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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF ALAMEDA

20 GENERAL JURISDICTION (UNLIMITED)

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

24 Plaintiffs,

25 vs.

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

Defendants.

Case No. 831252-3

PLAINTIFFS' POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE
PRELIMINARY INJUNCTION

Hearing Date: Monday, February 26, 2001

Hearing Time: 1:45 p.m.

Judge: Hon. Judith D. Ford

Department: 31

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

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1 Plaintiffs, The People of the State of California *ex rel.* Carol Spooner, et al., submit the
2 following points and authorities in support of their application for a temporary restraining order and
3 an order to show cause regarding preliminary injunction.

4
5 1 INTRODUCTION.

6 The Complaint sets forth ten causes of action, four of which are most germane to this
7 application for provisional relief. The 3rd, 4th & 5th causes of action are for "usurpation of office"
8 by 13 of the 17 individuals currently acting as directors of the Pacifica Foundation, on the grounds
9 of "refusal to vacate office after expiration of term," "unlawful election of directors in excess of
10 number permitted," and "refusal to vacate office after removal by voting members." The sixth cause
11 of action is for an accounting of the books of Pacifica Foundation from 1994 to present.

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13 Plaintiffs seek removal of 13 of the 17 currently acting directors of Pacifica for usurpation
14 of office. These individuals are unlawfully seated, are acting without authority, and should be
15 restrained during the pendency of this action, and until Court resolution of the ultimate issue of who
16 are and are not lawful directors, from: (1) amending the Pacifica Bylaws; (2) appointing or electing
17 any new directors to the Board; (3) removing any current directors from the Board; (4) moving
18 Pacifica's principal place of business, including financial offices, from its current location in Los
19 Angeles County; (5) destroying or removing from California any relevant documents, including any
20 financial records; and (6) taking any actions substantially affecting the assets, governance,
21 management, or operations of Pacifica, or any of its five radio stations,

22
23 2 SINCE THIS ACTION WAS FILED, DEFENDANTS HAVE DONE, ARE CONTINUING
24 TO DO, AND ARE THREATENING TO DO, ACTS CAUSING GREAT OR
25 IRREPARABLE INJURY TO THE RIGHTS OF PLAINTIFFS BEFORE THIS MATTER
CAN BE HEARD ON NOTICE.

26 At the board meeting on September 17, 2000, Defendants announced plans to amend the
27 Pacifica Bylaws and to appoint new directors at the next board meeting, scheduled for *March 2-4,*
28 *2001*, in Houston, Texas. (Bartley Decl., "Exh. A".) In addition, Defendants' course of conduct in
recent months evidences an intention to remove two of the minority directors -- Robinson and

1 Bramson -- who oppose the current board majority at the *March 2-4* board meeting. The two
2 directors' 3-year terms were to expire in March 2001. However, they have been re-elected for second
3 3-year terms by the station boards (aka "local advisory boards) they represent. Within the past few
4 weeks defendants terminated the employment of Pacifica's Controller for at least the past 20 years
5 (Spooner Decl.), and are making preparations to move the principal place of business, including the
6 financial office and records from Los Angeles County to Washington, D.C., *by March 1st*. (Bartley
7 Decl., "Exh. B".) Since December 2000, Defendants have taken and are continuing to take reckless
8 and destructive actions at radio station WBAI in New York that are reminiscent of their actions in
9 July 1999 at KPFA in Berkeley that originally motivated Relators to seek leave to sue. They have
10 caused or permitted: (1) firing of the management of WBAI, including the general manager and the
11 program director, and the "banning" of several volunteers; (2) changing of the station locks in the
12 middle of the night; (3) hiring of armed guards; (4) barring of the station's local station board from
13 holding public meetings at the station; (5) and harassment, threats, and firing of station staff who are
14 upset by these acts. As a result of Defendants' acts at WBAI, other personnel have resigned, the
15 station's listeners have engaged in public protests, and a nationwide boycott of Pacifica's on-air fund
16 drives has been called in protest. (Spooner Decl., "Exhs. E, F and G".) Defendants' actions are
17 destroying Pacifica.
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21 3 PROCEDURAL HISTORY.

22 Relators, on November 19, 1999, filed a petition with the California Attorney General for
23 leave to sue on behalf of the State's interest in supervising California nonprofit public benefit
24 corporations and charitable trusts. After investigation and briefing, including opposition by Defen-
25 dants, the Attorney General, on September 14, 2000, granted Relators leave to sue. This action was
26 filed on September 15, 2000. On October 16, 2000, some of the Defendants removed this action
27 to U.S. District Court for the Northern District of California. Plaintiffs promptly moved to remand.
28 On February 20, 2001, the case was ordered remanded to Alameda Superior Court.

1 4 STATEMENT OF FACTS.

