IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ROBINSON, RABBI AARON KRIEGEL,

Plaintiffs,

v.

PACIFICA FOUNDATION, et al. ,

Defendants.

No. C 00-3814 MJJ and related case
No. C 00-3815 MJJ

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND AND DENYING DEFENDANTS' MOTION TO REALIGN

I. INTRODUCTION

On October 16, 2000, Defendants Pacifica Foundation, et al. ("Pacifica") filed a motion to realign Robert Robinson, Aaron Kriegel, Leslie Cagan, Tomas Moran, and Peter Bramson as plaintiffs.[1] This motion requires the Court to decide whether there is a case or controversy between the aforementioned defendants and the plaintiffs in this case, and whether it should realign parties according to their real interests in this case.

On October 24, 2000, Plaintiffs Robert Robinson, Rabbi Aaron Kriegel ("Robinson Plaintiffs"), and Plaintiff The People of the State of California, *ex rel.* Carol Spooner ("Spooner Plaintiffs") filed a motion to remand this action to state court and a request of attorney's fees for

[1]Since the filing of the motion, Robert Robinson and Rabbi Aaron Kriegel have filed their own suit, which is being considered in conjunction with the *Spooner* case.

preparing the motion and for opposing defendants motion to realign certain defendants as plaintiffs.[2] This motion requires the Court to decide whether (1) it may exercise subject matter jurisdiction of this action, and (2) whether the failure of all defendants to join in removal is a procedural defect which defeats removal. Plaintiffs also request that the Court award Plaintiffs their costs, including attorney fees, incurred as a result of the removal.

Having considered the moving papers, the Court heard oral argument from all parties on January 12, 2001. The Court finds that both cases should be remanded to the State Court for the following reasons: 1) Pacifica has failed to establish that the Federal Communications Act has completely preempted Plaintiffs' claims; 2) Pacifica has failed to establish that Plaintiffs' claims raise substantial federal questions or arise under the U.S. Constitution or federal statutes; and 3) Pacifica failed to establish by competent evidence that no case or controversy exists between Plaintiffs and Defendants Cagan, Bramson, or Moran.

II. FACTUAL BACKGROUND

Defendant, The Pacifica Foundation ("Pacifica"), is a nonprofit corporation which is the licensee of the Federal Communications Commission ("FCC") with respect to five community radio stations, two of which are located in California.[3] On November 19, 1999, Spooner Plaintiffs applied to the California Attorney General for "relator" status to sue Pacifica on behalf of the People of the State of California. On September 14, 2000, the California Attorney General's office notified relators that their application for relator status was granted.[4]

On September 15, 2000 Spooner Plaintiffs filed suit in the Superior Court of California,

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[2]Spooner Plaintiffs and Robinson Plaintiffs will be referred to collectively as "Plaintiffs."

[3]Pacifica Foundation was first incorporated shortly after World War II, in 1946, by pacifists and war resisters. KPFA radio in Berkeley first began broadcasting on April 15, 1949. Pacifica is now the licensee of broadcast licenses for noncommercial educational radio broadcasting in five cities across the United States, including KPFA in Berkeley, California, KPFK in Los Angeles, California, KPFT in Houston, Texas, WBAI in New York, New York, and WPFW in Washington, D.C.

[4]Letter states the following:
"The allegations set forth by Relators raise substantial questions of law or fact regarding whether there is compliance with the purpose of the Pacifica Foundation charitable trust, whether its articles of incorporation are being adhered to, whether its assets are being properly protected, and whether it is being managed and directed in a manner consistent with the requirements of the California Corporations Code. The answers to these questions require judicial resolution." (Spooner Motion at 5:11-14.)

County of Alameda, against Pacifica. Spooner Plaintiffs name twenty past and current directors and officers of Pacifica as individuals and the Pacifica Foundation as defendants. Plaintiffs allege that the controlling members of the Board, acting through the Executive Committee, have violated and/or improperly amended, Pacifica's bylaw, breached their fiduciary duty to Pacifica, and wasted Pacifica's resources, in contradiction to Pacifica's founding mission, as expressed in its Articles of Incorporation.[5]

In a second action, filed on September 19, 2000 in California Superior Court, Robinson Plaintiffs, who are members of the Board of Directors of Pacifica, filed suit seeking essentially the same relief as Spooner Plaintiffs. On October 16, 2000, Pacifica and fifteen of the individual defendants removed both of the cases to this Court. The two cases were related and are now pending before the Court.

