

1 Daniel Rapaport (Bar No. 67217)
Thiele R. Dunaway (Bar No. 130953)
2 **WENDEL, ROSEN, BLACK & DEAN, LLP**
1111 Broadway, 24th Floor
3 Oakland, California 94607-4036
Telephone: (510) 834-6600
4 Fax: (510) 834-1928

5
6 Attorneys for Defendants
PACIFICA FOUNDATION,
7 DAVID ACOSTA, MARY FRANCES BERRY,
LYNN CHADWICK, VALRIE CHAMBERS,
8 ANDREA CISCO, ROBERT FARRELL, KEN FORD,
WENDELL JOHNS, BERTRAM LEE, BETH LYONS,
9 JUNE MAKELA, FRANK MILLSPAUGH,
JOHN MURDOCK, MICHEAL PALMER, and
10 KAROLYN VAN PUTTEN

11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 THE PEOPLE OF THE STATE OF
16 CALIFORNIA, ex rel. CAROL SPOONER,
et al.,

17 Plaintiffs,

18 vs.

19 PACIFICA FOUNDATION, a California
20 non-profit public benefit corporation and
charitable trust, et al.,

21 Defendants.
22
23

Case No. C 00 3815 MJJ

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION
TO MOTION TO DISQUALIFY
WENDEL, ROSEN, BLACK &
DEAN, LLP AS DEFENDANTS'
COUNSEL**

Date: January 9, 2001
Time: 9:30 a.m.
Courtroom: 11
Judge: Hon. Martin J. Jenkins

TABLE OF AUTHORITIES

Federal Cases

Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3d Cir. 1993)6, 7

Clark v. Lomas & Nettleton Fin. Corp., 79 F.R.D. 658
(N.D. Tex. 1978)11

GATX/Airlog Co. v. Evergreen Intern. Airlines, 8 F.Supp.3d 1182
(N.D.Cal. 1998)3

State Cases

Eldridge v. Tymshare, Inc., 186 Cal.App.3d 767,
230 Cal.Rptr. 815 (1986)7, 8

Forrest v. Baeza, 58 Cal.App.4th 65,
67 Cal.Rptr.2d 857 (1997)6, 8

Gaillard v. Natomas Co., 208 Cal.App.3d 1250,
256 Cal.Rptr. 702 (1989)11

In re Complex Asbestos Litigation, 232 Cal.App.3d 572,
283 Cal.Rptr. 732 (1991)3, 4

People v. Milk Producers Assn., 60 Cal.App.439 (1923)4

People v. Petroleum Rectifying Co., 21 Cal.App.2d 289 (1937)4

People v. Reclamation Dist. No. 108, 169 Cal. 786,
147 P. 1176 (1915)5

Responsible Citizens v. Superior Court, 16 Cal.App.4th 1717,
20 Cal.Rptr.2d 756 (1993)8, 11

Schmidt v. Magnetic Head Corp., 468 N.Y.S.2d 649,
97 A.D.2d 151 (1983)6, 7

*Tsakos Shipping & Trading, S.A. v. Juniper
Garden Town Homes, Ltd.*, 12 Cal.App.4th 74,
15 Cal.Rptr.2d 585 (1993)9

William H. Raley Co. v. Superior Court, 149 Cal.App.3d 1042,
197 Cal.Rptr.232 (1983)3

Wendel Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

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Statutes

California Corporations Code §5047.5	10
California Corporations Code §5231... ..	10
California Corporations Code §5238... ..	10

Rules

California Rules of Professional Conduct, Rule 3-310	8, 9
California Rules of Professional Conduct, Rule 3-310 (B).....	8
California Rules of Professional Conduct, Rule 3-310 (C).....	8
California Rules of Professional Conduct, Rule 3-600).....	8

Other

12 Ops. Cal. Atty. Gen. 340 (1949)	5
72 Ops. Cal. Atty. Gen. 8 (1989)	4, 5
72 Ops. Cal. Atty. Gen. 15 (1989)	5
Cal. State Bar Formal Opn. No. 1999-153	9

