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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

DAVID ADELSON, et al.,
Plaintiffs,

v.

PACIFICA FOUNDATION, et al.,
Defendants.

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

Plaintiffs,

v.

PACIFICA FOUNDATION, et al.,
Defendants.

) Consolidated Case No.: 814461-0
) [Consolidated with No. 831252-3
) and No. 831286-0]

) **PLAINTIFFS AND CROSS-**
) **COMPLAINANTS' MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN SUPPORT**
) **OF MOTION FOR PRELIMINARY**
) **INJUNCTION PROHIBITING ELECTION**
) **OR REMOVAL OF DIRECTORS**

) Date: September 13, 2001
) Time: 9:00 a.m.
) Dept.: 22
) Judge: Hon. Ronald M. Sabraw

1 ROBERT ROBINSON, et al.,)
Plaintiffs,)
2 v.)
3 PACIFICA FOUNDATION, et al.,)
Defendants.)
4)
5 _____)
TOMAS MORAN, et al.,)
Cross-Complainants,)
6 v.)
7 PACIFICA FOUNDATION, et al.,)
Cross-Defendants.)
8 _____)

1 **INTRODUCTION**

2 There are currently eleven individuals acting as directors of the Pacifica Foundation. One
3 of the central issues in all of the consolidated cases is the legality of the Pacifica Foundation Bylaws
4 under which a majority of the current directors were elected, and consequently, the legal authority
5 of the Pacifica Board to act on behalf of the Foundation. In addition, the action brought by the
6 People of the State of California asserts that the Foundation is currently limited to five directors
7 under its Articles of Incorporation.

8 The Pacifica Board is now divided into two camps of five directors each – plaintiffs
9 Robinson and Kriegel and cross-complainants Moran, Cagan and Bramson (collectively the
10 “Plaintiff Directors”), in one camp, and defendants Ford, Johns, Murdock, Lee and Chambers
11 (collectively the “Defendant Directors”), in the other camp – with one director, defendant Robert
12 Farrell, who is unaligned, as he has recently chosen not to be represented in this action with the other
13 Defendant Directors.

14 The Vice-Chair of the Board (Defendant Director Ford) has given notice of a special meeting
15 of the Pacifica Board for September 19th for the purpose of electing additional directors to the Board.

16 Since Defendant Directors only constitute five members of the current eleven-member Board, in
17 order to ensure their ability to pack the Board with directors favorable to their position in this
18 litigation, Defendant Directors’ counsel has also given notice that Plaintiff Director Bramson will
19 not be permitted to participate in that meeting because, allegedly, his term as a director has expired.

20 In addition, although September 19 is Rosh Hashanah, precluding Plaintiff Director Rabbi Kriegel
21 from attending or participating in the scheduled meeting, Defendant Directors have refused to
22 reschedule the meeting for another date.^{1/}

23 ^{1/} As set forth in the concurrently filed Plaintiffs’ and Cross-Complainants’ Memorandum of Points and
24 Authorities in Support of Motion for Preliminary Injunction Governing Conduct of September 2001 Meeting
25 of the Pacifica National Board, Defendant Directors’ efforts to preclude the participation of Plaintiff Directors
26 Bramson and Kriegel are arbitrary and insupportable.

1 Three, Section 2 of the Bylaw was purportedly amended to read as follows:

2 “NOMINATION OF DIRECTORS: Candidates for Directors may be nominated by:
3 1. Receiving a majority vote of a local advisory board. Of two nominees from the
4 local advisory board, at least one must be a person of color; 2. The foundation’s
Board Development Committee.”

5 Article Three, Section 3, was purportedly amended to provide for election of directors as follows:

6 “ELECTION OF DIRECTORS: In order to be elected as a director, a nominee must
7 receive the majority vote of those seated in a quorum.”

8 Spooner Dec., Ex. D.

9 In February 1999, defendants again purported to amend the Bylaws, again without the
10 approval of the local advisory boards, to eliminate the local boards’ rights even to directly nominate
11 directors. Article Three, Section 3, was purportedly amended to read as follows:

12 “NOMINATION OF DIRECTORS Candidates for Directors may be nominated by
13 the Foundation’s Board Governance and Structure Committee.”

