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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF ALAMEDA**

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| THE PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* CAROL SPOONER, *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>THE PACIFICA FOUNDATION, *et al.*,<br><br>Defendants. | Case No. 831252-3<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION TO DISQUALIFY EPSTEIN BECKER & GREEN, P.C. AS COUNSEL**<br><br>Date: April 10, 2001<br>Time: 9:00 a.m.<br>Department: 31<br>Name of Judge: Judith D. Ford |

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## I. INTRODUCTION

The Plaintiffs' Motion to Disqualify Epstein Becker & Green, P.C. ("EBG") from representing Defendants in this case is entirely baseless. As a preliminary matter, the Plaintiffs, who are neither current nor former clients of EBG, lack standing to assert this claim. EBG, moreover, does not have an impermissible conflict of interest in this case.

The Plaintiffs argue that EBG cannot properly represent both the Pacifica Foundation (the "Foundation") and its Directors. However, joint representation of a corporation and its Directors generally is permissible. This is true even in a derivative action — to which the Plaintiffs attempt to analogize to the present case — where there is no claim that the Directors have breached their duty of loyalty (by embezzling money from the corporation or engaging in similar conduct). Because the Plaintiffs in this case have not alleged that any of the Directors breached their duty of loyalty, dual representation of the Foundation and its Directors would be appropriate even if this were a derivative case, which it is not.

The Plaintiffs also allege that EBG's representation of the Foundation is improper because a defendant, John Murdock, is both a Director of the Foundation and an attorney with EBG. It is well established under California law that this type of representation is generally permissible. Moreover, Plaintiffs' claim that the arrangement represents impermissible self-dealing by Mr. Murdock must fail for two reasons. First, Mr. Murdock is not an "interested director" because he will not receive any compensation as a result of EBG's representation of the Foundation. Second, even if Mr. Murdock were deemed an interested director, the arrangement would be permissible because it was consented to by the Board in a vote in which Mr. Murdock did not participate. Third, the conduct complained of occurred before Mr. Murdock was even on the Board. Thus, he could have no personal liability.

Finally, in evaluating the Plaintiffs' motion, this Court must consider the financial burden that disqualification of EBG would impose on its clients in this case. EBG provides very cost effective representation to the Foundation and certain of its Directors, in this and

two related cases, because it is offering its services at a significantly discounted rate and because it is efficient to have the same firm representing both the Foundation and the majority of the individual Directors. For all of these reasons, this Court should deny Plaintiffs' Motion to Disqualify.

## II. ARGUMENT

Courts have consistently recognized that "[a] court confronted with an attorney disqualification motion should proceed with caution in order to avoid hardships on innocent clients where disqualifications are unnecessarily ordered." *In re Lee G. v. San Diego County Dep't of Soc. Serv.* (1991) 1 Cal.App.4th 17, 28. Further, courts have recognized that "[w]here only speculative or minimal benefit would be obtained by disqualification of . . . counsel, the 'dislocation and increased expense . . .' is not justified." *In re Lee*, supra, 1 Cal.App.4th at 28.

### A. Plaintiffs Lack Standing to Bring a Motion to Disqualify EBG from Representation of Defendants.

Plaintiffs' Motion to Disqualify EBG purports to be based on Cal. R. of Prof'l Conduct 3-310. California courts have consistently recognized that "[t]he rule [3-310], of course, never becomes applicable where the party seeking the attorney's disqualification fails to establish that such party was or is 'represented' by the attorney in a manner giving rise to an attorney-client relationship." *In re Lee*, supra, 1 Cal.App.4th at 27 (*citing Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70). Here, the Plaintiffs have failed to allege that they are, or have ever been, represented by EBG. No such allegation would be possible. As the directly applicable precedent makes clear, Plaintiffs lack standing to seek EBG's disqualification.

