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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. CAROL SPOONER, KURT GUERDRUM, ARTURO GRIFFITHS, AMBURN R. HAGUE, LEIGH HAUTER, PATRICIA HEFFLEY, BARBARA MacQUIDDY, RICK POTHOFF, CHARLES P.H. SCURICH, RONALD SWART, individually and on behalf of PACIFICA FOUNDATION,

Plaintiffs,

vs.

PACIFICA FOUNDATION, a California non-profit public benefit corporation and charitable trust, MARY FRANCES BERRY, JUNE MAKELA, FRANK MILLSPAUGH, ANDREA CISCO, KEN FORD, ROB ROBINSON, DAVID ACOSTA, MICHAEL PALMER, ROBERT FARRELL, AARON KRIEGEL, PETER BRAMSON, KAROLYN VAN PUTTEN, TOMAS MORAN, WENDELL JOHNS, LESLIE CAGAN, VALRIE CHAMBERS, BERTRAM LEE, BETH LYONS, JOHN MURDOCK, LYNN CHADWICK, and DOES 1-100, inclusive,

Defendants.

Case No. C 00 3815 WHA

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FOUNDATION'S MOTION TO DISMISS

Date: November 30, 2000
Time: 8:00 a.m.
Dept: 9
Judge: Hon. William H. Alsup

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I. INTRODUCTION[1]

Plaintiffs in this case are a group of self-selected disgruntled listeners of five radio stations[2] who crave the opportunity to control the content of the airwaves assigned to those stations by the Federal Communications Commission ("FCC"). The exclusive authority to control that content, however, belongs to the licensee designated by the FCC. That licensee is the Pacifica Foundation ("Foundation").

Plaintiffs dislike the changes that the Foundation, acting through its Board of Directors, has made and proposes to make in its stations' programming and administration. They seek to have the Court order changes to the Foundation's decisions, and to give plaintiffs authority they do not now possess with respect to determinations regarding future programming. While plaintiffs attempt to disguise their claims as involving state law issues, that is merely a façade. The undeniable essence of plaintiffs' claim is that they object to the programming and administrative decisions of the Foundation. As a result, plaintiffs' claims and requests for relief tread squarely on ground reserved exclusively for the FCC and CPB and are therefore preempted.

Plaintiffs also lack standing to bring this suit because, after receiving permission from the Attorney General to proceed as relators, they made very substantial changes to the complaint approved by the Attorney General. This is a clear and direct violation of applicable law. Cal. Code Regs. tit. 11, §§1-2.

Plaintiffs' claims against the Directors of the Foundation must be dismissed for two additional compelling reasons. First, the conduct alleged as the basis of plaintiffs' claims falls within the protection of the business judgment rule. Second, under California law, plaintiffs are first required file a verified petition with a court seeking leave to proceed against directors of a

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[1] This Memorandum is filed in support of the Motion to Dismiss filed on behalf of the following defendants: Pacifica Foundation, Mary Frances Berry, June Makela, Frank Millspaugh, Andrea Cisco, Ken Ford, David Acosta, Michael Palmer, Karolyn Van Putten, Wendell Jones, Valrie Chambers, Bertram Lee, Beth Lyons, John Murdock, Robert Farrell, and Lynn Chadwick (hereafter the "Foundation Defendants"). The Foundation Defendants have filed a motion seeking the realignment of defendants Robinson, Kriegel, Bramson, Moran, and Cagan as plaintiffs.

[2] KPFW (Washington, DC), KPFA (Berkeley), KPFT (Houston), KPFK (Los Angeles) and WBAI (New York).

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non-profit entity prior to filing suit against such directors. Plaintiffs did not do so. Cal. Code Civ. Proc. §425.15.

The claim for an accounting must be dismissed for two separate reasons. First, only the "members" and "directors" of a corporation, as defined by statute, have standing to seek an accounting. Plaintiffs, in their capacities as either "listener-sponsors" or "relators" fall into neither of these categories. Second, under applicable law, a plaintiff must first make a demand on the corporation for an accounting before he or she has 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 government officials, not to directors or officers of private nonprofit corporations such as 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 the representatives either to a station's Local Advisory Board ("LAB"), or to the Foundation's Board. There is simply 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 right on the listener to have any authority or control over the operation or program content of any of the Foundation's five stations.

II. THE STANDARD FOR A MOTION TO DISMISS

The Complaint must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") because it fails to state a claim on which relief may be granted. Under Rule 12(b)(6), a claim should be dismissed if, after accepting all well-pleaded allegations as true, and drawing all reasonable factual inferences the plaintiffs' favor, the plaintiffs can prove no set of facts alleged in the complaint that would entitle them to relief. *Warshaw v. Xoma Corp.,* 74 F.3d 955, 957 (9th Cir. 1996); *Johnson v. Knowles,* 113 F.3d 1114, 1117 (9th Cir.

