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PLAINTIFFS' REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION TO REMAND THE CASE TO STATE COURT AND FOR COSTS AND ATTORNEY'S FEES.

Plaintiffs, the People of the State of California, *ex rel.,* Carol Spooner, John D. Biello, Carolyn Birden, Kurt Guerdrum, Arturo Griffifths, Amburn R. Hague, Leigh Hauter, Patricia Heffley, Barbara MacQuiddy, Rick Potthoff, Charles P.H. Scurich, Ronald Swart, individually and on behalf of Pacifica Foundation, submit this reply to defendants' opposition to Plaintiffs' motion to remand this case to state court and for costs and attorneys' fees.

I. Defendants' Argument that the Right to Elect Directors Gives Non-Profit Corporate Members the Right to "Effectively Control" the Radio Stations and the Programming and the Day-to-Day Operation and Management of the Stations is Both Specious and Untenable.

It is elementary corporate law that a corporation's *board of directors* controls the corporation's activities, including the day-to-day management and operations of the corporation, usually through a chief executive officer hired by the board for that purpose.[1] *Shareholders* of for profit corporations have the right to express their approval or disapproval of the corporate management and direction by electing and removing directors. *Members* (as defined by California Corporations Code §5056) of California nonprofit public benefit corporations,

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[1] California Corporations Code §5210 provides as follows:

> "Subject to the provisions of this part and any limitations in the articles or bylaws relating to action required to be approved by the members (section 5034), or by a majority of all members (Section 5033), the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board. The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board."

likewise, have the right to express their approval or disapproval of the corporate management and direction by electing and removing directors. However, nothing in the California nonprofit corporations code gives *members* the right to control the corporation, and nothing in the Complaint seeks that right for the listener-sponsors, the local station boards (also known as local advisory boards or "LABs"), or any other person or entity.

Defendants set up a red herring -- that plaintiffs are seeking "to transfer authority to determine what programming serves the public interest from the Board, as license holder, to others who are not licensees." Opposition, 15:6-10. This assertion is grossly misleading. The Pacifica Foundation, *not the board*, is the licensee. The Complaint seeks to remove some directors for breach of charitable trust and other directors who have been unlawfully elected under unlawfully adopted bylaws, and seeks the election of new directors under lawfully adopted bylaws. The *board,* consisting of newly elected directors along with any remaining directors, would then, of course, be in control of the licensee, the Pacifica Foundation, with all "authority to determine what programming serves the public interest,"[2] not some inchoate "others" as defendants appear to contend.

II. Plaintiffs' Causes of Action Relate to Areas of Substantial State Interest

[2] Defendants also make the grossly misleading assertion that "plaintiffs seek actual transfer of Pacifica's radio licenses." Opposition, 15 at fn 7. Plaintiffs seek no such thing. No reasonable reading of the Complaint could support this assertion. Pacifica's radio licenses would remain Pacifica's radio licenses if all relief sought by the plaintiffs is granted. What would change would be the directors in control of Pacifica.

The Complaint raises three fundamental issues:

(1) Whether the *directors* of the Pacifica Foundation are directing, managing, operating and controlling the California nonprofit corporation in conformity with the express trust set forth in the Pacifica Foundation Articles of Incorporation, at Article II, the purposes of Pacifica, as amended August 19, 1948; and

(2) Whether the bylaws amendments of September 1997 and February 1999, purporting to make the Pacifica board of directors a self-selecting and self-nominating body, and to eliminate the station board members' rights to nominate and elect directors, were lawfully adopted in accordance with the requirements of California nonprofit corporations law; and

(3) Whether the bylaws of the Pacifica Foundation meet the requirements of California nonprofit corporations law for fair, reasonable, consistent and democratic means of nominating and electing directors given the nature, size, and operations of Pacifica.

None of these issues comes within the ambit of the Federal Communications Act or the Public Broadcasting Act. If the answers to the three fundamental state law issues raised in the Complaint are "No," then neither the Federal Communications Act nor the Public Broadcasting Act provide plaintiffs with any remedy.

III. Principles of Federalism and Comity, Applied by the Supreme Court in *Radio Station WOW,* Established Bifurcated Authority in Radio Licensing Areas.

