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1 **I. PLAINTIFFS HAVE STANDING TO BRING THE MOTION.**

2 The issue of standing to sue on behalf of the nominal Defendant Pacifica Foundation, in
3 general, is addressed in detail in Plaintiffs' Points and Authorities in Opposition to Defendants'
4 Demurrer. Since the demurring Defendants' demurrer is being heard at precisely the same time as
5 this motion to disqualify, Plaintiffs spare the Court from a repetition, in this brief, of those extensive
6 points and authorities.

7
8 The cases cited by Defendants regarding standing are inapposite. *In re Lee v. San Diego*
9 *County Department of Social Services*, 1 Cal.Rptr.2d 375 (1991), and the case it cited, *Civil Service*
10 *Com. v. Superior Court*, 209 Cal.Rptr. 159 (1984), are not shareholder derivative-type cases such as
11 this case.

12 This case is brought on behalf of Pacifica Foundation, which is named as a *nominal*
13 defendant, for wrongs *against the Foundation* by its officers and directors. The Foundation stands
14 to benefit in money damages against its officers and directors if Plaintiffs prevail.

15 The case law is well-developed and extensive that in analogous shareholder derivative-
16 type actions, the plaintiffs may object to dual representation of named individual defendant officers
17 and directors and the corporate entity, even when the plaintiffs do not establish that they, personally,
18 have or had an attorney-client relationship with the attorney. In *In re Oracle Securities Litigation*,
19 829 F.Supp. 1176, 1188 (N.D. Cal. 1993), the Court *on its own initiative* inquired into the dual
20 representation of allegedly disinterested directors and the corporate entity, found it improper, and
21 refused to approve a settlement agreement on that basis. Similarly, the Court of Appeals for the
22 District of Columbia Circuit, addressing the analogous problem of dual representation of a union and
23 union officials in actions brought on behalf of the union, has indicated that it would always require
24 separate counsel for a corporation in a shareholder's derivative action. *Yablonski v. United Mine*
25 *Workers of America*, 448 F.2d 1175, 1181 (1971), *cert. denied*, 406 U.S. 906, (1972). Please also
26 see: *Musheno v Gensemer*, 897 F. Supp 833 (M.D. Pa 1995); *Messing v. FDI, Inc.*, 439 F. Supp. 776
27 (D. NJ 1977); *Lewis v. Shaffer Stores Co.* 218 F.Supp. 238 (SDNY 1963); *Murphy v. Washington*
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1 *American League Base Ball Club*, 324 F.2d 394, 397-398 (D.C. Cir. 1963).

2 **II. DEFENDANTS PRESENT NO EVIDENCE OF “FULL DISCLOSURE AND**
3 **INFORMED WRITTEN CONSENT” BY NOMINAL DEFENDANT PACIFICA**
4 **FOUNDATION TO THE DUAL REPRESENTATION BY WENDEL, ROSEN,**
5 **BLACK & DEAN, LLP, OR EPSTEIN BECKER & GREEN, P.C.**

6 Under California Rules of Professional Conduct, Rule 3-310, “Disclosure” means
7 informing the client of the relevant circumstances and of the actual and reasonably foreseeable
8 adverse consequences to the client. Fourteen individual Defendants have filed declarations reflecting
9 their consent to the dual representation. These declarations are totally irrelevant. What is relevant
10 is that no declaration has been signed or filed by any appropriately disinterested person on behalf of
11 nominal Defendant Pacifica Foundation, *the party on whose behalf the subject motion to disqualify*
12 *is brought.*

13 Beyond representing to the Court that each of the individual defendants was provided a
14 copy of the subject motion to disqualify, there has been no filing by Defendants or Defendants'
15 counsel reflecting that the subject two law firms informed, acknowledged, or explained to nominal
16 Defendant Pacifica Foundation and the various individual Defendants of the nature of the potential
17 conflicts of interests between the directors and the Pacifica Foundation, and between some directors
18 who are accused of breach of charitable trust and against whom damages are sought on behalf of
19 Pacifica and other directors who are not alleged to have participated in breaches of trust but are
20 alleged to have been unlawfully elected. Nor is there any indication that Defendants' counsel have
21 apprized Defendants in detail of the possible adverse consequences and risks involved.