**B. EBG's Representation of Both the Foundation and Certain of its Individual Directors is Appropriate Because There is no Actual Conflict Among the Defendants Represented by EBG and all of Them Have Consented to the Arrangement.**

It is the general rule that an attorney "representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to provision of rule 3-310." Cal. R. Prof'l. Conduct 3-600. The exception, set out in Cal. Rule of Prof'l Conduct 3-310(C), is that an attorney "shall not, without the informed written consent of each client . . . accept representation of more than one client in a matter in which the interests of the clients potentially conflict." As EBG has undertaken to represent only those Directors whose positions respecting Plaintiffs' claims are completely aligned with the Foundation's, there is no conflict among the parties it represents. Moreover, California courts recognize that where a conflict is potential as opposed to actual, there may be joint representation if preceded by full disclosure and informed written consent by all of the affected clients. *See Klemm v. Superior Court* (1977) 75 Cal.App.3d 893, 899; *see also* Cal. State Bar Formal Op. No. 1999-153 (attorney may represent a corporation and one of its two shareholders in suit by second shareholder where the first shareholder, CEO, or president has authority to retain corporate counsel and gives informed consent).

In this case, EBG first undertook to represent the Foundation, and then after deciding what strategy would be most appropriate for the Foundation, inquired whether the Directors of the Foundation would take a similar position on this litigation. Only those Directors who unambiguously took a position that did not conflict with the Foundation's position were taken on as clients. Directors who took a position contrary to the Foundation's, or desired their own counsel, have sought independent representation. Counsel even took the step of sending Mr. Bartley's legal analysis to their clients so they could read his views without

editorialization. Nonetheless, EBG's clients gave their written consent.[1] EBG thus fulfilled the requirements of Cal. Code of Prof'l Responsibility Rule 3-310, and Plaintiffs' claim that EBG should be disqualified due to a conflict created by its dual representation of the Foundation and certain of its Directors must fail.

### C. Because Plaintiffs Have Not Alleged That the Directors Breached Their Duty of Loyalty to the Foundation, Joint Representation is Appropriate.

Plaintiffs do not and could not allege that any of the Directors undertook the kind of financial misconduct that would breach their duty of loyalty to the corporation. This means dual representation of the corporation and the Directors is entirely appropriate.

#### 1. Even in a Shareholder Derivative Action, Dual Representation is Appropriate in the Absence of Allegations that the Directors Breached their Duty of Loyalty.

The Plaintiffs rely on *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, 74 (*"Forrest"*), for the proposition that "case law clearly forbids dual representation of a corporation and directors in a *shareholder derivative suit*, at least where, as here, the *directors are alleged to have committed fraud*." (Emphasis added.) The present case is not, and could not be, a shareholder derivative action.

First, the Foundation is a non-profit entity and has no shareholders. The claims brought by the Plaintiffs are far more analogous to claims in a direct action than to those typical of a derivative action. A direct suit involves the enforcement by a shareholder of a claim belonging to a shareholder on the basis of being an owner of the shares. In contrast, a

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[1] *See* Declaration of David Acosta In Opposition to Motion to Disqualify Counsel; Declaration of Mary Frances Berry In Opposition to Motion to Disqualify Counsel; Declaration of Lynn Chadwick In Opposition to Motion to Disqualify Counsel; Declaration of Valrie Chambers In Opposition to Motion to Disqualify Counsel; Declaration of Andrea Cisco In Opposition to Motion to Disqualify Counsel; Declaration of Robert Farrell In Opposition to Motion to Disqualify Counsel; Declaration of Ken Ford In Opposition to Motion to Disqualify Counsel; Declaration of June Makela In Opposition to Motion to Disqualify Counsel; Declaration of Frank Millspaugh In Opposition to Motion to Disqualify Counsel; Declaration of John Murdock In Opposition to Motion to Disqualify Counsel; Declaration of Michael Palmer In Opposition to Motion to Disqualify Counsel; Declaration of Karolyn Van Putten In Opposition to Motion to Disqualify Counsel; Declaration of Bessie Wash In Opposition to Motion to Disqualify Counsel.

derivative action is brought on behalf of the corporation itself. Direct suits involve claims raising contractual or statutory rights of the shareholder, such as an action for an accounting. *See O'Hare v. Marine Electric Co.* (1964) 229 Cal. App. 2d 33 (recognizing an action is derivative if based upon injury to the corporation or to the whole body of its stock, but "individual" if the complaining stockholder is directly and individually injured).

