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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.* CAROL SPOONER, et al. Plaintiffs, vs. THE PACIFICA FOUNDATION, et al. Defendants.	Case No. 00 3815 MJJ **FOUNDATION DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO REMAND TO STATE COURT** Date: January 9, 2000 Time: 9:30 Courtroom: Nine Judge: Martin J. Jenkins United States District Judge

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I. INTRODUCTION

This case is one of a trilogy of cases[1] filed as part of a concerted attempt to wrest control over the five Pacifica Foundation ("Foundation") radio stations from the Foundation's governing board and place it in the hands of each station's Local Advisory Board ("LAB") and self-appointed individuals. At the heart of all three actions is the plaintiffs' proclaimed dissatisfaction with programming, administrative, and operational decisions made by the Foundation.

The plaintiffs here are a group of self-selected disgruntled listeners of certain of the stations, who also purport to bring this action on behalf of the Pacifica Foundation itself. Like the plaintiffs in the *Adelson* and *Robinson* actions, the plaintiffs here seek to have the Court order changes to the Foundation's governing structure that would effectively give control of the radio stations to the LABs and the listeners. This would include control over programming and the day-to-day operation and management of the stations.

While plaintiffs attempt to disguise their claims as involving state law issues, that is merely a façade. The essence of plaintiffs' claims is the programming, administrative, and operational decisions of the Foundation, which is the sole holder of the broadcast licenses granted by the Federal Communications Commission ("FCC"). The relief plaintiffs seek is to have this Court turn over those functions and that authority to them. As a result, plaintiffs' claims and requests for relief tread squarely on a field of law – the regulation of broadcast license holders – that is wholly occupied by the federal government. All their claims, therefore,

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[1] The first action filed was *Adelson, et al. v. Pacifica Foundation, et al.*, Case No. 814461-0, Superior Court of the State of California for the County of Alameda ("*Adelson*"). The named plaintiffs in Adelson are all members of one of the Local Advisory Boards ("LABs") and purport to bring the action on behalf of all others similarly situated and on behalf of the Pacifica Foundation. The other action filed is *Robinson et al. v. The Pacifica Foundation.* That action was filed in State Court as Case No. 831252-3 and was removed to this court where it is now Case No. 00 3814 MJJ. The two named plaintiffs in that action, Robert Robinson and Rabbi Aaron Kriegel, are directors of the Foundation's national board of directors and purport to bring the action as a derivative action.

are preempted by the Federal Communications Act ("FCA"). 47 U.S.C. 151, *et seq.*

II. PROCEDURAL BACKGROUND

Plaintiffs filed this action in the Superior Court of the State of California, Alameda County, on September 15, 2000. All substantively genuine defendants[2] removed the action in a timely manner to this Court on October 16, 2000, on the ground that plaintiffs' claims arise under the FCA, and the Public Broadcasting Act ("PBA"), 47 U.S.C. § 390 *et seq.*, contained within the FCA.

At the time of filing the Notice of Removal, the removing defendants filed a motion to realign purported defendants, Peter Bramson, Leslie Cagan, Tomas Moran, Robert Robinson, and Rabbi Aaron Kriegel, as plaintiffs. These individuals have publicly aligned themselves with the plaintiffs, and have joined with the plaintiffs in their effort to remove the Foundation Board so that the LABs and listeners can gain control over the radio stations, their programming format and operations.

On October 26, 2000, plaintiffs filed a motion to remand the action to state court and an opposition to defendants' motion to realign the parties. Judge Jenkins entered a Related Case Order on October 31, 2000, vacated all matters then scheduled for hearing, and ordered the parties to renotice the matters previously scheduled for hearings. All motions have been renoticed and are scheduled to be heard on January 9, 2000. Also pending before this Court and scheduled to be heard on January 9, 2000, is the Foundation Defendants' Motion to Dismiss the Plaintiffs' Complaint for Failure to State a Claim.

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[2] The removing defendants are the Pacifica Foundation, David Acosta, Mary Frances Berry, Lynn Chadwick, Valrie Chambers, Andrea Cisco, Robert Farrell, Ken Ford, Wendell Johns, Bertram Lee, Beth Lyons, June Makela, Frank Millspaugh, John Murdock, Michael Palmer, and Karolyn Van Putten ("Foundation Defendants").

III. REMOVAL TO FEDERAL COURT WAS PROPER

A. Plaintiffs' Claims are Completely Preempted by Federal Law and, Thus, Plaintiffs' Motion to Remand Should be Denied.

Generally, a cause of action can be removed only when a federal cause of action appears on the face of a well-pleaded complaint. In some circumstances, however, state law claims may properly be recharacterized as arising under federal law. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64.

