

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

5 Daly D.E. Temchine (Pro Hac Vice) (District of Columbia Bar No. 237057)  
James F. Peterson (Pro Hac Vice) (District of Columbia Bar No. 450171)  
6 **EPSTEIN BECKER & GREEN, P.C.**  
1227 25<sup>th</sup> Street, NW  
7 Washington, DC 20037  
Telephone: (202) 861-0900  
8 Facsimile: (202) 296-2882

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

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF ALAMEDA

14 THE PEOPLE OF THE STATE OF ) CASE NO. 831252-3  
CALIFORNIA, ex rel. CAROL SPOONER, )  
15 KURT GUERDRUM, ARTURO GRIFFITHS, )  
AMBURN H. HAGUE, LEIGH HAUTER, )  
16 PATRICIA HEFFLEY, BARBARA )  
MacQUIDDY, RICK POTHOFF, CHARLES )  
17 P.H. SCURICH, RONALD SWART, individually )  
and on behalf of PACIFICA FOUNDATION, )  
18 )  
Plaintiffs, )  
19 )  
v. )  
20 )

Date: April 10, 2001  
Time: 9:00 a.m.  
Department: 31  
Name of Judge: Judith D. Ford

21 PACIFICA FOUNDATION, a California  
nonprofit public benefit corporation and  
charitable trust, MARY FRANCES BERRY,  
22 JUNE MAKELA, FRANK MILLSPAUGH,  
ANDREA CISCO, KEN FORD, ROB  
23 ROBINSON, DAVID ACOSTA, MICHAEL  
PALMER, ROBERT FARRELL, AARON  
24 KRIEDEL, PETER BRAMSON, KAROLYN  
VAN PUTTEN, TOMAS MORAN, WENDELL  
25 JONES, LESLIE CAGAN, VALRIE  
CHAMBERS, BERTRAM LEE, BETH LYONS,  
26 JOHN MURDOCK, LYNN CHADWICK, and  
DOES 1-100, inclusive,  
27  
28 Defendants.

**TABLE OF CONTENTS**

1

2 I. INTRODUCTION ..... 1

3 II. PLAINTIFFS DO NOT MEET THE STANDARD FOR ISSUANCE OF A

4 PRELIMINARY INJUNCTION. .... 1

5 III. PLAINTIFFS HAVE NOT SHOWN ANY EVIDENCE OF LIKELY

6 IRREPARABLE HARM. .... 3

7 IV. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE

8 MERITS..... 5

9 A. The LABs Never had the Right to Elect Directors and, Therefore, Never Were

10 “Members” of the Foundation. .... 5

11 B. The Board is Not Limited to Five Members..... 7

12 C. Plaintiffs’ Other Claims that Board Directors are Improperly Seated are Invalid..... 8

13 D. Plaintiffs Lack Authority to Proceed *Quo Warranto* Because the Complaint Filed is

14 Substantially Different From the One Authorized by the Attorney General..... 9

15 E. The Board’s Actions are Protected by the Business Judgment Rule..... 9

16 F. The Attorney General Cannot Grant Relator Status for Most of the Types of Claims

17 Brought. .... 10

18 G. Plaintiffs’ Claims Against the Individual Defendants Will Fail as the Plaintiffs Did

19 Not, Prior to Filing this Action, File a Verified Petition Seeking Judicial Leave to

20 Proceed Against Those Defendants. .... 11

21 H. Plaintiffs’ Claims Will Fail On the Merits for Additional Reasons. .... 11

22 V. PLAINTIFF’S FOLLOWERS ARE CAUSING IRREPARABLE HARM TO

23 THE FOUNDATION..... 12

24 VI. A SIGNIFICANT BOND SHOULD BE REQUIRED IF THE INJUNCTION IS

25 GRANTED. .... 13

26

27

28 VII. CONCLUSION..... 13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*In re Silicon Graphics Inc. Sec. Litig. v. McCracken*, 183 F.3d 970 (9th Cir. 1999) .....9

**STATE CASES**

*Abrams v. St. John's Hosp. and Health Ctr.* (1994) 25 Cal. App. 4th 628 .....1

*Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal. App. 4th 365 .....9

*California Corr. Peace Officers Assoc. v. California* (2000) 82 Cal. App. 4th 294 .....1

*Casitas Inv. Co. v. Charles L. Harney, Inc.* (1962) 203 Cal. App. 2d 811 .....13

*KGB, Inc. v. Giannoulas* (1980) 104 Cal. App. 3d 844 .....2

*Loder v. City of Glendale* (1989) 216 Cal. App. 3d 777 .....3

*New Tech Developments v. Bank of Nova Scotia* (1987) 191 Cal. App. 3d 1065 .....2

*People v. Kelley* (1977) 70 Cal. App. 3d 418 .....2

*Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.* (1994)  
23 Cal. App. 4th 1459 .....1,3