2 40 BACKGROUND.

3 The Pacifica Foundation was founded in 1946. Its first station, KPFA in Berkeley, began
4 broadcasting in 1949. Since then, four additional radio stations have been acquired: KPFK in Los
5 Angeles, WBAI in New York City; KPFT in Houston, and WPFW, in Washington, D.C. The Foun-
6 dation is governed by a Board of Directors. Each of the five radio stations has a local station board
7 (also known as a "local advisory board"). The rights under the Bylaws of the station board members
8 to elect directors, and therefore their rights as corporate members, are the primary issue here.
9 Plaintiffs contend the station board members have the right to elect directors and, consequently, have
10 all statutory rights conferred upon corporate members.¹

13 41 THE ARTICLES OF INCORPORATION.

14 The initial 1946 Articles of Incorporation,² at Article VI, provide that there shall be five
15 directors of the corporation:

16 "That the number of directors of this corporation, to be known as the Committee
17 of Directors, shall be five (5), and that the names and addresses of the persons
18 who are to act in the capacity of such directors until the selection of their
19 successors, are as follows: [Names and addresses omitted.]

20 That special authority is hereby delegated to the members of this corporation to
21 change the number of directors thereof at any time by a bylaw to that effect."
(Bartley Decl., "Exh. C.")

22 Article VI has never been amended. The provision delegating "special authority" to the
23 members of the corporation to change the number of directors by amendment of the *bylaws* is in
24 direct conflict with Corp. C. §5151(a), which requires that when *articles* set forth the number of
25 directors, then the number "may *only* be changed by an amendment of the *articles*."

26 ¹ "Members" of California non-profit corporations are in many ways analogous to
27 shareholders of for-profit corporations. "Members" are defined in the California Corporations
Code and have statutory rights that will be discussed in the legal arguments below.

28 ² Initial Articles were filed with the Secretary of State on August 24, 1946.
Subsequent amendments to the Articles were filed on August 20, 1948, March 4, 1968, April
9, 1971, May 5, 1971, and February 2, 1976. A "Certificate of Ownership of WBAI-FM, Inc., by
Pacifica Foundation" was filed on November 19, 1973. (Bartley Decl., "Exh. C".)

1 In the Certificate of Amendment of Articles of Incorporation, filed with the Secretary of
2 State on February 2, 1976, Article V was amended to read as follows:

3 “The principal office for the transaction of the business of this Corporation shall
4 be located in the County of Los Angeles, State of California.” (Bartley Decl.,
5 "Exh. C".)

6 There have been no subsequent amendments to the Articles of Incorporation filed with the
7 Secretary of state since February 2, 1976.

8 **42 THE PACIFICA FOUNDATION BYLAWS.**

9 Plaintiffs do not have a copy of the original Pacifica Bylaws. The Bylaws, *circa* 1955,
10 pursuant to Article VII of the Articles, provided for one class of corporate membership called the
11 “Executive Membership,” vested with “ultimate control” of the corporation, including, but not
12 limited to, the right to elect a “Committee of Directors” and to amend the Articles and the Bylaws.
13 (Spooner Decl., "Exh. I".) The Bylaws have been amended many times since 1955.

14 The Bylaws at all times since September 30, 1961, have provide for an indefinite number
15 of directors. The Bylaws, at Article Three, Section 1, (c), provide as follows:

16 "Section 1 Membership on Board of Directors

17 [...]

18 (c) Number: There shall be such number of directors as the Board of Directors
19 may from time to time decide.” (Spooner Decl., "Exhs. J, K, L, M, N and O".)

20 This provision fails to meet the requirements of Corporations Code §5151(a), which
21 requires that the articles or bylaws specify a definite number, or a maximum and minimum number,
22 of directors, as discussed in legal arguments below.

23 The Bylaws, as amended on July 31, 1976, provided that the corporate directors were the
24 *sole* members of the Foundation. The early “Executive Membership” of the Foundation had been
25 eliminated by this time.³ The July 31, 1976 Bylaws, at Article Three, Section 1(a), defined the
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³ Plaintiffs do not know when the "Executive Memberships" were eliminated, but
presume such was done lawfully under then applicable statutes, *i.e.*, with the vote of
approval of the members.

1 members of the Board of Directors as follows:

2 “Section 1 Membership on Board of Directors:

3 (a) Defined: Members of the Board of Directors shall be individuals who have been
4 elected to the Board of Directors as hereinafter provided and are serving as such, and such
5 members of the Board of Directors *shall also be the sole members of The Foundation.*”
6 [Emphasis added.] (Spooner Decl., "Exh. J".)