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[3] Cal. Corp. Code §6333.

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

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1997) (a complaint should not be dismissed unless it appears beyond a reasonable doubt that plaintiffs can prove no set of facts in support of their claim that would entitle them to relief); *Oscar v. University Students Co-op. Assoc.*, 965 F.2d 783, 785 (9th Cir. 1992); *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998).

While the Court must accept all material allegations in a complaint as true, the Court need not accept legal conclusions, couched as factual allegations, as if they were true. *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology,* No. 99-15243, 2000 WL 1434626, *3 (9th Cir. Sept. 29, 2000) (conclusory allegations of law and unwarranted inferences are insufficient to defeat motion to dismiss for failure to state a claim); *Associated Gen. Contractors of America v. Metropolitan Water Dist. of S. California*, 159 F.3d 1178 (9th Cir. 1998).

Indeed, it is proper for a court to go outside the complaint and consider other materials and documents in evaluating a motion to dismiss under Rule 12(b)(6). *Cooper v. Pickett,* 137 F.3d 616 (9th Cir. 1997); *Fecht v. The Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996); *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) ("a document is not 'outside' the complaint if the complaint specifically refers to the document and if its authenticity is not questioned"); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988) (on a motion to dismiss, court may take judicial notice of documents which are "a matter of general public record"); *Mishler v. Clift*, 191 F.3d 998 (9th Cir. 1999); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

III. THE PLAINTIFFS' CLAIMS ARE PREEMPTED BY FEDERAL LAW.

A. Plaintiffs Seek to Change the Substance and Style of the Programming Aired by the Foundation's Stations and to Thereby Achieve De Facto Control of the Foundation's Broadcast Licenses.

While plaintiffs' claims are styled as state law causes of action, their actual agenda is to achieve control of the programming of the Foundation stations and to seize control of the stations and their broadcast licenses. (See, e.g., Compl., ¶¶1-4, 19-22, 43; Prayer For Relief, ¶¶1-8, 11-16). Such matters and purposes, however, are exclusively subject to federal regulations and, moreover, fall within the jurisdiction of the FCC as to program content issues, and the

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Corporation for Public Broadcasting ("CPB") with respect to the governance of public radio stations that receive federal funds through CPB. As to program content and community service issues, these must be brought first before the FCC in the context of a license renewal proceeding.[5] Then, if the plaintiffs are unhappy with the FCC's decision, their sole recourse would be an appeal to the Court of Appeals for the District of Columbia Circuit. 28 U.S.C. §2342(1); 47 U.S.C. §402(b)(2). Plaintiffs reveal the essence of their complaint early on, stating, in Paragraph 3 of their Complaint:

> In response to pressure from the CPB, members of the Pacifica Board of Directors and the Executive Director secretly made plans to divert Pacifica from its historic purpose and tradition of providing politically controversial programming and cutting-edge alternative news and information to the public.

Subsequently, they elaborate on their theme that the Foundation has changed the programming of its stations in a manner that they consider inappropriate, stating:

> [B]eginning as early as 1994, in response to fears of losing Corporation for Public Broadcasting ("CPB") funding, or in hopes of gaining more CPB funding as well as foundation grants, the executive director and the directors of Pacifica began a campaign of curtailing politically controversial news and public affairs programming on Pacifica stations, adding popular "niche music" programming, "professionalizing" air sound in a National Public Radio-type mimicry, reducing the numbers of volunteer programmers, "union busting" to remove volunteer programmers from the staff unions, reducing the diversity of arts, literature and cultural programming, and "pitching" Pacifica programming to more [sic] a wider more affluent, more "mainstream" listening audience and to corporate-funded foundation grant-makers.

(Compl. ¶19).

The relief sought by the plaintiffs reveals that their agenda not only involves a transfer of authority to them, but also requires the courts to be directly involved in station programming and administrative decisions. For example, they seek:

> Judgment requiring cessation of Defendants' expenditures of listener-sponsors' funds on pursuits inconsistent with the objectives of listener-sponsored free speech radio.

(Compl., Prayer for Relief at ¶10). The Court issuing such a judgment must, of necessity, decide

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[5] The CPB can also review these issues in determining whether to renew funding.

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what "pursuits are consistent with the objectives of listener-sponsored free speech radio."[6] Obviously, those pursuits cannot be identified unless that court first has determined the character of the "objectives" to be pursued.

