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TO THE COURT:

PLEASE TAKE NOTICE that on December 7, 2000, at 8:00 o'clock a.m., or as soon thereafter as counsel may be heard, in Courtroom 9 of the above-captioned Court, located at 450 Golden Gate Avenue, San Francisco, California,

the People of the State of California, *ex rel.* Carol Spooner, et al., will and hereby do move the Court, on grounds of conflicts of interest:

(1) to disqualify the law firms of Wendel, Rosen, Black & Dean ("WRB&D") and Epstein, Becker and Green ("EB&G") from dual representation of nominal defendant Pacifica Foundation ("Pacifica") and individually named defendant officers and/or directors of Pacifica Foundation in this action, and

(2) to disqualify the law firm of Epstein, Becker and Green ("EB&G") from representing any party in this action.

This Motion will be based on this Notice of Motion, on the Declarations of Daniel Robert Bartley, Esq., and Gary Evans, and the Memorandum of Points and Authorities filed herewith, on

the Court files and records in this action, and on such oral and documentary evidence as may be presented at the hearing.

Dated: _____

_____
DANIEL ROBERT BARTLEY
Attorney for Plaintiffs,
The People of the State of California *ex rel.* Carol Spooner, John D. Biello, Carolyn M. Birden, Kurt Guerdrum, Arturo Griffifths, Amburn R. Hague, Leigh Hauter, Patricia Heffley, Barbara MacQuiddy, Rick Potthoff, Charles P. H. Scurich, Ronald Swart, individually and on behalf of Pacifica Foundation

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISQUALIFY DEFENDANTS' COUNSEL

Plaintiffs, The People of the State of California, *ex. rel.* Carol Spooner, et al., for authority in support of their motion to disqualify defendants' counsel, submit the following:

I. BACKGROUND.

The gravamen of this motion to disqualify the law firms of EB&G and WRD&B from dual representation of Pacifica and its officers and directors is the conflict of interests between the *real plaintiff-in-interest,* Pacifica Foundation, and *all* of its defendant officers and directors. Additionally, in the case of EB&G, there is a conflict between Pacifica and defendant John Murdock who is a member of the EB&G law firm. As a member of the Pacifica Board of Directors, a member of one of the law firms representing Pacifica and some of its officers and directors, and as an individually named defendant in this lawsuit, Mr. Murdock wears three hats.

Mr. Murdock's three hats interfere with his and his law firm's professional and fiduciary responsibilities to Pacifica Foundation, the real plaintiff in interest in this suit, thus disqualifying the entire EB&G firm from representing any party to this action by imputed disqualification.

EB&G and WRB&D have been retained to represent both Pacifica and individual defendants in this present lawsuit without the procedural safeguards required by the governing rules of professional ethics and California laws. Additionally, as a named defendant in the underlying lawsuit charging officers and directors with a continuing pattern of fiduciary malfeasance, if plaintiffs prevail then defendant John Murdock will be subject to personal liability for fees and costs, breach of fiduciary duty and self-dealing, and will be removed as a Pacifica director.

As stated in the Complaint, the purpose of this lawsuit is to restore Pacifica to conformity with its founding purposes as set forth in its Articles of Incorporation, to remove directors for breach of charitable trust and gross abuse of authority and discretion, to remove directors who have been unlawfully elected under unlawful bylaws, to bring a democratic governance structure to Pacifica, and to recover damages on behalf of Pacifica Foundation for trust assets that have been wasted. In addition, plaintiffs seek declaratory relief: (1) compelling adoption of bylaws in conformity with law, (2) defining membership and voting rights in the corporation, (3) compelling specification of the number of directors, (4) compelling adoption and implementation of fair, reasonable and consistent mechanisms for democratic nomination and election directors.

While this is *not* a members' derivative action, this lawsuit is *analogous* to a derivative action, as plaintiffs are suing Pacifica Foundation as a *nominal defendant* for the malfeasance of the named officers and directors. Suing on behalf of the People of the State of California and on

behalf of Pacifica Foundation, plaintiffs seek to impose personal liability on some of the individual officers and directors for their breaches; however, *it is Pacifica Foundation that stands to benefit from the relief prayed for in this suit.*

II. FACTS.

The attorney caption on the face of defendants' papers filed with the Court in this action identifies both Wendel Rosen, Black & Dean, LLP ("WRB&D") and Epstein, Becker and Green, P.C. ("EB&G") as law firms jointly representing both the nonprofit corporate entity, Pacifica Foundation, and individually named defendants who are or were officers and/or directors of Pacifica.