14 This Bylaw has a footnote which provides that:

15 “The Board Governance and Structure Committee reports the following regarding the
16 the [sic.]Nomination of Directors. (2/28/99)

17 The Committee is committed to maintaining a National Governing Board composed
18 of a majority of persons of color, keeping in mind that this is a goal and not a quota.

19 The Committee recognizes that Local Advisory Boards will still have put in [sic.] to
20 the Governing Board through the Council of Chairs, and the right to nominate, as a
21 body or individually, directors to the Governing Board through the Board
22 Governance and Structure Committee. The only limitation is that the nominee may
not be a LAB member and a Governing Board member concurrently.

23 The Committee will insure representation from each signal area of each Pacifica
24 station.

25 The Executive Committee must have representation from each signal area.”

26 Spooner Dec., Ex. E.

1 (7) Where the obligation arises from a trust.

2 Cal. Civ. Proc. Code § 526(a).

3 In determining whether to issue provisional relief, a court must weigh two “interrelated”
4 factors: (1) the likelihood that the plaintiff will succeed on the merits at trial; and (2) the relative
5 interim harm that the plaintiff will likely suffer if an injunction is not issued compared to the likely
6 interim harm to defendant if an injunction is issued. *Butt v. State*, 4 Cal. 4th 668, 677-78 (1992).
7 “[T]he greater the plaintiff’s showing on one, the less must be shown on the other to support an
8 injunction.” *Id.* at 678. A court “must exercise its discretion in favor of the party most likely to be
9 injured. . . . If denial of an injunction would result in great harm to the plaintiff, and the defendants
10 would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the
11 preliminary injunction.” *Robbins v. Superior Court*, 38 Cal. 3d 199, 205 (1985).

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14 **II. THE BALANCE OF INTERIM HARMS FAVORS PLAINTIFFS**

15 Clearly, Defendant Directors’ attempt to elect new directors, while at the same time
16 arbitrarily disqualifying one Plaintiff Director from voting and effectively preventing a second
17 Plaintiff Director from attending the special meeting, is an attempt to pack the board with directors
18 favorable to defendants’ position in this litigation. But there is no current need whatsoever to elect
19 any new directors, except to favor defendants in this litigation.^{1/}

21 Any potential harm to defendants is minimal, due to the imminent trial date and ultimate
22 resolution of the proper method for election of directors and number of authorized directors. A firm
23

24 ^{2/} Because the number of directors is unspecified in the bylaws, and limited to five by the Articles of
25 Incorporation, *there are no vacant seats on the board of directors that need to be filled*. Therefore, no harm
26 will come to the Pacifica Foundation if no new directors are elected. In fact, even if six of the current directors
27 were to resign, there would be no vacancies on the board. The Foundation can certainly operate without the
28 election of new directors.

1 trial date has been set for early January 2002, just three and a half months from the date of the
2 intended special board meeting to elect directors.^{1/}

3 Defendants cannot credibly argue that new directors are necessary for the Foundation's
4 Board to function properly until trial. The current Defendant Directors, who under the bylaws are
5 the only ones that can call a board meeting to deal with issues at the Foundation, have repeatedly
6 refused to call a board meeting for any purposes other than to elect directors, despite repeated
7 requests by the Plaintiff Directors that a general meeting of the board be held to discuss ongoing
8 issues at Pacifica. Cagan Dec. ¶¶ 3-19. Therefore, the proper method to deal with these problems
9 is for a board meeting to be held so that the current directors can address the necessary issues
10 concerning the management of Pacifica Foundation, and not for the election of new directors to pack
11 the board.
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14 The *status quo* here is to not have *any* election or removal of directors. The central issue in
15 the litigation concerns how many directors are permissible, and the proper procedure for election
16 of directors. Therefore, any interim "election" of directors would vitiate the *status quo*, and would
17 necessarily require actions that support one view or the other of the ultimate issues in the litigation.
18

19 The only permissible maintenance of the *status quo* is to have the current board of directors remain
20 in place through trial, which, again, is less than four months from the date of the intended election
21 of new directors.

