Daniel Rapaport (Bar No. 67217)
Thiele R. Dunaway (Bar No. 130953)
WENDEL, ROSEN, BLACK & DEAN, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036
Telephone: (510) 834-6600
Fax: (510) 834-1928

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

ENDORSED
FILED
ALAMEDA COUNTY

JUN 13 2000

CLERK OF THE SUPERIOR COURT
By Columbus Littleberry, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

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

Plaintiffs,

vs.

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

Defendants.

Case No. 814461-0

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

Date:	June 23, 2000
Time:	2:00 p.m.
Department:	31
Name of Judge:	James A. Richman

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94604-2047

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

Wendel, Rosa[illegible] & Dean, LLP
1111 Ba[illegible], 24th Floor
Oakland, California 94607-4036

FEDERAL STATUTES

STATE STATUTES

Wendel, Ro[illegible] & Dean, LLP
1111 B[illegible] 24th Floor
Oakland, California 94607-4036

I. INTRODUCTION

The most succinct response to plaintiffs' clamor about their purported loss of rights is the adage: You can't lose what you never had. The allure that plaintiffs' siren song may have held at the demurrer stage is quickly dispelled by the *evidence* of Pacifica Foundation's operations, which indisputably shows that LAB members have **never** had the right to vote on the election of directors of Pacifica or on amendments to Pacifica's Bylaws. Regardless of whatever power plaintiff Sherry Gendelman may have *thought* she had, in fact, every Director of Pacifica from 1948 to date has been elected, not by LAB members but by the Board of Directors. Substantial evidence--including the sworn testimony by the former long-time chair of Pacifica's Board of Directors as well as the minutes from meetings of Pacifica's Board--conclusively shows that the Bylaw amendments complained of by plaintiffs did not take away any right from LAB members, because they had no right to elect Board members to begin with.

The ultimate irony of this case is the fact that the actions taken by the Pacifica Board that plaintiffs complain of, were taken by a Board that was composed of precisely the ratio of LAB-nominated directors to at-large directors that plaintiffs now seek to impose. The evidence shows that when the Board took action in September 1997 and February 1999, it consisted primarily of directors who had been originally nominated by LABs. Thus, the LABs effectively had the representation on the Board plaintiffs wanted--yet the now-disputed amendments were adopted by unanimous vote of LAB nominated Board members. Unhappy with the result, it is plaintiffs who are now attempting to "pack the Board."

That this lawsuit is nothing more than a thinly-veiled attempt to gain control of the Three Hundred Million Dollar public interest enterprise is reflected in the injunctive relief sought by plaintiffs.[1] Although the basic purpose of an injunction is to maintain the status quo until the action can be determined on its merits, plaintiffs seek to upend the status quo by requesting an order that would place their hand-picked allies on Pacifica's Board of Directors. Plaintiffs are

[1] Even local supporters of Pacifica's radio stations have begun disavowing and distancing themselves from the tactics of the small but vocal faction leading the attack on Pacifica, including one of the plaintiffs herein, David Adelson. *See* Ex. T to the Declaration of Lynn Chadwick ("Chadwick Decl.") filed herewith.

Wendel, R... Jack & Dean, LLP
111...roadway, 24th Floor
Oakland, California 94607-4036

asking this Court to use its authority to reconstitute the Board to plaintiffs' liking.

The motion should be denied, because plaintiffs have not and cannot establish the requisite elements for injunctive relief. The primary "support" for plaintiffs' motion is the wholly conclusory, incompetent and materially inaccurate Declaration of Sherry Gendelman, a four-year veteran of KPFA's Local Advisory Board. Plaintiffs cannot show they are reasonably likely to prevail, because the evidence demonstrates they are not members of Pacifica, they have never had the right to elect directors to Pacifica's Board, and they have never had the right to vote on amendments to Pacifica's Bylaws. Further, plaintiffs will not prevail on their claim that Pacifica is somehow wrongfully "packing the Board" with at-large directors and that a certain proportion of LAB-nominated and at-large directors must be maintained, because there has never been any proportion required by the Articles or Bylaws, the Bylaws explicitly delegate all such determinations to the Board, and historically there has been no particular proportion.

