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1 **I. INTRODUCTION**

2 Plaintiff, Pacifica Directors for Good Governance, (PDGG), an unincorporated
3 association of nine individual members of the Board of Directors of Pacifica Foundation
4 Radio, (Pacifica), seeks by its First Amended Complaint an injunction to force Pacifica to
5 rehire a terminated executive director who has now broken into the Pacifica National Office
6 and barricaded herself in, preventing Pacifica from conducting its business. PDGG's claim
7 has no merit, is barred by law, and would do irreparable harm to Pacifica.
8

9 **II. STATEMENT OF FACTS**

10 Pacifica Foundation Radio is a not-for-profit corporation operating five radio stations
11 located in Berkeley, Los Angeles, Houston, New York City, and Washington, D.C. Pacifica
12 Foundation Radio is governed by a board of directors, popularly known as the "Pacifica
13 National Board" or "PNB." Twenty of Pacifica's 22 directors are elected by delegates, four
14 from each station. Two are elected by the PNB itself to represent radio stations affiliated
15 with, but not owned by, Pacifica Foundation Radio. (Decl. of M. Wilkins, ¶¶ 4, 5.)
16

17 Each station's delegates meet annually in January to elect directors to serve on the
18 Pacifica National Board (Bylaws Article 5, Section 3). Each station's delegates elect four
19 directors (Bylaws Article 5, Section 1(c)) for terms of one year (Bylaws Article 5, Section 2).
20 In 2013, Summer Reese was the chair of the PNB and was acting as the Interim Executive
21 Director of the Pacifica Foundation, because the previous Executive Director, Arlene
22 Engelhardt, had resigned from her position in late 2012, and the board did not appoint a
23 replacement. Under California Corporations Code Section 5213(a), executive authority
24 defaults to the chair of a corporation's board: "The president, or if there is no president, the
25 chair of the board, is the general manager and chief executive officer of the corporation,
26 unless otherwise provided in the articles or bylaws." (Decl. of M. Wilkins, ¶¶ 6, 7.)
27

1 During 2013, Pacifica searched for a new Executive Director. At a Pacifica National
2 Board meeting held in November 2013, the PNB, by a one-vote margin, offered Ms. Reese
3 employment as Executive Director. Despite the divisions on the PNB, the Board agreed to
4 support Ms. Reese and to assist her in becoming a successful Executive Director, reaching a
5 near-consensus on what the terms and conditions of her employment should be. (Decl. of
6 M. Wilkins, ¶ 8.)
7

8 The PNB approved an agreement with Ms. Reese that contains certain conditions
9 precedent to Ms. Reese's employment. One condition required that Ms. Reese undergo a
10 background check approved by the PNB: "Subject to the completion of a background check
11 as approved by the PNB, you shall be employed under this agreement for a term of three
12 years, beginning December 1, 2013." Another condition required Ms. Reese to complete
13 employment documentation including proof of eligibility to work in the U.S. for I-9
14 purposes: "As a condition of employment, you will be required to complete new hire forms
15 and bring related documentation, including proof that you are presently eligible to work in
16 the United States for I-9 purposes." (Decl. of M. Wilkins, ¶ 9.)
17

18 A complete background check for Ms. Reese was never presented to the PNB for
19 approval. Additionally, employment documentation for Ms. Reese was never presented to
20 the PNB, despite its requests. Heather Gray, who was the Vice Chair of the PNB in 2013,
21 claimed that a background check had been completed but refused to provide that
22 background check to the PNB for approval. By the terms of the agreement, the offer
23 terminated on December 1, 2013. (Decl. of M. Wilkins, ¶ 10.)
24

25 On or about January 30, 2014, Summer Reese, Heather Gray, and then-PNB
26 Secretary Richard Uzzell fraudulently purported to enter into a new contract with Ms. Reese
27 that eliminates the background check condition and makes other material changes to her

1 terms of employment. The PNB did not authorize Ms. Reese, Ms. Gray, and/or Mr. Uzzell to
2 negotiate or execute the agreement and has never ratified it. When the new contract was
3 later presented to the PNB, the PNB voted to reject it. (Decl. of M. Wilkins, ¶ 11.)