22 Defendants' counsel fail to file any writing evidencing sufficient written disclosure by
23 Defendants' counsel to permit *Defendants* -- as opposed to *Defendants' counsel* -- to determine a lack
24 of conflicts of interest or to give informed consent to any conflicts of interest which *Defendants*
25 might determine to exist.

26 Under California Rules of Professional Conduct, Rule 3-310, “Informed written consent”
27 means the client’s written agreement to the representation *following written disclosure.*
28

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

8 Under this rule, the appropriate “constituents” to consent on behalf of the organization to
9 the dual representation would appear to be the directors that EB&G and WRB&D do *not* represent,
10 or the members of the Pacifica Foundation (i.e., the Local Advisory Board Members). *No such*
11 *consent has been filed.*

12 **III. PLAINTIFFS HAVE ALLEGED WITH PARTICULARITY MULTIPLE**
13 **BREACHES OF DIRECTORS’ FIDUCIARY DUTIES AND MULTIPLE CAUSES**
14 **OF ACTION WHICH ARE BREACHES OF THE DIRECTORS’ DUTY OF**
15 **LOYALTY AND WHICH WOULD RESULT IN PERSONAL LIABILITY IN**
16 **DAMAGES TO PACIFICA ON THE PART OF SOME OF ITS DIRECTORS AND**
17 **OFFICERS IF PLAINTIFFS PREVAIL.**

18 The First Cause of Action is for Breach of Charitable Trust¹, which includes allegations
19 of bad faith and conspiracy in diverting Pacifica from its founding purposes and engaging in *ultra*
20 *vires* activities. The Second Cause of Action is for Gross Abuse of Authority and Discretion. The
21 Sixth Cause of Action is for an Accounting, not only of wrongly expended and wasted funds in
22 preparation for and carrying out the armed occupation and shutdown of radio station KPFA, but also
23 of alleged irregularities in Pacifica’s accounts going back several years (including, without limit,
24 payments for space not built in the construction of studios for station WPFW and requiring WBAI
25 personnel to sign blank checks, at Complaint, ¶ 41) to determine whether or not there have been
26 misappropriations of funds and who is responsible.

27 _____
28 ¹Defendants erroneously characterize this action as purely a *quo warranto* action, apparently
because Plaintiffs’ Third, Fourth, and Fifth Causes of Action seek removal of directors for
usurpation of office on various grounds.

1 The Complaint makes detailed factual allegations of intentional wrongdoing, not of mere
2 negligence, but of *intentional* falsehoods, deceptive practices and patterns of deceit, involving
3 successive officers and directors over a period of several years, in order to carry out a plan to divert
4 Pacifica from its founding purposes and to engage in *ultra vires* activities.²

5 Defendants attempt to trivialize these allegations as “political rhetoric.” Defendants
6 behave as if they have forgotten that Pacifica was founded by Pacifists shortly after World War II for
7 a *political purpose* – “to contribute to a lasting understanding between nations and between the
8 individuals of all nations, races, creeds and colors; to gather and disseminate information on the
9 causes of conflict between any and all of such groups; and through any and all means compatible with
10 the purposes of this corporation, to promote the study of political and economic problems and the
11 causes of religious, philosophical and racial antagonisms.”(Articles of Incorporation, Article II (d),
12 as Amended August 20, 1948, attached as “Exhibit A”to the Declaration of Thiele R. Dunaway filed
13 in Support of Defendants’ Opposition to Motion to Remand, in United States District Court. Plaintiff
14 asks that the Court take judicial notice of such Declaration.) For that reason, among others, Pacifica
15 is *not* an ordinary business corporation, *nor* even an ordinary nonprofit educational radio broadcast
16 licensee, and the introduction of armed guards into a Pacifica radio station (at an estimated cost of
17 over \$300,000) in order to “shut down and reprogram that unit” was a shocking and serious breach
18