Moreover, even if the present case could be deemed to be analogous to a shareholder derivative action, *Forrest* would be entirely inapplicable. The holding of *Forrest* applies only where it is alleged that the directors have breached their duty of loyalty to the corporation by committing fraud, thereby making the corporation and the directors truly adverse. *Bell Atlantic Corp. v. Bolger* (3rd Cir. 1993) 2 F.3d 1304.[2] Significantly, the very commentary to Rule 1.13 of the (2d ed. 2000) American Bar Association's Annotated Model R. of Prof'l Conduct, which Plaintiffs cite,[3] unequivocally states: "Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit."

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[2] *See also Forrest,* 58 Cal.App.4th at 75 (recognizing need for separate counsel for corporation where directors are accused of embezzling from the corporation); *Messing v. FDI, Inc.* (D.N.J. 1977) 439 F. Supp. 776, 782 ("in this case, serious questions have been raised as to whether the corporation has *expended funds on behalf of the directors in violation of the law*") (emphasis added); *In re Oracle Securities Litigation* (N.D. Cal. 1993) 829 F. Supp. 1176, 1189 (recognizing that corporate counsel cannot represent corporation in a *securities fraud* case "where counsel advocates a settlement highly favorable to the individual defendants who are his superiors") (emphasis added); *Cannon v. U.S. Acoustics Corp.* (N.D. Ill. 1975) 398 F. Supp. 209 (recognizing that same counsel cannot represent corporation and select directors accused of misappropriation of corporate funds); *Lewis v. Shaffer Stores Co.* (S.D.N.Y. 1963) 218 F. Supp. 238 (recognizing that interests of directors and corporation were adverse in an action against directors to recover short swing profits); *Murphy v. Washington American League Base Ball Club* (D.C. Cir. 1963) 324 F.2d 394 (recognizing that interests of directors and corporation were adverse in a derivative suit challenging salary increases to members of the board); *Dukas v. Davis Aircraft Products Co.*, Inc. (1985) 494 N.Y.S.2d 632 (recognizing that interests of directors and corporation were adverse in a derivative action challenging the transfer of corporate property to another corporation owned and controlled by board members). Here, there is no allegation involving a transfer or appropriation of corporate assets, in any form and in any manner, to the individual defendants or for their benefit.

The Plaintiffs also cite *Essential Enterprises Corp., v. Dorsey Corp.* (Del. Ch. 1962) 182 A.2d 647. This case does not deal with disqualification of counsel, but rather with allocation of litigation expenses. In addition, the Plaintiffs cite *Garlen v. Green Mansions, Inc.* (1959) 193 N.Y.S.2d 116, a one paragraph opinion that does not reveal whether the directors were accused of a breach of their duty of loyalty.

[3] Plaintiffs' Memorandum of Points and Authorities in Support of their Motion to Disqualify Defendants' Counsel at 8, 11 and A-1.

In *Bell Atlantic*, the court held that dual representation of a corporation and its directors in a shareholder derivative action was appropriate where the complaint alleged "only mismanagement, a breach of the fiduciary duty of ***care***." *Id.* at 1316 (emphasis added). The *Bell Atlantic* court, noting that there were no allegations of fraud or self-dealing, stated that "we do not understand Plaintiffs to have accused defendants of breaching their duty of ***loyalty*** which requires a director to act in good faith and in the honest belief that the action taken is in the corporation's best interests." *Id.* (emphasis added). It is only where it is alleged that the directors have breached their duty of loyalty (and it is possible that they may be liable to the corporation) that dual representation may be inappropriate.[4] Where, as here, no such allegations exist, the Directors cannot be found personally liable to the Foundation, and dual representation is appropriate.

**2. Plaintiffs Have Not Alleged A Breach of the Duty of Loyalty.**

The Plaintiffs have not alleged that any of the Directors have breached their duty of loyalty. The "business judgment rule,"[5] moreover, creates a presumption that a director has fulfilled his or her duty of care and loyalty. To overcome the presumption, a plaintiff must plead with particularity that a director breached a duty. *See Aaron v. La Moderna*, No. C 97-0233 (N.D. Cal. Aug. 27, 1997) 1997 WL 564064, at *9; *see also Aronson v. Lewis* (Del. Super. Ct. 1984) 473 A.2d 805, 814 (recognizing that a plaintiff must plead with particularity that the challenged transaction was not the product of a valid business judgment); *In re Silicon Graphics Inc. Securities Litigation* (9th Cir. 1999) 183 F.3d 970,