Five defendants in the state court action, Bramson, Cagan, Kriegel, Moran, and Robinson did not join in the removal of either case. Kriegel and Robinson have since filed their own suit. Non-joining defendants, Cagan and Moran, were served with the Summons and Complaint by personal service on September 17, 2000. The Summons and Complaint were mailed to Bramson on September 22, 2000 and the return mail receipt was signed by Bramson on September 23, 2000. (Spooner Plaintiffs' Motion to Remand, 7:8-13, 8:3.) Plaintiffs assert that Defendants Cagan, Moran, and Bramson were properly served and their failure to join in removal requires this Court to remand the case to state court.

All Plaintiffs move to remand this action to state court, asserting two jurisdictional defects. First, Plaintiffs assert that removal was defective because individually named Defendants Peter Bramson ("Bramson"), Tomas Moran ("Moran"), and Leslie Cagan ("Cagan") have not joined in the removal. Second, Plaintiffs claim that this Court is without subject matter jurisdiction over the matters alleged in the complaint because the complaint does not assert any causes of action involving a federal question. In response, Pacifica filed a Motion to Realign Leslie Cagan, Tomas Moran, and Peter Bramson as Plaintiffs. Pacifica asserts that Cagan, Moran, and Bramson were "fraudulently

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[5]These causes of action are asserted under the California Nonprofit Corporation law, California Corporations Code § 5000, et seq., the California Uniform Supervision of Trustees for Charitable Purposes Act, California Government Code § 12580, et seq., and the California Unfair Competition Law, California Business & Professions Code § 17200, et seq.

joined" and have no adverse interest to the Plaintiffs in this case.

III. ANALYSIS

A. Motion to Remand

1. Legal Standard

a. Removal to Federal Court

As a general rule, an action is removable to federal court only if it might have been brought there originally. 28 U.S.C. § 1441(a). The removal statute is strictly construed, and the court must reject federal jurisdiction if there is any doubt as to whether removal was proper. Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996); Gaus v. Miles, Inc., 980 S. 2d 564, 565 (9th Cir. 1992). The defendants bear the burden of proving the propriety of removal. Duncan, 76 F.3d at 1485. The removal statute is strictly construed against removal jurisdiction. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1195 (9th Cir. 1988).

If there are several defendants in the action, the right to remove belongs to them jointly. Therefore, all defendants who may properly join in the removal notice must join. If any of them refuses, the action cannot be removed. Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986); 28 U.S.C. § 1446(a).

b. Subject Matter Jurisdiction

Federal Courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. An action "arises under" federal law within the meaning of § 1331 if either: (1) federal law creates the cause of action, or (2) the plaintiff's right to relief necessari1y depends on resolution of a substantial question of federal law. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). A state-law claim may be treated as one "arising under" federal law only where the vindication of the state law right necessarily turns on some construction of federal law. Id. at 9.

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. 28 U.S.C. § 1447(c). A strong presumption for remand exists when the original jurisdiction of the court is questionable. Gaus v. Miles, Inc. 980 F.2d at 565. Because of this strong presumption, courts will remand a case to state court if there is any

doubt as to the right of removal. Id.

2. Spooner Plaintiff's Motion to Remand

Spooner Plaintiffs assert that their complaint does not plead any claim arising under federal law as required by 28 U.S.C. § 1331. Defendants assert that plaintiff's claims arise under the Federal Communications Act ("FCA"), and the Public Broadcasting Act ("PBA") contained within the FCA, 47 U.S.C. § 301, *et seq.* Plaintiffs' complaint pleads causes of action to remove directors of a nonprofit corporation and seeks an order for an accounting and to amend corporate bylaws, all under various provisions of law governing California corporations and nonprofit corporations.[6] However, Defendants assert that under the well-pleaded complaint rule, under some circumstances, state law claims may properly be recharacterized as arising under federal law. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987). In addition, Defendants claim that Plaintiffs' state law claims are preempted by the FCA.

a. Preemption by the FCA and the PBA

Defendants' primary contention is that when Congress enacted the FCA, in intended to occupy the entire field of radio broadcasting.[7] Defendants cite a multitude of cases standing for the general proposition that "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); see also 47 U.S.C. § 301. They also cite cases which purportedly stand for the proposition that the FCA completely preempts the areas of licensing *and* the programming content of radio stations' broadcasts. However, as Plaintiffs point out and as more fully discussed below, the cases cited by

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[6] See supra, fn. 4.

