



FILED
 ALAMEDA COUNTY
 MAY 12 2014
 CLERK OF THE SUPERIOR COURT
 By Pam Williams
 Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ALAMEDA

<p>PACIFICA DIRECTORS FOR GOOD GOVERNANCE, Plaintiff, vs. PACIFICA FOUNDATION RADIO, et al., Defendants.</p>	<p>No. HG14-720131 ORDER (1) DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, AND (2) GRANTING DEFENDANT AND CROSS-COMPLAINANT'S APPLICATION FOR TEMPORARY RESTRAINING ORDER</p>
<p>AND RELATED CROSS-ACTION</p>	

Two matters came on regularly for hearing on May 6, 2014 in Department 15 of the above-entitled court, the Honorable Ioana Petrou presiding: (1) the Motion for Preliminary Injunction by Plaintiff Pacifica Directors for Good Governance ("PD"), and (2) the Application for Temporary Restraining Order by Defendant and Cross-Complainant Pacifica Foundation Radio ("PFR"). The Court has considered the papers filed in connection with these matters, the arguments of counsel, and the testimony of the witnesses who appeared at the May 6 hearing and, good cause appearing, HEREBY ORDERS as follows.

I. Plaintiff Pacifica Directors for Good Governance's Motion for Preliminary Injunction is DENIED.

According to PD's First Amended Complaint, PD is an unincorporated voluntary association comprised of nine individuals who are members of the board of directors of PFR. PD filed this action against PFR and 12 other board members of PFR. PD's First Amended Complaint alleges causes of action for (1) Removal of Directors - Fraudulent and Dishonest Acts, Gross Abuse of Authority and Discretion; (2) Removal of Directors – Breach of Duties; (3) Removal of Directors – Fraudulent and Dishonest Acts (against Defendant Tony Norman only); (4) Declaratory Relief; and (5) Preliminary and Permanent Injunctive Relief.

In this Motion PD seeks a preliminary injunction restraining Defendants from, *inter alia*, (1) violating PFR's Bylaws; (2) approving or executing any board decision resulting from a violation of those Bylaws; (3) breaching the terms of a purported January 30, 2014 employment contract between PFR and its (either current or former) Executive Director Summer Reese; (4) taking any action in furtherance of purported board decisions (including terminating Reese or re-hiring CFO Raul Salvador) absent documentation of board approval in compliance with the Bylaws; (5) making any further personnel decisions without proper board approval and recordation of such decisions; (6) interfering with Reese's further execution and performance of her job functions as Executive Director; and (7)

suspending board participation of Defendants Wilkinson, Norman, Roberts, Fuentes and Lamb for alleged egregious breaches of their fiduciary duty.

In determining whether to grant a preliminary injunction, the Court considers two interrelated factors: (1) the likelihood that plaintiff will prevail on the merits at trial; and (2) the interim harm that plaintiff would be likely to suffer if the injunction were denied as compared to the harm defendant would be likely to suffer if the injunction were issued. (*See Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 749.) Where plaintiff fails to show a reasonable likelihood of succeeding on the merits at trial, the Court does not reach the issue of whether the balance of harms favors granting or denying a preliminary injunction. (*See Yu v. University of La Verne* (2011) 196 Cal.App.4th 779, 787.)

As indicated by PD's request for injunctive relief recounted above, as well as by the subject matter of PFR's Cross-Complaint, the central issue in this case is the current employment status of (either current or former) Executive Director Summer Reese. The evidence in documentary and testimonial form presented to the Court in connection with this Motion reflects that Reese began acting as Interim Executive Director of PFR in 2012, and in November 2013 the PFR board voted to offer Reese the Executive Director position. On November 11, 2013, the board approved an agreement with Reese that is attached as Exhibit B to the Declaration of Margy Wilkinson filed on April 25, 2014 (hereinafter "the

Wilkinson Decl.”). That November 11, 2013 agreement (hereinafter “the November agreement”) was signed by Reese and by Richard Uzell on behalf of the board on November 15, 2013 and contained a number of terms that are particularly material to this Motion. First, the November agreement offered Reese the Executive Director position for a three-year term beginning December 1, 2013 “subject to the completion of a background check as approved by the PNB.” The offer would remain open until December 1, 2013. Second, it contained an arbitration agreement in which the parties agreed to arbitrate all disputes “between Pacifica and you arising out of your employment or the termination of your employment.” Third, it provided that it “may not be modified or changed except by another written agreement between us, signed by you and by the Pacifica National Board Secretary.”

