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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. CAROL SPOONER, et al., Plaintiffs, vs. PACIFICA FOUNDATION, et al., Defendants.	Case No. 831252-3 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FOUNDATION DEFENDANTS' DEMURRER TO COMPLAINT** Date: April 10, 2001 Time: 9:00 a.m. Dept: 31 Judge: Hon. Judith D. Ford

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I. INTRODUCTION

Defendants'[1] demurrer must be sustained and plaintiffs' claims must be dismissed for the following reasons. First, plaintiffs lack standing to bring this suit because, after receiving permission from the Attorney General to proceed as Relators, they made extensive and material changes to the complaint that had been approved for filing by the Attorney General. This is a clear and direct violation of applicable law. The Attorney General, moreover, has no authority to permit Relators to exercise unbridled discretion to redefine the state's claims and legal positions.

Plaintiffs' claims against the Directors of the Foundation must be dismissed for two further compelling reasons. The conduct alleged as the basis for plaintiffs' claims falls within the protection of the business judgment rule. Second, plaintiffs were required to file a verified petition seeking judicial leave to proceed prior to filing suit against directors of a non-profit entity. Cal. Code regs. tit. 11, §§1-2. Plaintiffs did not do so.

The claim for an accounting also must be dismissed for two independent reasons. First, only the "members" and "directors" of a corporation, as defined by statute, have the standing to seek an accounting.[2] Plaintiffs, in either of their capacities as "listener-sponsors" or "Relators" do not fall into either category. Second, a plaintiff first must make a demand on the corporation for an accounting before he or she can have the standing to file suit for an accounting.[3] Plaintiffs do not allege that they ever made such a demand on the Foundation.

Plaintiffs also assert several claims for "usurpation of office."[4] This cause of action, however, applies only to governmental and public offices, and not to private corporations such as

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[1] This Memorandum is filed in support of the Demurrer filed on behalf of the following defendants: Pacifica Foundation, Mary Frances Berry, June Makela, Frank Millspaugh, Andrea Cisco, Ken Ford, David Acosta, Micheal Palmer, Karolyn Van Putten, Wendell Johns, Valrie Chambers, Bertram Lee, Beth Lyons, John Murdock, Robert Farrell, and Lynn Chadwick (hereafter the "Foundation Defendants").

[2] Cal. Corp. Code §6336

[3] Cal. Corp. Code §6333.

[4] Compl., Fifth Cause of Action, ¶¶62-65.

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Foundation. Therefore, these claims must be dismissed.

Plaintiffs' claims must also be dismissed to the extent that they seek to have this Court grant to community public radio "listener-sponsors" any authoritative or substantive power in the selection, by any means, of representatives to either a station's Local Advisory Board ("LAB"), or of Directors to the Foundation's Board. There is no basis in law for this relief. A listener's decision to make a charitable donation to the Foundation, while laudable and appreciated, confers no legal rights on the listener to have any authority or control over the operation or program content of any of the Foundation's five stations.

Additionally, to the extent that plaintiffs' claims rest on their assertion that the LABs previously had the right to elect directors to the Foundation board and were improperly deprived of that right, their claims must be dismissed because the LABs never had such a right. Rather than "elect," the LABs only had been requested to "nominate" people to the Foundation board — a "right" that does not make them "members" of the Foundation under California law and whose elimination, even if it occurred, would not give rise to a cause of action.

Finally, plaintiffs' claims must be dismissed because they are preempted by federal law. Plaintiffs' claims boil down to objections to the programming and administrative decisions of the Foundation and, as such, tread squarely on ground reserved exclusively for the Federal Communications Commission ("FCC") and the Corporation for Public Broadcasting ("CPB").

II. PLAINTIFFS LACK STANDING TO BRING THIS ACTION AS RELATORS.

A. The Complaint Before this Court is Void as it is Substantially Different From the Complaint Approved by the Attorney General.

To bring an action as a Relator, a plaintiff must have the permission of the California Attorney General to file a specific complaint on the state's behalf. Cal. Civ. Proc. Code §803, *et seq*. Plaintiffs received permission to file the specific proposed complaint they had submitted to the Attorney General. (See Ex. A to Request for Judicial Notice). However, the Complaint filed with this Court is substantially altered from the one so submitted and is not the one that the Attorney General approved. Plaintiffs therefore have no authority to maintain this suit as Relators.