Plaintiffs have also failed to establish any harm they will suffer if the injunction does not issue. Plaintiffs have offered **no** evidence of any harm to them that would result if the injunction is denied. Even if plaintiffs had introduced evidence of harm, as discussed below, if the injunction issues, Pacifica would suffer far more serious harm.

In sum, since plaintiffs have never held or exercised the powers they seek here, the status quo is to leave the situation intact, without, in essence, letting the fox into the chicken coop. Plaintiffs' Motion for Preliminary Injunction should be denied.

II. STATEMENT OF FACTS

The Pacifica Foundation ("Pacifica") is a California non-profit public benefit corporation with its principal place of business in Los Angeles, California, and its National Headquarters in Washington, D.C. Declaration of Mary Frances Berry ("Berry Decl."), ¶3, filed herewith. Pursuant to a license from the Federal Communications Commission ("FCC"), Pacifica currently owns and operates six noncommercial, educational radio stations across the Country. *Id.* Pacifica must comply with all FCC regulations, which prohibit a licensee from directly or indirectly transferring control to any person absent approval of the FCC. Declaration of John Crigler ("Crigler Decl."), ¶13. Any such transfer without FCC approval would subject Pacifica

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

to monetary penalties and other sanctions. *Id.*

Direct testimony by Jack O'Dell, who served as the Chair of the Board for nearly 20 years, and by long-time members of Pacifica's Board, as well as the corporate minutes and records for over the past 20 years, show that Local Advisory Board members have never had the right to elect directors to the Board or to vote on amendments to Pacifica's Bylaws. Pacifica has never had any "members" as defined by California Corporations Code §5056, other than the Pacifica Board members themselves. Berry Decl., ¶4.

Prior to 1984, the Board both nominated and elected all Board members. Declaration of Jack O'Dell ("O'Dell Decl."), filed herewith, ¶4. In 1984, the Board amended Article Three, Section 2 to allow a station board to nominate Board members. After that amendment, in order to be elected, such local nominees needed only the majority vote of existing Board members, while "at-large" members needed a 2/3rds vote of the existing Board. *Id.* at ¶¶6 and 7. In 1991, this Bylaw was amended to require at least one such local nominee to be a person of color. *Id.* at ¶3. At no time from 1984 to 1997, when Article Three was again amended, did the Board of Directors interpret the Bylaw to mean that the LABs had the power to *elect* a director. *Id.* at ¶7. Rather, at all times, only directors then serving on the Board could vote to elect directors to the Board. *Id.* at ¶3; *see also*, Declaration of Ambrose I. Lane ("Lane Decl."), ¶2. At no time has any director ever been seated on the Board without the affirmative vote of the Board. *Id.* at ¶¶10, 12. Berry Decl., ¶6.

At the time the Bylaws were amended in September 1997 and February 1999--*i.e.*, the amendments plaintiffs challenge in this suit--the majority of the Board members who voted for the amendments were either also members of LABs or had been originally nominated to the Board by an LAB. Declaration of Frank Millspaugh ("Millspaugh Decl."), ¶6. In September of 1997, at a properly noticed and regularly scheduled meeting of the Pacifica Board, Article Three was again amended.[2] The only material change was to alter the percentage of votes required for

[2] The notice provided notice of proposed language changes, which were debated, amended and unanimously approved at the Board meeting. Berry Decl., ¶12. No director objected to the form of notice given. *Id.*

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

election to the Board. All nominees thereafter must obtain the votes of a majority of those seated in a quorum, as opposed to a majority of all directors for LAB nominees and a 2/3rds majority of all directors for at-large nominees. *Id.* at ¶3; Berry Decl., Ex. L, p. 7. These amendments were also intended to clarify the language of the 1988 version of the Bylaws, so that it could not even be argued that LABs actually controlled the election of any directors. Even though the amendments were passed in September 1997, no one objected to the amendments or otherwise questioned who held the power to elect directors for nearly two years.[3] Then came the June 14, 1999 letter to Pacifica from plaintiffs' counsel, Dan Siegel.

