Motion to Remand and for Costs
On Grounds of Defective Removal and Lack of Federal Question

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Motion to Remand and for Costs

On Grounds of Defective Removal and Lack of Federal Question

[Under 28 U.S.C. §1447(c)]

The People of the State of California, *ex rel.* Carol Spooner, John D. Biello, Carolyn M. Birden, Kurt Guerdrum, Arturo Griffifths, Amburn R. Hague, Leigh Hauter, Patricia Heffley, Barbara MacQuiddy, Rick Pothoff, Charles P. H. Scurich, and Ronald Swart, individually and on behalf of Pacifica Foundation, Plaintiffs, in the above case removed to this Court by sixteen of the twenty-one Defendants, hereby move to remand the case to the Superior Court of the State of California, County of Alameda, the Court in which this case was pending at the time of removal, upon the following grounds:

1. The Notice of Removal is defective under 28 U.S.C. §1446 because five of the individually named Defendants, Rob Robinson, Aaron Kriegel, Pete Bramson, Tomas Moran, and Leslie Cagan, have not joined in the removal. Plaintiffs deny the allegations in the Notice of the Removal that these Defendants are "sham defendants and nominal parties", and that they were "fraudulently joined ... to prevent removal by Pacifica", and that "the Complaint fails to allege any causes of action against either Robinson or Kriegel", and that "[t]he seventh, eight [sic], and ninth 'causes of action' seek no relief against individuals but only requests for declaratory relief", and that "[t]he sixth cause of action is an action for accounting against The Pacifica Foundation alone." Plaintiffs further deny the allegation that all or any of the Defendants may not have been properly served. Plaintiffs further allege that all defendants have received a copy of the initial pleadings, by service or otherwise, and that more than thirty days have elapsed since all of the non-removing defendants received the initial pleadings.

2. Plaintiffs deny the allegations in the Notice of Removal that this Court has original jurisdiction of this case, deny that Plaintiffs' claims involve a federal question, deny that Plaintiffs' claims arise under the Public Broadcasting Act ("PBA"), 47 U.S.C. §390, et seq., and other provisions of the Federal Communications Act ("FCA"), 47 U.S.C. §301, et seq, and further deny that this is a "civil action to clarify and enforce rights under the PBA and FCA and, thus, invokes subject matter jurisdiction of the United States District Court."

3. Defendants' may attempt to insert "clarification" or their alleged "rights" under the PBA and FCA as defenses to Plaintiffs' action; however, under the long-established "well-pleaded complaint rule," removal must be based on a federal question presented on the face of the plaintiffs' properly pleaded complaint, and a case may not be removed to federal court on the basis of a federal defense, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case. Plaintiffs deny that there is any federal defense in this case and further deny that the federal issues raised by defendants are relevant to any question at issue in the case.

4. This Court is without original jurisdiction over the matters alleged in all causes of action, 1 through 10, inclusive, of the complaint.

5. The case was improperly removed in that all causes of action are properly within the jurisdiction of the Superior Court of the State of California, as being asserted under the California Nonprofit Corporation Law, California Corporations Code §5000, et seq., the California Uniform Supervision of Trustees for Charitable Purposes Act, California Government Code §12580, et seq., and the California Unfair Competition Law, California Business & Professions Code §17200, et seq.

6. The cause herein was improperly removed in that the matters asserted in the complaint filed in the Superior Court of the State of California, County of Alameda, did not represent any claim or right arising under the Constitution, treaties or laws of the United States.

7. Even if this Court has jurisdiction, which Plaintiffs deny, the Court should abstain from exercising jurisdiction under *Burford v Sun Oil Co.* 319 U.S. 315 (1943), and other abstention principles, because removal would result in needless intervention by the federal courts and needless conflict with the State of California's administration of its own pervasive regulatory scheme for regulation of nonprofit public benefit corporations and enforcement of the California Nonprofit Corporation Law, California Corporations Code §5000, et seq., the California Uniform Supervision of Trustees for Charitable Purposes Act, California Government Code §12580, et seq., and the California Unfair Competition Law, California Business & Professions Code §17200, et seq., thereby affecting issues of substantial local importance that transcend any federal court jurisdiction in the case,

8. Plaintiffs further move the Court to order the payment to the plaintiffs by the removing defendants of all costs, including attorneys' fees, incurred by reason of the removal proceedings.

