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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

GENERAL JURISDICTION (UNLIMITED)

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

Plaintiffs,

vs.

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

Defendants

CASE NO. 821252-3

PLAINTIFFS' REPLY POINTS AND
AUTHORITIES IN SUPPORT OF
APPLICATION FOR PRELIMINARY
INJUNCTION.

Hearing Date: April 10, 2001

Hearing Time: 9:00 a.m.

Judge: Hon. Judith D. Ford

Department: 31

Location: U.S. Post Office Building
201 13th Street
Oakland, CA 94607
Tel 510 208 3949

Plaintiffs, The People of the State of California, *ex rel.* Carol Spooner, et al., present the following Points and Authorities in Reply to Defendants' opposition to the Preliminary Injunction.

Defendants Peter Bramson, Leslie Cagan, Aaron Kriegel, Tomas Moran, and Rob Robinson, although served with the Order to Show Cause and all moving papers, did not file any opposition to Plaintiffs' application for Preliminary Injunction.

1. PLAINTIFFS HAVE DEMONSTRATED NEAR CERTAINTY OF PREVAILING ON THE MERITS ON THEIR THREE *QUO WARRANTO* CAUSES OF ACTION FOR USURPATION OF OFFICE.

1 **ONLY FIVE DIRECTORS ARE PERMITTED UNDER THE ARTICLES OF INCORPORATION; THERE ARE CURRENTLY 15¹ DIRECTORS; THEREFORE AT LEAST TEN DIRECTORS ARE UNLAWFULLY SEATED AND MUST BE REMOVED.**

Pacifica's Articles of Incorporation limit the number of directors to five. Where there is a conflict between the Articles and the Bylaws, the Articles are controlling. *Morris v. Richard Clark Missionary Baptist Church* (1947) 78 Cal.App.2d 490, 492-493. Defendants have not even attempted to address the *Morris* rule.

2 **THE FORMER CORPORATIONS CODE DOES NOT SAVE DEFENDANTS.**

A primary issue in this case is whether Pacifica may have more than five directors when the Articles of Incorporation limit the number of directors to five. Defendants are not protected by the old general nonprofit corporation law any better than they are by the new nonprofit public benefit corporation law that went into effect in 1980. (Relevant portions of the old General Nonprofit Corporation Law are attached hereto as a appendix.)

¹ Since this application was filed Frank Millspaugh's term expired and he stepped off the board, and Beth Lyons resigned and has been dismissed from this case.

The elaborate transition provisions comprising Part 5 (commencing with Section 9910) of Division 2 of Title 1 of the Corporations Code govern when the new public benefit corporations law applies to corporations incorporated prior to January 1, 1980. Transition provision §9912,(a)(4), requires that “[a]ny corporation which does not come within paragraphs 1, 2, or 3 of this subdivision and all of the assets of which are irrevocably dedicated to charitable or public purposes and which according to its articles or bylaws must upon dissolution distribute its assets to a person or persons carrying on a similar purpose or purposes shall be subject to the new public benefit corporation law.” Pacific Foundation and its articles of incorporation clearly meet all the requirements of this section and therefore “shall be subject to the new public benefit corporation law.”

However, transition Sections 9913 and 9915 provide that certain specific sections of the new public benefit corporation law do not apply to otherwise subject corporations. These sections provide, in relevant part, as follows:

"§ 9913. Articles of incorporation; Adoption of amendments

(a) The provisions of Sections 5130, 5131 and 5132 of the new Public Benefit Corporation Law relating to the contents of articles of incorporation do not apply to subject corporations designated as public benefit corporations unless and until an amendment of the articles is filed stating that the corporation elects to be governed by all of the provisions of the new law not otherwise applicable to it under this part."²

"§ 9915. Adoption, amendment or repeal of bylaws

(a) Subdivision (a) of Section 5151 of the new public benefit corporation law does not apply to subject corporations governed by the public benefit corporation law, [. . .] but those corporations shall continue to be governed by the prior nonprofit law unless and until an amendment of the articles is filed pursuant to Section 9913. *If an amendment makes any change in the number of directors or the maximum or minimum number of directors or makes change from a fixed to a variable board or vice versa, it shall also be approved by the members (Section 5034).*" [Emphasis added.]

² None of the provisions of Corp. Code §§ 5130, 5131 or 5132, have any bearing on this case.

(b) *Notwithstanding subdivision (a), the new public benefit corporation law, the new mutual benefit corporation law, or the new religious corporation law, as appropriate, rather than the provisions of the prior nonprofit law apply with the respect to determining the limits on the number of directors.*" [Emphasis added.]