Significantly, although plaintiffs' counsel, Mr. Siegel, attended the September 1997 Board meeting, neither he nor his clients expressed any objection to the Bylaws amendment. In fact, Mr. Siegel, on behalf of his clients, spoke at the 1997 Board meeting and "applauded" Pacifica's 1997 Bylaw amendments and recognized the weakness of the LABs. Berry Decl., ¶6; Exhibit K, pp. 62-63; Declaration of Daniel Rapaport ("Rapaport Decl."), ¶¶4-6, filed herewith. Through his comments, Mr. Siegel also tacitly acknowledged that only Pacifica's directors voted on the election of directors. Even a week later, Mr. Siegel was describing the meeting as "very positive." *Id.*, Ex. Q.

On March 1, 1998, the Board of Directors issued its written policy clarifying the role of the LABs. Chadwick Decl., ¶2, Ex. S thereto. The policy demonstrates that the universal understanding before the February 1999 meeting was that the LABs "serve under the direction and guidance of the Pacifica National Governing Board." Ex. S, page 1. The Pacifica Board Chair and Executive Committee have "the authority to institute reorganization or reconstitution of the LAB." *Id.* Exhibit S specifies the powers and responsibilities of the LABs. Conspicuously absent is the power to elect directors. Rather, "No actions may be taken by the LAB that would preempt, in whole or in part, the authority or responsibility of the Governing Board." *Id.* at p. 2. The LAB's right to nominate potential members was, however, confirmed. See Ex. S to Chadwick Decl., page 4.

[3] Nor had any LAB member asserted or even suggested that they had a vested right to elect any director at any time before the 1997 amendments of Article Three.

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

In 1998, Pacifica was advised by the Corporation for Public Broadcasting that the Communications Act requires CPB grantees to have two separate and distinct boards – a governing board and a community advisory board. *See,* Ex. M to Crigler Decl., ¶5. Funding from CPB, which comprises a substantial percentage of Pacifica's budget, was in jeopardy since some Board directors had not formally resigned as LAB members after election to the Board. Crigler Decl., ¶¶4, 5.

In order to eliminate the risk of losing CPB funding, in 1999 the Board decided it was in the best interests of Pacifica to assure compliance with CPB requirements by simply amending the Bylaws to prohibit anyone serving as a director of the Board from simultaneously serving on an LAB board. *Id.* at ¶¶6, 7. After adopting this amendment, those Directors who had also been serving on LABs each chose to resign from their respective LABs and remain on Pacifica's Board. Crigler Decl., ¶6.

For all of plaintiffs' hyperbole, the Board made minimal changes to the election process at its February 1999 meeting. The changes adopted in no way eliminated or diminished the right of LABs to nominate. Berry Decl., ¶9. The 1999 amendment merely created a unified procedure for how those nominations would be handled. All nominations are to be forwarded to the Board's Governance and Structure Committee where they are prescreened for the Board. *Id. See* Ex. H, Footnote to Section 2. When the prescreening is complete, the Committee is to send the nominations to the Board for consideration and vote. The Committee has no power to exclude LAB nominees from presentation to the Board. Berry Decl., ¶9. This revised procedure in no way alters the LABs' right to nominate potential directors.

Nor have LAB members wrongfully been deprived of the right to vote on the size of the Board. The Bylaws have been crystal clear since 1961 that "There shall be such number of directors as the Governing Board shall from time to time decide." Article Three, Section 1, C. No LAB member has ever voted on such matters. O'Dell Decl., ¶13. The size and composition of the Board has varied from year to year at the discretion of the Board. Acosta Decl., ¶¶7, 8. However, the very Board plaintiffs complain of as having wrongfully adopted the disputed amendments was composed of a majority of directors who had been nominated by LABs.

