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JOHN MURDOCK, and LYNN CHADWICK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. CAROL SPOONER, JOHN D. BIELLO, CAROLYN M. BIRDEN, 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. 831252-3

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISQUALIFY WENDEL, ROSEN, BLACK & DEAN, LLP

Date: April 10, 2001
Time: 9:00 a.m.
Dept: 31
Judge: Hon. Judith D. Ford

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I. INTRODUCTION

This is an action instigated by "true believers." The relators and their supporters truly believe that they know better than the Pacifica Foundation's Board of Directors what the purpose of the Pacifica Foundation is and how to achieve that purpose. In essence, the relators seek to have this Court substitute relators' business judgment for that of Pacifica's Board of Directors.

The most recent effort by the relators in this *quo warranto* action to wrest control of the Pacifica Foundation from its Board of Directors is brought in the guise of this motion to disqualify the legal counsel of Pacifica Foundation ("Pacifica") and the individual directors named as defendants. While the relators' pending motion for preliminary injunction seeks to prohibit Pacifica's Board of Directors from taking any action while this suit is pending, this motion seeks to deprive Pacifica and its directors of their legal counsel. This pincer action in the legal arena combined with the continued assault on Pacifica in the media, on the Internet, and by protesters at Pacifica's radio stations are no doubt calculated to bring as much pressure to bear on Pacifica and its directors as possible in order to coerce capitulation to the relators' demands.[1] The motion to disqualify is particularly deplorable given the fact that several of the defendant directors were not even on the Board of Directors at the time the actions complained of by relators in their complaint took place. Nevertheless, relators now seek to deprive all of the director defendants and Pacifica of their chosen legal counsel.

Relators' motion to disqualify Wendel, Rosen, Black & Dean, LLP ("Wendel, Rosen") should be denied for several reasons: (1) this is not a shareholder's derivative

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[1] As an example of relators' plan to pressure Pacifica and the director defendants into capitulating, see the "Lawsuit Update" dated March 10, 2001 by Carol Spooner in which she states, among other things, that she believes there is a "very good chance that the court will remove all directors except Robinson, Kriegel & Bramson" and that "[w]e expect that the removed directors will agree not to appeal this ruling if we agree not to pursue our remaining claims for personal financial liability against them." A true and correct copy of that "Update" is attached as Exhibit A to the Declaration Of Daniel Rapaport In Opposition To Motion To Disqualify Wendel, Rosen, Black & Dean, LLP As Defendants' Counsel ("Rapaport Decl.").

action, but rather a *quo warranto* action brought in the name of the People of the State of California against Pacifica and its directors (and a former officer); (2) the action does not allege any claims against the directors for fraud, self-dealing or similar malfeasance, and the interests and positions of Pacifica and the director defendants are not in conflict; (3) even if there were a potential conflict, Wendel, Rosen has made the necessary disclosures and obtained the consent and waiver of Pacifica's Executive Director and of the individual director defendants[2]; and (4) if relators' unprecedented effort to disqualify Pacifica's counsel were successful, it would raise significant public policy concerns and would have a chilling effect on the ability of nonprofit corporations and other charitable organizations to attract and retain volunteer directors. The motion to disqualify Wendel, Rosen should therefore be denied.[3]

II. FACTUAL BACKGROUND

Prior to the filing of a related action against Pacifica in this Court in mid-1999, *Adelson, et al. v. Pacifica Foundation, et al.*[4], Wendel, Rosen had never represented

[2] In addition to representing Pacifica Foundation and former Executive Director Lynn Chadwick, Wendel, Rosen represents Pacifica directors David Acosta, Valrie Chambers, Andrea Cisco, Robert Farrell, Ken Ford, Wendell Johns, Bertram Lee, June Makela, Frank Millspaugh, John Murdock, Micheal Palmer, Karolyn Van Putten, and former director Dr. Mary Frances Berry, who are collectively referred to herein as the "director defendants." Relators' motion to disqualify is silent on Wendel, Rosen's representation of Ms. Chadwick, a former employee of Pacifica. In the event the motion also applies to her, the arguments set forth herein opposition the motion to disqualify are asserted on her behalf as well.