The evidence at the hearing was undisputed that the background check of Reese was not completed by December 1, 2013. Reese testified that the background check took approximately two months to complete, until sometime in January 2014, during which time she was repeatedly asked to track down old employment contacts.

On January 30, 2014, Reese signed an employment contract (hereinafter “the January agreement”) that was also signed by Acting Chair Heather Gray and Board Secretary Richard Uzell, both of whom are also members of PD. The January agreement differs from the November agreement in several material

respects. Fundamentally, it makes no reference to a background check. Perhaps even more significantly, it provides that during Reese's probationary period, Reese could only be terminated for cause; that she was not an at-will employee as of January 30, 2014; and that if terminated during the probationary period, she would be given a six-month severance payment. The November agreement contained no such terms.

PFR established that the board never authorized Gray or Uzell to enter the January agreement, the board never ratified that agreement, and in fact the majority of the board expressly rejected the January agreement at its meeting on February 7, 2014. PD and Reese contend that no board authorization or ratification of the January agreement was required because it simply restated the terms of the November agreement. However, as discussed above, the January agreement contained several terms that were significantly and materially different from the November agreement, and PD and Reese have not presented any evidence that the board ever authorized or ratified those different terms.

PFR held a regular board meeting (as provided in Article Six, Section 4 of the Bylaws) on February 7, 2014. At that meeting, board member Heather Gray provided the board with a summary of Reese's background check, but not the background check itself. (A copy of the material provided by Gray is attached as Exhibit C to the Wilkins Decl.) At an executive session of the board on February 10, the board passed a motion to require Summer Reese and/or Heather Gray to

provide the board with Reese's complete personnel file and background check within 10 days, and to restrict Reese's authority to act as Executive Director until further notice. (*See, e.g.*, Declaration of Carolyn Birden, filed by PD on April 15, 2014.)

It is not reasonably disputed that Reese and/or Gray did not provide Reese's "complete personnel file and background check" to the board within 10 days of February 10, 2014, and that the board did not vote to approve Reese's background check, as required by the November agreement. PD and/or Reese contend, *inter alia*, that (1) Reese could not have provided her "complete background check" to the board, because she didn't have it in her possession, and further that it wasn't customary for a "complete background check" to be submitted to the board for consideration because of job applicant's right to privacy in that information; (2) the reason the majority of the board was disinclined to approve her background check was because she had no Social Security Number based on her religious beliefs, and that if the board had consulted with or followed the advice of its employment counsel, the board would have realized any adverse decision based on Reese's failure to obtain a Social Security Number would constitute actionable employment discrimination; and (3) any action taken by the board since January 30, 2014 has been invalid because board member Tony Norman is a member of the District of Columbia's Advisory

Neighborhood Commission, and thus ineligible to serve on the board pursuant to Article Five, Section 1(B) of the Bylaws.

Addressing the third issue first, Article Five, Section 1(B) of the Bylaws prohibit a person from serving on the board if he or she “holds any elected or appointed public office at any level of government.” The Court heard unrebutted testimony from Defendant Brian Edwards-Tiekert that the board had considered whether Tony Norman held an “elected or appointed public office” in early 2013. The board concluded that he did not, because the District of Columbia’s Advisory Neighborhood Commission was not a “public office,” based on the fact that the Advisory Neighborhood Commission had no authority to take any actions itself, only to recommend actions to be taken by the District of Columbia. Therefore, PD has not demonstrated a likelihood of prevailing on a claim that Norman’s status as a board member invalidated any board decisions on or after January 30, 2014, including the decision on February 9, 2014 to elect Defendant Margy Wilkins as Chair of the board.

