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ENDORSED
FILED
ALAMEDA COUNTY

JUN 13 2000

CLERK OF THE SUPERIOR COURT
By Columbus Littleberry, Deputy

5 Attorneys for Defendants
PACIFICA FOUNDATION,
6 MARY FRANCES BERRY,
7 DAVID ACOSTA, JUNE MAKELA,
ANDREA CISCO, FRANK MILLSPAUGH,
8 KEN FORD, MICHEAL PALMER and WILLIAM LUCY

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA

11 DAVID ADELSON, LAUREN AYERS,
12 MARY BERG, JOANNE BOBB, LYDIA
BRAZON, CECELIA CARUSO, GAIL
13 DIXON, ANNE EMERMAN, SHERRY
GENDELMAN, TERRENCE GUY, JIM
14 HORWITZ, KAHLIL JACOBS-
FANTAUZZI, DAWUD KHALIL-ULLAH,
15 PELE DE LAPPE, STEVE LUSTIG,
ERROL MAITLAND, MIGUEL
16 MALDONADO, ANDREW NORRIS,
LEWIS O. SAWYER, JR., MARIALICE
17 WILLIAMS, and FRIEDA ZAMES,
individually, and on behalf of all others
18 similarly situated, and on behalf of Pacifica
Foundation,

19 Plaintiffs,

20 vs.

21 PACIFICA FOUNDATION, a California
22 Nonprofit Corporation, MARY FRANCES
BERRY, DAVID ACOSTA, JUNE
23 MAKELA, ANDREA CISCO, FRANK
MILLSPAUGH, KEN FORD, MICHEAL
24 PALMER, WILLIAM LUCY, and DOES 1-
25 25, inclusive,

26 Defendants.

Case No. 814461-0

DECLARATION OF MARY
FRANCES BERRY IN
OPPOSITION TO MOTION FOR
PRELIMINARY INJUNCTION

Date: June 23, 2000
Time: 2:00 p.m.
Dept: 31
Judge: Hon. James A. Richman

Wendel, Ro
1111 Broadway, 24th Floor
Oakland, California 94607-4036
K & Dean, LLP

1 I, Mary Frances Berry, declare:

2 1. I have personal knowledge of the matters stated herein and if called as a
3 witness could competently testify thereto.

4 2. I am the Chairperson of the Board of Directors of the Pacifica Foundation
5 ("Pacifica"), one of the defendants in this action, and I have held that position since
6 September 1997. I have served on the Board of Directors since 1997. I am also an
7 attorney duly licensed to practice law before the Bar of the District of Columbia, and I am
8 a professor of history at the University of Pennsylvania. I currently serve as Chairperson
9 of the United States Commission on Civil Rights.

10 3. Pacifica is a California nonprofit public benefit corporation with its
11 principal place of business in Los Angeles, California, and its National Headquarters in
12 Washington, D.C. Pursuant to a license from the Federal Communications Commission
13 ("FCC"), Pacifica currently owns and operates six noncommercial, educational radio
14 stations across the country: Berkeley, California (KPFA and KPFB), Los Angeles,
15 California (KPFK), Washington, D.C. (WPFW), New York, New York (WBAI), and
16 Houston, Texas (KPFT).

17 4. During the time I have served on the Board of Directors ("Board") of
18 Pacifica, Pacifica has never had any "members" other than the Board members
19 themselves. While nonprofit public benefit corporations may adopt a structure that
20 permits individuals utilizing the services offered by the corporation to vote on the election
21 of corporate directors, Pacifica has resisted this as unwieldy, expensive and unnecessary.
22 The process of allowing "listeners," "donors," or local advisory board members to vote as
23 directors would be impractical and costly, because, among other things, Pacifica is a
24 national organization, it would have numerous people voting who reside in several states.
25 Determining eligibility would be a major endeavor, and every election would require
26 substantial multi-state legal and administrative expense.

27 5. I am familiar with the provision found at Article Three, Section 2 of
28 Pacifica's Bylaws, as it existed prior to the September 1997 amendments, and on which

1 plaintiffs in this action apparently rely as support for their claim that Local Advisory
2 Boards ("LABs") elected members of the Board. Plaintiffs misinterpret former Section 2
3 of the Bylaws, because that provision only permitted LABs to nominate persons for
4 election to the Board and conferred no rights on the LABs to actually elect directors. As
5 it was explained to me by other Board members when I joined the Board in 1997, the
6 language of Section 2 was always interpreted and always intended to mean that the Board
7 itself had to affirmatively vote to elect every Board member and that the role of the LABs
8 was solely to nominate. Thus, Section 2 allowed for local nomination by LABs, but
9 vested power to elect Board members only in the Board itself.

10 6. At no point during the time I have served on the Board, have LABs ever
11 been entitled to vote to elect, nor based on my review of earlier minutes, have they ever
12 voted to elect, members of Pacifica's Board. Prior to 1984, The Board both nominated
13 and elected members. After 1984, the LABs nominated some members. Neither a LAB
14 nominee nor an at-large nominee became members of the Board unless and until the
15 Board voted to elect that nominee as a Board member and the member was then seated on
16 the Board. The minutes of the Board meetings demonstrate this. In fact, plaintiffs'
17 counsel, Dan Siegel, knows the LABs never elected directors. Mr. Siegel was present on
18 behalf of his clients at the Board meeting on September 28, 1997, where these issues were
19 discussed, prior to the Board's passage of the Bylaws amendment, which is now the
20 subject of this lawsuit. Rather than objecting to the Bylaw changes, Mr. Siegel explicitly
21 acknowledged the weakness of the LABs, acquiesced to the action taken by the Board
22 and went so far as to say to the Board "I applaud you" with respect to the actions taken
23 that day and even invited the Board to redraft the Bylaws. (See Transcript of Board
24 Meeting on September 28, 1997, at page 62-63. A true and correct copy of excerpts of
25 the transcription of the Board meeting held on September 27 and 28, 1997 is attached
26 hereto as Exhibit K.)