7 The July 31, 1976 Bylaws also provided for a "self-selecting" Board of Directors, at Article
8 Three, Section 2, as follows:

9 “Section 2 Election of Directors: (as amended 7/31/76)

10 In order to be elected, a nominee must receive the approval of two-thirds of the
11 members of the Board of Directors present and voting by secret ballot.” (Spooner
12 Decl., Exh. J".)

13 On January 31, 1984, the last clause of Article Three, Section 1(a), providing that the
14 directors were the *sole* members of the Foundation, was *removed from the Bylaws*, and, at the same
15 time, the right to elect representative directors, by nomination and majority vote of their members,
16 was conferred on the station board members. Article Three, Section 1(a), of the Bylaws adopted on
17 January 31, 1984, provides in its entirety:

18 “Section 1 Membership on Board of Directors:

19 (a) Defined: Members of the Board of Directors shall be individuals who have been elected
20 to the Board of Directors as hereinafter provided and are serving as such. (1/31/84)”
21 (Spooner Decl., "Exh. K".)

22 Article Three, Section 2, of the January 31, 1984 Bylaws provides as follows:

23 “Section 2 Election of Directors:

24 In order to be elected, a member [of a board of directors] must receive the
25 nomination and vote of a majority of the station board which he represents, unless
26 such member is classified as an “at large” member, in which event he must be
27 elected by a 2/3 vote of the Board of Directors of the Foundation, voting by secret
28 ballot, subject to approval of FCC counsel or FCC.⁴ (1/31/84)” (Spooner Decl.,
"Exh. K".)

By specifically conferring upon the station board members the right to elect, by majority
vote, directors to represent their station boards, this Bylaw conferred statutory "membership" rights
on the station board members, pursuant to Corp. C. § 5056. These membership rights, once given,

⁴ At that time the Federal Communications Act required that all directors of FCC
radio licensees be U.S. citizens, and there were certain prohibitions, *e.g.*, against interlocking
directorates of broadcast licensees, or persons with certain criminal background serving as
directors. Accordingly, the Bylaws provided that all directors, whether elected by a station
board or the Board of Directors, could be "vetted" by Pacifica's legal counsel for FCC
matters and the FCC determine.

1 could not be eliminated by the Board of Directors without a vote of approval of the station board
2 members, as required by Corp.C. §5150(b).

3 Pursuant to their rights under Article Three, Section 2, of the January 31, 1984 Bylaws, the
4 members of the five Pacifica station boards did, in fact, elect directors to represent them on the
5 Pacifica Foundation Board of Directors. "Ownership Reports,"⁵ certified to be correct by the then
6 Executive Director of the Foundation, David Salniker, were filed with the Federal Communications
7 Commission ("FCC") on December 28, 1987 and March 30, 1990, reporting that two directors had
8 been "appointed or elected" by four of the five Pacifica station boards (WPFW, KPFK, WBAI, and
9 KPFA), that one director had been "appointed or elected" by the KPFT station board, that one seat
10 reserved for election by the KPFT station board was "temporarily vacant," and that there were two
11 additional "at large" directors who had been "appointed or elected" by the Pacifica National Board.
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14 (Bartley Decl., "Exhs. D and E".)

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⁵ Certain events trigger a requirement that an "Ownership Report" be filed with the
FCC, including, but not limited to, periodic applications for renewal of broadcast licenses.
P's & A's in Support of Application for TRO - People ex rel. Spooner, et al. v. Pacifica, etal.- No. 831252-3

1 Defendants contend that the station boards merely "nominated" directors, and that the
2 Board of Directors elected them. However, the Minutes of Board of Directors' meetings in years
3 following the January 31, 1984, Bylaws amendments *do not record any elections* of directors
4 representing station boards *by the Board of Directors*. The Minutes record "motions to accept"
5 (2/87)⁶, "to seat" or "to formally seat" (5/87, 4/89, 10/20), "to welcome and formally seat" (9/88),
6 "to name" (6/91), "to seat alternates" (1/88, 1/90, 6/90, 6/91), and combined "motions to seat"
7 altogether "representatives" or "members" or "new members" and "alternate members" (5/88, 1/89,
8 2/91, 2/92). Perhaps most telling are the Minutes of the June 6-7, 1992 meeting which record a
9 "motion to seat" June Makela as an "*at large*" director along with two "alternates" from WBAI. The
10 Minutes of the immediately prior Board of Directors meeting, on February 1-2, 1992, record that
11 Makela had previously been selected or elected from an "at large list" at the Fall 1991 board
12 meeting,⁷ and the June 8-9, 1991, Minutes record the nomination and "choosing" of "at
13 large" directors who were placed on a list in order of preference to be invited to join the board, and
14 if they accepted, then to be "formally seated" at the October 1991 board meeting. Clearly, these
15 "motions to seat" and the like were mere welcoming ceremonies, *not* elections. The most that can
16 be said for these formalities is that they recorded the Board's recognition that these directors were
17 qualified to be seated as directors by virtue of their prior election by a local station board or, in the
18 case of "at large" directors, by the Board of Directors. (Spooner Decl., "Exhs. P-CC.")