**FEDERAL STATUTES**

Public Broadcasting Act, 47 U.S.C. § 396 .....11

**STATE STATUTES AND REGULATIONS**

Cal. Civ. Proc. Code § 425.15 .....11

Cal. Civ. Proc. Code § 529 .....13

Cal. Civ. Proc. Code § 803 .....9, 10

Cal. Corp. Code § 5036 .....6

Cal. Corp. Code § 5047.5 .....11

1	Cal. Corp. Code § 5142 .....	10
2	Cal. Corp. Code § 5151(a) .....	8
3	Cal. Corp. Code § 5223 .....	10
4	Cal. Corp. Code § 5239 .....	11
5	Cal. Corp. Code § 5250 .....	10
6	Cal. Corp. Code § 5520 .....	10
7	Cal. Corp. Code § 6336 .....	11
8	Cal. Corp. Code § 9000 .....	7
9	Cal. Corp. Code §§ 9913(a) .....	8
10	Cal. Corp. Code § 9915(a) .....	8
11	Cal. Gov't Code § 12580 .....	10
12	Cal. Gov't Code § 12591 .....	10
13	Cal. Gov't Code § 12598 .....	10
14	Cal. Code Regs. tit. 11, §§ 1-11 .....	10
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **I. INTRODUCTION**

2 Plaintiffs again are before this Court seeking injunctive relief with nothing other than  
3 unsubstantiated rumors, hearsay, multiple hearsay and untenable legal grounds to support their  
4 demand. Since this Court denied Plaintiffs' request for a Temporary Restraining Order ("TRO"),  
5 none of the irreparable harm then predicted by Plaintiffs has occurred. (See Reporter's  
6 Transcript of Proceedings, March 1, 2001, at 7:9-10.) As Defendants accurately represented to  
7 the Court at the TRO hearing, none of the grievous acts the Court was assured by Plaintiffs  
8 would occur at the recent meeting of the Foundation's Board of Directors took place. Nor do  
9 Plaintiffs have a scintilla of credible evidence that any such acts are likely to occur in the near  
10 future, or at any time.

11 Plaintiffs have not established the requisite elements for injunctive relief. They have  
12 completely failed to demonstrate that they will suffer any harm if a preliminary injunction does  
13 not issue. In contrast, it is the Foundation that would suffer significant harm if an injunction  
14 were to issue. Moreover, Plaintiffs have not shown any likelihood that they will prevail on the  
15 merits. Accordingly, Plaintiffs' motion for preliminary injunctive relief should be denied.

16  
17 **II. PLAINTIFFS DO NOT MEET THE STANDARD FOR ISSUANCE OF A  
18 PRELIMINARY INJUNCTION.**

19 In determining whether or not to issue a preliminary injunction, a trial court must  
20 evaluate two interrelated factors. The first factor is the likelihood that the plaintiff will prevail  
21 on the merits at trial. *Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.*  
22 (1994) 23 Cal.App.4th 1459, 1470-71. The second factor is the interim harm the plaintiff would  
23 be likely to suffer if the injunction were denied balanced against the harm that the defendant  
24 would suffer if the injunction were granted. In balancing the respective equities of the parties, a  
25 court must determine whether, pending a trial on the merits, the defendant should or should not  
26 be restrained from exercising any rights it claims to have. *Id.*; *California Correctional Peace*  
27 *Officers Assoc. v. California* (2000) 82 Cal.App.4th 294, 307; *Abrams v. St. John's Hosp. and*  
28 *Health Ctr.* (1994) 25 Cal.App.4th 628, 636.

1           In this case, Plaintiffs seek to have this Court issue an order effectively stopping the  
2 Pacifica Foundation (“Foundation”) Directors and staff from conducting the organization’s  
3 normal business operations until the resolution of a trial in this case. Most notably, they seek an  
4 injunction preventing the Defendants from “taking any substantial actions affecting the assets,  
5 governance, management, or operations of the Pacifica Foundation or any of its five radio  
6 stations.” See Plaintiffs’ Points and Authorities in Support of Ex Parte Application for  
7 Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction (hereafter  
8 “Plaintiffs’ Memo”), p. 1:18-19. Such an injunction is breathtakingly overbroad and vague.  
9 *People v. Kelley* (1977) 70 Cal.App.3d 418, 421 (“The overbreadth of the injunction in its  
10 present form . . . [infringed on] their constitutional right to engage in lawful work activity . . .”);  
11 *KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 847; *New Tech Developments v. Bank of*  
12 *Nova Scotia* (1987) 191 Cal.App.3d 1065, 1072.