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

1 **I. INTRODUCTION**

2 While issues of national politics may well be determined by the courts in Florida,
3 politics of a more parochial nature have brought this case to this Court. When this action
4 is evaluated dispassionately on its facts and the law--far removed from the protests in the
5 streets of Berkeley and the political rhetoric--it will be obvious that there is no viable
6 legal claim requiring judicial remedy. The California Attorney General's office, which as
7 an elective office is not immune from political pressure, became involved only at the
8 instance of the relators, who have also trumpeted their complaints before the City of
9 Berkeley's City Council, a California legislative committee, on the Internet, and on the
10 airwaves. Thus, in pursuing their crusade, the relators, or "listener-sponsors" as they
11 refer to themselves in the complaint, have assembled an array of forces against, and have
12 attacked Pacifica Foundation, a nonprofit public benefit corporation of limited means, and
13 its volunteer, uncompensated directors on a number of fronts.

14 The latest volley in this assault on Pacifica is the present effort to deprive Pacifica
15 of its legal counsel and to compel the volunteer directors to incur the burden and expense
16 of obtaining their own separate counsel. Relators' motion to disqualify Wendel, Rosen,
17 Black & Dean, LLP should be denied for several reasons: (1) this is not a shareholder's
18 derivative action, but rather a *quo warranto* action brought in the name of the State of
19 California against Pacifica and its directors; (2) the action does not allege any claims
20 against the directors for fraud, self-dealing or similar malfeasance, and the interests and
21 positions of Pacifica and the director defendants are not in conflict; (3) even if there were
22 a potential conflict, Wendel, Rosen has made the necessary disclosures and obtained the
23 consent of Pacifica's Executive Director and of the individual director defendants¹; and

24 ¹ In addition to representing Pacifica Foundation and former Executive Director Lynn
25 Chadwick, Wendel, Rosen represents Pacifica directors David Acosta, Dr. Mary Frances
26 Berry, Valrie Chambers, Andrea Cisco, Robert Farrell, Ken Ford, Wendell Johns,
27 Bertram Lee, Beth Lyons, June Makela, Frank Millspaugh, John Murdock, Micheal
28 Palmer and Karolyn Van Putten, who collectively are referred to herein as the "director
defendants." Relator's motion to disqualify is silent on Wendel, Rosen's representation
of Ms. Chadwick, a former employee of Pacifica. In the event the motion also applies to
her, the arguments set forth herein opposing the motion apply to her as well.

1 (4) if relators' unprecedented effort to disqualify Pacifica's counsel were successful, it
2 would raise significant public policy concerns and would have a chilling effect on the
3 ability of nonprofit corporations and other charitable organizations to attract and retain
4 volunteer directors. The motion to disqualify Wendel, Rosen should therefore be denied.²
5

6 II. FACTUAL BACKGROUND

7 Prior to the filing of the action styled *Adelson, et al. v. Pacifica Foundation, et al.*
8 in mid-1999, Wendel, Rosen had never represented Pacifica or any of its officers or
9 directors. (See, Declaration of Daniel Rapaport ("Rapaport Decl.") filed herewith, ¶ 2.)
10 After the *Adelson* complaint was filed, Wendel, Rosen was retained by the Executive
11 Director of Pacifica, Lynn Chadwick ("Chadwick"), to represent Pacifica. (*Id.*; see also,
12 Declaration of Lynn Chadwick ("Chadwick Decl.") filed herewith, ¶ 3.) Chadwick
13 agreed that Wendel, Rosen should also represent the individual Pacifica directors who
14 had been named as defendants in that action. (*Id.*)

15 When Carol Spooner and the other proposed relators applied to the Attorney
16 General for leave to sue in *quo warranto* in November 1999, Chadwick retained Wendel,
17 Rosen to represent Pacifica in that proceeding. (Rapaport Decl. at ¶3; Chadwick Decl. at
18 ¶ 3.) She also agreed that Wendel, Rosen should represent the individual directors who
19 had been named as proposed defendants. (*Id.*) Chadwick was not named as a defendant
20 in the original proposed complaint submitted by Spooner to the Attorney General. (*Id.*)
21 At no time prior to the filing of the present motion to disqualify, did Spooner or the other
22

23 ² It is important to note that in their motion to disqualify, relators at times generalize and
24 lump together allegations and assertions with respect to Wendel, Rosen, and Pacifica's
25 other counsel of record, Epstein Becker & Green, P.C. ("Epstein Becker"). For example,
26 on page 4 (lines 6-7) of their memorandum relators assert that "Ms. Wash hired EB&G
27 and WRD&B [*sic*] without the knowledge or approval of at least some of the Directors."
28 In making this assertion, relators cite to the purported transcript of the September 17,
2000 board meeting attached as an exhibit to the Declaration of Gary Evans. As set forth
in the Objections To Relators' Evidence filed herewith, defendants object to this
purported transcript on evidentiary grounds. However, even if this transcript were
admissible, it shows that the discussion at the September 17, 2000 meeting pertained only
to retention of the Epstein Becker firm and not Wendel, Rosen.

