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Court of Appeals

of the

State of New York

GOLDEN GATE YACHT CLUB,

Plaintiff-Appellant,

– against –

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Respondent,

– and –

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(c) of the Rules of Practice for the Court of Appeals of the State of New York, The Golden Gate Yacht Club ("GGYC") states the following:

1. GGYC is a not-for-profit organization under Section 501(c)(7) of Title 26 of the United States Code and incorporated in the United States, in the State of California.

2. GGYC is affiliated with the Golden Gate Yacht Club Youth Sailing Foundation, Incorporated, which is a not-for-profit organization under Section 501(c)(3) of Title 26 of the United States Code and incorporated in the United States, in the State of California.

3. GGYC has neither parents nor subsidiaries.

QUESTIONS PRESENTED

(1) Did the Appellate Division err in failing to give effect to the plain language of the Deed of Gift reflecting the settlor's intent?

(2) Did the Appellate Division, in any event, err by ignoring directly relevant extrinsic evidence bearing on the settlor's intent while relying on an item of extrinsic evidence irrelevant to that essential intent?

(3) Did the *nisi prius* court correctly analyze and hold that Plaintiff-Appellant Golden Gate Yacht Club's Notice of Challenge and Certificate complies with the Deed of Gift?

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to N.Y. C.P.L.R. 5601(a) because two Justices of the Appellate Division dissented on a question of law in a final order of reversal. The Appellate Division, First Department, by order dated July 29, 2008, reversed the orders of the Supreme Court, New York County (Herman Cahn, J.), entered March 18, 2008 and May 13, 2008. The Supreme Court had granted summary judgment to Golden Gate Yacht Club. The Appellate Division majority ruled in favor of Defendant-Respondent Société Nautique de Genève.

NATURE OF THE CASE

The America's Cup is a world-renowned sailing regatta governed by a Deed of Gift ("Deed") dating back to 1857. Under the Deed, each round of competition

is initiated when a yacht club of another country (the "Challenger of Record") challenges the defending champion (the "Defender"). The Challenger of Record plays an important role by negotiating the timing and rules of competition (the "Protocol") with the Defender. Protocols in recent years have allowed additional challengers ("mutual consent challengers") to participate in an elimination series, with the winner advancing to compete in a one-on-one match race against the Defender. *See Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 262 (1990). The Deed includes several important eligibility restrictions designed to ensure that the Challenger of Record is both independent of the Defender and a serious yacht club capable of competing in, and helping to manage, a race befitting the America's Cup. The Challenger of Record must be an "organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both." (R. at 98.)

This case involves an attempt by the current Defender to circumvent the rules of the America's Cup by installing a sham yacht club as Challenger of Record. This yacht club was incorporated only days earlier, lacked facilities of its own, members, and yachts, and had never held a regatta of any kind. (R. at 1265-66.) With the consent of that faux challenger, the Defender published a Protocol

for the 33rd America's Cup that granted itself, through its self-appointed management company, unprecedented and lopsided control of the contest, including the power to hire the referees and other officials, to establish "unilaterally" the rules for all racing events, and to accept or reject "at its sole and entire discretion" any entry from challenging competitors. (R. at 61, 114-38.) Six competitors from the 32nd America's Cup signed a joint letter condemning the Protocol as "the worst text in the history of the America's Cup," one that would "jeopardi[ze] the participation and survival of the event." (R. at 680-81.)

To protect the historic spirit of the Cup, Golden Gate Yacht Club ("GGYC"), the Challenger of Record for the 32nd America's Cup, presented its own Notice of Challenge on July 11, 2007. (R. at 101-03.) In its challenge, GGYC expressed its desire to negotiate a Protocol "comparable in scope, and similar in terms, to that used for the 32nd America's Cup," which included a challenger selection series and rules specifying monohull sailboats approximately 75 feet in length. (R. at 102, 317-55.) GGYC remains ready and willing to participate in an America's Cup open to all eligible competitors and based on evenhanded rules that preserve the integrity of the Cup.

When the Defender rejected GGYC's challenge, GGYC was left with no alternative but to file this action to hold the Defender to its obligations as trustee under the Deed of Gift. The motion court agreed that the current sham Challenger

of Record is not eligible, and that, under the terms of the Deed, GGYC is the Challenger of Record. The Appellate Division, First Department, reversed. Its decision contorts the plain language of the Deed and should be reversed. As the *nisi prius* court ruled and the Appellate Division dissenters agreed, the simple, straightforward conditions that the creator of the America's Cup Deed articulated in order to protect the competition from abuse should be respected and given effect. Failure to do so will destroy the America's Cup as we know it, and as the settlor intended it to be.

I. HISTORY OF THE AMERICA'S CUP

The America's Cup is a silver cup trophy "[s]o called because it was won by the yacht *America* in a race around the Isle of Wight in 1851." *Mercury Bay*, 76 N.Y.2d at 260. After bringing the trophy back to the United States, its six owners donated it to the New York Yacht Club ("NYYC") in 1857, creating a charitable trust under the laws of New York that dedicated the trophy as a "'perpetual Challenge Cup for the friendly competition between foreign countries.'" *Id.* (quoting original Deed). As originally drafted, the Deed was relatively simple, requiring only that a Challenger of Record be an "'organized yacht club of any foreign country,'" provide proposed race dates and basic dimensions of the challenger's vessel with six months' notice, and compete in a vessel "'of not less than thirty or more than three hundred tons.'" Winfield M. Thompson & Thomas

W. Lawson, *The Lawson History of the America's Cup* 45 (1902) (quoting original Deed).[1] Such yacht clubs, the Deed guaranteed, "'shall always be entitled ... to claim the right of sailing a match for this cup.'" *Id.* The Defender and Challenger of Record were free to agree on terms for the match, but in the event they could not do so the Deed stipulated that "'the match shall be sailed over the usual course for the annual regatta of the yacht club in possession of the cup.'" *Id.* The Deed provided that the Defender would serve as the Cup's trustee until succeeded by a qualified competitor who mounts a successful challenge. *Id.*

Over the next several decades, the Cup was twice returned to George Schuyler, the sole surviving donor, "when questions arose as to the terms of the trust in which the Cup was to be held." *Mercury Bay*, 76 N.Y.2d at 260. Mr. Schuyler first revised the Deed in 1882, making changes designed to prevent challenges by yacht clubs that did not hold annual ocean course regattas. The prior two challenges had come from "the Royal Canadian Yacht Club of Toronto and