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[4] Only a handful of cases have ever held directors liable for economic damages in the absence of a breach of the duty of loyalty. The best known of these cases is *Smith v. Van Gorkom* (Del. 1985) 488 A.2d 858, in which the court imposed individual liability on the directors upon a showing of gross negligence. In that case, the directors had completely failed to inform themselves of the relevant facts prior to approving a merger. Critically, the *Smith* court found it noteworthy that the facts before it involved an element of self-dealing. One of the defendant directors was approaching retirement age and stood to benefit personally from the transaction which caused a significant increase in the current value of his shares. *Id.* at 866.

[5] Cal. Corp. Code §5231.

990 ("At the pleading stage, [Corporate] Board independence and compliance with the business judgment rule are presumed.").

None of the Plaintiffs' allegations asserts a claim of fraud, bad faith or self-dealing, thus, no breach of the duty of loyalty is alleged. Plaintiffs' allegation that the Foundation changed its stations' programming format to encourage a "wider more affluent, more 'mainstream' listening audience" cannot, by any stretch, constitute a claim of fraud, bad faith or self-dealing. (Compl. ¶ 19). Plaintiffs' opinion that the Directors should have decided otherwise does not state a claim for a breach of the duty of loyalty.

Plaintiffs complain that the Foundation changed its bylaw provisions relating to the election of Directors to comply with the mandates of the Corporation for Public Broadcasting ("CPB"). (Compl. ¶ 24). That action cannot constitute fraudulent conduct, self-dealing or bad faith. It is highly pertinent, moreover, that California Corporation Code Section 5232 specifically provides 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, the decision to amend the Foundation's bylaws in order to avoid the "threat of immediate withholding [of] the second half of CPB funding," (Compl. ¶ 24) unambiguously is a decision covered by California's statutory business judgment rule. The opinion of a group of self-selected individuals that the Foundation should have foregone CPB funding does not present an exception to the business judgment rule.

The Plaintiffs also contend that the Defendant Directors improperly terminated station staff members when they concluded that these individuals had violated broadcast standards (Compl. ¶ 25, 29). They also complain that these Directors improperly hired a security service[6] and a public relations firm to protect the Foundation's personnel, property,

[6] This decision, based on the express suggestions of the Berkeley Police Department, could hardly be deemed to violate the business judgment rule. *See Declaration of Captain Will Pittman.*

and reputation. (Compl. ¶ 29). Even if a plausible argument could be made that Plaintiffs' point of view as to the propriety of these actions had merit, these allegations cannot possibly equate to claims of fraud, bad faith or self-dealing. To the contrary, all that is claimed is that the Directors made business decisions that the Plaintiffs would not have made.

In short, the Plaintiffs have failed completely to allege any conduct by any of the Directors that amounts to fraud, bad faith, or self-dealing, *i.e.*, conduct constituting a breach of the duty of loyalty. Their complaint on its face fails to overcome the statutory and precedential presumption, under the business judgment rule, that the Directors fulfilled their duty of loyalty. Thus, there is no basis for any conclusion other than that the Foundation's and the Directors' interests are aligned and the dual representation by EBG is appropriate.

**3. Dual Representation is Appropriate When the Dispute Focuses on the Rights of Competing Factions to Select Directors.**

The Plaintiffs' claims relate primarily to who should be allowed the right to elect Directors to the Foundation Board. (Compl. ¶ 19-20). In light of Plaintiffs' meritless effort to analogize this case to the for-profit corporation context, *Schmidt v. Magnetic Head Corporation* (Del. 1983) 468 N.Y.S.2d 649, 657, is instructive. There, the plaintiff shareholders alleged that they were entitled to designate a director to replace a prior designee who had resigned. The same counsel represented the corporation and the individual defendants. The *Schmidt* court held that representation of the corporation and its directors by the same law firm was appropriate because the action involved merely "the rights of competing stockholder factions to select a corporate director." The corporation itself, the court pointed out, would not benefit or suffer from the outcome of the lawsuit. *Id.* Plaintiffs ask the Court to rule that self-appointed listener-sponsors and members of the Local Advisory Boards should have the right to appoint Directors to the Foundation Board

to the exclusion of sitting Directors.[7] (*See* Compl. at ¶¶ 21, 22, 24-25). Thus, their position is analogous to that of the plaintiffs in *Schmidt*, and, as in the case of counsel for the defendants in *Schmidt*, it is entirely appropriate for EBG to represent both the Foundation and the majority of its Directors.