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

III. LEGAL ARGUMENT

The purpose of a preliminary injunction is to preserve the status quo until a final determination of the merits following a trial. *Continental Baking Co. v.* Katz (1968) 68 Cal.2d 512, 528. *See also*, Plaintiffs' Memo, p.3, l 4-5. In determining whether to grant an injunction, a court must consider two factors: "the likelihood that the plaintiff will prevail on the merits at trial," and the "interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70. The court must deny a request for preliminary injunction unless there is "a reasonable probability that plaintiff will be successful in the assertion of his rights." *Continental Baking Co. v. Katz, supra,* 68 Cal.2d at 528. Not only are plaintiffs seeking to alter the status quo by seeking a mandatory injunction, they have failed to demonstrate, by competent evidence, that they will prevail on the merits or that they will suffer harm greater than that, which will befall Pacifica.

A. Plaintiffs' Showing Does Not Remotely Approach The Standards Required For Injunctive Relief.

1. Plaintiffs Seek To Alter The Status Quo By Requesting Injunctive Relief That Will Reconstitute Pacifica's Board.

It is plaintiffs, not defendants, who seek to alter the status quo. The Declarations of those who have served on the Board as early as 1977, together with the Exhibits appended thereto overwhelmingly prove that the status quo has been that the Board of Directors always and exclusively elected new directors. O'Dell Decl., ¶¶7, 8; Lane Decl., ¶2; Millspaugh Decl., ¶2; Berry Decl., ¶5, 6. This power was never transferred, shared or delegated to anyone, including the LABs and LAB members. Plaintiffs have not provided a scintilla of admissible evidence to the contrary. The relief sought by plaintiffs, which includes placing plaintiffs' allies on the Board, would alter the processes which have been in place for over 50 years. Plaintiffs fall far short of their burden of proof, and the motion should be denied.

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

2. Plaintiffs Have Not And Cannot Show That They Will Prevail on the Merits.

a. Plaintiffs Will Not Prevail On The Merits

While plaintiffs baldly assert numerous times that they "will prevail on the merits," those assertions are not supported by the facts. Plaintiffs seem to rely heavily on the fact that the most recent iteration of their complaint withstood demurrer. However, in order to avoid demurrer, a party's complaint must only plead sufficient *allegations* to state a claim--regardless of whether those allegations are true or supported by facts. *Serrano v. Priest* (1971) 5 Cal.3d 584, 591 (court treats demurrer as admitting all material facts properly pleaded); *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214 (in determining a demurrer, the court does not consider the question of plaintiff's ability to *prove* the allegations). In contrast, a party seeking an injunction must present evidence to establish that it is reasonably likely they will prevail on the merits and that they will be seriously harmed absent the injunction. The burden is on plaintiffs as the moving parties. Evid. Code §§500, 505.

Plaintiffs' entire case is premised upon their misinterpretation of a Bylaw first enacted in 1988, which they claim empowered LAB members to elect some of the Pacifica Directors. Plaintiffs have presented almost no competent, admissible evidence to support their motion. The averments in the Gendelman Declaration repeatedly lack foundation and show no personal knowledge. In addition, her declaration is replete with impermissible legal conclusions and hearsay.[4] Peter Bramson's Declaration, which is far more limited in scope, is similarly deficient. In contrast, as discussed above, defendants' evidence shows that LAB members never had such power to elect directors; plaintiffs never exercised such power; and, until shortly before filing this lawsuit, plaintiffs never complained that they were not allowed to exercise such power.

[4] As Dr. Berry describes, she was never advised that Jay Imani was nominated by an LAB nor was the Board Governance Committee ever supplied with paperwork to consider him. Berry Decl., ¶13. If plaintiffs comply with normal procedures, he would be considered in due course. However, this does not assure his election, since that decision is one for the Board of Directors.

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

b. Plaintiffs Have No Standing, Because They Are Not Members of Defendant Pacifica Foundation.