The plaintiffs' concerns with the propriety of the stations' programming, and their belief that they, rather than the Foundation and its Board, should have control over the exercise of the authority provided by the Foundation's broadcast license, are issues properly addressed to the FCC at the time the stations' licenses come up for renewal. The FCC has exclusive responsibility[7] for determining which stations and owners should be granted licenses, and for reviewing the programming and operation of a radio station in order to determine whether its license should be renewed. 47 U.S.C. §301; see *Schroeder v. Municipal Court for the Los Cerritos Judicial Dist. of Los Angeles County,* 141 Cal. Rptr. 85 (1977). The only proper remedy available to plaintiffs is to complain first to the FCC and then, if dissatisfied with the result, to appeal to the D.C. Circuit Court of Appeals. See 28 U.S.C. §2342(1); 47 U.S.C. §402(b)(2). This suit is a blatant attempt to avoid exhausting available administrative remedies, and to improperly enmesh the judiciary in issues over which the FCC and CPB have jurisdiction.

B. Review of Programming and Determinations Regarding Who Should Control Broadcasting Licenses are the Function of the FCC.

The FCC has comprehensive authority to regulate radio broadcasting. The Federal Communications Act ("FCA"), 47 U.S.C. §151, *et seq.*, provides that the FCC shall "generally

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[6] Plaintiffs nowhere define the term "free-speech radio." Two salient points should be noted: (1) The Foundation is a private, not a governmental entity. By exercising the authority it has as a licensee, it does not engage in any conduct affected by the First Amendment. (2) The Foundation as the licensee and owner of its stations is vested with the authority and obligation to control what its stations air, and is liable for any injuries caused by tortious or otherwise wrongful speech its stations broadcast. If by "free-speech radio" plaintiffs mean a broadcast system through which any one of them, or others of whom they approve, can say anything they want, and have the Foundation simply take the consequences without any ability to interfere, such a system is a fantasy. Courts deal with reality and not wishful fantasies.

[7] Complaints about a public radio station's compliance also can be directed to the Corporation for Public Broadcasting ("CPB") and its Inspector General. See 5 U.S.C. Appendix § 1, *et seq.* ("Inspector General Act"). The CPB, if it concludes that a public radio station is acting in violation of legal requirements and is not serving its community, can deny federal funding. 47 U.S.C. §396(u)(8)(E).

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encourage the larger and more effective use of radio in the public interest." 47 U.S.C. §303(g). The FCA gives the FCC the power to grant and renew radio broadcast licenses according to the dictates of the "public interest, convenience, and necessity." 47 U.S.C. §307(a); see also 47 U.S.C. §312 (discussing FCC's power to revoke a license).

It has long been recognized that the FCC's power to regulate radio broadcasting extends beyond the regulation of technical matters, such as preventing interference between stations. The United States Supreme Court has consistently recognized that:

> An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license.

National Broadcasting Company v. United States, 319 U.S. 190, 217 (1943).

In *National Broadcasting Company* the Court added that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio.

Id. (internal quotation marks and citations omitted)

Further, "[t]hese provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest." *Id.* (internal quotation marks and citations omitted).

Similarly, in *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir. 1948), the court stated:

> We are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. ***It puts upon the Commission the burden of determining the composition of that traffic.***

Id. at 672 (emphasis added).

An express part of the FCC's charge and authority is to ensure that diverse views are represented in radio broadcasting:

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> [T]he Commission can and should attempt through the licensing process to ensure a multitude of tongues in order to provide the people with a multitude of ideas. This authorization is founded on values contained in the First Amendment and is thus presumed to be part of the FCC's "public interest" standard.

Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 273 (D.C. Cir. 1974) (Bazelon, C.J., concurring in the result).

The FCC thus requires every broadcaster to carry out an assessment of its community's perceived problems, and to broadcast programming responsive to those problems. Moreover, the FCC has the power to deny a broadcast license renewal if a station has not adequately addressed the needs of its community. Groups of listeners, such as the plaintiffs, have standing to intervene in a broadcast license renewal proceeding before the FCC. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). For instance, in *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732 (D.C. Cir. 1976), the plaintiffs challenged the FCC's renewal of a television station's license. They alleged that, while the community was 40% Mexican-American, the station spent only 2 to 6% of its public interest programming (excluding news shows) dealing with problems of interest to the Mexican-American community. *Id.* at 738.

The court stated:

> The Commission could find that such a gross disparity in allocation of programming time indicates a broadcaster's failure to serve his community's needs. Such a finding could suffice to deny renewal as a matter of law, or to establish a prima facia case that the broadcaster was not acting in the public interest and that a hearing was required.

