

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ERST EMPIRE STATE BUILDING, L.L.C.

Index No. 656145/16

Plaintiff,

-against-

**AFFIDAVIT OF
SHAIENDRA AGARWAL IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGEMENT**

PACIFICA FOUNDATION INC.,

Defendants.

STATE OF CALIFORNIA }

.ss:

COUNTY OF ALEMEDA }

SHAIENDRA AGARWAL, being duly sworn, deposes and says as follows:

1. I am the Chief Financial Officer of Pacifica Foundation (hereinafter "Pacifica"). In this capacity I am directly responsible for overseeing Pacifica's finances. My duties include, but are not limited to, assisting the Executive Director and Pacifica Board on all strategic and tactical matters as they relate to budget management, cost benefit analysis, forecasting needs and the securing of new funding.

2. I have personal knowledge of the facts set forth herein based on my position within Pacifica.

A. Background

3. Pacifica was born in the late 1940's out of the peace movement surrounding World War

II.

4. Pacifica is a foundation duly organized under the laws of the State of California with a principal place of business at 1925 Martin Luther King Jr. Way, Berkely, California 94704.

5. Pacifica's mission is to establish and operate for educational purposes, public, non-commercial and listener sponsored radio broadcasting stations, licensed by the Federal Communications Commission ("FCC").
6. Furthermore, Pacifica seeks in radio broadcasting operations to encourage and provide outlets for the creative skills and energies of the community; to conduct classes and workshops in the writing and producing of drama; to establish awards and scholarships for creative writing; to offer performance facilities to amateur instrumentalists, choral groups, orchestral groups and music students; and to promote and aid other creative activities which will serve the cultural welfare of the community.
7. Pacifica's broadcasting operations engage in activity that contributes to a lasting understanding between nations and between the individuals of all nations, races, creeds and colors; Pacifica endeavors to gather and disseminate information on the causes of conflict between any and all of such groups; and through any and all means compatible with the purposes of this corporation to promote the study of political and economic problems and of the causes of religious, philosophical and racial antagonisms.
8. Finally, Pacifica's radio broadcasting operations seek to promote the full distribution of public information; to obtain access to sources of news not commonly brought together in the same medium; and to employ such varied sources in the public presentation of accurate, objective, comprehensive news on all matters vitally affecting the community.
9. Pacifica holds five broadcasting licenses and broadcasts in Houston, Texas, Washington D.C., Los Angeles, California, Berkeley, California and New York City, New York.
10. In sum, Pacifica provides a vibrant and sustainable source of information that serves the public interest.

11. Pacifica's New York City affiliate, WBAI, (99.5 FM), has broadcast from the Empire State Building since the 1950's. WBAI is a New York institution; indeed, a trusted, treasured, distinct and needed voice for the greater New York City area.
12. To be clear, and for the reasons detailed below, Plaintiff's callous and aggressive pursuit of alleged monies owed in this action will, in no uncertain terms, if successful, bankrupt Pacifica and likely force WBAI off the air.

B. Pacifica's Current Financial Situation

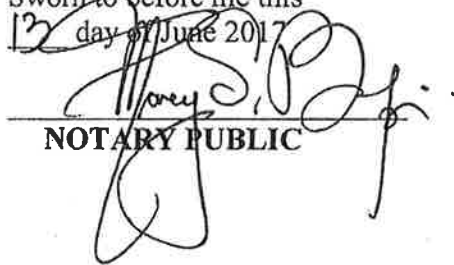
13. Pacifica's current financial situation, for several reasons, is dire.
14. For many years Pacifica has operated at a deficit.
15. Pacifica is currently under audit by the California Attorney General with regards to its finances.
16. Simply, as a non-profit reliant solely on the donations of listeners and supporters we have been increasingly unable to raise sufficient funds in order to continue operations.
17. Plaintiff is well aware of our financial situation and we have provided them with our financial statements for the years 2014 and 2015. Annexed hereto as Exhibit "A" are copies of Pacifica's audited 2014 and un-audited 2015 financial statements.
18. To that end, the new Pacifica Interim Director, Bill Crosier and the Pacifica Board and I are committed to making changes necessary to put our finances in order.
19. However, as of this date, we continue to remain in a dire financial state and in no uncertain terms, this lawsuit, if successful, will bankrupt Pacifica.
20. Indeed, the license agreement, at issue in this matter, which commenced June 1, 2005 and expires on April 30, 2020, has significantly added to Pacifica's current financial distress.

21. The agreement between the parties was completed after the September 11th attack on the World Trade Center. Inasmuch as the radio antenna, on top of the World Trade Center, no longer existed, Plaintiff took full advantage of these changed market conditions and burdened Pacifica with an onerous one-sided agreement.
22. Indeed, Pacifica's \$50,000.00 monthly obligation, under the lease, is no less than four times higher than the current market rate.
23. Pacifica currently has an offer from 4 Times Square to broadcast for \$12,000.00 per month. Annexed hereto as Exhibit "B" is a copy of an offer from 4 Times Square.
24. Furthermore, in addition to yearly increases, the lease obligates Defendant to pay annual Cost of Living Adjustments ("COLA") increases thus further and dramatically escalating Pacifica's burden.
25. While, it is undisputed that Pacifica was current on all its obligations under the lease as of June 30, 2014 (Gomes Affidavit ¶ 101) it was clear, as of 2014, that Pacifica could not continue to operate if compelled to continue paying its full obligations under the lease.
26. Precisely, for this reason, Pacifica requested a meeting with Defendant in July, 2014.
27. It is my understanding that the parties reached an agreement in 2014 in which Plaintiff would accept a reduced rent until such time the parties negotiated a final resolution.
28. As such, I was shocked when I learned that Plaintiff had commenced this action.

WHEREFORE, it is respectfully requested that Plaintiff's motion for summary judgement be denied in its entirety and that this court grant such other further relief as may be just and proper under the circumstances.

Shalendra S. Agarwal
SHAIENDRA AGARWAL

Sworn to before me this
12 day of June 2017


NOTARY PUBLIC

SEE NOTARY'S CERTIFICATE

CALIFORNIA JURAT CERTIFICATE

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of

ALAMEDA

Subscribed and sworn to (or affirmed) before me on this

13th

day of

JUNE

20 17, by

SHAIKENDRA SWARUP

AGARWAL

proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

WITNESS MY HAND AND OFFICIAL SEAL.

[Signature]
Signature of Notary Public



(Notary Seal)

OPTIONAL INFORMATION

The jurat contained within this document is in accordance with California law. Any affidavit subscribed and sworn to before a notary shall use the preceding wording or substantially similar wording pursuant to Civil Code sections 1189 and 8202. A jurat certificate cannot be affixed to a document sent by mail or otherwise delivered to a notary public, including electronic means, whereby the signer did not personally appear before the notary public, even if the signer is known by the notary public. The seal and signature cannot be affixed to a document without the correct notarial wording. As an additional option an affiant can produce an affidavit on the same document as the notarial certificate wording to eliminate the use of additional documentation.

DESCRIPTION OF ATTACHED DOCUMENT

CAPACITY CLAIMED BY SIGNER

AFFIDAVIT

(Title of document)

Number of Pages _____ (Including jurat)

Document Date _____

(Additional Information)

- _____ Individual
- _____ Corporate Officer
- _____ Partner
- _____ Attorney-In-Fact
- _____ Trustee
- _____ Other: _____