The actions of which plaintiffs complain are those that are inherent to the governance and management of Pacifica. Under the provisions of Pacifica's Articles of Incorporation and Bylaws and California law, those governing powers are vested solely in Pacifica's Board of Directors.[5]

Plaintiffs previously conceded that in order to both have standing and to prevail on their claims regarding corporate governance they must come within the ambit of California Corporations Code §5710, which requires that plaintiffs prove they are "members" of Pacifica. They rely on the definition of "member" found in Corporations Code §5056, which based upon a claimed right to vote for the election of a director. However, plaintiffs did not have that right. Further, "[a] person is not a member by virtue of ...[a]ny rights such person has as a delegate; or ... [a]ny rights such person has to designate or select a director or directors." Corp. Code §5056(d)(1) and (2).

Plaintiffs' only basis of alleged membership in Pacifica is their contention that LABs had the right to elect directors to Pacifica's Board of Directors, and, thus as representatives of those LABs, plaintiffs are in turn "members" of Pacifica. Plaintiffs misconstrue the meaning and language of the Bylaws allegedly in force prior to the 1997 and 1998 amendments. Yet as defendants' evidence unequivocally demonstrates, LABs never had that right.

As Mr. O'Dell stated in his declaration, the Bylaw relied on by plaintiffs merely required that, as a condition precedent to being elected by the Board of Directors ("In order to be elected") a potential director must receive the approval of over one-half of the station board ("The

[5] Nonprofit public benefit corporations are not required to issue stock or to have members (i.e., persons other than directors entitled to vote). (Corp. Code §5310.) Each nonprofit public benefit corporation is required to have a Board of Directors and "the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board." (Corp. Code §5210.) When a nonprofit public benefit corporation has no members, or the directors are the only members, any action of the corporation requires only approval of the Board of Directors. (Corp. Code §§5310(b)(c) and 5812(b)(3). That is currently, and in every iteration of the Bylaws, has been the case with Pacifica. (See Article 3, Section 1.A. of the Bylaws.) Gendelman Decl., Exhibit A.

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

nomination and vote of a majority of the station board") which he may represent, except for "at large" members who were not required to have any local support and could be elected by the Board itself. O'Dell Decl., ¶7 The Bylaw language confirms that the only right of the LABs is the right to nominate, and that the election itself was by the Board. *Id.* The only difference between local and "at-large" nominees was that those nominated and supported by LABs required only a majority vote of the Board for election while "at large" members required a two-thirds majority.

Even if the Court were to adopt plaintiffs' interpretation that their designation of a potential board member was absolute and had to be accepted by the Board of Directors, this does still not make plaintiffs "members" as defined by Corp. Code §5056. Since even under plaintiffs' interpretation, LABs could not vote to elect either other directors outside their signal area or at large directors. Station Board representatives, at best were able to designate a director.

Even if plaintiffs are deemed to have a right to "designate," as opposed to "nominate" directors, Corp. Code §5056(d)(2) expressly states that this right is not a basis for being deemed a "member." The logic is simple, those persons who have the right to engage in activities traditionally undertaken by governing boards—*such as the right to vote on the election of all* board members, make bylaws, or allow for merger or dissolution—are, in essence, members. This status confers broad rights. But §5056(d)(2) clarifies that if the extent of one's decision making is limited to a right to designate or select some, but not all directors, the statute will not as a matter of law confer the same status and will not deem that person to be a "member."

In sum, no matter how plaintiffs interpret the language in the Bylaws they rely upon, as establishing their status as "members," all interpretations prove plaintiffs lack that status. Either LABs could nominate a person for election by the Board of Directors, or they could nominate and internally elect two Board members who they designate as a member of the Board of Directors. In the first scenario they have no right to elect anyone and don't come within the ambit of §5056(a). In the second scenario, they are only designating two directors and are expressly not members per §5056(d)(2). Under any interpretation, the LABs themselves are not composed of "members." It is well settled that a court may not remove directors based upon an

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

action by improper parties. *American Center for Education, Inc. v.Cavnar* (1978) 80 Cal.App.3d 476, 499.