Id. Critically, however, the court ruled that, because the plaintiffs had failed to raise this precise issue before the FCC, the court was foreclosed from adjudicating the claim, holding that:

> The Commission must be given a fair opportunity to pass on a novel legal or factual argument, either initially or on a petition for reconsideration, before it can be brought before a reviewing court. Otherwise, the reviewing court would in effect be exercising primary jurisdiction over [an] issue not raised in front of the agency.

Id. at 739.

As another court has explained:

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> [The] freedom of the licensee to determine what programs his station shall broadcast is not, of course, an absolute and unfettered one. The exercise of the right is subject to review by the administrative agency, the Federal Communications Commission. [Periodically] the Commission must determine whether a renewal of the license is in the public interest, 47 U.S.C.A. §307, and it may review the action of the licensee in selecting programs at any time in proceedings under 47 U.S.C.A. §312. The enforcement of the Act and development of the concept of public interest under the Act are thus entrusted primarily to an administrative agency. The only function of the courts in the enforcement of the Act is the exercise of the right to enforce or review orders of the Commission under Sections 401 and 402 of the Act.

Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 500 (1st Cir. 1950). Similarly, in *M.B. Schnapper v. Foley*, 667 F.2d 102, 116-17 (D.C. Cir. 1981), the court held that the FCC is the exclusive forum for a listener's claims that the production and broadcast of a program disserved the public interest in violation of 17 U.S.C. §309(a).

C. 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 and in the public interest, and whether it serves the diverse needs of the community are within the exclusive jurisdiction of the FCC to address and resolve in the context of licensing and license renewal proceedings. The federal government has occupied the field in this area and state law claims that seek to address these areas therefore are preempted.

There are three circumstances in which federal law will preempt a state law. *See, e.g.*, *Cox v. Shalala*, 112 F.3d 151, 153 (4th Cir. 1997) ("*Cox*"). First, state laws are preempted where Congress expressly states its intention to preempt. *Id.*, citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, absent such express preemption, a state law will be preempted where Congress has regulated so pervasively in an area, that it fully occupies the field and there is no room left for the states to supplement federal law. *Cox*, 112 F.3d at 153, citing *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982). Finally, even where there is not express preemption and Congress has not occupied the field, a state law will be preempted to the extent it actually conflicts with federal law. *Cox*, 112 F.3d at 153, citing *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983).

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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, and the parties jointly applied to the FCC for consent to transfer 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. On appeal from a lower court decision, the Nebraska Supreme Court ordered the transfer of the licensed facilities back to the Society and ordered the parties "to do all things necessary" to secure a return of the license to the defrauded Society.

On review, the Court found that the order transferring the leasehold back to the Society was proper, but 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 the present case, plaintiffs effectively seek to have this Court dictate who shall have control of the programming of the station and decide who is the de facto licensee. Additionally, they effectively seek to have this Court rule that LABs and random self-appointed "listener sponsors" control the broadcast licenses of the Foundation and dictate how the stations are run and what they air. (See Compl. generally). As a result, plaintiffs here, like those in *Radio Station WOW*, seek to have the Court reach "into matters that do not belong to it." *Id.*

In *Regents of University System of Georgia*, 338 U.S. 586 (1950), the Court held that a breach of contract action by a radio station which had sold its stock to a university was not

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preempted, even though the FCC had indicated to the university that, unless the university agreed to give no further effect to the contract, it could lose its license. The Court stated that, "[t]he Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant." *Id.* at 600. However, the facts of the *Regents* case and of its progeny are clearly and materially distinguishable from the facts in the present case.

First, unlike *Regents*, this case does not involve the enforcement of contract rights and obligations between plaintiffs and the Foundation or the Foundation Defendants. Second, a clear and dominant aspect of the relief plaintiffs seek is to have this Court directly dictate matters relating to the programming contents and the administration of the stations. Such regulatory functions are reserved solely to the FCC and the CPB.

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 court ruled that those claims were precluded, holding:

> [T]he instant nuisance claim involves subject matter within the exclusive regulatory jurisdiction of the FCC. To allow the instant state law nuisance claim would frustrate the scheme of the Federal Communications Act which grants the FCC exclusive jurisdiction over this subject matter. Accordingly, we hold that enforcement of the instant state law nuisance claim is barred by the Supremacy Clause of the United States Constitution.