4 On January 30, 2014, the 2014 PNB was seated. Ms. Reese is not a member of the
5 2014 PNB. Accordingly, as of that date she was no longer the Acting Interim Executive
6 Director under Corporations Code Section 5213(a). (Decl. of M. Wilkins, ¶ 12.)

7 On February 9, 2014, the PNB elected Margy Wilkinson to serve as its chair. The
8 election was conducted according to the voting methods provided in Article Fifteen of the
9 Bylaws. The election was certified by Pacifica Secretary Cerene Roberts. (Decl. of M.
10 Wilkins, ¶ 14.)

11 On March 13, 2014, out of an abundance of caution and confronted with the
12 fraudulent employment agreement for Ms. Reese dated January 30, 2014, the PNB voted to
13 terminate any employment of Ms. Reese effective March 14, 2014. (Decl. of M. Wilkins, ¶
14 15.) As a result of the termination of any employment relationship with Summer Reese,
15 Margy Wilkinson as Chair of the PNB became the Acting Executive Director of the
16 Foundation. (Decl. of M. Wilkins, ¶ 16.) On March 20, 2014, at a meeting attended by all
17 members, the PNB authorized the hiring of Bernard Duncan to serve as Pacifica's Interim
18 Executive Director. He accepted the position. (Decl. of M. Wilkins, ¶ 17.)

19 Despite the facts that (1) Ms. Reese is no longer Pacifica's Acting Interim Executive
20 Director since she is no longer the chair of the PNB; (2) Ms. Reese never became even the
21 Probationary Executive Director under the November 11, 2013, agreement; and (3) the
22 Pacifica National Board voted affirmatively to end any employment with her effective March
23 14, 2014, Reese has broken into and refused to leave Pacifica's National Office at 1925
24 Martin Luther King Jr. Way in Berkeley, California. She, her mother, and up to 20

1 supporters have remained in Pacifica's offices. They refuse to leave, have barricaded the
2 door, have prevented others from entering, and have prevented the Foundation from
3 conducting its business. Ms. Reese's conduct and unlawful actions have caused irreparable
4 injury and damage to Pacifica. (Decl. of M. Wilkins, ¶ 18.)

5 6 **III. DISCUSSION**

7 **A. PDGG HAS NO STANDING AND IS BARRED FROM BRINGING THIS ACTION**

8 PDGG in this action claims to be an unincorporated association comprised of nine
9 individuals: Carolyn Birden, Janet Coleman, Heather Gray, Kim Kaufman, Luzette King,
10 Janet Kobren, Janis Lane-Ewart, Manijeh Saba, and Richard Uzzell, who are also members
11 of the PNB. (First Amended Complaint, "FAC", ¶ 5.) They bring this action against Pacifica
12 and twelve members of the PNB seeking a court injunction directing Pacifica and the PNB to
13 rehire its former interim executive director, Summer Reese, who was terminated.
14

15 **1. PDGG's Lawsuit is Barred by Its Failure to Comply With C.C.P. § 425.15.**

16 It is undisputed that the twelve individual defendants in this case are uncompensated
17 directors of Pacifica, a non-profit corporation organized to provide educational services.
18 (Pacifica Bylaws, Article One, Section 2; Article Five, Section 9.) A cause of action against an
19 uncompensated officer or director based on an alleged negligent act or omission may not be
20 included in a pleading in the absence of a court order based on a finding that the party filing
21 the pleading has introduced evidence that substantiates the claim. C.C.P. § 425.15(a)
22 provides:
23

24 (a) No cause of action against a person serving without compensation as a
25 director or officer of a nonprofit corporation described in this section, on account of
26 any negligent act or omission by that person within the scope of that person's duties
27 as a director acting in the capacity of a board member, or as an officer acting in the
capacity of, and within the scope of the duties of, an officer, shall be included in a
complaint or other pleading unless the court enters an order allowing the pleading
that includes that claim to be filed after the court determines that the party seeking to