When Congress enacts a statute with the intent to occupy an entire field, state law claims falling within the statute's reach are completely preempted. Federal jurisdiction exists even though the Complaint does not mention a federal cause of action. *Id.; Bastien v. AT&T Wireless Serv., Inc.*, 205 F.3d 983 (7th Cir. 2000) (FCA completely preempted state regulation of mobile telecommunications rates and market entry), *Heichman v. Am. Tel. and Tel. Co.*, 943 F. Supp. 1212, 1218 (C.D. Cal. 1995) (state claims involving quality of phone service, reasonableness of rates or breaches arising out of a duty created by the FCA are completely preempted); *In re Appeal of Graeme and Mary Beth Freeman*, 975 F. Supp. 570 (D. Vt. 1997) (federal law occupies the field of radio frequency interference so thoroughly that state or local regulation is completely preempted); *In re Comcast Cellular Telecommunications Litig.*, 949 F. Supp. 1193, 1202 (E.D. Pa. 1996) ("Due to the comprehensive nature of congressional regulation of the communications industry, a body of uniform federal common law has developed which preempts a variety of state claims in the communications area.").

State law will be preempted if it "attempts to regulate conduct in a field that Congress, by its legislation, intended to be occupied exclusively by the federal government." *Southwestern Bell Wireless, Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1190 (10th Cir. 1999) (county zoning regulation involving radio frequency interference is preempted because Congress completely occupied the field of radio interference), *citing Mount*

Olivet Cemetery Ass'n v. Salt Lake City, 164 F.3d 480, 487 (10th Cir. 1998), *citing English v. Gen. Elec. Co.*, 499 U.S. 72, 79 (1990). In *Southwestern Bell*, the court explained:

> Field preemption may be inferred if a federal scheme of regulation is so pervasive that Congress must have intended to leave no room for a state to supplement it or if an Act of congress touches a field in which the federal interest is so dominant the federal system is assumed to prohibit enforcement of state laws on the same issue.

Southwestern Bell, 99 F.3d at 1190, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

By enacting the Communications Act of 1934, "'Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry.'" *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 214 (1943) (quoting *Federal Communications Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1943)); *see also Benanti v. United States*, 355 U.S. 96, 104 (1957) (the Federal Communications Act is a comprehensive scheme for the regulation of interstate communication). Section 1 expressly states the FCA's "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges.'" *National Broadcasting*, 319 U.S. at 214. This general purpose is particularized to radio broadcasting in Section 301:

> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and period of the license.

Id.

Additionally, under the "artful pleading doctrine," a defendant may properly remove a state cause of action to federal court where the state cause of action raises a substantial federal question, and the plaintiff has a remedy under federal law. *Etheridge v. Harbor House Restaurant*, 861 F.2d 1389, 1402 (9th Cir. 1988); *Hunter v. United Van Lines*, 746 F.2d 635 (9th Cir. 1984). In such circumstances, courts can look beyond the face of the complaint and treat an ostensible state law claim as one arising under federal law. *Federated Dep't Stores, Inc. v. Moitie*, 425 U.S. 394, 397 n.2 (1981).

While plaintiffs' claims are characterized by them as presenting state law causes of action, the gravamen of their complaint is that the Foundation Board is wrongfully exercising its control as an FCC licensee over the management and programming of the Foundation's licensed radio stations. The licensing of radio stations and the programming content of the radio stations' broadcasts are exclusive areas of federal concern. *Simmons v. FCC*, 169 F.2d 670, 672 (D.C. Cir. 1948). State laws attempting to regulate these areas are completely preempted by the FCA and the Public Broadcasting Act. *See Cahnmann v. Sprint Corporation*, 133 F.3d 488 (7th Cir. 1998); *see also Heichman v. American Telephone and Telegraph Co.*, 943 F. Supp. 1212 (N.D. Cal. 1995); *c.f. Marcus v. American Telephone and Telegraph System*, 138 F.3d 46 (2nd Cir. 1998) (court found removal proper under the artfully pleaded complaint doctrine).

It long has been recognized that the FCC's power to regulate radio broadcasting extends beyond the regulation of technical matters, such as preventing interference between stations. The Supreme Court consistently has recognized that:

> An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of license.

National Broadcasting, 319 U.S. at 217.

In *National Broadcasting*, the Court added that:

> The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio.

Id. (internal quotation marks and citations omitted). Further, "[t]hese provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the larger and more effective use of radio in the public interest." *Id.* (internal quotation marks and citations omitted).

Similarly, *Simmons v. FCC*, 169 F.2d 670 (D.C. Cir. 1948), holds:

> We are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic.

Id. at 672. An express part of the FCC's charge and authority is to ensure that diverse views are represented in radio broadcasting:

> [T]he Commission can and should attempt through the licensing process to ensure a multitude of tongues in order to provide the people with a multitude of ideas. This authorization is founded on values contained in the First Amendment and is thus presumed to be part of the FCC's "public interest" standard.

Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 273 (D.C. Cir. 1974) (Bazelon, C.J., concurring in the result.)

