

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK : CIVIL
TERM : PART 15 -----x In the
Matter of :

WBAI, as an Affiliate of the Pacifica : Network, by CAROLYN MCINTYRE,
Chairwoman

Of the WBAI Local Station Board; HARVEY : EPSTEIN, as a Contributor
Member of the Pacifica Foundation and WBAI; ARTHUR : SCHWARTZ, as a
Producer Member of the Pacifica Foundation and WBAI; MIMI :
ROSENBERG, as a Producer Member of the Pacifica Foundation and WBAI;
JAMES : SAGURTON, Member of the Board of Directors Of the Pacifica
Foundation; and ALEX : STEINBERG, Member of the Board of

Directors of the Pacifica Foundation, : Petitioner(s) . :

For an Order Pursuant to Article 78 of the Civil Practice Law and
Rules and Section : 1315 of the Not for Profit Corporation
Law to compel Respondent to restore the : Status quo,

: - against - :

PACIFICA FOUNDATION, : Respondent(s) . :

-----x

71 Thomas Street
New York, N.Y. 10013 November 6, 2019

B E F O R E:

HONORABLE MELISSA ANNE CRANE, JUSTICE

Index:
159745/2019

MOTION

Shameeka Harris, CSR, RMR, CLR - Senior Court Reporter

5 New York, New York 10007
BY: ARTHUR Z. SCHWARTZ, ESQ.

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7.7 FOSTER GARVEY
Attorneys for the Defendant

8.8 100 Wall Street - 20th Floor New York, New York 10005

9.9 BY: KARA M. STEGER, ESQ.

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11 SHAMEEKA HARRIS, CSR, RMR, CLR Senior Court Reporter

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2 APPEARANCES: 3

ADVOCATES FOR 4 Attorneys for

JUSTICE CHARTERED ATTORNEYS

the Plaintiff 225 Broadway - Suite 1902

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11.11 petition

12.12 the first amended petition. On October 9, 2019,

13.13 Mr. Schwartz had that first amended petition returned to
him

14.14 by the court clerk and replace it with an entirely separate

15.15 petition that at some point later on he called the
corrected

16.16 first amended petition.

17.17 On October 11, 2019, Mr. Schwartz dismissed

18.18 original petitioner's Alex Steinberg and James Sagurton

19.19 without prejudice. On October 12, 2019, he dismissed both

20.20 of those individuals with prejudice. On October 15, 2019,

21.21 Judge Angle Meyer issued a scheduling order stating that

22.22 petitioner should provide one final amended petition which

23.23 would be entitled the second amended petition given that

24.24 there had been numerous affidavits and supplements to all
of

25.25 the various petitions already filed and that that second

26.26 amended petition would be filed by 5 p.m. on October 18,

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1.1

Proceedings

2.2 THE COURT: I am prepared to rule on the motion to

3.3 amend today and for a motion for PI. If anyone wants to put

4.4 anything on the record first, feel free to do so.

5.5 MS. STEGER: My name is Karen Steger. I am counsel

6.6 for the respondent Pacifica Foundation. I just wanted to

7.7 briefly address the request to amend the petition just

8.8 because there had been quite a few amendments of the
9 petition 10
in this case thus far.
On October 7, 2019, Mr. Schwartz filed an initial in this action. He
amended it later that day as
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1. 1 Proceedings
2.2 2019.
3.3 At midnight on October 18, 2019, Mr. Schwartz
4.4 e-mailed a second amended petition to the court as well as
5.5 to myself and then we have extensive oral argument based on
6.6 that petition in this courtroom on October 25, 2019.
7.7 On October 28, 2019, after that argument, counsel
8.8 for petitioner filed a motion to amend the caption of the
9.9 petition only which we thereafter opposed it. Then in his
10.10 reply, he altered that motion to be a motion to amend the
11.11 entire body of the petition and not just the caption which
12.12 is changing the nature of the original motion.
13.13 And at 3:30 a.m. this morning, counsel for
14.14 petitioners filed supplemental documents to supplement that
15.15 motion for a petition which motion had already been fully
16.16 briefed before this court. So, presumably, these are
17.17 additional amendments now to the third amended petition
18.18 which was initially just again an amendment of the caption
19.19 and not the full petition and that's all I have to say.
20.20 MR. SCHWARTZ: I have nothing. Your Honor, we did
21.21 move to amend the petition to add nine members of the
22.22 national board. The first I put we would just add them to
23.23 the caption and to the party section. And counsel correctly
24.24 pointed out that under the CPLR you need to file an amended
25.25 pleading as part of a motion to amend which is why we then
26.26 filed a third amended petition. And while I was at it, I

I am allowing the amendment. I am not considering

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1. 1

Proceedings

2.2 brought it up-to-date with all the votes that we had

3.3 affidavits about in the courtroom so that the full record

4.4 was in front of the court.

