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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
9 GENERAL JURISDICTION (UNLIMITED)

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

12 Plaintiffs,

13 vs.

14 PACIFICA FOUNDATION, a California
non-profit public benefit corporation and
charitable trust, et al.,

15 Defendants
16
17

CASE NO. 821252-3

POINTS AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION
PROHIBITING ADVANCEMENT OF
ATTORNEY'S FEES AND COSTS ON
BEHALF OF INDIVIDUALLY NAMED
DEFENDANTS

Hearing Date: May 8, 2001
Hearing Time: 9:00 a.m.
Judge: Hon. Judith Ford
Department: 31

1 Plaintiffs, The People of the State of California ex rel Carol Spooner, et al., present
2 the following points and authorities in support of their motion for preliminary injunction
3 prohibiting defendant Pacifica Foundation from advancing defense expenses of this litigation,
4 including without limit, attorneys' fees, on behalf of Defendants Mary Frances Berry, June
5 Makela, Frank Millspaugh, Andrea Cisco, Ken Ford, David Acosta, Micheal Palmer, Robert
6 Farrell, Karolyn van Putten, Wendell Johns, Valrie Chambers, Bertram Lee, John Murdock,
7 and Lynn Chadwick, unless and until each of these Defendants provides an undertaking to
8 repay such advances unless it is ultimately determined that he or she is entitled to
9 indemnification.

10 **I. FACTS.**

11 This is an action brought by the California Attorney General and relators appointed by
12 the Attorney General against the nominal defendant Pacifica Foundation ("Pacifica"), a
13 California nonprofit public benefit corporation, and twenty individually named past and
14 current officers and directors and/or employees of Pacifica.

15 The First Cause of Action for "Breach of Charitable Trust" under Corporations Code
16 §5142 and Government Code §12591 is brought against eight past and current officers and
17 directors and/or employees, namely: Mary Frances Berry, David Acosta, Robert Farrell, Ken
18 Ford, June Makela, Frank Millspaugh, Micheal Palmer, and Lynn Chadwick. Plaintiffs seek
19 an award of damages against these defendants on behalf of the Pacifica Foundation.

20 The Second Cause of Action is for removal of directors from office for "Gross Abuse
21 of Authority and Discretion" under Corporations Code §5223 against five current Pacifica
22 officers and directors, namely: David Acosta, Robert Farrell, Ken Ford, Frank Millspaugh,
23 and Micheal Palmer. This Cause of Action was also directed at Mary Frances Berry;
24 however, she has resigned from office since the Complaint was filed rendering this cause of
25 action against her moot.

1 The Third, Fourth and Fifth Causes of Action are in the nature of *quo warranto* under
2 Code of Civil Procedure §803 for “Usurpation of Office” on various grounds against
3 Defendants Ken Ford, David Acosta, Robert Farrell, Andrea Cisco, Frank Millspaugh, Tomas
4 Moran, Karolyn van Putten, Wendell Johns, Leslie Cagan, Valrie Chambers, Bertram Lee,
5 Beth Lyons, and John Murdock. Plaintiffs seek ouster of these defendants from their
6 respective offices. Defendants Beth Lyons and Frank Millspaugh have resigned from office
7 since the Complaint was filed rendering these Causes of Action moot as against them. The
8 Complaint has been dismissed as against defendant Beth Lyons.

9 The remaining Causes of Action are against all defendants for Accounting, and for
10 Declaratory and Injunctive relief compelling adoption of bylaws in conformity with
11 California Law, and for Unfair Business Practices.

12 Messrs. Temchine and Peterson, of Epstein Becker & Green, P.C. (“EBG”), are
13 representing nominal defendant Pacifica Foundation as well as fourteen of the nineteen
14 remaining individually named past and current officers and directors and/or employees of
15 Pacifica in this litigation, namely: Mary Frances Berry, June Makela, Frank Millspaugh,
16 Andrea Cisco, Ken Ford, David Acosta, Micheal Palmer, Robert Farrell, Karolyn van Putten,
17 Wendell Johns, Valrie Chambers, Bertram Lee, John Murdock, and Lynn Chadwick.
18 Defendant John Murdock is an “income partner” of defense counsel’s law firm, Epstein
19 Becker & Green, P.C. (Request for Judicial Notice, Affidavit of John M. Murdock in
20 Support of Foundation Defendants’ Reply to Plaintiffs’ Motion to Disqualify Defendants’
21 Counsel, filed in U.S. District Court.)