More significantly, the evidence shows the LABs never wielded such power. Thus, the fundamental underpinning of plaintiffs' motion fails. The amendment to the Bylaws they complain of did not detrimentally affect any vested right to elect directors, or to direct or dictate policy of Pacifica. Those rights were vested exclusively in Pacifica's Board of Directors. Plaintiffs' allegation that they lost any legal rights in February 1999 or earlier is simply without merit.[6]

3. The Harm To Pacifica From The Injunction Dwarfs Any Harm To Plaintiffs From Denial.

Plaintiffs have not provided any *evidence* that they are at risk of harm if the injunction is not issued. They merely **argue** that the presence of new Board members will cause them "to suffer extreme harm." Saying it does not make it so. Plaintiffs fail to suggest, much less prove, that the current Board can or will do anything to adversely affect any vested right. Instead they assert that a "lesser showing" of harm is required, because they have shown they will prevail. Plaintiffs' Memo, pp. 8:16-9:16. Plaintiffs have taken this argument one step further and made **no** showing of harm.

Plaintiffs' argument that they will be harmed unless the current composition of the Board is immediately changed by order of the Court is disingenuous and meritless. Plaintiffs filed this suit in response to the adoption in 1997 and 1999 of Bylaws amendments plaintiffs did not like. But those amendments were unanimously adopted by Boards which were composed **primarily of LAB nominees**. In other words, plaintiffs are attacking the actions taken by their own representatives serving on Boards that contained precisely the same ratio of LAB nominees to at-

[6] Plaintiffs' objections based on purportedly deficient notice of the proposed 1997 amendment similarly fall flat. An injunction may not issue to enjoin *past* conduct. *McManus v. KPAL Broadcasting Corp.* (1960) 182 Cal.App.2d 558, 563 ("a completed wrong cannot be corrected by a preliminary injunction, the purpose of which is to preserve the *status quo* until after final judgment") Further, unless a director objects, inadequate notice is deemed waived. (Corp. Code §5211(3).) Plaintiffs present no facts that any director sitting in September of 1997 contends he or she did not get notice or objected to inadequate notice. Corp. Code §5211 provides notice must only be given to directors, and plaintiffs do not contend they were directors.

Wendel, R... Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

large nominees that plaintiffs contend must be restored by this injunction. It is not LAB nominees plaintiffs seek, but **like-minded** nominees that will give them control of the Board.

Defendants have shown, through competent evidence, that were this Court to grant the preliminary injunction, Pacifica would be at serious risk. First, if LAB board members are placed on the Board this will almost certainly result in Pacifica's losing its funding from the Corporation for Public Broadcasting ("CPB")--representing a significant portion of its budget, resulting in a budget shortfall. In addition, as a licensee of the Federal Communications Commission, Pacifica must comply with FCC regulations, and the injunctive relief sought by plaintiffs would violate the FCC regulations and subject Pacifica not only to monetary forfeitures, but also other sanctions. Crigler Decl., ¶12. This would be irreparable harm to Pacifica. Further, Pacifica's contracts, actions and authority would be in question creating numerous foreseeable and unforeseeable disputes. On balance, the scales of justice are overwhelmingly tipped in favor of denying this injunction.

4. Mandatory Injunctions Are Rarely Granted.

Although they have tried to disguise the relief sought by phrasing it in prohibitory terms, plaintiffs are, in fact seeking mandatory injunctive relief. They ask this Court to strip 10 directors of their office, seat unnamed and unknown persons as directors, transfer all corporate authority to this new and undefined group, invalidate existing Bylaws, and effectively transfer control of Pacific in violation of CPB and FCC regulations.

Mandatory injunctions such as the one requested by plaintiffs are "'rarely granted'" and granting such an injunction "is not permitted except in extreme cases where the right thereto is clearly established." *Shoemaker v. County of Los Angeles* (1995) 37 Cal.App.4th 618, 625 (citation and internal quote marks omitted). It does not matter how plaintiffs characterize the requested injunctive relief. If it compels action, it is mandatory. *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446-447.

The performance of an affirmative act which changes the position of the parties by court order is a mandatory injunction. A mandatory injunction is permitted only in "extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

its refusal." *Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295-296; *accord; Teachers Ins. & Annuity Assn. v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493. This is not an "extreme" case.