As for PD’s arguments about why a “complete background check” was not provided to the board, and whether it was advisable for the board to consider Reese’s lack of Social Security Number as a basis for its decisions (if indeed the board did so), those arguments do not demonstrate a likelihood that PD will prevail on any claims that the board’s actions in February 2014 were invalid or constituted a breach of board members’ duties or abuse of authority. The

November agreement made Reese's employment subject to "the completion of a background check as approved by the PNB," and the majority of the board voted to require Reese and/or Heather Gray to provide a "complete background check" within 10 days of February 10, 2014 to facilitate its decision. PD's argument at the hearing - to the effect that the November agreement only required that the board approve what background check to perform, and not the actual or complete results of that background check - is not a persuasive interpretation of the provision. In ruling on this Motion, the Court does not need to, and does not, express any opinion on whether the board could have made a decision as to Reese's employment offer based on the summary of background check provided by Heather Gray, or whether it may have been advisable for the board to have more fully consulted with human resources counsel prior to taking any particular action concerning Reese's employment as Executive Director. The Court only determines that Plaintiff has not established a probability of prevailing on any claim that the the board exceeded or abused its authority or breached any duties by taking the actions it took in February 2014.

The board scheduled a special meeting on March 6, 2014 to discuss "matters related to individual employees," and another special meeting with that same agenda item was scheduled for March 13, 2014. (See Exhibit 1 admitted at May 6 hearing, at pages 7-8.) Reese's employment status was discussed at each of these meetings, and at the March 13 meeting, the majority of the board voted to

terminate Reese's employment as of March 14, 2014. PD and Reese complain that the March 13 meeting was "improperly noticed," that no human resources counsel were present at either the March 6 or March 13 board meeting, and that Reese's termination without cause breached the provisions of the January agreement. However, as stated above, PD has not demonstrated a probability of prevailing on any claim that the January agreement, requiring termination for cause during Reese's probationary period, was ever authorized or approved by the board or that the January agreement is legally binding on PFR. The November agreement, which was authorized by the board, contains no such provision requiring termination for cause during Reese's probationary period.

PD has not demonstrated a probability of prevailing on its claim that the March 13 meeting was "improperly noticed" (*see, e.g.*, Exhibit 1 referenced above, as well the declarations of Cerene Roberts filed April 25, 2014), nor has PD demonstrated that the failure to have human resources counsel present at the March 6 or March 13 board meetings violated any Bylaws, constituted a breach of duty by Defendants, or otherwise resulted in the March 13 decision to terminate Reese's employment exceeding PFR's authority.

Again, in making this ruling the Court makes no determination concerning Reese's performance as Executive Director or whether PFR's decision to terminate her employment was proper or wise. The Court merely determines that PD hasn't established a probability of prevailing on any claim that PFR's decision

to terminate Reese's employment exceeded its authority, or that the individual Defendants breached any duty or abused their authority in voting in favor of that decision.

As for the other various factual bases for PD's claims alleged in the First Amended Complaint (e.g., the decision to rehire CFO Raul Salvador, the retention of the Siegel & Yee law firm, designating Bernard Duncan as interim Executive Director), PD similarly has not demonstrated that PFR exceeded its authority in taking those actions, or that any of the individual Defendants breached any duty or abused their authority in their role in any of those actions.

Finally, the Court observes that (1) to the extent PD seeks to enjoin PFR from employing CFO Salvador, he is an indispensable party to this action, and the Court cannot grant the requested relief in his absence, and (2) to the extent that PD seeks to remove the various individual Defendants from the board, PD has not demonstrated that it has exhausted the internal administrative remedy provided by Article Five, Section 7 of the Bylaws.

Because PD has not established a probability of prevailing on any of the claims asserted in this action, the Court need not and does not reach any determination as to the balance of harms suffered by the parties if the requested preliminary injunction is granted or denied.

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II. PFR's Application for Temporary Restraining Order is GRANTED, in part, as follows.

In its Application for Temporary Restraining Order, filed April 25, 2014, PFR sought a preliminary injunction enjoining Cross-Defendant Summer Reese and "Does 1-100, and each of them, their agents, officers, employees, and representatives, and all persons acting in concert or participating with them" from entering, remaining, blocking ingress into or egress from, or the passage of persons into or out of PFR's National Office located at 1925 Martin Luther King Jr. Way, Berkeley.

The Application for Temporary Restraining Order was first presented to the Court on April 28, at which time Reese filed brief declarations from Tamika Miller and Weiling Thai. The Court heard testimony from Defendant Margy Wilkins and issued an order continuing the matter to May 6 at 10:00 a.m.

