

1 Daniel Rapaport (Bar No. 67217)
2 **WENDEL, ROSEN, BLACK & DEAN, LLP**
3 1111 Broadway, 24th Floor
4 Oakland, California 94607-4036
5 Telephone: (510) 834-6600
6 Fax: (510) 834-1928

7 Alan E. Walcher (Bar No. 089717)
8 **EPSTEIN, BECKER & GREEN, P.C.**
9 1875 Century Park East, Suite 500
10 Los Angeles, California 90067-2506
11 Telephone: (310) 556-8861

12 Attorneys for Defendants
13 **PACIFICA FOUNDATION, et al.**

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 **THE PEOPLE OF THE STATE OF**
17 **CALIFORNIA, ex rel. CAROL SPOONER,**
18 **KURT GUERDRUM, ARTURO**
19 **GRIFFITHS, AMBURN R. HAGUE,**
20 **LEIGH HAUTER, PATRICIA HEFFLEY,**
21 **BARBARA MacQUIDDY, RICK**
22 **POTHOFF, CHARLES P.H. SCURICH,**
23 **RONALD SWART, individually and on**
24 **behalf of PACIFICA FOUNDATION,**

25 **Plaintiffs,**

26 **vs.**

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

41 **Defendants.**

42 **Case No. C 00-03815 WHA**

43 **NOTICE OF MOTION AND**
44 **MOTION TO DISMISS FOR**
45 **FAILURE TO STATE A CLAIM**
46 **UPON WHICH RELIEF CAN BE**
47 **GRANTED**
48 **(F.R.C.P. 12 (b)(6))**

49 **Date: November 30, 2000**
50 **Time: 8:00 a.m.**
51 **Courtroom: 9**
52 **Judge: Hon. William H. Alsup**
53 **Trial Date: Not yet set**

1 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on November 30, 2000 at 8:00 a.m. or as soon
3 thereafter as the matter may be heard, in Courtroom 9 of the above-captioned Court,
4 located at 450 Golden Gate Avenue, San Francisco, California, the motion of defendants,
5 Pacifica Foundation, Dr. Mary Frances Berry, June Makela, Frank Millspaugh, Andrea
6 Cisco, Ken Ford, David Acosta, Micheal Palmer, Karolyn Van Putten, Wendell Johns,
7 Valrie Chambers, Bertram Lee, John Murdock, Beth Lyons, Robert Farrell and Lynn
8 Chadwick ("the Pacifica Defendants") to dismiss the action pursuant to Rule 12(b)(6) of
9 the Federal Rules of Civil Procedure because plaintiffs' complaint fails to state a claim
10 upon which relief can be granted is scheduled to be heard.¹

11 The grounds for this motion to dismiss are as follows: First, the claims and relief
12 requested by plaintiffs are preempted by federal law. Second, plaintiffs lack standing to
13 bring this suit because, after receiving permission from the Attorney General to proceed
14 as relators, plaintiffs made very substantial changes to the complaint approved by the
15 Attorney General. Third, the conduct alleged as the basis of plaintiffs' claims falls within
16 the protection of the business judgment rule. Fourth, plaintiffs failed to file the required
17 verified petition with a court seeking leave to proceed against directors of a non-profit
18 entity prior to filing suit against those directors in violation of California Code of Civil
19 Procedure §425.15. Fifth, plaintiffs have no standing in their capacities either as
20 "listener-sponsors" or as "relators" to seek an accounting. Sixth, plaintiffs have no
21 standing to file suit for an accounting, because they have failed to make a demand on the
22 corporation for an accounting. Seventh, plaintiffs' claims for usurpation of office fail to
23 state claims because there is no basis to assert such claims against directors or officers of
24 private nonprofit corporations. Eighth, plaintiffs have no legal basis for relief to the

25 _____
26 ¹ This motion is filed only on behalf of the Pacifica Defendants, as that term is defined
27 herein. The Pacifica Defendants have filed a motion seeking realignment of defendants
28 Rob Robinson, Aaron Kriegel, Peter Bramson, Tomas Moran and Leslie Cagan as
plaintiffs, which motion is scheduled to be heard concurrently with this motion on
November 30, 2000 at 8:00 a.m.

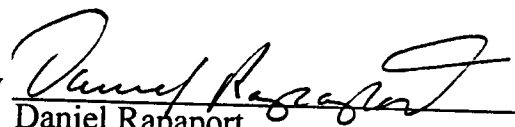
1 extent that they seek to have this Court grant to community public radio listeners
2 "listener-sponsors" any authority or control over the operation or program content of any
3 of Pacifica Foundation's five radio stations.

4 This motion will be based on this Notice of Motion, on the Declaration of Daniel
5 Rapaport and the Memorandum of Points and Authorities filed and served herewith, on
6 the Courts files and records in this action, and on such oral and documentary evidence as
7 may be presented at the hearing of this motion.

8
9 Dated: October 23, 2000

EPSTEIN, BECKER & GREEN, P.C.

10
11 WENDEL, ROSEN, BLACK & DEAN, LLP

12
13 By 
14 Daniel Rapaport
15 Attorneys for Defendants
16 PACIFICA FOUNDATION, DR. MARY
17 FRANCES BERRY, JUNE MAKELA,
18 FRANK MILLSPAUGH, ANDREA CISCO,
19 KEN FORD, DAVID ACOSTA, MICHEAL
20 PALMER, ROBERT FARRELL,
21 KAROLYN VAN PUTTEN, WENDELL
22 JOHNS, VALRIE CHAMBERS, BERTRAM
23 LEE, BETH LYONS, JOHN MURDOCK
24 and LYNN CHADWICK
25
26
27
28

Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036