Wherefore, the Plaintiffs pray that this case be remanded to the Superior Court of the State of California, County of Alameda, in accordance with the requirements of Title 28, Section 1447(c), and for an order awarding Plaintiffs their costs incurred in this Court by reason of the removal.

Dated: _____

_____

DANIEL ROBERT BARTLEY
Attorney for Plaintiffs/Relators
7 Guisela Court, P.O. Box 686
Novato, CA 94948-0686

Memorandum of Points and Authorities in Support

of Plaintiffs' Motion for Remand and Costs.

Plaintiffs, The People of the State of California, *ex. rel.* Carol Spooner, et al., for authority in support of their motion to remand this cause to the Superior Court of the State California, County of Alameda, submit the following:

I. Issues to be decided.

1) Whether all necessary defendants joined in the removal?

2) Whether this Court has federal question jurisdiction?

3) Whether abstention doctrines apply to this case?

4) Whether to award plaintiffs their costs, including attorney fees, incurred as a result of the removal?

II. Facts.

This is an action to correct breaches of the founding purposes of the Pacifica Foundation ("Pacifica"), a California nonprofit public benefit corporation, as set forth in its Articles of Incorporation (California public benefit corporations are deemed to be impressed with a charitable trust under California law. *Brown v. Memorial Nat'l Home Foundation*, 162 Cal.App. 2d 513, 538 (1958)), to compel an accounting, and to remove directors under various California statutory provisions including beach of charitable trust, gross abuse of authority and discretion,

and usurpation of office. Further, under post-judgment court supervision, plaintiffs seek to compel revision of Pacifica's bylaws to bring them into conformity with California law, to define its membership, and to hold elections of new directors. To these ends, plaintiffs will ask the court to apply the principle of California law that: "Corporations have no power to create bylaws that are unreasonable in their practical application; bylaws seemingly in compliance with statutory provision are invalid if they are unreasonable." *Braude v. Havenner,* 38 Cal. App. 3d 526, 533 (1974). The complaint also states a claim for unfair competition.

Pacifica Foundation was first incorporated shortly after World War II, in 1946, by pacifists and war resisters. KPFA radio in Berkeley first began broadcasting on April 15, 1949. Pacifica is now the licensee of broadcast licenses for noncommercial educational radio broadcasting in five cities across the United States, including KPFA in Berkeley, California, KPFK in Los Angeles, California, KPFT in Houston, Texas, WBAI in New York, New York, and WPFW in Washington, D.C.

Pacifica has a long, proud and controversial history of independence, free speech, artistic expression, and investigative journalism, including gathering and disseminating news and information not commonly available in other media. Following large public demonstrations in Berkeley, California, in the spring and summer of 1999, protesting, among other things, the firings of radio broadcasters, the discontinuance of regular programming, and the armed occupation of the KPFA radio station by a private security and "corporate intelligence gathering " firm hired by Pacifica, and after exhaustive investigation of the facts, "relators" herein applied on November 19, 1999, to the California Attorney General for "relator" status to sue Pacifica on behalf of the People of the State of California.

The issues were extensively briefed to the California Attorney General, with Pacifica filing an opposition brief in December 1999 and the then proposed "relators" replying at the end of January 2000. The issue of federal preemption was fully briefed and rejected by the California Attorney General. The California Joint Legislative Audit Committee also held hearings and investigated the causes of the disturbances and controversies at KPFA and Pacifica and issued its report in June 2000. (See Plaintiffs' Request for Judicial Notice filed herewith.)

On September 14, 2000, the California Attorney General's office notified relators that their application for relator status was granted, by letter stating as follows:

> "The allegations set forth by Relators raise substantial questions of law or fact regarding whether there is compliance with the purpose of the Pacifica Foundation charitable trust, whether its articles of incorporation are being adhered to, whether its assets are being properly protected, and whether it is being managed and directed in a manner consistent with the requirements of the California Corporations Code. The answers to these questions require judicial resolution.
>
> "Therefore, the application of Carol Spooner, John D. Biello, Carolyn M. Birden, Kurt Guerdrum, Arturo Griffifths, Amburn R. Hague, Leigh Hauter, Patricia Heffley, Barbara MacQuiddy, Rick Pothoff, Charles P.H. Scurich, and Ronald Swart, individually and on behalf of Pacifica Foundation, for Relator status to sue in quo warranto 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, is hereby granted."