1 file the pleading has established evidence that substantiates the claim. The court may
2 allow the filing of a pleading that includes that claim following the filing of a verified
3 petition therefore accompanied by the proposed pleading and supporting affidavits
4 stating the facts upon which the liability is based. The court shall order service of the
5 petition upon the party against whom the action is proposed to be filed and permit
6 that party to submit opposing affidavits prior to making its determination. The filing
7 of the petition, proposed pleading, and accompanying affidavits shall toll the running
8 of any applicable statute of limitations until the final determination of the matter,
9 which ruling, if favorable to the petitioning party, shall permit the proposed pleading
10 to be filed.

11 Here, PDGG has made various claims against the individual defendants, alleging that
12 they have failed to act properly as directors of the PNB when they voted to terminate
13 Summer Reese and when they voted to reinstate Pacifica CFO Raul Salvador. PDGG seeks
14 injunctive relief against these defendants and also seeks to remove them as directors of the
15 corporation. However, PDGG has failed to petition the court as required by C.C.P. § 425.15.
16 Accordingly, PDGG's claims against the individual defendants are barred.

17 **2. PDGG Lacks Standing to Seek Declaratory Relief.**

18 Here, plaintiff, an association of nine members of the Board of Directors of the
19 Pacifica Foundation Radio, lacks sufficient personal interest in the alleged controversies to
20 support a claim for declaratory relief. Declaratory relief requires "an actual controversy that
21 is currently active . . . and both standing and ripeness are appropriate criteria in that
22 determination." *Otay Land Co. v. Royal Indemnity Co.* (2008) 169 Cal.App.4th 556, 563.

23 Where the alleged controversies are, in essence, issues that concern the interest of the
24 organization or the public in the orderly and competent exercise of a nonprofit organization,
25 they are not a personal interest distinct from the public or non-profit organizational interest.

26 See, e.g. *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1253-1254.

27 As elected members of the Board of Directors of Pacifica Foundation Radio, the
28 plaintiff directors are subject to Corporations Code § 5231 and owe a duty of loyalty to
29 Pacifica Foundation Radio. They may not sue Pacifica Foundation Radio since this would be

1 a violation of their duty of loyalty to the organization and their duties under the Pacifica
2 Bylaws. See, e.g., Bylaws Article 5, Section E. As directors of the organization, they are in
3 effect suing themselves by suing Pacifica. Though stated in the context of governmental
4 boards and agencies, the Supreme Court has explained the legal and policy reasons why such
5 lawsuits are not permitted.
6

7 The Supreme Court offered what it termed “persuasive legal and policy reasons” why
8 citizen-taxpayer standing may not be exercised by public officials to sue the
9 governmental body on which they serve. (*Carsten v. Psychology Examining*
10 *Committee of the Board of Medical Quality Assurance* (1980) 27 Cal.3d 793, 798, 166
11 Cal.Rptr. 844, 614 P.2d 276.) First, it places the courts in the position of
12 offering advisory opinions: “Since petitioner has no personal interest in the outcome
13 of the litigation, she is in effect seeking to have the courts render an advisory opinion
14 on the propriety of an administrative action. A judgment here would affect no person
15 either favorably or detrimentally; it would purely and simply offer gratuitous advice
16 to the board....” (*Ibid.*) Second, such a petitioner is in effect suing him or herself, and
17 courts should not “encourage or permit this type of narcissistic litigation ... because of
18 the inevitable damage such lawsuits will inflict” upon the process of
19 government. (*Ibid.*)