5.5 THE COURT: I think I'm only addressing that part

6.6 of the motion to amend the caption and the parties. I don't

7.7 want to deal with substance because then -- I will explain

8.8 why when

9.9 take the

10.10 parties.

11

12.12 any prior dismissal to meet with prejudice on behalf of

13.13 James Sagurton and Alex Steinberg because the agreement to

14.14 dismiss with prejudice was at best a breach of contract and

15.15 at worst a product of duress. Attorney Ford Greene's

16.16 position was that Sagurton and Steinberg could not vote

17.17 because their presence in this lawsuit created a conflict.

18.18 All they wanted was to vote, and then, despite their

19.19 dismissal, they were still precluded from voting. So at

20.20 that point, all bets were off.

21.21 The bargained for exchange dismissal with prejudice

22.22 for the right to vote never happened because certain actors

23.23 for respondent breached that arrangement. Therefore, it is

24.24 void and there being no other real bar to the ability to

25.25 amend here because it is early in the proceedings. There

26.26 has not been an answer. We haven't had any discovery really

I get into my decision. So, again, I am going to motion to amend first and then the caption of the

1. 1

Proceedings

2.2 so I don't have a basis to deny a motion to amend.

3.3 However, I think this should be it. So the

4.4 operative pleading is therefore the third amended complaint

5.5 with respect to the caption and the parties. So let's move

6.6 on to the main event.

7.7 MS. STEGER: One point of clarification. The

8.8 supplemental affidavits filed this morning they said they

9.9 were supplementing the third amended petition. Are those

10.10 also part of the petition?

11.11 THE COURT: I'm not taking into consideration in

12.12 this decision anything that was filed past midnight last

13.13 night. That's when I stopped reading and I stopped writing

14.14 probably about ten minutes ago. So I have been working

15.15 pretty hard on this too, and I appreciate all of your work.

16.16 As I had said at the bench, I really appreciate everybody's

17.17 hard work.

18.18 So at the outset, I think it is helpful to state

19.19 what this case is not about because I think it will explain

20.20 and inform my decision or the Court's decision better.

21.21 So this case is not about usurpation of FCC

22.22 licenses. The federal court has determined it did not have

23.23 subject matter jurisdiction because there was no federal

24.24 question and that is now law of the case. The federal court

25.25 necessarily determined that there was no FCC issue.

26.26 Otherwise, it would have had subject matter jurisdiction.

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2.2 So I am not considering that issue because it is
3.3 not here. The federal court decision is really now law of
4.4 the case on that tissue. The case is also not about
5.5 whether, for want of a better term, I am going to call them
6.6 the California operatives, by this I mean Vernier, Greene,
7.7 and perhaps Jacobs and Crosier, and their decision to
8.8 suspend operations at WBAI somehow violated the business
9.9 judgment rule or were somehow arbitrary and capricious or
10.10 ill-advised. And the Court should not interfere with the
11.11 business judgments of corporations and the business
judgment
12.12 rule protects business associations from judicial second
13.13 guessing. So because of that, there's no real reason for me
14.14 to get into demand futility as a prerequisite to a
15.15 derivative suit or anything like that.
16.16 This case is also not about employment law or the
17.17 applicability of the employment handbook at Pacifica or
18.18 anywhere else. This case is not about whether or not anyone
19.19 in their radio show on WBAI airwaves advocated against the
20.20 president or not and this case need not address, at this
21.21 time, the democratic nature of Pacifica or the rights of
its
22.22 members as opposed to its board of directors.
23.23 I understand it is a very interesting and wonderful
24.24 democratic institution but that doesn't really -- I don't
25.25 really need to get into that for this decision. Rather,
26.26 this is about whether factions within the board of
directors