19
20 ²Bad faith is alleged in the Complaint (Cmp. ¶46) and detailed allegations of bad faith actions by
21 past and current officers and directors, including, without limit, intentional deceit (Cmp. ¶¶ 24,),
22 concealment (Cmp. ¶¶10, 19, 25, 42), conspiracy (Cmp. ¶¶10, 17, 24,), manipulation (Cmp. ¶¶
23 24, 25, 26), misrepresentations (Cmp. ¶¶ 24, 25) , coercion (Cmp. ¶¶ 19, 24, 25, 28) , threats
24 (Cmp. ¶¶19, 24, 25, 26, 28), oppression (Cmp. ¶19, 25, 27, 28, 29), and even armed force (Cmp.
25 ¶¶25, 27, 28), to carry out over several years a plan to disenfranchise the corporate membership
26 (the “LABs”) (Cmp. ¶¶22, 23, 24), unlawfully amend the bylaws to create a “self-selecting” board
27 of directors in derogation of the rights of the corporate members (Cmp. ¶¶22, 23, 24), to
28 unlawfully elect directors (Cmp. ¶¶ 35, 36), to permit directors to unlawfully serve after the
expiration of their terms or after they had been lawfully removed from office by vote of corporate
members (Cmp. ¶¶33, 37, 38), and to divert Pacifica from its founding purposes as set forth in its
Articles of Incorporation (Cmp. ¶¶ 18, 19), allow Pacifica to fall under the domination of a quasi-
governmental entity (the Corporation for Public Broadcasting) in contravention of the Articles of
Incorporation (Cmp. ¶¶ 19, 21, 24), and to spend extraordinary sums on *ultra vires* activities
(Cmp. ¶¶ 19, 29), all to the great injury of the Pacifica Foundation and the public interest (Cmp.
¶¶ 29, 30,), as well as to the rights of the corporate members and the individual donors and
listener-sponsors of Pacifica’s five radio stations across the country.

1 of trust, lacking any true business purpose, and not an ordinary action permitted under the “business
2 judgment rule.” Plaintiffs’ allegations amount to *far more* than a breach of directors’ duty of care.

3 “We have no hesitation in holding that -- except in patently frivolous cases --
4 allegations of directors' fraud, intentional misconduct, or self-dealing *require*
5 *separate counsel*. We recognize that corporate law has traditionally
6 distinguished between breach of the duty of care and breach of the duty of
7 loyalty, the latter being more grave. See Del. Code Ann. tit. 8 §§ 102(b)(7)
8 (charter amendment provision allowed to limit director liability for breaches of
9 duty of care but ‘such provision shall not eliminate or limit the liability of a
10 director: . . .for any breach of the director's duty of loyalty’); William A. Klein
11 & John C. Coffee, Jr., *Business Organization and Finance* 138-43, 152-58, 182
12 & n.97 (1990) (discussing distinction between duties of care and loyalty). But
13 drawing the line between breaches of care and loyalty may be difficult in many
14 cases. See Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure*
15 *of Corporate Law* 103 (1991) (‘Ultimately, though, there is no sharp line
16 between the duty of care and the duty of loyalty.’).”

17 *Bell Atlantic Corporation v. Bolger*, 2 F.3d 1304, 1317 (3rd Cir. 1993) (emphasis added).

18 In this case, where directors and officers are accused of conspiring in bad faith to breach
19 a charitable trust and to waste trust assets engaging in *ultra vires* activities, if Plaintiffs allegations
20 are proven, some directors and officers will be liable in damages to the corporation. These errant
21 directors' duty of loyalty to the corporation unquestionably is called into question by the facts alleged
22 in the Complaint. Dual representation of these directors and officers and the Foundation clearly
23 should not be permitted.

24 **IV. DEFENDANTS’ DO NOT ADDRESS THE ISSUE OF IMPUTED DISQUAL- 25 IFICATION OF DEFENDANT MURDOCK’S LAW FIRM.**

26 As argued in Plaintiffs’ moving papers, Defendant director Murdock is clearly disqualified
27 from representing the Pacifica Foundation, or any defendant other than himself, in this matter.
28 Defendants have not presented *any* evidence of consent after consultation including “explanation of
the implications of the common representation and risks involved,” as required under ABA Model
Rule 1.7. Mr. Murdock’s disqualification is imputed to every other attorney employed by Epstein
Becker & Green, P.C., under ABA Model Rules of Professional Responsibility, Rule 1.10. The rule
of imputed disqualification is consistently followed by the California courts. *Trone v. Smith*, 621
F.2d 994, 999 (9th Cir. 1980); *People v. Speedee Oil Change Systems, Inc.*, 20 Cal.4th 1135, 1139

1 (1999); *Henricksen v. Great American Savings and Loan*, 11 Cal.App.4th 109 (1992).