The letter is signed by Taylor S. Carey, Special Assistant Attorney General, For Bill Lockyer, Attorney General. (See "Exhibit A" to the Complaint.)

Relators, on behalf of the People of the State of California and the Pacifica Foundation (hereinafter referred to collectively as "Plaintiffs"), filed this action in the Superior Court of California, County of Alameda, on September 15, 2000, naming twenty past and current directors and officers of Pacifica as individuals and the Pacifica Foundation as defendants. Pacifica

Foundation and fifteen of the individual defendants removed the case to this Court on October 16, 2000.

A related action brought by two Pacifica directors who are defendants in this action, *Robinson, et al v. Pacifica Foundation, et al.*, was also removed by the defendants on the same date. (N.D. Cal. Case No. C 3814 MJJ, California Superior Court, County of Alameda, Case No. 831286-0, filed September 19, 2000.) Another related case, *Adelson et al. v Pacifica Foundation, et al.,* (California Superior Court, County of Alameda, Case No.814461-0, filed July 16, 1999) remains pending in the state court. (See Notice of Pendency of Other Action or Proceeding filed herewith.) While each case raises separate issues, all three of these cases involve, in a material part, the same subject matter and substantially all of the same defendants.

III. Legal Standard.

As a general rule, an action is removable to a federal court only if it might have been brought there originally. 28 U.S.C. §§ 1441(a). Because removal ousts a state court of jurisdiction, "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the (removal) statute has defined." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).

"The burden of establishing federal jurisdiction is on the party seeking removal, and the removal statute is strictly construed against removal jurisdiction. See *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988)." *Prize Frize, Inc v Matrix Inc.* 167 F.3d 1261, 1265 (9th Cir. 1999).

IV. There Is No Unanimity of Defendants.

Under 28 U.S.C. §1446, all proper defendants must join or consent to the removal notice. *Prize Frize v Matrix, Inc. supra,* 167 F.3d at 1266; *Emrich v Touche Ross & Co., supra*, 846 F.2d at 1192; *Parrino v FHP, Inc.*, 146 F.3d 699, 703 (9th Cir. 1988). Proper defendants are those who are not "nominal" or "fraudulently joined."

A defendant must file a notice of removal in the appropriate federal district court within thirty days after service of the Summons and Complaint or after otherwise receiving a copy of the Complaint after service of the Summons.[1] 28 U.S.C. §§ 1446(b); *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.* 526 U.S. 344, 347 (1999). (But see, *City and County of San Francisco v. Manning*, 2000 U.S. Dist. LEXIS 13544, pp. 8-9 (N.D. Cal. September 7, 2000) .[2])

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[1] *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.* 526, U.S. at p. 347-348, holds:

> "We read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process. Accordingly, we hold that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, "through service or otherwise," after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service."

[2] The rule followed in the Northen District Court for California is stated in *City and County of San Francisco v. Manning*, 2000 U.S. Dist LEXIS 13544, at pp 8-9, as follows:

> "28 U.S.C. §§ 1446(b) provides that a notice of removal must be filed 'within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading.' A majority of courts hold that this 30-day period begins when a defendant actually receives a copy of the Complaint, rather than when a defendant is properly served. *See, e.g., Tech-Hills Assoc. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993); *Dielsi v. Falk*, 916 F. Supp. 985, 989 (C.D. Cal. 1996); *Lofstrom v. Dennis*, 829 F. Supp. 1194, 1196 (N.D. Cal. 1993); *Uhles v. F.W. Woolworth Co.*, 715 F. Supp. 297, 298 (C.D. Cal. 1989). Since this interpretation of §§ 1446(b) more closely conforms to the wording of the statute, this Court also accepts the so-called 'receipt rule' as the better reasoned position. Thus, the 30-day time to file a notice of removal begins

to run upon a defendant's receipt of the complaint, not when the complaint is provided through formal service of process. Moreover, because §§ 1446 requires that all defendants join in removal, the 30-day period for removal begins to run from the date that the first defendant receives a copy of the complaint. *See Teitelbaum v. Soloski*, 843 F. Supp. 614, 615 (C.D. Cal. 1994)."