The decision in *Heichman v. American Telephone and Telegraph Company*, 943 F. Supp. 1212, 1214 (C.D. Ca. 1995) confirms that the FCA completely preempts any state law which purports to regulate matters within the scope of the FCA. (The *Heichman* court held that because the plaintiff's state tax law claims did not involve any duty or obligation within the

scope of the FCA, they were not preempted.) Here, however, because the very issues raised by plaintiffs – program content and the administration of licensee stations – are squarely within the scope of the FCA,[3] plaintiff's claims are preempted.

One aspect of *Heichman* warrants further note. In its decision, the *Heichman* court relied upon the FCA's savings clause, which, as relevant, provides that:

> nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. In a recent decision, however, the Court repudiated that broad holding and ruled that the savings clause could not be construed in a manner that interfered with the substantive purpose of the Act. *American Telephone & Telegraph Co. v. Central Office Telephone*, 524 U.S. 214 (1998). The Court held that Section 414:

> 'cannot in reason be construed as continuing . . . a common law right, the continuance of which would be absolutely inconsistent with the provisions of the FCA. In other words, the [FCA] cannot be held to destroy itself.'

Id., quoting Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 446 (1907).

Plaintiffs' complaint raises, and its outcome depends upon, substantial and dispositive federal questions. Whether or not the Foundation is operating its radio stations in accordance with the FCA as required by its charter, its status as an FCC licensee and as a CPB funding recipient, presents clear and substantial federal questions. The answers to these questions, moreover, are dispositive of the core issues in this case. The gravamen of plaintiffs' allegations involve: (1) issues relating to who should control the programming content of the Foundation's stations; (2) what form the programming should take; and (3) issues relating to the control, if any, the LABs are entitled to have over station programming and the day-to-day operations of

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[3] *See Simmons v. FCC*, 169 F.2d 670, 672 (D.C. Cir. 1948); *see also Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968).

the radio stations. Each of these issues depends upon applicable federal law.

Plaintiffs' Complaint reflects the dominant federal presence and involvement in the subject of their claims. Plaintiffs describe actions by various governmental agencies regarding Pacifica's programming format. (Compl. ¶ 24). Plaintiffs, for example, claim that:

> In response to *pressure from the CPB*, members of the Pacifica Board of Directors and the Executive Director secretly made plans to divert Pacifica from its historic purpose and tradition of providing politically controversial programming and cutting-edge alternative news and information to the public. In order to carry out their secret plans, this small cabal set about consolidating their power by illegal bylaws amendments destroying any semblance of democratic process at Pacifica, packing the Pacifica board of directors with persons supportive of their plans, firing station staff, issuing "gag orders" to station staff and local station advisory board members, and, ultimately, conspiring to "shut down and reprogram" KPFA and/or sell KPFA and/or WBAI.

(Compl. ¶ 3). Plaintiffs further complain that:

> [I]n response to *fears of losing Corporation for Public Broadcasting ("CPB")* funding, or in hopes of gaining more CPB funding as well as foundation grants, the executive director and the directors [of] Pacifica began a campaign of curtailing politically controversial news and public affairs programming on Pacifica stations, adding popular "niche music" programming, "professionalizing" air sound in a National Public Radio-type mimicry, reducing the numbers of volunteer programmers, "union busting" to remove volunteer programmers from the staff unions, reducing the diversity of arts, literature and cultural programming, and "pitching" Pacifica programming to more [sic] a wider more affluent, more "mainstream" listening audience and to corporate-funded foundation grant-makers.

(Compl. ¶ 19) (emphasis added). Plaintiffs also directly rely upon the compliance requirements set out in section 396(k)(8) of the FCA respecting the function of LABs. (Compl. ¶ 21). They similarly look to an alleged letter from a CPB vice president that threatened to withhold CPB funding if Pacifica did not bring itself into compliance with the requirements of federal law. (Compl. ¶ 24).

Further, plaintiffs allege in their First Cause of Action (Breach of Charitable Trust), that Defendants' actions "have perverted, and continue to pervert, the founding purpose of Pacifica .

. . ." (Compl. ¶ 46). They specifically state that the purpose of Pacifica is to:

> Establish and operate for educational purposes, in such manner that the facilities involved shall be as nearly self-sustaining as possible, ***one or more radio broadcasting stations licensed by the Federal Communications Commission and subject in their operation to the regulatory action of the Commission under the Communications Act of 1934, As Amended.***

(Compl. ¶ 18) (emphasis added). Plainly, in order to state the claims they present, plaintiffs are compelled to refer to and rely upon federal statutes and regulations.

Plaintiffs seek to have this Court confer upon LABs effective control over the Foundation's stations. Federal law specifically proscribes any such result. Applicable law requires that, as a recipient of funding from the CPB, the Foundation must: (1) assure that its Directors are independent of LAB influence and control; and (2) control its stations' program content and administration. 42 U.S.C. § 392(a)(2) (applicants for grants from CPB must provide assurances that "the operation of such public telecommunications facilities will be under the control of the applicant"). In brief, plaintiffs' requested relief demands that the Court nullify clear federal law requirements.