[3] It is important to note that in their motion to disqualify, relators at times generalize and lump together allegations and assertions with respect to Wendel, Rosen and Pacifica's other counsel of record, Epstein Becker & Green, P.C. ("Epstein Becker"). For example, on page 2, lines 23-24 of their memorandum, relators assert that "Ms. Wash hired EB&G and WRD&B [*sic*] without the knowledge or approval of at least some of the Directors." In making this assertion, relators cite to the purported transcript of the September 17, 2000 board meeting attached as an exhibit to the Declaration of Gary Evan and to their Request for Judicial Notice. As set forth in the Objections To Relators' Evidence filed herewith, defendants object to the purported transcript attached to the Evans declaration on evidentiary grounds. Even if this transcript were admissible, both it and the transcript attached to relators' Request for Judicial Notice show that the discussion at the September 17, 2000 meeting pertained *only* to the retention of the Epstein Becker firm and not Wendel, Rosen.

[4] Alameda County Superior Court Case No. 814461-0.

Pacifica or any of its officers or directors. *See*, Declaration of Daniel Rapaport ("Rapaport Decl.") filed herewith, ¶2. After the *Adelson* complaint was filed, Wendel, Rosen was retained by the then-Executive Director of Pacifica, Lynn Chadwick ("Chadwick"), to represent Pacifica.[5] *Id.* Chadwick agreed that Wendel, Rosen could also represent the individual Pacifica directors who had been named as defendants in that action. *Id.*

When Carol Spooner and the other proposed relators applied to the Attorney General for leave to sue in *quo warranto* in November 1999, Chadwick retained Wendel, Rosen to represent Pacifica in that proceeding. *Id.* at ¶3. She also agreed that Wendel, Rosen could also represent the individual directors who had been named as proposed defendants. All of the then-named directors agreed to this representation. *Id.* Chadwick was not named as a defendant in the original proposed complaint submitted by Spooner to the Attorney General. *Id.* At no time prior to the filing of the motion to disqualify by relators in the United States District Court in this removed action in November 2000, did Spooner or the other relators object to Wendel, Rosen's representation of Pacifica and the director defendants. *Id.* at ¶3.

This *quo warranto* action was filed on September 15, 2000. The current Executive Director of Pacifica, Bessie Wash ("Wash"), requested Wendel, Rosen continue to represent Pacifica in the action. Rapaport Decl. at ¶4. Wash also agreed that Wendel, Rosen could represent those Pacifica directors who had been named as defendants in the action, who had no conflict of interest with Pacifica. *Id.* Rapaport made written disclosures to Ms. Wash and the director defendants regarding conflicts of interest and representation. *Id.* at ¶6. All the director defendants Wendel, Rosen currently represents agreed to joint representation. *Id.* at ¶5. Subsequently, Ms. Wash and each of the available director defendants have signed a declaration stating that they have been advised of any potential conflict and each has expressly waived such conflict. *See,*

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[5] Chadwick was not and is not named as a defendant in the *Adelson* action.

declarations of Bessie Wash and the director defendants filed herewith. Wendel, Rosen's representation of directors does not extend to those directors whose interests appear to be aligned with the relators herein. Rapaport Decl., ¶¶5-7. They are separately represented by counsel of their choosing. *Id.*

III. LEGAL DISCUSSION

A. In Determining A Motion To Disqualify Counsel, A Court Must Carefully Balance Competing Interests

In light of a party's basic right to be represented by counsel of its choice, courts have been circumspect in determining whether to disqualify counsel. A number of factors must be considered:

> 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.

William H. Raley Co. v. Superior Court (1983) 149 Cal.App.3d 1042, 1048; *see also, In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, 586. These factors are particularly important in this case, where the relators are seeking to disqualify the counsel of a nonprofit corporation and its volunteer directors. Disqualification must be evaluated on a case-by-case basis. *In re Complex Asbestos Litigation, supra,* 232 Cal.App.3d at 601. Such motions should also be viewed with an eye toward the fact that "[s]uch motions can be misused to harass opposing counsel [citation], to delay the litigation [citation], or to intimidate the adversary into accepting settlement on terms that would not otherwise be acceptable," and that "'attorneys now commonly use disqualification motions for purely strategic purposes . . . .'" *Zador Corp. v. Kwan* (1995) 31 Cal.App.4th 1285, 1303 (quoting *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 300-301).

As is discussed in greater detail below, there is no potential or actual conflict of interest between Pacifica and the director defendants, and even if there were, both Pacifica and the director defendants have waived any such conflict in writing. As a

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result, defendants' right to their choice of counsel and the burden on Pacifica and the director defendants to replace experienced counsel far outweigh any competing considerations. *See, e.g., Zador Corp. v. Kwan, supra,* 31 Cal.App.4th at 1302.