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California's statutes and regulations set forth the only procedure through which relator status may be obtained from and granted by the Attorney General. Cal. Civ. Proc. Code §803, *et seq.*; Cal. Code regs. tit. 11, §§1-11. As a first step, a putative relator must file a "proposed complaint" with the Attorney General. Cal. Code Regs. tit. 11, § 2(a). The "defendant" in the proposed action is entitled to file an opposition setting forth the reasons why permission to sue should not be granted by the Attorney General. Cal. Code regs. tit. 11, §2(c).

If permission to file suit is granted, the complaint filed in court must be the same complaint approved by the Attorney General after the proposed defendant is given an opportunity to respond. The Attorney General has authority to modify the complaint he approved; relators do not.

> The complaint filed in the proceeding shall be the proposed complaint herein before referred to, changed or amended as the Attorney General shall suggest or direct, ***and the relator shall not thereafter in any way change, amend or alter the said complaint without the approval of the Attorney General.***

Cal. Code of Regs. tit. 11, §7 (emphasis added).

The complaint filed in this case is substantially different from the complaint presented to the Attorney General. (Compare the Complaint filed in this action with complaint approved by the Attorney General, attached as Ex. A to the Request for Judicial Notice.) For example, the Complaint here presents ten causes of action. The complaint that was approved stated only five. The Complaint as filed has 88 paragraphs. The complaint approved by the Attorney General had far less than half that number. Critically, the Complaint adds an entirely new theory of liability and a cause of action that was neither considered nor approved by the Attorney General. (See Compl., Count Ten (Unfair Competition)).[5] Such sweeping changes are entirely inconsistent with the statutory requirement that a relator must file the same complaint that was approved by the Attorney General after the proposed defendant has an opportunity to respond. Cal. Code of Regs. tit. 11, §7

Plaintiffs may contend that the Attorney General's letter granting them permission to

[5] The Complaint also adds five new director defendants and Lynn Chadwick, who was only an employee of Pacifica, a class of person the Attorney General never approved being sued.

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bring a relator action somehow exempts them from this requirement. (See Ex. A to Compl., letter dated September 14, 2000). That letter grants them permission to bring "such other causes of action and relief as relators deem appropriate." However, the law and regulations governing relator actions nowhere grant the Attorney General any authority to waive the "identical complaint" requirement. To the extent that the Attorney General's letter purports to be a waiver of the requirement that only the same complaint that he approved may be filed by a relator, that waiver is ultra vires as the Attorney General has no authority to waive a statutory mandate. *See generally, Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1191.

To the contrary, the Attorney General has a non-delegable duty to oversee and control any litigation brought under his name. Cal. Code Regs. tit. 11, §8; See, e.g., *City of Fresno v. People ex rel. Fresno Firefighters* (1999) 71 Cal.App. 4th 82, 92, n. 8. (Attorney General has ultimate control over the course of relator litigation) (citation omitted); *Motion Picture Studio Teachers & Welfare Workers* (1996) 51 Cal.App.4th 1190, 1195 (agency is not permitted to disregard a regulation's plain language). If the September 14th letter were construed as a waiver of the "identical complaint" requirement, and as a grant of authority to make unsupervised changes to the complaint he approved, the Attorney General would plainly have violated the duties of his office. In that event, he would unlawfully have turned over to private citizens the discretion to determine how the sovereign power of the State is utilized.

Moreover, the Attorney General cannot waive the Defendant's, and especially the previously unnamed defendant's right[6] to an opportunity to present responses to the new assertions and causes of action put forward by plaintiffs. If the September 14th letter was intended to waive these statutory and regulatory requirements, it would be ultra vires and a violation of the defendants' procedural due process rights.

B. Counts Two Through Ten Must Be Dismissed Because the Attorney General Lacks Authority to Grant Relator Status for These Causes of Action.

Plaintiffs claim standing and authority to bring this relator action on the basis of several

[6] Cal. Code Regs. tit. 11, §2(c).

