

ENDORSED
FILED
ALAMEDA COUNTY

APR 25 2014

CLERK OF THE SUPERIOR COURT

By PS Deputy

1 DAN SIEGEL, SBN 056400
2 ALAN S. YEE, SBN 091444
3 SIEGEL & YEE
4 499 14th Street, Suite 300
5 Oakland, CA 94612
6 Telephone: (510) 839-1200
7 Facsimile: (510) 444-6698

8 Attorneys for Cross-Complainant
9 Pacifica Foundation Radio

10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**

12 PACIFICA FOUNDATION RADIO, A
13 CALIFORNIA NOT-FOR-PROFIT
14 CORPORATION,

15 Cross-Complainant,

16 vs.

17 SUMMER REESE, and ROES 1 to 100,
18 inclusive,

19 Cross-Defendants.

Case No. HG14720131

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ORDER TO SHOW CAUSE AND
TEMPORARY RESTRAINING
ORDER**

Hearing Date: April 28, 2014

Hearing Time: 9:00 a.m.

Department: 15

Reservation# R-150818

20
21 Cross-complainant, Pacifica Foundation Radio (Foundation), a not-for-profit
22 corporation operating five radio stations located in Berkeley, Los Angeles, Houston,
23 Washington D.C., and New York, acting by and through its Board of Directors (Board),
24 submits the following memorandum of points and authorities in support of its
25 application for an order to show cause and for a temporary restraining order.

26 **I. INTRODUCTION**

27 The Board and the public are suffering irreparable damage as the result of the
28

1 actions of individuals, led by the cross-defendant Summer Reese, who have been
2 unlawfully trespassing and blockading access to the National Office of the Foundation
3 since March 17, 2014. The blockade is a continuation of the cross-defendants' actions
4 that began when Reese used a bolt cutter to cut the padlock on the National Office door
5 on March 17, 2014, and declare herself Executive Director to Foundation's employees,
6 thereby causing loss of good will, donations, and work hours.

7 In accordance with the Foundation's duty to "operate in the public interest and
8 [as] a trustee for the public,"¹ the Board seeks a temporary restraining order to stop
9 such unsafe, unfair, and illegal conduct and preserve the status quo until the
10 Foundation's motion for a preliminary injunction can be heard.

11 II. STATEMENT OF FACTS

12 The Foundation owns and operates five radio stations located in Berkeley, Los
13 Angeles, Houston, Washington D.C., and New York and interacts with over 150 affiliate
14 radio stations in the United States. The Foundation is responsible for the bi-monthly
15 payroll of all five stations along with handling accounts payable to run the stations'
16 programming and infrastructure. The Foundation is responsible for accounting and
17 managing approximately \$15 million dollars in revenue from all stations.

18 When the Foundation's operations are impaired, the listening audience is
19 unable to listen to or donate to the Foundation; artists, professors, and public figures
20 are unable to be on the radio; and people lose their jobs. In addition, staff would need
21 to be laid off if revenue is not generated or processed as a result of the recent blockades.

22 The National Office is located at 1925 Martin Luther King, Jr. Way, Berkeley,
23 California. It is not an office that would traditionally be considered hospitable as a
24 public forum. On March 13, 2014, the Board of Directors of the Foundation discharged
25 Summer Reese effective March 14, 2014. Reese was notified of her discharge that day.

26
27 ¹*McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, (1945), 151 F.2d 597, certiorari
28 denied 66 S.Ct. 530, 327 U.S. 779, 90 L.Ed. 1007; Communications Act of 1934, § 309(a), as
amended, 47 U.S.C.A. § 309(a).

1 Since March 17, 2014, a group of individuals headed by Reese has barricaded
2 and blocked access to the Foundation's National Office. Ms. Reese and her supporters
3 have blocked, physically assaulted, and stopped Board of Directors and Foundation
4 employees and members from entering the National Office. The blockaders have
5 installed air mattresses to sleep inside the National Office and to block the Board or
6 Foundation employees from entering. The blockaders have called in a commercial
7 shredding truck to shred financial documents. (Wilkinson Decl., at ¶6.)