2 Defendants have not presented any argument in their Opposition briefs that EB&G should
3 not be disqualified from representing *any* party to this matter on this basis.

4 **V. DEFENDANT MURDOCK DOES HAVE A MATERIAL AND A FINANCIAL**
5 **INTEREST IN THE EPSTEIN BECKER & GREEN LAW FIRM.**

6 Defendants cite no case authority to support their disingenuous claim that defendant
7 Murdock’s interest in the hiring of his law firm to represent Defendants in this case is not a “material
8 interest.” While Mr. Murdock states that he is an “income partner” and not an “equity shareholder”
9 of EB&G (Temchine Declaration in Support of Opposition to Plaintiff’s Motion to Disqualify,
10 Exhibit A, Affidavit of John M. Murdock), that does not mean that he does not benefit from the
11 profitability of EB&G when it comes time to determine his income, as he explained it; nor does it
12 mean that he does not receive other benefits by reason of procuring business for the firm, including
13 favorable treatment when it comes to promotion from “income partner” to “equity shareholder.”
14

15 The California Corporations Code does not define “material interest,” and Plaintiffs have
16 not been able to find any case law defining it in this context. However, the California Government
17 Code defines “financial interest” in the context of public officials³, and there is no reason that the
18 standard should be less stringent for fiduciaries of nonprofit public benefit corporations and
19

20 ³California Government Code § 87103. Financial interest A public official has a financial interest
21 in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision
22 will have a material financial effect, distinguishable from its effect on the public generally, on the
23 official, a member of his or her immediate family, or on any of the following: (a) Any business
24 entity in which the public official has a direct or indirect investment worth one thousand dollars
25 (\$ 1,000) or more. (b) Any real property in which the public official has a direct or indirect interest
26 worth one thousand dollars (\$ 1,000) or more. (c) Any source of income, other than gifts and other
27 than loans by a commercial lending institution in the regular course of business on terms available
28 to the public without regard to official status, aggregating two hundred fifty dollars (\$ 250) or
more in value provided to, received by or promised to the public official within 12 months prior
to the time when the decision is made. (d) Any business entity in which the public official is a
director, officer, partner, trustee, employee, or holds any position of management. (e) Any donor
of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars
(\$ 250) or more in value provided to, received by, or promised to the public official within 12
months prior to the time when the decision is made. The amount of the value of gifts specified by
this subdivision shall be adjusted biennially by the commission to equal the same amount
determined by the commission pursuant to subdivision (f) of Section 89503. For purposes of this
section, indirect investment or interest means any investment or interest owned by the spouse or
dependent child of a public official, by an agent on behalf of a public official, or by a business
entity or trust in which the official, the official's agents, spouse, and dependent children own

1 charitable trusts, nor is there any reason to believe that “material interest” is not a broader concept
2 than mere “financial interest.”

3 **VI. DEFENDANTS’ OWN EVIDENCE SHOWS THAT THEY DID NOT COMPLY**
4 **WITH CALIFORNIA CORPORATIONS CODE §5233, REGARDING**
5 **TRANSACTIONS WITH INTERESTED DIRECTORS.**

6 As set forth in Plaintiffs’ moving brief, where it is not reasonably practicable for a board
7 of directors to grant prior approval of a transaction with an interested director, a self-dealing
8 transaction may be allowed, if the board ratifies the transaction by majority vote of the disinterested
9 directors in office at the next board meeting. California Corporations Code §5233 requires the self-
10 dealer must prove that:

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

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

13 (3) a majority of the entire existing board (and not just a committee), without
14 counting the vote of the interested director(s), and with knowledge of all the material facts
15 concerning the transaction and the director’s interest, approved or authorized the
16 transactions; and

17 (4) the board considered and in good faith determined after an investigation
18 reasonable under the circumstances that the corporation could not have obtained a more
19 advantageous arrangement.
20