Defendant John Murdock has acted as a director of Pacifica Foundation since February, 2000, selected in violation of the corporate Articles of Incorporation and Bylaws as alleged in the Complaint. He is currently serving as the Chair of the board "Governance Committee", which is responsible for some of the very unlawful acts that prompted this lawsuit. He is an active member in the New York law firm of EB&G, based in its Washington D.C. office. EB&G was apparently hired in June 2000 by Pacifica Executive Director Bessie Wash to represent Pacifica in a related members' derivative lawsuit (*Adelson et al. v Pacifica Foundation, et al.,* Alameda County Superior Court Case No. 814461-0). Ms. Wash hired EB&G and WRD&B without the knowledge or approval of at least some of the Directors. (Declaration of Gary Evans, "Exhibit A"- Transcript of Board Meeting 9/17/2000, passim.)

Attorney Daly D.E. Temchine, also of the EB&G Washington, D.C., office, informed plaintiffs' counsel by letter dated September 28, 2000, that he and his firm are acting as co-

counsel with Mr. Rapaport and the WRB&D firm in this action. Contrary to the papers subsequently filed with this Court, Mr. Temchine also stated in his September 28th letter that EB&G does not represent Mr. Murdock or any of the individual defendants in this matter. (Declaration of Daniel Robert Bartley, "Exhibit A".) Mr. Temchine also represented in his September 28th letter that "the Board, without Mr. Murdock's participation, voted to retain this firm." The transcript of the board meeting on September 17, 2000, shows this representation to be false. (Declaration of Gary Evans, "Exhibit A" - Transcript of Board Meeting 9/17/2000, passim.)

While defendants' papers indicate that Alan E. Walcher of the Los Angeles office of EB&G is representing Pacifica and the individual defendants, it is clear that the Washington, D.C., office is actively involved in the defense. The Pacifica headquarters office is located in Washington, D.C. See also the Affidavit of EB&G employee Robert J. Hudock, sworn to in Washington, D.C., attached as "Exhibit B" to the Declaration of Daniel Rapaport in Support of Motion to Realign filed in this action on October 16, 2000.

Attorney Daniel Rapaport of WRB&D represented to the Court in his Declaration in Support of Motion to Dismiss that he and his firm are "one of the attorneys of record for defendants Pacifica Foundation, Dr. Mary Frances Berry, June Makela, David Acosta, Ken Ford, Micheal Palmer, Andrea Cisco, Frank Millspaugh, Robert Farrell, John Murdock, Karolyn Van Putten, Wendell Johns, Valrie Chambers, Bertram Lee, Beth Lyons and Lynn Chadwick." (Declaration of Daniel Rapaport in Support of Motion to Dismiss, Page 2, Paragraph 1.)

As the transcript of the meeting of the Pacifica Board of Directors on September 17, 2000, demonstrates, the Pacifica directors have not given their informed consent, after written

disclosure, to the dual representation and conflicts of interests that are grossly apparent in this case. (Declaration of Gary Evans, "Exhibit A".)

The Chairwoman of the Board, Mary Francis Berry, in giving her Executive Committee report to the assembled Board, described the process used to retain EB&G as follows:

> "Ah, we also discussed an issue that was raised at, ah – sometime during the weekend – about the law firm that represents us, and with the understanding that there's been some discussion of this, and whether there's some kind of conflict of interest, ah that one of our board members, who is a member of that firm, might have, and we, ah, of course were quite aware already that the Executive Director, who has the authority to do so, had engaged this firm because she had sent us out an email, and had informed us that she was doing it – she sent the board an email, and ah, we had received some communications from some people objecting, and saying they thought it was a conflict, and we assured ourselves again, as we had before, that, ah, and we were told about conversations that had taken place during the weekend, that there's nothing, ah, illegal, or immoral, or unappetizing, and indeed we should be grateful to the firm, in terms of the rates that they're giving us, and that Mr. Murdock is not, ah, self-dealing, or being un-in-aggrandized, or enriched, or anything else under the code, ah, for this, ah, for this matter. Ah, the – so these are the matters that, ah, we discussed¼." (Gary Evans Declaration, "Exhibit A", Transcript, page 2, line 9, to page 3, line 21.)