B. This Action Is Not A Shareholder's Derivative Action, But Rather, A *Quo Warranto* Action Brought In The Name Of The State

Relators expressly admit that this is not a shareholder's derivative action. (*See,* Points and Authorities In Support of Motion to Disqualify Defendants' Counsel (hereinafter, "Relators' Brief"), p. 2:3-4.) Nevertheless, in this effort to deprive defendants of their counsel relators attempt to rely on law which has been narrowly applied to shareholder derivative actions by claiming this action is "analogous to" a shareholder's derivative action. They request that the Court apply authorities restricted to derivative actions to this *quo warranto* action, even though there is absolutely no authority for this request. Relators' reliance on such law is misplaced. Relators are not shareholders, nor are they actual parties to this litigation. A brief review of the nature of a *quo warranto* proceeding demonstrates that this action is brought in the name of the People of the State of California against Pacifica and its directors, and is purportedly brought to serve the public interest, not the interests of the relators or Pacifica.[6]

While the action may have been filed at the instigation of the relators, it is in fact an action by the people. *People v. Milk Producers Assn.* (1923) 60 Cal.App. 439, 442. The fact that the relators are also named in the complaint does not convert the action into a private one. *People v. Petroleum Rectifying Co.* (1937) 21 Cal.App.2d 289, 291.

[6] The fact that the Attorney General granted leave to sue in *quo warranto* is not a determination of the merits by the Attorney General. 72 Ops. Cal. Atty. Gen. 15, 19 (1989).

"[I]n acting upon an application for leave to sue in the name of the people of the State, it is not the province of the Attorney General to pass upon the issues in controversy, but rather to determine whether there exists a state of facts or question of law that should be determined by a court in an action quo warranto; that the action of the Attorney General is a preliminary investigation, and the granting of leave is not an indication that the position taken by the relator is correct, but rather that the question should be judicially determined and that quo warranto is the only proper remedy." 12 Ops. Cal.Atty. Gen. 340, 341 (1949).

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1 "[S]uch an action may be brought and maintained only by the attorney-general in the
2 name of the people of the state and the relators are not 'parties' to the action." *People v.*
3 *Reclamation Dist. No. 108* (1915) 169 Cal. 786, 786. The focus is on whether some
4 public interest, rather than a private one, will be served. 72 Ops. Cal. Atty. Gen. at 9.
5 Thus, this action is like any third party action against the corporation and the
6 directors, and the interests of the corporation and the defendant directors are aligned
7 against this challenge. Pacifica is not a "nominal" defendant in this proceeding--it is the
8 main defendant.[7]

9
10 **C. There Is No Conflict Between Pacifica And The Defendant Directors That Requires Disqualification Of Wendel, Rosen**

11 Even if the Court were to determine that this *quo warranto* action was analogous
12 to a shareholder's derivative action and sought to extend the application of relators'
13 authorities to this very different situation, in light of the allegations of the complaint and
14 the particular circumstances of this case, disqualification would not be required, because
15 there are no claims of fraud, self-dealing or similar malfeasance by the director
16 defendants. Although relators cite several state and federal cases involving
17 disqualification of counsel in shareholder derivative actions, each of the cases in which
18 counsel was disqualified involved allegations of fraud, self-dealing or similar intentional
19 misconduct by the directors. However, California corporations law has drawn a clear
20 distinction between such misconduct and that of a director's mismanagement or
21 negligence, which constitutes a breach of the duty of care owed to the corporation.
22 Under California law, uncompensated volunteer directors such as the defendant directors
23 herein, are afforded special protection as a matter of public policy. *See*, Corp. Code
24 §5047.5(a) and the discussion herein at Section III. E, *infra*.
25 The public policy of California with respect to volunteer directors is reflected in
26 Section 5231 of the Corporations Code, which provides that any person who performs the

27 [7] Significantly, relators have cited no *quo warranto* case, and defendants have found no
28 such case, in which counsel for the defendants has been disqualified.

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duties of a director "in good faith in a manner such director believes to be in the best interest of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances," then that **person "shall have no liability based upon any alleged failure to discharge the person's obligations as a director, including . . . any actions or omissions which exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated."** (Emphasis added.)[8] This protection also expressly applies to directors' "acts or omissions in connection with the election, selection or nomination of directors." Corp. Code §5232. Corporations Code Section 5239 provides additional protection to volunteer directors by exempting the directors from personal liability for damages caused by the directors' negligent act or omission in the performance of their duties as directors or officers so long as the action was within the scope of the directors' duties, was in good faith and was not reckless or grossly negligent. However, California does not provide protection to directors who engage in self-dealing. Section 5231 exempts from its protection, self-dealing by directors, which is addressed in Section 5233. Corp. Code §5231(c).