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22 Since January 31, 1984, Article Three, Section 2, of the Bylaws has been amended or
23 purportedly amended by the Board of Directors four times. *None* of these purported amendments
24 was ever approved by the local station boards.

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26 On January 9, 1988, the pronoun "he" was changed to "s/he" and the word "counsel" was

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28 _____
⁶ Plaintiffs do not have copies of any Minutes prior to February 1987 recording the
addition of any director to the Board.

⁷ Plaintiffs do not have a copy of the Fall 1991 Minutes.

1 misspelled as “council,” but no material changes were made. (Spooner Decl., "Exh. L".)

2 On February 9, 1991, an additional sentence was purportedly appended to the end of Article
3 Three, Section 2, which read as follows:

4 “Each station board shall nominate at least one person of color as a permanent
5 representative to the National Board. (2/9/91)” (Spooner Decl., "Exh. M".)

6 The Minutes of the February 9, 1991, Board of Directors meeting do not record that any of
7 the local station boards approved this purported amendment, but do record that the WBAI station
8 had voted to reject it. Nonetheless, the directors purportedly adopted this appendage to Article
9 Three, Section 2, at the February, 1991, Board of Directors meeting. (Spooner Decl., "Exh. Z" .)

10 On September 28, 1997, a major change in the Bylaws provisions for election of directors
11 was purportedly adopted by the Board. Article Three, Section 2, was re-titled “Nomination of
12 Directors,” and the provisions for election of directors were set out in Section 3 as follows:

13 “Section 2 Nomination of Directors

14 Candidates for Directors may be nominated by: 1. receiving a majority vote of
15 a local advisory board. Of two nominees from the local advisory board, at least
16 one must be a person of color; 2. the Foundation’s Board Development
17 Committee. (9/28/97)”

18 “Section 3 Election of Directors

19 In order to be elected as a director, a nominee must receive the majority vote of
20 those seated in a quorum. (9/28/97)” (Spooner Decl., "Exh. N".)

21 Finally, the Bylaws provisions for nomination of directors were purportedly amended again on
22 February 28, 1999. Article Three, Section 2, currently reads as follows:

23 “Section 2 Nomination of Directors

24 Candidates for Directors may be nominated by the Foundation’s Board
25 Governance and Structure Committee. (2/28/99)”

26 Again the purported September 28, 1997 and February 28, 1999 Bylaws amendments were
27 never presented to local station boards for their vote of approval.

28 43 THIRTEEN OF THE SEVENTEEN INDIVIDUALS CURRENTLY ACTING AS
DIRECTORS ARE USURPERS.

The original Pacifica Articles specify that *there shall be five directors.* (Bartley Decl.,

1 "Exh. C".) This Articles provision has never been amended, yet there are currently 17 individuals
2 acting as directors of the Pacifica Foundation, namely: Defendants Acosta, Bramson, Cagan,
3 Chambers, Cisco, Farrell, Ford, Johns, Kriegel, Lee, Lyons, Millspaugh, Moran, Murdock, Palmer,
4 Robinson, and van Putten. (Spooner Decl.) Thirteen of these individuals are acting as directors
5 without the authority of the Articles or the Bylaws.
6

7 Two individuals -- Acosta and Ford -- have refused to vacate their offices after expiration
8 of their 3-year terms, which expired in March 1999, and June 2000, respectively. (Spooner Decl.,
9 Exhs. A. and D.)

10 Three individuals -- Johns, Moran, and van Putten -- were purportedly elected directors by
11 the Board of Directors in October 1999 (Chan Decl.); and five individuals -- Cagan, Chambers, Lee,
12 Lyons, and Murdock -- were purportedly elected directors by the Board of Directors in February
13 2000. (Spooner Decl.) These purported elections were: (1) in violation of the Articles, in that the
14 number of directors exceeded the five permitted, both before and after the purported elections; (2)
15 an unlawful change in the number of directors without the approval of the station board members;
16 and (3) in violation of the last lawfully adopted Bylaws provision establishing the procedure for the
17 election of "at large" directors, adopted January 31, 1984, which provides that "at large" directors
18 must be elected by a two-thirds majority of the directors present and voting, *by secret ballot*. In fact,
19 these directors were not "elected" by secret ballot, but by open voice vote and were all presented
20 together as "slates" to be voted upon, yes or no. (Chan Decl. and Spooner Decl.)
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23 Three directors -- Farrell, Cisco and Millspaugh -- have been removed from office by
24 majority vote of the station board members who initially elected them, yet have refused to vacate
25 their offices: Farrell was removed from office by majority vote of the KPFK station board in May
26 2000 (Adelson Decl.), and Cisco and Millspaugh were removed from office by majority vote of the
27 WBAI station board, also in May 2000. (Norris Decl.)
28

