

**Plaintiffs Opposition to Defendants' Motion to Realign Robert Robinson, Aaron Kriegel,  
Leslie Cagan, Tomas Moran and Peter Bramson as Plaintiffs.**

Plaintiffs, the People of the State of California, *ex rel.* Carol Spooner, et al, oppose defendants motion to realign defendants Robinson, Kriegel, Cagan, Moran and Bramson as plaintiffs on the following grounds:

**The Non-Removing Defendants are not Nominal or Fraudulently Joined.**

It is the duty of the federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute. Whether the necessary "collision of interests," *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 181 (1905), exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," *East Tennessee v. & G. R. v. Grayson*, 119 U.S. 240, 244 (1886), and the "primary and controlling matter in dispute," *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U.S. 368, 385 (1894); *Indianapolis et al. v. Chase National Bank, Trustee, et al.*, 314 U.S. 63, 69 (1941).

The primary purpose of plaintiffs' action, in addition to remedying the breaches of trust, waste of corporate assets, and usurpations of office that have occurred, is set forth in Paragraph 4 of the Complaint:

**"Purpose of Action"**

"[...] Relators seek to safeguard Pacifica from ever again being subverted from within by a small conspiratorial cabal, and *to vest the listener-sponsors with voting rights and legal membership status in the Pacifica Foundation.* Relators believe the listener-sponsors, who have cherished, built and supported Pacifica for more than 50 years, are best-suited to insuring the faithfulness of Pacifica to its

founding purposes as Pacifica enters its second half-century and the new ‘digital broadcasting’ age.” Complaint, Page 4, lines 17-27, *emphasis added*.

All Causes of Action set forth in the Complaint are necessary to that end, and all that are not limited to specifically named defendants are brought against all defendants. Plaintiffs filed this action in state court under the California Nonprofit Corporation Law (California Corporations Code §5000, et seq.), the California Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code §12580, et seq.), and the California Unfair Competition Law (California Business & Professions Code §17200, et seq.), setting forth ten Causes of Action<sup>1</sup> seeking the following remedies:

First, to remove directors for breach of charitable trust and to assess damages against them for waste of corporate assets (against removing defendants Berry, Acosta, Farrell, Ford, Makela, Millspaugh, Palmer, and Chadwick);

Second, to remove directors for gross abuse of authority and discretion and to assess damages against them for waste of corporate assets (against removing defendants Berry, Acosta, Farrell, Ford, Makela, Millspaugh, Palmer, and Chadwick);

Third, to remove directors for usurpation of office for refusing to vacate after expiration of term (against removing directors Ford and Acosta);

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<sup>1</sup> Removing defendants erroneously assert in their Memorandum in support of their Motion to Realign that plaintiffs only assert seven causes of action. Memorandum, page 3, lines 2-3.

Fourth, to remove directors for usurpation of office for unlawful election of directors in excess of number permitted in Articles of Incorporation, etc., (against removing defendants van Putten, Johns, Chambers Lee, Lyons, and Murdock, and against **non-removing defendants Cagan and Moran**);

Fifth, to remove directors for usurpation of office for refusal to vacate after lawful removal by the corporate members who elected them (against removing defendants Farrell, Cisco and Millspaugh);

Sixth, for an accounting (against **all defendants**);

Seventh, to compel adoption of bylaws defining the corporate “membership”<sup>2</sup> and

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<sup>2</sup> California Corporations Code §5056 (erroneously referenced as §5036 throughout the Complaint) defines “Member” in the context of a California nonprofit corporation as follows:  
(a) "Member" means any person who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors or on a disposition of all or substantially all of the assets of a

voting rights of members (against **all defendants**);

Eighth, to compel specification of the number of directors (against **all defendants**);

Ninth, to compel adoption of fair, reasonable and consistent mechanisms for democratically nominating and electing directors, to hold such elections under court supervision, and for all directors then remaining in office to yield their offices to the fairly elected directors (against **all defendants**); and

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corporation or on a merger or on a dissolution unless the provision granting such right to vote is only effective as a result of paragraph (2) of subdivision (a) of Section 7132. "Member" also means any person who is designated in the articles or bylaws as a member and, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote on changes to the articles or bylaws. (b) The articles or bylaws may confer some or all of the rights of a member, set forth in this part and in Parts 2 through 5 of this division, upon any person or persons who do not have any of the voting rights referred to in subdivision (a). (c) Where a member of a corporation is not a natural person, such member may authorize in writing one or more natural persons to vote on its behalf on any or all matters which may require a vote of the members. (d) A person is not a member by virtue of any of the following: (1) Any rights such person has as a delegate. (2) Any rights such person has to designate or select a director or directors. (3) Any rights such person has as a director.