Even in shareholder derivative actions involving for-profit corporations, a distinction between fraudulent misconduct or financial malfeasance and negligent conduct is recognized. For example, in *Forrest v. Baeza* (1997) 58 Cal.App.4th 65, the court of appeal addressed the issue of dual representation of directors and the corporation in a shareholder derivative action. That case involved an action by one of the three directors of two closely held corporations against the corporations and the other two directors, alleging that the directors had embezzled funds from the corporations and committed other malfeasance. *Id.* at 69-70. The plaintiff director filed a motion to disqualify the attorney representing the corporations and the two director defendants on

[8] This Section 5231 is the nonprofit corporation's counterpart to Corporations Code Section 309, in which the California Legislature codified the business judgment rule for corporations generally. *Gaillard v. Natomas Co.* (1989) 208 Cal.App.3d 1250, 1264.

the ground that the directors' embezzlement, tax fraud and other crimes created "an actual conflict of interest between the [directors] and the corporation that could not be waived." *Id.* at 70.

In affirming the trial court's decision to disqualify the attorney from representing the corporations based on the conflict of interest, the appellate court stated: "Current 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**." *Id.* at 74 (emphasis added).

This distinction has been recognized by other courts as well. In *Bell Atlantic Corp. v. Bolger* (3d Cir. 1993) 2 F.3d 1304, 1316-1317, the Third Circuit affirmed the district court's decision not to disqualify counsel from representing both the corporation and the directors in a shareholder's derivative action. The Court of Appeals concluded:

> We believe serious charges of wrongdoing have not been levelled against the individual defendants. We say this because plaintiffs have alleged only mismanagement, a breach of the fiduciary *duty of care* . . . . But 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 corporations' best interest . . . . There are no allegations of self-dealing, stealing, fraud, intentional misconduct, conflicts of interest, or usurpation of corporate opportunities by defendant directors.

Id. at 1316 (emphasis added by court).

Similarly, *Schmidt v. Magnetic Head Corp.* (1983) 468 N.Y.S.2d 649, 97 A.D.2d 151, concerned an action by minority shareholders against the majority shareholders and the corporation to enforce a purported right to designate a successor to a director's position. The minority shareholders moved to disqualify the law firm representing both the corporation and the director defendants. *Id.* at 657. In denying the motion, the court noted that this "action involving the rights of competing stockholder factions to select a corporate director" was "[u]nlike a derivative suit, where an adverse interest generally exists between a corporation and its directors . . . ." *Id.*

In contrast to *Forrest*, here there are no claims that the director defendants

1 committed fraud, engaged in self-dealing or other financial misconduct or malfeasance.
2 In parsing the allegations of the complaint, after disregarding the irrelevant partisan
3 rhetoric, it is apparent that the principal allegations of wrongdoing against the directors
4 are that they exercised business judgment that relators disagree with. For example, the
5 complaint alleges that out of fear of losing funding from the Corporation for Public
6 Broadcasting ("CPB"), or in an effort to obtain additional CPB funding, the directors
7 began changing programming on Pacifica's radio stations. (Complaint, ¶19.) Allegedly
8 as part of this "conspiracy" the directors voted to amend the bylaws and expanded the
9 number of at-large directors. (Compl., ¶¶ 22-24, 35-36) The complaint also alleges that
10 defendants' practices are "defective," because they are done "without a modicum of due
11 process." (Compl., ¶ 43) Relators allege that defendants "have perverted, and continue
12 to pervert, the founding purposes of Pacifica." (Compl., ¶46) While relators have
13 alleged general legal conclusions that defendants "conspired together in bad faith" to
14 violate the purposes of Pacifica and the charitable trust, and that they "acted in a manner
15 contrary to the best interests of the corporation," there are no allegations of fraudulent
16 acts, self-dealing, or intentional misconduct against defendants. *Id.* at ¶46. The
17 gravamen of their complaint is that relators want to "restore Pacifica to conformity with
18 its purposes, as set forth in its Articles of Incorporation." (Compl., p. 4:17-18.)
19 In their complaint, the relators have not and cannot overcome the presumption
20 given by the business judgment rule that the actions taken by the Board were taken in
21 good faith and in the belief that the actions were taken in Pacifica's best interests. *See,*
22 *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776. The business judgment
23 rule creates a rebuttable presumption that the directors' decisions are based on sound
24 business judgment. *Id.* As a result, anyone challenging a director's decision is required
25 to assert "specific allegations of malfeasance or bad faith. Where an improper motive is
26 claimed, plaintiff must allege that it was the sole or primary reason for the directors'
27 actions." *Id.* at 777. Relators have not and cannot do so. In sum, there is no fraudulent
28 conduct or financial malfeasance that could potentially warrant disqualification of

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defendants' counsel.

