

1 Daniel Rapaport (Bar No. 67217)
Thiele R. Dunaway (Bar No. 130953)
2 **WENDEL, ROSEN, BLACK & DEAN, LLP**
1111 Broadway, 24th Floor
3 Oakland, California 94607-4036
Telephone: (510) 834-6600
4 Fax: (510) 834-1928

5 Alan E. Walcher (Bar No. 089717)
EPSTEIN, BECKER & GREEN, P.C.
6 1875 Century Park East, Suite 500
Los Angeles, California 90067-2506
7 Telephone: (310) 556-8861

8 Attorneys for Defendants
PACIFICA FOUNDATION, et al.

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

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

17 Plaintiffs,

18 vs.

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

27 Defendants.
28

ORIGINAL
FILED

OCT 16 2000

RICHARD W. WISNICK
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

Case No. 00 3815 WHA

DEFENDANTS' MEMORANDUM
IN SUPPORT OF THEIR MOTION
TO REALIGN ROBERT
ROBINSON, AARON KRIEGEL,
LESLIE CAGAN, TOMAS MORAN,
AND PETER BRAMSON AS
PLAINTIFFS

Date:
Time:
Courtroom:
Judge:

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

1 Defendants Pacifica Foundation, Dr. Mary Frances Berry, June Makela, Frank
2 Millspaugh, Andrea Cisco, Ken Ford, David Acosta, Micheal Palmer, Karolyn Van
3 Putten, Wendell Johns, Valrie Chambers, Bertram Lee, John Murdock, Robert Farrell,
4 and Lynn Chadwick (the "Pacifica Defendants") submit the following memorandum in
5 support of their Motion to Realign Robert Robinson, Aaron Kriegel, Leslie Cagan, Tomas
6 Moran, and Peter Bramson as plaintiffs.

7 BACKGROUND

8 The Pacifica Corporation is a non-profit corporation which is the licensee of the
9 Federal Communications Commission ("FCC") with respect to five community radio
10 stations, two of which are located in California. On September 15, 2000, individuals
11 classifying themselves as "listener-sponsors" of Pacifica Foundation ("Pacifica") filed
12 suit against Pacifica. They did so in the purported capacity of "Relators." Neither the
13 plaintiffs nor the State of California are Directors, officers, employees, investors, holders
14 of equity interest in, or otherwise have any relationship to the Foundation. Their sole
15 relationship to the Foundation is that they chose to listen¹ for free, to its programs, and, in
16 their sole discretion, make tax-deductible contributions in such amounts as they choose to
17 donate.² The plaintiffs allege that the Pacifica Board implemented a "secret" plan during
18 assertedly secret Board meetings during 1994 and 1995,

19 curtailng politically controversial news and public
20 affairs programming . . . 'professionalizing' air sound in a
21 National Public Radio-type mimicry, reducing the numbers of
22 volunteer programs, 'union busting' to remove volunteer
23 programmers from the staff unions, reducing the diversity of
24 arts, literature and cultural programming, and 'pitching'
25 Pacifica programming to a more [sic] wider more affluent,
26 more 'mainstream' listening audience and to corporate-
27 funded foundation grant-makers.

24 Complaint at ¶19.

25 They also contend that the decision of the Pacifica Board's (the "Board") to amend

26 ¹ It is not clear whether the State of California also is a listener of Pacifica's stations.

27 ² While the Pacifica receives federal funds from the Corporation for Public Broadcasting,
28 it does not receive funding from the State.

1 Pacifica's Bylaws to accurately reflect the Board's authority to appoint and elect its
2 Directors was unlawful and must be reversed. Complaint at ¶23-24. The plaintiffs
3 purport to raise seven causes³ of action under state law. However, each of the plaintiffs'
4 state law causes of action seek an amendment to Pacifica's Bylaws: "establishing a fair,
5 reasonable, and democratic mechanism for the definition and selection of a body of
6 voting members, consistent with a modicum of due process, and ensuring the listener-
7 sponsors a voice in the management of Pacifica." Prayer for Relief at ¶6. They also seek
8 to have the composition of Pacifica's Board restructured. Prayer for Relief at ¶2. Robert
9 Robinson, Aaron Kriegel, Leslie Cagan, Tomas Moran, and Peter Bramson are Pacifica
10 Directors, a minority of the Board of Directors, who have opposed the Board's actions.
11 By their words and acts, all of these individuals have aligned themselves with the
12 plaintiffs against the Pacifica Defendants to force a political change at Pacifica.