1 relators object to Wendel, Rosen's representation of Pacifica and the director defendants.
2 (Rapaport Decl., ¶ 3)

3 This *quo warranto* action was filed on September 15, 2000. The current Executive
4 Director of Pacifica, Bessie Wash ("Wash"), retained Wendel, Rosen to represent Pacifica
5 in the action. (Rapaport Decl., ¶ 4.) Wash also agreed that Wendel, Rosen should
6 represent those Pacifica directors who had been named as defendants in the action, who
7 had no conflict of interest with Pacifica. (*Id.*) On or about September 29, 2000, Rapaport
8 made written disclosures to the defendants and discussed issues of conflicts of interest
9 and representation. (*Id.* at ¶ 5.) Subsequently, Wendel, Rosen has been asked in writing
10 to represent each of the director defendants in this action. (*Id.*) Wendel, Rosen's
11 representation of directors does not extend to those directors whose interests appear to be
12 aligned with the relators herein. (*Id.* at ¶¶ 6-9.)

13 III. LEGAL DISCUSSION

14 A. In Determining A Motion To Disqualify Counsel, A Court 15 Must Carefully Balance Competing Interests

16 In light of a party's basic right to be represented by counsel of its choice, a court
17 must be circumspect in deciding a motion to disqualify. There are a number of factors
18 that require consideration.

19 The court must weigh the combined effect of a party's right to
20 counsel of choice, an attorney's interest in representing a client, the
21 financial burden on a client of replacing disqualified counsel and any
22 tactical abuse underlying a disqualification proceeding against the
23 fundamental principle that the fair resolution of disputes within our
24 adversary system requires vigorous representation of parties by
25 independent counsel unencumbered by conflicts of interest.

26 *William H. Raley Co. v. Superior Court*, 149 Cal.App.3d 1042, 1048, 197 Cal.Rptr. 232
(1983); *see also, In re Complex Asbestos Litigation*, 232 Cal.App.3d 572, 586, 283
27 Cal.Rptr. 732 (1991).³ These factors are particularly important in this case, where the

28 ³ The Northern District applies the ethics rules of California. *GATX/Airlog Co. v. Evergreen Intern. Airlines*, 8 F.Supp.3d 1182, 1184 (N.D.Cal. 1998).

1 relators are seeking to disqualify the counsel of a nonprofit corporation and its volunteer
2 directors. Disqualification must be evaluated on a case-by-case basis. *In re Complex*
3 *Asbestos Litigation*, 232 Cal.App.3d at 601. As is discussed in greater detail below, there
4 is no potential or actual conflict of interest between Pacifica and the Director Defendants,
5 and, as a result, defendants' right to their choice of counsel and the financial burden on
6 Pacifica and the director defendants to replace any disqualified counsel far outweighs
7 competing considerations. Therefore, the motion to disqualify as to Wendel, Rosen
8 should be denied.

9 **B. This Action Is Not A Shareholder's Derivative Action,**
10 **But Rather A *Quo Warranto* Action Brought In The**
11 **Name Of The State**

12 Relators' motion to disqualify relies, in large part, on their attempt to portray this
13 action as being analogous to a shareholder's derivative action. Relators repeatedly assert
14 that it is *Pacifica* that will benefit from this proceeding, and, therefore, they contend there
15 is a purported conflict between Pacifica and its directors. However, relators' reliance on
16 cases involving conflicts of interest in shareholders' derivative actions is misplaced. A
17 brief review of the nature of a *quo warranto* proceeding demonstrates that this action is
18 brought in the name of the People of the State of California against Pacifica and its
19 directors and is brought to serve the public interest, not the interests of the relators or of
20 Pacifica.