22 In any event, it makes no sense to have an election of directors, when all of these
23 consolidated lawsuits credibly challenge the method for election of directors. If the election is
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25 ^{3/} The Court has stated that the January 7, 2002 trial date is a "date certain" and that "short of a
26 calamitous event, that is going to be the trial date." Hearing Transcript, May 21, 2001, at 5:28-6:1, 6:15-16.

1 allowed to proceed as noticed, the new, illegally-elected directors will commence to act on behalf
2 of the Foundation, clearly compounding the problems besetting this organization as a result of
3 unauthorized directors usurping control. It would also produce waste because the Foundation could
4 engage in no business that would not be subject to later challenge and perhaps revocation after trial
5 if the election is allowed to proceed and subsequently found to be invalid. Further, any such election
6 would cause delay and interference with the litigation, due to the filing of an amended complaint to
7 add new defendants to the current actions, the filing of a new legal action under Corporations Code
8 § 5617 to determine the validity of the election, or both.

9
10 In addition, removal of director Bramson by defendants would deprive the corporate
11 members, the local station boards, of one of the three remaining directors lawfully elected by them
12 whose term has not expired and who has not been removed by them. (Of the eleven current
13 directors, only five were originally elected by the local boards – Bramson - KPFA, Robinson and
14 Ford - WPFW, and Kriegel and Farrell - KPFK. Ford's term expired in June 2000 and he has not
15 been re-elected by that board, and Farrell has been removed by majority vote of the KPFK local
16 board.)
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19 **III. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS**
20 **CONCERNING THE PROPER CONSTITUTION OF THE PACIFICA BOARD**

21 Plaintiffs have a strong likelihood of success on the merits of their claim that Defendant
22 Directors' intended election of new directors would be illegal for two independent reasons. First,
23 under its existing corporate governance instruments, the Pacifica Board is limited to five directors.
24 Accordingly, any election of new directors in further excess of that number is invalid. Second, the
25 procedure Defendant Directors intend to use to elect new directors – election by simple majority vote
26 of board members sitting in a quorum – is invalid because not in compliance with the governing
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1 1984 Bylaw concerning the election of directors, which requires election either by the relevant local
2 advisory board, or by two-thirds vote of the existing board of directors.

3 **A. Defendant Directors’ Intended Election of New Directors Is Invalid**
4 **Because In Violation of Pacifica’s Governing Articles of Incorporation**

5 The Pacifica Board is limited to five directors as a matter of law. Pacifica’s original 1946
6 Articles of Incorporation specified that the number of directors was five, and authorized the
7 corporate members to change the number of directors by bylaw. Only one attempt, in 1961, to
8 change the number of authorized directors by bylaw has ever been made. That 1961 bylaw, however,
9 was invalid as a matter of law because it allowed an unspecified and unlimited number of directors
10 and failed to specify a stated minimum and maximum number, providing only that “there shall be
11 such number of directors as the board of directors shall from time to time decide.” Spooner Dec., Ex.
12 C (Article Three, Section 1(c)). This provision violates the former corporations law, Cal. Corp.
13 Code § 9300, in effect when the 1961 bylaw was adopted, which provided that when the articles of
14 incorporation state a specific number of directors, “the number of persons so named constitutes the
15 number of directors of the corporation” until the articles or bylaws are amended to state either a
16 different specific number or a variable number with the maximum number not exceeding the
17 minimum number by more than three.^{4/} It also violates the nonprofit corporations law in effect since
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21 ^{4/} Former Corporations Code § 9300 provided in pertinent part:
22 “The articles of incorporation shall set forth: . . . (e) The names and address of three or more persons who are
23 to act in the capacity of directors until the selection of their successors. [...] The number of persons so named
24 constitutes the number of directors of the corporation, until changed by an amendment to the articles or, unless
25 the articles otherwise provide, by a bylaw adopted by the members. However, the articles or, unless the articles
26 provide otherwise, a bylaw duly adopted by the members, may state that the number of directors shall not be
27 less than a stated minimum (which in no case shall be less than five) nor mor than a stated maximum (which
in no case shall exceed such stated minimum by more than three); and in the event that the articles or bylaws
permit such an indefinite number of directors, the exact number of directors shall be fixed, within the limits
specified in the articles or bylaws, by a bylaw or amendment thereof duly adopted by the members or by the
board of directors. In the event the articles provide for an indefinite number of directors, unless the articles