22 These defendants assert that “EBG is providing services to the Foundation at a
23 significantly discounted rate,” and that “it would impose a significant financial burden on the
24 defendants if EBG were disqualified.” (Request for Judicial Notice, Foundation Defendants’
25 Opposition to Plaintiffs’ Motion to Disqualify Epstein Becker & Green, P.C. as Counsel,
26

1 13:15-19.)

2 By letter from Plaintiffs' counsel to Mr. Temchine and Mr. Rapaport, dated February
3 17, 2001, Plaintiffs demanded that defendants provide proof that any and all defendants
4 whom they were representing at the expense of Pacifica Foundation had provided
5 undertakings as required by Corporations Code §5832(f). (Bartley Decl. "Exhibit A".)

6 By letter dated February 22, 2001, Mr. Temchine replied: "If as and when a court
7 with proper jurisdiction enters a final ruling that the Attorney General has acted properly in
8 connection with this lawsuit, and that the individuals named as plaintiffs are proper relators,
9 our client then will promptly and fully provide any disclosures and information which are
10 lawfully required of them." (Bartley Decl. "Exhibit B".)

11 Nominal defendant Pacifica Foundation and these same fourteen individually named
12 defendants are also represented by Mr. Rapaport and Ms. Dunaway of Wendel, Rosen, Black
13 & Dean, LLP. Plaintiffs believe but are uncertain that Pacifica's Directors' and Officers'
14 insurance carrier, rather than the Pacifica Foundation itself, may be paying the Wendel,
15 Rosen Black & Dean, LLP, firm for their services in defense of this action.

16 Plaintiffs are informed and believe that nominal defendant Pacifica Foundation is not
17 advancing expenses in defense of this litigation on behalf of defendants Rob Robinson,
18 Aaron Kriegel, Tomas Moran, Pete Bramson and Leslie Cagan.

19 **II. A CALIFORNIA NONPROFIT PUBLIC BENEFIT CORPORATION MAY**
20 **NOT ADVANCE LEGAL DEFENSE EXPENSES ON BEHALF OF ITS**
21 **AGENTS UNLESS THE AGENTS PROVIDE AN UNDERTAKING TO**
22 **REPAY THE ADVANCES IF IT IS ULTIMATELY DETERMINED THAT**
23 **THE AGENT IS NOT ENTITLED TO INDEMNIFICATION.**

24 Corporations Code §5238 governs indemnification of agents of California nonprofit
25 public benefit corporations. Due to the length of this statute, the full text is attached as an
26 Appendix to these Points and Authorities. Unless otherwise stated, all statutory references
27 herein are to the California Corporations Code.

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1 Under §5238(a), an “agent” is defined as “any person who is or was a director,
2 officer, employee or agent of the corporation or a predecessor corporation;” a “proceeding” is
3 defined as “any threatened, pending or completed action or proceeding, whether civil,
4 criminal, administrative or investigative;” and “expenses” include without limitation
5 “attorneys’ fees and any expenses of establishing a right to indemnification under subdivision
6 (d) or paragraph (3) of subdivision (e).”

7 An agent is entitled to indemnification against expenses actually and reasonably
8 incurred in connection with the *successful* defense of a proceeding or any claim or issue in a
9 proceeding. §5238(d).

10 Pending final disposition of a proceeding, a corporation may advance expenses
11 incurred in defending the proceeding *on receipt of an undertaking* on behalf of the agent to
12 repay the advance unless it is ultimately determined that the agent is entitled to
13 indemnification. §5238(f).

14 A corporation may insure its agents against liability arising from their status as agents,
15 whether or not it would have power to indemnify against that liability, but may not insure
16 against a violation of Corporations Code §5233 (self-dealing transactions). §5238(i).

17 Section 5238(c) applies to actions: (1) by or in the right of the corporation, (2)
18 brought under Corporations Code §5233 (self-dealing transactions), or (3) brought by the
19 Attorney general or a person granted relator status by the Attorney General for breach of a
20 duty relating to assets held in a charitable trust. Under §5238(c) the corporation may
21 indemnify an agent “against expenses actually and reasonably” incurred in connection with
22 the defense or settlement of the action “if such person acted in good faith, in a manner such
23 person believed to be in the best interests of the corporation and with such care, including
24 reasonable inquiry, as an ordinarily prudent person in a like position would use under similar
25 circumstances.”

