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18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF LOS ANGELES**

20 PACIFICA FOUNDATION INC., a California) Case No. 21BBCV00642
21 Nonprofit Public Benefit Corporation) [Assigned to Hon. Frank Tavelman, Dept. A]
22 Plaintiff,)

23 vs.) **REPLY BRIEF – MEMORANDUM OF**
24 NEW DAY PACIFICA, an Unincorporated) **POINTS & AUTHORITIES IN SUPPORT OF**
25 Association, by its Chair, SHARON KYLE;) **CROSS COMPLAINANTS’ MOTIONS FOR**
26 SHARON KYLE, Individually; JAN) **SUMMARY JUDGMENT/ADJUDICATION**
27 GOODMAN as Vice Chair of New Day) **AND OPPOSING PLAINTIFF’S MOTION**
28 PACIFICA and Individually; LYNDON FOLEY,) **FOR SUMMARY JUDGMENT**

29 as Treasurer of New Day PACIFICA and)
30 Individually; and AKIO TANAKA, as) Reservation ID No.: 427157353824
31 Secretary of New Day Pacifica and)
32 Individually; and DOES 1 through 25,) DATE: December 2, 2022
33 inclusive, Defendants) TIME: 9:00 a.m.

34 _____) DEPT: Los Angeles Superior Court
35 And Related Cross Actions) Burbank Courthouse
36) 300 E. Olive Ave., Dept. A
37) Burbank CA 91502

38 Case Filed: July 22, 2021
39 Trial Date: None

40 REPLY BRIEF – MEMO OF POINTS & AUTHORITIES IN SUPPORT OF CROSS-COMPLAINANTS’ MOTION FOR
41 SUMMARY JUDGMENT/ADJUDICATION AND OPPOSING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

1
2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Defendants and Cross Complainants submit this Reply Brief in support of their motion for
4 Summary Adjudication or Summary Judgment and in opposition to Pacifica's motion for Summary
5 Judgment and or Summary Adjudication.

6 **Papers Filed with Defendants' and Cross-Complainants' Motion**

- 7 1. Motion And Memorandum of Points and Authorities by Defendants and Cross-
8 Complainants
9 2. Separate Statement of Undisputed Facts
10 3. Declarations of:
11 a) Christina Avalos
12 b) Jan Goodman
13 c) Mansoor Sabbagh
14 d) Gerald Manpearl
15 e) Evidence, Volumes 1 and 2 (Referred to herein as NDP Ev V1 or V2)
16 4. Memorandum of Points and Authorities by Intervenors

17 **Reply Brief by Defendants and Cross-Complainants – Papers Filed**

- 18 1. Reply Brief & Memorandum of Points & Authorities by Defendants and Cross
19 Complainants
20 2. Declarations:
21 a) Jan Goodman
22 b) Carol Spooner
23 c) Carlos Zavala
24 3. Additional Supporting Exhibits, Evidence Vol. III
25 4. Reply To Plaintiff's Undisputed Facts
5. Reply to Declaration of Arthur Schwartz

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1 **REPLY BRIEF AND MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF**
2 **CROSS- COMPLAINANTS’ MOTION FOR SUMMARY ADJUDICATION OR**
3 **JUDGMENT**

4 **I. THE EXISTING BOARD MAJORITY HAS USED ITS INSTITUTIONAL POWER**
5 **IMBALANCE AND ORGANIZATIONAL RESOURCES TO MAINTAIN POWER**

6 There are two major issues before the court – Whether the Referendum was approved by
7 the Members, and whether the three remaining candidates endorsed by New Day Pacifica in the
8 2021 KPFK Local Station Board (LSB) election should be seated. These issues have brought to
9 the fore the battle that the entrenched power structure at Pacifica is fighting to prevent reforms
10 and to maintain power and control of the Pacifica Foundation.

11 During the last several years, the “powers that be” at Pacifica, including the Pacifica
12 National Board Majority, and other players aligned with them, have used their institutional power
13 imbalance and organizational resources to solidify their powers, as if Pacifica were their own
14 private club. They have used their erstwhile comparatively massive resources and power
15 imbalance and made “official” false statements about the content and effect of the proposed
16 Amendments to the Pacifica Bylaws by New Day Pacifica (the “New Day Bylaws”) to the
17 Pacifica National Board (PNB or Board) and to Pacifica Members, especially and repeatedly so to
18 those at station WBAI to virtually eliminate most challenges to that institutional power.

19 When New Day Pacifica organized and threatened to and subsequently voted for change,
20 the entrenched power block -- using the organization’s resources -- ignored the existing Bylaws,
21 and/or had the Pacifica National Board (PNB or “board” pass motions to carry out their wishes,
22 whether it was legal or in line with the Bylaws or the law, and those rules became the new rules.
23 Pacifica has also used the slowly moving judicial system, or the threat of using the judicial
24 system, to string out their power, to stay in control as long as possible.

25 Some examples from this campaign:

- 21 1. New Day requested access to the membership list on May 27, 2020. Pacifica was
22 required to supply access within **5 Business Days** as required by the Corp. Code
23 §6330 (1) and as also required by the Bylaws Art. 12, §4A. Evidence, Vol. III, Exhibit
24 54. Instead, Pacifica **stalled for 3 months**.
- 25 2. In May 2020, The Pacifica Bylaws required 1% of the membership to sign a petition,
in order to “trigger” a Bylaws referendum. In order to change the minimum number of

1 signers necessary to trigger the Bylaw Amendment process, a vote of the members is
2 required (NDP Evidence Vol. I, Exhibit 17, Art. 17 §1 B 3 ii & v). However, when
3 Pacifica and the PNB decided to make it harder for reformers to launch a Bylaws
4 Referendum, instead of calling for a membership vote to change the minimum number
5 of signatures required to initiate a Bylaw campaign, the Board majority simply voted
6 to amend the Bylaws and inserted the “new 5% requirement” into the Bylaws. Only
7 after they “changed” the minimum number of signatures to 5% did they allow New
8 Day access to the membership list, leaving New Day the option of either going to
9 court, or getting 5 times the number of signatures. Rather than litigate, New Day spent
10 the time and energy and obtained the 5%.

- 11
- 12
- 13 3. Pacifica agreed to arbitration with New Day with regard to disputes about the
14 referendum, inserting the word “process” into the agreement (NDP Evidence Vol. I,
15 Exhibit 3, ¶15 of the 12/4/20 Agreement) relating to the Referendum, but when New
16 Day invoked arbitration on the “process” of the parallel vote, Pacifica simply refused
17 to arbitrate.
- 18
- 19 4. The NES issued a Summary of the Bylaws proposal and rules which would govern the
20 election which stated:

21 “Referendum Outcome: The referendum is valid if both classes of members meet
22 quorum (10% for listeners, ~4,000 votes, and 25% for staff, ~250 votes). A majority of
23 votes (> 50%) will determine whether the current bylaws remain or if the proposed
24 bylaws are adopted. Pacifica Exhibit G Bylaws Referendum 2021 – Final Report,
25 P. 81; Ex. A1 to Report

This information was supplied to satisfy Cal. Corp. Code §5513 (c) which states that
“solicitations to vote shall indicate the number of responses needed to meet the
quorum requirement and, ... shall state the percentage of approvals necessary to pass
the measure submitted.”

The Court in Burke v. Ipsen explained that this information is not merely technical
because “This information is important because it gives the member an indication as to
how important his or her vote will be.” Burke v. Ipsen (2010) 189 Cal.App.4th 801,
816-17. Staff member, Intervenor, Mansoor Sabbagh bears this out when he stated in
his Declaration, attached to New Day’s Motion for Summary Adjudication when he

1 said “I would have campaigned differently, including being more focused on getting
2 the vote out among the staff had I known that there was such an agreement [to hold
3 parallel elections]. NDP Evidence Vol. I, Exhibit 23B, P 151, ¶2.

- 4 4. The plain reading of the above language is that if a majority of both the staff and
5 listeners meet quorum and a majority of them together vote yes, the current bylaws
6 will be replaced by the proposed bylaws.
- 7 5. A search of the Final Report, fails to find the term “Parallel Election” ever mentioned.
- 8 6. When the New Day Bylaws Referendum won a majority of votes by a 55% to 45%
9 margin among the members, those in control of Pacifica made the decision to devote
10 Pacifica’s resources to litigation, claiming that the December 4th agreement required a
11 parallel vote and that Staff Members’ rights would be affected adversely by the New
12 Day Bylaws, prolonging the Pacifica old regime’s grip on power, to stop the New Day
13 Bylaws from being implemented for as long as they could string out the court case.