21 "Quo warranto actions are commenced in the interest of the public to redress
22 wrongs that injure the public." 72 Ops. Cal. Atty. Gen. 8, 9 (1989). While the action
23 may have been filed at the instigation of the relators, it is in fact an action by the people.
24 *People v. Milk Producers Assn.*, 60 Cal.App.439, 442 (1923). "The complaint in this case
25 designates the people as the plaintiff; it is the people who complain; the wrongs
26 complained of are of public concern". *Id.* The fact that the relators are also named in the
27 complaint does not convert the action into a private one. *People v. Petroleum Rectifying*
28 *Co.*, 21 Cal.App.2d 289, 291 (1937). "[S]uch an action may be brought and maintained
only by the attorney-general in the name of the people of the state and the relators are not

1 'parties' to the action." *People v. Reclamation Dist. No. 108*, 169 Cal. 786, 786, 147 P.
2 1176 (1915). The focus is on whether some public interest, rather than a private one, will
3 be served. 72 Ops. Cal. Atty. Gen. at 9.

4 This action is like any third party action against the corporation and the directors,
5 and the interests of the corporation and the defendant directors are aligned against this
6 challenge. As with any such action, this suit is brought to remedy injury to the plaintiff
7 (here, the People), and not to the defendant.⁴ Pacifica is not a "nominal" defendant in this
8 proceeding--it is the main defendant.

9
10 **C. There Is No Conflict Between Pacifica And The Defendant
Directors That Requires Disqualification Of Wendel, Rosen**

11 Even if the Court were to determine that this *quo warranto* action was analogous
12 to a shareholder's derivative action, in light of the allegations of the complaint and the
13 particular circumstances of this case, disqualification is not required, because there are no
14 allegations of fraud, self-dealing or similar malfeasance by the director defendants.
15 Although relators cite several state and federal cases involving disqualification of counsel
16 in shareholder derivative actions, each of the cases in which counsel was disqualified
17 involved allegations of fraud, self-dealing or similar intentional misconduct by the
18 directors or officers. However, the courts have drawn a distinction between such
19 misconduct, which constitutes a breach of the duty of loyalty owed to the corporation, and
20 that of a director's mismanagement or negligence, which constitutes a breach of the duty

21
22 ⁴ The fact that the Attorney General granted leave to sue in *quo warranto* is not a
23 determination of the merits by the Attorney General. 72 Ops. Cal. Atty. Gen. 15, 19
(1989).

24 "[I]n acting upon an application for leave to sue in the name of the people of the State, it
25 is not the province of the Attorney General to pass upon the issues in controversy, but
26 rather to determine whether there exists a state of facts or question of law that should be
27 determined by a court in an action *quo warranto*; that the action of the Attorney General is
28 a preliminary investigation, and the granting of leave is not an indication that the position
taken by the relator is correct, but rather that the question should be judicially determined
and that *quo warranto* is the only proper remedy." 12 Ops. Cal. Atty. Gen. 340, 341
(1949). The Attorney General is afforded broad discretion in determining whether to
grant leave to sue. 72 Ops. Cal. Atty. Gen. at 20.

1 of care owed to the corporation. *See, e.g., Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304,
2 1316-1317 (3d Cir. 1993). In *Bell Atlantic*, the Third Circuit affirmed the district
3 court's decision not to disqualify counsel from representing both the corporation and the
4 directors in a shareholder's derivative action. The Court of Appeal concluded:

5 We believe serious charges of wrongdoing have not been levelled
6 against the individual defendants. We say this because plaintiffs
7 have alleged only mismanagement, a breach of the fiduciary *duty of*
8 *care*. . . . But we do not understand plaintiffs to have accused
9 defendants of breaching their *duty of loyalty* which requires a
10 director to act in good faith and in the honest belief that the action
11 taken is in the corporation's best interest. . . . There are no
12 allegations of self-dealing, stealing, fraud, intentional misconduct,
13 conflicts of interest, or usurpation of corporate opportunities by
14 defendant directors.

15 *Id.* at 1316 (emphasis added by court).