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1. 1 Proceedings
2.2 of Pacifica fighting about how to handle the financial
3.3 crisis within the organization whether or not they held

4.4 proper votes. And this vote, and the fallout from it, is
5.5 the only issue the Court is going to address today.
6.6 So the following facts are not disputed. On
7.7 October 7th at the instigation of the Executive Director
8.8 John Vernile, WBAI was shut down. The staff of WBAI were
9.9 handed termination letters, everyone was locked out of the
10.10 building and programming was switched from WBAI programming
11.11 to a feed from Pacifica's station in Berkeley California.
12.12 By the end of the day, however, petitioners had obtained a
13.13 TRO barring the takeover.
14.14 On October 10th, the judge of the Appellate
15.15 Division, First Department, modified the TRO so as only to
16.16 require the continued employment of staff. Then the case
17.17 was removed to federal court, eventually remanded and ended
18.18 up here.
19.19 On the evening of Thursday, October 10, 2019, on
20.20 two days notice, the twenty-two member board was to vote on
21.21 whether or not to ratify Vernile's actions. At the
22.22 beginning of the meeting, the Chair of the meeting produced
23.23 a letter from Pacifica's general counsel, Mr. Ford Greene,
24.24 stating that the board members from WBAI had a conflict of
25.25 interest because they had been elected to represent the
26.26 members of WBAI whose station status was at issue and that

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15 were not 16

17.17 New York
18.18 unable to listen to the meeting. They were able to listen
19.19 but unable to participate because their voices had be
muted.
20.20 How did this happen? Ms. Sabrina Jacobs, the acting chair,
21.21 admits in her affidavit that she unilaterally decided to
22.22 mute their participation because she believed they had a
23.23 conflict and she wanted a vote to happen because there had
24.24 apparently been some stalling in her mind.

25.25 Accordingly, on October 12, 2019, the decision of
26.26 Mr. Vernile was ratified by the Pacifica National Board by
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1. 1

Proceedings

2.2 Board Members Steinberg and Sagurton had an additional
3.3 conflict because they had joined this lawsuit.

4.4 Ford Greene also advised that WBAI's single board
5.5 member, who was also a staff member, had a conflict because
6.6 essentially they had lost their job as a result of the
7.7 actions Vernile had authorized. There is also some
8.8 indication in the record that an assistant attorney general
9.9 from California agreed with Mr. Greene that there may be a
10.10 conflict and EDOC 104 is that indication.

11.11 So according to Petitioners, by October 11th, it
12.12 was clear that 12 board members, a majority, wanted to vote
13.13 to disapprove what Vernile had done. And board meetings
14.14 were held through Pacifica's conference call system. They

in person.

On the evening of October 12, 2019, the four Board members and Grace
Aaron, found themselves

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2.2 9-7 vote. Had the other members been included, the vote
3.3 would have gone the other way, 12-9.

4.4 Immediately thereafter, three directors, including
5.5 Grace Aaron, called for another special meeting the next day
6.6 which was the 13th of October. The nine members who had
7.7 voted in favor of ratifying Vernile's actions did not
8.8 participate on October 13th. And after some technical
9.9 difficulties due to loud music being piped into the

10.10 conferencing system that petitioner implies was done on
11.11 purpose to disrupt the meeting, the vote was 12-0 to remove
12.12 various people from office, including Vernile, and to
13.13 restore WBAI to full operations. Respondent does not
14.14 contest that having 12 Board members constituted a quorum.
15.15 The day after -- well, on October 13th also Alex
16.16 Steinberg, director, posted notice of an emergency meeting
17.17 of the Pacifica National Board that he set for October 20,
18.18 2019. Each director received multiple e-mails about the
19.19 meeting. That meeting occurred with 12 directors present
20.20 and ratified the resolution from October 13th. However,
21.21 Executive Director Vernile has ignored the October 2019
22.22 vote.
23.23 So there appears to be an impasse and the immediate
24.24 issue for the Court is which board vote, if any, is the
25.25 legitimate vote. In evaluating this case, I have relied
26.26 very heavily on the case of Lane v Sierra Club, 183 Misc 2d
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Proceedings