8 By standing in and otherwise blocking the entrance of the National Office, Reese
9 and those acting in concert with her have been successful in: (1) preventing the Chair of
10 the Board and Chief Financial Officer (CFO) from having access to the accounts payable
11 and financial data to begin the Foundation's audit as well as to evaluate the state of
12 accounts payable; (2) restricting the Chair of the Board from removing Reese from
13 payroll; and (3) preventing the CFO and new interim Executive Director access to an
14 office to work in to fulfill their duties to the Foundation. (Wilkinson Decl. at ¶7.)

15 Reese has explicitly stated during meetings with Berkeley Police and the Chair of
16 the Board that she and those acting in concert with her will not leave the National
17 Office. (Wilkinson Decl. at ¶8.)

18 The Board has sought the assistance of the Berkeley Police Department, which is
19 charged with protecting the Foundation's property. However, the Berkeley Police
20 Department was unable to persuade Reese to vacate the National Office. The Berkeley
21 Police Department has, however, stated that it would enforce a temporary restraining
22 order if this Court were to issue one. (Wilkinson Decl. at ¶9.)

23 III. DISCUSSION

24 A. THE BOARD IS ENTITLED TO A TEMPORARY RESTRAINING 25 ORDER REQUIRING DEFENDANTS TO CEASE THEIR UNLAWFUL 26 ACTIVITY

26 The Board seeks a narrow Temporary Restraining Order ("TRO") that merely
27 prohibits the cross-defendants and those acting in concert with them from entering,
28 remaining or blocking people attempting to enter, leave, or pass through the

1 Foundation's National Office and/or into Foundation's Radio Stations, essentially an
2 order telling the cross-defendants to "stay out of the Foundation property." The
3 requested injunctive relief is appropriate for numerous reasons:

4 • Cross-defendants' past, current, and future conduct constitutes a private
5 nuisance and trespass. Civil Code Section 3479 ("an obstruction to the free use of
6 property, in the customary manner, so as to interfere with the comfortable enjoyment
7 of life or property"); Civil Code Section 3501 ("The remedies against a private nuisance
8 are: 1. a civil action"); Berkeley Municipal Code 13.52.020 ("It is unlawful for any
9 person to enter or go upon or pass over or remain upon any land of another after being
10 personally forbidden to do so by the owner of said property, or by the person entitled to
11 the possession thereof for the time being, or the authorized agent of either"); and Penal
12 Code Section 647 (e) ("every person who commits any of the following acts is guilty of
13 disorderly conduct, a misdemeanor: (e) Who lodges in any building, structure, vehicle,
14 or place, whether public or private, without the permission of the owner or person
15 entitled to the possession or in control of it.").

16 • Cross-defendants' conduct constitutes a civil conspiracy to commit the
17 nuisance and disorderly conduct.

18 • Courts are permitted to go further than they ordinarily would in giving
19 injunctive relief in furtherance of public interests than when only private interests are
20 involved. *Socialist Workers 1974 California Campaign Committee v. Brown* (1975) 53
21 Cal.App.3d 879, 889. Here, cross-defendants are causing profound damage to
22 interstate and international commerce, affecting businesses and individuals throughout
23 the country.

24 • The Foundation and the public will suffer irreparable injury if the cross-
25 defendants' conduct is not halted immediately. Cross-defendants are unlikely to be
26 financially able to pay damages to compensate for the many hundreds to thousands of
27 dollars of losses they are causing. *West Coast Constr. Co. v. Oceano Sanitary Dist.*
28 (1971) 17 Cal.App.3d 693, 700. Moreover, with each day of shutdown or slowdown at

1 the Foundation, the damage will grow at an increasing pace; members, sustainers,
2 listeners, and vendors will choose to do business with other radio stations or sue for
3 accounts payable.

4 • When, as here, a public charity entity seeks an injunction under a specific
5 statute and establishes that it is reasonably probable that it will prevail on the merits,
6 the potential harm to the public outweighs the potential harm to the responding party.
7 *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72 (where the legislative body has
8 specifically authorized injunctive relief against the violation of such a law, it has already
9 determined that (1) significant public harm will result from the proscribed activity, and
10 (2) injunctive relief may be the most appropriate way to protect against that harm.)