[7] See Blackburn v. Doubleday Broadcasting Co. 353 N.W. 2d 550, 554 (1984), citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) (citations omitted). State law may be preempted in the following circumstances:

> [F]irst, when Congress in enacting a federal statute has expressed a clear intent to pre-empt state law... [express preemption]; second when it is clear despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire filed of regulation and has thereby "left no room for the States to supplement" federal law... [field preemption]; and finally, when compliance with both state and federal law is impossible... or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Conflict preemption]

Defendants assert here that Congress intended to occupy the entire field with respect to the regulation of radio broadcasting, including the regulation of programming content.

Defendant do not support the exercise of federal jurisdiction on this record. For example, in Simmons v. FCC, 169 F.2d 670 (D.C. Cir. 1948), the court held that local stations must comply with the variety of local interest requirements under which they hold their licenses, not that the FCC is the exclusive arbiter of whether or not a nonprofit corporate licensee is fulfilling its trust obligations under its articles of incorporation or its corporate purposes in its choice of programming. Similarly, Cahnmann v. Sprint Corp., 133 F.3d 488 (7th Cir. 1998) the court held that the FCC has primary jurisdiction to determine the validity of tariffs filed by "telecommunications common carriers" and that common law breach of contracts claims seeking damages based upon noncompliance with tariff rates were preempted. Neither of these decisions supports a finding of federal jurisdiction where, as here, Plaintiffs seek, pursuant to the California nonprofit corporations law, to remove some directors for breach of charitable trust and other directors who have been elected in violation of Pacifica Foundation Bylaws.

The court's decision in Heichman v. American Telephone and Telegraph Co., 943 F. Supp. 1212 (C.D. Cal. 1995), is instructive in analyzing whether the claims asserted are completely preempted by the FCA or otherwise. In Heichman, the court stated that the removing party must show that a state cause of action is one which Congress has transformed into an inherently federal cause of action by *completely* preempting the field of its subject matter. 943 F. Supp. 1212(citing Avco. Corp. v. Acro Lodge No 735, 390 U.S. 557 (1987)(emphasis added)). The court noted that the savings clause was a strong indication that the Act did not intend to completely preempt state law. Heichman, 943 F. Supp. at 1220; see also 47 U.S.C. § 414.[8] The court also noted that complete preemption should be found only in "extraordinary cases." Heichman at 1222, citing Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).[9] Accordingly, the court in Heichman found that state claims for breach of contract, unfair business practices, and accounting should not be transformed into federal causes of action and remanded the action to state court for lack of subject matter

[8]Section 414 provides: "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."

[9]The court noted here that complete preemption has been found only in two cases: (1) §301 of the Taft-Hartley Act completely preempts state claim arising out of contract between employer and union; and (2) ERISA's enforcement provisions completely preempt state contractual claim for benefits owed under ERISA. Heichman at 1219.

jurisdiction. Id. at 1222.

As Plaintiffs point out, the purpose of the FCA is, *inter alia*:

> "to maintain control of the United States over all the channels of 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, so that no person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except with a license in that behalf granted under the provisions of the Act." 47 U.S.C. § 301.