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[1] This brief cites occasionally to the first and second versions of the Deed. Those documents comprise part of the appellate record in *Mercury Bay*, 76 N.Y.2d 256, New York County Clerk's Index No. 2129, Appendix Vols. I and II (CA0000505 - CA0000506, and CA0000813 - CA0000814), and are also widely cited in the secondary literature. They can be found in their entirety in the Thompson and Lawson volume, "the earliest recognised history of the America's Cup." (R. at 743.) This court may take judicial notice of these Deeds, whose content is beyond dispute, as "matters of public history." *Hunter v. N.Y., Ontario & W. R.R.*, 116 N.Y. 615, 621 (1889). "Any document 'worthy of confidence' may be used by the courts to ascertain historical facts without the production of evidence." *Stawski v. John Hancock Mut. Life Ins. Co.*, 163 N.Y.S.2d 155, 158 (Sup. Ct. N.Y. County 1957). Société Nautique de Genève itself quoted from the Lawson history in a submission to an arbitration panel convened for the 31st America's Cup. (R. at 743.)

secondly the Bay of Quinte Yacht Club, both situated on the Canadian Great Lakes," and had "failed poorly and were much criticised." (R. at 742.) Those less prestigious lake-based clubs had raced vessels "crude in finish and appointment and in all unfinished condition," and "[t]he New York Yacht Club felt that [they] failed to comply with the spirit of the intention of the donors and were degrading the standing of the competition and the Club." (R. at 742-43.)

The revised Deed required that in addition to being (1) an "'organized yacht club,'" (2) "'of a foreign country'" (i.e., a country other than the Defender's), the Challenger of Record must also be (3) "'incorporated, patented, or licensed by the legislature, admiralty, or other executive department'" of that country, and (4) "'having for its annual regatta an ocean water-course on the sea or on an arm of the sea (or one which combines both).'" Thompson & Lawson, *The Lawson History of the America's Cup* 90 (quoting second Deed). Further, because the America's Cup was "to bring out seamanship as well as speed," (R. at 743) the Deed mandated that all "'[v]essels intending to compete for this cup must proceed under sail on their own bottoms to the port where the contest is to take place.'" Thompson & Lawson, *The Lawson History of the America's Cup* 91 (quoting second Deed). Finally, Mr. Schuyler added a provision dealing with the possibility of a defunct Defender, which provides that "'[s]hould the club holding the cup be for any cause

dissolved, the cup shall be handed over to any club of the same nationality it may select which comes under the foregoing rules.'" *Id.*

Mr. Schuyler revised the Deed a final time in 1887, providing the text—aside from two amendments by order of the New York Supreme Court in 1956 and 1985[2]—that survives today. This third Deed extended the notice period to ten months and specified the basic dimensions that a Challenger of Record must include in its challenge. (R. at 98.) It also included restrictions on the size of competing yachts, stipulating for instance that vessels with one mast "shall be not less than [sixty-five] feet, nor more than ninety feet on the load water-line." (R. at 98); *see Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82, 102 (1st Dep't 1989) ("After World War II … the deed of trust was modified to reduce the minimum load waterline dimension from 65 feet to 44 feet ….") (Rubin, J., concurring), *aff'd*, 76 N.Y.2d 256 (1990). The Deed also clarified that "when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided." (R. at 99.)

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[2] In an effort to revive interest in the America's Cup, "in 1956 the New York Yacht Club obtained a court order amending the Deed of Gift to reduce the minimum load water-line length to its present 44 feet and to eliminate the requirement that the challenging vessel sail to the match 'on its own bottom', a requirement that had disadvantaged foreign challengers." *Mercury Bay*, 76 N.Y.2d at 262. The 1985 amendment added text allowing for America's Cup races in the Southern Hemisphere to take place between May 1st and November 1st.

Beyond these broad requirements, the final Deed continued to give the Defender and Challenger of Record the freedom to, "by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match." (R. at 99.) "Through this 'mutual consent' provision, every America's Cup match since 1970, save one, has been an event in which challengers from different countries competed in an elimination series for the opportunity to have a one-on-one race with the Defender." (R. at 3302.) In the one Cup for which the Defender and Challenger of Record were unable to negotiate agreeable terms—the subject of the *Mercury Bay* dispute—the parties held a one-on-one match under the minimal default rules spelled out in the Deed itself. *Mercury Bay*, 76 N.Y.2d at 264.

II. BACKGROUND OF THE PRESENT DISPUTE

On August 18, 2000, Société Nautique de Genève ("SNG") sought to become a mutual consent challenger in the 31st America's Cup. (R. at 738.) The Defender at the time, the Royal New Zealand Yacht Squadron ("RNZYS"), accepted SNG's participation on condition that the arbitration panel convened for the 31st America's Cup ("ACAP 31") confirm SNG's eligibility to compete. (R. at 738.) At issue was whether SNG violated the terms of the Deed and the Protocol because it had not held an annual ocean course regatta on the sea prior to the lodging of its mutual consent challenge. (R. at 662, 664.) The ACAP 31 decision

ratified the validity of SNG's participation as a mutual consent challenger, and SNG went on to win the 31st America's Cup in March 2003. (R. at 56, 894-79.)

In July 2007, after a challenger elimination series in which GGYC served as Challenger of Record, SNG defended its title in the 32nd America's Cup, defeating RNZYS once again. (R. at 57.) The day before the final race, SNG announced that if it was victorious then Club Náutico Español de Vela ("CNEV") would be the Challenger of Record for the 33rd America's Cup. (R. at 57.)

SNG had been maneuvering to pre-select a pliable Challenger of Record for quite some time. The 32nd America's Cup was headquartered in Valencia, Spain, and the local and national Spanish officials had a strong interest in keeping it there. "Initially, Real Federación Española de Vela ('RFEV'), a Spanish sailing federation, contemplated becoming the Challenger of Record for the 33rd America's Cup" (R. at 3314-15), and RFEV has admitted that its objectives were to increase its sponsorship budget and to ensure that the next Cup would be in Valencia. (R. at 112, 371, 942 ¶ 56(2).)