1 1980, Cal. Corp. Code § 5151(a), which requires either a stated number of directors or “that the
2 number of directors shall be not less than a stated minimum nor more than a stated maximum.”^{1/}

3 Accordingly, whether the old or the new nonprofit corporations law applies to the 1961 bylaw, the
4 1961 bylaw was invalid and failed to change the number of authorized directors from the five
5 specified in the Articles of Incorporation. As no subsequent bylaw has ever been adopted concerning
6 the number of authorized directors, the limitation to five directors in the Articles of Incorporation
7 still applies. Since there are already more than five directors on the Board, any new election of
8 directors in further excess of that number would be invalid and must be voided. *See Morris v.*
9 *Richard Clark Missionary Baptist Church*, 78 Cal. App. 2d 490, 492-93 (1947).
10

11 **B. Defendants’ Intended Election of New Directors Is Invalid Because In**
12 **Violation of Pacifica’s Governing 1984 Bylaw Concerning Election of Directors**

13 The procedure Defendant Directors intend to use to elect new directors – election by simple
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15 provide otherwise, such indefinite number may be changed, or a definite number fixed without provisions for
16 an indefinite number, by a bylaw duly adopted by the members.”

17 ^{5/} Corporations Code § 5151 provides in pertinent part:

18 “(a) The bylaws shall set forth (unless such provision is contained in the articles, in which case it may only be
19 changed by an amendment of the articles) the number of directors of the corporation; or that the number of
20 directors shall be not less than a stated minimum nor more than a stated maximum with the exact number of
21 directors to be fixed, within the limits specified, by approval of the board or the members (Section 5034), in
22 the manner provided in the bylaws, subject to subdivision (e) of Section 5151. The number or minimum
23 number of directors may be one or more.”
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1 majority vote of a quorum of the board of directors – is also invalid because not in compliance with
2 the governing 1984 Bylaw concerning the election of directors. The 1984 Bylaw requires that, in
3 order to be elected, an individual must either receive “the nomination and vote of a majority of the
4 station board which he represents,” or, if the individual is to be an “at large” director, “he must be
5 elected by a 2/3 vote of the Board of Directors of the Foundation, voting by secret ballot.” Spooner
6 Dec., Ex. C (Article Three, Section 2).
7

8 **1. The 1984 Bylaw is unambiguous and demonstrates that the local**
9 **advisory boards had the right to vote for directors, and thus were**
10 **corporate members of Pacifica, and this bylaw remains the operative**
11 **bylaw for election of directors.**

12 The 1984 Bylaw is the operative Bylaw concerning election of directors, and any later
13 purported amendments to this Bylaw are invalid since done in violation of the Corporations Code.
14 Corporations Code Section 5150 provides that, where a nonprofit corporation has corporate
15 members, bylaws amendments which “materially and adversely affect the rights of members as to
16 voting or transfer” must be approved by the members. Thus, the 1984 Bylaw concerning election
17 of directors could not be changed without the approval of the local advisory boards.

18 Under the 1984 Bylaw, the local advisory boards were corporate members of Pacifica. The
19 Corporations Code defines corporate “members” as “any person who, pursuant to a specific
20 provision of a corporation’s articles or bylaws, has the right to vote for the election of a director or
21 directors.” Cal. Corp. Code § 5056(a). The 1984 Bylaw provided that the local advisory boards had
22 the right “to nominate *and vote*” for directors. Thus, under Corp. Code § 5056, the local advisory
23 boards clearly were corporate members. As such, under Corp. Code § 5150, no amendments to the
24 bylaws concerning election of directors could be made without the approval of the local advisory
25 boards.
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1 Defendants in 1997 and 1999 – in actions which gave rise to this litigation – purported to
2 amend the Bylaw for election of directors in a manner that attempted to strip the local advisory
3 boards of their power under the 1984 Bylaw to elect directors, and to allow candidates for director
4 to be nominated by a Board committee and to be elected by a simple majority vote of Board
5 members seated in a quorum. These purported amendments were not submitted to nor approved by
6 the station board (renamed “local advisory board”) members. Thus, these bylaws violate
7 Corporations Code Section 5150, are invalid, and cannot be the basis for the election of any new
8 directors.^{1/}