While the FCC may have exclusive jurisdiction over the issuance of licenses to radio stations, the Supreme Court has refused to read this act as giving the FCC authority to determine the validity of contracts between licensees and others. See Regents of University System of Georgia v. Carroll, 338 U.S. 586 (1950). Similarly, the FCC has upheld a state court's authority to adjudicate common law fraud claims and to order restitution of physical assets of a station, even though the order may well have terminated a broadcasting station by separating the lease station property from the broadcast license. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945). Defendants have failed to establish that Plaintiffs claims within the exclusive jurisdiction of the FCC or that they are completely preempted by the FCA.

b. Claims arising under Federal Law

The gravamen of Plaintiffs' claims is that Pacifica breached its own founding and governing documents, its Articles of Incorporation and Bylaws, and violated California law regarding the governance and structure of California nonprofit public benefit corporations. While Plaintiffs' claims make factual allegations with reference to the Corporation for Public Broadcasting and the Public Broadcasting Act ("PBA"), they assert that these are merely examples of the defendants' breaches of trust and bad faith, and that they do not make any claim of right under the PBA or the FCA.

While Plaintiffs do make references to attempts, threats, modification, and censorship of the stations' programming, the Court disagrees with Defendants' assertion that these duties and obligations do not rise solely under federal law. Defendants rely on Massachusetts Universalist Convention v. Hildreth & Rodgers Co., 183 F.2d 497, 500 (1st Cir. 1950), for the proposition that licensees of the FCC have the duty, under the Act, to serve the public interest and that therefore,

there is no room under the FCA for state law regulation of a broadcast licensee's programming decisions. However, the court in Hildreth focused primarily on the FCC's role as an administrative body in reviewing the freedom of the licensee to broadcast which programs it deems in the "public interest." More importantly, the court ultimately held that it was up to the holder of the licensee to determine whether or not a rejected program is in the public interest and that the contract dispute was not a federal ground upon which jurisdiction could be based. Id. at 501.

Defendants also rely on several cases which discuss the FCC's jurisdiction over broadcasting content and focus on the FCC's broad "public interest" in ensuring that diverse views are represented in radio broadcasting. See e.g. National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 214 (1943), Matter of Agreements Between Broadcast Licensees and the Public, 57 F.C.C.2d 42 (1975). However, as Plaintiffs point out, even in the area of content regulation, there are limits to the FCC's jurisdictional reach and, as importantly, the "public interest" standard is a much lower one than that required to evaluate programming as expressed in Pacifica's trust purposes.[10] Furthermore, the Defendants' reliance on Matter of Agreements Between Broadcast Licensees and the Public, 57 F.C.C.2d 42 (1975) is misplaced because it focuses on the broadcast licensee's obligation to maintain supervision and control over its programs and not enter in agreements with third parties which contain "fixed determinations, binding and unchangeable," where flexibility is required to serve the public interest. Id. at 48.

Plaintiffs argue that all relief prayed for in the Complaint against Pacifica does not divest Pacifica or its duly elected directors, of the ultimate control over planning, execution, and supervision of programming and station operation. Furthermore, Plaintiffs have asserted no right to funding from the Corporation for Public Broadcasting ("CPB") in their complaint, and Pacifica's eligibility for funding is not at issue. Plaintiffs' references to the Public Broadcasting Act and the CPB are merely factual examples of Pacifica's directors' and management's alleged bad faith and dishonesty in dealing with its voting members, and do not transmute their claims to ones arising under federal law, as Defendants' contend. To the extent that CPB regulations may require that members of "Community Advisory Boards" not serve simultaneously as directors, or not elect

[10]See Reply at 4:25-6:5.

Pacifica directors, Plaintiffs assert that Pacifica has several options.[11]

Defendants have failed to establish that Plaintiffs claims raise substantial federal questions such that the claims are preempted. For the reasons set forth above, the Court finds that Spooner Plaintiffs do not allege a cause of action arising under federal law which would give rise to a basis on which this Court could exercise subject matter jurisdiction over this matter. The Court also finds that Plaintiffs state law claims are not completely preempted by the FCA.[12] The Court grants Spooner Plaintiffs motion to remand the action to State Court.