5 LEGAL STANDARD FOR GRANTING PRELIMINARY INJUNCTIVE RELIEF.

1 An injunction is an order or decree of a court either preventing or compelling an act. Code
2 Civ. P. § 526(a) provides, in pertinent part:

3 “§526 (a) An injunction may be granted in the following cases:

4 (1) When it appears by the complaint that the plaintiff is entitled to the
5 relief demanded, and the relief, or any part thereof, consists in restraining the
6 commission or continuance of the act complained of, either for a limited period
or perpetually.

7 (2) When it appears by the complaint or affidavits that the commission or
8 continuance of some act during the litigation would produce waste, or great or
irreparable injury, to a party to the action.

9 (3) When it appears, during the litigation, that a party to the action is
10 doing, or threatens, or is about to do, or is procuring or suffering to be done, some
act in violation of the rights of another party to the action respecting the subject
of the action, and tending to render the judgment ineffectual.

11 (4) Where pecuniary compensation would not afford adequate relief.

12 [...]

(7) Where the obligation arises from a trust."

13 The purpose of a preliminary injunction is to preserve the status quo until a final determina-
14 tion of the controversy following a trial. *Scaringe v. J.C.C. Enterprises* (1988) 205 Cal.App.3d
15 1536, 1542. Thus, a preliminary injunction may be issued to prevent prospective damage as well
16 as to contain ongoing damage. *Nutro Products v. Cole Grain Co.* (1992) 3 Cal.App.4th 860, 867.
17 Plaintiffs may seek injunctive relief against threatened infringement of their rights, and need not
18 wait until they have suffered actual harm. *Southern Christian Leadership Conference v. Al Malaikah*
19 *Auditorium Co.* (1991) 230 Cal.App.3d 207, 223.

21 While the equitable remedy of injunction is discretionary, the court must not abuse its
22 discretion by failing to issue an injunction when a threatened injury requires an injunction:

23 "[The court] must exercise its discretion 'in favor of the party most likely to be
24 injured.' [Citation omitted.] If denial of an injunction would result in great harm
25 to the plaintiff, and the defendants would suffer little harm if it were granted, then
26 it is an abuse of discretion to fail to grant the preliminary injunction. [Citations
omitted.]" *Robbins v. Sup. Ct.* (County of Sacramento) (1985) 38 Cal.3d 199, 205.

27 The court's discretion is exercised in light of an interrelated 2-pronged test: Who will suf-
28 fer greater injury (*Shoemaker v County of Los Angeles* (1995) 37 Cal.App.4th 618, 633), and
probable outcome at trial (*Robbins, supra*, at 206). The determination must be guided by a "mix" of

1 the potential-merit and interim-harm factors; the greater the showing on one, the less must be shown
2 on the other, to support an injunction. *Butt v State of California* (1992) 4 Cal.4th 668, 677-678.

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4 Upon granting an injunction, the court must require an undertaking on the part of the
5 applicant "to the effect that the applicant will pay to the party enjoined any damages, not exceeding
6 an amount to be specified, the party may sustain by reason of the injunction, if the court finally
7 decides that the applicant was not entitled to the injunction." Code Civ. P. §529(a).

8 6 ARGUMENT

9 60 THE OBLIGATION ARISES FROM A TRUST.

10 Injunctions are proper where the obligations sought to be enforced, or the breach of which
11 are sought to be restrained, arise under a trust. Code Civ. P §526(a)(7). Nonprofit public benefit
12 corporations are impressed with a charitable trust by virtue of the express declaration of the corpora-
13 tion's purposes in its articles of incorporation. *Pacific Home v. County of Los Angeles*, 41 Cal.2d
14 844, 852 (1953). Corporate directors, therefore, have the fiduciary obligations of trustees to conform
15 with statutory requirements for amendment of bylaws, election of directors, and all other matters
16 concerning its assets, governance, management, and operations. This obligation is enforceable by
17 the Attorney General, and Relators appointed by the Attorney General, who is vested with
18 responsibility for oversight of California nonprofit corporations and charitable trusts. Code Civ. P.
19 §803; Corp. C. §5142, 5223, 5250, and 5520; Govt. C. §12580, 12591, 12598; and 11 Barclay's
20 Official Cal. Code Regs. §§1-11.

23 60 PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS AT TRIAL.

24 01 Bylaws amendments "materially and adversely" affecting the rights of the
25 corporate members as to voting must be approved by the members, as
26 required by Corporations Code §5150.