10 Defendants have contended that the local advisory boards are not corporate members because
11 they did not have the right to elect members under the 1984 Bylaw, but only to nominate directors
12 for election by the sitting directors. This interpretation, though, is plainly contradicted by the clear
13 language of the 1984 Bylaw itself, which provides for “the nomination *and* vote” of the station
14 boards. *See, e.g., American Center for Education, Inc. v. Cavnar*, 26 Cal. App. 3d 26, 32 (1972)
15 (corporate bylaws are to be construed according to the general rules governing the construction of
16 statutes and contracts); *United Multiple Listing Serv., Inc. v. Bernstein*, 134 Cal. App. 3d 486, 490
17 (1982) (where a bylaw is unambiguous, no construction of terms is required).

20 **2. Even were the Court to hold that the Bylaw language is ambiguous,**
21 **extrinsic evidence shows that under the 1984 Bylaw the local advisory**
22 **boards had the right to vote for directors, and thus were corporate**
members and later “amendments” are invalid.

23 ^{6/} In addition, there had been an earlier purported Bylaw amendment in 1991, providing that each station
24 board shall nominate at least one person of color as a permanent representative to the Pacifica Board. This
25 amendment is also invalid for these same reasons because never submitted to nor approved by the local
26 advisory boards.

1 Although the Court need look no further than the clear language of the Bylaw itself to
2 determine its meaning, extrinsic evidence also demonstrates that the local advisory boards had the
3 right to elect directors under the 1984 Bylaw, and thus were members of Pacifica. The Board's
4 intent in adopting this Bylaw was to provide the local station boards with the right to elect directors
5 to the Pacifica Board. Franck Dec. ¶¶ 4-13. This intent is further demonstrated by the fact that at
6 the same time that the Board adopted the 1984 Bylaw providing the local station boards with the
7 right to vote to elect directors, the Board eliminated from the Bylaws the provision that the Board
8 of directors were the sole members of the Foundation. Following adoption of the 1984 Bylaw, and
9 before any controversy arose concerning the local advisory boards' right to vote to elect directors,
10 Pacifica repeatedly certified to the FCC that certain of its directors were elected by the local station
11 boards. Spooner Dec. Exs. F & G.

14 **IV. NO BOND IS REQUIRED UNDER CCP §§ 529(b)(3) & 995.220**

16 While in most circumstances a bond is required if a preliminary injunction is issued, in this
17 case no bond is required by law because the plaintiffs are the People of the State of California and
18 the Attorney General. CCP § 529, which requires an undertaking on the granting of an injunction,
19 expressly exempts “[a] public entity or officer described in Section 995.220” from this requirement.

20 CCP § 529(b)(3). Section 995.220, in turn, provides in relevant part:

22 Notwithstanding any other statute, if a statute provides for a bond in an action or
23 proceeding, including but not limited to a bond for issuance of a restraining order or
24 injunction . . . , the following public entities and officers are not required to give the
bond and shall have the same rights, remedies, and benefits as if the bond were given:

25 (a) The State of California or the people of the state, a state agency, department,
26 division, commission, board, or other entity of the state, or a state officer in an
official capacity or on behalf of the local public entity.

1 CCP § 995.220. Accordingly, no bond is required or may be imposed. *See, e.g., City of South San*
2 *Francisco v. Cypress Lawn Cemetery Assoc.*, 11 Cal. App. 4th 916, 921-22 (1992).^{1/}

3 **CONCLUSION**

4 For the foregoing reasons, the moving parties respectfully request that the Court enter a
5 preliminary injunction enjoining defendants from adding or removing any directors during the
6 pendency of this action.
7

8 Dated: August 23, 2001

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28 ^{1/} Even if the Court were to require a bond, the amount of the bond should be minimal, because the
29 purpose of a bond is to protect the party being enjoined from any damages it may sustain by reason of the
30 injunction. Cal. Civ. Proc. Code § 529(a). As the injunction only involves the election of directors, and will
31 cause defendants *no* possible foreseeable damages, only a token bond of \$500 would be appropriate.

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