2.2 944. It is a Supreme Court New York County from 2000 case.
3.3 In that case, a local group of a California nonprofit
4.4 corporation filed a petition to set aside a resolution to
5.5 suspend that local group. And the Court granted the
6.6 petition because the chapter did not follow the requisite
7.7 procedure in suspending the local group.
8.8 I have also considered the case of Paglia v Staten
9.9 Island Little League, 38 AD 2d 575 and Verella v Lynch 304
10.10 AD 2d 398 First Department 2003 all of the cases the
parties
11.11 have cited and cases related to the cases I have cited. So
12.12 these cases demonstrate that Courts are quick to overturn

13.13 board decisions where bylaws are not followed. So it is
14.14 really Pacifica's bylaws that govern this dispute and
that's
15.15 what I looked at in reaching my decision.
16.16 So I looked at Article 13 which governs conflict of
17.17 interest and Section 3 of Article 13 contemplates a
18.18 determination by a majority vote of the disinterested
19.19 directors whenever -- whether a conflict of interest
exists.
20.20 So the disinterested directors are going to determine
21.21 whether or not there was a conflict of interest but this
22.22 doesn't appear to have happened.
23.23 Rather Sabrina Jacobs again admits in her affidavit
24.24 that she decided on her own to exclude the four directors
25.25 because she believed and agreed with Ford Greene conclusion
26.26 that they have a conflict. However, under the bylaw, there
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Proceedings

2.2 was no conflict. Section 2 of Article 13 defines conflict
3.3 of interest. It says a conflict of interest exists where
4.4 the financial or business interests of an interested person
5.5 are or may be consistent with the best interests -- are or
6.6 may be inconsistent with the best interests of the
7.7 foundation. The following circumstances shall be deemed to
8.8 create a conflict of interest.
9.9 A. A contract or transaction between the
10.10 Foundation or a Foundation radio station and an interested
11.11 Person or Family Member.
12.12 B. A contract or transaction between a Foundation
13.13 or a Foundation radio station and an entity in which an
14.14 interested person or family member has a financial interest

15.15 or with which such person has a relationship, for example
as
16.16 a director, officer, trustee, partner or guardian.
17.17 C. A compensation arrangement between any entity
18.18 or individual of which the Foundation or a Foundation radio
19.19 station has a contract or transaction and an interested
20.20 person or a family member.
21.21 D. A compensation arrangement between any entity
22.22 or individual with which the Foundation or a Foundation
23.23 radio station has a contract or transaction and an entity
in
24.24 which an interested party or family member has a financial
25.25 interest.
26.26 E. An interested person competing with the

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None of these situations constituting a conflict of is involved with
respect to those board members who employees of the station. The
conflict of interest

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1. 1 Proceedings
2.2 Foundation in the rendering of services or in any other
3.3 contract or transaction with a third party.
4.4 F. An interested person accepting gifts,
5.5 entertainment or other favors from any individual or entity
6.6 that does or is seeking to do business with, or is a
7.7 competitor of, the Foundation and really other or is
8.8 receiving a loan or to secure other financial commitments
9.9 from the foundation and the section goes on to say in both
10.10 cases under circumstances where it might reasonably be
11.11 inferred that such action was intended to influence or
would
12.12 likely influence the interested person in the performance
of
13.13 his or her duties.

15.15 interest
16.16 were not
17.17 rules clearly contemplate a pecuniary interest. Respondent
18.18 has not negated petitioner's showing that three of those
19.19 four excluded directors had a direct or even indirect
20.20 pecuniary interest in the outcome of the vote. The two that
21.21 were part of the lawsuit certainly did not have a pecuniary
22.22 interest and their involvement in the lawsuit is the same
23.23 issue as the vote i.e. that Executive Director Vernile
acted
24.24 inappropriately when he shut down WBAI. By respondent's
25.25 logic, anyone with a differing opinion than those of the
26.26 executive director and the chair would have a conflict.