Id. at 556. In reaching this conclusion, 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 common-law remedy at issue." *Id.* at 555. As is directly relevant here, the court ruled that:

> ***Unquestionably, federal legislation has pre-empted local regulation of*** radio transmission, including assignment of frequencies, interference phenomena, and ***the content of broadcast material.***

Id. (emphasis added). In sum, plaintiffs' attempt to utilize state law and the judiciary to attain

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their goal of achieving programming and administrative control of the Foundation's stations is an unvarnished attempt to evade the jurisdictional authority of the FCC and CPB.

D. Plaintiffs' Claims That Seek to Give the Local Advisory Boards Control over the Foundation Are Preempted by the Public Broadcasting Act ("PBA"), and, Under the Provisions of the PBA, Lack Any Merit.

Plaintiffs seek to have this Court confer upon LABs effective control over the Foundation. (See Compl. generally). Federal law specifically proscribes any such result. Applicable law requires that, as a recipient of funding from the CPB, the Foundation must: (1) assure that its Directors are independent of LAB influence and control; and (2) control its stations' program content and administration. 42 U.S.C. §392 (a)(2) (applicants for grants from CPB must provide assurances that "the operation of such public telecommunications facilities will be under the control of the applicant"). In brief, plaintiffs' requested relief demands that the Court nullify clear federal law requirements.

The CPB was created by the Public Broadcasting Act of 1967 ("PBA"), 47 U.S.C. §390 *et seq.* The CPB is a nonprofit, private corporation governed by a 10-person, bipartisan Board of Directors appointed by the President with the advice and consent of the Senate. See *FCC v. League of Women Voters of California*, 468 U.S. 364, 369-70 (1984). It was founded to provide federal funding for noncommercial radio and television stations in support of such stations' operations and educational programming. See *id.* at 366.

The PBA provides that, in order to receive CPB funding, a station must have a "community advisory board."[8] 47 U.S.C. §396(k)(8)(A). Moreover, the Act expressly provides that:

> The role of the [community advisory] board shall be ***solely advisory*** in nature, except to the extent other responsibilities are delegated to the board by the governing body of the station. ***In no case shall the [community advisory] board have any authority to exercise any control over the daily management or operation of the station.***

47 U.S.C. §396(k)(8)(C) (emphasis added).

The Pacifica Foundation currently has five community advisory boards or LABs — one

[8] For reasons having no substantive effect, those entities are called a "LABs" by the Foundation.

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for each of its five stations. (Compl. ¶2 (naming the Foundation's five stations) and ¶21 (discussing the LABs)). Plaintiffs allege that, under the Foundation's bylaws as they were amended in 1984, each of the LABs had the right to elect Directors to sit on the Board of the Foundation. (Compl. ¶22).[9] That this authority was determined to be out of compliance with the just cited statute, which requires that recipients of CPB funding have LABs that do not "have any authority to exercise any control over the daily management or operation of the station." 47 U.S.C. §396(k)(8)(C). Indeed, the plaintiffs themselves allege that the CPB informed the Foundation in 1998 that this arrangement "appear[ed] to be at variance with both the law and our guidelines." (Compl. ¶24). Plaintiffs allege that in 1999, faced with the threat of losing its CPB funding, the board of the Pacifica Foundation voted unanimously to change the bylaws so as to ensure that the Foundation was in compliance with the law. (Compl. ¶24).

Plaintiffs contend that the Foundation should have exercised their judgment to forego the CPB funding in order to provide LABs with the right to elect the Directors of the Foundation. Even if that right had existed, which it did not, and even if that point of view made sense, it was rejected by the Directors who have the fiduciary responsibility for the stations. If plaintiffs' allegations were true, the result would have been an unlawful transfer of de facto control of the stations' broadcast licenses.

IV. 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.

In order to bring an action as a relator, a plaintiff must have the permission of the California Attorney General. Cal. Civ. Proc. Code §803, *et seq.* Plaintiffs sought and received

[9] Foundation Defendants do not concede that the LABs ever had the power to elect Directors of the Foundation. Rather, the only power that the LABs ever had was the power to nominate Directors of the Foundation. Any change in the Bylaws complained of was simply intended to comply with the PBA by ensuring that the same individuals did not sit on both an LAB Board and the Foundation Board. However, even if plaintiffs' allegations are accepted as true for purposes of this motion to dismiss, their claims are preempted by the PBA. Specifically, if, as plaintiffs allege, the Foundation had to modify its Bylaws to take away the LABs' right to vote in order to comply with federal law, then the plaintiffs' claims that this action violated state law are preempted.