The CPB was created by the Public Broadcasting Act of 1967, 47 U.S.C. § 390 *et seq.* The CPB is a nonprofit, private corporation governed by a 10-person, bipartisan Board of Directors appointed by the President with the advice and consent of the Senate. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 369-70 (1984). It was founded to provide federal funding for noncommercial radio and television stations in support of such stations' operation and educational programming. *Id.* at 366.

The PBA provides that, in order to receive CPB funding, a station must have a "community advisory board."[4] 47 U.S.C. § 396(k)(8)(A). Moreover, the Act expressly

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[4] For reasons having no substantive effect, those entities are called a "LABs" by the Foundation.

provides that:

> The role of the [community advisory] board shall be solely advisory in nature, except to the extent other responsibilities are delegated to the board by the governing body of the station. ***In no case shall the [community advisory] board have any authority to exercise any control over the daily management or operation of the station.***

47 U.S.C. § 396(k)(8)(C) (emphasis added). To avoid the inescapable conclusion that the PBA prohibits the LABs from exercising control over the operation of the station, plaintiffs make the remarkable statement that "there is nothing in the law compelling Pacifica to apply for or to accept matching grants from the Corporation for Public Broadcasting." (Motion to Remand at p. 14). Plaintiffs' argument is a *non sequitur*. The fact is that Pacifica does receive funds from the CPB and, thus, is subject to the provisions of the PBA.

Moreover, plaintiffs allege that the wrongdoings of which they complain were brought about by improper influence from the CPB, the very entity imbued by Congress with oversight responsibility for public broadcasting corporations which receive CPB funds. (Compl, ¶¶ 3, 19, 21, 24). Plaintiffs' self-serving position is that, in order to enable plaintiffs to control Pacifica stations against the wishes of the licensee's Board of Directors, Pacifica should not accept CPB funds (funds that Congress made available to further the strong public policy of assisting public broadcasting companies to better serve the public interests in areas where commercial radio left a void).[5]

In addition, plaintiffs' causes of action are completely preempted because these claims arise out of duties created by the FCA, and concern an area completely occupied by the federal government. *Heichman*, 943 F. Supp. at 1212. Plaintiffs make numerous allegations regarding alleged, attempted, and threatened changes to, and the control, modification, and censorship of,

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[5] Ironically, plaintiffs fail to see that, if Pacifica did not receive funds from the CPB, there would be no requirement for it to have LABs. (Title 47, section 397(k)(8)(C) provides that, to receive CPB funding, a station must have a local advisory board).

the stations' programming. (*See* Compl. ¶ 19). However, the duties and obligation a licensee has with regard to its programming arise solely under federal law. *Massachusetts Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 500 (1st Cir. 1950) ("*Hildreth*"). No state law either does or may define such duties.

In *Hildreth*, the plaintiff, a charitable corporation "devoted to the diffusion of religious knowledge," alleged that it had a contract with a radio broadcasting licensee under which the licensee was to furnish its broadcasting facilities for sermons prepared by the plaintiff. *Id.* The plaintiff alleged a violation of the FCA. The court noted that "[t]he claim made by the plaintiff is clearly predicated on the theory that, once its contract has been made, it has a positive right, arising under the Federal Communication Act . . . the solution of which depends on the proper interpretation to be given a federal law." *Id.* at 494.

Similarly, the plaintiffs allege that, because of provisions in the Foundation's articles of incorporation regarding the Foundation's purpose and mission, its LABs and its stations' listeners have an entitlement to a certain type of programming and an unfettered entitlement to the airways without any constraints or controls imposed by the Foundation acting through its Board. *Hildreth*, although not a removal case, is instructive as to the respective parties' rights, obligations, and duties with regard to programming.

The *Hildreth* court stated:

> Certainly the Act does not expressly confer on anyone the right to broadcast any material at any time, whether or not it has a contract for such a broadcast. Nor does there seem to be any basis for an implication of such a right. There is nothing in the Act to indicate that the mere fact that one party to the contract is a licensee under the Act gives to the other contracting party any greater rights than those which the law ordinarily gives to parties to a contract.
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> * * *
>
> It is true that licensees under the Act have a duty to operate their

> stations so as to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what program will best serve the public interest. We conclude that a licensee is not fulfilling his obligations to operate in the public interest and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.'

Id. at 499-500 *(quoting Federal Communications Commission Report on Chain Broadcasting,* May 2, 1941, *quoted in National Broadcasting,* 319 U.S. 190).