Late in the afternoon of May 5, Reese presented the Court with a 33 page opposition brief, along with declarations from Reese, Richard Uzell, and Kim Kaufman. When Reese's counsel was asked at the May 6 hearing why he had filed a 33 page opposition brief (which grossly exceeds the page limitation provided by California Rules of Court, Rule 3.1113(d)), he explained that he mostly practiced in federal court and hadn't had time to "research" the rules concerning page limitations for briefs in state court, but had been informed by someone that there were no rules regarding page limitations for briefs requesting

or opposing temporary restraining orders. Reese's counsel has been misinformed. All parties are put on notice that, in the future, the Court will not read or consider any briefs filed in this case that exceed the page limitations provided by Rule 3.1113(d), unless it has previously granted permission to file a brief of that length. (See Rules 3.1113(g) and 3.1300(d).)

The Court also observes that Reese's memorandum refers to numerous declarations (by, *inter alia*, "Mosely, Black, Gaite, Alexander," see Reese's memorandum at page 11:19 and 26) that have neither been filed with the opposition nor provided to the Court at any time.

For the reasons set forth above, the Court finds that PD and Reese have failed to demonstrate a probability of prevailing on any claim that Reese has a legally enforceable agreement to continue to serve as PFR's Executive Director. Put another way, the Court finds that PFR has demonstrated a probability of prevailing on its claim that Reese was terminated from her employment by PFR nearly two months ago, and that her continued occupation of PFR's National Office constitutes trespass and a nuisance. More specifically, PFR has established a probability of prevailing on its claim that the November agreement never became effective, due to the board's failure to approve Reese's background check, and that the purported January agreement was neither authorized nor ratified by PFR and therefore does not bind PFR in any way.

Reese contends that this Court has no jurisdiction to issue a temporary restraining order against Reese, as a result of arbitration clauses contained in Reese's various purported employment contracts. The January agreement provides that "arbitration is the exclusive means of resolving any dispute arising between [the parties] during Reese's tenure in office as Executive Director of Pacifica." Even assuming *arguendo* that the January agreement was legally binding on PFR, it would only require arbitration of disputes arising during Reese's tenure in office. It would not require arbitration of disputes related to Reese's trespass at the National Office after her termination and PFR has demonstrated a probability of prevailing on its claim that Reese was terminated as of March 14, 2014. As for the November agreement, PFR has demonstrated a probability of prevailing on its claim that the November agreement never became effective because the board never approved Reese's background check. Moreover, a dispute about whether Reese is trespassing or committing a nuisance at the National Office by continuing to occupy her office two months after her termination is not a dispute "arising out of your employment or the termination of your employment."

As PFR has demonstrated a likelihood of prevailing on the merits, the Court turns to the interim harm that PFR would be likely to suffer if the temporary restraining order were denied as compared to the harm Reese would be likely to suffer if the temporary restraining order were issued. Counsel for Reese argues

that while the situation is not ideal, it is workable and that Reese should be allowed to continue to function as Executive Director until a later date when there is a more extensive factual hearing and subsequent findings.

The Court finds that the current situation is not only far from ideal, but completely untenable. For example, Joyce Black, a witness called by Reese, testified that she would not report to the Chief Financial Officer ("CFO") as instructed by PFR unless PFR provided some kind of proof that they had the right to tell her to report to the CCFO. Further, Reese has not rebutted the allegations that she is preventing the Chair of the Board and CFO from access to accounts payable and financial data and prevented the CFO and newly appointed Executive Director from having access to an office to work in. (*See Wilkinson Decl.*)

The harm to Reese is that she may no longer work at PFR. While not minimal harm, it is outweighed by the harm PFR will suffer if – during the pendency of this lawsuit – an individual whose employment the PFR board has voted to terminate continues to occupy the PFR National Office and purports to act as if she were still the Executive Director. If able to establish that her termination was improper, Reese is free to seek compensation for any harm she contends she will suffer from her termination by suing PFR for monetary damages.

Reese argues that the Court must prohibit her from being removed from the National Office as the Court, or arbitrator, has the power to order reinstatement.