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1. 1 Proceedings
2.2 A difference of opinion is the very reason for a
3.3 vote. Instead, here, respondent used the difference of
4.4 opinion to claim a conflict existed and disenfranchised
5.5 those board members as a result. And, by that logic, if the
6.6 reason for shutting out the New York directors centers
7.7 around WBAI's impact on the rest of Pacifica, then really
8.8 every director has an interest in the outcome of the vote.
9.9 So nobody could vote.
10.10 Now, because Electronic Doc 104 which is undated
11.11 but contains statements from the, I don't know when, but
12.12 from the assistant AG of California, I will briefly address
13.13 the issue of breach of fiduciary duty. All Board members
14.14 have a fiduciary duty to act in the best interest of the
15.15 corporation. It is not necessarily, and certainly remains
16.16 to be seen here, whether it is in Pacifica's best interest

17.17 to shut down WBAI. It is certainly within the realm of
18.18 possibility that the disenfranchised board members
19.19 legitimately disagreed that it was not in Pacifica's best
20.20 interest to shut down WBAI, a station that is historic and
21.21 popular, in a very public way in the middle of a fund
drive.
22.22 Moreover, there are other -- there may be other
23.23 ways of handling a financial crisis than by shutting down
24.24 your lodestar station. For instance, I don't know if anyone
25.25 considered Chapter 11 but it is to give Pacifica breathing
26.26 room to operate while it dealt with its debts. But this is

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2.2 all irrelevant to the decision and I only mention it to
3.3 address that respondent is not countered petitioner's
4.4 showing that there may not have been a breach of fiduciary
5.5 duty.
6.6 However, with respect to the staff representative
7.7 on the board of directors, there is a conflict, and that
8.8 person, I guess Shawn Rhodes is his name, was properly
9.9 excluded from the vote. Clearly, as they would lose their
10.10 job if Vernile's actions were upheld, any WBAI staff member
11.11 on the board would have a pecuniary interest in this
12.12 particular issue. That is a conflict.
13.13 The bottom line is that there simply was no
14.14 conflict to prevent non-staff directors from voting to
15.15 reverse the executive directors actions. The vote of
16.16 October 12th was therefore conducted in violation of the
17.17 bylaws and disenfranchised members whose vote would have
18.18 made a difference in the outcome of the vote. Therefore,
19.19 that vote must be set aside.

20.20 The next question is whether the vote that 12
21.21 members held on October 20th to ratify the resolution of
22.22 October 13th was legitimate. Respondent contends that the
23.23 October 20th meeting was improper because it was not on
24.24 seven days notice. Article 6 Section 4 of the bylaws
25.25 directs the notice requirements for meetings of the board
of
26.26 directors. It states:

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1. 1 Proceedings
2.2 Quote, special meetings shall require only seven
3.3 days advance notice, but shall also require telephonic
4.4 notice by leaving a message at the telephone number given to
5.5 the Foundation Secretary for such notice by each director,
6.6 closed quote.
7.7 Respondent has adopted the somewhat convoluted
8.8 argument of Attorney Ford Greene from EDOC 106 that the
9.9 October 20th meeting lacked the requisite notice. This
10.10 argument is more clear in EDOC 57 which contains an e-mail
11.11 from Ford Greene to Alex Steinberg among others. In it, he
12.12 claims Pacifica is governed by California law, okay, that's
13.13 fine, but that somehow the California Code of Civil
14.14 Procedure which governs notice in a court action applies
and
15.15 you don't count the first day.
16.16 By this math, Ford Greene changes the bylaws to
17.17 require eight days notice. And nothing in the bylaws states
18.18 it is incorporating the California Code of Civil Procedure
19.19 to count. Plus, respondent's own meetings would be
20.20 invalidated if this really were the requirement.
21.21 The record supports that the pattern and practice
22.22 of Pacifica was not require even seven days notice at all.

23.23 Thus, the meeting of October 20 was noticed sufficiently in
24.24 advance. Moreover, also so that we don't elevate form over
25.25 substance, nothing in the record indicates that the Vernile
26.26 faction of directors did not receive notice and an
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2.2 opportunity to be heard. They did and they squandered that
3.3 opportunity is not really germane to this decision.

4.4 Thus, the October 20th meeting is the only valid
5.5 meeting. And, accordingly, petitioner has demonstrated a
6.6 likelihood of success on the merits.

7.7 I am going to move on to irreparable harm now.

8.8 Although respondent characterizes the irreparable harm as
9.9 compensable by money damages because laid off employees can
10.10 be paid later, respondent overlooks that interrupting
WBAI's

11.11 broadcast in the middle of a fund drive no less would cause
12.12 irreparable harm because it impedes WBAI's and therefore
13.13 Pacifica's ability to raise money so that both can continue
14.14 to survive, pay rent, make money, etc.