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permission to file this action on the basis of a specific proposed complaint they submitted to the Attorney General. (See Ex. A to Decl. of Daniel Rapaport filed herewith.) However, the Complaint filed with this Court is substantially altered from the one submitted to the Attorney General. Because the complaint before the Court is not the one that the Attorney General approved, plaintiffs do not have any authority to maintain this suit.

California's statutes and regulations set forth the procedure under which relator status may be obtained from 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 then 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 submitted to and approved by the Attorney General. While the Attorney General has authority to modify the complaint, relators do not. The regulations state:

> 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 Regs. tit. 11, §7 (emphasis added).

This limitation serves several salutary purposes. First, by requiring a relator to follow through on the proposed suit approved by the Attorney General, the limitation assures that the State's sovereign authority entrusted to the Attorney General is not misused by private citizens for their personal ends, but is used to pursue public ends. It also guarantees that the proposed defendants will have had an opportunity to address every claim the Attorney General has been asked to review and approve.[10] Despite the clear prohibition against their unilateral amendment of the complaint approved by the Attorney General, plaintiffs pulled a morally and legally indefensible "bait and switch" with the complaint.

[10] For instance, they add parties who have been deprived of their statutory right to dispute the request to the Attorney General prior to the complaint being filed.

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That complaint is substantially different from the complaint presented to the Attorney General. (*Compare* Complaint filed in this action with complaint proposed to the Attorney General, attached as Ex. A to the Declaration of Daniel Rapaport.) For example, the new complaint presents ten causes of action, whereas the complaint that was approved included only five. The present complaint has 88 paragraphs, whereas the complaint approved by the Attorney General had far less than half that number. Finally, the new complaint adds new parties, an entirely new theory of liability, and causes of action that never were considered or approved by the Attorney General. (*See, e.g.*, Compl., Count Ten (Unfair Competition).) Such sweeping changes to the complaint are entirely inconsistent with the statutory requirement that a Relator must file a complaint identical to that approved by the Attorney General. Cal. Code Regs. tit. 11, §7

The Foundation Defendants anticipate that plaintiffs will contend that the Attorney General's letter granting permission to bring a relator action somehow exempts them from the identical complaint filing requirement. (See Ex. A to Compl., Letter dated September 14, 2000). The Attorney General's letter, issued prior to plaintiffs' filing of the complaint, arguably does contain a broad grant of latitude. The letter grants permission to bring in court the causes of action contained in the original complaint and "such other causes of action and relief as relators deem appropriate." Even if this grant of authority were as broad as plaintiffs are likely to argue, 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 action is ultra vires, as the Attorney General has no authority to waive this statutory mandate. See *Neighborhood Action Group For Fifth District v. County of Calaveras*, 203 Cal. Rptr. 401, 411-412 (1984) (rejecting argument that grant of extension by director of administrative agency is impervious to judicial review, stating, "[t]he statutory authority to grant extensions of time to comply is circumscribed by numerous conditions. The Act of extension itself may be ultra vires as in violation of these conditions") (footnote omitted).

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The Attorney General has a non-delegable duty to oversee and control any litigation brought under his name. Cal. Code Regs. tit. 11, §8; *City of Fresno v. People ex rel. Fresno Firefighters, IAFF Local 753*, 83 Cal. Rptr. 2d 603, 609 (1999) (Attorney General has ultimate control over the course of relator litigation) (citation omitted); *Motion Picture Studio Teachers & Welfare Workers, Local No. 884 v. Millan*, 59 Cal. Rptr. 2d 608, 611 (1996) (agency is not permitted to disregard a regulation's plain language). If his letter were construed as a waiver, the Attorney General would plainly have violated the duties of his office in that he would have turned over to private citizens the discretion to determine how the sovereign power of the State shall be utilized. Moreover, the Attorney General cannot waive the Foundation Defendants' right and opportunity to present a response to him to the new assertions and causes of action put forward by plaintiffs. If his letter was intended to have such an effect, it is not only ultra vires, it is also a violation of the Foundation Defendants' procedural due process rights as established by statute. Because plaintiffs filed a complaint that is substantially unlike the one approved by the Attorney General, plaintiffs are not entitled to bring this action as relators. Accordingly, the complaint should be dismissed in its entirety.

B. Counts Two Through Nine 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 based on several different statutes and regulations. (*See* Compl. ¶5 (Cal. Civ. Proc. Code §803; Cal. Corp. Code §§5142, 5223, 5250, 5520; Cal. Gov. 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 Nine.