20 Finally, significant policy concerns “militate against permitting disgruntled
21 governmental agency members to seek extraordinary writs from the courts.
22 Unquestionably the ready availability of court litigation will be disruptive to the
23 administrative process and antithetical to its underlying purpose of providing
24 expeditious disposition of problems in a specialized field without recourse to the
25 judiciary. Board members will be compelled to testify against each other, to attack
26 members with conflicting views and justify their own positions taken in
27 administrative hearings, and to reveal internal discussions and deliberations.
Litigation, even the threat of litigation, is certain to affect the working relationship
among board members. In addition, the defense of lawsuits brought by dissident
board members—and such suits would undoubtedly be frequent—will severely tax the
limited budgetary resources of most public agencies.” (*Carsten, supra*, 27 Cal.3d at p.
799, 166 Cal.Rptr. 844, 614 P.2d 276.) Moreover, “[f]rom the vantage point of the
judiciary such litigation has ominous aspects. It is purely and simply duplicative, a
rerun of the administrative proceedings in a second, more formal forum. The
dissident board member, having failed to persuade her four colleagues to her
viewpoint, now has to persuade merely one judge. The number of such suits
emanating from members on city, county, special district and state boards, will add
significantly to court calendar congestion.” (*Ibid.*)

24 *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1257-1258.

25 These same policy concerns apply to a board member of a non-profit organization
26 who has accepted the elected position of director. By accepting the elected position, they
27 have waived any right to sue Pacifica Foundation Radio as a member of the organization.

1 Such lawsuits brought by dissident board members severely tax the limited budgetary
2 resources of the organization. They affect the working relationships among board members,
3 compelling board members to testify against each other, to attack members with conflicting
4 views to justify their own positions, and to reveal internal and confidential discussions and
5 deliberations. To allow such lawsuits would allow dissident board members who have failed
6 to persuade their colleagues to their viewpoint to try to persuade one judge.
7

8 Accordingly, an elected director of a non-profit organization, by accepting the duties
9 imposed by Corporations Code § 5231 and the Bylaws of the organization, forfeits his or her
10 standing to sue as a member.

11 **3. PDGG's Derivative Lawsuit is Barred for Failure to Comply With**
12 **Statutory Procedures Under Corporations Code § 800.**

13 Even if we assume that plaintiff as an unincorporated association of nine individual
14 directors is not barred from suing Pacifica Foundation Radio and twelve directors of the
15 Foundation, plaintiff has failed to show that it has standing to bring a derivative suit on
16 behalf of the Foundation.
17

18 Standing in a derivative action requires the shareholder/member plaintiff to show
19 he/she presented the basis of the litigation to the corporation's board and tried to "secure
20 from the board such action as the plaintiff desires." Corporations Code § 800, subd. (b)(1),
21 (2). Demand on the board will be excused only when plaintiff sufficiently establishes that
22 demand would have been futile. Corp. Code § 800, subd. (b)(2); *Shields v. Singleton* (1993)
23 15 Cal.App.4th 1611, 1618-1619.
24

25 Mere allegations of the futility of a demand on the directors is not sufficient to satisfy
26 plaintiff's duty. *Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572,
27 587. The proof must be shown from facts specific to each director from which the trier of

1 fact can find a reasonable doubt that the particular director could be expected to fairly
2 evaluate the claim of the shareholder plaintiff. A showing of structural bias in lieu of these
3 specific facts is insufficient. *Id.*

4 It is undisputed that the nine individuals failed to make any effort to secure action
5 from the Board of Directors of the Pacifica Foundation prior to prosecuting this lawsuit.
6 Plaintiff has failed to allege any specific facts demonstrating why a demand to the Board of
7 Directors would be futile. The complaint must allege *specific* facts as to *each director*
8 showing why demand would be futile. Corporations Code § 800(b)(2); *Bader v. Anderson*
9 (2009) 179 Cal.App.4th 775, 790. Plaintiff has alleged no such facts.