27 "Members" of California nonprofit corporations are defined at Corporations Code §5056,
28 in pertinent part, as follows:

"§5056 (a) 'Member' means any person who, pursuant to a specific provision of

1 a corporation's articles or bylaws, has the right to vote for the election of a
2 director or directors [...]."

3 Accordingly, the January 31, 1984 Bylaws amendment, granting the station board members
4 the right to elect directors by "the nomination and vote of a majority of the station board which he
5 represents" endowed the station board members with statutory corporate membership status. Once
6 that right to elect directors was created, the Board of Directors could not lawfully revoke it without
7 a vote of approval of the station board members, which approval has never been obtained.
8

9 Corporations Code §5150 permits a board of directors to amend bylaws *except* in certain
10 circumstances where approval of the corporate membership is required. A board of directors *may*
11 *not* amend the bylaws so as to materially and adversely affect the voting rights of the members,
12 without express approval of the members, as defined in Corporations Code §5034.

13 "§5150 (a) Except as provided in subdivision (c), and Sections 5151, 5220, 5224,
14 5512, 5613, and 5616, bylaws may be adopted, amended or repealed by the board
15 unless the action would materially and adversely affect the rights of members as
16 to voting or transfer.

17 (b) Bylaws may be adopted, amended or repealed by approval of the
18 members (Section 5034); provided however, that such adoption, amendment or
19 repeal also requires approval by the members of a class if such action would
20 materially and adversely affect the rights of that class as to voting or transfer in
21 a manner different than such action affects another class.

22 (c) The articles or bylaws may restrict or eliminate the power of the board
23 to adopt, amend or repeal any or all bylaws, subject to subdivision (e) of Section
24 5151."

25 In the case at hand, where membership rights were created in the station board members
26 when the Bylaws were amended in 1984 to specifically grant them the right to vote for the election
27 of directors, any Bylaws amendment eliminating their voting rights would effectively terminate their
28 membership and would require their vote of approval.

Corporations Code §5342 provides, in pertinent part, as follows:

29 "§5342 (a) An amendment of the articles or bylaws which would terminate all
30 memberships or any class of memberships shall meet the requirements of this part
31 and this section.

32 (b) Before such an amendment is adopted the corporation shall give
33 written notice to members not less than 45 nor more than 90 days prior to any vote

1 by the members on the amendment. The written notice shall describe the effect
2 of the amendment on the corporation and the members. [...]

3 (c) Any such amendment shall be approved by the members (Section
4 5034)."

5 Corporations Code §5034 defines "approval by the members" as follows:

6 §5034 'Approval by (or approval of) the members' means approved or ratified by
7 the affirmative vote of a majority of the votes represented and voting at a duly
8 held meeting at which a quorum is present (which affirmative votes also constitute
9 a majority of the required quorum) or written ballot in conformity with Section
10 5513, 7513, or 9413 or by the affirmative vote or written ballot of such greater
11 proportion, including all the votes of the memberships of any class, unit, or
12 grouping of members as may be provided in the bylaws (subdivision (e) of Section
13 9151) or in Part 2, Part 3, Part 4 or Part 5 for all or any specified member action.

14 02 The purported bylaws amendments of February 9, 1991, September 28,
15 1997, and February 28, 1999, did "materially and adversely" affect the
16 rights of the members as to voting, and were never approved by the
17 members. and are, therefore, of no legal force or effect.

18 Clearly, under these statutory provisions, the purported Bylaws amendments of September
19 28, 1997, eliminating the right of the station board members to *elect* representative directors and
20 replacing with a right to merely *nominate* directors, required a vote of approval of the members, *i.e.*,
21 the station board members. As no such vote of approval by the station board members ever
22 occurred, those Bylaws amendments were *void ab initio* and are of no legal force or effect
23 whatsoever. The February 28, 1999 Bylaws amendment purporting to eliminate the station board
24 members' rights even to nominate directors, following upon the ineffectual September 28, 1997
25 Bylaws amendments, was never approved by the station board members, and also, clearly, has no
26 legal force or effect. The February 9, 1991 Bylaws amendment requiring the station boards "to
27 nominate at least one person as color as a permanent representative to the National Board," was
28 never approved by the station board members. To the extent that Bylaws amendment was intended
to materially and adversely affect the rights of the members, it too was *void ab initio* and is of no
legal force or effect.

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03 The station board members have all the statutory rights of corporate members, including the right to remove without cause directors elected by them, and to elect replacement directors upon expiration of the terms of directors elected by them.

Corporations Code §5222 provides for removal of directors by the members without cause:

“§5222 (a) Subject to subdivisions (b) and (f) of this section, any or all directors may be removed without cause if:

(1) In a corporation with fewer than 50 members, such removal is approved by a majority of all members (Section 5033).

(2) In a corporation with 50 or more members, such removal is approved by the members (Section 5034).

