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Plaintiffs, The People of the State of California, *ex rel.* Carol Spooner, et al., individually and on behalf of the Pacifica Foundation, present the following Points and Authorities in opposition to the joint and several demurrer of defendants Pacifica Foundation, Mary Frances Berry, June Makela, Frank Millspaugh, Andrea Cisco, Ken Ford, David Acosta, Micheal Palmer, Karolyn Van Putten, Wendell Johns, Valrie Chambers, Bertram Lee, Beth Lyons[1], John Murdock, Robert Farrell, and Lynn Chadwick[2] ("demurring defendants").

II. INTRODUCTION.

Demurring defendants have attempted to attack plaintiffs' and relators' standing to bring these causes of action by misstating the law, and ignoring the distinctions in the law, as it pertains to relators and the State's right, vested in the Attorney General, to bring actions by and through relators as to three distinct categories of action: (1) enforcement of charitable trusts and corporations; (2) actions in the nature of *quo warranto* to try the right to office and to exercise a corporate franchise issued by the State; and (3) unfair competition. Demurring defendants' arguments are not well taken. To do so would be contrary to the time-honored standing of relators to sue as interested parties in actions affecting the public interest. The demurrer should be overruled.

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[1] All causes of action against defendant Beth Lyons were dismissed by agreement of the parties upon her resignation from the Pacifica Foundation board of Directors. See Request for Judicial Notice of the Court Records in this case.

[2] Defendants Peter Bramson, Leslie Cagan, Aaron Kriegel, Tomas Moran, and Rob Robinson did not join in the demurrer.

12. **LEGAL STANDARD FOR RULING ON DEMURRER.**

A demurrer will not be sustained unless the objection is clearly well taken. The complaint should be construed "liberally ... with a view to substantial justice between the parties." C.C.P. §452. A general demurrer for failure to state a cause of action must be overruled if the complaint states *any* valid claim entitling the plaintiff to relief. It is not necessary that the cause of action be the one intended by the plaintiff. Thus, the plaintiff may be mistaken as to the nature of the case, or the legal theory on which he can prevail. But if the essential facts of *some* valid cause of action are alleged, the complaint is good against a general demurrer. *Gruenberg v Aetna Ins. Co.* (1973) 9 Cal.3d 566.572. A general demurrer does not lie to challenge an improper remedy. *Venice Town Council Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1561-1562. A demurrer does not lie to only *part* of a cause of action. If there are sufficient allegations to entitle the plaintiff to relief, other allegations cannot be challenged by general demurrer. *Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 778.

For purposes of testing the sufficiency of a cause of action, the demurrer admits the truth of all material facts properly pleaded. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.

13. **THE LAW IN ACTIONS BY RELATORS.**

The Complaint states ten causes of action in three distinct categories:

(1) Six causes of action – the First, Second, Sixth, Seventh, Eighth and Ninth – are to enforce the Pacifica Foundation's ("Pacifica") Articles of Incorporation and the statutory and common law governing charitable trusts and charitable corporations and to protect Pacifica's assets.

(2) Three causes of action – the Third, Fourth and Fifth -- are in the nature of *Quo*

Warranto for usurpation of office by directors of a California nonprofit public benefit corporation.

(3) One cause of action – the Tenth – is for unfair business practices.

In actions affecting the public interest, three classifications of relator actions are generally described in 4 Witkin Cal. Proc. Plead §139[3]: (1) *qui tam* actions; (2) *quo warranto* actions, and (3) "other actions".

This is not a *qui tam* case. However, the second and third of Witkin's classifications of relator actions are applicable here.

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[3] 4 Witkin, Cal. Proc. Pleading, §139, "Action by Relator," reads as follows, in pertinent part:

"(a) Qui Tam. A statute may authorize an informer's action ('qui tam action') to be brought by a private individual to recover a penalty on behalf of the government, with a share of the recovery going to him. [...]

(b) Quo Warranto. A proceeding under the statutory equivalent of the common law writ of quo warranto (C.C.P. 803 et seq.; see 8 Cal. Proc. (4th), Extraordinary Writs, §§9) is distinguishable. It may be commenced at the instance of a private person as relator but the individual is not a party, and the Attorney General alone has control over the action, with the sole power to appeal from an adverse judgment or to dismiss the proceeding. (*People v. Petroleum Rectifying Co.* (1937) 21 C.A.2d 289, 68 P.2d 984.)

(c) Other Actions. In *Brown v. Memorial Nat. Home Foundation* (1958) 162 C.A.2d 513, 538, 329 P.2d 118, cross-complainant, an unincorporated charitable association, was held entitled to sue to remove trustees and enforce compliance with the terms of a charitable trust, where the Attorney General, having the basic right of action, had consented. The court defined a relator as 'a party in interest who is permitted to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official.'"