14 **II. RESPONSE TO PACIFICA’S OPENING BRIEF: FACT VS. FICTION**

15 Pacifica’s General Counsel, Arthur Schwartz, wrote a declaration regarding the events and
16 facts leading up to and including the New Day Bylaw’s Referendum and the KPFK LSB
17 Candidate Disqualification. However, a significant proportion of the facts which he states
18 are simply fiction. Most of the following are an indication of Pacifica’s continuing false
19 narrative. Many of the examples below are not necessarily relevant to these Motions *per*
20 *se*, and any one of which might be overlooked in a motion for summary judgment; —
21 however, it is not just a question of undisputed facts— but a whole narrative, including
22 instance after instance whereby Pacifica has continuously misled the Listener members,
23 the Staff, the Pacifica National Board (PNB), and now Pacifica is attempting to mislead
24 the Court stating “alternate facts”. Examples:

- 25 1. **FICTION:** Pacifica states that Carol Spooner, (a leading proponent of the
2019-2020 PRP Referendum), represented New Day and asked for access to the
Pacifica membership list to qualify the New Day Referendum in June 2020.
(Pacifica’s Ps & As p.6, line 15-18 and on p.7 lines 7-11)

A. **FACT:** It was Beth Kean, a founder of New Day, who asked for the
list in May of 2020. Spooner had nothing to do with New Day. See
Spooners declaration. See NDP Evidence Vol. III, Exhibit 51, Beth Kean

1 email of May 27, 2020. Defendants do not know why Pacifica continues to
2 invoke Spooner's name in relationship to the New Day Bylaws proposal,
3 except that she was a leader in the previous Pacifica Restructuring Project
4 (PRP) Bylaws Amendment project (2019 Referendum Proposal) and
5 became a "villain" for many opposed to Bylaws reform efforts, but she had
6 nothing to do with the New Day project, other than endorsing it. Or maybe
7 to imply that if Spooner was involved that the New Day people "could'a
8 would'a should'a" known that the PRP election utilized a "Parallel vote".

2. FICTION: Schwartz declared that the Bylaws had already changed from
1% to 5% by the time New Day asked for the list. (See Schwartz Dec. 10:7-11)

9 A. FACT: Beth Kean/New Day asked for the list on May 27, 2020 and
10 the Bylaw requiring 1% of the members' signatures to "propose" a Bylaw
11 was not amended to require 5% until July 27, 2020 -- 2 months after the
12 demand was made. (And New Day was not granted access to the list until
13 August of 2020.)

Below is a short calendar relating to the 1% to 5% change.

- 14 ● May 27, 2020 -- Kean sent her demand letter for access to
15 the membership list. See NDP Evidence Vol. III, Exhibit
16 51.
- 17 ● June 25, 2020 -- The PNB Motion to change the Bylaws
18 from 1% to 5% was made at the PNB meeting of that date.
- 19 ● July 27, 2020-- The Bylaws requiring signatures of 5% of
20 the membership to propose a bylaw amendment went into
21 effect without ever holding a Member election to ratify this
22 amendment, as the Bylaws and Corp. Code required for any
23 amendment harming Members' rights. [Article 17, 1](#) NDP
24 Evidence Vol. III, Exhibit 52.
- 25 ● New Day decided to spend the time and energy to obtain the
5% rather than litigate - and did so.

1 Access to the membership list was provided only after 3 months,
2 although the Bylaws and corporations code require access within 5
3 days.

4 3. FICTION: Pacifica is apparently claiming that Defendants were aware on
5 December 4, 2020 of the Parallel Vote requirement contained in the Contract and
6 Work Plan signed by Penaloza.

7 A. FACT: The Contract and Work Plan, to the knowledge of
8 Defendants, was not even signed until about March 4, 2021. See NDP
9 Evidence Vol. I, Exhibit 4; Also See JG Dec. (NDP Evidence Vol. I,
10 Exhibit 23c) and Penaloza Deposition pg 33:20-25; pg 34:1-15. NDP
11 Evidence Vol. III, Exhibit 55.

12 B. FACT: Neither Pacifica nor Penaloza ever announced or shared the
13 work plan with anyone. New Day did not receive a copy of the Contract
14 and Work Plan until about May, 2021 and immediately after being made
15 aware of the work plan New Day filed a complaint with Penaloza on about
16 May 27, 2021 and later requested to arbitrate the issue of the parallel
17 election. To claim that it was “announced” in March by the NES, is a
18 fabrication

19 4. FICTION: “The four elected officers/Directors who would serve as a new
20 board until, at various times, elections and installation for a smaller board would
21 be held.” Plaintiff’s Ps & As, 2:19-21, Dec. of Schwartz, 5: ¶10.a. (p.5).

22 A. FACT: **“THIS IS PART OF THE BIG LIE.** This is a critical part
23 of Pacifica Regime’s false narrative, a fabrication that Schwartz has
24 repeated over and over again. He elaborated to the National Board where
25 he said:

“[W]hat bothers me most about these bylaws is that, for—whether
it’s 1-1/2 months or 3 month I’m not sure—there would be four
people running Pacifica, no Board. They could do whatever they
want, whatever they want, and it somehow hits me in the gut that
WBAI would be back off the air, if these four people just got to run
it, without a Board, without representation from anybody else in the
United States from any of the stations.

1 And that's the biggest part of this. That there is a period of total
2 dictatorship by a 4-person committee that could totally change
3 Pacifica." NDP Evidence Vol. 1, Exhibit 18, p. 68.

4 B. FACT: The above was said to the Members and Listeners, to the
5 Staff (particularly WBAI), and now to this Court. See Goodman 5:26 –
6 6:21, Evidence Vol. III, Exhibit 60.

7 C. FACT: (See NDP Evidence Vol. II, Exhibit 2, New Day Bylaws,
8 Proviso Three, P. 58) Elections of Directors from all stations are required
9 within 9 days of approval of the Bylaws. The **First Board meeting will**
10 **take place within 10-15 days of approval of the Bylaws** and will include
11 the newly elected Station Directors and Officers. The process of electing
12 Staff Directors is required immediately after the new Bylaws go into effect.
13 NDP Evidence Vol. II, Exhibit 2, Prov. Two C, P. 58 of New Day Bylaws.

14 Therefore, the Officers would never "serve as a new board" or "alone".

15 5. FICTION: Elected Local Station Boards will be eliminated B – Pacifica's
16 SSUF Undisputed Fact #12; (See Plaintiff's Ps & As, 2:19-21, Dec. of Schwartz,
17 5: ¶10.a. (p.5) Again, part of the Narrative created and propounded by GC
18 Schwartz and Pacifica to attempt to scare people away from New Day Pacifica.

19 A. FACT: The local station boards continue to be elected and will be a
20 part of the structure of Pacifica. See NDP Evidence Vol. II, Exhibit 2a,
21 New Day Bylaws Article Six, Page 23, and Art. 6, §6, P. 25.

22 6. FICTION: That New Day's list is only a derivation or "gleaned from
23 Pacifica's membership list". (Pacifica's Memo of Ps & As 30:15, Pacifica's Ps &
24 As p.1, line 24)

25 A. FACT: As Judge Kalra stated in the hearing of the Pacifica's
Application for a TRO and OSC re Issuance of a Preliminary Injunction To
Stop New Day from using Pacifica's mailing list to solicit donations to
fund the legal defense in this matter: New Day never had Pacifica's
membership list in the first place: New Day's emails were sent by a third
party vendor to Pacifica members and New Day added to its own list
information from people who voluntarily went to New Day's web site and

1 gave their information to New Day. (See UF #46; UF #48, See Schwartz
2 Declaration ¶#30), Goodman Dec. #2, Evidence Vol. III, Exhibit 60.