The Attorney General himself (as opposed to relators) might be authorized to bring actions such as those arising under Counts Two through Nine. These counts allege various purported violations of the California Nonprofit Corporations Law (Counts Two through Nine). The Attorney General has authority under California Government Code §12598 to bring actions arising from violations of the Nonprofit Corporations Law (§5000 *et seq.*, Cal. Corp. Code), but not to authorize relators to do so. Likewise, the Attorney General alone is specifically authorized

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to bring actions under §5223 of the California Corporations Code — the section prohibiting "gross abuse of authority and discretion." None of these statutory provisions, however, grants any authority to the Attorney General to empower or delegate to private citizens the authority 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 the Attorney General has no authority to confer such standing upon them, as the Legislature did not see fit to grant him such power.

Plaintiffs cite only two statutes under which the Attorney General is authorized to grant relator standing. Cal. Civ. Proc. Code §803, Cal. Corp. Code §5142. Only one of these statutes is arguably relevant 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 gives the Attorney General the authority to grant the plaintiffs relator status for purposes of Count One (Breach of Charitable Trust).

The only other statute cited by plaintiffs under which relator status is available, is section 803 of the California Code of Civil Procedure. Plaintiffs' Counts Three, Four, and Five, which seek removal of various directors for "usurpation of office," [11] each rely on Section 803 as the source of authority for the grant of relator status. (Compl., 53, 57, and 63). However, plaintiffs' reliance on Section 803 is misplaced. Section 803 has no applicability or reference to directors and officers of non-profit corporations.

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 non-profit 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*, 113 Cal.App.2d 428, 432; 248 P.2d 450, 453 (1952) (citing *Parker v. Riley*, 18 Cal.2d 83, 87; 113 P.2d 873, 875 (1941)). The sovereign powers of the state are

[11] Compl., Counts Three to Five.

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involved if a public 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.* The Foundation's directors and officers neither possess nor exercise any of these powers. Critically, the State has no "police powers" with respect to FCC broadcast licensees. Necessarily, they do not hold a public office for purposes of section 803.

The Foundation's Directors and officers also have not usurped a "franchise" as required by Section 803. Under California law, the term "franchise" is used synonymously with a "right" or "privilege" to make private use of a State asset or authority. 80 Ops. Cal. Atty. Gen. 290 (1997). A franchise is typically 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, such as the railways, trolleys, gas, water, sewer, or electric companies. *Saathoff v. City of San Diego*, 41 Cal. Rptr. 2d 352, 356 (1995). 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 no regulatory power over them. There is no plausible argument that the Foundation Defendants are involved with a "franchise." Clearly, Directors of the Foundation — a private, non-profit corporation that is a licensee of the FCC — are not holders of a franchise under Section 803. Thus, the Attorney General does not even have standing to bring these claims himself, much less to bestow relator status on plaintiffs to bring these claims.

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

Plaintiffs' claims against the Foundation Defendants must be dismissed because their complaint fails to allege any conduct that is not subject to the protection of the business judgment rule. 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, when plaintiffs fail to allege facts sufficient to overcome the immunity from liability provided by the business judgment rule, the complaint must be dismissed. See *Barnes v. State Farm Mut. Auto. Ins. Co.*, 20 Cal. Rptr. 2d 87, 95 (1993).

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California has codified a corporate director's duty of care to his or her corporation in Section 5231(a) of the California Corporation Code. This statute provides that:

> 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.

Cal.Corp. Code §5231(a) (emphasis added).

California also has codified the business judgment rule. Section 5231(c) of the California Corporation Code 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. *See generally, 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); *Katz v. Chevron Corp.*, 27 Cal.Rptr.2d 681 (1994). 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." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985). Further, the burden falls upon the plaintiffs to plead with particularity allegations of fraud, bad faith, and self-dealing. Fed R. Civ. P. 9(b); *see also, Aronson*, 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). Plaintiffs here utterly and completely fail to present any such detailed factual allegations in their complaint.

The business judgment rule protects many types of actions and decisions from liability

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even if, in hindsight, the result produced proves unfavorable. *See, e.g., Shlensky v. Wrigley*, 237 N.E.2d 776 (Ill. App. 1968); *see also, Kamin v. American Express Co.*, 383 N.Y.S.2d 807 (Sup. Ct. 1976). 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. Even if that were true, it does not follow that the Directors are not entitled to the protection and benefit of the business judgment rule. As long as the plaintiffs have not alleged with particularity that the conduct involved "fraud, bad faith, or self-dealing," the conduct is protected by the business judgment rule.

Not one of the plaintiffs' allegations amounts to a claim of fraud, bad faith or self-dealing. For instance, the plaintiffs allege that Foundation 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 in the abstract that the Directors should have decided otherwise, that allegation falls far short of claims of fraud, bad faith, or self-dealing pled with particularity.