Because RFEV is "not a yacht club[,] but a federation of sports clubs and individuals who promote the sport of sailing" (R. at 3303), its own attorneys advised it that it could not lodge a valid challenge. (R. at 943 ¶ 56(3), 1263 ¶ 4.) In an attempt to avoid disqualification under the Deed, RFEV incorporated CNEV on June 19, 2007 "for the express purpose of challenging for the 33rd Cup and

avoiding lingering controversy regarding the capacity of a sailing federation, such as RFEV, to become a challenger and potential trustee under the Deed of Gift." (R. at 3303.) RFEV incorporated CNEV as a convenience entity, and it is undisputed that "RFEV controls the decisions to be taken" by CNEV. (R. at 943 ¶ 56(4), 1263 ¶ 7.) CNEV has no vessels (R. at 1264 ¶ 9), no members (other than the five RFEV directors who created it (R. at 1464 ¶ 10)), and no telephone number, web site, or physical facility of its own (R. at 1264-65 ¶¶ 11-12).

SNG accepted a purported challenge from CNEV immediately after it successfully defended the America's Cup. (R. at 57.) In exchange for doing so—a move which cemented Spain as the venue for the 33rd America's Cup—CNEV acceded to a one-sided Protocol that SNG published a mere two days later. (R. at 57.) A popular Spanish newspaper remarked that the Protocol gave SNG "total control of the competition," leaving the possible challengers with "no possible weapon to defend themselves." (R. at 358.) The Protocol granted SNG the unilateral power to: (1) set the Sailing Instructions, Racing Rules, Event Regulations, and ACC Rules (which specify the boat design and construction rules); (2) withhold many of these rules until 60 days before the match; and (3) change the rules even days before the match. (R. at 120 ¶ 2.5, 123 ¶ 5.4(b), 127-28 ¶ 14.1, 130 ¶¶ 17, 18.) The Protocol also granted SNG the power to determine the format for the match, and to appoint the Race Committee, Measurement

Committee, and Umpires. (R. at 123 ¶ 5.4(a), 126-27 ¶¶ 11, 13.3, 13.5, 13.7.) Finally and most importantly, it gave SNG the unilateral power to expel, without recourse, any challenger that disputed SNG's authority under the Protocol. (R. at 121 ¶ 2.7(d).)[3]

The Protocol caused a massive rift within the international sailing community. Although a few yacht clubs agreed to its terms, six competitors from the 32nd America's Cup signed a joint letter condemning the Protocol as "the worst text in the history of the America's Cup," one that would "jeopardi[ze] the participation and survival of the event." (R. at 680-91.) The letter also noted that "serious questions have been raised about the legitimacy of the newly created and purely instrumental entity called [CNEV] to advance a Challenge under the provisions of the Deed of Gift." (R. at 681.) These fears were partially realized when Louis Vuitton, which had sponsored the challenger elimination series for more than twenty years, cited the questionable nature of the Protocol as a reason for its decision to withdraw sponsorship for the 33rd America's Cup. (R. at 210.)

GGYC's challenge, lodged on July 11, 2007, made plain its desire to negotiate "a Protocol comparable in scope, and similar in terms, to that used for the 32nd America's Cup," which included mutual consent challengers and fair rules

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[3] The handful of amendments to the 33rd America's Cup Protocol since its adoption have been wholly cosmetic, retaining SNG's power to control the significant aspects of the Cup competition. SNG's unilateral power is limited in minor instances only by a requirement of approval from an arbitration panel selected by SNG and CNEV. (R. at 1243-47.)

for more modest monohull racing yachts. (R. at 102, 317-55.)[4] In order to preserve its ability to compete in a default match should one become necessary, GGYC included in its Notice of Challenge a certificate listing specifications for a vessel with dimensions matching the maximum allowed under the Deed for a single-masted yacht—90 feet by 90 feet. (R. at 103.) As SNG understood immediately and has repeatedly reaffirmed in these proceedings, "[t]hese dimensions can only be for a multi-hulled vessel." (R. at 797 ¶ 36.) Challenging with specifications for a large multihull, rather than a more traditional monohull was necessary because, under this Court's decision in *Mercury Bay*, a Defender is entitled to defend a default match in a multihull, even though such vessels are "inherently faster than a monohull." 76 N.Y.2d at 264.

SNG rejected GGYC's challenge on July 23, 2007, stating that because it had received a valid challenge from CNEV it was barred by the Deed from considering another challenge until after the 33rd America's Cup has been decided. (R. at 140.) SNG also commenced an arbitration proceeding effectively against itself, submitting an application to determine the validity of CNEV's challenge to an arbitration panel that was selected by SNG and CNEV and drew its authority from the disputed SNG/CNEV Protocol. That panel dutifully affirmed SNG's

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[4] SNG, as Defender at the time, negotiated and agreed to the 32nd America's Cup Protocol along with GGYC. (R. at 317-55.) SNG has never offered an explanation for why it altered the terms of the Protocol so drastically for the 33rd America's Cup.

position. (R. at 890-92, 968-69.) GGYC was in a Catch-22: it could participate in the arbitration only by agreeing to SNG's Protocol, but doing so exposed it to disqualification at SNG's sole discretion for disputing the binding effect of the Protocol. (R. at 121, 135.)[5] By making specific reference to its disqualification power when rejecting GGYC's challenge, SNG had already made plain its intent to consider such a drastic remedy. (R. at 140.) Regardless, the power to construe the Deed is reserved to the New York courts. *Mercury Bay*, 76 N.Y.2d at 263 (citing EPTL 8-1.1(c)(1)).

III. PROCEEDINGS BELOW

On July 20, 2007, the same day that SNG initiated its arbitration proceeding, GGYC brought suit in the Supreme Court of New York County. (R. at 55-66.) In its complaint, GGYC alleged that SNG breached the terms of the Deed and its duty of loyalty as trustee of the America's Cup, "engaging in self-dealing by accepting CNEV's invalid challenge and by entering into the Protocol without engaging in the consensual process required by the mutual consent clause of the Deed." (R. at 65.) GGYC sought both a declaration invalidating CNEV's challenge and SNG's protocol, and also a declaration that GGYC's challenge was valid. (R. at 65.)

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[5] Although the arbitration panel invited GGYC to participate without submitting to its jurisdiction, the panel had no authority to protect GGYC from SNG's unilateral disqualification power. (R. at 121 ¶ 2.7(d).) Furthermore, SNG and CNEV were empowered under the Protocol to remove members of the arbitration panel "at their discretion at any time." (R. at 134 ¶ 24.3.) And since the panel was itself a creature of SNG's illegitimate Protocol, it is inconceivable that it would have disqualified CNEV, which would have called its own existence into question.