1. RELATORS IN ACTIONS TO ENFORCE CHARITABLE TRUSTS AND CORPORATIONS.

The First, Second, Sixth, Seventh, Eighth and Ninth Causes of Action fall under Witkin's "other actions" classification of actions by relators, as they for enforcement of the laws governing of a charitable corporation by interested parties, where the primary right of enforcement lies with the Attorney General.

As set forth in *Brown v Memorial Nat'l Home Foundation*, *supra,* 162 Cal.App.2d, at pp 538-539:

> "A relator is a party in interest who is permitted to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official. The term is thus defined in Rawle's Third Revision of Bouvier's Law Dictionary, page 2863: 'At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of 9 Anne. In this country, even where no similar statute prevails, informations are allowed to be filed by private persons desirous to try their rights, in the name of the attorney-general, and these are commonly called relators.' The attorney general prescribes his own rules for granting such consent and they may be entirely informal."

In fact, the Attorney General has promulgated *no regulations* for granting relators permission to sue in "other actions" and all of demurring defendants' references to 11 Cal Code of Regulations §§1-15 (regulating *quo warranto* actions) are entirely inapposite as to these six causes of action.

The *Brown* Court goes on:

> "In *People v. San Francisco*, 36 Cal. 595, 605, an interested party filed a mandamus proceeding under the title of *People ex rel. Ferguson*. The application and notice thereof were signed by the attorney for the relator, but not by the attorney general. The court said in this connection: 'Though the Attorney General did not sign the notice, he unites in the brief in support of the application, and thereby, impliedly at least, consents to the use of the name of the People.'" *Brown v Memorial Nat'l Home Foundation*, *supra,* 162 Cal.App.2d, at p. 539.

In cases where the State has no direct interest in the subject matter of the suit, once a relator has been given permission to sue in the name of the People, the Attorney General may not control the suit nor may he withdraw his consent to the suit to the prejudice of the interests of the relator. (*People ex rel. Rondel v. North S.F.H. & R.R. Assn.* (1869) 38 Cal. 564, 565; *People ex rel. Garrison v Clark* (1887) 72 Cal. 289, 290; 14 Santa Clara Law Review 296 p. 300.)

In some cases the courts have exercised their equitable jurisdiction to grant a responsible party with a special interest standing by to sue to enforce charitable trust provisions, even without the Attorney General's permission. *See, e.g., San Diego etc. Boy Scouts of America v. City of Escondido* (1971) 114 Cal.App.3d 189,195; Code of Civil Procedure §382.

2. **RELATORS IN QUO WARRANTO ACTIONS.**

The Third, Fourth and Fifth Causes of Action are in the nature of *Quo Warranto* to try the right of individuals to the office of corporate director and to exercise the franchise of a corporation chartered by the State of California. The People of the State of California are the party-plaintiff pursuant to California Code of Civil Procedure §803.[4] 11 Barclay's Official Cal. Code Regs., Chapter 1, is entitled "Regulations Governing Proceedings in the Nature of Quo Warranto," and consists of twelve regulations, 11 CCR §§1-15 (with no regulations number 12, 13 or14). While the Attorney General may work through the relator's attorney, the Attorney

[4] "§ 803. Action by attorney-general against usurper
"An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, *or any franchise*, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor."

General has ultimate control and may step in at any time to assume the management of the proceeding. 11 CCR §8.[5]

> "While the attorney general may bring the action, and has control thereof, there is no statutory provision pointing out the exact manner in which that control shall be exercised, or preventing him from acting with or through the attorney for the 'private party' whose interest is recognized by the statute which permits him to bring the action." *People ex rel. Southwest Exploration Company v City of Huntington Beach* (1954) 128 Cal.App.2d 452, 456.

[5] 11 CCR § 8. Control by Attorney General
"The Attorney General may at all times, at any and every stage of the said proceeding, withdraw, discontinue or dismiss the same, as to him may seem fit and proper; or may, at his option, assume the management of said proceeding at any stage thereof."

Neither CCP §803 nor the regulations require relators to seek *judicial* leave to sue in *quo warranto.* 11 CCR §2.[6] The regulations require an applications to the *Attorney General* for leave to sue.

3. **RELATORS IN UNFAIR BUSINESS PRACTICES ACTIONS.**

The Tenth Cause of Action for Unfair Business Practices also falls under Witkin's "other actions" classification. The Attorney General has express statutory authority under Business and Professions Code §17204 (see Section __, below) to bring the action on his own complaint or the complaint of any person. The same informality of procedures to appoint relators would apply in