10 Well-established common law requires “extraordinary conditions” to allow a
11 derivative suit to prevent the abuse of the derivative suit remedy. *Kamen v. Kemper*
12 *Financial Services, Inc.* (1991) 500 U.S. 90, 95-96. California has adopted the test employed
13 by the Delaware courts requiring that to show demand futility, the plaintiff must allege facts
14 creating a *reasonable doubt* that the board of directors could have properly exercised its
15 *independent and disinterested business judgment* in responding to the shareholder’s
16 demand. *Bader v. Anderson* (2009) 179 Cal.App.4th 775, 791-792. Prior to *Bader v.*
17 *Anderson*, there were few California cases that had attempted to delineate the circumstances
18 constituting demand futility required by Corporations Code § 800(b)(2). *Id.*, at 790.

19 PDGG fails to plead any facts to show that a rejection of its derivative lawsuit by the
20 Pacifica Board would not have been done in good faith. A showing of bad faith by the
21 Pacifica Board is required before plaintiff may sue the Pacifica Board. Such a showing is part
22 of the derivative lawsuit.

23 A derivative lawsuit is in essence a consolidation in equity of two suits, one by
24 the shareholder against the directors seeking an order that they sue those who have
25

1 wronged the corporation, and the other by the corporation against the wrongdoers.
[citation.]

2 *Bader v. Anderson, supra*, 179 Cal.App.4th at 789.

3
4 A director will be deemed not to be disinterested if the facts alleged demonstrate a
5 potential personal benefit or detriment to the director as a result of the decision. The
6 personal benefit must arise out of the transaction being challenged. A showing that a
7 director may not be disinterested cannot be made through general allegations. *Bader v.*
8 *Anderson, supra*, 179 Cal.App.4th at 792.

9 Thus, even where the board approved the challenged transaction, that decision, of
10 itself, would not establish demand futility under the theory that such approval
11 “automatically connotes ‘hostile interest’ and ‘guilty participation by directors.’” [citation.]
12 *Bader v. Anderson, supra*, 179 Cal.App.4th at 793. Thus, even general averments that the
13 directors were involved in a conspiracy or aided and abetted the wrongful act complained of
14 will not suffice to show demand futility.

15
16 The test of demand futility is not whether or not the board would have rejected the
17 lawsuit proposed by plaintiff. Plaintiff must apprise the court of facts specific as to each
18 director from which it can conclude that that particular director could or could not be
19 expected to fairly evaluate the claims of the shareholder plaintiff without being influenced by
20 improper considerations. PDGG has failed to do so. As the *Bader* court emphasized, a
21 board decision that the corporation should not bring an action may itself be an exercise of
22 the business judgment rule, not a showing of futility. *Bader v. Anderson, supra*, 179
23 Cal.App.4th at 789.

24
25 PDGG failed to make any effort to secure action from the Board of Directors of the
26 Pacifica Foundation prior to prosecuting this lawsuit. The complaint fails to make any
27

1 allegations of *specific* facts as to *each director* showing why demand would be futile.

2 Accordingly plaintiff has no standing to bring this suit against Pacifica Foundation Radio
3 and each of the other defendants.

4
5 **4. PDGG’s Claims Under Corporations Code § 5223 are Barred for Failure to Exhaust Internal Administrative Remedies**

6 Article Five, Section 7 of the Pacifica Bylaws establishes Pacifica’s internal procedures
7 for removing directors. The director is afforded reasonable and appropriate due process,
8 including notice and an opportunity to be heard. At no time prior to bringing its lawsuit to
9 remove defendants as directors has the plaintiff in this action exhausted the administrative
10 procedures established by the Pacifica Bylaws for removing any of the defendants in this
11 action as directors.

12
13 It is well established in California that a party must exhaust internal administrative
14 remedies as prerequisite to filing a lawsuit with the courts. The California Supreme Court
15 explained in *Rojo v. Kliger* (1990) 52 Cal.3d 65:

16
17 The reason for the exhaustion requirement in this context is plain. As we
18 stated in *Pinsker v. Pacific Coast Society of Orthodontists*, (1974) 12 Cal.3d 541 at
19 page 557: “[W]e believe as a matter of policy that the association itself should in the
20 first instance pass on the merits of an individual’s application rather than shift this
burden to the courts. For courts to undertake the task ‘routinely in every such case
constitutes both an intrusion into the internal affairs of [private associations] and an
unwise burden on judicial administration of the courts.’ [Citation.]”