SNG moved to dismiss and for summary judgment on September 21, 2007, asserting that because "CNEV's challenge satisfies the plain language of the Deed," the court could not look beyond the "four corners" of the Deed to ascertain the donor's intent. (R. at 1025.) SNG argued that it was irrelevant that CNEV had yet to hold a regatta at the time of its challenge, because the Deed's use of the word "having," "fairly read, includes past, present or future regattas." (R. at 1029.) On October 5, 2007, GGYC cross-moved for summary judgment, arguing that the Deed expressly provides that a Challenger of Record must meet the Deed's qualification requirements, including the regatta requirement, at the time of its challenge. (R. at 1186, 1193-94.) GGYC contended that CNEV is not a yacht club at all (because CNEV lacks even the most basic elements such as vessels and members) and clearly did not have an annual regatta. (R. at 1188, 1193.) CNEV was a mere alter ego of its parent RFEV, and suffered the same eligibility disqualifications, notwithstanding its alternative corporate form. (R. at 1188-89.)

The Supreme Court (Herman Cahn, J.) issued a Memorandum and Decision on November 27, 2007, holding that CNEV failed to fulfill the express requirements of the Deed when it challenged. (R. at 34-52.) The court held that the plain meaning of the phrase "having for its annual regatta" requires that the Challenger of Record must have held regattas in the past and will continue to do so in the future. (R. at 47.) The court also ruled that GGYC's Notice of Challenge

complied with the terms of the Deed and that GGYC was the Challenger of Record. (R. at 52.) The motion court directed the parties to settle an order to implement its decision. (R. at 52.)

On December 27, 2007, SNG delayed settlement of the order by filing a motion requesting leave to renew and reargue, raising for the first time a new argument that GGYC's Notice of Challenge and accompanying Certificate did not meet the Deed's requirements. (R. at 1532-33, 1536-46.) On January 15, 2008, SNG recast this motion as an order to show cause. (R. at 1898-99.) After conducting a hearing on the validity of GGYC's challenge, on March 17, 2008 the motion court issued a Memorandum Decision and Order denying both of SNG's motions and upholding the court's original declaration that GGYC's Notice of Challenge and Certificate were valid. (R. at 21-33.) On May 12, 2008, the motion court issued a third culminating and comprehensive Memorandum Decision setting the race dates for the America's Cup, and issued a series of Orders that implemented its November 27, 2007 decision, fixed the race dates as commencing ten calendar months hence, set the location of the match as Valencia or any other site selected by SNG, and permitted GGYC and SNG to engage in the mutual consent process.

SNG appealed to the Appellate Division, First Department. In a 3-2 decision on July 29, 2008, the Appellate Division reversed the motion court's

March 18, 2008 and May 13, 2008 orders. (R. at 3310.) The majority searched for and found ambiguity, reasoning that participles like "having" "'derive their tense from the verb on which they depend,'" and that because there is no clear verb referent for the phrase "having for its annual regatta," the phrase "can only be interpreted through strained English usage" and is "subject to conflicting interpretations." (R. at 3307) (quoting W. M. Baskervill & J. W. Sewell, *An English Grammar for the Use of High School, Academy, and College Classes* 173 (1896).) To resolve that contrived ambiguity, the majority leapt forward in time to a single piece of extrinsic evidence that had occurred more than a century after the Deed itself: the ACAP 31 decision allowing SNG to participate as a mutual consent challenger even though it had yet to hold an ocean course regatta at the time of its initial challenge (but did hold an ocean course regatta before its conditional acceptance as a mutual consent challenger). The Appellate Division majority concluded that the Deed did not require a Challenger of Record to have actually held a regatta on an ocean course by the time of its challenge, and declared CNEV to be a valid Challenger of Record. (R. at 3307-10.) The majority never analyzed, nor even cited, the provision of the Deed that prohibits a Defender from considering any other challenges "when a challenge from a Club fulfilling all the conditions required by this instrument has been received." (R. at 99.)

Justice Nardelli, joined by Presiding Justice Saxe, dissented. (R. at 3321.) These Justices discerned plainly "that the donor's intent was to allow for challenges for the Cup from established yacht clubs that regularly hold annual regattas and not from a club merely organized just for the purpose of challenging for the Cup." (R. at 3323.) They further agreed with the motion court that GGYC's Notice of Challenge was valid under the Deed and "that even if the certificate contained a possible ambiguity, SNG was not at any time actually confused or misled by the Certificate." (R. at 3325.)

ARGUMENT

The America's Cup Deed of Gift is a remarkably brief document to govern such a major sporting event. Its genius lies in the simplicity of its terms, and in the considerable freedom it affords the Defender and Challenger of Record to agree on rules for the upcoming race. George Schuyler, one of the Cup's original donors, set some threshold standards, however, with eligibility criteria designed to guarantee that the Challenger of Record is both a serious yacht club experienced in ocean course racing and genuinely independent of the Defender. The eligibility rules protect all of the participants in the event: they protect the Defender by ensuring that the Challenger of Record is a legitimate competitor and partner in helping to manage a world-class ocean regatta; they protect all challengers by setting objective qualification standards and requiring the Defender to accept all

qualified challenges on a first-come-first-served basis; and they protect the competition as a whole by encouraging a genuinely competitive and prestigious event, and by reducing the potential for collusion between the Defender and a Challenger of Record. Those criteria—including particularly the requirement that only a yacht club "having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both," may serve as Challenger of Record—are crucial to the settlor's intent and expectation that the America's Cup would be "preserved as a perpetual Challenge Cup for friendly competition between foreign countries." (R. at 98.)

At the time of its purported challenge, CNEV undeniably did not satisfy the Deed's simple criteria for a Challenger of Record. It was not an "organized Yacht Club" but a shell entity, incorporated only days before and lacking any and all of the characteristics of a real yacht club—such as members, vessels, and facilities. CNEV also had never conducted a sailing race of any kind, let alone an annual ocean course regatta on the sea or an arm of the sea. It is simply an alter ego of a sailing federation, RFEV, which is in league with the Defender SNG and traded control of the event in return for keeping the Cup in Valencia, Spain. By agreeing to all of SNG's demands for a Protocol so one-sided that it provoked immediate condemnation from the sailing community, CNEV promptly confirmed why the Deed's eligibility criteria should be taken seriously.

There are two basic legal errors in the Appellate Division majority's decision that CNEV is nonetheless qualified to be Challenger of Record.