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[6] § 2. Application for Leave to Sue; Contents
"The relator shall submit to the Attorney General his application for "leave to sue," which application shall consist of the following:
(a) Original verified complaint, together with one copy thereof, and a verified statement of facts. The proposed complaint shall be prepared for the signature of the Attorney General, a deputy attorney general and the attorney for the relator, as attorneys for plaintiff.
(b) Points and authorities showing why the proposed proceeding should be brought in the name of the people, and supporting the contention of relator that a public office or franchise is usurped, intruded into or unlawfully held or exercised by the proposed defendant.
(c) A notice directed to the proposed defendant to the effect that relator is about to apply to the Attorney General for "leave to sue" in the proceeding therein named, and that the proposed defendant may, within the period provided in Section 3 hereof, show cause, if any he have, why "leave to sue" should not be granted in accordance with the application therefor.
(d) Proof of service of such application, complaint, statement of facts, points and authorities and notice upon the proposed defendant.

this type of action as in actions to enforce charitable trusts, as this is not a *quo warranto* action. In addition, any person has a private right to sue under §17204, without permission of the Attorney General or of any public official.

14. **FIRST, SECOND, SIXTH, SEVENTH, EIGHTH AND NINTH CAUSES OF ACTION – PLAINTIFFS HAVE STANDING TO ENFORCE A CHARITABLE CORPORATION'S COMPLIANCE WITH GOVERNING STATUTES AND ITS ARTICLES OF INCORPORATION AND TO PROTECT ITS ASSETS.**

1. **THE ATTORNEY GENERAL HAS BROAD POWERS UNDER COMMON LAW AND CALIFORNIA STATUTORY LAW TO INSURE COMPLIANCE WITH ARTICLES OF INCORPORATION, THE STATUTES OF THIS STATE, AND TO PROTECT ASSETS HELD BY NONPROFIT PUBLIC BENEFIT CORPORATIONS.**

In *Brown v Memorial Nat'l Home Foundation, supra,* 162 Cal.App.2d at p. 537, the Court held:

> "[The] attorney-general, as the chief law officer of the state, has broad powers derived from the common law, and in the absence of any legislative restriction, has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights and interests." (Citing *Pierce v Superior Court* (1934) 1 Cal.2d 759, 761-762 [37 P.2d 453, 460; 96 A.L.R. 1020].)

Under the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Government Code §§12580, et seq., the Attorney General has the primary responsibility for supervising charitable trusts and corporations in California.[7] [8]

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[7] Government Code §12591, Proceedings and powers of Attorney General; Jurisdiction, provides as follows: "The Attorney General may institute appropriate proceedings to secure compliance with this article and to invoke the jurisdiction of the court. The powers and duties of the Attorney General provided in this article are in addition to his existing powers and duties. Nothing in this article shall impair or restrict the jurisdiction of any court with respect to any of the matters covered by it, except that no court shall have jurisdiction to modify or terminate any trust of property for charitable purposes unless the Attorney General is a party to the proceedings."

[8] Government Code §12598, "Attorney General's Powers for Enforcement; Recovery of Costs",

All the assets of a California nonprofit public benefit corporation are deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes in its Articles of Incorporation. *Pacific Home v County of Los Angeles* (1953) 41 Cal.2d 844, 852.

In addition to statutory remedies, all equitable remedies are available for the enforcement of charitable trusts. In a recent case involving a nonprofit public benefit corporation, *People v Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, *review denied* September 29, 1999 Cal.Lexis 6981, the Court held:

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provides, in pertinent part, as follows:

> "(a) The primary responsibility for supervising charitable trusts in California, for insuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, resides in the Attorney General. The Attorney General has broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities. These powers include, but are not limited to, charitable trust enforcement actions under all of the following:
> (1) This article.
> (2) Title 8 (commencing with Section 2223) of Part 4 of Division 3 of the Civil Code.
> (3) Division 2 (commencing with Section 5000) of Title 1 of the Corporations Code.
> (4) Sections 8111, 11703, 15004, 15409, 15680 to 15685, 16060 to 16062, 16064, and 17200 to 17210, inclusive, of the Probate Code.
> (5) Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business and Professions Code, and Sections 17500 and 17535 of the Business and Professions Code.
> (6) Sections 319, 326.5, and 532d of the Penal Code."

"The assets of nonprofit corporations [...], organized solely for charitable purposes, are impressed with a charitable trust which the Attorney General has a duty to protect. (Citation omitted.) A complete range of equitable remedies vindicates the public interest in charitable assets; such remedies include injunctions to prevent and correct breach of fiduciary obligations arising from a trust. (Code Civ. Proc., §526, subd. (a)(7).)" *Id*. at p. 1074.

Accordingly, the Attorney General has an unassailable right sue for breach of trust and all appropriate statutory and equitable remedies, including, without limit, removal of directors, accounting, and declaratory and injunctive relief compelling adoption of bylaws in conformity with the statutory requirements governing nonprofit public benefit corporations.

1 Sixth Cause of Action – The Attorney General's Right to Sue For an Accounting is Not Limited by Corporations Code Sections 6333 or 6336.