When several board members complained that they had never received any such emails, that Executive Committee meetings were closed to the rest of the board, and that they in fact had only just learned of the hiring, it was conceded that the hiring occurred sometime on or about June with regard to the related state court case (*Adelson, et al. v. Pacifica Foundation, et al.*). (Evans Declaration, "Exhibit A" - Transcript, page 7, lines 12-13.) Board Chair Mary Francis Berry responded in exasperation to dissident directors' complaints: "Under Pacifica's rules, hiring is done by the Executive Director who has full authority to hire whomever she pleases" (Evans Declaration, "Exhibit A" - Transcript, page 5, lines 20-21) and "The board did not discuss the retainer of Mr. Murdock's firm." (Evans Declaration, "Exhibit A" - Transcript, page 6, line 18.) When Board members questioned the Executive Director, Bessie Wash, whether the

retention of EB&G was discussed with other Board members, Ms. Wash responded: "I frequently discuss a lot of things with various people. So there were some people I discussed it with, yes." (Evans Declaration, "Exhibit A" - Transcript, page 7, lines 23-24.) Further probing was met with Board Chair Mary Francis Berry's complaint "¼I don't think¼the Executive Director has to submit to cross examination¼The Executive Director has the authority to hire a firm. She hired a firm. You've been told that the firm was hired." (Evans Declaration, "Exhibit A" - Transcript, page 7, line 28, to page 8, line 17.)

After several directors continued to object to what they saw as a conflict of interest and lack of proper hiring procedure, several directors attempted to make motions to reflect their concerns. Their motions were summarily defeated by the 2/3rds majority which has unlawfully wrested control of the organization. Even a motion by Director Leslie Cagan to schedule a conference call or other venue to discuss litigation strategy was defeated. Chair Mary Francis Berry closed the discussion after "caucusing" with Mr. Murdock, by suggesting that individual directors with problems regarding representation by EB&G simply talk among themselves or ask to meet with counsel. She concluded:

> "Ah, we have debated this motion and defeated it. It has been defeated, which means we shouldn't still be discussing it. And also, whatever any individual board member might feel, the majority of the board members do not believe that it is necessary to have such a meeting or to talk about it. They seem to be, and there was not, there was not a majority that was uneasy about our representation, as I read the votes that just took place here at this meeting. So, this is a matter of persuading one's individual colleagues if one wishes to have a different consensus¼." (Evans Declaration, "Exhibit A" - Transcript, page 23, lines 23-28.)

III. ARGUMENT

A. A Court's Power to Order Disqualification of Counsel Is Derived from its

Inherent Power to Control the Administration of Proceedings Before It.

The district court has the primary responsibility for controlling the conduct of lawyers practicing before it. *Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980).

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety. (Citations omitted.)"

Erickson v Newmar Corp. 87 F.3d 298, 304 (9th Cir. 1996).

Under California law, the trial court's authority to disqualify an attorney derives from the power inherent in every court "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it in every matter pertaining thereto". Cal. Code Civ. P. § 128, subd. (a)(5). *People v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1145 (1999), *In re Complex Asbestos Litigation,* 232 Cal. App.3d 572, 585 (1991).

Motions to disqualify counsel involve a conflict between the client's right to counsel of choice and the need to maintain ethical standards of professional responsibility. *Comden v. Superior Court,* 20 Cal.3d 906, 915 (1978). Even when the client has knowingly chosen to waive a conflict, the courts have often come down in favor of disqualification to preserve the public trust in the scrupulous administration of justice and the integrity of the bar. When, as here, there has been no such waiver, disqualification is all the more necessary. A recent California case on point, *Forrest v Baeza*, 58 Cal. App.4th 65 (1997), succinctly resolved the conflict:

> "The issue of disqualification 'ultimately involves a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. The paramount concern, though must be the preservation of public trust in the scrupulous administration of justice and the integrity of the bar. The recognized and important right to counsel of one's choosing must yield to considerations of ethics that run to the very integrity of our judicial process.'"