21 Here, Defendants do not establish that it was not practicable for the Board of Directors of
22 Pacifica to pre-approve the transaction at the June 2000, meeting of the Board of Directors, or even
23 that the transaction was ratified at the *next* meeting after the hiring took place. (Plaintiffs do not
24 admit that it has been ratified at *any* Board meeting to date.) The Board met on June 11, 2000.
25 (Spooner Declaration in Support of Motion to Disqualify Defendants’ Counsel.) Apparently EB&G
26 was hired by the Executive Director to represent Pacifica in the related state court case, *Adelson, et*
27 *al. v Pacifica, et al*, some time in June 2000; whether before or after June 11, 2000 is uncertain.
28

1 (Temchine Declaration in Support of Opposition to Plaintiff's Motion to Disqualify, Exhibit B,
2 Transcript, 43:13-16.)

3 In any case, the transcript supplied by Defendants of the September 17, 2000, board
4 meeting (Temchine Declaration, Exhibit B), where the Defendants assert that the board "ratified" the
5 transaction, shows:

6 1) that several directors complained that they did not learn (other than by rumors)
7 that the hiring had taken place until they arrived at the meeting. (Transcript, 39:20-40:8;
8 44:10 - 46:8.);

9 2) that the terms of the transaction were not revealed to the directors at the
10 September 17th meeting. (Transcript, 38:9-16, 51:3-5); and

11 3) that the Board was prevented by the Chair (Defendant Mary Frances Berry)
12 from making the inquiries necessary to considering and making in good faith a
13 determination after an investigation reasonable under the circumstances that the
14 corporation could not have obtained a more advantageous arrangement. (Transcript, 37:19
15 - 64:6, *passim*.)

16 The transcript provided by Defendants does *not* reflect that the September 13, 2000, letter-
17 opinion of attorney John Crigler (Temchine Declaration, Exhibit C) was provided to the Board of
18 Directors (except, perhaps some Executive Committee Members) prior to or at any time during the
19 September 17th Board meeting.

20 To the extent that a majority of the Board voted not to discharge EB&G, they certainly did
21 not do so under circumstances that meet their fiduciary duties under the requirements of §5233 of the
22 California Corporations Code. Even a motion to meet again by conference call to discuss the matter
23 was defeated by the Board of Directors majority under the control of the Chair. (Transcript, 56:9 -
24 60:12..)

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27 **VII. DEFENDANTS HAVE NOT ESTABLISHED THAT REPRESENTATION BY**
28 **EB&G PROVIDES ANY BENEFIT TO THE CORPORATION, AND THEIR**
EVIDENCE SUGGESTS THAT SUCH REPRESENTATION IS NOT IN THE

1 **FINANCIAL BEST INTERESTS OF THE CORPORATION.**

2 Defendants assert that “EBG is providing services to the Foundation at a significantly
3 discounted rate,” and that “it would impose a significant financial burden on the defendants if EBG
4 were disqualified.” (Foundation Defendants’ Opposition to Plaintiffs’ Motion to Disqualify Epstein
5 Becker & Green, P.C. as Counsel, 13:15-19.) Mr. Temchine, in his e-mail to Defendant director
6 Leslie.Cagan (Temchine Declaration, Exhibit A, filed in opposition to the motion to disqualify in
7 United States District Court; Plaintiffs request that this Court take judicial notice of such document),
8 explains: “The utility to the Foundation of multiple representations by its counsel is that, if feasible,
9 it conserves its assets as represented by its D&O insurance policy.” But the Defendants do not
10 explain how paying a “discounted rate” to EB&G for attorneys’ services is more beneficial to the
11 corporation than calling upon its Directors and Officers liability insurer to defend the case at *no*
12 *expense* to the corporation (except, perhaps a deductible). Presumably, the insurer is obligated to
13 provide the directors with defense counsel under the terms of the policy.
14

15 Finally, the fact that Pacifica is apparently paying for the defense of its directors out of
16 corporate funds raises serious issues of propriety, in and of itself, under California Corporations Code
17 §5238.⁴

18 Even in the context of a for-profit corporation, such payments for directors’ defense costs
19 are risky.
20

21 “As to the propriety of the corporation's paying the legal expenses and counsel
22 fees of the individual defendants in the present litigation, we think final
23 settlement of this question must await the termination of the suit. If in the light
24 of the result of the litigation and applicable provisions of law the individual
25 defendants are found to be entitled to indemnification in whole or in part, the
26 corporation can, of course, effect such indemnification. If the directors
27 authorize payments of this sort by the corporation prior to final judgment, they
28 do so at the risk of being held liable to the corporation for the amounts of any
such payments which are ultimately determined to have been improper. Whether they or the corporation can or should be enjoined from making any payments prior to final judgment is not before us: no request was made for such an injunction.”