C. Robinson Plaintiffs' Motion to Remand

In a separate pleading, the Robinson Plaintiffs allege four causes of action: Violation of California Corporation Code; Breach of Pacifica's By-Laws; Breach of Fiduciary Duty; and Violation of the Right to Free Speech. (Robinson Compl. ¶¶84-100.) These claims are substantially similar to those raised by the Spooner Plaintiffs in that they seek to ensure that Defendants act lawfully under the California Nonprofit Corporations Act. The Robinson Plaintiffs' complaint, in a manner similar to the allegations set forth in the Spooner complaint, also refers to Pacifica's receipt of funding from the Corporation for Public Broadcasting and references elimination of aspects of traditional program format. (Robinson Complaint at 16, 17, 28, and 37.) Defendants assert that these references, and others found within the Complaint, compel a finding that the Robinson Plaintiffs' claims are preempted. The Court disagrees. While Plaintiffs do set forth allegations that reference programming changes and Pacifica's financial relationship to the Corporation for Public Broadcasting, these references do not create federal jurisdiction for the reasons set forth more fully

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[11]Plaintiffs assert that Pacifica may, for example, (1) decline to apply for CPB funding, (2) require that its Local Advisory Board members resign from services on the Board upon election as Pacifica Directors, (3) form separate Community Advisory Boards that do not elect directors while still maintaining Pacifica's Local Advisory Boards to advise directors as to local state matters and to elect directors, and (4) bring suit to challenge CPB regulations.

[12]In addition, Plaintiffs assert that "a case may not be removed to federal court on the basis of a federal defense . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Souther Cal., 463 U.S. 1, 14 (1983). Ordinarily, federal preemption is a defense, but under the "artful pleading doctrine," once an area of state law has been "completely preempted, any claim purportedly based on that preempted state law claim is considered from its inception, a federal claim, and therefore arises under federal law." Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). As noted above, the Court finds that the FCA does not completely preempt Plaintiffs' state law claims, and therefore these claims should not be construed as arising under federal law. Accordingly, the Court finds Defendants' preemption claim remains a defense which cannot give rise to subject matter jurisdiction based on a federal question.

in Section III.A.2 of this Order. As such, the Court finds that Plaintiffs first three causes of action do not set forth a basis for federal jurisdiction as they are not preempted.

However, the Robinson Plaintiffs' fourth cause of action, which alleges that the gag rules and punishments imposed by Pacifica on persons who object their policies and practices "violate free speech rights guaranteed by the state and federal constitution," requires further analysis. Defendants assert that Plaintiffs allege a federal cause of action on the face of their complaint -- a violation of free speech guarantees of the U.S. Constitution.

Plaintiffs principally rely on this Court's decision in CCSF v. Manning, where this Court stated that "if a claim is supported not only by a theory establishing federal subject matter jurisdiction, but also by an alternative theory which would not establish jurisdiction, the federal subject matter jurisdiction does not exist." No. C 00-2355, 2000 WL 1346732 at *6 (N.D. Cal. Sept. 7, 2000), quoting Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988). However, the case at issue is distinguishable from Manning because here, Plaintiffs do not reference federal law in connection with establishing their state law claims, they arguably allege a separate cause of action under the First Amendment of the U.S. Constitution. Therefore, Manning is not dispositive on this issue in this case.

Plaintiffs also assert that this case is more analogous to Rains v. Criterion Systems, Inc. 80 F.3d 339, 345 (9th Cir. 1996), where the court found that "[t]he invocation of Title VII as a basis for establishing an element of a state law cause of action does not confer federal question jurisdiction when the plaintiff also invokes a state constitutional provision or state statute that can and does serve the same purpose." Plaintiffs assert that the California Constitution provision guaranteeing free speech "can and does serve the same purpose" as the First Amendment to the U.S. Constitution. Furthermore, they argue that the California Constitution provides broader free speech protection than its federal counterpart.[13] Defendants assert that Rains is distinguishable because in that case, one of the causes of action was for wrongful termination in violation of public policy and the plaintiff

[13]See Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 908 (1979), affirmed 477 U.S. 74 (1980). "Though the framers could have adopted the words of the federal Bill of Rights they chose not to do so... special protections thus accorded speech are marked in this court's opinions. [In] Wilson v. Superior Court, 13 Cal.3d 652, 658 (1975)... for instance [the court] noted that '[a] protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee of the right of free speech and press.'"

merely made reference to the policy against discrimination in California anti-discrimination statues and Title VII, but did not allege a cause of action under Title VII.