13           On a daily basis, and in the ordinary course of business, the Foundation’s management  
14 makes decisions affecting the operations and assets of the Foundation. These include, by way of  
15 obvious example, purchasing of office supplies, selecting vendors, paying bills, hiring clerical  
16 and other staff, defending and prosecuting legal proceedings, and shifting time slots for  
17 programming. Plaintiffs’ requested injunction offers no criteria by which to determine if any  
18 such quotidian decisions would “substantially” affect the Foundation’s assets, management, or  
19 operations. As a result, the Foundation would have to seek this Court’s guidance on a very  
20 frequent basis as to whether particular operational and management decisions were “substantial.”  
21 The only other alternative would be to provide a controlling managerial voice to the Plaintiffs or  
22 the Attorney General, neither of whom have any legal right or authority of any kind either to  
23 manage the Foundation or to set its policies. The harm caused by such a sweeping injunction  
24 unquestionably would cripple the Foundation’s ability to conduct its business. The harm caused  
25 to the Foundation clearly outweighs the entirely speculative harms prophesized by Plaintiffs.

26           As discussed in detail below and in Defendants’ Demurrer to Complaint on file herein,  
27 Plaintiffs have made no showing that they are likely to prevail on the merits. To the contrary,  
28 there are numerous sound reasons why Plaintiffs are very likely to lose on the merits. In short,

1 the balance of the equities weighs strongly in favor of denying the requested preliminary  
2 injunction.

3  
4 **III. PLAINTIFFS HAVE NOT SHOWN ANY EVIDENCE OF LIKELY  
IRREPARABLE HARM.**

5 The Plaintiffs have completely failed to present any evidence that irreparable harm to  
6 them is likely. They ask this Court to enjoin the Foundation on the basis of rank and unfounded  
7 speculations that certain acts would otherwise take place.

8 First, Plaintiffs ask that this Court restrain the Defendants from amending the Pacifica  
9 bylaws. However, the evidence clearly confirms that no bylaw changes are planned for the near  
10 future. *Declaration of John M. Murdock in Opposition to Order to Show Cause Re Preliminary*  
11 *Injunction* (“*Murdock Declaration*”) at ¶ 6. The facts are that at its most recent meeting, the  
12 Board voted unanimously to adopt a process to review and determine whether to revise and  
13 amend the bylaws – a process that is likely to take over a year. *Id.* The process of revising the  
14 bylaws will involve participation by numerous sources including, as is immediately relevant,  
15 Pacifica station listeners. *See id.* at ¶¶ 3 and 4. Thus, any bylaws which may eventually be  
16 adopted will reflect a consensus building process and may satisfy even these Plaintiffs.  
17 Moreover, advance notice must and will be given prior to any Board meeting at which the Board  
18 might vote on any bylaw amendment. *Id.* If this case is still pending at that time, and Plaintiffs  
19 then still believe that the processes which were followed, or that the proposed bylaws  
20 themselves, were in some way illegal, they could seek equitable relief from this Court at that  
21 time. Their request for an injunction at this time is entirely without basis and, at best, is grossly  
22 premature. *See Tahoe Keys Property Owners’ Ass’n* (1994) 23 Cal.App.4<sup>th</sup> at 1471 (affirming an  
23 order denying a preliminary injunction in part because the plaintiff “presented little evidence or  
24 argument that would support a claim of irreparable injury...”); *Loder v. City of Glendale* (1989)  
25 216 Cal.App.3d 777, 783 (holding that there is a high degree of existing or threatened injury  
26 required for prejudgment injunctive relief).

27 Second, Plaintiffs ask that the Court restrain defendants from appointing or electing new  
28 Pacifica Directors. Again, Plaintiffs have presented no evidence that this is likely to occur at any

1 time in the near future. Plaintiffs' initial representation to the Court was that Defendants would  
2 improperly elect new Directors at the Board meeting held on March 3 and 4, 2001. In fact, no  
3 new Directors were elected at that meeting.<sup>1</sup> *Murdock Declaration* at ¶ 7. Although Plaintiffs  
4 reiterate that concern, they also again offer no evidence that any such acts are immediately  
5 threatened. Moreover, a blanket prohibition on electing Directors until this case goes to trial is  
6 an unreasonable restriction on Pacifica's ability to carry on its basic operations. It would mean  
7 that if Directors' terms expire or Directors resign, the Foundation would be unable to fill those  
8 vacant positions on the Board. This is an unwarranted and harmful position in which to place the  
9 Foundation.

10 Third, Plaintiffs ask that this Court restrain Defendants from removing anyone currently  
11 seated as a Director. Again they present no evidence that any such action is likely. To the  
12 contrary, as pointed out in footnote 1, *supra*, Robert Robinson, a Director who is openly hostile  
13 to the current majority of the Foundation Directors, and whose interests are aligned with those of  
14 the Plaintiffs, was re-elected at the recent Board meeting. Further, the removal of a Director  
15 requires a two-thirds vote of the Directors and sufficient notice that Plaintiffs could seek relief  
16 from this Court if such a hypothetical event in fact were to be threatened in the near term.