11 • The typical test to balance hardships in granting or not granting the requested
12 injunction, and the question of threat of future violations, are not in play here, because
13 the Board is limiting the relief sought to an injunction against patently illegal activity-
14 there is no right of defendants implicated in, nor hardship to, the defendants in
15 stopping illegal activity. *Empire Star Mines Co. v. Butler* (1944) 62 Cal.App.2d
16 466,529-530.²

17 •The requested TRO will preserve the status quo until the hearing on cross-
18 complainant's motion for a preliminary injunction.

19
20 **B. THE REQUESTED TRO DOES NOT IMPLICATE THE
BLOCKADERS' FIRST AMENDMENT RIGHTS**

21 The defendants' First Amendment rights are not implicated here for several
22 reasons. First, the relief sought is nothing more than an order to stop conduct which
23 unquestionably violates state law and local ordinances, specifically Civil Code Section
24 3479 ("an obstruction to the free use of property, in the customary manner, so as to

25 ² Even if it were appropriate to balance hardships, the concurrently filed Declaration of
26 Margy Wilkinson, particularly at ¶¶ 7, 11, demonstrates the significant, irreparable
27 injury that will result not only to the Foundation but to the California radio audience
28 and the state as a whole if defendants continue to blockade the Foundation's National
Office. Conversely, there is no harm whatsoever to the defendants if the requested
order is issued, since *it only prohibits acts that are already illegal.*

1 interfere with the comfortable enjoyment of life or property"); Civil Code Section 3501
2 ("The remedies against a private nuisance are: 1. a civil action"); Berkeley Municipal
3 Code 13.52.020 ("It is unlawful for any person to enter or go upon or pass over or
4 remain upon any land of another after being personally forbidden to do so by the owner
5 of said property, or by the person entitled to the possession thereof for the time being,
6 or the authorized agent of either"); and Penal Code Section 647 (e) ("every person who
7 commits any of the following acts is guilty of disorderly conduct, a misdemeanor: (e)
8 Who lodges in any building, structure, vehicle, or place, whether public or private,
9 without the permission of the owner or person entitled to the possession or in control
10 of it."). (Wilkinson Decl. ¶ 6.) Second, the relief sought is not content based; indeed, it
11 is not directed toward speech at all. Third, the area from which the Board seeks to
12 exclude the unlawful activity is a private office busy with heavy commercial traffic.
13 (Wilkinson Decl. at ¶ 5.) It is not a public forum, and it is not semi-public or limited
14 public forum. Indeed, the general public is not invited or allowed into the National
15 Office.

16 **1. The requested TRO restricts only illegal conduct, not speech.**

17 It is essential to recall what is at stake in the Foundation's complaint. The Board
18 does not seek to prevent peaceful picketing - on the part of cross-defendants or any
19 other party - in a recognized public forum. Rather, the Board only seeks to prevent
20 unlawful conduct. The First Amendment does not immunize cross-defendants from the
21 consequences of such conduct. Nor does it bar the Board from seeking injunctive relief
22 to remedy the situation. The United States Supreme Court has repeatedly held that the
23 Fifth and Fourteenth Amendment rights of private property owners must be respected
24 and protected, and trespassing, even while engaging in protected speech, is conduct,
25 not speech, and is not protected by the First Amendment. In *Lloyd Corp. v. Tanner*
26 (1972) 407 U.S. 551, 570³, the United States Supreme Court specifically held that "there

27 _____
28 ³ (Respondents, who sought to distribute handbill invitations to a meeting to protest the draft
and the Vietnam War, had no right to do so at a privately owned and operated shopping center.)

1 has been no such dedication of Lloyd's privately owned and operated shopping center
2 to public use as to entitle respondents to exercise therein the asserted First Amendment
3 rights." The Court explicitly noted that "[t]he Constitution by no means requires such
4 an attenuated doctrine of dedication of private property to public use....nor does
5 property lose its private character merely because the public is generally invited to use
6 it for designated purposes." *Id.* at 569.