Five defendants in the state court action, Pete Bramson, Leslie Cagan, Aaron Kriegel, Tomas Moran, and Rob Robinson, did not join in the removal. None of them are "nominal" or "fraudulently joined" defendants. Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Realign Defendants is incorporated herein by this reference. Non-joining defendants Leslie Cagan, Tomas Moran and Rob Robinson were served with the Summons and Complaint by personal service on September 17, 2000, at a Board of Directors meeting, in Arlington, Virginia, effecting service under California Code of Civil Procedure §§413.10 and 415.10. True copies of the Proofs of Service on these defendants are attached to the Declaration of Daniel Robert Bartley as **"Exhibit A"**, and incorporated by this reference. The Summons and Complaint were mailed to defendants Pete Bramson and Aaron Kriegel by First Class Mail, Return Receipt Requested, on September 22, 2000, pursuant to California Code of Civil Procedure §415.30. The return mail receipt was signed by Pete Bramson on September 23, 2000. A true copy of the return mail receipt is attached to the Declaration of Daniel Robert Bartley as **"Exhibit B"** and incorporated by this reference. No return receipt has been received from Aaron Kriegel as of the date of this filing. Prior to removal, Plaintiffs' counsel was contacted by legal counsel for each of the non-joining defendants, including defendant Aaron Kriegel, requesting extensions of time to file responsive pleadings in the state court, which extensions were granted.

The failure of any one of these five defendants (except perhaps Aaron Kriegel) to join in the removal is fatal, requiring remand of the case to the state court.

V. There is No Federal Question Jurisdiction.

Under 28 U.S.C.. § 1331, the federal courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. An action "arises under" federal law within the meaning of Section 1331 if either: (1) federal law creates the cause of action, or (2) the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28, (1983). A state-law claim may be treated as one "arising under" federal law only where the vindication of the state law right necessarily turns on some construction of federal law. *Id.* at 9.

A. Plaintiffs Claims do Not Arise Under and are Not Preempted by the Federal Communications Act (47 U.S.C. §301 et seq.)

Plaintiffs' court complaint does not plead any claim arising under federal law. The removing defendants wrongly assert that plaintiffs' claims arise under the under the Federal Communications Act ("FCA"), 47 U.S.C. § 301, *et seq.* The purpose of the FCA is, *inter alia,* to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, so that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except with a license in that behalf granted under the provisions of the Act.[3]

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[3] **"§§** 301. License for radio communication or transmission of energy
"It is the purpose of this Act [47 USCS §§§§ 151 et seq.], among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the

Plaintiffs have pleaded causes of action to remove directors of a nonprofit corporation, order and accounting and amend corporate bylaws, all relating to the enforcement authority of the

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> terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia, to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmissions or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) [47 USCS §§ 303(t)]); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act [47 USCS §§§§ 151 et seq.] and with a license in that behalf granted under the provisions of this Act [47 USCS §§§§ 151 et seq.].

Attorney General of the State of California under the California Nonprofit Corporation Law (California Corporations Code §5000, et seq.), the California Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code §12580, et seq.), and the California Unfair Competition Law (California Business & Professions Code §17200, et seq.).

Under the FCA, federal control is exclusive over technical matters such as radio frequency allocation. *Head v New Mexico Bd. of Examiners in Optometry,* 374 US 424 (1963). However, under long-established law, the Federal Communications Commission ("FCC") has no jurisdiction to adjudicate contract disputes and the like affecting transfers of control of broadcast licenses. *Granik v FCC,* 234 F2d 682, 684-685 (D.C. Cir. 1956). There are, of course, many areas of state law affecting broadcast stations where the FCC lacks subject matter jurisdiction. In addition, there are cases which have sustained state court jurisdiction even though the court's action affected a field regulated by the FCC. *See e.g., Regents of the University System of Georgia v Carroll,* 338 U.S. 586 (1949) (state enforced a contract dispute despite fact that FCC ordered breaching party to repudiate the contract as a licensing condition); *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945) (upheld state authority to adjudicate common law fraud claims and to order restitution of physical assets of station even though the order may well have terminated a broadcasting station by separating the leased station property from the broadcast license); *Minnesota-Iowa Television Co. v. Watonwan T.V. Improvement Association,* 294 N.W.2d 297 (Minn. 1980) (upheld state court's authority to issue injunction to enforce contract right, even though it would prevent organization from broadcasting material which it had FCC license to broadcast). In *Minnesota-Iowa Television Co.,* the Minnesota Supreme Court noted that, even if the FCC disapproved of the contract at issue, it had no power to invalidate it. 294

N.W.2d, at 305.