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different statutes and regulations. (See Compl. 5 (Cal. Civ. Proc. Code §803; Cal. Corp. Code §§5142, 5223, 5250, 5520; Cal. Gov't Code §§12580, 12591, 12598; Cal. Code Regs. tit. 11, §§1-11)). None of these statutes or regulations, however, allows relators to bring the specific causes of action contained in Counts Two through Ten.

The Attorney General himself (as opposed to Relators) might be authorized to bring actions such as those arising under Counts Two through Ten. These counts allege various violations of the California Nonprofit Corporations Law (Counts Two through Nine) and the California Unfair Competition Act (Count Ten). The Attorney General alone, and no other person or entity, has authority under California Government Code §12598 to bring actions arising from violations of the Nonprofit Corporations Law (§5000 *et seq.*, Cal. Corp. Code) and California's Unfair Competition Act (§17200 *et seq.*, of the Cal. Bus. & Prof. Code). Likewise, the Attorney General alone is authorized to bring actions under §5223 of the California Corporations Code — the section prohibiting "gross abuse of authority and discretion." None of these statutory provisions grants any authority whatsoever to the Attorney General to empower private citizens to enforce any of these laws in the guise of a relator action, or otherwise. Plaintiffs have no independent standing to assert a cause of action under these laws, and these claims must be dismissed.

Plaintiffs cite the only two statutes under which the Attorney General is authorized to grant relator standing. Cal. Civ. Proc. Code. §803; and Cal. Corp. Code 5142. Only one of these has any arguable relevance to this matter. Section 5142 allows "the Attorney General, or any person granted relator status by the Attorney General" to bring an action to remedy a breach of charitable trust. Cal. Corp. Code §5142(a)(5). This provision arguably provides the Attorney General the authority to grant relator status for purposes of Count One (Breach of Charitable Trust).

The only other statute cited by plaintiffs under which relator status is available and may be granted by the Attorney General is §803 of the California Code of Civil Procedure.[7]

[7] Cal. Bus. & Prof. Code §17204 authorizes suits by members of the general public, but only with the consent of a district attorney.

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Plaintiffs' Counts Three, Four, and Five, which seek removal of various directors for "usurpation of office," each rely on §803 as the source of authority for the grant of relator status. (Compl., ¶¶53, 57, and 63). Section 803, however, has no applicability to directors and officers of *private* corporations of any kind.

Section 803 specifically authorizes relator actions as a remedy against persons who usurp a "public office" or "franchise." Directors and officers of the Foundation, a private corporation, do not hold any public office or franchise. A "public office" is "an office or trust [that] requires the vesting in an individual of a portion of the sovereign powers of the state." *Schaefer v. Superior Court* (1952) 113 Cal.App.2d 428, 432 (citing *Parker v. Riley* (1941) 18 Cal.2d 83, 87). The sovereign powers of the State are involved if an officeholder exercises: (1) police powers of the State; (2) independent power in the disposition of public property; or (3) the power to incur financial obligations upon the part of a county or the State. *Id.* Foundation Directors and officers neither possess nor exercise any of these powers. Thus, they do not hold a public office under §803.

The Foundation's Directors and officers also have not usurped a "franchise" as required by §803. Under California law, the term "franchise" is synonymous with a "right" or "privilege" to make private use of a State asset or authority. 80 Ops. Cal. Atty. Gen. 290, 291 (1997). A franchise typically is created when the State, usually through an agency, authorizes a private company to set up its infrastructure on public property in order to provide public utilities to the public – e.g. railroad, trolley, gas, water, sewer, and electric power companies. *Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 703-704. Here, the Foundation's authority, and hence that of its Directors and officers, to own and operate a radio station derives exclusively from federal authority. The State has no ownership interest in the airwaves, no capacity to license radio broadcast stations and has no regulatory power over them. Moreover, there is no allegation that any part of the Foundation's physical infrastructure rests upon, or utilizes, public property. There is no plausible argument that the Foundation Defendants are involved with a "franchise" within the meaning of §803. In sum, the Attorney General has no authority to bestow relator status with respect to Counts Two through Ten.

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III. PLAINTIFFS' CLAIMS AGAINST THE FOUNDATION DEFENDANT DIRECTORS MUST BE DISMISSED BECAUSE THE CONDUCT ALLEGED IS PROTECTED BY THE BUSINESS JUDGMENT RULE.