Forrest v Baeza, at p.73, quoting *Metro-Goldwin-Meyer , Inc. v Tracinda Corp.*, 36 Cal.App.4th 1832, 1838 (1995), and *In re Complex Asbestos Litigation, supra,* 232 Cal.App.3d at 585 (1991).

B. Both Firms Should Be Disqualified from Dual Representation for Violation of Conflict of Interest Rules

An attorney's duty of loyalty to his client is codified in every state and jurisdiction in order to mandate strict safeguards on attorney representation of conflicting interests. The American Bar Association's Model Rules relating to conflict of interest and dual representation, supplemented by cases applying those rules to derivative suits, require that both EB&G and WRB&D be disqualified from dual representation of Pacifica and its officers and directors in this action. The same result would pertain in the application of California Rules of Professional Conduct, or the ethics rules of the bars of New York, location of EB&G headquarters, or the District of Columbia, home jurisdiction of EB&G attorneys John Murdock and Daly Temchine.[1]

[1] Due to their length and for ease of reading, the relevant rules of ethics and professional conduct are appended at the end of this brief.

(See e.g., *Griva v. Davison*, 637 A. 2d 830 (1994)).

The California Rules of Professional Conduct most applicable to this motion are Rules 3-310 and 3-600.

Under California Rule 3-310(B), an attorney has a duty to provide a client with "written disclosure" where he has a "legal, business, financial or personal relationship with a party or witness in the same matter." "Disclosure" is defined in subdivision (A) as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client¼"

California Rule 3-310(C) deals with dual representation in which interests of two or more clients "potentially" or "actually" conflict and requires that the attorney secure the "informed written consent" of each client. The same requirement exists under California Rule 3-600, regarding representation of an entity and its directors, or other constituents. (See Harris and Valijura, "Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service", 53 *The Business Lawyer*, No. 2, at 479ff (February, 1998).)

Both WRB&D and EB&G are engaged in "dual representation" of Pacifica and its officers and directors here. In addition, EB&G is also representing its firm member, John Murdock. The firm's identity with Mr. Murdock makes the conflict even stronger.

Again, there has been no written disclosure or written consent to the conflicts of interest inherent in the dual representation, and even if there had been, Mr. Murdock's role in securing such consent would require the strictest scrutiny.

C. Dual Representation of Corporate and Individual Defendants is Proscribed

in Analogous Derivative Actions.

There is a substantial body of authority proscribing dual representation of corporate and individual defendants in a derivative action. See, e.g., *Cannon v US Acoustics Corp,* 398 F. Supp. 209 (ND Ill 1975), *aff'd in part, rev'd in part,* 532 F.2d 1118 (7th Cir 1976); *Lewis v Shaffer Stores Co,* 218 F. Supp. 238 (SDNY 1963); *Messing v FDI, Inc,* 439 F. Supp. 776 (D NJ 1977); *Murphy v Washington American League Base Ball Club, Inc,* 116 U.S. App. D.C. 362, 324 F.2d 394 (DC Cir 1963); *Garlen v Green Mansions, Inc,* 9 A.D.2d 760, 193 N.Y.S.2d 116 (1959); *Dukas v Davis Aircraft Products Co, Inc,* 129 Misc. 2d 846, 494 N.Y.S.2d 632 (Sup 1985); *Essential Enterprises Corp v Dorsey Corp,* 40 Del. Ch. 343, 182 A.2d 647 (1962).

> "The derivative action exists, after all, to benefit the corporation, not derivative plaintiffs' counsel or the individual defendants. See *Cannon v US Acoustics Corp,* 398 F. Supp. at 213. Dual representation is impermissible, particularly at the settlement stage, because:
>
> If the same counsel represents both the corporation and the director and officer defendants, the interests of the corporation are likely to receive insufficient protection. An increased recovery for the corporation is wholly incompatible with the goal of limiting the defendants' liability. Defendants' counsel is thus placed in an untenable position, and more often than not he will succumb to the pressure to approve any settlement between the shareholder and his individual clients."