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1 However, no indemnification shall be made under §5238(c) for amounts paid in
2 settling or otherwise disposing of a threatened or pending action or for expenses incurred in
3 defending a threatened or pending action which is settled or otherwise disposed of without
4 either court approval or the approval of the Attorney General. On a claim or matter as to
5 which the agent has been adjudged liable to the corporation in the performance of his duty,
6 indemnification is authorized only to the extent that the court determines that, “in view of all
7 the circumstances,” the agent is “fairly and reasonably entitled to indemnity.”

8 Under §5238(b) a corporation may indemnify an agent in other proceedings (such as
9 *quo warranto* proceedings under Code of Civil Procedure §803) if the agent “acted in good
10 faith and in a manner such person reasonably believed to be in the best interests of the
11 corporation.”

12 Section 5238(e) requires that, except as provided by §5238(d) (*successful* defense of a
13 proceeding or any claim or issue in a proceeding), indemnification in any proceeding may
14 only be authorized upon “a determination that indemnification of the agent is proper in the
15 circumstances because the agent has met the applicable standard of conduct set forth in
16 §5238(b) or (c)”. Indemnification may be authorized on such a determination in any of three
17 ways:

18 (1) “A majority vote of a quorum consisting of directors who are not parties to
19 such proceeding.” §5238(e)(1).

20 (2) Approval of the members under Corporations Code §5034, excluding the
21 vote of any person to be indemnified. §5238(e)(2).

22 (3) By order of the court in which the proceeding is or was pending.
23 §5238(e)(3).

24 **III. THE LEGISLATURE HAS MANDATED THAT THE CORPORATE**
25 **ENTITY’S ASSETS BE PROTECTED DURING LITIGATION, AND,**
26 **WITHOUT THE REQUIRED UNDERTAKINGS, THE SECURITY OF**
27 **PACIFICA’S ASSETS IS SUFFERING ONGOING IRREPARABLE HARM.**

1 Considerable sums have no doubt already been expended on behalf of the individual
2 defendants in their unsuccessful removal of this action to Federal Court, and are continuing
3 to be expended on their behalf in defense of the action in this Court. The Legislature has
4 mandated that the corporate entity's assets must be safeguarded in this situation, and the
5 required undertakings are not optional or discretionary.

6 Defendants' counsel, Mr. Temchine, has misinterpreted the law and, therefore, has
7 apparently failed to advise nominal defendant Pacifica Foundation to take the required
8 actions to protect its assets in the event its individually named officers and directors are
9 ultimately determined not to be entitled to indemnification in this matter. Likewise,
10 defendants' insurance defense counsel, Mr. Rapaport, has apparently taken no action to
11 require Pacifica to safeguard its assets. This inaction may or may not be due to the inherent
12 conflicts of interest in dual representation of the corporate entity and the individually named
13 directors. However, Plaintiffs have brought this action on behalf of Pacifica Foundation to
14 protect its assets, and have standing to request the assistance of the court.

15 Plaintiffs suggest \$21,500, each, as an adequate undertaking to secure Pacifica's
16 assets, based upon estimated ultimate litigation defense costs of \$300,000, divided by the
17 fourteen individual defendants represented by Epstein Becker & Green, PC.

18 **IV. PLAINTIFFS ARE NOT REQUIRED TO SHOW LIKELIHOOD OF**
19 **SUCCESS ON THE MERITS TO JUSTIFY PROHIBITION OF**
20 **ADVANCEMENT OF LITIGATION DEFENSE EXPENSES WITHOUT AN**
21 **UNDERTAKING.**

22 Plaintiffs are not required to show likelihood of ultimate success on the merits in
23 order to justify the Preliminary Relief requested in this instance. *The individual Defendants*
24 *are required to ultimately succeed on the merits* or otherwise justify a finding that they are
25 entitled to indemnification upon settlement or other resolution of this case. Unless and until
26 such occurrence, they are required to defend this case at their own expense or to provide

1 Pacifica with an undertaking to repay their defense expenses.

2 **CONCLUSION.**

3 For the foregoing reasons Plaintiffs request the Court to protect the Pacifica
4 Foundation's assets by issuing a preliminary injunction prohibiting Pacifica from advancing
5 litigation expenses in this matter on behalf of any of the individually named defendants,
6 unless and until they, and each of them, files with the Court proof of an undertaking in the
7 amount of \$21,500, each, or such amount as the Court deems appropriate.

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9 Dated: April 12, 2001

Respectfully submitted,

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DANIEL ROBERT BARTLEY, Esq.
Attorney for Plaintiffs/Relators

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