This argument is not only irrelevant because Reese has not filed any pleading seeking such affirmative relief against PFR, but unconvincing. Contracts for rendition of personal services are not subject to specific enforcement, but rather give rise to a claim for monetary damages. (See Civil Code § 3390 and Barndt v. County of Los Angeles (1989) 211 Cal.App.3d 397, 403-406.) Reese's citation to Colvig v. RKO General Inc. (1965) 232 Cal.App.2d 56 to argue the contrary principle is not persuasive. Colvig held that the plaintiff, a radio announcer, suing his former employer for refusing to put him back on the air stated a cause of action for breach of contract, but the court did not order that plaintiff be reinstated to his position. (Id. at 66-68.) Further, Reese has not demonstrated that monetary damages would be inadequate to compensate her for any damages she may incur if she decides to bring a claim for wrongful termination and ultimately prevails.

At the hearing, Reese asked for the opportunity to seek her own temporary restraining order enjoining PFR from removing her from the National Office. The Court observes that Reese has not filed any cross-complaint or other pleading in this action containing any affirmative claim for relief against PFR, so she has no basis on which to seek a temporary restraining order at this time. The Court further observes that when Reese could have filed a lawsuit seeking injunctive or other relief when she found herself locked out of the National Office on March 14. Instead, she took a bolt cutter and began occupying the National Office

against the wishes of the majority of the PFR board, and she apparently continues to do so to this date.

On June 3, 2014 at 9:00 a.m. in Department 15, Cross-Defendant Summer Reese is ordered to show cause why a preliminary injunction should not be issued enjoining her from entering, remaining, blocking ingress into or egress from, or the passage of persons into or out of PFR's National Office located at 1925 Martin Luther King Jr. Way, Berkeley pending trial of this matter.

Reese may file and serve an opposition to PFR's motion for a preliminary injunction by May 20, 2014. The opposition brief may be no more than 15 double spaced pages, and may be supported by any declarations or other evidence Reese chooses to submit. In ruling on PFR's motion for preliminary injunction, the Court will NOT consider Reese's excessive opposition brief provided to the Court on May 5, and that brief may not be incorporated by reference into Reese's opposition to be filed by May 20. Rather, all arguments Reese chooses to present in opposition to PFR's motion for preliminary injunction should be contained in her opposition brief to be filed by May 20.

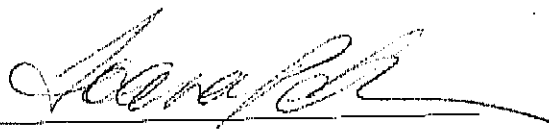
PFR may file and serve a reply brief of up to 10 double spaced pages by May 27, 2014.

Courtesy copies of all papers must be delivered directly to Department 15.

Pending the hearing on the order to show cause, Reese is enjoined from entering, remaining, blocking ingress into or egress from, or the passage of

persons into or out of PFR's National Office located at 1925 Martin Luther King Jr. Way, Berkeley. The Court, at this time, limits the temporary restraining order to Summer Reese herself. PFR has not identified any of the "Does 1-100, and each of them, their agents, officers, employees, and representatives, and all persons acting in concert or participating" with her, nor has it provided any information that would allow anyone seeking to enforce this Order to determine who those individuals may be. PFR may seek to expand the scope of this temporary restraining order to include other specified individuals, upon a showing that those individuals are trespassing at the National Office or committing a nuisance or disorderly conduct.

May 12, 2014
Date


Ioana Petrou
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE

CASE NAME: PACIFICA DIRECTORS FOR GOOD GOVERNANCE vs. PACIFICA
FOUNDATION RADIO

ACTION NO.: HG14-720131

I certify that the following is true and correct: I am the clerk in Dept. 15 of the Superior Court of California, County of Alameda and not a party to this cause. I served ORDER (1) DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION, AND (2) GRANTING DEFENDANT AND CROSS-COMPLAINANT'S APPLICATION FOR TEMPORARY RESTRAINING ORDER by facsimile, and by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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I declare under penalty of perjury that the following is true and correct
Executed on May 12, 2014 at Oakland, California.

Leah T. Wilson
Executive Officer/Clerk

by  _____
Pam Williams -Deputy Clerk