Defendants argue that new § 5151(a)³ requiring "that the bylaws or the articles of a non-profit

³ Corporations Code § 5151(a) provides as follows:

"§ 5151. Contents; Directors; Meetings; Committees; Members

(a) The bylaws shall set forth (unless such provision is contained in the articles, in which case it may only be changed by an amendment of the articles) the number of directors of the corporation; or that the number of directors shall be not less than a stated minimum nor more than a stated maximum with the exact number of directors to be fixed, within the limits specified, by approval of the board or the members (Section 5034), in the manner provided in the bylaws, subject to subdivision (e) of Section 5151.

The number or minimum number of directors may be one or more."

New §5151 is derived from elements of several of the former code sections including §§ 9300, 9400-9403, and 9500. A related relevant former law was prior Corporations Code §9400, which provided, in pertinent part, as follows:

"§9400. Adoption; amendment; repeal

Bylaws may be adopted, amended or repealed by any of the following:

[...]

(c) A bylaw or bylaw amendment fixing or changing the authorized number of directors may be adopted *only by the members* and may not be adopted by the board of directors except where the articles or bylaws provide for an indefinite number of directors

corporation specify either a number of directors, or a range on the number of directors permitted” does not apply to Pacifica because it is a “grandfathered” entity. Defendants’ memorandum, page 9:3-7. Defendants then assert that former Corporations Code §9500 is the section that governs. Former §9500 required nonprofit corporations to have a minimum of three directors, while under the current law (§5151(a)) the minimum number of directors required is one. However, whether the minimum number of directors is three or one is completely irrelevant to any issue in this case.

The actual relevant section of the old general nonprofit corporations law that does govern is former §9300(e) which contains virtually identical language to the new §5151(a). Section 9300(e) reads:

“§9300 The articles of incorporation shall set forth:

[. . .]

(e) The names and address of three or more persons who are to act in the capacity of directors until the selection of their successors. These persons may be given such titles as are deemed appropriate, but they shall be subject to all laws of this state relating to directors except as otherwise provided in this part. *The number of persons so named constitutes the number of directors of the corporation, until changed by an amendment to the articles or, unless the articles otherwise provide, by a bylaw adopted by the members.* However, the articles or, unless the articles provide otherwise, a bylaw duly adopted by the members, *may state that the number of directors shall not be less than a stated minimum (which in no case shall be less than five) nor more than a stated maximum (which in no case shall exceed such stated minimum by more than three);* and in the event that the articles or by laws permit such an indefinite number of directors, the exact number of directors shall be fixed, within the limits specified in the articles or bylaws, by a bylaw or amendment thereof duly adopted by the members or by the board of directors. In the event the articles provide for an indefinite number of directors, unless the articles provide otherwise, such indefinite number may be changed, or a definite number fixed without provisions for an indefinite number, by a bylaw duly adopted by the members.”

Thus, under old §9300(e) when the articles state a specific number of directors, “the number

pursuant to subdivision (e) of Section 9300.” [Emphasis added.]

of persons so named constitutes the number of directors of the corporation” until the articles or bylaws are amended to state either a different specific number or a variable number with the maximum number not exceeding the minimum number by more than three. No such amendment of the articles or bylaws has ever been adopted.

Pacifica’s Articles, at Article VI, state the number of directors “shall be five.” The bylaws state that the number of directors “shall be such number as the board of directors shall from time to time decide.” Not only does this bylaw fail to meet the requirements of former §9300, the Articles, at Article VI, give authority to the *members, not the directors*, to change the number of directors. Again, where there is a conflict between the articles and the bylaws, the articles control. *Morris v. Richard Clark Missionary Baptist Church, supra*, 78 Cal.App.2d at 492-493. The number of directors of the Pacifica Foundation is limited to five.

3 **UNDER THE 1984 BYLAWS, WHICH HAVE NEVER BEEN LAWFULLY AMENDED BY CONSENT OF THE MEMBERS, ONLY THREE OF THE CURRENT DIRECTORS ARE LAWFULLY SEATED.**⁴

Defendants' arguments can be summarized as follows: "Our members have no rights because we routinely violated our members' rights." Defendants' main argument is that a 1991 bylaws amendment, adopted without the consent of the station board members (or "LABs"), changed the plain meaning of the 1984 bylaws provisions for election of directors. This is an absurd proposition. Any subsequent amendment, not approved by the members, which adversely affected the members' voting rights, is void and unenforceable.