In *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945), the Supreme Court recognized the FCC's responsibility to establish a nationally consistent licensing policy, while it also recognized the responsibility of local courts in enforcing state laws. In emphasizing the need for reconciliation of the two authorities, the Court observed that:

> "[I]f the State's ... [laws] can be effectively respected while at the same time reasonable opportunity is afforded for the protection of the public interest which lead to the granting of a license, the principle of fair accommodation between state and federal authority . . . should be observed."

326 U.S. at 132.

The FCC's response to this ruling is explained in *In re Kirk Merkley, Receiver,* 94 F.C.C.2d 829 (1983):

> "[W]hile there is no question that the Commission has exclusive authority over a station's license, we are also charged with the responsibility of accommodating state law, where appropriate."

94 F.C.C.2d at p. 838.

The Commission goes on, in *In re Kirk Merkley, Receiver*, to state:

> "For this reason we have established procedures which acknowledge bifurcated authority in certain licensing areas. For example, where a licensee is accused of breaching a contract to assign its license, the determination of whether a breach occurred is left to a local state court. *Carnegie Broadcasting Co.*, 5 FCC2d 882 (1966). The Commission does not possess the resources, the expertise or the jurisdiction to adjudicate such claims fully. See *Regents v. Carroll*, 338 U.S. 586 (1950). On the other hand, we have determined that limits on the ability of licensees to hold certain types of interests and engage in certain types of contracts are required under the Communications Act. Thus, we have adopted policies and procedures which have effectively limited the ability of licensees in these areas. One example of this is our treatment of reversions, as discussed earlier. Another example is in the area of media ownership and the Commission rules limiting the interests which can be held in conjunction with broadcast properties. . . . Thus, the Commission would not approve the assignment of a license which would cause a violation of its multiple or cross-ownership rules, regardless of the contractual power of a licensee to acquire such an interest under state law. Similarly, if an assignment application's related contract of sale violated existing rules or policies, we would withhold our approval until the problem was corrected. In this way, while the interpretation and enforcement of contracts are within the jurisdiction of state courts, the Commission has established certain public interest limitations on a licensee's contractual authority and imposes these limits by withholding its approval of a pending assignment application. Moreover, through this procedure, conflicts between Commission policy and state laws can be avoided"

Id., at p. 838-839.

Likewise, in the present case, a "fair accommodation" between state and federal authority must be observed. Here, violations of state nonprofit corporations law are alleged. Determination of whether such violations have occurred should be left to the state court. The FCC does not possess the resources, the expertise or the jurisdiction to adjudicate such claims fully.

The FCC is within its jurisdiction to impose certain "public interest" limitations by withholding its approval of transfers of control of licensees. However it is not within its jurisdiction to determine whether or not a nonprofit corporate licensee is meeting its trust obligations under its articles of incorporation, and defendants have cited no authority that it is. Additionally, because the Federal Communications Act definition of "public interest" is so broad, the FCC has very limited jurisdiction over program content.

> "The FCC is well aware of the limited nature of its jurisdiction, having acknowledged that it 'has no authority and, in fact, is barred by the First Amendment and [47 U.S.C. §§ 326] from interfering with the free exercise of journalistic judgment.' *Hubbard Broadcasting, Inc.*, 48 F.C.C.2d 517, 520 (1974). In particular, the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations; for although 'the Commission may inquire of licensees what they have done to determine the needs of the community they propose to serve, the Commission may not impose upon them its private notions of what the public ought to hear.' Network Programming Inquiry, Report and Statement of Policy, 25 Fed. Reg. 7293 (1960); see also *Commercial TV Stations,* 98 F.C.C.2d 1076, 1091-1092 (1984), modified, 104 F.C.C.2d 358 (1986), remanded in part on other grounds *sub nom. Action for Children's Television v. FCC,* 261 U.S. App. D.C. 253, 821 F.2d 741 (CADC 1987)."
>
> "Stations licensed to broadcast over the special frequencies reserved for 'noncommercial educational' stations are subject to no more intrusive content regulation than their commercial counterparts. Noncommercial licensees must operate on a nonprofit basis, may not accept financial consideration in exchange for particular programming, and may not broadcast promotional announcements