In re Oracle Sec. Litig., 829 F.Supp. 1176, 1188 (N.D. Cal. 1993).

In *Forrest v. Baeza, supra,* the California Court of Appeals granted a motion to disqualify an attorney from simultaneously representing a corporation and director-defendants in a shareholder's derivative action. The court explained that corporations are "nominal defendants" in a shareholder's derivative suit and that:

> "In such a suit, *the corporation, while nominally a defendant, is actually a plaintiff; if the allegations of the [shareholders] cross-complaint are proved, the corporation stands to benefit from recovery for the director-defendant's wrongful actions.* [Emphasis supplied; citations omitted.] Current case 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. [Citations omitted.]"

58 Cal.App.4th, at p. 74.

The *Forrest* court emphasized that, where adversity between the directors and the corporation is alleged in the complaint, the court should accept the allegations for purposes of a motion to disqualify counsel.

> "[T]he merits of the action (which will determine whether there is in fact adversity between the corporation and directors in a derivative suit) should not be determined in the context of a motion to disqualify counsel. Here, under the allegations of the cross-complaint, it is clear that the interests of the corporations and the Forrests are adverse."

Id., at p. 75.

Finally, the court noted that consent of the directors to the conflict of interests is inappropriate in this context.

> "Indeed, commentators and case law alike have concluded that reliance on consent is ill founded in the context of derivative litigation. [...] This consent rationale seems peculiarly inapplicable to a derivative suit, because the corporation must consent through the directors, who, as in the present case, are the individual defendants."

Id., at p. 76.

While this action is *not* a members' derivative action, the plaintiffs are in a position, for purposes of conflict of interest considerations, analogous to the position of the suing shareholders in *Forrest*. If plaintiffs' allegations are proven, Pacifica will be the beneficiary, making Pacifica, like the corporation in *Forrest*, the nominal defendant and adversary to the named director-defendants.

Even if a majority of the directors claim to have consented to the conflict, such consent is

ineffective in this context:

> "[I]t is ¼clear that an inanimate corporate entity, which is run by directors who are themselves defendants in the derivative litigation, cannot effectively waive a conflict of interest as might an individual under applicable professional rules, such as [California Rules] 3-600(E) and 3-310."

In re Oracle Securities Litigation, 829 F. Supp. 1176, 1189 (N.D. Cal. 1993).

Accordingly, both EB&G and WRB&D must be disqualified from dual representation of Pacifica and its officers and directors in this case.

D. Imputed Disqualification of Epstein, Becker & Green, P.C.

The EB&G attorneys representing Pacifica, and John Murdock and other Pacifica officers and directors, clearly have a business relationship with their colleague and fellow firm member, John Murdock. As the transcript of the Pacifica Board Meeting of September 17th demonstrates, not only were Pacifica directors not provided with written disclosure of relevant circumstances or consequences, they literally were admonished that they had no right to ask. (Declaration of Gary Evans, "Exhibit A", passim.)

The California Rules of Professional Conduct do not specifically deal with the situation presented here – where a director's firm is hired to represent a charitable corporation in an action brought against that same director, among others, for the benefit of the charitable corporation.

California courts have consistently followed the rule from the ABA Model Rules of Professional Responsibility that an attorney's disqualification from representing a particular client is imputed to every attorney in the firm where the disqualified attorney practices. *Trone v. Smith, supra,* 621 F.2d at p. 999; *People v. Speedee Oil Change Systems, Inc., supra,* 20 Cal.4th at p. 1139; *Henricksen v Great American Savings and Loan,* 11 Cal. App.4th 109 (1992); ABA

Model Rules of Professional Responsibility, Rule 1.10. Accordingly, if John Murdock is disqualified from representing Pacifica or its directors in a suit that accuses him of wrongdoing, then the entire EB&G law firm is also disqualified.

E. The Hiring of Defendant Director John Murdock's Law Firm to Represent Pacifica Foundation and Its Officers and Directors Was an Unapproved Self-Dealing Transaction in Violation of California Corporations Code § 5233.

California Corporations Code, section 5233,[2] defines a self-dealing transaction in the context of a nonprofit public benefit corporation, as "a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest[3] and which does not meet the requirements of ¼ subdivision (d)."