7 The Supreme Court restated the same principles that "one of the essential sticks
8 in the bundle of property rights" belonging to the prior owner of the 1968 property;
9 namely, the right to exclude others. *PruneYard Shopping Ctr. v. Robins* (1980), 447
10 U.S. 74, 82. Fifteen years earlier, in *Cox v. Louisiana* (1965) 379 U.S. 536, the Court
11 had reiterated government's obligation to maintain order, saying "[t]he constitutional
12 guarantee of liberty implies the existence of an organized society maintaining public
13 order, without which liberty itself would be lost in the excesses of anarchy." *Id.* at 554-
14 5. As in *Lloyd Corp.*, the Court went on to specifically condemn the exact tactics
15 employed by blockaders, saying, "One would not be justified in ignoring the familiar
16 red light because this was thought to be a means of social protest. Nor could one,
17 contrary to traffic regulations, insist upon a street meeting in the middle of Times
18 Square at the rush hour as a form of freedom of speech or assembly A group of
19 demonstrators could not insist upon the right to cordon off a street, or entrance to a
20 public or private building, and allow no one to pass who did not agree to listen to their
21 exhortations." *Id.* California courts agree that "blocking access to public and private
22 buildings has never been upheld as a proper method of communication in an orderly
23 society." *Feminist Women's Health Center v. Blythe* (1995) 32 Cal.App.4th 1641, 1669.
24 Again, this is precisely what defendants have done, barricading themselves inside the
25 National Office, sleeping in the National office, and blockading the entrance to Board
26 members and Foundation employees. (Wilkinson Decl. at ¶ 6.)

27 **2. National Office is not a public forum.**

28 Even if the requested TRO did somehow burden speech, distinct from illegal

1 conduct (which it does not), the National Office where the cross-defendants have
2 barricaded themselves is not a public forum, nor is it a semi-public or limited public
3 forum. Unlike streets have from time to time been a traditional forum for assembly and
4 communicating thoughts, the cases are clear that unlawful activity on the street that
5 blocks private property remains illegal and such activity may be enjoined. *Hague v.*
6 *CIO* (1939) 307 U.S. 496, 516 (defendants' right to use the street) "is not absolute, but
7 relative, and must be exercised in subordination to the general comfort and
8 convenience, and in consonance with peace and good order . . . "); see also, *Coates v.*
9 *City of Cincinnati* (1971) 402 U.S. 611, 614-616 ("the City is free to prevent people from
10 blocking sidewalks, obstructing traffic, littering streets, committing assaults, or
11 engaging in countless other forms of antisocial conduct . . ."); *Amer. Foundries v. Tri-*
12 *City Council* (1921) 257 U.S. 184,204-205 ("It is idle to talk of peaceful communication
13 in such a place and under such conditions. The numbers of the pickets in the groups
14 constituted intimidation. * * * The crowds they drew made the passage of the
15 employees to and from the place of work, one of running the gauntlet. Persuasion or
16 communication attempted in such a presence and under such conditions was anything
17 but peaceable and lawful.")

18 The above-cited cases make clear that local authorities have the power, and the
19 duty, to maintain unobstructed access to private buildings, public streets, and
20 sidewalks, notwithstanding attempts to impede or disrupt access under the guise of
21 First Amendment activity. The requested relief is in no way onerous. It simply requires
22 the defendants to stop barricading themselves and blocking those who wish to do
23 business at the National Office. Also, as stated in *Empire Star Mines Co. v. Butler*
24 (1944) 62 Cal.App.2d 466,529-530, if the defendants have no intent of continuing the
25 illegal activity, they should not complain about being enjoined from doing so:

26 It is well settled that an injunction may be granted against repeated or
27 continuous trespasses. The property owner will not be relegated to successive
28 suits for damages. (*Slater v. Pacific Amer. Oil Co.*, 212 Cal. 648, 655; *Watson v.*

1 *Heger*, 48 Cal.App.2d417; *Eames v. Philpot*, 72 Cal.App. 151; 28 Am.Jur. 318-
2 330; notes, 32 A.L.R. 463;92 A.L.R. 578, injunction against repeated or
3 continuous trespasses on real property.)