The issue of whether or not the Foundation's programming decisions are serving the public interest is "appropriately left to the Commission rather than in the first instance to the courts, for it is one which is complicated by problems peculiar to the radio industry." *Hildreth,* 183 F.2d at 500. (See Declaration of Daniel Rapaport, Exhibit A, Pacifica Foundation's Articles of Incorporation). There is no room under the FCA for state law regulation of a broadcast licensee's programming decisions, and thus, plaintiffs' state law claims are preempted.

Plaintiffs acknowledge that state law claims may be treated as arising under the federal law where the vindication of the asserted state law right necessarily turns on the construction of federal law. (Motion at p. 8, *citing Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 9 (1983). However, they suggest that federal exclusivity with respect to broadcasting is limited to technical matters such as radio frequency allocation. (Motion at p. 9). To the contrary, as discussed above, the regulatory reach of the FCA is not limited to technical matters, but extends to subjects such as who controls programming content and the operation of a broadcasting station. Plaintiffs cite irrelevant cases, which ostensibly stand for the proposition that the FCC has no jurisdiction to adjudicate contract disputes affecting

transfers of control of broadcast licenses. (Motion at pp. 9-12).[6] Plaintiffs miss the point. This is not a contract dispute, and the Foundation Defendants do not maintain that all disputes between a broadcast licensee and another party are completely preempted by federal law. Moreover, federal preemption is not about whether or not a federal agency has jurisdiction to hear a particular dispute. What is relevant to federal preemption analysis is whether, even when a plaintiff does not mention a federal cause of action, its claims may properly be recharacterized as arising under federal law. *Metropolitan*, 481 U.S. at 64. Whether LABs and the stations' listeners are entitled to control the programming and operational decisions, which is the issue in this case, raises a substantial federal question in an area of law that is completely occupied by federal law. This issue is completely preempted by federal law.

One of the decisions cited by plaintiffs amply illustrates this point. Plaintiffs cite *In the Matter of Agreements Between Broadcast Licensees and the Public*, 57 FCC 2d 42 (1975), for the proposition that it is the FCC's longstanding policy "to refuse to adjudicate private contract law questions for which a forum exists in the state courts and to take a 'wait and see' posture vis-a-vis the outcome of such disputes when issuing or renewing broadcast licenses." (Motion to Remand at p. 11). In that decision, the FCC stated its policy with regard to the legality of private agreements which delegate a licensee's responsibilities under the FCA to a third party.

The Commission stated:

> In accordance with the legislative design for broadcasting set out in the Communications Act, licensees alone must assume and bear ultimate responsibility for the planning, execution, and supervision of programming and station operation. This

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[6] The plaintiffs disingenuously cite three cases as establishing that the FCA is not applicable in this case. First, *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1949), dealt with the recovery of money damages as a result of a breach of contract, not with who should control the radio station. Second, *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), dealt with the conveyance of the physical assets of a radio station, not the transfer of the actual radio licenses. Third, *Minnesota – Iowa Television Co. v. Watonwan TV Improvement Association*, 294 N.W. 2d 297 (Minn. 1980), dealt with an injunction barring the television station from broadcasting content that, by the terms of its license, it was permitted, but not required, to broadcast.

> responsibility cannot be delegated, and a licensee cannot (even unilaterally) foreclose its discretion and continuous duty to determine the public interest and to operate in accordance with that determination.
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> * * *
>
> Complete supervision of and control over programs, including careful examination of their content, directly affects the rendition of a public service. The right to determine, select, supervise, and control programs is inherently incident to the privilege of holding a station license. In fact, the right becomes a responsibility of a licensee, as he must be held to strict accountability for the service rendered.

In the *Matter of Agreements Between Broadcast Licensees and the Public*, 57 FCC at 47. The Commission went on to state:

> If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest . . . . We have thus uniformly rejected agreements, which would operate to restrict the right of a licensee to make and implement decisions respecting station operations. It is on this foundation, then, that we adopt the following policies.

Id. at 48. The Commission provided examples of the types of agreements it has uniformly rejected:

> For example, we have proscribed network agreements which unduly restrict the carriage of programs of other networks . . . and trade agreements which impair a licensee's obligation to retain control over program matter at all times . . . . We have also pointed out that "private agreements cannot be construed to limit a broadcaster's responsibilities and obligations imposed by the Communications Act . . . . We have acted to prevent the possible improper delegation of licensee responsibility in connection with subscription agreements between radio stations and musical format service companies . . . . There is, of course, no rule of law or policy which prohibits a licensee in the exercise of its discretion, from determining not to broadcast certain programs or to broadcast other programs which it believes better serve the public interest. ***It is the fixed determination, binding and unchangeable, which runs afoul of the requirement of licensee responsibility.***

Id. at 48 (emphasis added) (internal citations omitted). The Commission concluded:

> We cannot . . . approve agreements which contain 'fixed determinations, binding and unchangeable," in areas where flexibility to serve the public interest is required. To the extent

> that any agreement surrenders this discretion to others, it cannot be considered by this Commission as having any force or effect.