Furthermore, the Communications Act contains a savings clause which expressly provides:

> "Exclusiveness of Chapter. Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." **47 U.S.C. §414.**

Congress' decision to include a savings clause in the Communications Act evidences its desire to preserve those state court claims for breaches of independent duties that neither conflict with specific provisions of the Act nor interfere with its regulatory scheme. *See, e.g., Bruss Co. v. Allnet Communications Services, Inc.,* 505 F.Supp. 401 (N.D. Ill. 1985) (preserving plaintiff's Illinois common law and statutory fraud claims); *Kellerman v. MCI Telecommunications Corp.,* 493 N.E. 2d 1045 (Ill. 1986) (fraud claims arising out of defendant's allegedly false advertising practices held not preempted); *American Inmate Phone Systems, Inc. v. U.S. Spring Communications Co.,* 787 F.Supp 852 (N.E.Ill. 1992) (contract and consumer fraud claims preserved); *Cooperative Communications v. AT&T Corp.,* 867 F.Supp. 1511 (D. Utah 1944) (no preemption of claims for intentional interference with prospective economic relations, interference with contract, business disparagement, breach of covenant of good faith and fair dealing and unfair competition). Applied properly, the savings clause harmonizes Congress' obvious desire to preserve certain state court claims with its clear purpose in enacting the Communications Act of ensuring reasonable, non-discriminatory telecommunications service for all Americans.

It is the FCC's "longstanding policy" to refuse to adjudicate private contract law

questions for which a forum exists in the state courts, and to take a "wait and see" posture vis a vis the outcome of such disputes when issuing or renewing broadcast licenses. *Listeners' Guild, Inc. v. FCC* (D.C. Cir. 1987) 813 F2d 465, 469. (*See, e.g., Agreements between Broadcast Licensees and the Public,* 57 F.C.C.2d 42 (Comm'n 1974); *Carnegie Broadcasting Co.,* 5 F.C.C.2d 882, 884 (Comm'n 1966); *Transcontinent Television Corp.,* 44 F.C.C. 2451, 2461 (Comm'n 1961).

> "Although the Federal Communications Act gives the FCC exclusive jurisdiction over radio broadcasting, the Supreme Court has refused to read this act as giving the FCC authority 'to determine the validity of contracts between licensees and others.' *Regents of the University System of Georgia v. W.E. Carroll*, 338 U.S. 586, 602 (1950).
>
> "The FCC itself consistently maintains the position that it has no jurisdiction over the private contract rights and obligations of parties, even though the subject matter of such contracts concerns broadcasting facilities. *In re Application of Transcontinent Television Corp. (WROC-TV),* 21 Rad. Reg. (P & F) 945 (1961), *Gerald J. Block, 36 Rad. Reg.* (P & F) 924 (1976). In its ruling in a dispute about the proper interpretation of an agreement regarding radio station facilities, the FCC noted that this was the 'sort of dispute which cannot be resolved by the Commission and is best left to the local courts.' *In re John F. Runner, Receiver (KBIF), 36 Rad. Reg. 2d* (P & F) 773, 778 (1976). By the same token, local courts have maintained their jurisdiction over private contractual matters. As the Supreme Court of Utah noted, 'the fact that the agreement concerns a radio station does not divest the court of jurisdiction.' *Themy v. Seagull Enterprises, Inc., 595 P.2d 526 (Utah 1979).*" *Hanover Radio, Inc. v. Ninety-Two Point Seven Broadcasting, Inc.,* 2 Va.Cir. 84, 86 (1982).