27 7. Furthermore, at no time during my involvement with Pacifica have LABs or
28 LAB members ever voted on any amendments or changes to Pacifica's Bylaws. I am

1 informed and believe, and based on the minutes of Board meetings predating my
2 involvement, can state that historically no LAB member ever voted on a Bylaw or Bylaw
3 amendment, whether they affected LABs or not.

4 8. When Section 2 of Pacifica's Bylaws was amended by the Board at its
5 September 28, 1997 meeting, one by product of the amendment ("September 1997
6 amendment") was to clarify the language of Section 2 so that it was consistent with the
7 Board's longstanding interpretation and practice that the LABs only nominated, but
8 members of the Board voted to elect Board members. See the Board's Minutes for its
9 September 28, 1997 meeting, attached as Exhibit L hereto.

10 9. The September 1997 amendment and the subsequent amendment to Article
11 Three, Section 2 in February 1999 did not eliminate the right of the LABs to nominate
12 potential members of the Board. LABs still have the right to nominate potential Board
13 members. Pursuant to Article Three, Section 2 of the current Pacifica Bylaws, the names
14 of the LABs' nominees for election to the Board are to be given to the Board Governance
15 and Structure Committee (the "Committee"). The Committee is responsible for screening
16 all of the nominees, both LAB nominees and at-large nominees, for presentation to the
17 Board for consideration and vote. The Committee has no power to exclude LAB
18 nominees from presentation to the Board. In fact, the February 28, 1999 amendment to
19 the Bylaws eliminated the restriction on the number of nominees a LAB could nominate.
20 Prior to the February 1999 amendment, LABs were limited to two nominees each. That
21 restriction was eliminated by the February 28, 1999 amendment.

22 10. With respect to the length of terms that may be served by persons elected as
23 members of the Board, it has been a long-standing policy of the Board that if a director
24 has been elected as an officer or as a member of the Executive Committee of the Board,
25 and during the director's term as officer or Executive Committee member, his or her term
26 as a director of the Board expires, the director has been allowed to continue to serve on
27 the Board until the balance of his or her term as officer or Executive Committee member
28 expired. Currently no director on the Board is serving on the Board past their elected

1 term, except for David Acosta, who was elected as a member of the Executive Committee
2 and Vice Chair, and who is entitled, under the custom and practice of this long-standing
3 policy to remain on the Board until these terms expire (June, 2001) or he is reelected to a
4 second term as a Board member. Ms. Makela did serve beyond her elected terms at the
5 request of the Board because her term had not expired as Treasurer and Executive
6 Committee member. She resigned in February 2000.

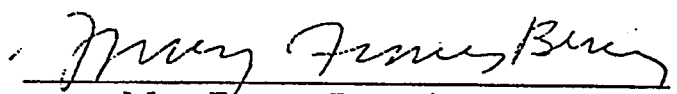
7 11. Although plaintiffs contend that Pacifica has "packed the Board" with at-
8 large directors, a comparison of Pacifica's current Bylaws to those as they existed since
9 1961, shows that no version of the Bylaws contains any restriction on the number of at-
10 large directors who may serve on the Board. The Bylaws state "There shall be such
11 number of directors as the Governing Board shall from time to time decide." During my
12 involvement with Pacifica, LABs and LAB members have never had any input into either
13 the procedures for nominating and electing at-large directors nor have they ever voted on
14 at-large directors or the total number of directors. Pacifica's Bylaws have and continue to
15 commit the determination of the size of the Board and the number of at-large members to
16 the discretion of the Board. In fact, on September 28, 1997, Mr. Siegel was present and
17 applauded Pacifica's Board's decision to add at-large members. See Exhibit K. <

18 12. The actions complained of by plaintiffs in their petition for injunction
19 occurred pursuant to regularly noticed meetings of Pacifica. The actions were
20 unanimously approved. See Exhibit K. Even Mr. Bransom voted affirmatively. None of
21 the directors serving on the Board at the time the actions by the Board were taken at the
22 September 28, 1997 and February 28, 1999 meetings objected to the form of notice given.
23 In fact, the notices did provide notice of proposed language changes, which were debated,
24 amended and unanimously approved.

25 13. The election of Bertram Lee, John M. Murdock, Leslie Cagan, Valerie
26 Chambers and Beth Lyons were as at-large members. The Board of Directors elected
27 these members by over a 2/3rds majority, although such a super majority was not, in my
28 opinion, required. My legal opinion, which is valued in some circles, is that nothing in

1 the Bylaws restricts the Governing Board from expanding or reducing the size of the
2 Board or number of "at-large" directors. I was never advised by Ms. Gendelman or
3 anyone else that Jay Imani had been nominated by the KPFA LAB. No paperwork on his
4 was provided. If proper documentation were to be provided, his nomination would be
5 considered in due course like any other LAB nominee.

6 I declare under penalty of perjury under the laws of the State of California that the
7 foregoing is true and correct and that this declaration was executed on this 8th day
8 of June, 2000 at Washington, D.C.

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10 _____
11 Mary Frances Berry

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