> or advertisements on behalf of for-profit entities. 47 CFR §§§§ 73.621(d)-(e) (1993); see generally *Public Broadcasting*, 98 F.C.C.2d 746, 751 (1984); *Educational Broadcast Stations*, 90 F.C.C.2d 895 (1982), modified, 97 F.C.C.2d 255 (1984). What is important for present purposes, however, is that noncommercial licensees are not required by statute or regulation to carry any specific quantity of 'educational' programming or any particular 'educational' programs. Noncommercial licensees, like their commercial counterparts, need only adhere to the general requirement that their programming serve 'the public interest, convenience or necessity.' *En Banc Programming Inquiry*, 44 F.C.C.2d 2303, 2312 (1960). The FCC itself has recognized that 'a more rigorous standard for public stations would come unnecessarily close to impinging on First Amendment rights and would run the collateral risk of stifling the creativity and innovative potential of these stations.' *Public Broadcasting, supra*, at 751; see also *Public Radio and TV Programming*, 87 F.C.C.2d 716, 728-729, 732, PP29-30, 37 (1981); *Georgia State Bd. of Ed.*, 70 F.C.C.2d 948 (1979)."

Turner Broadcasting System, Inc. v FCC, 512 U.S. 622, 650-651 (1994).

Accordingly, it is quite possible that the FCC would find no "public interest" violations if the Pacifica Board, through its current self selection process, were to appoint a majority of directors who were members of white supremacist groups and who used the Pacifica stations to air their views (carefully avoiding prohibited "hate speech"). Many broadcast licensees do air such views without running afoul of the FCC, which is forbidden by statute from engaging in "censorship" or from promulgating any regulation "which shall interfere with the [broadcasters'] right of free speech." 47 U.S.C. §§ 326. Yet such use of the Pacifica stations would clearly be enjoinable by the California courts as a violation of Pacifica's trust purposes as stated at Article II (d) of its Articles of Incorporation: "In radio broadcasting operations to engage in any activity that shall contribute to a lasting understanding between nations and between the individuals of all nations, races, creeds and colors; to gather and disseminate information on the causes of conflict between any and all of such groups; and through any and all means compatible with the purposes of this corporation, to promote the study of political and economic problems and the causes of

religious, philosophical and racial antagonisms." (See also Plaintiffs' Brief in Opposition to Motion to Dismiss, fully incorporated herein by this reference. The "public interest" is not the proper standard for determination of whether there has been a breach of a charitable trust by the directors of a California nonprofit public benefit corporation.)

The Pacifica bylaws, as adopted January 31, 1984, provided for election of directors as follows:

> "ELECTION OF DIRECTORS: In order to be elected, a member must receive the nomination and vote of a majority of the station board which he represents, unless such member is classified as an "at large" member, in which event he must be elected by a 2/3 vote of the Board of directors of the Foundation, voting by secret ballot, subject to approval of FCC council or FCC."

This provision for election of directors by majority vote of the station boards granted "membership" rights to the station board members, as defined under California Corporations Code §5056. Pursuant to California Corporations Code §§5150 and 5342, bylaws amendments that would "materially and adversely affect the rights of members as to voting or transfer" or would "terminate all memberships or any class of memberships" are required to receive a vote of approval of the members in order to be effective.

On September 28, 1997, the board purported to amend the bylaws, without a vote of approval of the station boards (now referred to as "local advisory boards"), changing Article Three, Section 2, to read as follows:

> "NOMINATION OF DIRECTORS: Candidates for Directors may be nominated by: 1. Receiving a majority vote of a local advisory board. Of two nominees from the local advisory board, at least one must be a person of color; 2. The Foundation's Board Development Committee."

And adding a new Article Three, Section 3, which read as follows:

"ELECTION OF DIRECTORS: In order to be elected as a director, a nominee must receive the majority vote of those seated in a quorum."

Finally, on February 28, 1999, the board purported to amend the bylaws once again (without a vote of approval of the station boards), as follows:

> "NOMINATION OF DIRECTORS: Candidates for Directors may be nominated by the Foundation's Board Governance and Structure Committee."