In *Mid-Texas Broadcasting, Inc.,* 71 F.C.C.2d 1173 (1979), a case where a dispute arose between majority and minority shareholders concerning a vote by a majority of the shareholders of a corporate licensee to assign the station license, the minority shareholders petitioned the FCC to deny the transfer application on the grounds that the sales prices was unrealistically low, that the majority shareholders would receive benefits from the sale not shared with the minority shareholders, and that these actions constituted a breach of the majority's fiduciary duty. The

petitioners also initiated a suit in state court seeking, among other things, damages and a stay of the transfer. The Commission rejected the petition, noting that the subject matter was a private dispute to be resolved in the state courts. The Commission also noted that "any harm which they may suffer from the transaction can clearly be satisfied by money damages pursuant to local judicial determination. In sum, petitioners' claims are a matter of private dispute which, as we have traditionally held, are beyond our regulatory jurisdiction and must be satisfied in local courts or other appropriate forums. *Transcontinent Television Corp.,* 21 RR 945 (1961)." *Mid-Texas Broadcasting,* 71 F.C.C.2d at p. 1174.

Even when the FCC acts, e.g., in granting an assignment or transfer application, this does not preclude further litigation on contractual or other claims in state or federal court related to the license or the licensee, nor does it foreclose the FCC from taking any appropriate further action in light of court adjudication of such claims. *Chief Washakie TV,* 46 Rad. Reg. (P & F) 2d 1594, 1598 n.7 (1980). Should Plaintiffs ultimately prevail on all causes of action in the state court, a change of more than 50% of the directors of Pacifica would occur, triggering requirement for FCC approval of the transfer of control[4] under 47 U.S.C. §310(d).[5] However, the state court can

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[4] In general, transfers of control of corporate licenses take place whenever any person, other legal entity, or group in privity, because of family, business or other relationship, gains or loses affirmative or negative (50 percent) control. *Re Mandan Radio Asso*. (1962) 33 FCC 894. See also, generally, Stephen F. Sewell, *Assignment and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934,* 43 Fed.Comm. L.J. 277 (1991).

[5] 47 U.S.C. §310(d):
"Assignment and transfer of construction permit or station license. No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and

easily structure injunctive relief to require the departing directors to cooperate in the necessary application for FCC approval.

> "We think that State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station." *Radio Station WOW, Inc. v Johnson,* 326 US 120, 132 (1945).

Also, In *Arecibo Radio Corp.*, 101 FCC 2d 545, 550 (1985), *aff'd sub nom. Llerandi v FCC,* 863 F.2d 79 (D.C. Cir. 1988), the Commission honored a court order requiring the station licensee to execute an assignment application in favor of another party.

In the present case, none of plaintiffs' claims arise under or are preempted by the Federal Communications Act or require a weighing of its policies. Therefore, federal question jurisdiction does not exist on such basis and the case should be remanded to state court.

B. Plaintiffs Claims do Not Arise Under and are Not Preempted by the Public Broadcasting Act (47 U.S.C. §301 et seq.)

> upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 [47 USCS §§ 308] for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

The removing defendants also wrongly assert that plaintiffs' claims arise under the Public Broadcasting Act ("PBA"), 47 U.S.C. § 390, *et seq.* The purpose of the PBA is to provide federal assistance, through matching grants, in the planning and construction of public telecommunications facilities, as set forth at §390.[6] To carry out this purpose Congress created the Corporation for Public Broadcasting as an independent nonprofit corporation funded by Congress.

Plaintiffs have asserted no rights to matching grants from the Corporation for Public Broadcasting under the Public Broadcasting Act for any purpose.

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[6] "47 U.S.C. § 390. Declaration of purpose "The purpose of this subpart [47 U.S.C. §§§§ 390 et seq.] is to assist, through matching grants, in the planning and construction of public telecommunications facilities in order to achieve the following objectives: (1) extend delivery of public telecommunications services to as many citizens of the United States as possible by the most efficient and economical means, including the use of broadcast and nonbroadcast technologies; (2) increase public telecommunications services and facilities available to, operated by, and owned by minorities and women; and (3) strengthen the capability of existing public television and radio stations to provide public telecommunications services to the public."

Removing defendants, in their Memorandum in Support of Their Motion to Realign, assert that "Pacifica and a majority of its directors, [...], firmly believe that the FCA and PBA require that listener-sponsors not be permitted under either statute to elect the Directors of Pacifica." Memorandum, 5:11-13. Regardless of the belief of Pacifica and a majority of its directors, that is not the law. In fact, election of nonprofit corporate directors by the listeners-sponsors of noncommercial educational broadcasting stations is common practice.[7] But, even if it were the law, there is nothing in the law compelling Pacifica to apply for or to accept matching grants from the Corporation for Public Broadcasting.