[...]

(b) Except for a corporation having no members pursuant to Section 5310:

[...]

(3) When by the provisions of the articles or bylaws the members within a chapter or other organizational unit, or region or other geographic grouping, voting as such, are entitled to elect one or more directors, any director so elected may be removed only by the applicable vote of the members within such organizational unit or geographic grouping.”

Accordingly, the three directors -- Farrell, Cisco and Millspaugh -- who were removed in May 2000 by majority vote of the KPFK and WBAI station board members who originally elected them are acting as directors without authority, and Plaintiffs will be entitled to an order removing them from office, upon trial on the merits.

The 3-year term of David Acosta, who was originally elected by the KPFT station board, expired in February 1999, and the 3-year term of Ken Ford, who was originally elected by the WPFW station board, expired in June 2000. These directors have refused to vacate their offices, and the Board of Directors has refused to permit election of their replacements by the stations boards.

Therefore, they are acting as directors without authority, and Plaintiffs will be entitled to an order removing them from office and compelling election of their replacements, upon trial on the merits.

04 Excessive Number of Directors.

In cases where there is a conflict between the articles of incorporation and the bylaws as to the number of corporate directors, the articles are the controlling document. *Morris v Richard Clark Missionary Baptist Church* (1947) 78 Cal.App.2d 490. In *Morris* a church’s articles provided

1 for seven trustees with one-year terms, yet the corporation adopted bylaws providing for nine trustees
2 with terms continuing as long as good behavior. After a controversy arose, the members, at a duly
3 called meeting, agreed to abide by the articles; six of the nine incumbent trustees who had served
4 more than one year were removed and four other members were elected to complete the list of seven,
5 with three of those who had not served one year holding over. *Id* at 491. The *Morris* court held that
6 the articles controlled and that election of the new trustees was regular and valid. Since the bylaws
7 amendment changing the number and terms of directors was without authority in the articles and was
8 not accomplished by amendment of the articles, the court concluded that the portion of the bylaws
9 providing for nine directors was void. *Id.* at 492-493.

11 After the 1947 *Morris* decision, the Corporations Code was enacted in 1949, replacing the
12 former Civil Code provisions governing California corporations. The relevant Corporations Code
13 section today is §5151, which was adopted in 1978 and provides in pertinent part as follows:

15 “§5151. (a) The bylaws shall set forth (unless such provision is contained in the
16 articles, in which case it may only be changed by an amendment of the articles)
17 the number of directors of the corporation; or that the number of directors shall
18 not be less than a stated minimum nor more than a stated maximum with the exact
19 number of directors to be fixed within the limits specified, by approval of the
20 board or the members (Section 5034), in the manner provided in the bylaws,
21 subject to subdivision (3) of Section 7151. The number or minimum number of
22 directors may be one or more.

23 (b) Once members have been admitted, a bylaw specifying or changing a
24 fixed number of directors or the maximum or minimum number or changing from
25 a fixed to a variable board or vice versa may only be adopted by approval of the
26 members (Section 5034)”

27 Accordingly, the Pacifica Bylaws provision, at Article Three, Section 1(a), that “there shall
28 be such number of directors as the Board of Directors [or Governing Board] shall from time to time
decide” does not meet the Section 5151(a) requirement that when the number of directors is set forth
in the articles the number of directors “may only be changed by an amendment to the articles.”
Therefore, under *Morris*. Pacifica Bylaws Article Three, Section 1(a), is void.

In addition, Corp. C. §5151(b) requires that once *members* are admitted, any change in the

1 number of directors must be approved by the members, *i.e.*, the station board members, and cannot
2 be adopted by the Board of Directors without their approval. Therefore, the eight directors (Cagan,
3 Chambers, Johns, Lee, Lyons, Moran, Murdock, and van Putten) purportedly elected by the Board
4 of Directors in October, 1999 and February, 2000, when added to the directors already seated at the
5 time, exceeded the number of directors permitted by the Articles, and resulted in a radical change
6 in the number of directors without the approval of the members. Plaintiffs will be entitled to an
7 order removing them from office, upon trial on the merits.
8

9 \\\

10 61 THE BOARD OF DIRECTORS' ACTIONS THREATEN PACIFICA
11 FOUNDATION WITH GREAT OR IRREPARABLE HARM.