None of these bylaws amendments were submitted to the FCC for its approval[3] prior to their purported adoption by the board, yet Pacifica now argues that a suit to void these purported bylaws amendments for failure seek and receive a vote of approval of the local station board members, as required by California nonprofit corporations law, is now somehow within the jurisdiction of the FCC. Even if FCC approval of bylaws provisions for election of directors were required (which plaintiffs do not admit) there is no reason to believe such approval would be denied by the FCC, after a determination by the California court that the purported bylaws amendments violate California nonprofit corporations law, given that the provisions of the 1984 bylaws for election of directors stood without FCC objection for more than 13 years. The FCC has a longstanding policy of deferring to state court judgments in state law matters. *Llerandi v. FCC*, 863 F.2d 79, 81 (D.C. Cir. 1988).

More to the point, there is no reason to believe the FCC would apply any different standards to approval of directors elected by the station boards (or the listener-sponsors) than it would apply to directors elected by the directors. *See* 47 U.S.C. §310 which prohibits granting of a station license to a foreign government, an alien, a corporation organized under the laws of a

[3] It may reasonably be inferred that no such FCC approval of the bylaws amendments was sought or the Defendants would certainly have mentioned it in their briefs.

foreign government, and certain "regional concentration rules" – even if more than 50% of the directors were to change, as happens from time to time in the ordinary course as directors' terms expire.

IV. The Fact That Pacifica Currently Receives Funding from the Corporation For Public Broadcasting Has No Bearing, Whatsoever, Upon Determination of the State Law Breach of Charitable Trust and Nonprofit Public Benefit Corporations Law Issues Raised in the Complaint.

It is the Defendants, not the Plaintiffs, who are arguing a *non sequitur.* Plaintiffs have asserted no right to funding from the Corporation for Public Broadcasting ("CPB") in their Complaint, and Pacifica's eligibility for such funding is not at issue. Plaintiffs' references in their Complaint to the Public Broadcasting Act and the CPB are factual examples of Pacifica directors' and management's bad faith and dishonesty (with the apparent collusion of certain CPB officials) in dealing with its voting members – the local station (advisory) board members -- and of their abandonment of the founding principles of "listener-sponsorship" and the financial independence mandated by the Articles of Incorporation.

To the extent that CPB regulations may require that members of "Community Advisory Boards" (called variously by Pacifica "Station Boards", "Local Advisory boards" or "LABs") may not simultaneously serve as directors or may not elect the Pacifica directors (which Plaintiffs do not admit), Pacifica has several options, including, without limit, (1) declining to apply for CPB funding, (2) requiring that its "LAB" members resign from service on the LABs upon election as Pacifica Directors, (3) formation of separate "Community Advisory Boards" that do not elect directors while still maintaining Pacifica's traditional Station (Local Advisory) Boards to advise the directors as to certain local station matters and to elect directors, (4) bringing suit to

challenge such CPB regulations, and so on.

The Corporation for Public Broadcasting has no jurisdiction over Pacifica's programming content and no authority to dictate the composition of its Board of Directors or the method of electing such directors, and Defendants cite no authority for their argument that it does. If Plaintiffs' ultimately prevail, and if Pacifica's bylaws are ultimately amended, for example, to provide that listener-sponsors elect the local station boards, which, in turn, elect the Pacifica directors, and if the CPB were to determine that such a governance structure disqualified Pacifica from eligibility for CPB funding, then that might give rise to another lawsuit to challenge such a determination by the CPB -- but that case is not this case. While a newly constituted board of directors of Pacifica, indeed, might also decide bring suit against the CPB for improper attempts to gain leverage over programming decisions, that also is not the case before the Court in this action.[4]

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[4] The CPB is forbidden from using its financial support to gain "leverage" over programming decisions.

> "[A]lthough federal funding provided through the Corporation for Public Broadcasting (CPB) supports programming on noncommercial stations, the Government is foreclosed from using its financial support to gain leverage over any programming decisions. See 47 U.S.C. §§§§ 396 (g)(1)(D) (directing CPB to

V. The Cases Cited by Defendants are Inapposite.

Simmons v FCC, 169 F.2d 670 (D.C. Cir. 1948) holds that local stations must comply with the variety and local interest requirements under which they hold their licenses, not that the FCC is the arbiter of whether or not a nonprofit corporate licensee is fulfilling in its choice of programming its corporate purposes and trust obligations under its articles of incorporation. *Cahnmann v. Sprint Corporation*, 133 F.3d 488 (7th Cir. 1998) holds that the FCC has primary jurisdiction to determine the validity of tariffs filed by "telecommunications common carriers" such as Sprint, and that state law breach of contracts claims are preempted by the tariffs.