Id. at 49-50. Clearly, the Commission under the authority of the FCA, has the last word with respect to private contracts, subject to state contract law, that purport to transfer control of a radio station from the licensee to other parties. Control of a station is an FCA issue, not a state law issue.

What plaintiffs are asking of this Court, in the guise of interpreting the Foundation's Articles of Incorporation and Bylaws, is to transfer the authority to determine what programming serves the public interest from the Board, as license holder, to others who are not licensees. Clearly under the FCA's regulations, the Foundation cannot delegate or giveaway to the LABs or the listener-sponsors its obligation to itself determine how to serve the public interest.[7]

Plaintiffs are unable to deny that the relief they seek effectuates a transfer of control of the stations, which would require FCC approval. (Motion to Remand at p. 12). They argue, however, that a state court can "structure injunctive relief to require the departing directors to cooperate in the necessary application for FCC approval." (Motion to Remand at p. 13). In support of this contention, they cite *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945). In fact, however, *Radio Station WOW* stands for exactly the opposite proposition. In that case, the lower court had ordered the parties to "do all things necessary" to secure a return of a license to a radio station. The Supreme Court held that such an order inappropriately tread on an area reserved exclusively for the FCC, stating:

> [W]e think the court went outside its bounds when it ordered the

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[7] The plaintiffs cite *Mid-Texas Broadcasting, Inc.* 71 FCC.2d 1173 (1979), however, the FCC clearly distinguishes between a case such as the one at issue in this matter where the plaintiffs seek actual transfer of Pacifica's radio licenses as opposed to monetary relief. Further, *Arecibo Radio Corp.* 101 FCC 2d 845 (1985), specifically dealt with the transfer of control, arising out of a sale, as opposed to transfer of control due to programming disputes.

> parties "to do all things necessary" to secure a return of the license. Plainly that requires the Society to ask the Commission for a retransfer of the license to it and requires WOW not to oppose such a transfer. . . . These are restrictions not merely upon the private rights of parties as to whom a State court may make appropriate findings of fraud. They are restrictions upon the licensing system which Congress established. It disregards practicalities to deny that, by controlling the conduct of the parties before the Communications Commission, the court below reached beyond the immediate controversy and into matters that do not belong to it.

Id. at 130-31.

Plaintiffs' argument is couched on a theory that, because state courts may have concurrent jurisdiction with federal courts over the issues they present in their Complaint, preemption does not lie. This argument simply demonstrates their misunderstanding of preemption. Federal preemption does not turn on whether or not state courts have concurrent jurisdiction with the federal courts. *See, e.g., Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1998). In fact, in an area of law well established to completely preempt state law, the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.* (as amended), the statute itself provides for concurrent jurisdiction with state courts for certain types of claims. 29 U.S.C. 1132(e)(i). Nonetheless, the federal courts have consistently held that when those types of claims are brought in state court, they are removable to federal court under a complete preemption theory. *See Metropolitan*, 481 U.S. at 63.

Defendants do not argue that state courts may not have concurrent jurisdiction over what clearly are federal causes of action. The Foundation Defendants' argument, which plaintiffs completely fail to address, is that the regulation of FCC licensed radio stations is completely preempted by federal law. As a consequence, plaintiffs' claims are removable to the federal courts.[8]

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[8] Further, *Bruss Co. v. Allnet Communications Services, Inc.*, 505 F. Supp. 801 (N.D. Ill. 1985), *Kellerman v. MCZ Telecommunications Corp.* 493 N.E.2d 1045 (Ill. 1986), *American Inmate Phone Systems, Inc. v. U.S.*

B. The Non-Removing Defendants Should Be Realigned.

As an alternative basis for remand, plaintiffs argue that the removal is procedurally defective because five of the defendants did not join in the removal. (Motion to Remand at p. 6). The Foundation Defendants, in their Motion to Realign, have fully briefed the issue whether Defendants Bramson, Moran, Cagan, Robinson, and Kriegel should be realigned because they have publicly aligned themselves with the plaintiffs, and have supported the plaintiffs' efforts to eliminate the current Board members in order to replace them with a majority of LAB members. The purpose of that effort being to enable the LABs, and whoever controls them, to control the programming content, administration, and operation of the stations. Defendants' Motion to Realign the Parties is scheduled to be heard the same day as Plaintiffs' Motion to Remand. In order not to burden the Court with duplicative arguments, Foundation Defendants hereby incorporate and adopt the arguments made in their Motion to Realign the Parties, as well as in their Reply to Plaintiffs' Opposition to Motion to Realign.

One brief point is particularly worth noting. Carol Spooner, the lead named plaintiff in this case, has publicly admitted that the five non-removing defendants are aligned with the plaintiffs. Spooner's statement against interest demonstrates that plaintiffs' argument against realignment is wholly disingenuous. In an e-mail dated October 20, 2000, apparently sent to the public, she excoriates one of the Foundation Defendants, Beth Lyons, and praises Bramson, Kriegel, Moran, Robinson and Cagan for their rejection of all of the other defendants' – *i.e.* the Foundation Defendants – unified position in support of the Foundation's actions and policies. (See Declaration of Daniel Rapaport, Exhibit B, E-Mail sent by Carol Spooner).