Bylaws are construed as contracts and the rules for construction of contracts apply. *Ticor*

⁴ Since this application was filed Michael Palmer’s term expired, but he continues to act as a director.

Title Co. v. Rancho Santa Fe Assn. (1986) 177 Cal.App.3d 726, 730. Where the language of a written instrument is clear and explicit, that language controls. Civil Code §1638.

The 1984 bylaws contains three clear and explicit provisions governing election of directors:

"Article Three, Section 2, Election of Directors

In order to be elected, [1] a member must receive the nomination and vote of a majority of the station board which he represents, [2] unless such member is classified as an 'at large' member, in which event he must be elected by a 2/3 vote of the Board of directors of the Foundation, voting by secret ballot, [3] subject to approval of FCC Counsel or FCC."

These provisions, when read together with the concurrent elimination from the 1984 bylaws of the provision in the prior bylaws that the Board of Directors "shall also be the sole members of The Foundation" (at bylaws Article Three, Section 1 (a)) make the meaning and intent of the 1984 bylaws absolutely clear: The station board members were intended to be and are members of The Foundation with the right to elect directors.

In fact, Pacifica's "Ownership Reports" filed with the FCC in the 1980s, certifying that directors were elected by the station boards, are admissions against interest, made prior to there arising any motive to "interpret" or "recollect" differently. Whether or not the directors subsequently "interpreted" the bylaws to mean something else, and whether or not the LAB members understood or were informed of their voting rights, and even whether or not the LABs or the directors actually did or thought they did the "electing" -- all that is irrelevant. To the extent that the board acted in derogation of the LAB members' rights, they acted unlawfully, and lawful conduct must be restored to Pacifica's affairs.

4 **DEFENDANTS MAY NOT EXTEND THE TERMS OF DIRECTORS
WITHOUT APPROVAL OF THE MEMBERS.**

Defendants assert that directors terms are extended beyond their original 3-year term by

reason of their election as a corporate officer, under a bylaw adopted in 1995. However, under Corporations Code §5220(a), directors' terms may not be extended beyond three years, and no bylaw extending the terms of directors may be adopted without the approval of the members.⁵

2. **IT IS NOT NECESSARY TO SHOW AT THIS STAGE THAT PLAINTIFFS WILL PREVAIL ON ALL CAUSES OF ACTION. IT IS ENOUGH TO SHOW THAT THEY WILL PREVAIL IN REMOVING THE USURPERS FROM THE BOARD OF DIRECTORS.**

At this early stage in litigation, with discovery just getting started, it is not possible to show with certainty that plaintiffs will prevail on all causes of action. But that is not necessary in order to support the preliminary injunction requested by plaintiffs. In this case, all that is necessary is to show a strong likelihood that the usurpers will be removed. Plaintiffs have met that test, and indeed, intend to move swiftly to summary adjudication on their *quo warranto* causes of action for usurpation of office.

⁵ “§ 5220. Election and selection of directors; Term of office (a) Except as provided in subdivision (d), directors shall be elected for such terms, not longer than three years, as are fixed in the articles or bylaws. However, the terms of directors of a corporation without members may be up to six years. In the absence of any provision in the articles or bylaws, the term shall be one year. The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups of one or more directors. The terms of office of the several groups and the number of directors in each group need not be uniform. No amendment of the articles or bylaws may extend the term of a director beyond that for which the director was elected, nor may any bylaw provision increasing the terms of directors be adopted without approval of the members (Section 5034).”

3. **THIS CASE MUST BE DISTINGUISHED FROM THE *ADELSON V. PACIFICA* CASE.**

The ruling in the *Adelson* injunction proceeding has no legally cognizable preclusive effect here. *Adelson* was seeking a mandatory injunction; plaintiffs herein are seeking a prohibitory injunction. (Defendants' Request for Judicial Notice, Reporter's Transcript of Proceedings, page 2, lines 15-19.) The standard for issuance of the prohibitory injunction is generally lower because the injunction only prohibits changing the status quo rather than mandating conduct that is new or alters the status quo. Cal. Prac. Guide: Civil Procedure Before Trial (The Rutter Group 1997) 9:547-554. Also, in the *Adelson* case the preliminary injunction was denied on the basis of inadmissible and irrelevant evidence. Plaintiffs herein present compelling evidence that was lacking in the *Adelson* injunction proceeding, including, but not limited to, the certified copies of the "Ownership Reports" to the FCC evidencing Pacifica's admissions against interest that directors were elected by the station boards. Finally, the *Adelson* case has no claims based upon the Articles of Incorporation limitation on the number of directors to five.