Subdivision (d) of section 5233 is "the heart of the self-dealing section." *The Jurisdiction of the Attorney General Over Corporate Fiduciaries Under the New California Nonprofit Corporations Law,* Abbott and Kornblum, 13 USFLR 753 (Summer 1979).

Subdivision (d) provides for two circumstances under which a self-dealing transaction may be allowed, or more correctly, under which the statutory remedy for self-dealing will not apply: The first circumstance is approval by the State of California Attorney General ("AG") or

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[2] Due to its length, and for ease of reading, California Corporations Code Section 5233 is fully set forth at the end of this brief.

[3] Although the term "material financial interest" is not defined in the statute or case law, attorneys' fees are certainly costly and Mr. Murdock, as a profit-sharing member of the EB&G did not deny his pecuniary interest in the transaction. Because discussion of the transaction was squelched by Ms. Berry and her cabal at the September Board Meeting, plaintiffs are unaware of the extent of the financial interest at stake.

by a court in an action in which the AG is an indispensable party, either before or after the transaction is consummated. The second requires the self-dealer, or other person seeking to uphold the transaction, to prove four items:

(1) the corporation entered into the transaction for its benefit;

(2) at that time, the transaction was fair and reasonable as to the corporation;

(3) *prior* to entering into the transaction, a majority of the entire existing board (and not just a committee), without counting the vote of the interested director(s), and with knowledge of all the material facts concerning the transaction and the director's interest, approved or authorized the transactions; and

(4) *prior* to that authorization or approval the board considered and in good faith determined after an investigation reasonable under the circumstances that the corporation could not have obtained a more advantageous arrangement

The third subdivision allows a committee or person authorized by the board to approve a self-dealing transaction using the standards applicable to the full board, *provided that (a) it was not reasonably practicable to obtain prior approval of the board and (b) the board at its next meeting determines that the committee or person did follow those standards and the board then ratifies the transaction by a vote of the majority of the disinterested directors in office*.

The transcript of Pacifica's September 17, 2000, Board Meeting (Declaration of Gary Evans, "Exhibit A"), demonstrates an egregious disregard and violation of those protections, and serves to illustrate the necessity for their inclusion in the California Corporations Code.

Contrary to Chairwoman Berry's opinion that uneasy directors needed to "persuade" the board majority to discuss the hiring of director Murdock's law firm to represent them and

Pacifica (Evans Declaration, "Exhibit A" - Transcript, page 23, lines 23-28), the California legislature foresaw the type of self-dealing abuse that occurred here at Pacifica. Rather than putting the onus on individual Board members to "persuade" their fellow directors to demand the right to discuss a self-dealing transaction, the legislature prescribed mandatory procedures to ensure fully informed discussion and consent. Because the transaction involved a director's own law firm, Pacifica's "rule" of allowing the Executive Director full authority to hire legal counsel comes into direct conflict with California Corporations Code § 5233.

The bald facts exposed in the transcript of the board meeting lay bare the gross impropriety of defendant John Murdock, d/b/a Epstein, Becker & Green, representing the interests of Pacifica Foundation in this action *against John Murdock* and others.

Defendant Murdock and his law firm, EB&G, have not only violated applicable rules of professional conduct, they have violated the self-dealing prohibitions set forth in California Corp. C. § 5233, and should be disqualified from representing any party in this action.

CONCLUSION

Pacifica Foundation, while nominally a defendant in this action, is actually the real plaintiff-in-interest, because it is Pacifica Foundation that stands to benefit from the relief sought against the individual defendant Pacifica officers and directors.

Therefore, for the reasons stated above, plaintiffs respectfully request the Court to immediately disqualify:

(1) the law firms of Wendel, Rosen, Black & Dean, LLP, and Epstein, Becker and Green, P.C., from dual representation of nominal defendant and real-plaintiff-in interest, Pacifica

Foundation, and individually named defendant officers and/or directors of Pacifica Foundation in this action, for the conflict of interests between Pacifica Foundation and its officers and directors, and

(2) the law firm of Epstein, Becker and Green from representing any party in this action for its conflict of interest between actual plaintiff-in-interest Pacifica Foundation and defendant EB&G law firm member John Murdock, who is Pacifica Director and Chair of the Pacifica Board of Directors' Governance Committee, and a defendant in this action.