⁴Due to its length, §5238 is appended at the end of this brief.

1 *Murphy v. Washington American League Base Ball Club*, 324 F.2d 394, 398 (D.C. Cir.

2 1963) (footnotes omitted).s

3

CONCLUSION

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Dated: April 5, 2001

Respectfully submitted,

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Attorney for Plaintiffs

1 APPENDIX

2 CORPORATIONS CODE
3 TITLE 1. CORPORATIONS
4 DIVISION 2. NONPROFIT CORPORATION LAW
5 PART 2. NONPROFIT PUBLIC BENEFIT CORPORATIONS
6 CHAPTER 2. Directors and Management
7 ARTICLE 3. Standards of Conduct
8 Cal Corp Code §§ 5238 (2000)

9 §§ 5238. "Agent"; "Proceeding"; "Expenses"; Power of corporation to indemnify person threatened
10 to be made party to proceeding; Indemnification of agent for expenses incurred; Purchase of liability
11 insurance on behalf of corporate agent; Applicability of section

12 (a) For the purposes of this section, "agent" means any person who is or was a director, officer,
13 employee or other agent of the corporation, or is or was serving at the request of the corporation as
14 a director, officer, employee or agent of another foreign or domestic corporation, partnership, joint
15 venture, trust or other enterprise, or was a director, officer, employee or agent of a foreign or
16 domestic corporation which was a predecessor corporation of the corporation or of another enterprise
17 at the request of such predecessor corporation; "proceeding" means any threatened, pending or
18 completed action or proceeding, whether civil, criminal, administrative or investigative; and
19 "expenses" includes without limitation attorneys' fees and any expenses of establishing a right to
20 indemnification under subdivision (d) or paragraph (3) of subdivision (e).

21 (b) A corporation shall have power to indemnify any person who was or is a party or is threatened
22 to be made a party to any proceeding (other than an action by or in the right of the corporation to
23 procure a judgment in its favor, an action brought under Section 5233, or an action brought by the
24 Attorney General or a person granted relator status by the Attorney General for any breach of duty
25 relating to assets held in charitable trust) by reason of the fact that such person is or was an agent of
26 the corporation, against expenses, judgments, fines, settlements and other amounts actually and
27 reasonably incurred in connection with such proceeding if such person acted in good faith and in a
28 manner such person reasonably believed to be in the best interests of the corporation and, in the case
of a criminal proceeding, had no reasonable cause to believe the conduct of such person was
unlawful. The termination of any proceeding by judgment, order, settlement, conviction or upon a
plea of nolo contendere or its equivalent shall not, of itself, create a presumption that the person did
not act in good faith and in a manner which the person reasonably believed to be in the best interests
of the corporation or that the person had reasonable cause to believe that the person's conduct was
unlawful.

(c) A corporation shall have power to indemnify any person who was or is a party or is threatened
to be made a party to any threatened, pending or completed action by or in the right of the
corporation, or brought under Section 5233, or brought by the Attorney General or a person granted
relator status by the Attorney General for breach of duty relating to assets held in charitable trust, to
procure a judgment in its favor by reason of the fact that such person is or was an agent of the
corporation, against expenses actually and reasonably incurred by such person in connection with the
defense or settlement of such action if such person acted in good faith, in a manner such person
believed to be in the best interests of the corporation and with such care, including reasonable
inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. No
indemnification shall be made under this subdivision:

(1) In respect of any claim, issue or matter as to which such person shall have been adjudged to be

1 liable to the corporation in the performance of such person's duty to the corporation, unless and only
2 to the extent that the court in which such proceeding is or was pending shall determine upon
3 application that, in view of all the circumstances of the case, such person is fairly and reasonably
entitled to indemnity for the expenses which such court shall determine;

4 (2) Of amounts paid in settling or otherwise disposing of a threatened or pending action, with or
without court approval; or

5 (3) Of expenses incurred in defending a threatened or pending action which is settled or otherwise
6 disposed of without court approval unless it is settled with the approval of the Attorney General.