17 Fourth, Plaintiffs seek to have this Court restrain Defendants from moving the  
18 Foundation's principal place of business from Los Angeles, California. While the Foundation's  
19 official principal place of business is designated as Los Angeles, its primary business operations  
20 were, in fact, historically located in Berkeley. Moreover, this issue essentially is moot. Last  
21 year, before this action was filed, the Berkeley operations office was moved to Washington,  
22 D.C., where Pacifica station WPFW is located. *Id.* at ¶ 8. The Foundation has a financial  
23 operations office in Los Angeles which is going to be integrated with the operational functions in  
24 the Washington, D.C. office. *Id.* As discussed in more detail below, the relocation of  
25 operational functions to the office in Washington, D.C. will in no way impact the availability in  
26

---

27 <sup>1</sup> One existing director, Robert Robinson, was re-elected, thus maintaining the current Board composition.  
28 *Id.* Significantly, Mr. Robinson is a plaintiff in another case against the Foundation, and his interests are aligned  
with those of the Plaintiffs in this case. Nonetheless, a majority of the Board, which included many of the individual  
defendants in this case and in the *Robinson* case, voted to seat him for a second term.

1 California of financial data or documents. *Id.* In other words, Plaintiffs have not offered the  
2 merest scintilla of credible evidence that any financial information which they or the Attorney  
3 General may be entitled to review will become unavailable to them. Conversely, maintaining the  
4 documents in Los Angeles would be administratively and financially burdensome to the  
5 Foundation. *Id.*

6 Fifth, Plaintiffs request that this Court restrain Defendants from destroying or removing  
7 from California any relevant documents, including any financial documents. Plaintiffs have  
8 absolutely no evidence that any destruction of documents has occurred or is planned. *See*  
9 *Declaration of Jacqueline L. Johnson in Opposition to Order to Show Cause Re Preliminary*  
10 *Injunction.*

11 Sixth, Plaintiffs request this Court to restrain Defendants from “taking any substantial  
12 actions affecting the assets, governance, management, or operations of the Pacifica Foundation  
13 or any of its five radio stations.” Plaintiffs present no specific allegations describing these  
14 “actions,” nor do they explain how they would be irredeemably harmed if such unspecified  
15 actions were to occur. The sweeping and purposefully indefinite injunctive relief requested by  
16 Plaintiffs would essentially paralyze the Foundation’s ability to run its stations and would require  
17 the Court to constantly involve itself in the operations of each of the five Pacifica stations. Such  
18 relief is completely inappropriate, and is wholly unjustifiable in light of Plaintiffs’ patent  
19 inability to identify any particular impending action that would harm them irreparably.

20 **IV. PLAINTIFFS HAVE NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE**  
21 **MERITS.**

22 **A. The LABs Never had the Right to Elect Directors and, Therefore, Never**  
23 **Were “Members” of the Foundation.**

24 Plaintiffs argue that the Local Advisory Boards (“LABs”) once upon a time had the right  
25 to “elect” Directors of the Foundation and, therefore, were “members” of the Foundation whose  
26 right to elect Directors could not be taken away without their consent. It is clear, however, even  
27 from the face of the Plaintiffs’ complaint, that the LABs never “elected” Directors. Instead, they  
28 only nominated individuals who could only be elected as Directors by the sitting Directors of the

1 Foundation Board. The ability to nominate candidates for a directorship does not confer  
2 “membership” status on the LABs under Corporations Code section 5036.

3 The clearest possible proof that LABs could only had a right to “nominate” appears in  
4 paragraph 22 of the complaint. That paragraph accurately states that, in 1991, the bylaws were  
5 amended by the addition of this language: “Each station board shall nominate at least one person  
6 of color as a permanent representative to the National Board.” (Emphasis added.) If Plaintiffs  
7 were right that LABs had the right in 1991 and previously to “elect” Directors, this bylaw  
8 amendment would mean that the LABs could only “nominate” a person of color to be a  
9 candidate for a directorship, but could “elect” a white person to the Board. That overtly racially  
10 discriminatory result makes absolutely no sense. That abhorrent construction of the 1991 bylaw  
11 amendment, however, is necessitated by Plaintiffs’ contention that LABs had a right to elect  
12 Directors, and that this right was taken away unlawfully by bylaw revisions in 1997 and 1999.  
13 Plaintiffs’ dependence upon a wholly improbable and racist construction of the 1991 bylaw  
14 revision is compelling evidence of the factual poverty of their claim. The ability to nominate,  
15 which is all LABs ever had, did not make the LABs “members” under Corporations Code section  
16 5036.

