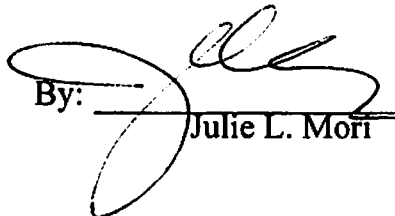
On February 22, 2010, I served the following document on the parties in the within action:

**ANSWER OF JUDGE JOSEPH W. O'FLAHERTY
TO FORMAL PROCEEDINGS**

BY HAND: The above-described document will be placed in a sealed envelope which will be hand-delivered on this same date by SPINCYCLE LEGAL SERVICES, addressed as follows:

Andrew Blum
Office of Trial Counsel
455 Golden Gate Avenue, Ste. 14424
San Francisco, CA 94102-3660

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 February 22, 2010

By:  _____
Julie L. Mori