The Attorney General's broad equitable powers to supervise and enforce charitable trusts and corporations are not limited by Corporations Code §§6333 or 6336, which apply only to corporate members' rights to inspect records and demand accounting. The demurrer will not lie if the complaint states *any* valid cause of action entitling the plaintiff to the relief requested. *Gruenberg v Aetna Ins. Co., supra,* 9 Cal.3d at p. 572.

2 Seventh, Eighth, and Ninth Causes of Action – The Attorney General May Sue to Compel Adoption of Bylaws in Conformity with the Requirements of Law; and Corporations Have No Power to Adopt Unreasonable Bylaws, Even if Seemingly in Compliance With Statutory Requirements.

The 1984 Pacifica Bylaws created statutory "members" of the corporation as defined by

Corporations Code §5056[9], by reason of the specific provision in those bylaws that the local station boards (or "LABs" as they are sometimes called) have the right to elect directors "by nomination and vote of a majority of the station board which he represents." (Compl. ¶22) Defendants' attempt to reinterpret the plain meaning of the 1984 bylaws by reference to an amendment adopted seven years later, in 1991, which they admit is nonsensical, is of no avail. No subsequent amendments eliminating the station board members' right to elect directors were ever presented to the station boards for their vote of approval, as required under Corporations Code §5151(a)[10]. (Compl. ¶23.) Therefore the Attorney General has may sue for declaratory and injunctive relief nullifying any and all post-1984 purported bylaws amendments in derogation of the rights of the corporate members, the station boards.

The Pacifica Foundation Articles of Incorporation specify that the number of directors shall be five. (Compl. ¶ 31.) The bylaws state that "There shall be such number of directors as the Board of Directors [or governing board] shall from time to time decide." (Compl. ¶ 32.) When the number of directors is specified in the Articles, the number of directors may not be

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[9] "§ 5056. "Member"
(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 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.
[...]"

[10] "§ 5150. Manner of adoption, amendment, or repeal
(a) Except as provided in subdivision (c), and Sections 5151, 5220, 5224, 5512, 5613, and 5616, bylaws may be adopted, amended or repealed by the board unless the action would materially and adversely affect the rights of members as to voting or transfer.
[...]"
Note: Sections 5151, 5220, 5224, 5512, 5613 and 5616, all refer to amendments that can only be made with approval of the members.

changed by amendment of the bylaws. Corp. Code §5151.[11] Therefore, the Attorney General has the right and power to sue for declaratory and injunctive relief nullifying this bylaw and requiring adoption of lawful bylaws in conformity with the Articles.

The Seventh Cause of Action alleges that the current of selecting the station boards is fundamentally unfair because the listener-sponsors (donors) have no voice in the selection of voting members or in the election of directors. The station boards are currently self-selecting. (Compl. ¶21.) While Pacifica's listener-sponsors may not have a statutory right to legal membership status and voting rights, given the abuses alleged in the Complaint (see Argument __, below) under both the current self-selection system for election of directors and under the prior system of election by the self-selected station board members, it is reasonable to seek equitable relief requiring Pacifica to adopt bylaws granting listener-sponsors membership status and voting rights. In a 1974 case involving a nonprofit corporation, the First Appellate District

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[11] "§5151. Contents; Directors; Meetings; Committees; Members
(a) The bylaws shall set forth (unless such provision is contained in the articles, in which case it may only be changed by an amendment of the articles) the number of directors of the corporation; or that the number of directors shall be not less than a stated minimum nor more than a stated maximum with the exact number of directors to be fixed, within the limits specified, by approval of the board or the members (Section 5034), in the manner provided in the bylaws, subject to subdivision (e) of Section 5151. The number or minimum number of directors may be one or more.
(b) Once members have been admitted, a bylaw specifying or changing a fixed number of directors or the maximum or minimum number or changing from a fixed to a variable board or vice versa may only be adopted by approval of the members (Section 5034).
[...]"

Court held:

> "Corporations have no power to create bylaws that are unreasonable in their practical application. (*People's Bank v. Superior Court* (1894) 104 Cal. 649, 652); bylaws seemingly in compliance with statutory provisions are invalid if they are unreasonable.. (*Id.; Haynes v Annandale Golf Club* (1935) 4 Cal.2d 28, 30.)" *Braude v Havener* (1974, 1st Dist.) 38 Cal.App.3d 526, 533.

The *Braude* case was an equitable action to overturn the election of directors under former Corporations Code §2236 and a "broad general attack" on the corporation's bylaws. The court ruled that, while the elections procedures seemingly met statutory requirements, they were unreasonable in that they failed to provide a "real exercise of the franchise." The case was remanded to the trial court to retain equitable jurisdiction to compel the defendants "to put into effect such new electoral processes as the court may consider just and proper."