17 Moreover, in the related case of *Adelson, et al. v. Pacifica Foundation, et al.* pending in  
18 this Court,<sup>2</sup> numerous plaintiffs — all of whom were, or are, on LABs — indicated in their  
19 deposition testimony that they could not provide any admissible evidence to support their claim  
20 that the LABs ever had the power to elect Directors to the Foundation Board. *See exhibits*  
21 *attached to Declaration of Daniel Rapaport in Opposition to Order to Show Cause Re*  
22 *Preliminary Injunction.* In fact, these Plaintiffs generally conceded that they knew of no one  
23 who had ever served as a Director of the Foundation’s Board without being elected to that  
24 position by Board Directors.

25 Prior to 1984, the Foundation Board both nominated and elected all Board Directors.  
26 *Request for Judicial Notice, Attachment 7 (Declaration of Jack O’Dell in Opposition to*

27 \_\_\_\_\_  
28 <sup>2</sup> Alameda County Superior Court Case No. 814461-0. Plaintiffs in the related *Adelson* case also sought a  
preliminary injunction from this Court. Plaintiffs’ request was denied.

1 *Plaintiffs' Petition for Preliminary Injunction*), ¶ 4. In 1984, the Board amended Article Three,  
2 Section 2, of the Bylaws to allow LABs to nominate Board members. After that amendment, in  
3 order to be elected, a LAB nominee needed only a majority vote of existing Directors, while  
4 nominees for "at large" Director seats needed a two-thirds majority vote to be elected. *Id.* at ¶¶ 6  
5 and 7. As discussed above, this bylaw was amended in 1991 to require at least one LAB  
6 nominee to be a person of color. *Id.* at ¶ 3. At no time from 1984 to 1997, when Article Three  
7 again was amended, did the Foundation's Board ever interpret the bylaws to mean that the LABs  
8 had the power to *elect* a Director. *Id.* at ¶ 7. Rather, at all times, only Directors then serving on  
9 the Board could vote to elect new Directors. *Id.* at ¶ 3. *Request for Judicial Notice*, Attachment  
10 2 (*Declaration of Mary Frances Berry in Opposition to Motion for Preliminary Injunction*), ¶ 6;  
11 *see also Request for Judicial Notice*, Attachment 4 (*Declaration of John Crigler in Opposition to*  
12 *Motion for Preliminary Injunction*), ¶ 10.<sup>3</sup> In short, Plaintiffs' claims wholly depend on a  
13 demonstrably false and wholly unsupportable presumption.

14 **B. The Board is Not Limited to Five Members.**

15 Plaintiffs complain that the majority of the Board is acting without authority because the  
16 Foundation's Articles of Incorporation limit the size of its Board to five Directors. Plaintiffs'  
17 Memo, pp. 3:5-21, 7:18-25. Plaintiffs' argument is that the "special authority" in the  
18 Foundation's Articles allowing a number of Directors in excess of five violates Corporation  
19 Code § 5151(a). *Id.* Plaintiffs' contention is without merit because Plaintiffs are looking to the  
20 wrong statute.

21 California's nonprofit corporation law was substantially revised effective January 1,  
22 1980. Nonprofit corporations in existence prior to January 1, 1980, however, continued to be  
23 governed by the prior General Nonprofit Corporation Law (former Corp. Code § 9000 *et seq.*  
24 (included as an Appendix to Vol. 24)) with respect to: (1) the contents of their articles of  
25

26 <sup>3</sup> Additionally, although several of the Foundation's filings with the Federal Communications Commission prior to  
27 1991 listed the LABs in the column entitled "By Whom Appointed or Elected," from 1991 on, this was corrected to  
28 more accurately reflect the fact that the National Board was, in fact, the entity that elected all of the directors, even  
though the LABs nominated certain directors. *See Exhibits to Declaration of John Crigler in Opposition to Order to  
Show Cause re Preliminary Injunction.*

1 incorporation and (2) the number of directors. CAL. CORP. CODE §§ 9913(a) and 9915(a)  
2 (transition provisions between the former and current law).

3 It is the current California law, the 1980 revision, which is mistakenly relied upon by  
4 Plaintiffs, that requires that the bylaws or the articles of a non-profit corporation specify either a  
5 number of directors, or a range on the number of directors permitted. CAL. CORP. CODE  
6 § 5151(a). This requirement does not apply to “grandfathered” entities incorporated prior to  
7 1980 such as the Foundation. CAL. CORP. CODE § 9915(a). As a result, the Foundation is  
8 governed by former section 9500 which states that: “except as otherwise provided by the articles  
9 of incorporation or the by-laws,” a corporation shall have “not less than three directors.”  
10 Plaintiffs must concede: (a) that the Foundation has at least “three” Directors; and (b) that its  
11 bylaws specifically permit the Board to fix the number of Directors in its discretion. *Id.*  
12 Accordingly, the size of the Foundation’s current Board is fully in compliance with the  
13 Foundation’s Articles, and Bylaws and the directly applicable statute.

