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September 13, 2000

Via E-Mail and Federal Express

Ms. Bessie Wash
Executive Director
Pacifica Foundation
2390 Champlain Street, NW
Washington, DC 20009

Dear Bessie:

You have asked for our opinion as the question of whether the Pacifica Foundation would violate the self-dealing provisions of the California Corporations Code (the "Code") by retaining Epstein, Becker & Green, P.C. ("EB&G). Section 5233(a) of the Code defines a self-dealing transaction as one in which the nonprofit corporation is a party and in which one or more of its directors has a material financial benefit. The question concerning self-dealing arises because John Murdock is a Pacifica Director and a member of the firm of EB&G.

In addressing this question, I have relied upon certain factual representations made by Mr. Murdock in his letter to you of August 30, 2000. In particular, I have assumed the accuracy of the statements that the terms under which EB&G was retained are fair and reasonable, that the services of EB&G attorneys are being provided at a substantial discount from their standard billing rates, and that Mr. Murdock does not bill Pacifica for any time he devotes to Pacifica matters. Although not stated in Mr. Murdock's letter, I also assume that Mr. Murdock does not receive any commission on, or any indirect personal financial benefit resulting from, fees billed by other EB&G attorneys.

That assumption is critical to the determination of whether Mr. Murdock is an "interested director" as defined by Section 5233(a) of the California Corporations Code. This provision of the Code defines an interested director as one who has a "material financial interest" in the transaction between the non-profit corporation and the party providing goods or services to the

corporation. If the Pacifica Board is satisfied that Mr. Murdock has no such material financial interest in the transaction, Mr. Murdock is not an interested director and the self-dealing provisions of the California Code would not apply.

Even if Mr. Murdock is an interested director, the self-dealing provisions of the California Corporations Code would not be violated in either of two relevant sets of circumstances, defined as exceptions to the definition of a self-dealing transaction by an interested director.

The first set of circumstances, described in Section 5233(d)(2) of the Code, provides that: (a) the corporation entered into the transaction for its own benefit; (b) the transaction was fair and reasonable to the corporation at the time the corporation entered into the transaction; (c) prior to consummating the transaction the Board authorized the transaction in good faith by a vote of a majority of the directors in office, not counting the vote of the interested director, and with knowledge of the material facts concerning the transaction and the director's interest in the transaction.

In the second set of circumstances, described in Section 5233(d)(3): (a) a committee or person authorized by the Board approved the transaction; (b) it was not reasonably practicable to obtain approval of the Board prior to entering into the transaction; and (c) the Board, after determining in good faith that the conditions described in the first set of circumstances were satisfied, ratified the transaction at its next meeting by a vote of the majority of the directors in office, not counting the vote of the interested director or directors.

The second set of circumstances appear to be applicable. EB&G has commenced work for Pacifica pursuant to authorization by the Executive Director because it was not reasonably practicable to obtain approval of the Board prior to entering into the transaction. If the Pacifica Board concludes that Mr. Murdock is an interested director, the Board must determine in good faith that the following two conditions are satisfied: (1) that Pacifica has entered into the transaction for its own benefit and (2) that the terms of the transaction are fair and reasonable to Pacifica. The self-dealing provisions of the Code will not apply if these conditions are met and if the transaction is ratified at the upcoming Board meeting by a vote of the majority of directors in office, excluding the vote of Mr. Murdock.

A violation of the self-dealing provisions of the Code would subject Pacifica to actions brought by a director or officer of the company or by a person granted relator status by the Attorney General. In the event a violation is deemed to have occurred, the interested director could be ordered to pay such damages that would provide a fair and equitable remedy to the corporation. Such remedies may include an accounting of any profits made from the transaction and payment of those profits to the corporation.

Pacifica should also be aware of IRS regulations that pertain to so-called "excess benefit transactions." See IRC Section 4958(c)(1)(B). These provisions are similar, but not identical, to the self-dealing provisions of the California Code. While too complex to analyze fully in this letter, the excess benefit provisions impose sanctions on certain corporate insiders who improperly benefit from transactions with a tax-exempt organization. An excess benefit transaction is a transaction in which an economic benefit is provided by a tax-exempt organization to or for the use of any disqualified person, if the value of the economic benefit to the organization exceeds the value of the consideration paid. The excess benefit provisions sanction only those transactions which result in an unreasonable or excessive benefit to a disqualified person.

Transactions are presumed to be reasonable if the arrangement: is (1) approved by a Board of Directors composed entirely of individuals not subject to the control of the disqualified persons, (2) if the Board has obtained and relied upon appropriate data as to comparability of the charges to be incurred; and (3) documented the basis of its determination. One serving as a director or officer of a corporation is not automatically a disqualified person. A disqualified person is a person who is in a position to exercise substantial influence over the affairs of the corporation.

Even if one assumes that Mr. Murdock is a disqualified person, the transaction involving his firm, EB&G, would not be deemed to confer an excess benefit if the transaction were approved by the Board based upon the Board's documented conclusion that the terms are comparable to terms obtainable from similar sources.

Please let me know if you would like me to elaborate further on issues of either California law or tax law.

Sincerely,

John Crigler

JC:ah
Enclosure