Defendants' long recitations from *Matter of Agreements Between Broadcast Licensees and the Public*, 57 FCC 2D 42 (1975), are plainly and completely irrelevant. Plaintiffs are not alleging a contract between Pacifica and any *third parties* that limits or restricts the licensee's "responsibility for the planning, execution and supervision of programming and station operation." Plaintiffs are alleging breaches of Pacifica's own founding and governing documents, i.e., its Articles of Incorporation and Bylaws, and of California law regarding the governance and structure of California nonprofit public benefit corporations. If all relief prayed

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> 'carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities'), §§ 398(a) (CPB operates without interference from any department, agency, or officer of the Federal Government, including the FCC)."

Turner Broadcasting System, Inc. v. FCC, supra., 512 U.S. at p. 651.

for in the Complaint were granted, the licensee, Pacifica Foundation, under the ultimate control of duly elected directors, would still be in complete control of the planning, execution and supervision of programming and station operation.

VI. Defendants' Own Evidence Shows that the Non-Removing Defendants Should Not Be Realigned.

The defendants' own evidence, a letter from attorney Daly D.E. Temchine to director Leslie Cagan, dated October 10, 2000, reveals that defendant Cagan wished to join the board majority in court but was rejected by the attorneys representing the board majority. Declaration of Temchine in Support of Opposition to Motion to Disqualify Defendants' Counsel, Exhibit B. The Court and the Plaintiffs can certainly reasonably infer from Ms. Cagan's desire to join the board majority that she believes none of the allegations of the Complaint have any merit, or, at a minimum, that she believes her substantial interests lie with the board majority.[5]

Defendants make much of a statement of fact by plaintiff Spooner that defendant Lyons joined the board majority in court, while defendants Robinson, Kriegel, Bramson, Moran, and Cagan did not. Clearly the statement by Ms. Spooner proffered by defendants draws no conclusions as to "what side of the fight" the non-removing directors are on. Declaration of Thiele R. Dunaway In Support of Defendants' Opposition to Plaintiffs' Motion to Remand, Exhibit B. Spooner merely notes that removing director Lyons has made clear what side of the

[5] A close reading of Temchine's letter supports the inference that Ms. Cagan was rejected as a majority defendant solely for the reason that she asked the attorney certain clarifying questions, which the attorney interpreted as not expressing "a like mind" with the other directors who, presumably, did not have the same temerity to question their attorneys about legal strategy.

fight she is on. Plaintiffs have no knowledge, and Ms. Spooner asserted none, as to what position non-removing defendants Moran and Cagan will take as to their removal as unlawfully elected directors, nor do Plaintiffs know what position any of the non-removing directors will take regarding Plaintiffs' request for bylaws amendments granting Pacifica listener-sponsors "membership" status and voting rights in Pacifica. No such remedy is sought in the suit filed by directors Robinson and Kriegel or the suit brought by Pacifica LAB members currently pending in state court.

Defendants ask this Court to speculate that because five independent directors have allegedly opted not to be represented by Epstein, Becker & Green and by Wendel, Rosen, then they must be nominal defendants who are completely in Plaintiffs' camp. Opposition Brief, 17: 12. The five independent directors have neither joined Plaintiffs' position in the lawsuit, nor expressed their intentions in that regard.

The five independent directors have asked for, and received from Plaintiffs, extensions of time in which to answer, until the motion to remand is ruled upon.

VII. This Matter Has Already Been Extensively Reviewed by the California Attorney General.

The fact that the California Attorney General saw fit, after a ten-month review process, to grant Plaintiffs leave to sue as relators reflects better than anything whether the issues of nonprofit public benefit corporation governance and adherence to the purpose of the charitable trust is a matter of substantial public concern to the State of California.

VIII. Extensive State Regulatory Scheme Exists Re Corporate Governance and Purpose of Charitable Trust.

There exists an extensive state regulatory scheme with respect to matters of corporate governance and with respect to ensuring adherence to a public benefit corporation's charitable purpose. Abbott and Kornblum, *Jurisdiction of the Attorney General Over Corporate Fiduciaries Under the New California Nonprofit Corporations Law,* 13 USFLR 753 (Summer 1979).