3 Although both Pacifica and New Day agree that the issues of voter
4 intimidation/fraud/packing the voter rolls or etc. at WBAI, is not at issue in
5 these motions for summary adjudication, because the resolution of these
6 issues will, of necessity entail consideration of conflicting factual evidence,
7 never the less Pacifica's Ps & As state:

7 7. FICTION: "The overwhelming rejection of the New Day Referendum by
8 WBAI is both understandable and reasonable given New Day's efforts to close
9 WBAI and fire Staff." (at p. 20, lines 19-20). (New Day is responding here simply,
10 so that the well is not poisoned by this additional piece of Fiction.)

10 8. FICTION: "That New Day is going to sell WBAI and fire everyone, and
11 previously tried to fire everyone." THE BIG LIE (see, e.g. NDP Evidence Vol. I,
12 Exhibit 18 - transcript of Schwartz comments to the PNB saying that "the 4
13 officers would be in sole charge for 1.5 to 3 months and that they could shut down
14 the station without input by anyone)". And now they say the same thing to the
15 Court.

15 A. FACT: It is the repetition of this false tale, by Schwartz and others,
16 specially to members and Staff at WBAI where Mr. Schwartz has a radio
17 program and where he has a long history of influence, that New Day
18 believes was a cause of the negative voting at WBAI (which, again, is not
19 relevant to this motion). This is again the BIG LIE. But see the **FACTS**
20 **stated above which are that the Officers will never serve alone on the**
21 **Pacifica National Board.** There is no truth nor evidence or even a
22 suggestion of evidence that New Day is or would be trying to sell WBAI,
23 yet it is repeated over and over, EVEN TO THE COURT. This contention
24 is totally "made up" out of whole cloth, by Schwartz. (Why would anyone
25 connected with Pacifica want to get rid of a major station that reaches
between 50-100 million people.) This is a fabrication of Schwartz repeated
and repeated and repeated as true. This accusation was made in both
Referendum elections. It is the "Willie Horton" call to arms of WBAI. It

1 is repeated over and over to the Staff, to the Listeners, to National Board
2 and to members. No wonder WBAI and WPFW in Wash DC voted heavily
3 against the Referendum. Confirming this non-stop repeat of the big lie, the
4 99% to 1% in itself creates a credibility issue of fraud, undue influence, and
5 voter intimidation/rigging. Although an example of why Pacifica's claims
are not credible, this is not an issue at this time.

6 9. FICTION: Pacifica's repeated claim that the New Day proponents are the
7 same ones that were involved in the 2019-2020 Referendum. (Schwartz
8 Declaration, ¶¶ 26 & 29, Pacifica's Ps & As page 11:14-16).

9 A. FACT: Another Schwartz fabrication with no evidence. In fact, a
10 number of New Day supporters were opposed to the 2019-2020 PRP
11 Bylaws proposal. Pacifica's Ps & As 5:17-21 & 6:15-19, discusses the
12 2019-2020 Referendum and tries to tie the two Referenda together. Again,
13 via the invocation of Carol Spooner – without any evidence. (The 2019-
2020 Referendum completely eliminated the Staff representatives, and
clearly a parallel election would have been required by the Bylaw and
California Law.) However, that referendum lost.

14 B. FACT: New Day is a different organization and New Day's
15 Leadership was not involved with that 2019 Referendum and did not
16 include Carol Spooner. Dec. of Jan Goodman #2, 2:17-21, Evidence Vol.
17 III, Exhibit 60.

18 10. FICTION: Pacifica argues in a number of places, that New Day agreed to
19 Parallel voting in the 12/4/20 Agreement, and indicates that that ends the
20 discussion. Plaintiff states: "Notably, in the December 4, 2020 Agreement, New
21 Day agreed to the vote by two classes of voters and did not raise the issue for
22 another six months". (Pacifica's MSJ Ps & As 19:20-21)

23 A. FACTS: New Day did not agree to the parallel election, when it
24 signed the 12/4 Agreement. Although the fact that two separate
25 Votes were required is located within the 200+ pages contained in the NES
Final Referendum Report, no one from New Day had read it all and none
were of this component. New Day was not made aware that a Parallel vote

1 was even on the table, until about May, 2021, well after 12/4/20, when they
2 obtained a copy of the Penaloza Work Plan, which was not even signed
3 until about March 4, 2021. See Evidence, Vol. I, Exhibit 4, Contract and
4 work Plan. (Goodman Dec #2, p. 3:8-13, Evidence Vol. III, Exhibit 60.)

5 11. FICTION: Penaloza’s disqualification of the candidates in the KPFK LSB
6 was carried out in a manner similar to other disqualifications.

7 A. FACTS: Penaloza admits in the 2021 NES Final Election Report
8 that the disqualification did not occur until after voting closed when she
9 said that there had been no “pre-tabulation disqualifications.” In plain
10 English, that means that the disqualifications had occurred after the
11 counting took place. **NES 2021 Delegate Final Election Report, P. 17,**
12 **NDP Evidence, Vol. III, Exhibit 53.** The disqualification of the candidates
13 occurred at a minimum of 7 to 15 days after the close of voting of the
14 election, and the results showing that the “disqualified” candidates actually
15 won the election was publicly posted.

16 Again: Some of the above issues may not be particularly relevant
17 to either motion but they set a pattern of continually misleading the public
18 and the court.

19 **III. THE NEW DAY BYLAWS DO NOT MATERIALLY AND ADVERSELY**
20 **AFFECT THE STAFF DIFFERENTLY THAN THEY AFFECT THE**
21 **LISTENERS AS TO VOTING**

22 The most central issue in both Pacifica’s and New Day’s motions for summary
23 adjudication/judgment is whether or not, under the Bylaws and California law, a majority of all
24 members is sufficient to amend the Bylaws or if a parallel vote is required in this case.

25 All parties agree that this is a legal question and there are no disputed facts on this
question. (See NDP Evidence, Vol. I, Exhibit 17, p, 66 & 67, Bylaws Art. 17, §2iv, §3v, §4; &
Corp Code §5034 & 5150).

Defendants, Cross-Complainants and Intervenors (hereafter “New Day, etc.,” or
“Defendants, etc.”) posit that:

1 (1) Staff Members, will gain an **important new right relating to voting** under the New
2 Day Bylaws - **the right to directly elect their own representatives** to the Pacifica
3 National Board - something lacking under the existing Bylaws, and

4 (2) Under **New Day, Staff Members themselves** will directly **elect a guaranteed**
5 **minimum of 2 of 15 Directors.**

6 (3) In addition, although the number of guaranteed seats on the Pacifica National Board
7 (PNB) elected by both Listeners and Staff will be reduced under the New Day Bylaws,
8 importantly the percentage of Listener Directors is reduced more than the number of Staff
9 Directors guaranteed to be on the PNB. Currently Staff comprise 22% of the Entire Board
10 and Listeners Comprise 68% of the enter Board. Under New Day, Staff are guaranteed to
11 comprise 13% of the entire board, but listeners will have a greater reduction, because they
12 are only guaranteed 33% of the entire board. Guaranteed staff seats go down by less than
13 50% (22>13), whereas Listener Guaranteed seats go down by more than 50% (68%
14 >33%).

15 (4) It is still New Day's contention that in deciding whether the Staff is disadvantaged
16 more or less than Listeners as to voting, that the correct numbers to compare are the ratio
17 of Staff Directors to Listener + staff seats, and the number of Listener Directors to
18 Listener + staff seats, under the current bylaws vs. the New Day Bylaws, as discussed
19 extensively in the opening brief.

20 Pacifica's opening brief argues that when discussing advantages or disadvantages, one
21 must look at the power that the Staff has to elect people to the National Board. (Pacifica's
22 Opening Memo. of Ps & As 4:16-17). Pacifica takes the position that since there are far less Staff
23 than Listeners who would vote in the national elections for Officers, that, under New Day, Staff
24 has less (voting) power than they have under the present Bylaws, and therefore all Officers and
25 At-Large Directors will be Listener Directors. However, Plaintiff/Pacifica does not take into
account the fact that under the current Bylaws, Staff do not directly elect the Staff Directors –
they only elect Staff to the Local Station Boards, as Delegates. Under the current Bylaws, the
Staff LSB members of each station have essentially no power to elect the Staff Director, because
the LSB's, as a whole – consisting of 18 Listeners and 6 Staff, elect the Staff Director to the
National Board (Pacifica's SUF #5). Thus, at each station, the 18 votes of the Listener-Delegates

1 determine who the Staff Director will be (PSUF #7 & Pac. Bylaws, Art. 5, Sec. 3 B). In other
2 words, Listener-Delegates currently elect 100% of the Directors to the National Board. Thus,
3 using Pacifica’s theory, under the New Day Bylaws, Staff’s power to actually elect two Staff
4 Directors (as opposed to having two Staff Directors, elected by Listener Delegates) will, by
5 Pacifica’s definition, under the New Day Bylaws, significantly improve the power of the Staff to
6 elect Directors, over their present status.