16 This distinction was recently recognized in California as well. In *Forrest v. Baeza*,
17 58 Cal.App.4th 65, 67 Cal.Rptr.2d 857 (1997) the court of appeal addressed the issue of
18 dual representation of directors and the corporation in a shareholder derivative action.
19 That case involved an action by one of the three directors of two closely held corporations
20 against the corporations and the other two directors, alleging that the directors had
21 embezzled funds from the corporations and committed other malfeasance. *Id.* at 69-70.
22 The plaintiff director filed a motion to disqualify the attorney representing the
23 corporations and the two director defendants, on the ground that the directors'
24 embezzlement, tax fraud and other crimes created "an actual conflict of interest between
25 the [directors] and the corporations that could not be waived." *Id.* at 70.

26 In affirming the trial court's decision to disqualify the attorney from representing
27 the corporations based on the conflict of interest, the appellate court stated: "Current case
28 law clearly forbids dual representation of a corporation and directors in a shareholder
derivative suit, at least where, as here, the directors are alleged to have committed fraud."
Id. at 74.

Similarly, *Schmidt v. Magnetic Head Corp.*, 468 N.Y.S.2d 649, 97 A.D.2d 151
(1983), concerned an action by minority shareholders against the majority shareholders

1 and the corporation to enforce a purported right to designate a successor to a director.
2 The minority shareholders moved to disqualify the law firm representing both the
3 corporation and the director defendants. *Schmidt*, 468 N.Y.S.2d at 657. In denying the
4 motion, the court noted that this “action involving the rights of competing stockholder
5 factions to select a corporate director” was “[u]nlike a derivative suit, where an adverse
6 interest generally exists between a corporation and its directors” *Id.*

7 As in *Bell Atlantic*, here there are no allegations that the directors committed fraud,
8 engaged in self-dealing or otherwise abused their control by placing their interests above
9 those of the corporation. In parsing the allegations of the complaint, after disregarding
10 the irrelevant partisan rhetoric, it is apparent that in the complaint the principal allegations
11 of wrongdoing against the directors are that out of fear of losing funding from the
12 Corporation for Public Broadcasting (“CPB”), or in an effort to obtain additional CPB
13 funding, the directors began changing programming on Pacifica’s radio stations.
14 (Complaint, ¶19) As part of this “conspiracy” the directors voted to amend the bylaws
15 and expanded the number of at-large directors. (Compl. ¶¶ 22-24, 35-36) The complaint
16 also alleges that defendants’ practices are “defective,” because they are done “without a
17 modicum of due process.” (Compl. ¶ 43). Apart from alleging the general legal
18 conclusions that defendants “conspired together in bad faith” to violate the purposes of
19 Pacifica and the charitable trust, and that they “acted in a manner contrary to the best
20 interests of the corporation,” there are no allegations of fraudulent or intentional
21 misconduct against defendants.

22 The relators have failed to satisfy their pleading burden to overcome the
23 presumption given by the business judgment rule that the actions taken by the Board were
24 taken in good faith and in the belief the actions were taken in Pacifica’s best interests.
25 *See, Eldridge v. Tymshare, Inc.*, 186 Cal.App.3d 767, 776, 230 Cal.Rptr. 815 (1986). The
26 business judgment rule creates a rebuttable presumption that the directors’ decisions are
27 based on sound business judgment. *Id.* As a result, anyone challenging a director’s
28 decision is required to assert “specific allegations of malfeasance or bad faith. Where an

1 improper motive is claimed, plaintiff must allege that it was the sole or primary reason for
2 the directors' actions." *Id.* at 777.

3 Relators' general and conclusory allegations fail to satisfy this burden.

4
5 **D. Even If There Were A Potential Conflict Between Pacifica
6 And The Director Defendants, Wendel, Rosen Has Made
7 The Requisite Disclosures**

8 Rule 3-600(E) of the California Rules of Professional Conduct expressly permits
9 an attorney to represent both a corporation and its directors and officers (subject to Rule
10 3-310). *See, e.g., Responsible Citizens v. Superior Court*, 16 Cal.App.4th 1717, 1731, 20
11 Cal.Rptr.2d 756 (1993) (Rule 3-310 "also make clear that concurrent representation of the
12 partnership and one or more of the partners is possible subject to the conflict of interest
13 rules.") Rule 3-310(B) provides that an attorney shall not accept representation of a client
14 "without providing written disclosure to the client" when the attorney has a "legal,
15 business, financial, professional, or personal relationship with a party" in the same matter.
16 Rule 3-310(C) requires that when there is a potential or actual conflict of interest between
17 clients in the same matter, an attorney must obtain the informed written consent of each
18 client.