First, the Appellate Division majority found the phrase "having for its annual regatta an ocean water course on the sea" ambiguous because a participle like "having" must be located in time by the tense of another verb, and the majority could not find one. That strained construct fails to confront closely the language of the Deed. In fact the Deed expressly provides that the challenge period is closed only by a challenge from a Club "fulfilling" all the conditions of the Deed, which plainly indicates that the eligibility criteria must already be satisfied *at the time of challenge*. The criteria themselves are framed in the present tense, since the phrasing implicitly requires a Challenger of Record that *is* "organized," as well as "incorporated," "patented," or "licensed." And any doubt about the grammar is resolved by an analysis of the overall purpose, structure, and interrelated provisions of the whole Deed—an analysis the majority failed to undertake. The Appellate Division majority's reading, by contrast, would deprive the eligibility criteria of any objective significance and leave both the competitors and the Cup at the mercy of disputes, confusion, and collusion.

Second, even if it were necessary to resort to extrinsic evidence, the correct approach to trust interpretation is to divine the intent of the settlor *at the time of trust formation*. All of the contemporaneous evidence that is available shows that

George Schuyler regarded the eligibility criteria as threshold bulwarks against challenges from inexperienced clubs that would degrade the quality of America's Cup competition. The ocean course regatta requirement, for instance, was included by Mr. Schuyler in the second, 1882 version of the Deed to ensure that third-rate yacht clubs could not challenge, after a series of embarrassingly uncompetitive races with Canadian lake clubs sailing shoddy boats in 1876 and 1881. The Appellate Division majority ignored this genuinely relevant extrinsic evidence and relied entirely on the opinion of a single lay arbitration panel, a century after Mr. Schuyler's death, that considered circumstances very different from those presented here.

This Court should reverse, and reinstate the motion court's decision declaring GGYC the Challenger of Record for the next America's Cup.

I. THE DEED UNAMBIGUOUSLY REQUIRES A CHALLENGER OF RECORD TO MEET ALL CONDITIONS OF ELIGIBILITY AT THE TIME OF ITS CHALLENGE

A. The Plain Language Of The Deed Makes Clear That CNEV Is Not Eligible To Serve As Challenger Of Record

Under New York law, "the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself." *Mercury Bay*, 76 N.Y.2d at 267. This is because "the words used in the instrument itself are the best evidence of the intention of the drafter of the document." *Id.*

Even if a trust contains an ambiguous phrase or clause, a court is not free to turn to extrinsic evidence without first attempting to discern the settlor's intent "'"from the whole context and subject-matter of the deed so as to make one entire and consistent construction of the whole.'" *N.Y. Life Ins. & Trust Co. v. Hoyt*, 161 N.Y. 1, 9 (1899) (citation omitted); *In re Fabbri's Will*, 2 N.Y.2d 236, 240 (1957) (the settlor's intent "must be gleaned not from a single word or phrase but from a sympathetic reading of the will as an entirety and in view of all the facts and circumstances under which the provisions of the will were framed"); *see also* 106 N.Y. Jur. 2d *Trusts* § 93 (2006) (same).

Read fairly and as a whole, the plain language of the Deed confirms that CNEV cannot be a valid Challenger of Record. The tenth paragraph of the Deed explicitly provides that "when a challenge from a Club *fulfilling all the conditions required by this instrument* has been received, no other challenge can be considered until the pending event has been decided." (R. at 99) (emphasis added.) The present participle "fulfilling" is located in time by the phrase "*has been received*," clearly demonstrating that the eligibility conditions of the Deed must already be satisfied at the time the challenge is received, in order to close the challenge period and preclude subsequent qualified challenges.

Those eligibility criteria are spelled out in the fourth paragraph, which provides that:

> Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup ....

(R. at 98.) A valid America's Cup Challenger of Record therefore must be (1) an organized Yacht Club, (2) of a country other than that of the Defender, (3) incorporated, patented, or licensed by the appropriate national authority, and (4) "having" for its an annual regatta an ocean course on the sea or an arm of the sea.

SNG itself has acknowledged that the Deed's eligibility criteria must be satisfied at the time a challenger issues its challenge. In a letter dated January 26, 2005, replying to an inquiry by the NYYC regarding RFEV's eligibility to compete for the 32nd America's Cup, SNG wrote that it confirmed RFEV's eligibility "*[b]efore* accepting [its] challenge." (R. at 706) (emphasis added.) SNG explained that

> [u]nder the current Protocol and Terms of challenge a challenging yacht club has to meet at least [the] following criteria deriving from the Deed of Gift:
> (a) The club is "organized"
> (b) It is incorporated, licensed or patented by a legislature, government department, or admiralty
> (c) It has an annual regatta on the sea or an arm of the sea
> (d) The yacht club is foreign, that is to say not of the same country as the trustee yacht club.

(R. at 706.) The dispute over RFEV's eligibility as a challenger was not resolved by this exchange. RFEV is not a "Yacht Club" under the Deed, and continuing doubts about its eligibility led it to establish the shell club CNEV.

Like its parent and alter ego RFEV, CNEV is not an "organized Yacht Club" as required by the Deed. (R. at 98.) RFEV cannot eliminate this inadequacy merely by incorporating a fictitious yacht club with several RFEV directors as its only "members." "Although the term 'organized' often refers to the nature of an entity's legal existence or formation," the motion court correctly recognized that "here the donors contemplated additional indicia of a yachting club." (R. at 45.) The plain language of the Deed requires, in separate terms, that the Challenger of Record must be an "organized Yacht Club" *and* then that it must be "incorporated, patented, or licensed." (R. at 98.) The "organized Yacht Club" requirement cannot be treated as mere surplusage. *See Eidt v. Eidt*, 203 N.Y. 325, 330 (1911) ("It is, moreover, an established rule that the courts should give effect to every word and provision of the will, in so far as they may without violating the intent of the testator or well-settled rules of law."). It is undisputed that CNEV has no vessels, no members (other than the five RFEV directors who created it), no telephone number, no web site, and no physical facility of its own. *Supra*, at 10. As late as September 2, 2007, SNG's then general counsel, Hamish Ross, stated that CNEV is "a paper club." (R. at 1095.) GGYC respectfully submits that this Court should hold that CNEV is not an "organized Yacht Club" on these undisputed facts.[6]

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[6] Regardless, this Court should not rule against GGYC without at least a remand for the factual

As the motion court recognized, the cleanest way to resolve this case is to hold that, at the time SNG wrongly accepted CNEV's challenge and refused GGYC's challenge, CNEV was not a yacht club "having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both." In the context of the Deed, the participial phrase "having for" clearly means "with," and requires that a challenger must be an organized yacht club with an annual regatta on an ocean course on the sea or an arm of the sea, or one which combines both. *See, e.g., Century Dictionary: An Encyclopedic Lexicon of the English Language* 6952-53 (1891) (defining "with" as "[h]aving, possessing, bearing, or characterized by").[7] The phrasing plainly requires *present possession* of an annual ocean course regatta, not a future aspiration.[8] *See* 1 Noah Webster, *American Dictionary of the English Language* (1828) (defining "having" as "[p]ossessing; holding in power or possession"). Mr. Schuyler could easily have

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development that the motion court thought would be necessary on this issue. (R. at 46) ("Whether these attributes are sufficient—in the absence of vessels, members, and a telephone number, *etc.*—to constitute a 'Yacht Club' under the Deed would require an analysis of custom and practice in the sport, as well as a hearing.")