D. Even If There Were A Conflict Between Pacifica And The Defendant Directors, Wendel, Rosen Has Made The Requisite Disclosures

The California Rules of Professional Conduct contemplate and allow for an attorney's representation of multiple parties in a single action. For example, Rule 3-600(E) of the California Rules of Professional Conduct expressly permits an attorney to represent both a corporation and its directors and officers (subject to Rule 3-310). *See, e.g., Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1731 (Rule 3-310 "also makes clear that concurrent representation of the partnership and one or more of the partners is possible subject to the conflict of interest rules."). Rule 3-310(B) provides that an attorney shall not accept representation of a client "without providing written disclosure to the client" when the attorney has a "legal, business, financial, professional, or personal relationship with a party" in the same matter. Rule 3-310(C) requires that where there is a potential or actual conflict of interest between clients in the same matter, an attorney must obtain the informed written consent of each client.

Wendel, Rosen had not represented Pacifica or any of its directors or officers prior to its retention as counsel for Pacifica in the *Adelson* action in or about July 1999. That is, when Pacifica retained Wendel, Rosen, it retained *independent* counsel. In the present action, Wendel, Rosen was first retained to represent all defendants by the Executive Director, and the individual directors agreed. Thereafter, Pacifica's current Executive Director, Bessie Wash (who has not been named as a defendant), agreed to Wendel, Rosen's continued representation. Wash also agreed that Wendel, Rosen could represent those individual directors whose interests are aligned with and not adverse to Pacifica.[9]

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[9] Although the court in *Forrest v. Baeza, supra*, 58 Cal.App.4th at 76, a shareholder's derivative action, determined that a conflict of interest between the corporation and some of its directors could not be waived on behalf of the corporation by the same directors involved in the conflict, that is not applicable here. In this instance, the Executive Director, who is neither a director nor a named defendant, but who has full authority to hire legal counsel for Pacifica, made the decision to continue to retain Wendel, Rosen to represent Pacifica and also agreed that Wendel, Rosen could represent the director defendants who are aligned with Pacifica. Where an independent third party waives the conflict on behalf of the corporation, such waiver under Rule 3-310 is effective. *See*,

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In order to determine whether there is a potential or actual conflict of interest, an attorney must evaluate whether any of the following six potential conflict situations exist or may arise during representation"

> (1) conflicting instructions from the clients in which the lawyer cannot follow one client's instructions without violating another clients instruction; (2) conflicting objectives of the clients in which the lawyer cannot effectively advance one client's objective without detrimentally affecting another client's objective; (3) advocacy of antagonistic positions of the clients in which the lawyer is called on to advocate both sides of a negotiation or a legal position at the same time; (4) inconsistent expectations of confidentiality in which one client expects the lawyer not to disclose information the lawyer would be required to impart to the other client; (5) a preexisting relationship with one client that would adversely affect the lawyer's independent judgment on behalf of the other client; and (6) conflicting demands by the clients for the original file once the representation has ended.

Cal. State Bar Formal Opn. No. 1999-153. If one of more of these factors are "reasonably possible," a potential conflict exists. *Id.*

Wendel, Rosen assessed these factors with respect to the positions of Pacifica and each of the individual director defendants, and determined that no actual or potential conflict existed or would potentially arise during representation. *See*, Rapaport Decl., ¶ 6 Furthermore, Wendel, Rosen made the appropriate disclosures to the clients regarding any potential for conflict. *Id.* at ¶¶6, 14.

In any event, Wendel, Rosen has obtained the written consent of the defendants with respect to representation in this matter, along with the clients' waiver of any potential or actual conflicts. *See*, Declarations of Bessie Wash, David Acosta, Mary Frances Berry, June Makela, Frank Millspaugh, Andrea Cisco, Ken Ford, Micheal Palmer, Robert Farrell, Karolyn Van Putten, Wendell Johns, Valrie Chambers, John Murdock and Lynn Chadwick. Not only did Wendel, Rosen send written disclosure to the directors and to Bessie Wash regarding Wendel, Rosen's representation of them and Pacifica in this action, but also following the filing of relators' motion to disqualify,

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Declaration of Bessie Wash in Opposition to Motion to Disqualify Counsel, ¶ 1.