4 It is not a ground for denying an injunction that the defendants ceased to deliver
5 water into plaintiffs' mine while the temporary injunction has continued in
6 effect. (*Vaughan v. John C. Winston Co.*, 83 F.2d 370, 373, 374; *Goshen*
7 *Manufacturing Co. v. Hubert A. Myers Manufacturing Co.*, 242 U.S. 202, 207,
8 208; *Walling v. Haile Gold Mines, Inc.*, 136 F.2d 102, 105.) Moreover, litigants
9 are entitled to reasonable repose from future unnecessary litigation. The plain
10 and direct manner of giving this repose is by enjoining the defeated party from
11 continuing to perform the acts found to be wrongful. *If he has no intent to*
12 *continue the wrongful acts he is not injured by the decree. If he has such intent*
13 *the injunction protects the successful party from the necessity of bringing*
14 *successive actions for damages.* Thus, in quiet title suits, in the discretion of the
15 court, the decree frequently includes an injunctive provision. (*Wolf v. Gall*, 174
16 Cal. 140; *Brooks v. Calderwood*, 34 Cal. 563; *Taylor v. Hawley*, 6 Cal.App.2d
17 576; see discussion and cases collected 22 Cal.Jur., p. 133, § 20.) (Emphasis
18 added.)

19 There are numerous additional reasons why injunctive relief is appropriate here,
20 notwithstanding free speech and right of assembly issues:

21 • Picketing can be enjoined if it blocks access to the business picketed. *Kaplan's*
22 *Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 77-78; *Pittsburg*
23 *Unified Sch.*, *supra*, at 891. The *Kaplan* court noted the need to avoid
24 intimidation and undue influence with those seeking access to the picketed
25 property, *Id.* at 78. The *Kaplan* court further noted that picketing which
26 obstructs access may be an unfair labor practice under Labor Code Section 1154
27 (a)(1) to the extent that it restrains or coerces non-striking employees in the
28 exercise of their right to refrain from concerted activities. *Id.* at 71.

1 • Picketing can be enjoined if it interferes "with the municipality's interest in
2 protecting the public health, safety, or order in assuring the efficient and orderly
3 use of the streets and parks for their primary purpose." In re Hoffman (1967) 67
4 Cal.2d 845, 849, as quoted in *Pittsburg Unified Sch. v. Calif Sch. Employees*,
5 supra, 166 Cal.App.3d 875, 891.

6 • Picketing can be enjoined if it seeks to achieve an unlawful purpose. *Pittsburg*
7 *Unified Sch.*, supra, at 891, citing *Teamsters Union v. Vogt* (1957) 354 U.S.
8 284291. See also, *Carpenters Union v. Ritter's Cafe* (1942) 315 U.S. 722, in
9 which the Supreme Court affirmed an injunction against peaceful picketing,
10 which constituted a secondary boycott in violation of Texas antitrust laws.

11 **C. THIS IS NOT A "LABOR DISPUTE"**

12 This is not a "labor dispute" within the meaning of Code of Civil Procedure
13 Section 527.3 or Labor Code Section 1138.1, in part because the Blockaders are private
14 individuals, not employees of the Foundation. (Wilkinson Decl. at ¶ 8.) Picketing which
15 obstructs access, because of its tendency to lead to violence, is not "peaceful picketing"
16 immunized from an injunction. *Kaplan's Fruit & Produce Co., Inc. v. Superior Court of*
17 *Los Angeles County* (1979) 26 Cal.3d. 60, 66.

18 **IV. CONCLUSION**

19 For the foregoing reasons, the Foundation respectfully requests that the order to
20 show cause and temporary restraining order issue as requested be granted.

21 Dated: April 25, 2014

22 SIEGEL & YEE

23 By: 

24 Alan S. Yee

25 Attorneys for Cross-Complainant
26 Pacifica Foundation Radio
27
28