19 Wendel, Rosen had not represented Pacifica or any of its directors or officers prior
20 to its retention as counsel for Pacifica in the *Adelson* action in or about July 1999.
21 That is, Pacifica retained independent counsel. In the present action, Wendel, Rosen was
22 retained to represent Pacifica by Pacifica's current Executive Director, Bessie Wash, who
23 has not been named as a defendant. Wash also agreed that Wendel, Rosen should
24 represent those individual directors whose interests are aligned with and not adverse to
25 Pacifica.⁵

26 ⁵ Note that in shareholder derivative cases such as *Forrest v. Baeza*, 58 Cal.App.4th at 76,
27 which found that a conflict of interest between a corporation and some of its directors
28 could not be waived by the same directors involved in the conflict are not applicable here.
In this instance, the Executive Director, who is neither a director nor a named defendant,
but who has full authority to hire legal counsel for Pacifica, made the decision to retain
Wendel, Rosen to represent Pacifica and also agreed that Wendel, Rosen should represent
the director defendants. Where an independent third party waives the conflict on behalf

1 In order to determine whether there is a potential or actual conflict of interest, an
2 attorney must evaluate whether any of the following six potential conflict situations exist
3 or may arise during representation:

4 (1) conflicting instructions from the clients in which the lawyer
5 cannot follow one client's instruction without violating another
6 client's instruction; (2) conflicting objectives of the clients in which
7 the lawyer cannot effectively advance one client's objective without
8 detrimentally affecting another client's objective; (3) advocacy of
9 antagonistic positions of the clients in which the lawyer is called on
10 to advocate both sides of a negotiation or a legal position at the same
11 time; (4) inconsistent expectations of confidentiality in which one
12 client expects the lawyer not to disclose information the lawyer
13 would be required to impart to the other client; (5) a preexisting
14 relationship with one client that would adversely affect the lawyer's
15 independent judgment on behalf of the other client; and (6)
16 conflicting demands by the clients for the original file once the
17 representation has ended.

18 Cal. State Bar Formal Opn. No. 1999-153. If one or more of these factors are
19 'reasonably possible,' a potential conflict exists. *Id.*

20 Wendel, Rosen assessed these factors with respect to the positions of Pacifica and
21 each of the director defendants, and determined that no actual or potential conflict existed
22 or would potentially arise during representation. (*See*, Rapaport Decl., ¶ 5.) In any event,
23 Wendel, Rosen has obtained the written consent of the defendants with respect to
24 representation in this matter. Wendel, Rosen sent a written disclosure to the directors
25 regarding Wendel, Rosen's representation of Pacifica. Each of the directors who are
26 aligned with the interests of Pacifica, have consented to Wendel, Rosen's representation
27 of them.

28 In sum, an attorney may concurrently represent two parties in the same action so
long as they do not have opposing interests in the lawsuit that would require the attorney
to advance those divergent interests simultaneously. *Tskanos Shipping & Trading, S.A. v.*
Juniper Garden Town Homes, Ltd., 12 Cal.App.4th 74, 95-96, 15 Cal.Rptr.2d 585 (1993);
see also, Cal. State Bar Formal Opn. No. 1999-153.

of the corporation, such waiver under Rule 3-310 is effective.

1 **¶E. Depriving Uncompensated Volunteer Directors Of Their Counsel**
2 **Would Impede The Public Policy Of Encouraging Persons To Serve**
3 **As Directors Of Nonprofit Corporations And Charitable Organizations**

4 The California Legislature has expressly recognized that public policy is promoted
5 by providing special protection from liability to volunteer directors of nonprofit
6 corporations who serve without compensation. Corporations Section 5047.5(a) provides
7 in part:

8 The Legislature finds and declares that the services of directors and
9 officers of nonprofit corporations who serve without compensation
10 are critical to the efficient conduct and management of the public
11 service and charitable affairs of the people of California. The
12 willingness of volunteers to offer their services has been deterred by
13 a perception that their personal assets are at risk for these activities. .
14 . . It is the public policy of this state to provide incentive and
15 protection to the individuals who perform these important functions.