The complaint fails to allege any conduct by the Foundation defendants that is not subject to the protection of the business judgment rule.[8] Moreover, "[a]t the pleading stage, [Corporate] Board independence and compliance with the business judgment rule are presumed." *In re Silicon Graphics Inc. v. McCracken*, 183 F.3d 970, 990 (9th Cir. 1999). Accordingly, because plaintiffs fail to allege facts sufficient to overcome the immunity from liability provided by the business judgment rule, the complaint must be dismissed. *See, e.g., Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365, 379-380.

California has codified a corporate director's duty of care owed to his or her corporation in §5231(a) of the California Corporation Code as follows:

> A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner ***such director believes*** to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

California also has codified the business judgment rule in both §§309 and 5231(c) of the California Corporation Code. Section 5231(c) provides:

> Except as provided in Section 5233, a person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including, without limiting the generality of the foregoing, any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated.

The business judgment rule operates to shield the Foundation Directors from personal liability, and to insulate their decisions from judicial review, where they have acted in good faith, with the honest belief that their actions were in the best interest of the Foundation, and on an informed and rational basis. *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694. *See*

[8] As a separate ground for this demurrer, defendant Lynn Chadwick demurs to all causes of action on the ground that she is not alleged to be a director, and therefore no claims can be maintained against her, because she owed no duty to plaintiffs.

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generally, Katz v. Chevron Corp. (1994) 22 Cal.App.4th 1352; *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds; Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000); *see also, In re Silicon Graphics Inc. v. McCracken*, 183 F.3d 970 (9th Cir. 1999).

Where there are no allegations of fraud, bad faith, or self-dealing, it is presumed the directors reached their business judgment in good faith, and considerations of motive are irrelevant." *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366. Further, the burden falls upon the plaintiffs to plead with particularity allegations of fraud, bad faith, and self-dealing. S*ee, Lee, supra* and *Aronson, supra,* 473 A.2d at 814 (recognizing that the plaintiff must plead with particularity that the challenged transaction was not the product of a valid business judgment). The complaint presents no such allegations.

In California, the business judgment rule protects actions and decisions by directors from liability even if, in hindsight, the result produced proves unfavorable. *Lewis v. Anderson* 615 F2d 778, 781 (9th Cir. 1979). Plaintiffs' allegations relating to the Directors' conduct, construed in plaintiffs' favor, suggest only that the Directors' conduct, viewed from plaintiffs' subjective perspective, was not the perfect or optimal course of conduct for the Foundation and its stations.

Not one of the plaintiffs' allegations amounts to a claim of fraud, bad faith or self-dealing. For instance, the plaintiffs allege that the Foundation's Directors changed its stations' programming format to encourage a "wider more affluent, more 'mainstream' listening audience." (Compl. ¶19). While plaintiffs may not like this decision, and although it may be argued that the Directors should have decided otherwise, that allegation falls very far short of claims of fraud, bad faith, or self-dealing pled with particularity. *Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694; *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776-777.

Plaintiffs also complain that the Foundation changed its bylaw provisions relating to the election of Directors to comply with the mandates of the CPB. (Compl. ¶24). California Corporation Code §5232 specifically states that "section 5231 [the business judgment rule statute] governs the duties of directors as to any acts or omissions in connection with the **election, selection, or nomination of directors.**" (Emphasis added.) The decision to amend the Foundation's bylaws in order to avoid the "threat of immediate withholding [of] the second half

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of CPB funding," (Compl. 24) is a decision that plainly is covered by the business judgment rule. The opinion of the plaintiffs that the Foundation should have foregone CPB funding does not constitute an allegation of fraud, bad faith, or self-dealing by the Directors.

The plaintiffs further contend that the Foundation's Directors improperly terminated staff members when they concluded that these individuals had violated broadcast standards (Compl. ¶¶25, 29), and improperly hired a security service and a public relations firm to protect the Foundation's personnel, property, and reputation. (Compl. ¶29). Even if plaintiffs' conclusion had merit, these allegations nonetheless fail to show fraud, bad faith or self-dealing. To the contrary, all they show is that certain choices were made in the belief that they served the Foundation, and that the plaintiffs vehemently disagree with these choices. In short, the plaintiffs have failed to allege any conduct by any of the Directors that amounts to fraud, bad faith, or self-dealing. Therefore, all of the Foundation Directors' conduct placed in issue is protected by the business judgment rule and this Court must dismiss all of the claims based on that conduct.