The complaint makes factual allegations with reference to the Corporation for Public Broadcasting and the Public Broadcasting Act (47 U.S.C. §396(k)(8), requiring grantees to establish independent "community advisory boards"), as examples of the defendants' breaches of trust and bad faith actions with regard to its "community advisory boards" (sometimes referred to by Pacifica as "local station boards" or "local advisory boards" or "LABs"), and not to make any claim of right under the Public Broadcasting Act or the Federal Communications Act. Complaint,

[7] By way of illustration, the bylaws of four noncommercial educational broadcasting licensees are attached as Exhibits to the Declaration of Carol Spooner: KQED in San Francisco, California, KBOO in Portland, Oregon, WORT (Back Porch Radio Broadcasting, Inc.) in Madison, Wisconsin, and KDHX (Double Helix Corporation) in St. Louis, Missouri. Some or all of the directors of each of these licensees are elected by the listeners or staff of these licensees, illustrating great flexibility in the governance structure of nonprofit community, educational and public broadcasting stations.

4:2-9; 10:4-7; 11:5-19, 12:19 to13:21.

None of plaintiffs' claims arise under or are preempted by the Public Broadcasting Act or require a weighing of its policies. Therefore, federal question jurisdiction does not exist on such basis and the case should be remanded to state court.

C. A Federal Defense Does Not Create Federal Question Jurisdiction.

The courts have long held that "the presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987); see also *Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 152, (1908). A defense is not part of a plaintiff's properly pleaded statement of his or her claim. See *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63, (1987); *Gully v. First Nat. Bank in Meridian,* 299 U.S. 109, 112, (1936). Thus, "a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.,* 463 U.S. 1, 14, (1983).

Allied as an "independent corollary" to the well-pleaded complaint rule is the further principle that "a plaintiff may not defeat removal by omitting to plead necessary federal questions." *Franchise Tax Bd. Of Cal., supra,* 463 U.S. at 22. The "artful pleading" doctrine allows removal where federal law *completely preempts* a plaintiff's state-law claim. See *Metropolitan Life Ins. Co., supra,* 481 U.S. at 65-66; *Avco Corp. v. Machinists,* 390 U.S. 557, 560, (1968) Although federal preemption is ordinarily a defense, "once an area of state law has

been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar, Inc. v. Williams, supra,* 482 U.S. at 393.

Plaintiffs' complaint raises only well established state law claims and it cannot plausibly be construed as artful pleading that omits any necessary federal question related to plaintiffs' state law claims. The FCA expressly denies preemption of state common law or statutory claims in its savins clause at 47 U.S.C. §414: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

VI. Even if Federal Question Jurisdiction Does Exist Abstention Doctrines Would Require Remand of this Action to the State Court for Resolution.

Under the doctrine enunciated in *Burford v. Sun Oil Co.,* 319 U.S. 315 (1943), the Supreme Court held that when an issue "clearly involves basic problems of [state] policy[,] . . . equitable discretion should be exercised to give the [state] courts the first opportunity to consider them." *Id.* at p. 332.

The Ninth Circuit requirements for application of *Burford* are set forth in *Tucker v First Maryland Savings & Loan, Inc*, 942 F.2d 1401 (9th Cir. 1991):

> "In an effort to limit the application of abstention under the *Burford* principle, this circuit generally requires certain factors to be present for abstention to apply: (1) that the state has concentrated suits involving the local issue in a particular court; (2) the federal issues are not easily separable from complicated state law issues with which the state courts may have special competence; and (3) that federal review might disrupt state efforts to establish a coherent policy. *Knudsen Corp. v. Nevada State Dairy Comm'n,* 676 F.2d 374, 377 (9th Cir. 1982). If the district

> court determines that *Burford* abstention is appropriate under the circumstances, dismissal rather than stay of the federal action is normally required. *See Burford,* 319 U.S. at 334; *Knudsen,* 676 F.2d at 377." *Tucker v. First Maryland Savings & Loan, Inc.,* at 942 F.2d at 1405.

This case is about the application of California's Nonprofit Corporation Law and is brought within the California Attorney General's enforcement authority under that law and the California Uniform Supervision of Trustees for Charitable Purposes Act.