5. The Cases Cited By Plaintiffs Are Of No Assistance.

Plaintiffs cite, without analysis, four cases that they argue are sufficiently similar to the facts here to lend guidance to this Court in considering plaintiffs' injunction. These cases are *Heckmann v. Ahmanson* (1985) 168 Cal.App.3d 119; *E&H Wholesale Inc. v. Glaser Bros.* (1984) 158 Cal.App.3d 728; *Signal Oil and Gas Company v. Ashland Oil* (1958) 49 Cal.2d 764; and *Borg v. International Silver Co.* 11 F.2d 147 (2d Cir. 1925). Plaintiffs' Memo, p. 4:4-10. When they are viewed with an analytical eye, however, none support plaintiffs' requested injunctive relief.

In *Heckmann* the appellate court upheld a preliminary injunction precluding a defendant, which made a $60 million profit in a greenmail stock transaction, from disposing of the funds pending trial, since the court believed the directors gained a personal benefit by agreeing to the payment. This case is so attenuated from the facts before this Court, analysis is unnecessary. The same can be said about *E&H Wholesale* the appellate court ordered a preliminary injunction against a cigarette distributor's sales since "there can be no doubt that defendant sold cigarettes below cost . . ." in violation of B&P Code §17043. Again no factual or legal similarity exists with the facts here.

Signal was a complex interstate dispute over the tax validity of a voting trust. The court held that even when an order enjoining certain conduct is later found to be erroneous, the order is not void. Briefly, the trial court order enjoined a corporation from holding a particular directors' meeting. In an appeal challenging the validity of the order, the *Signal* court found that since six of fifteen directors obeyed the court's order and did not attend the enjoined meeting, the actions taken at that meeting should be reversed, because the obedient directors should not have lost their right to debate the majority by reason of the lower court's mistake. *Signal, supra* at 781-782.[7]

[7] If anything, the teaching of *Signal* is the court should be careful in enjoining corporate activities since even orders later found to be in error must be obeyed.

Wendel, [illegible], Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

Although *Borg* is an antique but otherwise unremarkable federal decision applying a 19th century New Jersey law, it actually supports defendants here. The Second Circuit reviewed and affirmed a district court's refusal to issue a preliminary injunction precluding a sale of stock in the face of allegations that the sale was a disguised attempt by certain directors to increase their control. The appellate court acknowledged that a decision such as selling shares at auction "was certainly for the directors" and concluded that "we can hardly upset the directors' decision on any suspicions which the evidence presents."[8]

B. Plaintiffs' Objections To The 1997 Amendments Affecting The Election Of At-Large Members And Eliminating The Reference To Secret Ballots Provide No Basis For Injunctive Relief.

The evidence shows that the 1997 amendments to the Bylaws were unequivocally within the power of the Board, which adopted them by a unanimous vote. It is undisputed that since 1961, the Bylaws have stated "There shall be such number of directors as the Board of Directors shall from time to time decide." Gendelman Decl., Exhibit A (Article Three, Section 1(c)). Thus, this amendment was perfectly permissible. Even if plaintiffs were "members" within the meaning of Corporations Code §5150, the amendments were not actions that affected their claimed vested right to elect LAB representatives. Moreover, plaintiffs waived any right to complain when Mr. Siegel, on behalf of his clients, endorsed the Board's actions. Significantly, the 1997 Board consisted of a majority of directors who had been LAB nominees.

C. Mr. Acosta's Presence On The Board Is Not A Basis For Injunctive Relief.

Plaintiffs contend that two Board members--David Acosta and June Makela--have served beyond the expiration of their terms and should be removed by this Court. However, as defendants' witnesses testified, the Board has had a longstanding policy that when a Board member is elected to a Board Officer term, his or her tenure as a Board member is extended to be coextensive with that term of office. Millspaugh Decl., ¶5; O'Dell Decl., ¶11; Berry Decl., ¶10. In Ms. Makela's case, she left the Board when her term as Treasurer and Executive Committee

[8] In short, plaintiffs citations to authority follow the dubious modern aggressive trend to piece together language out of context from cases to create a mosaic whose motif, while appearing logical, contains no true structure.