Likewise, Plaintiffs' claim that listener-sponsors should be granted membership status and voting rights is one where the Court may exercise its equitable jurisdiction to compel provisions for election of directors as the court may consider just and proper after consideration of all the evidence at trial. In any event, a demurrer does not lie against a remedy, but only against a cause of action. Here, plaintiffs have stated a valid cause of action for adoption of fair and reasonable procedures for election of directors and selection or election of voting members.

2. RELATORS HAVE THE RIGHT TO SUE TO ENFORCE COMPLIANCE WITH GOVERNING STATUTES, ARTICLES OF INCORPORATION, AND TO PROTECT ASSETS HELD BY A PUBLIC BENEFIT CORPORATION, WHEN THE ATTORNEY GENERAL, HAVING THE BASIC RIGHT OF ACTION, HAS CONSENTED.

As set forth in the Complaint, and as demurring defendants admit, the Attorney General, by letter dated September 14, 2000, granted relators permission to sue "individually and on behalf of Pacifica Foundation" in *quo warranto* and "for breach of charitable trust, removal of

directors, accounting, declaratory and injunctive relief ordering revision of bylaws and election of directors and definition of voting members, and such other causes of action and relief as Relators deem appropriate, against the Pacifica Foundation, and its past and current officers and directors."[12]

Therefore, manifestly, on the face of the Complaint, the Attorney General has consented to relators' bringing this action and all causes of action set forth in the Complaint to enforce the laws governing charitable corporations, as deemed appropriate by the Relators.

Demurring defendants make much of the difference between the complaint relators proposed to the Attorney General in November 1999 and the complaint actually filed in September 2000.[13] However, given the passage of ten months' time during which five additional directors were unlawfully elected[14] (Complaint ¶13) and the California Joint Legislative Audit

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[12] A true copy of the Attorney General's letter is attached to the Complaint as "Exhibit A."

[13] 11 CCR § 7, provides as follows:
"The complaint filed in the proceeding shall be the proposed complaint herein before referred to, changed or amended as the Attorney General shall suggest or direct, and the relator shall not thereafter in any way change, amend or alter the said complaint without the approval of the Attorney General."

[14] It must be presumed that these defendants were on notice of the application pending before the

Committee issued a report on its findings and conclusions after hearings into the matters complained of in the Complaint (Request for Judicial Notice __), it is not surprising that the Attorney General would suggest, direct or approve such changes, and demurring defendants have presented no evidence that he did not.[15]

Demurring defendants' assertion that relators have no standing to bring the First, Second, Sixth, Seventh, Eighth and Ninth Causes of Action is without merit and the demurrer should be overruled.

15. THE THIRD, FOURTH AND FIFTH CAUSES OF ACTION – THE ATTORNEY GENERAL HAS STANDING TO BRING AN ACTION IN THE NATURE OF *QUO WARRANTO* UNDER C.C.P. §803 FOR USURPATION OF OFFICE AGAINST DIRECTORS OF A PRIVATE CORPORATION, EITHER WITH OR WITHOUT A RELATOR.

The Third, Fourth and Fifth Causes of Action are in the nature of *quo warranto,* seeking removal of directors who have been unlawfully elected or are unlawfully usurping the office of director and the exercise of the Pacifica corporate franchise. 8 Witkin Cal. Procedure, Writs, § 7, describes the history of proceedings in the nature of *quo warranto* in California:

> "The proceeding in quo warranto has had a peculiar history in California. The 1872 code abolished the writ (see original version of C.C.P. 802) and substituted a

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Attorney General asserting the invalidity of these election procedures. Certainly the corporate defendant, and its directors had a fiduciary duty to so inform them.

[15] Demurring defendants have asked the court to take Judicial Notice of the proposed complaint submitted to the Attorney General in September of 1999. Judicial notice cannot be taken where the official acts are themselves in dispute; e.g., a demurrer cannot be used to resolve a dispute as to whether the acts took place. *Cruz v County of Los Angeles* (1985) 173 Cal.App.3d, 1131, 1134.

> statutory action, identical in purpose and effect. (C.C.P. 803 et seq.) Then the Constitution of 1879 included quo warranto in the recital of writs that the superior court has jurisdiction to issue. Thereafter, C.C.P. 802 was amended to delete the language abolishing it. It is little more than an academic question whether C.C.P. 803 created a new proceeding in lieu of quo warranto, or set forth a procedure governing the issuance of the writ in the exercise of the constitutional jurisdiction. The constitutional revision of 1966, which eliminated reference to quo warranto (Cal. Const., Art. VI, §§10, supra, §§3), makes the statute the foundation of the proceeding. In practice, however, both courts and lawyers tend to refer to the remedy as 'quo warranto,' certainly a more convenient term than the chapter title, 'Actions for Usurpation of an Office or a Franchise.'"

Demurring defendants' contention that an action for usurpation of office may not be brought against officers of private corporations is without merit, and is unsupported by the history and case law of *quo warranto* actions. While such actions are rare in recent history, they are clearly permitted in a proper case where the public interest will be served by such action.