7 (d) To the extent that an agent of a corporation has been successful on the merits in defense of any
8 proceeding referred to in subdivision (b) or (c) or in defense of any claim, issue or matter therein, the
9 agent shall be indemnified against expenses actually and reasonably incurred by the agent in
connection therewith.

10 (e) Except as provided in subdivision (d), any indemnification under this section shall be made by
11 the corporation only if authorized in the specific case, upon a determination that indemnification of
12 the agent is proper in the circumstances because the agent has met the applicable standard of conduct
set forth in subdivision (b) or (c), by:

13 (1) A majority vote of a quorum consisting of directors who are not parties to such proceeding;

14 (2) Approval of the members (Section 5034), with the persons to be indemnified not being entitled
to vote thereon; or

15 (3) The court in which such proceeding is or was pending upon application made by the corporation
16 or the agent or the attorney or other person rendering services in connection with the defense, whether
or not such application by the agent, attorney or other person is opposed by the corporation.

17 (f) Expenses incurred in defending any proceeding may be advanced by the corporation prior to the
18 final disposition of such proceeding upon receipt of an undertaking by or on behalf of the agent to
19 repay such amount unless it shall be determined ultimately that the agent is entitled to be indemnified
20 as authorized in this section. The provisions of subdivision (a) of Section 5236 do not apply to
advances made pursuant to this subdivision.

21 (g) No provision made by a corporation to indemnify its or its subsidiary's directors or officers for
22 the defense of any proceeding, whether contained in the articles, bylaws, a resolution of members or
23 directors, an agreement or otherwise, shall be valid unless consistent with this section. Nothing
contained in this section shall affect any right to indemnification to which persons other than such
directors and officers may be entitled by contract or otherwise.

24 (h) No indemnification or advance shall be made under this section, except as provided in subdivision
25 (d) or paragraph (3) of subdivision (e), in any circumstance where it appears:

26 (1) That it would be inconsistent with a provision of the articles, bylaws, a resolution of the members
27 or an agreement in effect at the time of the accrual of the alleged cause of action asserted in the
proceeding in which the expenses were incurred or other amounts were paid, which prohibits or
otherwise limits indemnification; or

28 (2) That it would be inconsistent with any condition expressly imposed by a court in approving a

1 settlement.

2 (i) A corporation shall have power to purchase and maintain insurance on behalf of any agent of the
3 corporation against any liability asserted against or incurred by the agent in such capacity or arising
4 out of the agent's status as such whether or not the corporation would have the power to indemnify
the agent against such liability under the provisions of this section; provided, however,

5 that a corporation shall have no power to purchase and maintain such insurance to indemnify any
6 agent of the corporation for a violation of Section 5233.

7 (j) This section does not apply to any proceeding against any trustee, investment manager or other
8 fiduciary of an employee benefit plan in such person's capacity as such, even though such person may
9 also be an agent as defined in subdivision (a) of the employer corporation. A corporation shall have
power to indemnify such trustee, investment manager or other fiduciary to the extent permitted by
subdivision (f) of Section 207.

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1 **PROOF OF SERVICE**

2 The undersigned declares he/she is employed in the county of Marin, State of California,
3 by Daniel Robert Bartley Law Offices, P.O. Box 686, Novato, CA, 94948-0686. I am over the age
4 of 18 and not a party to this action. On today's date, I served, true and correct copies of "**REPLY
POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISQUALIFY
DEFENDANTS' COUNSEL**" by placing such in a sealed envelopes addressed as follows:

5 Daniel Rapaport, Esq.
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8 Oakland, CA 94607
9 Tel 510 834 6600 Fax 510 834 1928
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16 I personally served such document upon demurring Defendants' local counsel Daniel
17 Rapaport.

18 I mailed, via U.S. mail, first-class postage prepaid, this document to the other listed
19 counsel.

20 I declare under penalty of perjury, under the laws of the State of California, that the
21 foregoing is true and correct and that this declaration was executed on this 5th day of April, 2001,
22 at Oakland, Alameda County, California.

23 _____
Daniel Robert Bartley

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