14 **C. Plaintiffs’ Other Claims that Board Directors are Improperly Seated are**  
15 **Invalid.**

16 Plaintiffs assert various other reasons why they believe certain individual Directors are  
17 improperly seated. Each of these claims is without merit:

18 1. Directors Acosta and Ford: Plaintiffs assert that these Directors are  
19 “usurpers” because their terms have expired, but they nonetheless remain on the Board.  
20 Plaintiffs’ Memo, p. 7:25-28. Plaintiffs neglect to inform the Court, however, that both Messrs.  
21 Acosta and Ford were elected as Board officers before their terms as Directors expired. *See*  
22 Request for Judicial Notice (*O’Dell Decl.* ¶11). Under both the Foundation’s Bylaws and its  
23 longstanding practice, election as a Foundation officer extends the term of a Director to be  
24 coextensive with the term of the office. *Id.*; Bylaws, Article 3 § 4. Accordingly, both Directors  
25 Acosta and Ford remain properly seated on the Board.

26 2. Other Individual Directors: Plaintiffs variously claim that the elections of  
27 other individual Directors are invalid because: (1) the elections were in violation of the  
28 purported five Director limit; (2) the approval of the LABs to change the number of Directors

1 was not obtained; (3) the elections did not comply to the last “lawfully adopted” bylaws in 1984  
2 under which LABs ostensibly were entitled to elect Directors; and (4) these individual Directors  
3 assertedly were subsequently “removed” from the Board by the LABs that purportedly originally  
4 “elected” them to the Board. Plaintiffs’ Memo, pp. 7:28 – 8:15. However, the elections of these  
5 Directors were valid for the same reasons: (1) Plaintiffs’ five Director limit argument is based  
6 on an inapplicable statute; and (2) the LABs never have had the right to approve or disapprove of  
7 changes to the bylaws to either elect or to remove Directors. Plaintiffs cite no authority of any  
8 kind to the contrary. Thus, Plaintiffs’ challenges to these individual Directors must fail.

9 **D. Plaintiffs Lack Authority to Proceed *Quo Warranto* Because the Complaint**  
10 **Filed is Substantially Different From the One Authorized by the Attorney**  
11 **General.**

12 To bring an action as a Relator, a plaintiff must have the permission of the California  
13 Attorney General to file a specific complaint on the State’s behalf. CAL. CIV. PROC. CODE  
14 § 803, *et seq.* Plaintiffs received permission to file only the specific proposed complaint they  
15 had submitted to the Attorney General. (*See Exh. A to Decl. of Daniel Rapaport*). The  
16 Complaint filed with this Court is substantially and materially altered from the one submitted to  
17 and approved by the Attorney General. Plaintiffs, therefore, have no authority to maintain this  
18 suit as Relators.

19 This argument is more fully discussed in the Memorandum in Support of Foundation  
20 Defendants’ Demurrer to Complaint.

21 **E. The Board’s Actions are Protected by the Business Judgment Rule.**

22 The complaint fails to allege any conduct by the Defendants that is not subject to the  
23 protection of the business judgment rule. Moreover, “[a]t the pleading stage, [Corporate] Board  
24 independence and compliance with the business judgment rule are presumed.” *In re Silicon*  
25 *Graphics Inc. Sec. Litig. v. McCracken*, 183 F.3d 970, 990 (9<sup>th</sup> Cir. 1999). Accordingly, because  
26 Plaintiffs have presented no facts sufficient to overcome the immunity from liability provided by  
27 the business judgment rule, Plaintiffs’ claims necessarily will fail. *See Barnes v. State Farm*  
28 *Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4<sup>th</sup> 365, 378-379. In fact, one of the primary claims of

1 Plaintiffs is that Defendants erred when they approved the hiring of security guards to be present  
2 at Pacifica station KPFA during the summer of 1999. As the Police Reports attached to the  
3 Declaration of Nancy Brown establish, the Board had clear and ample reason to be concerned.  
4 *See Declaration of Nancy Brown in Opposition to Order to Show Cause Re Preliminary*  
5 *Injunction.* The Declaration of Captain Will Pittman of the Berkeley Police Department shows  
6 that the police in fact recommended the hiring of security personnel for the station. *See*  
7 *Declaration of Captain Pittman in Opposition to Order to Show Cause Re Preliminary*  
8 *Injunction.* Under such circumstances, the Foundation's actions not only were unquestionably  
9 within the scope of the business judgment rule. Moreover, it would have been irresponsible for  
10 the Foundation to act otherwise. Plaintiffs are seeking injunctive relief that would have  
11 immediate adverse effects on the authority and status of the individual Director defendants. That  
12 result is inappropriate where the only state of facts before the Court is that the defendant  
13 Directors' actions were in compliance with the business judgment rule.