Tenth, unfair competition (against removing defendants Berry, Acosta, Farrell, Ford, Makela, Millspaugh, Palmer, and Chadwick).

Each and every Cause of Action in the Complaint vitally affects the substantive rights and interests of the parties against whom it is brought.

The removing defendants assert that plaintiffs and the non-removing defendants “all believe that listener-sponsors, notwithstanding the FCA and PBA [Federal Communications Act and Public Broadcasting Act<sup>3</sup>], do have the right to elect the Directors of Pacifica,” and that therefore, the parties should be realigned in accordance with the principles established in *Indianapolis v. Chase National Bank, supra*, 314 U.S., at p. 64. Memorandum in Support of Motion to Realign, 3: 18-20, 5:15-17; Notice of Removal, 3:2-16.

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<sup>3</sup> Defendants apparently intend to assert the Public Broadcasting Act and Federal Communications Act as federal law defenses to Plaintiffs’ state law claims.

While Plaintiffs do agree that the non-removing defendants have shown concern about the current state of affairs at Pacifica, and Plaintiffs do acknowledge and appreciate the legal action brought by non-removing defendants Robinson and Kriegel [See related case --- ], Plaintiffs have no information leading them to believe that any of the non-removing defendants “believe that listener-sponsors have the right to elect the Directors of Pacifica.” Defendants’ assertion is both pure speculation and immaterial.<sup>4</sup> Whether or not any of the non-removing defendants do hold such beliefs, Plaintiffs have no information leading them to believe that non-removing defendants Robinson, Kriegel or Bramson desire to be compelled under court supervision to amend the bylaws to provide membership status and voting rights for listener-sponsors, or to surrender their offices as directors upon democratic election of new directors, as prayed for in the Complaint, and defendants have supplied none. In fact, the Robinson and Kriegel lawsuit does not ask for such relief, but only seeks to return to the pre-1997 Pacifica bylaws which did not provide membership and voting rights for listener-sponsors. (See related case *Robinson et al. v Pacifica Foundation, et al.*, also removed by the to this Court on the same date, N.D. Cal. Case No. C 3814 MJJ, California Superior Court, County of Alameda, Case No. 831286-0, filed September 19, 2000.) In addition, Plaintiffs have no information leading them to believe that non-removing defendants Cagan and Moran agree that they were unlawfully elected or that they desire to be removed as directors for usurpation of office, as prayed for under

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<sup>4</sup> Plaintiffs have not asked that listener-sponsors be given the right to elect directors in their Complaint. They have merely asked for “membership” status and voting rights. Under California law, different classes of membership with voting rights are permitted. While Plaintiffs leave the details to post-judgment development of a suitable governance structure (under court supervision and with the assistance of provisional directors), they envision a system where listener-sponsors elect local station board that, in turn, elect directors, reserving for the listener-

the Fourth Cause of Action, and defendants' have supplied none.

The cases cited by removing defendants in their Memorandum in Support of Motion to Realign are clearly distinguishable from this case, in that the rights and interests of the non-removing defendants clearly "collide" with plaintiffs' interests in causes of action that are central and necessary to the purpose of the action, i.e., removal of directors for usurpation of office and declaratory relief compelling amendments to bylaws, election of new directors, and compelling non-removing directors to yield their offices to the fairly elected directors.

Wherefore, plaintiffs pray this Court not to realign any of the non-joining defendants, Rob Robinson, Aaron Kriegel, Leslie Cagan, Tomas Moran, or Pete Bramson, as plaintiffs in this action, because none of them are nominal or fraudulently joined as defendants.

Date: \_\_\_\_\_

Respectfully submitted,

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sponsors the right to recall directors.