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Wendel, Rosen provided each director defendant and Ms. Wash with a copy of the Points And Authorities In Support Of Motion To Disqualify Defendants' Counsel filed by the relators, so that the director defendants and Ms. Wash could see first-hand, the strongest argument that relators could present on the conflict issue. Even after reading relators' arguments, the director defendants and Ms. Wash (on behalf of Pacifica) agreed in writing to Wendel, Rosen's continued representation of them, and agreed to waive any conflicts. Thus, Pacifica and each of the director defendants who are aligned with the interests of Pacifica have consented to Wendel, Rosen's representation of them.

In sum, an attorney may concurrently represent two or more parties in the same action so long as they do not have opposing interests in the lawsuit that would require the attorney to advance those divergent interests simultaneously. *Tskanos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 Cal.App.4th 74, 95-96; *see also*, Cal. State Bar Formal Opn. No. 1999-153. Pacifica and the director defendants do not have divergent interests and even if they did, any such conflict has been waived.

E. Depriving Uncompensated Volunteer Directors Of Their Chosen Counsel Would Impede The Public Policy Of Encouraging Persons To Serve As Directors Of Nonprofit Corporations And Charitable Organizations

The California Legislature has expressly recognized that public policy is promoted by providing special protection from liability to volunteer directors of nonprofit corporations who serve without compensation. Corporations Section 5047.5(a) provides in part:

> The Legislature finds and declares that the services of directors and officers of nonprofit corporations who serve without compensation are critical to the efficient conduct and management of the public service and charitable affairs of the people of California. The willingness of volunteers to offer their services has been deterred by a perception that their personal assets are at risk for these activities . . . . It is the public policy of this state to provide incentive and protection to the individuals who perform these important functions.

Not only do a number of provisions of the California Corporations Code exempt such volunteers from liability (so long as they act in good faith and in what they believe

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to be the best interests of the corporation), but also the Code permits a nonprofit corporation to indemnify such directors against claims by third parties. *See, e.g.,* Cal. Corp. Code §5238. One means of promoting these policies is for a nonprofit corporation, which often is operating with limited financial means, to provide a joint defense to its uncompensated directors who have been named as co-defendants with the corporation.

Relators seek to undermine these statutory protections by attempting to manufacture a purported conflict of interest between Pacifica and its director defendants. Permitting relators to interfere with Pacifica's choice of counsel, particularly since relators did not object until nearly a year after relators were aware of the dual representation by Wendel, Rosen, would have a chilling effect on attracting people to serve as uncompensated, volunteer directors in nonprofit corporations and other charitable organizations.

It would be manifestly unfair (as well as extremely financially burdensome to Pacifica) to allow relators to deprive Pacifica and its directors of their chosen legal counsel, based on the general and conclusory allegations contained in the complaint, which, at most, complain of the directors' exercise of their business judgment. Even if this were a shareholder's derivative suit, which it is not, relators' allegations fail to overcome the business judgment presumption. *See* discussion of the business judgment rule in Defendants' Opposition to the Order To Show Cause Re Preliminary Injunction.

In sum, if the Court considers all of the factors in this action, including the relators' delay in objecting to the dual representation by Wendel, Rosen; the fact that disqualification motions are too often used as a litigation tactic to gain an advantage over an opponent; the fact that the plaintiffs in the companion case of *Adelson v. Pacifica Foundation* made no motion to disqualify either Wendel, Rosen or Epstein, Becker & Green; and the burden disqualification will impose on Pacifica and its directors if they are compelled to retain new counsel, it will deny relators' motion. *See, Responsible Citizens v. Superior Court, supra,* 16 Cal.App.4th at 1725.

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IV. CONCLUSION

The interests of Pacifica and the defendant directors are wholly aligned in this case and there is no actual or potential conflict of interest between them that would warrant disqualification of Wendel, Rosen. Moreover, Wendel, Rosen has made the necessary disclosures and obtained the informed written consent as well as waivers of any conflict of interest of all of the defendants it represents. Under the circumstances, and particularly in light of the hardship it would impose on both the directors and on Pacifica if they were deprived of their chosen counsel, who is readily familiar with the evidence and issues in this case, and required to obtain new and separate counsel, the motion to disqualify Wendel, Rosen should be denied.

Dated: March 29, 2001

WENDEL, ROSEN, BLACK & DEAN, LLP

By ______________________
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