14 This argument is more fully discussed in the Memorandum in Support of Foundation  
15 Defendants' Demurrer to Complaint.

16

17 **F. The Attorney General Cannot Grant Relator Status for Most of the Types of  
18 Claims Brought.**

19 Plaintiffs claim standing and authority to bring this relator action on the basis of several  
20 different statutes and regulations. (*See* Compl. ¶ 5 (CAL. CIV. PROC. CODE §803; CAL. CORP.  
21 CODE §§ 5142, 5223, 5250, 5520; CAL. GOV'T CODE §§ 12580, 12591, 12598; CAL. CODE REGS.  
22 tit. 11, §§ 1-11)). None of these statutes or regulations, however, allows a relator to bring the  
23 specific causes of action contained in Counts Two through Ten. The Attorney General has no  
24 authority to disregard plainly stated legislative determinations expressed in statutes. He cannot  
25 confer powers in contravention of statutory limitations. Accordingly, each of these claims must  
26 fail.

27 This argument is more fully discussed in the Memorandum in Support of Foundation  
28 Defendants' Demurrer to Complaint.

28

1  
2 **G. Plaintiffs' Claims Against the Individual Defendants Will Fail as the**  
3 **Plaintiffs Did Not, Prior to Filing this Action, File a Verified Petition Seeking**  
4 **Judicial Leave to Proceed Against Those Defendants.**

5 California Code of Civil Procedure section 425.15 requires that, unless a plaintiff first  
6 obtains leave of court, no cause of action arising out of negligent conduct can be brought by that  
7 plaintiff against any person serving without compensation as a director or an officer of a  
8 nonprofit corporation if, with respect to the cause asserted, the person was acting within the  
9 scope of that position. No exception is made by section 425.15 for individuals who file suit in  
10 the guise of relators. Here, the Plaintiffs failed to seek judicial approval from a court before  
11 filing this action and their claims allege negligence at worst. Consequently, the claims against  
12 the individual Foundation Directors and officers are barred by section 425.15 of the California  
13 Code of Civil Procedure.<sup>4</sup>

14 This argument is more fully discussed in the Memorandum in Support of Foundation  
15 Defendants' Demurrer to Complaint.

16 **H. Plaintiffs' Claims Will Fail On the Merits for Additional Reasons.**

17 Plaintiffs' sixth claim purports to state a cause of action for an accounting under  
18 California Corporations Code § 6336.<sup>5</sup> This statute, however, provides the right to seek an  
19 accounting only to *members* and *directors* of the corporation from which the accounting is  
20 sought. Plaintiffs are neither members nor directors of the Foundation and have no standing to  
21 bring this claim. Section 6336 further requires: (1) that a party first must make a demand for  
22 inspection of documents on a corporation, and (2) that the corporation refuse that demand, before  
23 a court can order an inspection. Plaintiffs do not allege that they made a demand, or that the  
24 Foundation refused their demand. Plaintiffs lack standing to assert a claim for an accounting.

25 <sup>4</sup> As the Complaint here is not one which was approved by the Attorney General, and thus simply is a private  
26 action, the provisions of California Corporation Code §§ 5047.5 and 5239 which immunize uncompensated directors  
27 and officers of nonprofit corporations also are applicable to this case.

28 <sup>5</sup> It is pertinent that the Public Broadcasting Act (47 U.S.C. § 396(k)(8)(A)) requires that each licensee  
receiving Corporation for Public Broadcasting ("CPB") funds undergo a biennial audit by independent certified  
public accountants (or, in certain cases, to submit a financial statement). 47 U.S.C. § 396(l)(3)(B)(ii). This  
information, and such other financial information as the CPB may require, must be submitted biennially to the CPB.  
47 U.S.C. § 396(l)(3)(B)(iii). The CPB must maintain the information at its offices for public inspection and  
copying for at least three years. 47 U.S.C. § 396(l)(4)(A).

1 Plaintiffs' state law claims also must fail because they seek to address issues solely  
2 within the purview of the FCC. Issues relating to whether a station's programming is  
3 appropriate, is in the public interest, and serves the diverse needs of its community are within the  
4 exclusive jurisdiction of the FCC to address in the context of station licensing and license  
5 renewal proceedings. The federal government has fully occupied the field in this area.  
6 Accordingly, Plaintiffs' state laws based claims are preempted by federal law.

7 These arguments are more fully discussed in the Memorandum in Support of Foundation  
8 Defendants' Demurrer to Complaint.