[7] For equivalent uses of the phrase, see, e.g., *Howard v. Ingersoll*, 54 U.S. 381, 413 (1852) ("land *having for* its eastern boundary the State of Georgia") (emphasis added), and *Marconi Wireless Telegraph Co. v. National Electric Signaling Co.*, 213 F. 815, 834 (E.D.N.Y. 1914) ("The electrolytic detector is a device *having for* its lower terminals a small platinum cup containing a dilute acid solution.") (emphasis added).

[8] The Appellate Division also reasoned that "as a matter of standard English usage, the noun 'regatta' cannot be the proper object of the verb 'possess.'" (R. at 3307.) That was in response to GGYC's observation that "having" as commonly used in the law means "to possess," which means present ownership rather than a mere future aspiration. It is not clear why the Appellate Division thought that a yacht club could not "possess" a regatta. The settlor's use of the phrase "*its* annual regatta" shows he thought otherwise.

said, if such were his intent, that a challenging Club must merely pledge to hold an annual regatta henceforth. The motion court and Appellate Division dissenters were thus entirely correct to conclude that the annual regatta phrase "is plainly understood to mean that it is an on-going activity; the activity has taken place and is continuing. It implies that the organization has had one or more regattas in the past, and will continue to have them in the future." (R. at 47.)

A study of the first part of the sentence confirms that conclusion. The Appellate Division majority reasoned that the participial phrase "having for its annual regatta" is grammatically ambiguous because it lacks any corresponding referent verb to locate it in time, and participles "have no tense of their own, but derive their tense from the verb on which they depend." (R. at 3307) (citing Baskervill & Sewell, *An English Grammar* 173.)[9] A participle like "having" can indeed be *cast* into the past, present, or future as a "progressive tense" describing a continuing present state or action at a given point in time—such as in the sentences "I was having turkey for my Thanksgiving dinner," or "I will be having turkey for my Thanksgiving dinner." But nothing about this sentence suggests that the "having" clause in the Deed describes a state not yet realized by the Challenger of Record. To the contrary, the first three criteria listed in the fourth paragraph of the

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[9] The grammar book the majority relied upon explains (at 172) that participles "either belong to … or … modify a substantive"—a "substantive" being a noun, pronoun, or noun phrase. The present participle "having" in the Deed of Gift belongs to the substantive "Yacht Club"—as do the four past participles "organized," "incorporated," "patented," and "licensed."

Deed are clearly located in the past—or, more precisely, the past continuing up to the present. The challenging yacht club must have been and still be "organiz*ed*," "of a foreign country," and "incorporat*ed*," "patent*ed*," or "licens*ed*" by the appropriate national authorities. The present tense verb phrase "has been and remains" is implied throughout the first part of the sentence by the participles "organized," "incorporated," "patented," and "licensed," and hence it is also implied for the participle "having."[10] It makes no sense to sever the final criterion—"having for its annual regatta"—from the first three. Under the canon of construction *noscitur a sociis*, the meaning of a word or phrase is "known from its associates," *People v. Keyes*, 75 N.Y.2d 343, 346 (1990), or "'ascertained by reference to the meaning of words associated with it,'" *Heintz v. Brown*, 80 N.Y.2d 998, 1002 (1992) (citation omitted). *See also Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) ("The traditional canon of construction, *noscitur a sociis*, dictates that 'words grouped in a list should be given related meaning.'") (citation

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[10] The phrase "shall always be entitled to the right of sailing a match of this Cup" expresses a present condition continuing into the future, consistent with the purpose of the entire Deed to govern matches that, from the settlor's perspective, would all occur in the future. But the future tense of the verb "shall" does not alter the tense of the prior participles. In Act II, scene 4 of *Measure for Measure*, Shakespeare has the character Ford say: "see the hell of having a false woman: my bed shall be abus'd, my Coffers ransack'd, my reputation gnawne at ...." *Mr. William Shakespeares Comedies, Histories, & Tragedies* 47 (1623). Ford has no trouble saying both that he "shall" be abused and also that (in his opinion) he already has a false wife for the listener to "see." And the tenth paragraph confirms that only a yacht club "fulfilling" the eligibility conditions of the Deed can issue a binding challenge.

omitted). The Appellate Division majority missed this temporal symmetry entirely.

The Deed's use of the word "annual" in the fourth paragraph lends additional support. Although an organization may optimistically announce plans for a "first annual" event based on an intention to continue the event indefinitely into the future, the most natural implication of specifying an "annual" event is to require that it has occurred at least once in the past.[11] And the Deed originally provided for default matches to "'be sailed over the *usual* course for the annual regatta of the yacht club in possession of the cup.'" *Mercury Bay*, 150 A.D.2d at 102 (quoting original Deed) (emphasis added) (Rubin, J., concurring). To the Deed's drafter, the term "annual" thus carried an expectation of occurrence and repetition, incompatible with an inaugural event.

There is no ambiguity in the term "having" if one reads it in the context of the Deed. Therefore, because the Appellate Division majority erred in failing to look to the entire Deed for guidance in construing the settlor's intent, its order should be reversed on the law and the rulings of the motion court should be upheld and reinstated.

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[11] Indeed, the Harper Dictionary notes that, "[a]n example of 'instant tradition,' *first annual* is a contradiction in itself." William and Mary Morris, *Harper Dictionary of Contemporary Usage* 245 (1975). And the Associated Press Stylebook observes that "[a]n event cannot be described as *annual* until it has been held in at least two successive years." Associated Press, *Stylebook and Briefing on Media Law* 17 (Norm Goldstein ed., 35th ed. 2000).