13 I. ARGUMENT

14 Robert Robinson, Aaron Kriegel, Leslie Cagan, Tomas Moran, and Peter Bramson
15 have no "case" or "controversy" with the plaintiffs in this case. Article 3, section 2 of the
16 United States Constitution requires that an adversarial relationship exist between
17 plaintiffs and defendants. *See Valley Forge Christian College v. Americans United*, 454
18 US. 464, 473 (1982). This Court is required to realign parties according to their real
19 interest, so as to accurately reflect the parties of interests in the outcome of the case. *See*
20 *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941). The Ninth Circuit, in *Dolch v.*
21 *United California Bank*, 702 F.2d 178 (1983), recognized that:

22 The courts, not the parties, are responsible for aligning the
23 parties according to their interests in the litigation. If the
24 interests of a party named as a defendant coincide with those
25 of the plaintiff in relation to the purpose of the lawsuit, the
26 named defendant must be realigned as a plaintiff for
27 jurisdiction purposes. **Realignment may be required even if
28 a diversity of interests exists on other issues.**

26 *Id.* at 180 (*emphasis added*).

³ Seventh, Eight, and Ninth Causes of Action are claims for declaratory relief.

1 Those who take antagonistic positions on the “primary and controlling matter” in
2 the dispute are properly classified as plaintiffs and defendants. *See Indianapolis*, 314 U.S.
3 at 72. The court’s inquiry “is a practical not a mechanical determination and is resolved
4 by the pleadings and the nature of the dispute.” *Id.* at 69. In *Dolch*, a child of the settlors
5 of a trust sued to overturn assignments to a trust of copyright renewal rights. A sibling
6 who was originally sued as a defendant co-trustee was realigned as a plaintiff because that
7 sibling would benefit from a decision invalidating the assignments to the trust. *Dolch*. 702
8 F.2d at 178-79. Similarly, in *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*,
9 819 F.2d 1519, 1522 (9th Cir. 1987), the court realigned an aircraft manufacturer and an
10 aircraft parts manufacturer as co-parties, rather than as adversaries. The court did so
11 because the parties had a similar stake in the construction of an exculpatory clause in the
12 contract with the plaintiff airline.

13 As directly pertinent to this case, the District Court for the Northern District of
14 California has recognized that:

15 It would be an illogical alignment . . . [to] allow a plaintiff,
16 under the camouflage title of defendant, to veto the wishes of
17 the legitimate defendants. In short, for the purposes of
remand, [such a] defendant . . . should be considered aligned
with [the] plaintiff.

18 *Baneth v. Planned Parenthood*, No. CIV.A.C-94-0870, 1994 WL 224382 (N.D.Cal.
19 April 10, 1994).

20 Here, the plaintiffs and Robinson, Kriegel, Bramson, Cagan and Moran all want to
21 radically alter the status quo at Pacifica and to steer it in a different direction than that
22 selected by a clear majority of the Pacifica’s Board. The Pacifica Defendants’ goal and
23 purpose is to maintain the status quo and to implement the direction chosen by the
24 Pacifica’s Board.

25 The precedent is clear and consistent that parties named as defendants who fail to
26 take a hostile position to the plaintiff should be realigned so that their failure to cooperate
27 in removal to federal court does not prevent removal by the proper defendants in an
28 action. Recently, the Southern District of New York in *Still v. DeBuono*, 927 F. Supp.

1 125, 130 (S.D.N.Y. 1996), denied a motion for remand where certain of the defendants
2 failed to join defendant parent's removal petition and realigned the state defendants as
3 plaintiffs. *See also Norman v. Cuomo*, 796 F. Supp. 654, 658-59 (N.D.N.Y. 1991) (denied
4 remand where four defendants failed to join removal petition); *see also Folts v. City of*
5 *Richmond*, 480 F. Supp. 621, 623 (E.D.V.A. 1979); *see also Hansen v. United States*, 191
6 F.R.D. 492 (D.C.V.I. Feb. 29, 2000).

7 The "primary or controlling matter" in this case is whether under the Federal
8 Communications Act ("FCA"), 47 U.S.C. § 301, *et seq.*, and the Public Broadcasting Act
9 ("PBA"), 47 U.S.C. § 390, *et seq.*, listener-sponsors have any standing or authority to
10 force Pacifica to amend its Bylaws respecting the manner in which its Directors are
11 selected. Pacifica and a majority of its directors, comprising most of the Pacifica
12 Defendants, firmly believe that the FCA and PBA require that listener-sponsors not be
13 permitted under either statute to elect the Directors of Pacifica. They also believe that
14 these Federal laws require the Pacifica's Board to exercise control over the programming
15 presented by the stations for which Pacifica holds a license. In contrast, the plaintiffs,
16 Robinson, Kriegel, Cagan, Moran, and Bramson all believe that listener-sponsors,
17 notwithstanding the FCA and PBA, do have the right to elect the Directors of Pacifica.