15.15 According to the affidavit of Carolyn McIntyre
16.16 which is EDOC 63, at the close of the fund drive's first
17.17 week, they had brought in 24 thousand dollars at least.

18.18 There is additional irreparable harm because the longer
WBAI

19.19 is off the air there is danger listeners will go elsewhere.

20.20 The balance of the equities favor Petitioners as well. The
21.21 actions of persons employed by Pacifica had been ultra
22.22 vires, and possibly bullying. This is demonstrated by
23.23 declaring a conflict when there was none and preventing
24.24 those members from participating by muting their lines
25.25 without warning.

26.26 The longer WBAI is off the air, the unsanctioned Shameeka
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21.21 framed right, is maybe besides is that there was a
22.22 conversation, I think, Miss Perry had with -- she's the
23.23 program director of WBAI. She had a conversation with the
24.24 chief. She is also the president of the news station. The
25.25 person who's the chief engineer for the east coast for
26.26 Pacifica and he said I don't have to listen to a state
court

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Proceedings

2.2 actions by what appears to be the minority will only become
3.3 more entrenched. So I think it is time to get WBAI back on
4.4 the air and back to fund-raising. I am therefore putting
5.5 back into place the TRO that Judge Nervo granted.
6.6 If, however, if there is to be another vote, I
7.7 strongly suggest a neutral monitor to be put in place who
8.8 will report to the court. And I am forewarning everyone I
9.9 will not tolerate stalling on a vote. And I just wanted to
10.10 say nothing that I do or any other court does can help
11.11 Pacifica's financial situation which I understand is
12.12 impacted by the advent of podcast and the internet and all
13.13 of that. So I really do think mediation would be helpful
14.14 here and so if the parties are amenable I will try to find
15.15 a mediator for you. And so a solution can be found in the
16.16 interest
17.17 sure.

18 19

-- best interest of Pacifica as a whole. Okay. So

MR. SCHWARTZ: Should we submit an order because -- THE COURT: That's just what I was going to --

MR. SCHWARTZ: A concern that I have. It has to be

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1. 1

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2.2 judge. John Vernile told me that only a federal judge can
3.3 tell me what to do because he has the switch. So I am going
4.4 to submit an order. I just want everyone to know it is
5.5 going to say Pacifica and its agent, dah dah dah dah da
6.6 including its engineer, its interim executive director,
7.7 whatever, are enjoined from, whatever, what we --

8.8 THE COURT: Well, everyone can submit proposed
9.9 orders, and I would look at both of them. I am sure,
10.10 Miss Steger, you are going to want to submit also.

11.11 MS. STEGER: Yes.

12.12 THE COURT: I also thought you might be going to
13.13 the Appellate Division so we are going to turn around the
14.14 transcript as soon as we can.

15.15 MS. STEGER: I would like to say something on the
16.16 record. The reasons I went through a series of amendments
17.17 at the start was for various specific reason. The fact
18.18 there was a decision today regarding the October 20th vote
19.19 really reflects the importance of that because as forth in
20.20 the timeline as set forth earlier in this hearing, we fully
21.21 briefed this issue, these issues by October 18th. The
22.22 second amended petition was filed by October 18th. Any
23.23 supplemental brief and petitions that were filed
24.24 thereafter -- which, again, is the problem of having
25.25 supplements to the petition instead of just petitions --
26.26 significantly prejudiced my client because the cause of

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Proceedings

actions are changing day-to-day and the October 20th meeting was never fully briefed.

So we didn't get to put in the record the reason

fully why that was incorrect. The petition, the second amended petition was the operative petition, doesn't address the October 20th meeting because it was an October 18th petition and so that prior to today was the -- was, in fact, the operative pleading.

THE COURT: It was extensive argument in the papers about the California Code of Civil Procedure and I read all of that. Why was I reading that if you didn't get a chance --

MS. STEGER: That was related to the October 13th meeting. There had been an October 10th to 12th meeting that had been held by the Pacifica board and the October 13th meeting which we felt was improper for notice purposes.

THE COURT: Well, October 13th was before October 18th for the second amended complaint.

MS. STEGER: Absolutely, but the October 20th meeting we never got to address the reasons for the improprieties of that.

THE COURT: I think that is incorrect based on everything I've read. I read the same argument again and again and again about the October 20th meeting.