B. CNEV's Participation As Challenger Of Record Is Inconsistent With The Manifest Purposes Of The Deed

Even accepting SNG's unnatural interpretation (an assumption *arguendo* which we urge is unfounded), a court cannot resort to extrinsic evidence without first considering whether the competing interpretations *make sense* and fairly comport with the Deed's manifest purposes. *See In re Herzog*, 301 N.Y. 127, 135 (1950) ("In resolving [a construction problem] primary attention must be given to the manifest purpose sought to be accomplished."); *see also* 106 N.Y. Jur. 2d *Trusts* § 93 ("In construing the instrument reference may be had to the general scheme of the trust, its object and purposes, and the facts and circumstances surrounding its execution.") (footnote omitted). A document is ambiguous only if, viewed objectively, it fairly admits of more than one *reasonable* interpretation. *See Evans v. Famous Music Corp.*, 1 N.Y.3d 452, 458 (2004) (a contract is ambiguous if it is "susceptible to more than one reasonable interpretation"); *Chimart Assocs. v. Paul*, 66 N.Y.2d 570, 573 (1986) (the existence of ambiguity is determined by "whether the agreement on its face is reasonably susceptible of more than one interpretation"). Accordingly, the court should reject any construction of the Deed language that "would produce an absurd and illogical result." *In re Farmers' Loan & Trust Co.*, 189 N.Y. 202, 205 (1907).

There are several reasons why the interpretation of the Deed of Gift urged by SNG and embraced by the Appellate Division majority makes no sense in light of the structure and obvious purposes of the Deed.

First, the majority's interpretation reduces the concept of eligibility *conditions* to a nullity. Under SNG's view, a yacht club could satisfy the condition of "having for its annual regatta an ocean water course on the sea" by expressing the mere intent to fulfill its terms at some point in the future. But in no other sporting event are the basic eligibility criteria for participation left up to bare representations of intent. Reading the fourth and tenth paragraphs together makes plain that the settlor anticipated that there would be meaningful eligibility requirements for a challenge. What is the point of having eligibility criteria at all, if their satisfaction depends entirely on the (objectively unknowable) state of the challenger's subjective intentions? The Deed of Gift is an elegantly brief document, and any interpretation that would render any provision essentially superfluous and of no practical import should be avoided. *See In re Buechner*, 226 N.Y. 440, 443 (1919) (Cardozo, J.) ("Words are never to be rejected as meaningless or repugnant if by any reasonable construction they may be made consistent and significant."); *Eidt*, 203 N.Y. at 330 ("[C]ourts should give effect to every word and provision of the will ….").

Second, an interpretation that a Challenger is "having" an annual regatta merely by having an intention to *begin* such a tradition in the future would inject uncertainty and potential for mischief into the entire scheme of the Deed that the settlor surely did not intend. The whole system established by the Deed is that the Defender entertains challenges, and, when it receives a challenge "fulfilling" the conditions of eligibility, the Defender is forbidden from entertaining any other challenge until the first valid challenge received has been resolved. If compliance with the regatta requirement depends on a challenger's subjective, unilateral, and unknowable intentions about the future, how is the Defender to ascertain reliably whether the challenge is valid, and that it preempts subsequent challenges? What if the challenger asserts a desire to begin holding an annual ocean course regatta but there are good reasons to suspect that it lacks either the intent or the ability to do so? The reading urged by SNG and embraced by the Appellate Division majority leaves the Defender with no reliable way to determine its fiduciary obligations as trustee under the Deed, and is an invitation to continual uncertainty, confusion, contention, and litigation.

Third, that reading leaves the Defender exposed to a string of challenges from entities (like CNEV, or a company seeking to profit from the America's Cup publicity opportunities) that go through the minimal legal paperwork of creating a shell corporation, proclaim the best of intentions about seriously challenging for

the Cup and becoming a real yacht club with members, facilities, and regattas, but then in fact do not carry through or do so in an inept manner. The America's Cup is the premier event in sailing, and represents an enormous investment in time and resources by all parties involved. A bungled challenge costs the Defender the expenses associated with building a defending yacht and training a crew (which has always been extremely expensive), ties up the Defender and the whole worldwide yacht racing community for at least ten months during which time no one else can challenge, and threatens to tarnish and devalue the prestige of the Cup as the ultimate prize in sailing. The Deed's eligibility requirements are designed and intended to minimize this vulnerability by allowing only genuine yacht clubs with established sailing traditions—that would presumably seek to protect their reputations in the yachting world—to become Challengers of Record. A shell entity set up for the single purpose of challenging for the America's Cup, like CNEV, necessarily faces no such constraints. (R. at 1027.) And as both the motion court and the dissenting Justices at the Appellate Division correctly recognized, "[a]n established yacht club that has already held an annual regatta is more likely to better understand the ramifications of the race and, thus, be better able to negotiate the terms of a match … than a newly-formed club that has not yet held a regatta." (R. at 48-49); *see also* (R. at 3323) ("[I]t is clear that the donor's intent was to allow for challenges for the Cup from established yacht clubs that

regularly hold annual regattas and not from a club merely organized just for the purpose of challenging for the Cup, without any experience in holding a regatta of this magnitude.")

Fourth, if Challengers of Record are not held to objective and temporally meaningful eligibility criteria, the doors would be opened for abuse by an unscrupulous Defender. The central purpose of the Deed is to ensure that the Cup is "preserved as a perpetual Challenge Cup for friendly competition between foreign countries." (R. at 98.) The Deed takes great care to ensure that the Defender must abide by its fiduciary obligations as trustee and meet any valid challenge, in a relatively short period of time, or forfeit the Cup. But the mutual consent provision represents a potential loophole through which a Defender and compliant pseudo-challengers could hijack the Cup indefinitely. A Defender could install a sham Challenger of Record who will not compete vigorously or (as in this case) will accept a biased Protocol that would be inconsistent with the settlor's intent for a "perpetual challenge Cup." Under the plain words of the Deed, the America's Cup is intended to be a challenger-driven event, wherein a Defender must accept any qualified challenge, and face possible defeat, under the simple and explicit rules in the Deed unless it can mutually agree with the Challenger of Record on other rules. In theory, a Defender and a pliable or captive Challenger of Record could agree to rules giving lopsided advantage to the Defender, or even

specifying a race a hundred years hence. The Deed's only safeguards are the eligibility criteria in the fourth paragraph, which (correctly interpreted and respected) ensure that the Challenger of Record is a serious entity with the means and the incentive to remain independent of the Defender.