Despite the parties differing perceptions as to the basis for Plaintiffs' First Amendment claim, it remains unclear whether Plaintiffs' claim arises under the First Amendment of the U.S. Constitution or the free speech provisions in the California Constitution. The Court's ability to resolve this ambiguity is further impacted because the claim is against Pacifica, a private entity, which is beyond the reach of the First Amendment.[14] Given the Courts inability to resolve this issue, the Court must strictly construe the removal statute and must federal jurisdiction if there is any doubt as to whether removal was proper. See Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir. 1996); see also Gaus v. Miles, Inc., 980 F.2d 564, 565 (9th Cir. 1992). It is doubtful that Plaintiffs' claim for violation of the right to free speech gives rise to a "separate and independent" federal cause of action, which would provide a basis for federal subject matter jurisdiction. Therefore, the Court grants Robinson Plaintiff's motion for remand.

B. Motion to Realign

Plaintiffs also assert that the lack of unanimity of defendants in removing the action to this Court defeats such removal. Non-joining defendants, Cagan and Moran, were served with the Summons and Complaint by personal service on September 17, 2000. The Summons and Complaint were mailed to Bramson on September 22, 2000 and the return mail receipt was signed by Bramson on September 23, 2000. (Spooner Plaintiffs' Motion to Remand, 7:8-13, 8:3.) Plaintiffs assert that Defendants Cagan, Moran, and Bramson were properly served and that their failure to join in removal requires this Court to remand the case to state court. Defendants assert that the non-removing defendants should be realigned to reflect their true interests in the case, and therefore, their lack of joinder in the removal should not affect this Court's jurisdiction.

1. Legal Standard

The defendants bear the burden of proving the propriety of removal. Duncan, 76 F.3d at 1485. If there are several defendants in the action, the right to remove belongs to them jointly.

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[14]Pacifica's status as a non-governmental entity affects Plaintiffs' claim under the First Amendment of the Constitution, because the First Amendment applies only to actions by the federal government, and to State action by incorporation through the Fourteenth Amendment.

Therefore, all defendants who may properly join in the removal notice must join. If any of them refuses, the action cannot be removed. Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986); 28 U.S.C. §1446(a).

Article 3, Section 2 of the United States Constitution requires that an adversarial relationship exist between plaintiffs and defendants. See Valley Forge Christian College v. Americans United, 454 U.S. 464, 473 (1982). Courts are required to realign parties according to their real interest, so as to accurately reflect the parties' interests in the outcome of the case. See Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 69 (1941). The parties' interests must be ascertained from the "primary and controlling matter in dispute." Id.

2. Analysis of Motion to Realign

Defendants Bramson, Cagan, and Moran did not join in the removal of either of these cases to this Court. Kriegel and Robinson have since filed their own suit. Defendants assert that Bramson, Cagan, Kriegel, Moran, and Robinson have no "case" or "controversy" with the Spooner plaintiffs in this case. Defendants also assert that Cagan, Moran, and Bramson have no "case" or "controversy" with the Robinson Plaintiffs. Defendants claim that no adversarial relationship exists because the non-joining Defendants also allegedly want to "radically alter the status quo at Pacifica and to steer it in a different direction than that selected by a clear majority of Pacifica's Board." (Motion to Realign at 4:20-24.) Furthermore, Defendants argue that Plaintiffs have collusively joined these individuals as defendants in order to prevent removal of the action to this Court.

Spooner Plaintiffs assert that the primary purpose of the action is to remedy the breaches of trust, waste of corporate assets, and usurpations of office that have occurred. Therefore, Spooner Plaintiffs argue that the Robinson lawsuit seeks to reinstate the pre-1997 Pacifica bylaws which did not provide membership and voting rights for listener sponsors, which does not demonstrate that Robinson and Kriegel seek the same relief as Spooner Plaintiffs.