21 *Id.*, 52 Cal.3d at 86 -87.

22 Having failed to exhaust internal administrative procedures, PDGG is barred from bringing
23 any action under Corporations Code § 5223.

24 **5. PDGG’s Claim For Injunctive Relief To Terminate Pacifica’s CFO Is Barred For Failure to Join an Indispensable Party.**

25
26 By its Amended Complaint, PDGG seeks an injunction directing Pacifica Foundation
27 Radio to terminate the employment of its CFO. The CFO is therefore an indispensable party

1 to plaintiff's complaint. "Where the plaintiff seeks some type of affirmative relief which, if
2 granted, would injure or affect the interest of a third person not joined, that third person is
3 an indispensable party." *Sierra Club, Inc. v. California Coastal Comm'n* (1979) 95 CA3d
4 495, 501, 194; see *Olszewski v. Scripps Health* (2003) 30 C4th 798, 808, (a person is an
5 indispensable party "when the judgment to be rendered *necessarily must affect his rights*"
6 [emphasis added])
7

8 When an action cannot proceed in the absence of an indispensable party, the action
9 should be dismissed on the ground that "justice requires that the action not proceed" in the
10 party's absence. *Union Carbide Corp. v. Sup.Ct. (Villmar Dental Labs, Inc.)* (1984) 36 C3d
11 15, 22.
12

13 **B. PLAINTIFF HAS FAILED TO SHOW IRREPARABLE HARM**

14 Here, PDGG claims irreparable harm based on the likelihood of an unlawful
15 discharge lawsuit by Summer Reese, the consequential financial risk of a lawsuit, the
16 damages resulting from reinstating its CFO, and other risks of loss related to these two
17 matters. (Plaintiff's Amended Points and Authorities In Support of Preliminary Injunction,
18 page 12.) PDGG's claim is at most speculative and is not supported by any concrete facts.
19 There is no evidence that Ms. Reese may sometime in the future prevail in a lawsuit based
20 on a fraudulent contract. Even if there was, there would be clearly a legal remedy in the
21 form of damages.
22

23 C.C.P. § 526(a)(2) includes the traditional consideration of 'irreparable harm.'
24 Irreparable harm is often related to the 'inadequate legal remedy' (i.e., the damages remedy
25 is inadequate because some immeasurable harm is threatened). But, it is also a separate
26 consideration. The court seeks more than a mere dispute. Relief is unlikely unless someone
27

1 will be significantly hurt in a way that cannot be later repaired. *People ex rel. Gow v.*
2 *Mitchell Brothers' Santa Ana Theater* (1981) 118 CA3d 863, 870-871.

3 Moreover, the threat of 'irreparable harm' must be *imminent* as opposed to a
4 mere possibility of harm sometime in the future: "An injunction cannot issue in a vacuum
5 based on the proponents' fears about something that may happen in the future. It must be
6 supported by actual evidence that there is a realistic prospect that the party enjoined intends
7 to engage in the prohibited activity." *Korean Philadelphia Presbyterian Church v.*
8 *California Presbytery* (2000) 77 CA4th 1069, 1084.

10 **C. PLAINTIFF CANNOT PREVAIL ON THE MERITS**

11 A preliminary injunction *must not* issue unless it is "reasonably probable that the
12 moving party will prevail on the merits." *San Francisco Newspaper Printing Co., Inc. v.*
13 *Sup.Ct. (Miller)* (1985) 170 CA3d 438, 442—abuse of discretion to grant injunction where
14 plaintiff lacked standing to sue; see *Costa Mesa City Employees' Ass'n v. City of Costa*
15 *Mesa* (2012)298209 CA4th 298, 310. Here, plaintiff cannot prevail on the First Amended
16 Complaint.
17

18 **1. The Gravamen of Plaintiff's Complaint is Prohibited by Civil Code § 3390.**

19 The gravamen of plaintiff's complaint is for declaratory and injunctive relief to force
20 Pacifica Foundation Radio to employ Summer Reese and to terminate the employment of
21 Raul Salvador. This relief is prohibited. Civil Code § 3390 provides as follows:
22

23 The following obligations cannot be specifically enforced:

24 . . .