Plaintiffs' research has found two cases where officers of private corporations were removed in *quo warranto* actions: *People ex rel Allen v Hill* (1860) 16 Cal 113, an "information by the Attorney General in the nature of quo warranto to determine the title to the offices of the Gold Hill and Bear River Water Company, a corporation formed under the general corporation Act of April, 1853; " and *People ex rel Probert v Robinson* (1883) 64 Cal. 373, an action brought to oust trustees from private mining corporation for invalid election.

The California Supreme Court noted in 1920 that *quo warranto* actions or actions under §803 were at that time the *only* method for testing the validity of election of officers of private corporations:

> "A further answer to the respondent's contention as to the invalidity of this election of directors is that conceding for the sake of argument such invalidity, the persons elected exercised the functions of such directors and there was no other set of men claiming to be directors. Under these circumstances they were if not *de jure* certainly *de facto* the board of directors, and as such their authority could not

> be questioned collaterally, and their right to the offices claimed and exercised by them could only be tested in a *quo warranto* proceeding, or by the method provided by section 803, of the Code of Civil Procedure. (*Potomac Oil Co. v. Dye*, 10 Cal. App. 534, 539, [102 Pac. 677]; 2 Cook on Corporations, sec. 619.)" *Guaranty Loan Co. v Fontanel,* (1920) 183 Cal. 1, 8-9.

In a 1929 California Supreme Court case, *Consumers Salt Co. v. Riggins*, (1929) 208 Cal. 537, 542-543, the Court again recognized the traditional use of *quo warranto* actions to try the right of private corporate directors to office:

> "A summary proceeding has been provided by [former] section 315 of the Civil Code whereby the right of a person claiming to have been elected a director of a corporation existing under the laws of this state can be inquired into and if found to be illegal, it may be set aside and a new election called. Originally *quo warranto* proceedings were the sole remedy whereby the right of a person assuming to act as a director might be tested. Whether these are the only proceedings now open to one "grieved by any election held by any corporate body," it is not necessary for us to here decide. These proceedings just mentioned are direct proceedings brought for the purpose of determining the legality of the election of one purporting to be a director." *Id.* at p. 452.

Former Civil Code section 315, which granted stockholders and members of private corporations the right to challenge elections of directors, has been replaced by Corporations Code §5617, which authorizes any director or member of a nonprofit public benefit corporation to bring an action to determine the validity of any election or appointment of a director. There is nothing in this statute, just as there was nothing in former Civil Code §315, limiting the right of the Attorney General to bring a *quo warranto* action.

This view is supported by the recent Attorney General opinion cited by demurring defendants, 80 Ops. Cal. Atty. Gen. 290 (1997), which involved a disputed election of corporate officers of the Filipino American Council of San Francisco, a California nonprofit public benefit corporation. In denying relator status to corporate members in that case the Attorney General opined:

> "Granting leave to sue in quo warranto would not serve the pubic interest in determining whether the officers of the Filipino American Council of San Francisco are usurping, intruding into, or unlawfully holding or exercising the franchise of the council."

The Attorney General's opinion goes on to state:

> "While it would appear that a section 803 action in the nature of quo warranto would resolve the corporate election dispute in question, we note that such disputes are normally the subject of lawsuits not requiring the Attorney General's participation. [...] The filing of a section 803 action in the nature of quo warranto is normally unnecessary."

The Attorney General noted that the parties seeking relator status in the Filipino American Council case had standing to sue as corporate members under Corp Code §5617. The Attorney General concluded:

> "Although the availability of an alternative remedy does not preclude the filing of an action in the nature of quo warranto by the Attorney General as a matter of law (see *Citizens Utilities Co. v. Superior Court*, supra, 56 Cal.App.3d at 404-405), we have considered the existence of such alternatives in determining whether the issuance of leave to sue would serve the public interest. (75 Ops.Cal.Atty.Gen. 70, 74 (1992); 74 Ops.Cal.Atty.Gen. 31, 32 (1991); 12 Ops.Cal.Atty.Gen. 340, 342 (1949).) We have also considered the availability of adequate legal remedies in matters solely of private concern. Thus, in 9 Ops. Cal.Atty.Gen. 1, 2 (1947), we denied leave to sue, stating: 'The right to proceed in quo warranto is time honored, and the Attorney General is of the opinion that in exercising the powers vested in him he should give careful consideration to the question as to whether the leave to sue should issue in each case to the end that there will be presented to the courts actions brought in the name of the People of the State only in cases where such a course is the only one open to the proposed relator. In other words, in matters solely of private concern, it should be the policy to deny quo warranto in cases where there is adequate remedy otherwise available to the parties claiming to be aggrieved. *People v. Milk Producers*, 60 Cal.App. 439." 80 Ops. Cal. Atty. Gen. 290.