Although plaintiffs are not parties to the related state court action now pending (*Adelson et al v Pacifica Foundation, et al.,* Superior Court, Alameda County, Case No. 814461-0), Pacifica Foundation and most of its directors are defendants in that case, and overlapping issues concerning the legality of amendments to Pacifica bylaws are central to the determination of both cases.

California's interests in supervision of charitable trustees under its laws are of paramount concern in this case. This case clearly involves basic problems of state policy in its supervision of such trustees, as evidenced by the California Attorney General's concern in granting relators status to sue on behalf of the People of California, and also by the proceedings and report of the California Joint Legislative Audit Committee. In addition, difficult questions of state law are involved in this case.

Lastly, federal court abstention is also appropriate under *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800 (1976). Because of considerations of "wise judicial administration, [the] conservation of judicial resources and comprehensive disposition of litigation," *id.* at 817, federal abstention and deference to parallel state proceedings is appropriate under *Colorado River* even when none of the more established doctrines apply. Exact parallelism is not required. It is enough if the two proceedings are "substantially similar." *Nakash v.*

Marciano, 882 F.2d 1411, 1416 (9th Cir. 1989).

Here, the three proceedings originally filed in the California Superior Court, County of Alameda, share overlapping issues and parties and require abstention in the interests of judicial economy and comity so that the related proceeding currently pending in the state court (*Adelson et al v Pacifica Foundation, et al.),* the related action that has been removed to this court (*Robinson, et al v. Pacifica Foundation, et al.*), and this case will be together again in the one court that may resolve them with consistency.

VII. Costs and Fees Are Requested on Remand.

The removal of this case to federal court calls for payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal under 28 U.S.C. §§ 1447(c); see *Moore v. Permanente Medical Group, Inc.*, 981 F.2d 443, 446 (9th Cir. 1992). In exercising its discretion to award costs and attorney's fees, the Court should consider whether removal was improper, looking both at the nature of the removal and of the remand. See *id.* The purpose of an award is not to punish the removing party but instead to reimburse the party who sought remand for litigation costs incurred as a result of unnecessary removal. See *id*. at 447. The availability of costs and attorney fees replaces the former requirement of posting of a bond; however, it serves the same purpose--to discourage improper removal. *Dead Kennedys v Biafra*, 46 F.Supp.2d 1028, 1030 (N.D. Cal. 1999). Even if the Court finds the removal was "fairly supportable" an award of costs and fees is within the Court's discretion when the removal was "wrong as a matter of law." *Balcorta v. Twentieth-Century-Fox Film Corp.*, 208 F.3d 1102, 1106, n.2 (9th Cir. 2000).

In the case at hand, the removing defendants should have known that removal was not

supportable under any theory. See *Vestron, Inc. v. Home Box Office, Inc.*, 839 F.2d 1380, 1381 (9th Cir. 1988) The limitations of federal jurisdiction under the Federal Communications Act are long settled law, and defendants' contention that the Public Broadcasting Act is somehow controlling here are utterly without foundation.

The removing defendants are under a fiduciary obligation not to waste Pacifica's assets which are impressed with a charitable trust for the public benefit. The fact that nonprofit public benefit corporation assets were wasted in the process of removal is an additional factor that weighs in favor of an award of costs and fees. *Dead Kennedys, supra,* 46 F.Supp.2d at p. 1032.

Removal was improper and reimbursement of expenses is appropriate in this case. Bad faith need not be shown under 28 USC §1447(c), *Moore v. Permanente Medical Group, Inc., supra*, 981 F.2d at 446; *Balcorta v Twentieth Century Fox Film Corp.*, 208 F.3d supra at p.1106, n.2, but even if it were, an award of fees and costs would be justified in this case. Removal of this case was clearly sought solely for purposes of harassment and delay.

Conclusion.

For all the foregoing reasons Plaintiffs respectfully request the Court to remand this case to the Superior Court of the State of California, County of Alameda, on the grounds that: (1) the removal was improper for lack of unanimity among the defendants, (2) lack of federal question jurisdiction, and (3) abstention principles under *Burford* and *Colorado River;* and for an order taxing costs, including attorney fees, against the removing defendants.

Dated: _____

Respectfully submitted,

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