25 2. An obligation to employ another in personal service;

26 The rational for prohibiting injunctions compelling performance of employment
27

1 contracts was summarized by the court in *Barndt v. County of Los Angeles* (1989) 211
2 Cal.App.3d 397:

3 It has long been established that a contract to perform personal services cannot be
4 specifically enforced, regardless of which party seeks enforcement. (*Poultry*
5 *Producers etc. v. Barlow* (1922) 189 Cal. 278, 288 [208 P. 93]; 5A Corbin, Contracts,
6 § 1204, p. 398; Dobbs, Remedies, § 12.25, pp. 929-931.) The rule evolved because of
7 the inherent difficulties courts would encounter in supervising the performance of
8 uniquely personal efforts. . . . More importantly, however, the common law
9 disfavored specific performance to avoid the friction and social costs that often result
10 when employer and employee are reunited in a relationship that has already failed.
11 (See *Poultry Producers etc. v. Barlow*, *supra*, 189 Cal. at p. 288; Rest.2d, Contracts, §
12 367 com. (a) at p. 192.) **This rationale is particularly applicable where the**
13 **services to be rendered require mutual confidence among the parties and**
14 **involve the exercise of discretionary authority.**
15 (See *Rautenberg v. Westland* (1964) 227 Cal.App.2d 566, 573 [38 Cal.Rptr. 797].)

16 *Id.*, 211 Cal.App.3d at 403 -404. (emphasis added).

17 The rule applies both where an employer sues to compel the employee to return to
18 work and where an employee sues to get his or her job back. In either case, “the remedy of
19 specific performance is simply not available ...” *Barndt v. County of Los Angeles*, *supra*, 211
20 CA3d at 405.

21 Additionally, Civil Code § 3390 subsection 3 prohibits the court from forcing a party
22 to perform an act which it cannot perform lawfully. Here, Summer Reese has refused to
23 provide Pacifica Foundation Radio with a social security number. An employer is required
24 by law to obtain an employee’s social security number. Specifically, the Internal Revenue
25 Code, 26 U.S.C. §6109(a)(3) & (d), requires employers to provide the social security
26 numbers of their employees. Similar laws have been enacted by the State of California.
27 Additionally, employers are required to have an employee complete an Immigration Form I-
9. 8 C.F.R. § 274a.2(a) & (b)(1)(i), § 274a.10(b)(2). Even if she sincerely believes that her
religion prevents her from providing a social security number, the Courts agree that an
employer is not liable under Title VII when accommodating an employee’s religious beliefs

1 would require the employer to violate federal or state law. *Sutton v. Providence St. Joseph*
2 *Medical Center* (C.A.9 (Cal.), 1999) 192 F.3d 826, 830. See also, *Seaworth v.*
3 *Pearson* (C.A.8 (Minn.), 2000) 203 F.3d 1056, 1057 -1058 (Requiring an employer to seek a
4 waiver of IRS penalties caused by employee's refusal to provide a social security number
5 imposed an undue hardship on the employer under Title VII.)
6

7 Requiring Pacifica to employ a person who refuses to provide a social security
8 number would violate both state and federal law and is prohibited by Civil Code § 3390.

9 **2. Plaintiff Has Failed to Allege Facts That Support a Cause of Action Under**
10 **Corporations Code § 5223.**

11 The allegations that have been made by PDGG against defendants fail to include any
12 facts that would justify the removal of any director under Corporations Code § 5223.

13 Margy Wilkinson was elected as Chair of the PNB on February 8, 2014, and the
14 election was certified by the Board secretary. The Pacifica Bylaws, Article Fifteen,
15 subsection B, provides for an instant runoff method when there is no majority. Those
16 procedures were followed, and she was elected Chair.