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

member expired, so as to her, the question is moot. Similarly, Mr. Acosta was elected Vice Chair and that term continues until June 2001. Acosta Decl., ¶2; Millspaugh Decl., ¶5.

In any event, the Board could, if it chose, eliminate all term limitations, to which plaintiffs again would have no standing to object. Since the Board could take such action or make an exception for Mr. Acosta, it clearly has the power to do so by procedural policies. Finally, a director holds office until the later of the expiration of their term and until a successor has been elected and qualified. Ex. I; Cal. Corp. Code §301(B). Since no successor has been elected or qualified, Mr. Acosta's status is wholly consistent with California law.[9]

D. The Injunctive Relief Requested By Plaintiffs Is Preempted.

The entire field of regulating format and determining the appropriateness of conduct by FCC licensees lies with the FCC. *See, e.g. Lamb v. Sutton* (M.D. Tenn. 1958) 164 F.Supp. 928, 934 ("Congress under the Federal Communications Act of 1934, as amended, completely occupied and preempted the field of interstate communications in radio and television"); s*ee also, Schroeder v. Municipal Court* (1977) 73 Cal.App.3d 841, 846. That regulatory scheme gives objectors an opportunity to voice their grievances and complaints with stations operated under an FCC license in the license renewal hearings. 47 U.S.C. §309(d)(1); *See, e.g., Brandywine-Main Line Radio, Inc. v. F.C.C.* (D.C. Cir. 1972) 473 F.2d 16, 59.

Furthermore, plaintiffs' efforts to remove directors from the Board raise issues of a court's authority to order "the removal from office of certain individual directors." This is impermissible, because any substantial change in control of the licensee requires approval of the transfer of the FCC license. 47 U.S.C. §310(d), 309(b), (c); *see, Storer Communications, Inc. v. F.C.C.* (D.C. Cir. 1985) 763 F.2d 436, 438. Crigler Decl., ¶12.

E. Any Preliminary Injunction Would Require A Large Bond.

CCP §529 requires the Court, on granting injunction, to order an undertaking adequate to pay any damages which may be sustained by reason of the injunction. *Casitas Inv. Co. v.*

[9] Plaintiffs' argument also fails, since even if this were a violation of corporate policy, it is not within the scope of Corporations Code §5150 that they may complain about.

Wendel, R. Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036

Charles L. Harney, Inc. (1962) 203 Cal.App.2d 811, 815 (issuance of an injunction must be supported by a bond or undertaking). If the injunction is issued, Pacifica faces potential FCC sanctions and the loss of CPB funding. There is little doubt the requested injunctive relief would cause this loss. Crigler Decl., ¶¶4, 12. The absolute floor for any bond should be one million dollars. Even if the Court is convinced plaintiffs have an overwhelmingly strong case, it still must require an undertaking in an amount to fully compensate defendants, if plaintiffs lose no matter how improbable. *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App. 3d 1, 16.

IV. CONCLUSION

Plaintiffs have failed to show that they are likely to succeed on the merits or that they will be harmed if the injunction does not issue. Any hesitation the Court may harbor in rejecting out of hand plaintiffs' Petition for Preliminary Injunction should be removed when it considers the potential harm to Pacifica were this relief to be granted. The current Board of Directors would be stripped of its authority. The control of Pacifica, a complex and vital National Radio Network would be changed in violation of FCC regulations. CPB funding would be in jeopardy. Every contract and agreement entered into by this Board would be subject to question potentially resulting in disputes and litigation. Such potential harm far outweighs any conclusory allegation of harm to LAB members, who have never yet tasted the power they evidently crave. The motion should be denied.

Dated: June 13, 2000

WENDEL, ROSEN, BLACK & DEAN, LLP

By _____
Daniel Rapaport
Attorneys for Defendants

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036