7 Pacifica also argues that you should look only at the total number of "Staff" Board
8 Directors, that Staff are guaranteed to be able to elect under New Day (not the number of staff
9 which can be elected). Pacifica focusses on how many Directors Staff are guaranteed to be
10 elected under the New Day Bylaws. Using this analysis Pacifica comes up with 22.72% vs.
11 13.3% (see Pacifica’s Ps & As 6:28).

12 The error in Pacifica’s analysis is that the Bylaws and statute do not talk about a class
13 being “disadvantaged” solely in relationship to its own representation under current vs under
14 amended Bylaws – in a vacuum- but instead “Is the one class disadvantaged greater than the other
15 class is disadvantaged (as to voting).” Therefore, if you are going to compare how many fewer
16 “Staff” seats are guaranteed on the National Board, you must also compare the number of Listener
17 Directors are currently elected by Listener members, vs. the guaranteed number of Listener
18 Directors guaranteed under New Day. Then, those two sets of ratios need to be compared.

19 The fact that under the New Day Bylaws, the Staff has the ability or the power to elect two
20 (13%) of the 15 National Board Directors, means Staff Members have improved their position
21 both in relationship to themselves (currently they elect 0% of the National Board) and also in
22 relationship to the percentage drop in guaranteed Listener representation

23
24
25
**A. A COURT FINDING THAT THE STAFF IS NOT MATERIALLY AND
ADVERSELY AFFECTED WITH REGARD TO VOTING –
A SIMPLE MAJORITY IS ALL THAT WOULD BE REQUIRED TO PASS
THE NEW DAY AMENDED BYLAWS**

If the court finds that the staff is not materially and adversely affected differently and
adversely compared to listener members with regard to voting, then the New Day bylaws should
be immediately implemented. That will be dispositive of Pacifica’s Causes of Action Numbers 1
and 2, leaving only Pacifica’s Causes of Action numbers 3-5 regarding the use - or the lack

1 thereof – of the Pacifica Membership list to raise funds, and whether that use conformed to the
2 requirements of the Corporations Code § 6330 et seq.

3 **B. THE DECEMBER 4TH AGREEMENT DID NOT AND CANNOT**
4 **WAIVE CORPORATIONS CODE SECTIONS 5034 AND 5150 NOR**
5 **PACIFICA BYLAWS ARTICLE 17**

6 Pacifica argues that the Dec. 4, 2020 agreement binds not only New Day, but the entire
7 membership to a parallel vote. Plaintiff’s argument overlooks several crucial facts that are
8 undisputed.

- 9 1. First and foremost, the law as provided in Corporations Code §§ 5034 and 5150 and the
10 Pacifica Bylaws are determinative of whether a majority of the members is necessary to
11 amend the Bylaws as New Day proposed, or if both Listeners and Staff must both vote
12 affirmatively in order to change the Bylaws. Neither the Interveners nor the members at
13 large can have their rights taken away by an agreement between Pacifica and New Day.
- 14 2. Even if a private agreement could waive the bylaws and the corporations code, the
15 December 4th agreement was not an agreement to hold a parallel election.
- 16 3. Factors to be considered with regard to whether there was an agreement to hold a “parallel
17 election” when the December 4th agreement was signed, include the following:
 - 18 A. Within the four corners of the 12/4/20 Agreement there is no mention of a parallel
19 vote. NDP Evidence Vol. I, Exhibit 3.
 - 20 B. A parallel vote was never discussed by counsel or the parties.
 - 21 C. A major reason New Day wanted to execute the Dec. 4, 2020 agreement was to
22 ensure that the fair campaign practices, put in place by the judge in the previous
23 Bylaws referendum (PRP) case (the 2019 Referendum), would be observed
24 especially with regard to prohibiting producers at Pacifica stations from speaking
25 pro or con about the proposed amendments without equal time, and prohibiting the
use of Pacifica resources to support or oppose the proposed amendment (because
such fair campaign procedures had not been in place before the judge had strongly
chided Pacifica for violating its own Bylaws and fair campaign practices, and
ordered that Pacifica follow such practices, as delineated specifically in paragraph
10 of the agreement.

1 D. If the parallel vote was a critical and mutually understood component of the
2 agreement as claimed by Pacifica, why was it not referred to specifically in the
3 12/4/20 agreement as were the elements regarding equal time *etcetera*?

- 4 4. There was not a “meeting of the minds” between New Day Pacifica and Pacifica, with
5 regard to what was meant by the December 4th Agreement. New Day, *et al*, were unaware
6 at the time that the 12/4/20 agreement was signed, that the previous referendum had
7 required a “parallel vote” in which both Staff and Listeners had to vote in the affirmative
8 in separate elections in order for the referendum to pass or that such a requirement was
9 located somewhere within the 200 page NES report referred to in the agreement, or that
10 New Day could possibly be viewed as agreeing to a parallel vote as later defined by
11 Pacifica. Upon reviewing the 13 page “main” report, in retrospect, the report mentions a
12 “parallel vote” but the parallel vote is not defined there as requiring a majority of both
13 Staff and Listeners to vote separately in the affirmative for the referendum to pass.
14 5. Again, retrospectively, in the 2019 referendum vote it makes sense that a separate
15 affirmative vote of the Staff was required, since that 2019 referendum eliminated Staff
16 from the National Board entirely. This is not the case with the New Day Bylaws.
17 6. And finally, the parties have no power to either require, if not needed, or to waive a
18 parallel vote, if required, by the Corporations Code and/or the Pacifica Bylaws.

15 **IV. REGARDING DISQUALIFICATION OF CANDIDATES IN THE KPFK LSB**
16 **ELECTION**

17 One of the norms of American democracy is that the election is over when voting is
18 closed. There is no going back and disqualifying voters after they have voted, nor disqualifying
19 candidates after the last vote has been cast, or of not informing voters that certain candidates were
20 being disqualified. There has to be a line after which adding or subtracting votes or disqualifying
21 candidates is no longer permissible and the last day of voting is that line.

21 The first public hint that the 3 New Day endorsed candidates had been disqualified
22 occurred on November 3, 2021, more than two weeks after the close of voting, on October 15,
23 2021. NDP Undisputed Facts #86 & 87.

24 A. There are four major issues with regard to the disqualification of the KPFK
25 candidates endorsed by New Day:

- 1 1. The overriding issue in this case is that Pacifica disqualified the
2 candidates at least a week after voting ended.
- 3 2. Was the Postcard asking for donations to underwrite this
4 litigation to enforce members' rights to implement the New Day
5 Bylaws, which 55% of the voters approved, a legitimate use of
6 the corporate mailing list?
- 7 3. For argument's sake, even if the postcard sent by New Day was
8 a violation of § 6338, then the question arises: was
9 disqualification of the candidates appropriate under the
10 circumstances, considering that the candidates had done nothing
11 wrong?
- 12 4. Did the disqualification of the candidates, as carried out by
13 Renee Penaloza and Pacifica fall within the purview of the
14 Bylaws which state that:
15 "In the event of any violation of these provisions for fair
16 campaigning, the local elections supervisor . . . shall
17 determine, in good faith and at their sole discretion, an
18 appropriate remedy, up to and including disqualification of
19 the candidate(s)." In other words, did the candidates violate
20 the provisions for fair campaigning, or was the dispute just
21 between Pacifica and a group (New Day, a separate group of
22 Pacifica members) who endorsed them?
- 23 5. If the Disqualification of the Candidates was improper, should
24 the term of office of the candidates be *nunc pro tunc* to the date
25 that they should have been installed originally (December 15,
2021).

26 This democratic norm, that "the election is over, when the last vote is cast" is so universal
27 in American Society that it has been rarely discussed as an issue.