IV. THE PLAINTIFFS' CLAIMS AGAINST THE INDIVIDUAL FOUNDATION DEFENDANTS MUST BE DISMISSED AS THE PLAINTIFFS DID NOT, PRIOR TO BRINGING THIS ACTION, FILE A VERIFIED PETITION SEEKING JUDICIAL LEAVE TO PROCEED AGAINST THOSE DEFENDANTS.

California Code of Civil Procedure §425.15 provides that, unless a plaintiff first obtains leave of court, no cause of action arising out of negligent conduct can be brought by that plaintiff against any person serving without compensation as a director or an officer of a nonprofit corporation if, with respect to the cause asserted, the person was acting within the scope of that position. As relevant the statute provides:

> No cause of action against a person serving without compensation as a director or officer of a nonprofit corporation described in this section, on account of any negligent act or omission by that person within the scope of that person's duties as a director acting in the capacity of a board member, or as an officer acting in the capacity of, and within the scope of the duties of, an officer, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading.

Cal. Civ. Proc. Code §425.15. Plaintiffs' purported "relator" status has no relevance to this requirement. Section 425.15 makes no exception for "relators."

The statute also provides that a court may allow the filing only upon the prior filing of a

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verified petition "accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based." *Id.* Plaintiffs never obtained leave from any court to proceed against the individual Foundation Defendants. Therefore, their claims against these individuals are barred to the extent they are based on any alleged "negligent act or omission" made while the individuals were acting in their official capacities at the Foundation. California Civil Code §1714 indicates that "negligence" is the failure to exercise ordinary care or skill in the management of property that results in injury to another. The plaintiffs do not sufficiently allege that the alleged wrongdoing of the individual Foundation Defendants constituted anything other than purported negligence on their part.

Section 425.15 applies even where it is alleged that directors have failed to use ordinary care and skill and, thus, have behaved in a manner that is negligent. Nothing in plaintiffs' complaint suggests that the individual Foundation Defendants' conduct, seen in the worst light possible, amounted to knowing and willful wrongdoing. Thus, because the plaintiffs failed to seek judicial approval from a court before filing this action, and because their claims allege negligence at worst, their claims against the individual Foundation Directors and officers are barred by §425.15 of the California Code of Civil Procedure.[9]

V. THE CLAIM FOR AN ACCOUNTING MUST BE DISMISSED BECAUSE PLAINTIFFS: (1) LACK STANDING AND (2) DO NOT ALLEGE THAT THEY MADE THE REQUISITE DEMAND FOR AN ACCOUNTING ON THE FOUNDATION.

A. Because They are Neither Corporate Members nor Directors of the Foundation, the Plaintiffs Lack Standing to Seek an Accounting.

Plaintiffs' sixth claim purports to state a cause of action for an accounting under California Corporations Code §6336.[10] This statute, however, provides a right to seek an

[9] As the Complaint here is not one which was approved by the Attorney General, and thus simply is a private action, the provisions of California Corporation Code §§5047.5 and 5239 which immunize uncompensated directors and officers of non-profit corporations also are applicable to this case.

[10] It is pertinent that the Public Broadcasting Act (47 U.S.C. §396(k)(8)(A)) requires that each licensee receiving the Corporation for Public Broadcasting ("CPB") funds undergo a biennial audit by independent certified public accountants (or, in certain cases, to submit a financial statement). 47 U.S.C. §396(l)(3)(B)(ii). This information, and such other financial information as the CPB may require, must be submitted biennially to the CPB. 47 U.S.C. §396(l)(3)(B)(iii). The CPB must maintain the information at its offices for public inspection and copying for at

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accounting only to *members and directors* of the corporation from which the accounting is sought. Plaintiffs are neither members nor Directors of the Foundation and have no standing to bring this claim.