Dated: October 27, 2000

Respectfully submitted,

_____

DANIEL ROBERT BARTLEY
Attorney for Plaintiffs,
The People of the State of California *ex rel.* Carol Spooner, John D. Biello, Carolyn M. Birden, Kurt Guerdrum, Arturo Griffifths, Amburn R. Hague, Leigh Hauter, Patricia Heffley, Barbara MacQuiddy, Rick Potthoff, Charles P. H. Scurich, Ronald Swart, individually and on behalf of Pacifica Foundation

APPENDIX

ABA Model Rules of Professional Conduct:

"RULE 1.7 Conflict of Interest: General Rule
(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

"RULE 1.10 Imputed Disqualification: General Rule
(a) While lawyers are associated with a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

(b) [...]

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7."

New York Code of Professional Responsibility:

"§1200.20 [DR 5-101.] Conflicts of Interest - Lawyer's Own Interests
(a) A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be re reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest."

"§1200.24 [DR 5-105. Conflicts of Interest: Simultaneous Representation
(a) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section.

(b) A lawyer shall not continue multiple employment if the exercise of independent professional judgement in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under subdivision (c) of this section.

(c) In situations covered by subdivisions (a) and (b) of this section, a lawyer may represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved.

(d) While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so under sections 1200.20(a), 1200.24(a) or (b), 1200.27(a) or (b), or 1200.45(b) of this Part, except as otherwise provided therein.

(e) [...]."

Washington D.C. Rules of Professional Conduct:

"RULE 1.7 Conflict of Interest: General Rule
(a) A lawyer shall not advance two or more adverse positions in the same matter.

(b) Except as permitted in paragraph (c) below, a lawyer shall not represent a client with respect to a matter if:

(1) That matter involves a specific party or parties, and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter, even though that client is unrepresented or represented by a different lawyer;

(2) Such representation will be or is likely to be adversely affected by representation of another client;

(3) Representation of another client will be or is likely to be adversely affected by such representation; or

(4) The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's own financial, business, property, or personal interests.

(c) A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if each potentially affected client provides consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation.

(d) If a conflict not reasonably foreseeable at the outset of a representation arises under paragraph (b)(1) after the representation commences, and is not waived under paragraph (c), a lawyer need not withdraw from any representation unless the conflict also arises under paragraphs (b)(2), (b)(3), or (b)(4).

California Rules of Professional Conduct:

"RULE 3-310. Avoiding the Representation of Adverse Interests
(A) For purposes of this rule:

(1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;

(2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;

(3) "Written" means any writing as defined in Evidence Code section 250.

(B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:

(1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or

(2) The member knows or reasonably should know that:

(a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and

(b) the previous relationship would substantially affect the member's representation; or

(3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or

(4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter."

"RULE 3-600. Organization as Client

(A) In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement.

(B) If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a manner which is likely to result in substantial injury to the organization, the member shall not violate his or her duty of protecting all confidential information as provided in Business and Professions Code section 6068, subdivision (e). Subject to Business and Professions Code section 6068, subdivision (e), the member may take such actions as appear to the member to be in the best lawful interest of the organization. Such actions may include among others:

(1) Urging reconsideration of the matter while explaining its likely consequences to the organization; or

(2) Referring the matter to the next higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(C) If, despite the member's actions in accordance with paragraph (B), the highest authority that can act on behalf of the organization insists upon action or a refusal to act that is a violation of law and is likely to result in substantial injury to the organization, the member's response is limited to the member's right, and, where appropriate, duty to resign in accordance with rule 3-700.

(D) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a member shall explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization's interests are or may become adverse to those of the constituent(s) with whom the member is dealing. The member shall not mislead such a constituent into believing that the constituent may communicate confidential information to the member in a way that will not be used in the organization's interest if that is or becomes adverse to the constituent.

(E) A member representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 3-310. If the organization's consent to the dual representation is required by rule 3-310, the consent shall be given by an appropriate constituent of the organization other than the individual or constituent who is to be represented, or by the shareholder(s) or organization members."

California Nonprofit Corporations Code.