16 Not only do a number of provisions of the California Corporations Code exempt
17 such volunteers from liability (so long as they act in good faith and in what they believe
18 to be the best interests of the corporation), but also the Code permits a nonprofit
19 corporation to indemnify such directors against claims by third parties. *See, e.g.,* Cal.
20 Corp. Code § 5238. One means of promoting these policies is for a nonprofit corporation,
21 which often is operating with limited financial means, to provide a joint defense to its
22 uncompensated directors who have been named as co-defendants with the corporation.

23 Relators seek to undermine these statutory protections by attempting to
24 manufacture a purported conflict of interest between Pacifica and its director defendants.
25 Permitting relators to interfere with Pacifica's choice of counsel, particularly since
26 relators did not object until nearly a year after relators were aware of the dual
27 representation by Wendel, Rosen, would have a chilling effect on attracting people to
28 serve as uncompensated, volunteer directors in nonprofit corporations and other
charitable organizations.

The public policy of California with respect to volunteer directors is reflected in
Section 5231 of the Corporations Code, which provides that any person who performs the

1 duties of director "in good faith, in a manner such director believes to be in the best
2 interests of the corporation and with such care, including reasonable inquiry, as an
3 ordinarily prudent person in a like position would use under similar circumstances," then
4 that person "shall have no liability based upon any alleged failure to discharge the
5 person's obligations as a director, including . . . any actions or omissions which
6 exceed or defeat a public or charitable purpose to which a corporation, or assets
7 held by it, are dedicated." (Emphasis added.)⁶

8 It would be manifestly unfair to allow relators to deprive Pacifica and its directors
9 of their chosen legal counsel, based on the general and conclusory allegations contained
10 in the complaint. Even if this were a shareholder's derivative suit, relators' allegations
11 fail to satisfy the burden of overcoming the business judgment presumption.⁷

12 In sum, the Court should consider all of the factors in this action, including the
13 relators' delay in objecting to the dual representation by Wendel, Rosen; the fact that
14 disqualification motions are too often used as a litigation tactic to gain an advantage over
15 an opponent; and the financial burden disqualification will impose on the individual
16 directors if they are compelled to retain their own attorneys or on Pacifica if it is required
17 to provide separate litigation counsel for the director defendants. *See, Responsible*
18 *Citizens v. Superior Court*, 16 Cal.App.4th 1717, 1725, 20 Cal.Rptr.2d 756 (1993).

19
20
21
22 ⁶ This section is the nonprofit corporation's counterpart to Corporations Code Section
23 309, in which the California Legislature codified the business judgment rule for
corporations generally. *Gaillard v. Natomas Co.*, 208 Cal.App.3d 1250, 1264, 256
Cal.Rptr. 702 (1989).

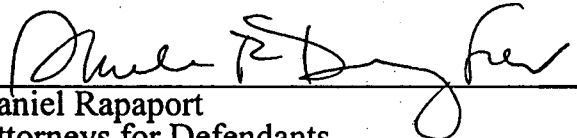
24 ⁷ Moreover, any disqualification at this juncture is premature, as defendants have filed a
25 motion to dismiss the entire action. At this stage of the proceedings, there is no conflict
26 between Pacifica and the director defendants. *See, e.g., Clark v. Lomas & Nettleton Fin.*
27 *Corp.*, 79 F.R.D. 658, 661 (N.D.Tex. 1978) ("At this stage of the proceedings when the
28 court must make a determination on whether as a matter of law the defendants should be
in the lawsuit, unless it can be shown that an actual conflict exists or that certain
confidences are being jeopardized, I think the client's right to select the counsel of his
choice outweighs any potential conflict of interest.")

1 **IV. CONCLUSION**

2 The interests of Pacifica and the director defendants are wholly aligned in this
3 case, and there is no actual or potential conflict of interest between them that would
4 warrant disqualification of Wendel, Rosen. Moreover, Wendel, Rosen has made
5 necessary disclosures and obtained the informed consent of all of the defendants it
6 represents. Under the circumstances, and particularly in light of the financial hardship it
7 would impose on both the directors and on Pacifica if they were required to retain new
8 and separate counsel, the motion to disqualify Wendel, Rosen should be denied.

9
10 Dated: November 21, 2000

11 WENDEL, ROSEN, BLACK & DEAN, LLP

12
13 By 
14 Daniel Rapaport
15 Attorneys for Defendants
16 Pacifica Foundation, et al.

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Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036