Moreover, §6336 provides a cause of action for an accounting only when a corporation has refused either a demand for inspection "under this chapter," or a demand pursuant to §§6330 or 6333. Sections 6330 and 6333 provide that a "member" of the corporation can make a demand to inspect certain corporate documents. This right of inspection is not granted to any other party. The only other statutory right to inspect corporate books is set out in §6334, which provides that a "director" shall have the right to inspect and copy the corporation's books and records. Thus, the only individuals with a right to proceed under §6336 are members and Directors of the Foundation.[11]

The word "member" is defined in Cal. Corp. Code §5056 as any person: (1) "who, pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote for the election of a director or directors or on disposition of all or substantially all of the assets of a corporation or on a merger" or (2) as "any person who is designated in the articles or bylaws as a member and pursuant to a specific provision of a corporation's articles or bylaws, has the right to vote on changes to the articles or bylaws." Plaintiffs describe themselves solely as "listener/sponsors" and "relators." In short, the plaintiffs are neither members nor directors of the Foundation and have no right to seek an accounting from the Foundation.

B. Plaintiffs Do Not Allege that They Made a Demand for an Accounting to the Foundation.

Section 6336 requires: (1) that a party make a demand for inspection of documents on a corporation, and (2) that the corporation refuse that demand, before a court can order an inspection. Specifically, the statute states:

> ***Upon refusal of a lawful demand for inspection*** under this chapter, or a lawful ***demand*** pursuant to Section 6330 or Section

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least three years. 47 U.S.C. §396(l)(4)(A).

[11] Section 6336 contains no authority for the Attorney General to seek an accounting. Thus, even if the plaintiffs could proceed as relators, such status would not entitle them to an accounting.

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> 6333, the superior court ***of the proper county, or the county where the books or records in question are kept, may enforce the demand or right of inspection"***

Cal. Corp. Code §6336 (emphasis added).

This requirement that a party make a demand on the corporation prior to bringing suit for an accounting is repeated in both of the statutes referenced in §6336. Section 6330 provides that, subject to certain restrictions, a member (as defined in § 5056) may pursue either or both of the following:

> (1) Inspect and copy the record of all the members' names, addresses and voting rights, at reasonable times, upon five business days' ***prior written demand upon the corporation*** which demand shall state the purpose for which the inspection rights are requested; or (2) Obtain from the secretary of the corporation, ***upon written demand*** and tender of a reasonable charge, an alphabetized list of the names, addresses and voting rights of those members entitled to vote for the election of directors, as of the most recent record date for which it has been compiled or as of a date specified by the member subsequent to the date of the demand. The demand shall state the purpose for which the list is requested.

Cal. Corp. Code §6330(a) (emphasis added). Similarly, §6333 provides that:

> The accounting books and records and minutes of proceedings of the members and the board and committees of the board shall be open to inspection ***upon the written demand on the corporation*** of any member at any reasonable time, for a purpose reasonably related to such person's interests as a member.

Cal. Corp. Code §6333 (emphasis added). Plaintiffs do not allege that they made a demand or that the Foundation refused their demand. As a result, they lack standing to assert a claim for an accounting, and their sixth cause of action must be dismissed.

VI. ESTABLISHED AUTHORITY UNDERCUTS THE PLAINTIFFS' CLAIMS THAT "LISTENER-SPONSORS" HAVE A LEGAL RIGHT TO PLAY A ROLE IN THE SELECTION OF LAB REPRESENTATIVES AND IN THE NOMINATION OR ELECTION OF DIRECTORS OF THE FOUNDATION.

Plaintiffs' seventh and eighth claims seek to have this Court establish a mechanism through which "listener-sponsors" would have an effective voice both in the selection of LAB members, and in the nomination and election of Directors to the Board of the Foundation. None

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of the statutory provisions cited by plaintiffs come remotely close to substantiating plaintiffs' claim of entitlement to such relief in a judicial proceeding. As demonstrated above, the authority to decide how LAB members and Foundation Directors are selected is required by existing law to be vested in, and exercised solely by, the Foundation's Board. The relief plaintiffs seek requires legislative and regulatory changes and, thus, is available only from non-judicial sources; i.e., the FCC, the CPB and Congress.