Manifestly, on the face of the Complaint, the Attorney General has exercised the power vested in him to authorize this *quo warranto* action, as provided under Code of Civil Procedure §803.

1. IT MUST BE PRESUMED THAT PLAINTIFFS HAVE COMPLIED WITH ALL RELEVANT REGULATIONS GOVERNING *QUO WARRANTO* ACTIONS.

Given Attorney General's power to revoke his consent to Relators' *quo warranto* causes of action (the Third, Fourth and Fifth Causes of Action) or to dismiss them at any time, the Court must presume that he would have done so during the six months since the Complaint was filed if he did not approve of the Complaint as filed.[16]

Demurring defendants' arguments are not well taken and the demurrer should be overruled as to the Third, Fourth and Fifth Causes of Action.

16. TENTH CAUSE OF ACTION – BOTH THE ATTORNEY GENERAL AND PRIVATE PARTIES HAVE STANDING TO SUE UNDER THE UNFAIR COMPETITION LAW.

[16] 11 CCR §8, provides as follows:
"The Attorney General may at all times, at any and every stage of the said proceeding, withdraw, discontinue or dismiss the same, as to him may seem fit and proper; or may, at his option, assume the management of said proceeding at any stage thereof."

The Attorney General has standing to sue under the express provisions of Bus. & Prof. Code §17204[17], either upon his own complaint or "upon the complaint of any board, officer, person, corporation or association." Likewise, recent case law is unequivocal that, under the express provisions of the statute, private parties have standing to sue. *Stop Youth Addiction, Inc. v Lucky Stores, Inc.* (1998 17 Cal.4th 553; *Reese v Payless Drug Stores Northwest, Inc.* (1995, 1st Dist.) 34 Cal.App.4th 19.

Demurring defendants have egregiously misstated the law, and have attempted to mislead the Court. The demurrer as to the Tenth Cause of Action for Unfair Competition should be overruled.

17. **THE BUSINESS JUDGMENT RULE DOES NOT PROTECT DIRECTORS' ACTIONS UNDERTAKEN IN BAD FAITH.**

The "business judgment rule" does not insulate directors from liability for actions taken

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[17] "Business and Professions Code § 17204. Injunction prosecuted by Attorney General, district attorney, or city attorney

"Actions for any relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by *the Attorney General* or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city and county in the name of the people of the State of California upon their own complaint or upon the complaint of any board, officer, person, corporation or association *or by any person acting for the interests of itself, its members or the general public.*" [Emphasis added.]

in bad faith, and the presumption does not apply where bad faith is sufficiently alleged.

> "'The policy reasons for keeping a court from evaluating after the fact the wisdom of a particular business decision do not apply when the issue is whether a party to that decision acted fraudulently or in bad faith. The assessment of fraud or bad faith is a function courts are accustomed to perform, and in performing it the courts do not intrude upon the process of business decisionmaking beyond assuring that those decisions are not improperly motivated.' (Rosenthal v. Rosenthal (Me. 1988) 543 A.2d 348, 353; see also Auerbach v. Bennett, supra, 393 N.E.2d at p. 1002.)" *Will v Engebretson & Co.* (1989) 213 Cal.App.3d 1033, 1043.

Corporations Code §5231[18] sets forth directors' to obligation to perform their duties in good faith. Under Corporations Code §5230(a)[19] the directors' duty to act in good faith applies without regard to whether a director is compensated by the corporation, and under Corporations

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[18] "§ 5231. Director to perform duties in good faith; Good faith reliance on official corporate information, opinions, and records; Liability of directors
(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes 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.
(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by:
(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;
(2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence; or
(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence, so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.
(c) Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated."

[19] "§ 5230. Duties and liabilities of directors of nonprofit public benefit corporation
(a) Any duties and liabilities set forth in this article shall apply without regard to whether a director is compensated by the corporation."

Code §5232[20], applies specifically to acts or omissions in connection with the election, selection, or nomination of directors.

All factual allegations of the Complaint must be taken to be true for purposes of ruling on the demurrer. Bad faith is alleged in the Complaint (Compl. ¶) and detailed allegations of bad faith actions by past and current officers and directors, including, without limit, intentional deceit (Compl. ¶¶ 24,), concealment (Compl. ¶¶10, 19, 25, 42), conspiracy (Compl. ¶¶10, 17, 24,), manipulation (Compl. ¶¶ 24, 25, 26), misrepresentations (Compl. ¶¶ 24, 25) , coercion (Compl. ¶¶ 19, 24, 25, 28) , threats (Compl. ¶¶19, 24, 25, 26, 28), oppression (Compl. ¶19, 25, 27, 28, 29), and even armed force (Comp. ¶¶25, 27, 28), to carry out over several years a plan to disenfranchise the corporate membership (the "LABs") (Compl. ¶¶22, 23, 24), unlawfully amend the bylaws to create a "self-selecting" board of directors in derogation of the rights of the corporate members (Compl. ¶¶22, 23, 24), to unlawfully elect directors (Compl. ¶¶ 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 (Comp. ¶¶33, 37, 38), and to divert Pacifica from its founding purposes as set forth in its Articles of Incorporation (Comp. ¶¶ 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 (Comp. ¶¶ 19, 21, 24), and to spend extraordinary sums on *ultra vires* activities (Comp. ¶¶ 19, 29), all to the great injury of the Pacifica Foundation and the public interest (Comp. ¶¶ 29, 30,), as well as to the rights of