9  
10 **V. PLAINTIFF'S FOLLOWERS ARE CAUSING IRREPARABLE HARM TO THE**  
11 **FOUNDATION**

12 Plaintiffs allege that an injunction is necessary to prevent the Board from causing further  
13 "injury" to the Foundation's reputation, goodwill, and fundraising capacity. Plaintiffs' Memo, p.  
14 14:27-28. In reality, it is Plaintiffs' own actions, and those of their supporters, that are tarnishing  
15 the Foundation's reputation and goodwill, and are damaging its fundraising capacity. For  
16 example, websites on the Internet are encouraging individuals not to donate funds to the  
17 Foundation and, instead, to donate them to support Plaintiffs' lawsuit. Examples of these  
18 websites are attached as Exhibit H to Declaration of John Murdock. Plaintiffs' followers have  
19 engaged in an organized campaign of threats, harassment, racial slurs, and abuse of the  
20 Foundation's volunteer Directors and its employees. *See Murdock Declaration*, ¶10. This  
21 pattern of abuse recently culminated in an assault against two employees at the Pacifica station in  
22 Houston, Texas. *See Declaration of Garland Ganter*. According to Plaintiff Carol Spooner's  
23 own website, the attacker is a member of Ms. Spooner's "Committee to Remove the Pacifica  
24 Board." *See Declaration of James F. Peterson in Opposition to Order to Show Cause Re*  
25 *Preliminary Injunction*. It is this campaign of harassment and abuse that is causing irreparable  
26 harm to the Foundation.  
27  
28

1 **VI. A SIGNIFICANT BOND SHOULD BE REQUIRED IF THE INJUNCTION IS**  
2 **GRANTED.**

3 Finally, if a preliminary injunction is granted, the Plaintiffs should be required to post a  
4 significant bond, far in excess of the meaningless Five Hundred Dollars (\$500) amount that they  
5 propose. Code of Civil Procedure section 529, subdivision (a) states in pertinent part: "On  
6 granting an injunction, the court or judge must require an undertaking on the part of the applicant  
7 to the effect that the applicant will pay to the party enjoined any damages, not exceeding an  
8 amount to be specified, the party may sustain by reason of the injunction, if the court finally  
9 decides that the applicant was not entitled to the injunction." As a result, a bond must be  
10 adequate to pay any damages which may be sustained by reason of the injunction. *Casitas Inv.*  
11 *Co. v. Charles L. Harney, Inc.* (1962) 203 Cal.App.2d 811, 815.

12 Plaintiffs' bond request is a clear expression of their complete lack of comprehension or  
13 concern for either factual or legal reality. The injunction Plaintiffs seek would effectively place  
14 either in their hands, or the Court's control, an enterprise with an annual budget in excess of Ten  
15 Million Dollars (\$10,000,000.00). Given the potential damage that this group of intolerant and  
16 wholly self-righteous zealots can cause, a bond of Eight Hundred Thirty-Three Thousand Dollars  
17 (\$833,000.00)<sup>6</sup> for each month a preliminary injunction endures is reasonable and appropriate. If  
18 Plaintiffs are not in a position to bear the financial responsibilities attendant to a takeover of the  
19 Foundation's operations, it would be irresponsible to entrust that responsibility to them.  
20  
21

22  
23 **VII. CONCLUSION**

24 Plaintiffs again have failed to offer any evidence of irreparable harm that they will suffer  
25 if an injunction is not issued. To the contrary, the Foundation's ability to conduct its operations  
26 would be severely harmed should the requested relief be granted. Further, it is plain that, at best,  
27

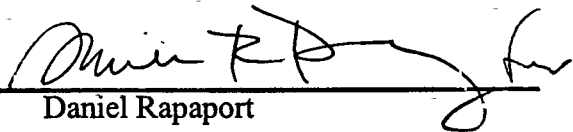
28 <sup>6</sup> \$10,000,000.00 ÷ 12 months = ± \$833,000.

1 there is a minimal likelihood that Plaintiffs will succeed on the merits of their claims. Therefore,  
2 their motion for preliminary relief should be denied.  
3

4 Dated: March 30, 2001

5 EPSTEIN BECKER & GREEN, P.C.

6  
7 WENDEL, ROSEN, BLACK & DEAN, LLP  
8

9 By   
10 Daniel Rapaport

11 Attorneys for Defendants PACIFICA  
12 FOUNDATION, MARY FRANCES BERRY,  
13 JUNE MAKELA, FRANK MILLSPAUGH,  
14 ANDREA CISCO, DAVID ACOSTA, MICHEAL  
15 PALMER, KENNETH FORD, ROBERT  
16 FARRELL, KAROLYN VAN PUTTEN,  
17 WENDELL JOHNS, VALRIE CHAMBERS,  
18 BERTRAM LEE, JOHN MURDOCK, LYNN  
19 CHADWICK  
20  
21  
22  
23  
24  
25  
26  
27  
28