> Rob Robinson, Aaron Kriegel, Tomas Moran, Pete Bramson & Leslie Cagan have all retained separate counsel and have NOT

Spring Communications Co., 787 F. Supp. 852 (N.E. Ill. 1992), and *Cooperative Communications v. AT&T Corp.*, 867 F. Supp. 1511 (D. Utah 1988), specifically deal with situations where state causes of action do not interfere with a federal regulatory scheme. However, the plaintiffs in this case wish to directly interfere with FCC licensing decisions.

> joined the board majority's position on [their] suit. When the time came, finally, when all of the directors had to fish or cut bait – Lyons didn't have the courage or the conviction to fight the board cabal . . . . The gloves are off and Lyons is on the wrong side of the fight.

Id. Obviously, the nominal non-Foundation defendants are perceived as on Spooner's side of the fight.

Consistent with the reality that they are sham defendants, none of the non-Foundation defendants has answered the complaint, responded to any of the motions that have been filed in this action, or asked for or received any extensions of time from the Court. Each of them has had ample opportunity to assert that he or she is not aligned with the plaintiffs, and none has done so.

IV. THE ABSTENTION DOCTRINES WOULD BE INAPPROPRIATE APPLIED IN THIS CASE.

Recognizing that they cannot defeat federal preemption, plaintiffs argue that this Court should remand this case under the *Burford*[9] and *Colorado River Doctrine* abstention theories.[10] Plaintiffs' argument is without merit.

The dominant general principle is that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996), *citing Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 821 (1976) ("Federal Courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them'"); *England v. Louisiana Bd. Of Medical Examiners*, 375 U.S. 411, 415 (1964) ("When a federal court is properly appealed to in a cover over which it has by law jurisdiction, it is its duty to take such jurisdiction'") (quoting *Willcox v. Consolidated Gas. Co.* 212 U.S. 19, 40 (1909), *Cohens v. Virginia* 19 U.S. 264 (1821) (federal courts "have no more

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[9] (Motion to Remand, p. 16-17).

[10] *Id.*

right to decline the exercise of jurisdiction which is given, than to usurp that which is not").

Plaintiffs urge this Court to abstain from exercising its jurisdiction and remand this case to state court under theories first enunciated in *Burford v. Sun Oil Co.* ("*Burford*"), 319 U.S. 315 (1943) and *Colorado River Water Conservation Dist. v. United States* ("*Colorado River*"), 424 U.S. 800 (1976). Since those two abstention doctrines first were announced, the Court has made it clear that abstention is the exception, not the rule. *New Orleans Pub. Serv. Inc. v. City Council of New Orleans* ("*NOPSI*"), 491 U.S. 350, 359 (1989). In *NOPSI*,

> The Supreme Court explained that the [*Burford*] doctrine counsels federal courts 'sitting in equity' to refrain from interfering with 'proceedings or orders of state administrative agencies' when 'timely and adequate state court review is available' and: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.'

Fragoso v. Lopez, 991 F.2d 878, 882 (1st Cir. 1993) (*quoting NOPSI*, 491 U.S. at 361, *quoting Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976); *Hachamovitch v. Debuono*, 159 F.3d 687, 697 (2nd Cir. 1998); *A.G.G. Enterprises v. Washington County, Oregon,* 2000 U.S. Dist. LEXIS 4566, Civ. No. 99-1097-KI (D. Ore., April 6, 2000).

The Ninth Circuit has imposed further requirements before *Burford* abstention can be applied:

> 1) the state must have concentrated suits involving the local issue in a particular court; 2) the federal issues must not be easily separable from complicated state law issues with which the state courts may have special competence; and 3) federal review might dispute state efforts to establish a coherent policy.

A.G.G. Enterprises, 2000 U.S. Dist. LEXIS at *14, *quoting Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 296 (9th Cir. 1996).

Here, there is no ongoing administrative proceeding. There are no difficult or complicated questions of state law requiring resolution in order to decide whether plaintiffs can obtain the relief they seek, nor are there any state efforts to establish a coherent state policy with respect to a matter of substantial public concern. Public policy respecting the management and program content of radio stations is a matter of federal, not state, concern. As discussed above, the core of this lawsuit concerns only substantial issues of federal law arising under the FCA and the PBA. Because abstention is appropriate, *inter alia*, only "where the issues sought to be adjudicated in federal court are primarily questions regarding that state's laws,"[11] no such justification exists in this case.