28 It is clear that an elections supervisor could not simply disqualify a candidate and have the
29 candidate removed after the candidate had been seated on a board for two weeks. Likewise, that
30 person could not be disqualified by the election supervisor a month after the announcement that
31 that person had won. If there were a desire to disqualify such candidates, a different procedure
32 should have to take place which would include a chance for a hearing and notice, statement of

1 which provision of Pacifica's Fair Campaign Provisions the candidates supposedly violated, and
2 other aspects of due process.

3 Pacifica does not even acknowledge in their Motion for Summary Judgment that the
4 disqualification occurred long after all the votes were in, let alone attempt to justify such a belated
5 disqualification.

6 **B. THE DISQUALIFICATION OF THE NEW DAY ENDORSED KPDK
7 CANDIDATES WAS WRONGFUL**

8 1. The disqualifications did not occur until after the tabulation occurred – which was
9 about two weeks after the close of voting. **NES 2021 Delegate Final Election
10 Report, P. 17, NDP Evidence, Vol. III, Exhibit 53.**

11 Pacifica thus took the truly egregious step of **disqualifying 4 of the New Day
12 endorsed candidates long after voting closed.** (NDP Evidence Vol. I, Exhibit 21,
13 Penaloza Depo Vol I, 100:6-10) **This was based on the flimsy excuse that the
14 candidates should be penalized for New Day soliciting funds to defend this
15 lawsuit** and to implement the New Day Bylaws which the Majority of members
16 believed would benefit the Foundation, and for which it was legal to solicit funds.

17 2. Penaloza admitted in the NES Final Report that the results of the election, showing
18 that all 7 remaining candidates endorsed by New Day had won, were posted the next
19 week (@Nov. 2, 2021). (Penaloza Depo. Vol. I, p. 30:8-16, Evidence Vol. I, Exhibit
20 21.) Then, that posting was taken down and a new one, excising the names and vote
21 counts of the four remaining New Day endorsed candidates was posted. This excised
22 posting (@Nov. 3, 2021) – was the first public hint that the candidates had been
23 “disqualified” occurred two weeks after voting closed.

24 3. To add insult to injury and to further intimidate not only the candidates, but others
25 who might cross the regime in the future, Pacifica added, as defendants in this case, all
8 of the endorsed New Day candidates.

4. And now, at the time of this writing, after having put those endorsed Candidates in
the position of being Defendants in a civil suit for a year (a very scary proposition for
the average citizen) Pacifica has announced that the candidates are being dismissed as
Defendants, essentially admitting that they should never have been defendants in the
first place!

1 5. Had this overt power grab not taken place, New Day-endorsed Candidates would
2 have been seated in 7 of the 9 open Listener seats at KPFK, on December 15, 2021,
3 changing the power balance on KPFK's LSB and possibly on the PNB. As it was, only
4 3 of the NDP-endorsed candidates were seated.

5 **C. THE NATIONAL PERSPECTIVE**

6 Looked at from a national perspective, in Berkeley/KPFA, 8 out of 12 (66%) LSB positions
7 up for election that year were won by New Day endorsed candidates. In Houston/KPFT it was 9
8 out of 12 (75%) and in LA it would have been 8 out of 12 (66%). Pacifica LSB Elections 2021
9 Final Report PP 1-6 Goodman Dec. #2, p. 4:11-15, Evidence Vol. III, Exhibit 60.

10 ///

11 ///

12 **D. BYLAW MANDATED ELECTIONS NEVER TOOK PLACE IN 2022**

13 **The Bylaws require that there should have been Delegate/Local Station Board
14 elections in 2022 to replace those individuals whose three-year terms end in December, 2022.**

15 Normally, one might expect that if the majority of the membership wanted leadership to
16 go in a certain direction, that one could simply wait for the next election to take place and the new
17 leaders would be elected, however, the *coup de grâce* at Pacifica this year is that the
18 **LSB/Delegate elections mandated by the Bylaws to have been conducted in 2022 simply
19 were “allowed” to never take place - as if the Pacifica foundation were a private club where
20 elections are optional.**

21 **The PNB passed an illegal resolution on October 20, 2022, providing, in part, that the
22 expired terms of LSB members will be extended due to the lack of an election this year. See
23 item 62 in the Appendix of the agenda, at https://kpftx.org/archives/pnb/221020/221020_8138_agenda.pdf
24 to read the agenda. As of 11-7-22 the minutes had not been posted.**

25 “§ [Section 7220\(a\)](#) [parallel to 5220(a)] quite clearly states that a sitting director's term
may not be extended at all. . . . In other words, those directors in place may not have their
terms extended, and bylaws can be amended to lengthen the terms
of *future* directors...” *Burke v. Ipsen* (2010) 189 Cal.App.4th 801, 814 also see § [5220\(a\)](#)

1 **E. ULTIMATELY, THERE WERE NO LEGITIMATE GROUNDS TO**
2 **DISQUALIFY THE CANDIDATES.**

- 3 1. New Day had a right to solicit funds to legally enforce the referendum results and to
4 litigate whether the 55% to 45% vote of the members was sufficient to implement the New
5 Day Bylaws i.e., this litigation, as discussed in Defendants’/Cross-Complainants’ opening
6 brief.
7 2. Pacifica does not even contend that the candidates approved of the solicitation or that they
8 endorsed the solicitation or that they had anything to do with the solicitation or even saw
9 the solicitation before it was sent out. (See Plaintiff’s brief, 13:23-27 plaintiff concedes
10 that the endorsed candidates had nothing to do with the postcard). Thus, even if wrongful,
11 the candidates cannot be held responsible.
12 3. GC Schwartz goes so far as to allege that the postcard was sent out “solely” by Jan
13 Goodman (See Dec of Arthur Schwartz 3:26 ¶8.

14 **F. PENALOZA EITHER HAD NO ROLE OR ABDICATED HER ROLE AS**
15 **DECISION MAKER REGARDING THE ELECTIONS**

16 In Pacifica’s pleadings they imply great deference to the “decisions” of Renee Penaloza,
17 who was hired to run the Bylaws Referendum, and was hired as the National Election Supervisor
18 for the 2021 Local Station Board/Delegates elections. However, in reality, with regard to the
19 Referendum, she was contractually obligated to run a “Parallel Election” called for in her
20 employment contract and work plan.

21 For instance, in his declaration, GC Schwartz states that on March 4, 2021, Penaloza
22 “announced” that the voting on the referendum would be by a parallel vote, as if the decision
23 regarding the necessity to have a parallel vote was Penaloza’s. (In addition to the fact that this
24 was required by the contract and work plan that she had signed, the contract and work plan were
25 never “announced” but were in fact kept confidential.) See Goodman Declaration #2. Penaloza
26 tells a different story. In her deposition, she makes it clear that the work plan relating to the
27 parallel vote was presented to her as a *fait accompli* – something she had to follow. Penaloza
28 deposition 48: 2-22. NDP Evidence, Vol. III, Exhibit 55.

1 Likewise, when she "announced" that the referendum did not pass, she was not making an
2 independent determination. Her "announcement" was based on simply following the terms of her
3 employment contract and work plan which was given to her when she was hired.

4 To justify the disqualification of the candidates in the KPFK LSB election, Pacifica hangs
5 its hat on the Pacifica Bylaws (Article 4, Section 6): "the ...national elections supervisor shall
6 determine, in good faith and at [her] sole discretion, an appropriate remedy up to and including
7 disqualification of the candidates" Pacifica's Memo of P's and A's pg 15:3-10 as if, *ipso facto* if
8 she disqualified the candidates they were legitimately disqualified (without regard to whether the
9 determination was arbitrary and capricious or reasonable, or etc.) However, notably, Pacifica
10 left out the first phrase of that sentence "**in the event of any violation of these Provisions for
fair campaigning the ...National Elections Supervisor** shall determine..." meaning that there
11 must be a violation of the fair campaign rules, before a disqualification occurs.

12 However, in her deposition, Penaloza states that she put the decisions regarding the
13 Candidates "in Arthur's hands", because the issues relating to the postcard, the candidates and
14 New Day were involved in litigation with Pacifica. Penaloza Depo V1, 61:21-22. NDP
15 Evidence, Vol. III, Exhibit 55.