VII. THE LABS NEVER HAD THE RIGHT TO ELECT DIRECTORS.

Plaintiffs argue that the LABs had the right to "elect" directors of the Foundation and therefore were "members" of the Foundation whose right to elect could not be taken away without their consent.[12] However, it is clear from the face of the plaintiffs' complaint that the LABs never "elected" directors, but rather only were afforded an opportunity to "nominate" directors to the Board of the Foundation — a right that does not confer "membership" status on LABs under California Corporations Code § 5036. As plaintiffs state in paragraph 22 of their complaint, the Foundation's bylaws were amended in 1991 by the addition of this language: "Each station board shall nominate at least one person of color as a permanent representative to the National Board." (Emphasis added.) If plaintiffs were right that LABs had the right to "elect" Directors, the necessary conclusion would be that the LABs could "nominate" a person of color, but could "elect" a white person to be a Director. That blatantly discriminatory result makes absolutely no sense and is repugnant to every principle of the Foundation. The ability to nominate does not make the LABs members of the Foundation and thus could not confer any rights on them under Corp. C. §5036.[13]

[12] Since plaintiffs are neither LABs nor LAB members, they do not have the standing to assert a claim based on an asserted wrongful deprivation which constitutes an injury to LABs and their participants alone.

[13] Additional evidence that the LABs never had the power to "elect" Directors is discussed in the Defendants' Points and Authorities in Opposition to Order to Show Cause Re Preliminary Injunction.

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VIII. BECAUSE THE PLAINTIFFS' STATE LAW CLAIMS SEEK TO ADDRESS ISSUES SOLELY WITHIN THE PURVIEW OF THE FCC, THEY ARE PREEMPTED BY FEDERAL LAW.

Issues relating to whether a station's programming is appropriate, in the public interest and serves the diverse needs of its community, are within the exclusive jurisdiction of the FCC to address in the context of station licensing and license renewal proceedings. The federal government has fully occupied the field in this area.

In *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), the "Society," an owner of a radio station, leased the station to "WOW," a corporation formed to operate the station as lessee. The parties jointly applied to the FCC for its consent to a transfer of the station license. The plaintiff, a member of the Society, sued to have the lease and assignment of the license set aside for fraud. While the suit was pending, the FCC consented to the assignment of the license, and the Society transferred the station properties and the license to WOW. The Nebraska Supreme Court, however, ordered the parties "to do all things necessary" to secure a return of the license to the Society.

The Supreme Court held that the state court "went outside its bounds" when it ordered the parties "to do all things necessary" to secure a return of the license, stating: "[p]lainly, that requires the Society to ask the Commission for a retransfer of the license to it and requires WOW not to oppose such a transfer." *Id.* at 130. The Court went on to hold that:

> These restrictions are not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. ***It disregards practicalities to deny that, by controlling the conduct of parties before the Communications Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it.***

Id. at 131 (emphasis added).

Similarly, in *Blackburn v. Doubleday Broadcasting Co., Inc.*, 353 N.W.2d 550 (Minn. 1984), plaintiffs brought state law nuisance claims against radio stations whose broadcasts were alleged to interfere with the plaintiffs' ability to receive broadcasts from other stations. The Blackburn court noted that "the preemption question turns on whether there exists an irreconcilable conflict between the purposes of the Federal Communications Act and the

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common-law remedy at issue." *Id.* at 555. In the present case, plaintiffs as individuals and purported agents of the State effectively seek to have this Court, a State court, dictate who shall have control of the programming of the station and, thus, decide who is the de facto licensee. Plaintiffs here, thus, seek to have State law claims govern matters that are preempted by federal law.

IX. CONCLUSION

For the reasons stated above, the Foundation Defendants respectfully request that this Court sustain the demurrer to the complaint without leave to amend.

Dated: March 19, 2001

EPSTEIN BECKER & GREEN, P.C.

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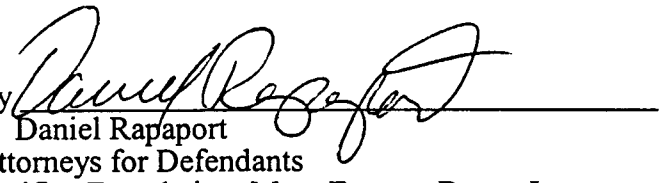
By 
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