17 Tony Norman is a duly elected member of the PNB. He has never been elected or
18 appointed to a public office as defined by Pacifica's Bylaws and California law. Mr.
19 Norman's position on a District of Columbia Advisory Neighborhood Commission is not a
20 public office because it provides for no exercise of sovereign power but was merely advisory.
21 This issue was resolved by the PNB more than a year ago on February 22, 2013, when Mr.
22 Norman was first elected to the PNB. Mr. Norman disclosed well in advance of the meeting
23 that he held a position on the Advisory Neighborhood Commission. The matter was debated
24 by the PNB and the PNB voted to seat Mr. Norman. The motion to seat Mr. Norman on the
25 PNB was made by Carolyn Birden and supported by Richard Uzzell, Janet Coleman,
26
27

1 Manijech Saba and Heather Gray, who are all now plaintiffs in this action.

2 Cerene Roberts was elected as Secretary to the PNB on February 9, 2014. Since
3 assuming office, she has provided all required public notices required by California law and
4 the Corporation for Public Broadcasting Open Meeting Requirements. Notices regarding
5 closed sessions of the PNB and the reasons for them are made available to the public before
6 the meeting on the foundation's calendar at <http://kpftx.org/pacalendar/index.php>. To
7 read the particulars, one must click on the actual meeting date. Reports-out of closed
8 session business are generally prepared and sent to the technical staff for posting within 24
9 hours of the meeting's end. To read those, one can visit the Foundation's main site
10 <http://pacificafoundation.org/> and click the grey box in the lower left hand corner labeled "Reports on
11 PNB Exec Sessions" or go directly to the page http://pacificafoundation.org/notices_home.php. Draft
12 minutes that have been finalized of open and closed meetings of the PNB since February 7,
13 2014, have been distributed to the PNB. Some of those have been approved while others
14 have not yet been brought for a vote. Since assuming office, Ms. Roberts has provided draft
15 minutes to the PNB more expeditiously than before. The prior secretary, plaintiff Richard
16 Uzzell, failed to produce several months of outstanding minutes of the PNB meetings despite
17 promised delivery.

18 The charges against Mr. Jose Luis Fuentes similarly have no merit. Like any other
19 member of the PNB, he was entitled to express his opinions regarding the issues before the
20 board and to contribute to the discussions before resolution. When he contacted third party
21 vendors to remove unauthorized signers, he did so at Ms. Wilkinson's direction as Chair of
22 the PNB, and he clearly identified himself as a member of the PNB.

23 No specific allegations are made against any of the other director defendants. As
24 discussed above, the termination of the employment of Summer Reese, who has now broken
25

1 into the Pacifica National Office and barricaded herself in, and prevented the Foundation
2 from conducting its business, was more than justified.

3 Raul Salvador has been the CFO of Pacifica since May 9, 2013. While performing his
4 duties in the fall of 2013, Mr. Salvador discovered that Summer Reese had authorized cash
5 advances in violation of Pacifica policy and had reimbursed herself for expenses without the
6 proper invoices. Ms. Reese did not deny these allegations. Shortly thereafter, one of Ms.
7 Reese's subordinates made a claim of sexual harassment against Mr. Salvador. Mr. Salvador
8 was placed on paid administrative leave pending an internal investigation. The allegations
9 were investigated and no cause was found for any discipline of Mr. Salvador. He was
10 accordingly reinstated on March 27, 2014.

11
12 Pacifica contracts with a professional human resources firm which provides HR
13 guidance as needed. The organization is insured, and PNB has been careful to avoid any
14 actions that would make the organization uninsurable.

15 16 **IV. CONCLUSION**

17 For all of the foregoing reasons, Plaintiff's request for a preliminary injunction must
18 be denied.

19
20 Dated: April 25, 2014

SIEGEL & YEE

21 By 

22 **ALAN S. YEE**

23 Attorneys for Defendant/Cross-Complainant
24 **PACIFICA FOUNDATION RADIO**