16 As indicated in the Bylaws, the National Election Supervisor (NES) has a wide purview to
17 disqualify candidates for violating the fair campaign rules laid out in the Bylaws. But the
18 discretion is not unlimited:

- 19 1. Disqualification needs to be based on violation of the fair campaign practices, not
20 just anything that the NES doesn't like.
- 21 2. The disqualification needs to be made **in good faith**.
- 22 3. **Good faith requires** the elements of reasonableness **and fair dealing, fairly**
23 **listening to both sides, making decisions** that are **not trivial, arbitrary or**
24 **capricious** and which are **not pretextual** unrelated to business needs or goals.
25 *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 107-108
4. Sole discretion does not mean "anything goes" or "the NES said it, therefore it
must be correct".

**G. DISQUALIFYING THE CANDIDATES FOR APPEARING ON A
POSTCARD WHICH ASKED FOR DONATIONS TO SUPPORT
IMPLEMENTING THE BYLAWS --WHICH 55% OF THE MEMBERS**

1 **THOUGHT WOULD BENEFIT THE FOUNDATION – WHILE IGNORING**
2 **THE SOLICITATION OF FUNDS FOR ACTIVITIES WITH NO**
3 **INDICATION THAT THE FUNDS WOULD BENEFIT PACIFICA WAS**
4 **ARBITRARY AND CAPRICIOUS AND THEREFORE NOT IN GOOD**
5 **FAITH**

6 §§ 6330 & 6338 allow the use of the membership list to solicit donations if such money
7 will be used for a purpose which the user reasonably and in good faith believes will benefit the
8 corporation. Since 55% of the members felt that enacting the New Day Bylaws would benefit the
9 organization, soliciting donations to implement those Bylaws which members thought would
10 benefit Pacifica make it clear that New Day could reasonably and in good faith believe the same
11 thing also.

12 On the other hand, the postcard from the Social Uplift Foundation/Candidate Slate asked
13 for money to support “other activities”, without any reference to benefiting Pacifica, and thus
14 those monies could be spent on anything. NDP Evidence Vol. I, Exhibit 12, p. 54.

15 The fact that the Candidates on the New Day Postcard were disqualified because of a
16 solicitation which clearly was one which 55% of the members thought would benefit the
17 Foundation, (a legitimate reason, per §6338) while those appearing on a postcard, which asked for
18 money, without any indication that it would be used to benefit Pacifica is arbitrary and capricious
19 at best, and much more likely is pretextual. The decision to disqualify the candidates based on
20 appearing on said postcard is therefore exceedingly arbitrary and capricious.

21 When pressed to state exactly which Fair campaign practices the candidates violated, Ms.
22 Penaloza could not point to anything in the Fair campaign practices listed in the Bylaws
23 themselves, but finally landed on referring to something on the Pacifica website called
24 elections.Pacifica.Org the 2021 Fair campaign provisions where it says that “there are two types
25 of fair campaign rules: those mandated by the Bylaws and those proposed by the national
elections supervisor and adopted by the management of the foundation as a matter of policy” And
under those provisions it says that a candidate can be disqualified for a first violation that is
objectively purposeful or malicious.” Penaloza thus claimed that what the candidates did was to
act maliciously. See Penaloza deposition 73:25. NDP Evidence Vol. III, Exhibit 55.

26 **H. GOOD FAITH DEFINED**

1 In discussing “Good Faith” and “Good Cause” the court (in an employment case, but the
2 concepts are similar here) explained:

3 “We give operative meaning to the term "good cause" . . . as fair and honest reasons,
4 regulated by good faith . . .that are not trivial, arbitrary or capricious, unrelated to
5 business needs or goals, or pretextual. A reasoned conclusion, in short, supported by
substantial evidence gathered through an adequate investigation that includes notice
of the claimed misconduct and a chance . . . to respond.

6 **“ . . . must act in good faith and fairly listen to both sides, for that is a duty lying
7 upon every one who decides anything. But I do not think they [a school board]
8 are bound to treat such a question as though it were a trial. . . . They can obtain
9 information in any way they think best, always giving a fair opportunity to those
10 who are parties in the controversy for correcting or contradicting any relevant
11 statement prejudicial to their view.**

12 *Cotran v. Rollins Hudig Hall Internat., Inc.* (1998) 17 Cal.4th 93, 107-108 (emphasis
13 added).

14 Although this is not an employment case, the decision to disqualify someone from
15 becoming a Delegate, a potential Director of the Pacifica National Board, and someone who votes
16 to choose Directors of the National Board of Pacifica, a multi-million dollar media corporation, is
17 not trivial. Protection from bad faith disqualification is provided by the Bylaws, and “fairly
18 listening to both sides”, at a minimum is necessary. In this case, Penaloza admits that either she
19 did not read to the end of the exculpatory Goodman email of September 7, 202, or probably did
20 not read the information therein about what the candidates did or didn’t do or promised or didn’t
21 promise because she was too busy running the election. She obviously did pay close attention to
22 instructions given to her by Arthur Schwartz and to the facts presented to her by Grace Aaron
23 (another KPFK LSB candidate with a significant conflict of interest because two of the candidates
24 who she claimed were innocent were on her slate and she was running against the other New Day-
25 endorsed candidates).

26 The Bylaws state that the disqualification must be a violation of the Fair Campaign
27 Provisions in the Bylaws (Pacifica Bylaws, Article Four §6). NDP Evidence Vol. III, Exhibit 54.
28 and also that the decision to disqualify a candidate must be in good faith.

1 **I. PENALOZA ABDICATED HER DECISION-MAKING ROLE WHEN SHE**
2 **FAILED TO READ INFORMATION ON BEHALF OF THE CANDIDATES**
3 **AND PUT DECISIONS “IN SCHWARTZ’S COURT.”**

4 It is also clear that it was Schwartz - not the NES who made the decision, let alone in “her
5 sole discretion” to disqualify. See Penaloza Depo Vol. I, 61:21-22. NDP Evidence Vol. III,
6 Exhibit 55. In addition, Penaloza stated several times in her deposition that essentially she was
7 deferring to Arthur Schwartz in regards to virtually everything relating to the dealing with the
8 candidates. In her deposition, Ms. Penaloza also claimed to be neutral, on the other hand it was
9 her opinion that an attorney was not supposed to be neutral but was supposed to represent one
10 side. Penaloza Depo Vol. I, 37:20—38:5. NDP Evidence Vol. III, Exhibit 55.

11 In addition, **Penaloza wasn’t reading the correspondence on behalf of the candidates**
12 **relating to the details regarding the facts and lack of culpability of the candidates**, as detailed
13 by Goodman. On the one hand, she states that she regarded Goodman as the lawyer representing
14 the candidates. See Penaloza Depo V1, 19:24-25; 20:1-25;21:1-2. NDP Evidence Vol. III,
15 Exhibit 55. And on the other hand, she ignored Goodman or didn’t read the emails written by
16 Goodman. Why? Because she put the decisions in Schwartz’s hands, as indicated in her emails
17 and deposition testimony, or she was just too busy – essentially abdicating her duty to listen to
18 both sides. When Goodman emailed the NES telling her that the candidates had nothing to do
19 with the postcard or the solicitation, the NES wrote back saying that Schwartz would respond, not
20 her. (see Defendant’s etc. Undisputed Facts #59).

21 In her deposition Penaloza explained that she was very busy, had many responsibilities
22 and did not read all of the emails:

23 I was NES. So you know how these things go; There's strings and strings
24 and you get 100s and hundreds of emails and this, mind you is in the
25 middle of a very busy election. Penaloza Depo Vol. I, Page 90: 5, NDP
 Evidence Vol. III, Exhibit 55.