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THE COURT: We talked at the last argument about how you -- how if I invalidated the October 13th meeting then his -- then Vernile -- unless I invalidate the October 20th meeting may be invalid also in which case Vernile's decision stands. We have that whole discussion on the record. So how could I possibly think you weren't addressing the October 20th meeting?

MR. SCHWARTZ: And Miss Steger filed extensive argument about -- including an affidavit from Miss Jacobs and an affidavit from Mr. Greene about the October 20th meeting in the record here. So even though --

THE COURT: I cited them in the decision.

MR. SCHWARTZ: It wasn't yet in the petition because it happened after the second amended petition. I mean, this is a case that unfolds as we go along. There was certainly a record about it and the only reason I included it in the third amended petition which was just to basically bring us up-to-date before decision.

THE COURT: I didn't read anything that was filed at 3:30 in the morning.

MR. SCHWARTZ: No, that third amended petition was filed last week.

THE COURT: I know that. I am saying if there was anything after that. Shameeka Harris, CSR, RMR, CLR - Senior Court Reporter

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MR. SCHWARTZ: Well, it was actually the most interesting thing. There was a segment from the Carsy (Phonetic) committee about WBAI. In some ways, I just thought it was interesting.

THE COURT: The other thing is, you know, I really crafted this as narrowly as possible because I don't think courts have any business second guessing the business decisions of the corporations. And I will not go there. So that's why I made it so limited because I think that's all really that I can do -- however or I should do frankly.

So I don't -- even the facts in the record I don't see -- well, I don't see -- the only thing you got is that -- that I should count like they do in California for court cases. And I didn't see anything else that made the October 20th meeting somehow improper or was anyone -- you didn't say anyone was disenfranchised.

In fact, the record reflected that people could have participated. Everyone had notice. I'm not sure what more you want to say beyond what's in there already.

MS. STEGER: Well, I would just point out that it is incorrect that the Board Greene affidavit or the Vernile affidavit address the October 20th meeting because they were both submitted prior to October 18th. So I would say they could not have addressed the October 20th meeting.

THE COURT: Maybe, you should read it again. Shameeka Harris, CSR, RMR, CLR - Senior Court Reporter

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notice in the record several times.

MS. STEGER: It said corporate governments. It

didn't say what resolutions were going to be voting on. The details what were going to be voted on were sent out the day of October 20th, the day of the meeting and their notice seven days before is supposed to put forth in detail what's going to be occurring in the meeting, not same day. So, yes, ultimately, he did have in full the notice of what was

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MS. STEGER: I think it was notice procedures but

there were also additional reasons why that meeting was incorrect because -- and we had only the notice in hand at the time the briefing closed on October 18th and at the time the second amended petition was submitted on October 18th. Again, we did not get to comment.

THE COURT: What other reasons were there that the October 20th was incorrect?

MS. STEGER: They gave improper notice.

THE COURT: I dealt with that.

MS. STEGER: And they also did not provide in

detail what was to be voted on at the meeting which the

bylaws provide that and it needs to Article 6 of the bylaws.

THE COURT: I thought that 13th was what was going to be voted MR.

SCHWARTZ: I think the

be done and that's

the resolution from the on?

notice -- we put the

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2.2 going to be voted on that day. It was the same day as the

3.3 October 20th meeting.

4.4 THE COURT: Okay. So here's the thing. I don't

5.5 like to elevate form over substance. It is like a thing of

6.6 mine. And I think here to do that would render a great

7.7 injustice because what disturbs me about this, honestly, is

8.8 the disenfranchisement of records under the guise of a

9.9 conflict of interest. It is trumped up. It didn't look

10.10 right so that is informing my decision. It seems that it

11.11 was forced through by cutting off people's rights to really

12.12 due process to be heard and to vote and that's why --
that's

13.13 really what is informing this decision. I don't see the

14.14 same thing happening on the October 20th vote. If it did,

15.15 please draw it to my attention, but I didn't see anything
in

16.16 the record indicating that somehow someone wasn't allowed
to

17.17 participate and that's the difference.

18.18 So, that's my decision and you know it is never

19.19 easy and you both did a great job and thank you. Okay.

20.20 MS. STEGER: Thank you, your Honor.

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Certified to be a true and accurate transcript of the stenographic minutes taken within.

SHAMEEKA HARRIS, CSR, RMR, CLR Senior Court Reporter

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