IX. This Case Meets the Abstention Criteria Set forth in the *Burford* and *Colorado River* Cases.

Here the *Burford* abstention is appropriate because there is: (1) an ongoing related case with some overlapping issues currently pending in state court, *Adelson v Pacifica Foundation, et al.*,[6] (2) there are complicated state issues regarding supervision of charitable trusts and the Attorney General's authority in this area, as well as issues of extending prior case law regarding election of directors of nonprofit mutual benefit corporations to nonprofit public benefit corporations, (3) inconsistent results between the pending state action and this action could well disrupt the state's ability to establish a coherent policy regarding supervision of its nonprofit charitable corporations, particularly if this court were to create some sort of special exception to California nonprofit corporations law applicable only to FCC broadcast licensees.

The *Colorado River* abstention doctrine is also applicable because: (1) the Superior Court of Alameda County has already asserted jurisdiction over the Pacifica Foundation trust in the *Adelson* case, (2) it is far more convenient to litigate all pending cases in one forum, and the time has long passed where the *Adelson* suit could have been removed from the state court, (3) it is

[6] In addition, there is another related case that has also been removed by the defendants, *Robinson et al. v Pacifica Foundation, et al.*, and that in all likelihood will be remanded to the same state court. Coordination of the trial of the three suits together in the Alameda County Superior Court will assure consistent results on overlapping issues and coherent state policy, as well as judicial economy.

certainly desirable to avoid piecemeal litigation of the three related cases, or worse, inconsistent results; (4) the state court first obtained jurisdiction over the *Adelson* case in July 1999, this case was filed in the state court in September 2000 and not removed by the defendants until October 2000; (5) clearly state law controls the determination of all issues raised herein; and finally (6) the state proceeding is adequate to protect the interests of all the parties. The State of California has a comprehensive and fair statutory scheme for determining the rights of nonprofit corporate directors, members, and the intended beneficiaries who are members of the public, with respect to nonprofit public benefit corporations, and none of the issues raised in the complaint refer to the "rationing of radio licenses."

X. Bad Faith Is Not Required for an Award of Costs and Attorney Fees.

As pointed out in Plaintiffs' moving brief, bad faith is not required for an award of attorney fees upon remand. *Moore v. Permanente Medical Group, Inc.,* 981 F.2d 443, 446 (9th Cir. 1992); *Balcorta v Twentieth Century Fox Film Corp.*, 208 F.3d 1102, 1105 n.2 (9th Cir. 2000). The 9th Circuit rule is that 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, supra*, 208 F.3d at p.1106, n.2.

> "When a district court remands a matter to state court, it has wide discretion to 'require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.' 28 U.S.C. §§ 1447(c); *Moore v. Permanente Med. Group, Inc.,* 981 F.2d 443, 447 (9th Cir. 1992). A district court may impose costs and fees without a showing of bad faith or improper motive. Id. at 446 (quoting *Morgan Guar. Trust Co. v. Repub. of Palau,* 971 F.2d 917, 923 (2d Cir. 1992)); 16 James Wm. Moore et al., Moore's Federal Practice §§ 107.41[3][b] (3d ed. 1999) ('An award under the statute does not require a showing of bad faith or that the removal was frivolous, vexatious, or lacking

an objectively reasonable basis.') "

Phipps v Praxair, Inc., 99-CV-1848 TW (LAB), 1999 U.S. Dist LEXIS 18745, *19-20 (S.D. Cal. 1999).

The *Phipps* court exercised its discretion not to award attorneys fees and costs because,

> "Given the contrary decisions made by other courts addressing this question, the complexity of the underlying jurisdictional issues, and the paucity of authoritative and recent case law on the subject, the Court finds that an award of costs and expenses is not warranted."

Id, at *22.

The present case is distinguishable from *Phipps* in that the underlying jurisdictional issues here are well settled and there is a plethora of case law on the limits of FCC jurisdiction in state law areas.

Conclusion.

For all the foregoing reasons Plaintiffs respectfully pray this Court to Grant their motion for remand of this case to the Alameda County Superior Court from whence it came and for an award of attorney's fees and costs incurred as a result of the removal.

Date: _____ Respectfully submitted,

_____