 ... At the time, I likely did not see that. 90:11, *Ibid*

 ... But to be very honest, I don't think I was reading this. 91: 4 through 5,
Ibid

1 I had all these other things going on I'm trying to manage. And in my head,
2 the only thing I really wanted to happen was the remedy postcard. Penaloza
3 Depo Vol. 1, 55 89:10-18, *Ibid*

4 Neither New Day, Goodman, nor the candidates ever agreed to sending out the apology
5 postcard which Pacifica and Penaloza claims to have thought that the candidates had agreed to.
6 Goodman stated that New Day (not the candidates) would send a clarifying (not an apology)
7 postcard, and the candidates said NO that they would not send a postcard and admit to breaking
8 the Corporations Code. See NDP Evidence, Vol. I, Exhibit 9, p 33 and 36)

9 When 4 of the candidates were relieved of responsibility for the postcard (and allowed to
10 be included in the 2nd vote tally), it was Schwartz that decided what to do -- not the
11 NES. Penaloza wrote on September 7, 2021: **“Arthur is going to reply to this.”** In her
12 deposition September 21, 2022 p. 89, line 5 Penaloza explained: **“ I mean the reason was
13 because there was an ongoing case against all of these people on this card.”**

14 **89:10... “so in my head, it was in his court.”**

15 NDP Evidence Vol. III, Exhibit 55.

16 And in the discussion of what transpired and what should happen, **Penaloza emailed
17 Goodman saying that she was referring the matter to Arthur Schwartz to answer.** (see
18 Undisputed Facts #62)

19 On September 28, 2021, **GC Schwartz** emailed 4 of the candidates and **said that he was
20 going to tell Penaloza not to penalize the four endorsed candidates** who Aaron had said were
21 not culpable, as discussed in the post (emphasis added). (N-DPUF #17 Exhibit #16 to Depo of
22 Penaloza; Dec. Avalos 2: 7-12, NDP Vol. I, Exhibit 23A)

23 When the first vote tally was sent showing that all of the New Day endorsed candidates
24 won, the NES posted the results on the Pacifica web site. (see Undisputed Fact #86) The posting
25 was then removed from the Pacifica web site. (see Undisputed Facts #87)

Subsequently, on about November 3, 2021 a new Tabulation was posted, and the names
and total votes received by the Final 4 “Disqualified “New Day endorsed candidates were
excised. This was the first public hint that something was amiss.

Later, upon questioning, the NES stated that the 4 endorsed candidates had been
disqualified – well after voting had closed and all of the votes were in. (See Depo of Penaloza
NDP Evidence Vol. I, Exhibit 21, pg100:3-11)

1 Nothing was said after the initial threat and week of back and forth about potentially
2 disqualifying the eight candidates; Ballots were sent to all members with all 8 New Day endorsed
3 candidates; **Members were never told that the candidates were disqualified (either before or**
4 **after the election) by the NES or anyone else until two weeks after the close of voting, after**
5 **the second tabulation was posted;** During the election process, members were never notified of
6 any change, although it would have been easy for the NES to do so by email; after the voting
7 closed, the ballot tabulation contractor Simply Voting reported to the NES that the New Day
8 endorsed candidates had won; Penelozza, the NES, posted these results to the Pacifica National
9 website; and after the results, including the 4 later disqualified candidates, were posted, these
10 results were removed from the web site and Simply Voting was told to do a recount. (see
11 Undisputed Fact #87)

12 **J. THE APPARENT COVER-UP IS INDICATIVE THAT SOMETHING WAS**
13 **ROTTEN**

14 Schwartz and Penalozza have changed their story about why some of the New Day
15 endorsed candidates might not be disqualified and why the remaining four were “disqualified.”

16 The **FIRST explanation**, was given during the campaign, prior to the end of voting, on
17 **9/28/21**, when **Schwartz wrote** to the New Day endorsed candidates whose votes were allowed to
18 be counted in the second Pacifica/Simply Voting Tabulation (including Avalos, Oyeyipo, Zavala
19 and said that Grace Aaron had told him that they were innocent and knew nothing about the
20 postcard, so **he was going to tell the election supervisor to not penalize them**. (NDP Evidence
21 Vol. I, Exhibit 16, hereafter the “dispensation” email) – also, another example of Schwartz
22 directing Penalozza what to do. (Remember that Aaron herself was a candidate in this same
23 election, running against the New Day-endorsed candidates.)

24 **SECOND**, in the final report about the LSB election, **Penalozza stated that Schwartz had**
25 **told Penalozza that Schwartz, himself, had talked to the candidates and the candidates**
themselves had told Schwartz that they knew nothing about the postcard (Exh. 53 NES
2021 Delegate Final Election Report, P. 17, NDP Evidence, Vol. III, and therefore Penalozza
did not penalize them by disqualifying them. She also repeated, in her Deposition, that it was
Schwartz who told her that HE had talked to the candidates and reported the conversation to her.
Penalozza Depo Vol. I, pg 105:20-24, NDP Evidence Vol III, Exhibit #55. But Candidates Avalos
and Zavalo both say that they did not talk to Schwartz, Aaron or Penalozza, they simply received

1 the letter of Dispensation from Schwartz. See Avalos Declaration, NDP Evidence Vol. I, Exhibit
2 23A, p. 147 pg.2:7-12; Zavala Declaration, dated 1/3/22, NDP Evidence Vol. III, 2:5-19

3 **THIRD**, now, in pleading before this court, Pacifica has come up with a new story saying
4 that it was **Grace Aaron was the one who had spoken to the candidates** who ultimately were
5 given “dispensation” and they had told Aaron that they knew nothing about the postcard and **that**
6 **Aaron had then told Penaloza this fact** and that that was why the candidates had been given
7 dispensation.

8 **FOURTH, Schwartz explains why the candidates called her and the appearance of**
9 **Grace Aaron** in the emails about dispensation of the candidates, **by saying that she was the**
10 **Secretary of the Pacifica National Board at that time and thus an appropriate person to be**
11 **involved in the discussion.** Except, this is a total fabrication! Grace Aaron was not the Secretary
12 of the National Board in 202, nor was she even a member of the National Board¹, or even a
13 member of the LSB during this period of time, having resigned from the LSB the previous
14 December, 2020². She was however a candidate and two of the candidates who she “defended”
15 were on her slate.

16 Lastly, when considering whether 1) the decision to disqualify the candidates was
17 Penaloza’s and 2) whether it was “in good faith”, considering all of the above, especially
18 considering that the decision was made at least a week after voting closed and including the
19 contradictory different stories about why and how the other New Day Endorsed candidates
20 received “dispensation”, the whole scenario relating to the disqualification of these candidates
21 does not come close to seeming to be in good faith, let alone passing the “smell test”

22 If the Disqualification of the Candidates was improper, the term of office of the candidates
23 should be *nunc pro tunc* to the date that they should have been installed originally (December 15,
24 2021.) This could be significant, since under the current Bylaws, a person is only eligible to be
25 seated on the National Board after they have been on the Local Station Board for a year. It would
be unfair to bar them from being elected to the National Board due to Pacifica’s inappropriately
“disqualifying them” and preventing them from serving for virtually that entire year.

V. ADDITIONAL POINTS FROM THE PLAINTIFF’S Ps & As.

¹ See NDP Exhibit 56 Minutes of PNB meeting of 9/23/21 showing Grace Aaron not on PNB and Polina Vasiliev as Secretary

² See Exhibit 57 Minutes of 8-15-21 PNB minutes showing Aaron not appearing on roster of either present or absent members.

1 The following should also be noted from Plaintiff's Ps & As, as concessions supporting
2 the Defendants' position:

3 B. Points Regarding The 2021 Referendum Of New Day.

- 4 1. Pacifica's Ps & As page 2, line 8; "There is no question that if those four candidates
5 hadn't been disqualified they would have been elected."
6 2. Plaintiff's Ps & As p. 10, lines 14-25 States as follows: "On May 26, 2021 Pacifica's
7 Counsel refused to arbitrate the issue of the two classes of voters, claiming once again it
8 had been agreed to in the December 4, 2020 [Agreement]." (Pacifica's MSJ 10:14. The
9 Ps & As then state: "Repeatedly, up through the date of tabulation, New Day sought to
10 arbitrate the "Staff Veto" and counsel for Pacifica refused." (p10, l21)

11 C. Regarding The KPFK LSB/Delegates Election.

- 12 1. Plaintiff's Ps & As page 2, line 8; "There is no question that if those four candidates
13 hadn't been disqualified they would have been elected."
14 2. Plaintiff concedes that *the New Day* Endorsed Candidates had nothing to do with the post
15 card. Pacifica's Ps & As states: "That postcard was sent under the name of New Day, not
16 the delegate candidates it was supporting." "In the card (Pacifica's Exhibit M) New Day
17 endorsed candidates for the KPFK LSB election and also solicited donations to challenge
18 the results of the New Day Bylaw Proposal Referendum." Plaintiff's Ps & As 13:26-27.
19 Defendants etc. agree with both points.
20 3. All New Day candidates won the first vote tally, and according to Plaintiff's Ps & As
21 would have won the second vote tally had they been included. (Pacifica's Ps & As p14,
22 line 27 to p.14,