Next, plaintiffs complain that the Foundation changed its bylaw provisions relating to the election of Directors. (Compl. ¶24). California Corporation Code Section 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." Therefore, any decision to amend the Foundation's bylaws allegedly in order to avoid the "threat of immediate withholding [of] the second half of CPB funding," (Compl. ¶24) would have been a decision covered by the business judgment rule.[12] The opinion of a group of individuals that the Foundation should have foregone CPB funding does not amount to an allegation of fraud, bad faith, or self-dealing by the directors.

The plaintiffs further contend that the Foundation's directors improperly terminated staff

[12] Foundation Defendants deny that any change in bylaws ever affected the rights of LAB members. They **never** had the right to elect the Foundation's Board members. They were delegated the obligation to nominate some directors who were, in turn, elected by the Board itself.

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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 a plausible argument could be made that plaintiffs' point of view as to these actions were correct, these allegations 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 plaintiffs vehemently disagree with these choices. However, a decision by the majority of the Foundation's Board that differs with plaintiffs' point of view is not evidence of fraud, bad faith, or self-dealing, no matter how completely certain plaintiffs are that theirs is the only correct point of view. 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, the Foundation Directors' conduct is protected by the business judgment rule and this Court should dismiss all of the claims against them.

VI. 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 Section 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. The statute provides, in relevant part:

> 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.[13]

[13] Plaintiffs' purported "relator" status has no relevance to this requirement. Section 425.15 makes no exception for "relators."

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The statute also provides that the court may allow the filing only upon the filing of a verified petition "accompanied by the proposed pleading and supporting affidavits stating the facts upon which the liability is based." *Id.*

The plaintiffs never sought or obtained leave of 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" 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. Plaintiffs' claims include allegations that the wrongdoing of the individual Foundation Defendants constituted negligence.

Section 425.15 applies even where it is alleged that the directors have failed to use ordinary care and skill and, thus have behaved in a manner that is negligent. Because the plaintiffs failed to seek judicial approval from a court before filing this action, and because their claims contain allegations of negligence, their claims against the individual Foundation directors and officers are barred by §425.15 of the California Code of Civil Procedure.[14]

VII. THE CLAIM FOR AN ACCOUNTING (COUNT SIX) 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[15]. This statute, however, provides a right to seek an accounting only to members and directors of the corporation from which the accounting is

[14] As the Complaint here is not one which was approved by the Attorney General and 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 are applicable.

[15] It is pertinent that the PBA requires that each licensee receiving 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 least three years. 47 U.S.C. §396(l)(4)(A).

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sought. Because plaintiffs are neither members nor Directors of the Foundation, they have no standing to bring this claim and the claim must be dismissed.

Moreover, §6336provides 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 given to any other party. The only other statutory right to inspect corporate books is set out in §6334. That statute 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.[16]

Plaintiffs do not allege that they are members or Directors of the Foundation. They describe themselves solely as "listener/sponsors" and "relators." The word "members" 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 do not fall into any of these defined categories.

In a pertinent observation, the legislative history of the California Nonprofit Corporations Code notes that, while donors or contributors may have a "significant interest" in the corporation or "may be members in a general sense," however, "they do not have rights with respect to the internal governance of the corporation." Report of the Select Committee on Revision of the Nonprofit Corporations Code, Assembly Daily Journal (August 27, 1979), p. 9006 (emphasis added). 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

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

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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 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 above) 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, Section 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 either such demands or a refusal by the Foundation. As a result, they lack standing to assert a claim for an accounting, and their sixth cause of action must be dismissed.

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VIII. 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.

In their seventh and eighth claims, plaintiffs 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 of the statutory provisions cited by plaintiffs comes 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 Board 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. That plaintiffs may make tax-deductible contributions to the Foundation, while commendable and generous, does not vest in them with any legal standing or entitlement to the relief they demand.

IX. CONCLUSION

For the reasons stated above, the Foundation Defendants respectfully request that this Court dismiss the plaintiffs' complaint with prejudice, and award to the Foundation Defendants their attorneys' fees and costs in connection with this matter.

Dated: October 23, 2000

Respectfully submitted,

EPSTEIN, BECKER & GREEN, P.C.

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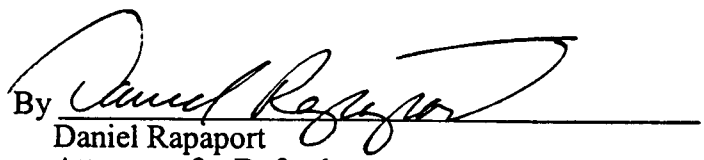
By 
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