**D. The Fact that Mr. Murdock is an Attorney Employed by EBG and Also a Director of The Foundation is Not a Basis for Disqualifying EBG in this Case.**

California courts have consistently recognized that a lawyer may properly serve as counsel to a corporation and also serve as a director of that corporation. As has been judicially observed:

> [Lawyers often] serve as directors on boards of corporations for which they also work. . . . the practice is widespread and has its defenders, who point out that corporations should not be deprived of special skills such 'interested directors' can provide, and that the potential conflicts of interest can be avoided by full disclosure.

*Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 32.

Here, Plaintiffs argue that because John Murdock is an attorney employed by EBG, a Director of the Foundation and, by virtue of his having volunteered for that unpaid position, a defendant in this case, the Foundation's retention of EBG constituted an impermissible self-dealing transaction by an interested Director in violation of Cal. Corp. Code § 5233. Cal. Corp. Code § 5233, however, is utterly silent as to disqualification of counsel issues. More importantly, the Foundation's retention of EBG fully complied with the requirements of Section 5233 and the retention therefore does not constitute an impermissible self-dealing transaction by Mr. Murdock.

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[7] In addition, the Plaintiffs request "judgment awarding damages according to proof in favor of Pacifica Foundation and against defendants Berry, Acosta, Farrell, Ford, Makela, Millspaugh, Palmer, [and] Chadwick . . . jointly and severally, for breach of charitable trust." Prayer For Relief at ¶ 17. The Plaintiffs apparently base this request for relief on the Defendants' retention of security services to protect KPFA personnel and equipment from protestors. (Compl. at ¶ 29). This allegation does not rise to the level of fraud or a violation of the duty of loyalty and is insulated by the business judgment rule.

**1. Because Mr. Murdock is Receiving No Compensation for EBG's Work for the Foundation, He is Not an Interested Director.**

In *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1368, the court recognized that "[a] director's association with a company that does business with the corporation does not in and of itself establish a lack of independence." The *Katz* court noted that if a director's compensation is not tied to the work done for the corporation for which he is a director, then the mere fact that his company does work for the corporation does not make him an interested director. *Id.*

Cal. Corp. Code §5233 provides that a director must have a "material interest" in the matter at issue in order to be characterized as an "interested director" within the meaning of the statute. John Murdock never has received, nor will he ever receive, any compensation in any form by reason of EBG's representation of the Foundation. (Declaration of Daly D.E. Temchine, Exhibit A, Affidavit of John M. Murdock, ¶¶ 3, 4). Further, Mr. Murdock could not possibly be liable in damages to the Foundation since he was not a Director at the time of the events Plaintiffs complain about. Therefore, Mr. Murdock has no "material interest" in the arrangement, and he cannot be an interested Director. *Katz,* supra, 22 Cal. App.4th at 1368.

**2. Even If, Hypothetically, Mr. Murdock were an Interested Director, the Foundation's Representation by EBG Would be Proper Because the Retention of the Firm was Reviewed and Approved by a Majority of Non-Interested Directors.**

Cal. Corp. Code §5233(d) provides that a corporate transaction is not an impermissible self-dealing arrangement where "[t]he corporation entered into the transaction for its own benefit . . . [t]he transaction was fair and reasonable as to the corporation at the time the corporation entered into the transaction . . .[a] person authorized by the board approved the transaction . . . [i]t was not reasonably practicable to obtain approval of the board prior to entering into the transaction [and] . . . [t]he board, after determining in good faith that the conditions [above] were satisfied, ratified the transaction at its next meeting by a vote of the majority of directors then in office without counting the vote of the interested director."