"§ 5233. Self-dealing transaction by interested director; Remedies

(a) Except as provided in subdivision (b), for the purpose of this section, a self-dealing transaction means a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest and which does not meet the requirements of paragraph (1), (2), or (3) of subdivision (d). Such a director is an "interested director" for the purpose of this section.

(b) The provisions of this section do not apply to any of the following:

(1) An action of the board fixing the compensation of a director as a director or officer of the corporation.

(2) A transaction which is part of a public or charitable program of the corporation if it: (i) is approved or authorized by the corporation in good faith and without unjustified favoritism; and (ii) results in a benefit to one or more directors or their families because they are in the class of persons intended to be benefited by the public or charitable program.

(3) A transaction, of which the interested director or directors have no actual knowledge, and which does not exceed the lesser of 1 percent of the gross receipts of the corporation for the preceding fiscal year or one hundred thousand dollars ($ 100,000).

(c) The Attorney General or, if the Attorney General is joined as an indispensable party, any of the following may bring an action in the superior court of the proper county for the remedies specified in subdivision (h):

(1) The corporation, or a member asserting the right in the name of the corporation pursuant to Section 5710.

(2) A director of the corporation.

(3) An officer of the corporation.

(4) Any person granted relator status by the Attorney General.

(d) In any action brought under subdivision (c) the remedies specified in subdivision (h) shall not be granted if:

(1) The Attorney General, or the court in an action in which the Attorney General is an indispensable party, has approved the transaction before or after it was consummated; or (2) The following facts are established:

(A) The corporation entered into the transaction for its own benefit;

(B) The transaction was fair and reasonable as to the corporation at the time the corporation entered into the transaction;

(C) Prior to consummating the transaction or any part thereof the board authorized or approved the transaction in good faith by a vote of a majority of the directors then in office without counting the vote of the interested director or directors, and with knowledge of the material facts

concerning the transaction and the director's interest in the transaction. Except as provided in paragraph (3) of this subdivision, action by a committee of the board shall not satisfy this paragraph; and

(D) (i) Prior to authorizing or approving the transaction the board considered and in good faith determined after reasonable investigation under the circumstances that the corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances or (ii) the corporation in fact could not have obtained a more advantageous arrangement with reasonable effort under the circumstances; or

(3) The following facts are established:

(A) A committee or person authorized by the board approved the transaction in a manner consistent with the standards set forth in paragraph (2) of this subdivision;

(B) It was not reasonably practicable to obtain approval of the board prior to entering into the transaction; and

(C) The board, after determining in good faith that the conditions of subparagraphs (A) and (B) of this paragraph were satisfied, ratified the transaction at its next meeting by a vote of the majority of the directors then in office without counting the vote of the interested director or directors.

(e) Except as provided in subdivision (f), an action under subdivision (c) must be filed within two years after written notice setting forth the material facts of the transaction and the director's interest in the transaction is filed with the Attorney General in accordance with such regulations, if any, as the Attorney General may adopt or, if no such notice is filed, within three years after the transaction occurred, except for the Attorney General, who shall have 10 years after the transaction occurred within which to file an action.

(f) In any action for breach of an obligation of the corporation owed to an interested director, where the obligation arises from a self-dealing transaction which has not been approved as provided in subdivision (d), the court may, by way of offset only, make any order authorized by subdivision (h), notwithstanding the expiration of the applicable period specified in subdivision (e).

(g) Interested directors may be counted in determining the presence of a quorum at a meeting of the board which authorizes, approves or ratifies a contract or transaction.

(h) If a self-dealing transaction has taken place, the interested director or directors shall do such things and pay such damages as in the discretion of the court will provide an equitable and fair remedy to the corporation, taking into account any benefit received by the corporation and whether the interested director or directors acted in good faith and with intent to further the best interest of the corporation. Without limiting the generality of the foregoing, the court may order the director to do any or all of the following:

(1) Account for any profits made from such transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property used in such transaction; and

(3) Return or replace any property lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or account

for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate. The court may award prejudgment interest to the extent allowed in Section 3287 or 3288 of the Civil Code. In addition, the court may, in its discretion, grant exemplary damages for a fraudulent or malicious violation of this section."