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[20] "§ 5232. Good faith provisions govern duties of directors; Election, selection, or nomination of directors
(a) Section 5231 governs the duties of directors as to any acts or omissions in connection with the election, selection, or nomination of directors.
(b) This section shall not be construed to limit the generality of Section 5231."

the corporate members and the individual donors and listener-sponsors of Pacifica's five radio stations across the country.

Demurring defendants' demurrer on the grounds of the business judgment rule is not well taken and should be overruled.

18. CODE OF CIVIL PROCEDURE SECTION 425.15 DOES NOT APPLY AS THE COMPLAINT BRINGS NO CAUSE OF ACTION FOR NEGLIGENCE.

Code of Civil Procedure §425.15 applies *only* to claims for negligence against uncompensated nonprofit corporate officers and directors.[21] The Complaint states no cause of action, whatsoever, for negligence against any person serving without compensation as an officer or director. The First and Second Causes of Action are for Breach of Charitable Trust and Gross Abuse of Authority under Corporations Code §5142[22] and §5223[23], respectively. All appropriate

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[21] Defendant Lynn Chadwick was Pacifica's Executive Director from 1997 to February 2000. (Comp. ¶ 14.) In the non-profit corporations sector the title "Executive Director" is commonly substituted for "President." In any event, defendants admit that defendant Chadwick was an "employee." (Demurrer, at fn. 3.) Therefore, they admit either that Ms. Chadwick was compensated or that she was not an "officer" subject to the protections of CCP §425.15, or both.

[22] "§ 5142. Actions to remedy breach of charitable trust; Who may bring action
(a) Notwithstanding Section 5141, any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust:
(1) The corporation, or a member in the name of the corporation pursuant to Section 5710.
(2) An officer of the corporation.
(3) A director of the corporation.
(4) A person with a reversionary, contractual, or property interest in the assets subject to such charitable trust.
(5) The Attorney General, or any person granted relator status by the Attorney General.
The Attorney General shall be given notice of any action brought by the persons specified in paragraphs (1) through (4), and may intervene.
[...]"

[23] "§ 5223. Removal of director by court order; Grounds
"(a) The superior court of the proper county may, at the suit of a director, or twice the authorized number (Section 5036) of members or 20 members, whichever is less, remove from office any director in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation or breach of any duty arising under Article 3 (commencing with Section 5230) of this chapter, and may bar from reelection any director so removed for a period prescribed by the court. The corporation shall be made

remedies are available in such actions including damages payable to the corporation.[24] This cause of action is grounded upon allegations of breach of the officers' and directors' duty of good faith, including, intentional deceit, etc., all as described in VII, above.

19. **THE ISSUE OF FEDERAL PREEMPTION IS *RES JUDICATA.***

The Court is requested to take Judicial Notice of the ruling of the Federal District Court for the Northern District of California, dated February 20, 2001, granting plaintiffs' motion to remand this case to this Court.[25] Apparently, demurring defendants included federal preemption as a basis for demurrer in order to use up plaintiffs' 15-page limit in opposing the demurrer. Defendants' demurrer on the basis of federal preemption should be overruled as *res judicata.*

20. **CONCLUSION.**

For all the foregoing reasons, the demurrer should be overruled as to all causes of action and all demurring defendants.

Date: _____ Respectfully presented,

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a party to such action.
(b) The Attorney General may bring an action under subdivision (a), may intervene in such an action brought by any other party and shall be given notice of any such action brought by any other party.

[24] Corporations Code §5047.5 does not exempt officers or directors from causes of action for monetary damages where they have acted in bad faith or in any action brought by the Attorney General. Corporations Code §5239 is inapposite as this is not a third-party action.

[25] The District Court expressly ruled, at page 9, lines 2-7:
"Defendants have failed to establish that Plaintiffs claims raise substantial federal questions such that the claims are preempted. [...] the Court finds that Spooner Plaintiffs do not allege a cause of action arising under federal law which would give rise to a basis on which this Court could exercise subject matter jurisdiction over this matter. The Court also finds that Plaintiffs state law claims are not preempted by the FCA [Federal Communications Act]. The Court grants Spooner Plaintiffs motion to remand the action to State Court."

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Attorney for Plaintiffs/Relators