4. **THE STATUS QUO MUST BE MAINTAINED TO PRESERVE THE PACIFICA FOUNDATION FROM FURTHER DESTRUCTION.**

Contrary to the Defendants' unfounded misrepresentation of Plaintiffs' request, Plaintiffs do not seek to "stop the Pacifica Foundation Directors and staff from conducting the organization's normal business operations." Plaintiffs seek to maintain the status quo until resolution of the ultimate issue of who has legitimate authority to direct Pacifica and the usurpers are ousted from control of the Pacifica board of directors. In the meanwhile, the board of directors, and their agents, employees, etc., should be restrained from "substantial acts" affecting Pacifica's assets, governance, management and operations. Those acts would include: (1) amending the Pacifica bylaws, (2)

appointing new directors, (3) removing current directors, (4) moving the principal place of business, including the finance office, from the place specified in the Articles of Incorporation and Bylaws, (5) destruction of relevant documents, including financial documents, and (6) other “substantial acts” such as sale, transfer or incumbrance of Pacifica assets; entry into contracts for purchase of real property or long term leases of real property, or construction projects; firing managers or staff without cause or cancelling regular radio programming. None of these acts are “normal business operations.” Any or all of these acts are potentially grievously damaging to the future of the Pacifica Foundation, as well as to the rights of those lawfully entitled to elect directors to make those kinds of decisions.

Defendants make much of their not taking the actions they stipulated they would not take prior to the Court’s ruling on this Preliminary Injunction. As the stipulation was entered as an Order of this Court, Defendants’ restraint is not surprising, nor is it any guarantee against such actions in the future without a preliminary injunction from this Court.

1 DEFENDANTS’ OWN EVIDENCE SHOWS THAT PACIFICA IS SUFFERING IRREPARABLE HARM UNDER THE CURRENT USURPERS.

Defendants have presented disturbing evidence of the outrage being directed at them by the very listening audience and staff that Pacifica relies upon for its support and survival. This loss of public support and of Pacifica’s good will and reputation as a champion of free speech, dissent and protest against injustice and oppression is not something that can easily be repaired.

Defendants attribute these expressions of outrage to “plaintiffs’ followers.” But, in fact, these actions are arising spontaneously across the country from many people and groups that have just “had enough” and have determined to take action in whatever ways they believe effective to rid

Pacifica of this destructive Board of Directors. While plaintiffs do not always endorse their tactics, they do share their aims.

The defendants' refusal to take any responsibility for the chaos they have caused and continue to cause by their repressive conduct and their contempt for and slander of their critics over the past few years is appalling. Defendants' abuses of public sensibilities are the cause of this growing public outrage. Against police advice, Defendants caused citizens arrests of peaceful protesters in Berkeley in 1999, including Maudelle Shirek, a dignified but frail African American Berkeley City Councilwoman in her '80s [Exhibits to Declaration of Nancy Brown] and then characterized these peaceful protesters as "violent" and "racists." Defendants recently fired and banned managers, staff and volunteers at WBAI, seven out of eight of whom are of African American or Caribbean African ancestry, yet the defendants abuse those who criticize these actions as "racists." This cynical and offensive "spin doctoring" debases the founding principles of Pacifica and all those who have fought racism, bigotry in all its forms, injustice and oppression, including those at Pacifica, over the past half century. For the good of Pacifica they should resign, and save us all the time and expense of lawsuits.

In addition, granting the Preliminary Injunction will prevent a multiplicity of lawsuits to remove additional unlawfully elected directors.

5. **CONCLUSION.**

Plaintiffs have demonstrated a strong likelihood of succeeding on the merits on the issues related to the control of the corporation by legitimate directors. Plaintiffs seek only the preservation of the status quo until the usurping directors can be removed from office. Defendants have not made any credible showing that they would be harmed by maintenance of the status quo, while

Plaintiffs have clearly demonstrated that Defendants are continuing along the path of harm to the actual operation of Pacifica Foundation as well as to Pacifica's good will, an intangible asset.

Therefore Plaintiffs' request for a prohibitory preliminary injunction should be granted by this Court.

Dated: April 5, 2001

Respectfully presented,

DANIEL ROBERT BARTLEY, ESQ.
Attorney for Plaintiffs/Relators