The retention of EBG satisfies all of these criteria. The Foundation entered into the transaction for its own benefit. The transaction was, and remains, fair and reasonable to the Foundation (EBG is charging the Foundation below market rates, and the Foundation is benefiting from the efficiency of having the same firms represent both the Foundation and certain of its Directors). The decision to retain EBG was appropriately made by the Foundation's Executive Director Bessie Wash, who is authorized to retain counsel on behalf of the Foundation. While it was not reasonably practicable for Ms. Wash to obtain approval of the Foundation Board prior to retaining EBG, a majority of the disinterested Directors on the Board approved the transaction at its next meeting, when — after discussing the fact that EBG would be representing both the Foundation and certain of its Directors, and the fact that Mr. Murdock was a Director, an attorney employed by EBG, and a defendant in the litigation — they voted not to direct the Executive Director to discharge EBG. (*See* Declaration of Daly D.E. Temchine, Exhibit B, Transcript of Foundation Board Meeting of September 17, 2000, at pp. 55-56);[8] (Declaration of Daly D.E. Temchine, Exhibit A, Affidavit of John M. Murdock, ¶ 6). Additionally, Executive Director Bessie Wash obtained an opinion letter from an independent attorney, John Crigler, determining that the Board of Directors could properly retain EBG. (Declaration of Daly D.E. Temchine, Exhibit C, Letter from John Crigler, Esq. dated September 13, 2000).

**E. Where Only Speculative or Minimal Benefit Would be Obtained Through Disqualification, the Increased Expense to the Defendants is Not Justified and the Motion for Disqualification Must be Denied.**

In the present case, Plaintiffs have demonstrated no conflict of interest. However, even if such a conflict were to exist, disqualification would not be automatic. Rather,

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[8] The Plaintiffs in this case attached an incomplete and, in some respects, inaccurate transcript of the September 17, 2000, board meeting. The official version of the transcript, which is attached, clearly shows that the hiring of EBG was approved by a majority of non-interested Directors. *Compare*, Declaration of Daly D.E. Temchine, Exhibit D, Transcript of Foundation Board Meeting of September 17, 2000, at page 55, line 7 through page 56, line 8, with Declaration of Gary D. Evans, Exhibit A, unofficial transcript, at page 16, line 20 through page 17.

California courts have adopted a balancing test for the disqualification of attorneys subject to such a conflict:

> The court must weigh the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation of parties by independent counsel unencumbered by conflicts of interest.

*Allen v. Academic Games Leagues of Am., Inc.* (C.D.Cal. 1993) 831 F. Supp. 785, 789.

Here, Plaintiffs have completely failed to demonstrate how EBG's representation of the Foundation and certain of its Directors wrongfully disadvantages them. Likewise, there is no allegation or demonstration that this joint representation provides the defendants with any inappropriate advantage to the material detriment of Plaintiffs. In sum, Plaintiffs' motion for disqualification is a transparent tactical ploy intended to deprive the Defendants of their chosen counsel.

Because EBG is providing services to the Foundation at a significantly discounted rate, and because of the obvious efficiencies that result from having the same firms represent both the Foundation and the Directors who support the Foundation's positions in this litigation, it would impose a significant hardship and a financial burden on the defendants if EBG were disqualified.

## III. CONCLUSION

EBG's representation of both the Foundation and certain of its Directors in this case is proper. Because they have failed to allege a breach by the Directors of the duty of loyalty, the Plaintiffs have stated no claim that could plausibly be expected to put the Foundation and these Directors in positions adverse to one another. This case is not remotely analogous to those cases cited by the Plaintiffs in which, for instance, a director embezzled money from a corporation and the suit sought to recover those corporate funds. Moreover, the dual representations, and the role of Mr. Murdock as a

defendant, a Director, and an attorney at EBG were fully disclosed and approved by a majority of the disinterested Directors on the Foundation's Board when they ratified the Executive Director's retention of EBG.

In short, the motion must be denied because there is no conflict of interest, because the equities weigh in favor of permitting the Foundation and its Directors to maintain their cost-effective relationship with their current counsel, and because the Plaintiffs' motion amounts to a bad faith litigation tactic. Therefore, Defendants respectfully request that this Court deny the Plaintiffs' Motion to Disqualify Defendants' Counsel, and provide Defendants with such other relief as the Court deems proper under the circumstances.

Dated: March 30, 2001

Respectfully submitted,
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