The evidence submitted by Defendants to support their motion to realign consists primarily of inadmissible, unauthenticated, hearsay documents.[15] Furthermore, the evidence submitted is not

[15]See L.R. 7-5(a). Factual contentions made in support of or in opposition to any motion should be supported by an affidavit or declaration and by appropriate references to the record. Extracts from depositions, interrogatory answers, requests for admissions, and other evidentiary matters must be appropriate authenticated by an affidavit or declaration.

probative of the proper alignment of these Defendants. As Plaintiffs point out, in the cases cited by Defendants in support of their motion to realign, the courts made the alignment determination on the basis of the targeted party's stated position in papers on file with the court. See, e.g., Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 72 (1941); Dolch v. United California Bank, 702 F. 2d 178, 181 (9th Cir. 1983).

Bramson, Cagan, and Moran have made no appearance in this action and have taken no position in regard to the lawsuit. As noted above, the admissibility of the evidence is questionable, and furthermore, contains no statements by any of the Defendants of their position on this lawsuit. For example, the Bramson Declaration takes no position on the lawsuit; it is merely a recitation of what occurred at a Pacifica Board meeting in October 1999, and the events that took place thereafter. (Rapaport Decl., Ex. E.) The unauthenticated flyer purportedly announcing a meeting arranged and conducted by Cagan also takes no position on the lawsuit. The Affidavit of Robert Hudock and the transcript of a KPFA broadcast not only contain statements which constitute hearsay, but also contain no statement by Moran on his position on the lawsuit. The evidence suggests that non-removing defendants have shown concern about the current state of affairs at Pacifica, however, Defendants assertion that the tacit inactivity of Bramson, Moran, and Cagan establishes that they are properly allied with Plaintiffs is pure speculation.

Based on the evidence submitted to the Court finds that Defendants Bramson, Cagan, and Moran and are not misaligned. Thus, removal was procedurally defective, due to the lack of unanimity of defendants joining in the removal. This procedural defect provides a separate and independent basis for the remand of these actions.

C. Request for Attorney's Fees

In conjunction with their motions to remand, Plaintiffs request that the Court award them costs and attorney's fees incurred as a result of the removal pursuant to 28 U.S.C. § 1447(c); see also Moore v. Permanente Medical Group, Inc. 981 F.2d 443, 446 (9th Cir. 1992). In exercising its discretion to award costs and attorney's fees, the court should consider whether removal was

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Defendants submittted an unauthenticated transcript of an interview with Moran, and unauthenticated flyer announcing a meeting arranged and conducted by Cagan.

improper, looking both at the nature of the removal and of the remand. Moore, 981 F.2d at 446. Even if the court finds the removal was "fairly supportable," an award of costs and fees is within the court's discretion when the removal was "wrong as a matter of law." Balcorta v. Twentieth-Century-Fox Film Corp. 208 F.3d 1102, 1106, n.2 (9th Cir. 2000).

Defendants assert that even where removal 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 v. Praxair, Inc., C.A. 99-CV-1848 TW, 1999 WL 1095331, *6 (S.D. Cal. Nov. 12, 1999). Here, the underlying jurisdictional issues are complex and there is a paucity of authoritative and recent case law on the subject of whether a suit against a charitable trust, involving disputes about the content of broadcast programming, gives rise to a federal cause of action under the Federal Communications Act. Furthermore, it was proper for Defendants to attempt to remove the actions without the consent of individuals, whom they believed to be misaligned as defendants. Accordingly, the Court finds that Defendants did not attempt to remove this action in bad faith and denies Plaintiffs request for costs and attorney's fees.

IV. ORDER

The Court finds that it lacks subject matter jurisdiction over this matter. Plaintiffs' complaints do not allege a cause of action that raises a federal question and the Federal Communications Act does not completely preempt Plaintiffs' state law claims. The Court also finds that alignment is proper with respect to Defendants Bramson, Cagan, and Moran, and that the removal was procedurally defective due to the lack of unanimity of defendants. Accordingly, the Court grants Plaintiffs' motion to remand the action to the Superior Court of California, County of Alameda. Also, for the reasons set forth above, the Court denies Plaintiffs' request for costs and attorney's fees.

IT IS SO ORDERED.

Dated: February 20, 2001

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

ba

United States District Court
for the
Northern District of California
February 20, 2001

* * CERTIFICATE OF SERVICE * *

Case Number:3:00-cv-03814

Robinson

vs

Pacifica Foundation

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 20, 2001, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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