23 D. "In late October 2021 the NES published the results of the KPFK LSB Delegate
24 Election which excluded the votes received by Payne, Pearlman, and Wolman due
25 to their disqualification. Had New Day endorsed candidates Payne, Pearlman,
Ryan, and Wolman not been disqualified, they would have been elected to the
KPFK LSB in the 2021 KPFK Delegate election." (See Pacifica MSJ 18:1-2)

**VI. NEW DAY PACIFICA HAD THE RIGHT TO SOLICIT FUNDS FROM
PACIFICA MEMBERS FROM ITS OWN LIST**

1. Regarding the Right to Solicit. Plaintiff concedes that New Day created its own mailing
list. See Pacifica's Ps & As p23:1-7. "Each of these requests from New Day resulted in

1 New Day compiling its own list of Pacifica members’ email addresses for use during the
2 referendum campaign.”

3 **VII. ISSUES PACIFICA IGNORES IN ITS BRIEF**

4 A substantial part of Plaintiff’s P&A argues issues that have little to do with these
5 motions. Largely avoided by Plaintiff are many of the real issues in these motions. These are
6 questions Plaintiff ignores in its Brief:

7 E. Regarding the 12/4/20 Agreement:

- 8 1. Why isn’t “parallel voting” ever mentioned in this document?
- 9 2. What evidence is there that parallel voting was ever discussed prior to the 12/4/20
10 Agreement?
- 11 3. Why or how can an alleged agreement of Pacifica & New Day override the
12 Pacifica Bylaws or California Law?
- 13 4. How can an alleged agreement between Pacifica & New Day effect or change the
14 rights of the Intervenors or any other Pacifica member?

15 F. Regarding The KPFK Local Station Board (LSB) Election:

- 16 1. Who made the decision to demand a signed postcard to all members on the KPFK
17 membership list, apologizing for breaking the Corporations code from all 8 New
18 Day Endorsed Candidates?
- 19 2. Who made the decision that 4 of the Candidates would not be disqualified from
20 either the first vote or the second vote if they didn’t sign such a postcard?
- 21 3. Why isn’t the last day of voting the final day to disqualify a candidate?
- 22 4. Why doesn’t the posting of the results, including the fact that the candidates won,
23 about two weeks after the final voting day indicate that disqualification after the
24 close of voting would be inappropriate?
- 25 5. Did Pacifica claim any other ground for disqualifying anyone other than the
Postcard, and failure to apologize?

VIII. FACTS/ISSUES NECESSARY FOR THE COURT TO RULE ON

There are a lot of allegations and facts in all the Declarations filed with these motions that
have nothing or little to do with the issues in these motions. It is submitted that these extraneous
facts should be ignored. The facts necessary for the Court to rule on the issues in these two
Summary Judgment motions are all agreed upon. The issues are:

1 **A. DID THE 2021 REFERENDUM PASS?** Were the Staff Members disadvantaged
2 greater or more adversely than the Listener Members were disadvantaged.

3 1. Was a parallel election required under the Bylaws or California law?

4 **B. WERE THE THREE CANDIDATES, WHO RECEIVED SUFFICIENT**
5 **VOTES TO WIN, ILLEGITIMATELY DISQUALIFIED?**

6 In the KPFK 2021 LSB election were the 3 candidates properly and justifiably disqualified
7 by the National Election Supervisor?

8 **C. THE RIGHT TO SOLICIT FUNDS:**

9 1. Can New Day solicit from its mailing list compiled independently and from
10 mailings asking for donation and email address?

11 2. Can New Day solicit funds to support this lawsuit from the Pacifica
12 membership list, in the future, if necessary?

13 **IX. PRAYER**

14 That Pacifica and the Pacifica National board, and its staff, and Pacifica’s Counsel, and
15 the members of Pacifica’s Local Station Boards at all 5 stations, and the staff and management at
16 each of the five stations, are hereby prohibited from the following:

- 17 1. For a judgment and order holding that the referendum held in 2021 passed by a
18 majority of all members, which was all that was necessary to pass the 2021 New
19 Day Bylaws Referendum and s/election of Officer/Directors.
- 20 2. For a judgment that said amended Bylaws do not affect the Staff materially and
21 adversely in a manner differently than the Listeners as to voting.
- 22 3. Prohibiting any interference with the 2021 New Day Pacifica Referendum from
23 being immediately implemented, including the installation of the 4 Transition
24 Directors/Officers within 15 days of the order of this court;
- 25 4. That the three remaining “disqualified” candidates for the KPFK local station
board were improperly “disqualified,” prohibiting interference with the remaining
New Day endorsed candidates, for the KPFK LSB, Robert Payne, Nancy Pearlman

1 and Adam Wolman that won the first ballot count, from taking office *nunc pro*
2 *tunc* as of December 15, 2021;

3 5. New Day Pacifica was entitled to solicit money to prosecute this lawsuit and may
4 continue to do so. Prohibiting any interference with fundraising by New Day
5 Pacifica for this lawsuit from New Day's own lists or from Pacifica membership
6 lists.

7 6. That no accounting of the funds raised by New Day Pacifica is appropriate.

8 7. That New Day Pacifica owes no money to Pacifica.

9 Date: November 7, 2022

Respectfully Submitted,

11 **Mandel and Manpearl**

13 *ss// Gerald Manpearl*

14 By Gerald Manpearl, Attorney for

15 Defendants & Cross Complainants New Day
16 Pacifica, Jan Goodman and Robert Payne

17 **Law Offices of Jan Goodman**

18 *ss// Jan Goodman*

19 **By: Jan Goodman, Attorney for**

20 ***Nancy Pearlman and Adam Wolman***

21 Defendants & Cross Complainants Nancy
22 Pearlman and Adam Wolman

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: 35095 NAME: Gerald Manpearl FIRM NAME: MANDEL AND MANPEARL STREET ADDRESS: 120 Larkin Place CITY: Santa Monica STATE: CA ZIP CODE: 90402 TELEPHONE NO.: 310-614-4586 FAX NO.: E-MAIL ADDRESS: JerryManpearl@gmail.com ATTORNEY FOR (name): Defendants and Cross-Complainants	<p style="text-align: center;"><i>FOR COURT USE ONLY</i></p>
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles STREET ADDRESS: 300 E. Olive MAILING ADDRESS: CITY AND ZIP CODE: Burbank, CA 91502 BRANCH NAME: Burbank	
PLAINTIFF/PETITIONER: PACIFICA FOUNDATION DEFENDANT/RESPONDENT: NEW DAY PACIFICA FT AI	CASE NUMBER: 21BBCV00642
PROOF OF ELECTRONIC SERVICE	JUDICIAL OFFICER: Hon. Frank Tavelman
	DEPARTMENT: A

1. I am at least 18 years old.
 - a. My residence or business address is (specify):
 120 LARKIN PL.
 SANTA MONICA, CA 90402
 - b. My electronic service address is (specify):
 myla.reson@gmail.com

2. I electronically served the following documents (exact titles):
 See attachment

The documents served are listed in an attachment. (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

3. I electronically served the documents listed in 2 as follows:
 - a. Name of person served: Matthew Learned, Arthur Schwartz and Christopher Lamerdin
 On behalf of (name or names of parties represented, if person served is an attorney):
 Pacifica Foundation and Calif. Atty. General (respectively)
 - b. Electronic service address of person served :
 mlearned@forpurposelaw.com aschwartz@afjlaw.com Christopher.Lamerdin@DOJ.CA.gov
 - c. On (date): 11-09-2022

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment.
 (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: 11-09-2022

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Myla Reson

 (TYPE OR PRINT NAME OF DECLARANT)

▶ /s/Myla Reson

 (SIGNATURE OF DECLARANT)

ATTACHMENT TO PROOF OF SERVICE

1. Reply Brief & Memorandum of Points & Authorities by Defendants and Cross Complainants
2. Evidence Vol. III - Additional Supporting Exhibits 51-57 and the following Declarations:
 - Exhibit 58: Declaration of Carlos Zavala
 - Exhibit 59: Declaration of Carol Spooner
 - Exhibit 60: Declaration of Jan Goodman
3. Reply To Plaintiff's Undisputed Facts
4. Response to Declaration of Arthur Schwartz
5. Reply Brief by Intervenors