18 Robert Robinson and Aaron Kriegel are clearly aligned with the plaintiffs. They
19 have filed their own action (the *Robinson* action) against the Pacifica Defendants,
20 attached as Exhibit A to the Declaration of Daniel Rapaport ("Rapaport Declaration")
21 filed herewith, asserting substantially the same claims and seeking the same type of relief
22 as the plaintiffs seek here. They also firmly believe that control over programming must
23 lie in the hands of local individuals, without regard to the FCA and PBA. Indeed, the
24 absence of any conflict between the plaintiffs and Robinson and Kriegel is evident on the
25 face of the Complaint itself. The Complaint fails to allege any causes of action against
26 either Robinson or Kriegel. In contrast, the first, second, third, fourth, fifth, and tenth
27 causes of action name specific defendants who are included among the Pacifica
28 Defendants. The seventh, eighth, and ninth causes of action seek no relief against

1 individuals but only requests for declaratory relief. The sixth cause of action is an action
2 for an accounting against Pacifica alone.

3 If any doubt could possibly remain as to whether the plaintiffs and Robinson and
4 Kriegel are allies rather than antagonists, it was resolved on September 24, 2000. On that
5 date, Kenneth Frucht, Esq., the attorney representing Robinson and Kriegel in their suit
6 against Pacifica, and certain of the Pacifica Defendants appeared on a radio talk show
7 with Carol Spooner. During that program they coordinated their legal strategy to force
8 Pacifica to amend its bylaws. An affidavit describing the radio broadcast is attached to
9 the Rapaport Declaration as Exhibit B.

10 Tomas Moran has also publicly aligned himself with the plaintiffs. In an interview
11 with a reporter by the name Dennis Bernstein, attached hereto as Exhibit C, Moran clearly
12 disclosed his preference for the plaintiffs' position in this litigation. Moran further
13 confirmed his alignment with the plaintiffs when he appeared on a talk show with both
14 Carol Spooner and Mr. Frucht. An affidavit describing the radio broadcast is attached to
15 the Rapaport Declaration as Exhibit C.

16 Similarly, Leslie Cagan, aligned herself with the plaintiffs' position at a meeting
17 she called and conducted on October 10, 2000. A flyer announcing the purpose of the
18 meeting is attached to the Rapaport Declaration as Exhibit D. That document clearly
19 evidences that Cagan does not wish to continue with the status quo as do the Pacifica
20 Defendants.

21 Peter Bramson revealed his antagonism to Pacifica and to the Pacifica Defendants
22 in the context of another lawsuit, *Adelson v. Pacifica Foundation, et al.*, Civil Action No.
23 814461-0 (Alameda County Superior Court, filed July 16, 1999). A copy of the
24 complaint in *Adelson* is attached to the Rapaport Declaration as Exhibit E. It is plain that
25 the plaintiffs in *Adelson* have many of the same complaints, and seek relief similar to that
26 demanded in this case and in *Robinson*. Mr. Bramson provided his support to the plaintiff
27 and not to the Foundation in that case. An affidavit of Peter Bramson in the *Adelson* case
28 is attached to the Rapaport Declaration as Exhibit F.

1 II. CONCLUSION:

2 There cannot be any serious doubt that Bramson, Moran, Kriegel, Robinson and
3 Cagan are hostile to the real defendants in this case, and also are substantively aligned
4 with the plaintiffs. Sham defendants should not be allowed to prejudice the rights of
5 genuine defendant, and therefore, the Pacifica Defendants respectfully submit that their
6 motion should be granted.

7 Dated: October 16, 2000

EPSTEIN BECKER & GREEN, P.C.

8
9 WENDEL, ROSEN, BLACK & DEAN, LLP

10
11 By 

Daniel Rapaport

12 Attorneys for Defendants
13 Pacifica Foundation, Mary Frances Berry, June
14 Makela, Frank Millspaugh, Andrea Cisco,
15 David Acosta, Micheal Palmer, Robert Farrell,
16 Karolyn Van Putten, Wendell Johns, Valrie
17 Chambers, Bertram Lee, Beth Lyons, John
18 Murdock and Lynn Chadwick

19
20
21
22
23
24
25
26
27
28
Wendel, Rosen, Black & Dean, LLP
1111 Broadway, 24th Floor
Oakland, California 94607-4036