12 The primary purpose of preliminary injunctive relief is to preserve the status quo during
13 litigation. In *Fretz v. Burke* (1967) 247 Cal. App.2d 741, plaintiffs were granted a mandatory pre-
14 liminary injunction compelling the defendants to pay to them certain regular distributions of partner-
15 ship profits that the defendant was holding in a suspense account. On appeal, the defendants argued
16 that plaintiffs had not shown irreparable injury, since an accounting of the partnership upon disso-
17 lution would entitle them to distribution of all profits held in this account. The Court of Appeal held:
18

19 “The term ‘irreparable injury’ as applied to the granting of an injunction has been
20 defined as ‘that species of damages, whether great or small, that ought not to be
21 submitted to on the one hand or inflicted on the other.’ [Citations omitted.]
22 Defendant finds fault with this definition in that every injury is one which ought
23 not to have been submitted to or inflicted; wherefore, the definition would make
24 every injury irreparable. We believe the definition is not to be regarded as
25 enlarging all injuries to the status of irreparability, but, as applied to cases such as
26 the one before us, to be deemed as warranting the use of the injunctive power of
27 the court against a wrong which the trial judge no doubt deemed insufferable
28 because it constitutes an overbearing assumption by one person of superiority and
domination over the rights and property of others.” 247 Cal.App.2d, at 746.

Under this definition, the exercise of control of Pacifica by 13 usurpers on the Board of
Directors certainly should be “deemed insufferable because it constitutes an overbearing assumption
by thirteen persons of superiority and domination over the rights and property of others.”

1 The rights of directors and the rights of corporate members to elect directors are not mere
2 empty formalisms without substance. As the California Supreme Court held in *Signal Oil v. Ashland*
3 *Oil & Refining Co.* (1958) 49 Cal.2d 764, 782:

4 "Each member of a corporate body has the right of consultation with the others,
5 and has the right to be heard upon all questions considered, and it is presumed
6 that, if the absent members [of the board of directors] had been present, they
7 might have dissented, and their arguments might have convinced the majority of
8 the unwisdom of their proposed action, and thus have produced a different result."

9 Likewise, in a case where usurpers who have no right to be heard are in control of a
10 corporation's board of directors, it can be presumed that, if they were not present, their arguments
11 could not persuade the board to take unwise actions, and thus the deliberations of the board would
12 produce different results.

13 Defendants' destructive actions have already produced great injury to the Foundation's
14 fund-raising capacity, as evidenced by the calling of a national boycott, and to its intangible assets,
15 *i.e.*, its reputation and the good will of its listeners, its contributors, and its employees. In addition,
16 moving the corporations' principal place of business and financial records out of state poses a severe
17 risk of loss or destruction of records necessary to carry out a full accounting of Pacifica's books,
18 tending to render judgment ineffectual.

19
20 62 DEFENDANTS WILL SUFFER NO HARM IF INJUNCTIVE RELIEF IS
21 GRANTED.

22 Plaintiffs are only seeking preservation of the status quo; the restraints on Defendants' abil-
23 ity to change the status quo will not materially adversely affect Defendants or their rights in any way.

24 CONCLUSION

25 For all the foregoing reasons, Plaintiffs ask this Court to issue a temporary order, and after
26 hearing, a preliminary injunction, restraining Defendants from: (1) amending the Pacifica Bylaws,
27 (2) appointing or electing new Pacifica directors, (3) removing anyone currently seated as a director,
28 (4) removing the corporation's principal place of business from its current location in Los Angeles

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County, California, (5) destroying or removing from the state of California any relevant documents, including financial documents, and (6) taking any substantial actions affecting the assets, governance, management, or operations of the Pacifica Foundation or any of its five radio stations.

No bond is required for a temporary restraining order. Relators request that a minimal bond of \$500 be set for issuance of the Preliminary Injunction, as Defendants will suffer no harm from maintaining the status quo during the pendency of this action.

DATED: February 23, 2001

ARENT FOX KINTNER PLOTKIN & KAHN, PLLC
BARTLEY LAW OFFICES
ATTORNEYS FOR PLAINTIFFS

By: _____
Daniel Robert Bartley

PROOF OF SERVICE

1 The undersigned declares he/she is employed in the county of Marin, State of California, by
2 Daniel Robert Bartley Law Offices, P.O. Box 686, Novato, CA, 94948-0686. I am over the age of
3 18 and not a party to this action. On today's date, I served, true and correct copies of "PLAINTIFFS'
4 POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY
5 RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY
6 INJUNCTION"by placing such in sealed envelopes addressed as follows:

7 Daniel Rapaport, Esq.
8 Wendel, Rosen, Black & Dean, LLP
9 1111 Broadway, 24th Floor
10 Oakland, CA 94607
11 [Tel 510 834 6600 Fax 510 834 1928]
12 [E-mail drapaport@wendel.com]

13 I then this day caused such documents to be personally served upon Defendants' local
14 counsel Daniel Rapaport.

15 I declare under penalty of perjury, under the laws of the State of California, that the
16 foregoing is true and correct and that this Decl. was executed on this 23rd day of February, 2001, at
17 Novato, California.

18 _____
19 Daniel Robert Bartley
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