Even if this Court were to decide that some of the state law causes of action asserted by plaintiffs were not preempted, it could exercise its pendent jurisdiction as to such claims. The claims raised by plaintiffs are not "complicated state law issues with which the state courts may have special competence." *Firemen's Fund,* 87 F.3d at 296. The state law claims plaintiffs purport to assert are straightforward breach of bylaws and fiduciary duty claims. Plaintiffs have failed to identify any particularly complicated or esoteric issues respecting such claims and, therefore, those claims cannot be said to require special competence of the state courts.

To determine if federal review of a case would be disruptive of a state's efforts to establish a coherent policy with respect to a matter of substantial public concern, three factors must be present: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Hacchamovitch*, 159 F.3d at 697 (factors do not favor abstention in action challenging suspension of medical license). There is no state regulatory scheme with respect to the control of FCC licensees. No need exists to select among

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[11] *Tucker v. First Md. Savings & Loan, Inc.*, 942 F.2d 1401, 1407 (9th Cir. 1991).

possible constructions of a state statute as federal law alone is dispositive. Nor is there any evidence that the State traditionally has been concerned with the regulation of FCC licensed radio stations.

Last, federal court abstention is not appropriate under *Colorado River*. In *Colorado River*, the policy of the McCarran Amendment (28 U.S.C. § 1345) was furthered by dismissal of the case because the purpose of the amendment was to create a unified adjudication of water rights and Colorado legislation established a continuous proceeding for adjudication of water rights. 424 U.S. at 819. Courts look to six factors in resolving whether "exceptional circumstances" under the *Colorado River* doctrine that warrant abstention by a district court:

> (1) whether either court has assumed jurisdiction over a res; (2) the relative convenience of the forums; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law controls; and (6) whether the state proceeding is adequate to protect the parties' interests.

Gropper v. County of Santa Clara, 1994 WL 680041 (N.D. Cal. 1998) (*citing Colorado,* 428 U.S. at 818); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 25-26 (1983)).

The purpose of the FCA: "[Is to] to [regulate] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service." 47 U.S.C. § 151. The policy of the FCA is furthered by the creation of the FCC as a centralized authority to resolve radio-licensing issues on a national level. *See id; see also Simmons v. FCC*, 169 F.2d 670, 672 (D.C. Cir. 1948) ("We are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic."). In contrast to the state of Colorado in the *Colorado River* case, California has not developed a separate, alternative program for the rationing of radio licenses and, if it did, such

a program clearly would be in violation of the Supremacy Clause. Further, unlike land or water rights, which are traditionally the domain of the states, the radio spectrum is exclusively controlled by the federal government. Thus, abstention under the *Colorado River* doctrine is inappropriate in this case.

V. THIS COURT MAY NOT AWARD THE PLAINTIFFS ATTORNEYS' FEES.

Plaintiffs' request for attorneys' fees is unjustifiable. Assuming, hypothetically, that plaintiffs had presented a viable and persuasive argument for remand, an attorneys' fee award still would be unwarranted.

28 U.S.C. § 1447(c) provides that: "[a]n order remanding the case may require payment of just costs and attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). The federal courts in California have consistently recognized that. *Phipps v. Praxair, Inc.*, C.A. 99-CV-1848 TW, 1999 WL 1095331, *6 (S.D. Cal. Nov. 12, 1999). However, even where removal has been determined to be improper, the award of attorney fees is not warranted where "the underlying jurisdictional issues," are complex, and there is a "paucity of authoritative and recent case law on the subject." *Phipps*, 1999 WL 1095331 at *6.

Removal based on complete preemption is a complex subject. Indeed, the Ninth Circuit recently reversed two district courts on the ground that their analysis of complete preemption law was erroneous. *See Ruthledge v. Seyfarth*, 201 F.3d 1212 (9th Cir. 2000); *Stuart v. Unum Life Ins. Co.*, 217 F.3d 1145 (9th Cir. 2000). Defendants do not claim they are, and may not fairly be required to be, more knowledgeable and astute than United States District Court Judges. Here, where the core complaints and the relief sought unambiguously implicate controlling federal statutory and regulatory considerations, removal has a solid good faith grounding.

In addition, this Court and many other jurisdictions have recognized that improperly

aligned defendants need not join a petition for removal. *See Baneth v. Planned Parenthood*, 1994 WL 224382 (N.D. Cal. 1994); *see also Folts v. City of Richmond*, 480 F. Supp. 621, 623 (E.D. Va. 1979); *see also Hansen v. U.S.*, 191 F.R.D. 492 (D.C.V.I. 2000). The defendants' removal without the consent of all defendants is based on sound authority, documented facts and proper legal reasoning. Therefore, even if there were any basis upon which plaintiffs' motion for remand could be granted, an award of attorneys' fees to them would be unwarranted.

VI. CONCLUSION

For the preceding reasons, and such others as hereafter may be advanced, Plaintiffs' Motion for Remand must be denied.

Dated: November 21, 2000

Respectfully submitted,

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