SNG attempted to reconcile some of these obvious problems by arguing below that the regatta condition "sets forth a sufficient, but not necessary, qualification for a yacht club to challenge for the America's Cup," and that the Defender can choose to accept a challenge from a club that has not yet held an annual regatta "so long as the yacht club intends to hold an annual regatta and does so prior to the date of its proposed match." Brief for Defendant-Appellant at 5 (1st Dep't filed Apr. 21, 2008); *see also id.* at 6 ("The Deed of Gift expects no more than that a challenger be one having an annual regatta when it seeks to *sail* a match of the Cup, not when the challenge is issued."). That reading essentially concedes the basic grammatical point that the regatta must actually have occurred by some point in time before the race, and just moves the deadline forward by a few months. It provides no basis for distinguishing the regatta requirement temporally from the other eligibility criteria that are essential to the Deed's core purposes. (SNG's reading would, for example, allow a Defender to accept a challenge from any person or entity that intends to become a yacht club—even a bakery or pizza parlor.) Most tellingly, it is also inconsistent with the text and obvious purpose of

the tenth paragraph, which provides that "when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided." (R. at 99.) SNG would apparently permit the Defender to brush aside such a qualifying challenge in deference to any number of prior *unqualified* challenges if it chooses.

SNG's reading also does not genuinely solve the problems identified above. It still leaves the Defender and the sailing community exposed to the risk of an unqualified and amateurish Challenger of Record; it still means that the Challenger of Record may negotiate the Protocol with the Defender without ever having conducted an ocean race of its own; and it still permits the Defender to monopolize the Cup indefinitely by setting up a friendly sham Challenger of Record and then agreeing to a distant race date.

The structure and obvious purposes of the Deed therefore emphatically support the reading that is most naturally suggested by the text: that the Challenger of Record must already possess, at the time of challenge, an annual regatta on an ocean course—and that *hoping to have* an annual regatta does not meet the Deed's criterion in that respect.

II. EVEN IF *ARGUENDO* THE DEED WERE DEEMED AMBIGUOUS, THE RELEVANT EXTRINSIC EVIDENCE COMPELS A READING THAT REQUIRES A CHALLENGER OF RECORD TO MEET ALL THE CONDITIONS OF ELIGIBILITY AT THE TIME OF ITS CHALLENGE

A. The Appellate Division Majority Inexplicably Ignored Key Extrinsic Evidence Of The Settlor's Intent

In a case of true ambiguity in a trust agreement, courts may consider extrinsic evidence as an aid of construction. *See, e.g., Evans*, 1 N.Y.3d at 459. Here, the evidence demonstrates that the Deed's eligibility criteria were meant to exclude mediocre and unqualified yacht clubs, thereby ensuring the prestige of the America's Cup and the likelihood that it would remain an active and "perpetual Challenge Cup for friendly competition between foreign countries." (R. at 98.)

First, SNG's own submission to ACAP 31 stated that Mr. Schuyler intended to protect the prestige and perpetual vitality of America's Cup by allowing only "*eminent* yacht club[s]" to compete. (R. at 742) (emphasis added.) The NYYC's worldwide invitation in July 1857 was sent only to established and eminent clubs, and expressed the desire for "a spirited contest for the Championship." (R. at 742.)

Second, Mr. Schuyler amended the Deed to insert the ocean course annual regatta requirement specifically in response to two failed challenges by second-rate Canadian yacht clubs in 1876 and 1881. The Canadian clubs, situated on the Great Lakes, produced vessels "crude in finish" and "virtually untried," whose performance against the NYYC was viewed by the public as a "farce." (R. at

743.)[12] The NYYC complained that the Canadian challengers came "from a little local club consisting principally of open boats and with *no stated regatta course* for large vessels," and believed that such challenges "failed to comply with the spirit of the intention of the donors and were degrading the standing of the competition and the Club." (R. at 742-43) (emphasis added.) The NYYC therefore returned the Cup to Mr. Schuyler and asked him to amend the Deed of Gift to impose more stringent standards for challengers. (R. at 743.) Mr. Schuyler's new Deed—the second, 1882 version—added conditions including the annual ocean course regatta requirement at issue in this case. (R. at 744.) That history confirms that the regatta requirement was meant to play an important role in weeding out aspiring Challengers of Record that were not (or not yet) likely to mount a world-class challenge for the Cup. As explained by one of the histories in SNG's ACAP 31 submission, the Deed now required that "any challenging club *must have* a course on the sea or an arm of the sea which *served* in its annual regattas." (R. at 744) (emphasis added.) The author's choice of tenses makes perfect sense in the historical context: the club already *must have* a course that has

[12] The notes of J. Frederick Tams, a NYYC member appointed to a committee regarding the America's Cup around the time of the Canadian challenges, provide further detail. (R. at 742-43) ("We see today a vessel constructed by one of our own neighbours on inland waters … being dragged through the mud of the canal on her way to contest for this much coveted emblem. In addition to which she comes, not as the proved and acknowledged champion of the section of the globe from which she hails, and of the model representing the successful type of that part of the world, but crude in finish and appointment and in all unfinished condition …. And further … she comes fresh from the stocks, virtually untried in other words an experiment at the expense of the New York Yacht Club.")

already *served* in its annual regattas. Allowing the requirement to be satisfied merely by aspirations for the future would leave Mr. Schuyler's specific purpose unattained, by permitting the inferior Canadian clubs to challenge again merely by *promising* to have an ocean course regatta.

Finally, to the extent that extrinsic evidence about how later trustees have administered the trust since Mr. Schuyler's death is relevant at all, *see infra* 38-39, a simple survey of the sixteen Challengers of Record from the past thirty-two America's Cup competitions spanning more than a century shows that *every one* was a bona fide yacht club fulfilling the Deed's conditions at the time of its challenge. (R. at 722.) The inference from such a consistent course of conduct, existing even before the most recent version of the Deed itself, is compelling.

B. The Appellate Division Majority Based Its Decision On An Irrelevant Piece Of Extrinsic Evidence

When courts do turn to extrinsic evidence, the inquiry remains focused on the settlor's intent. *See In re Will of Flyer*, 23 N.Y.2d 579, 584 (1969) ("[I]n *every* case in which a will is ambiguous or silent with respect to a controverted matter, *it is the testator's intent which must control* ....") (emphasis added); *In re Estate of Collia*, 475 N.Y.S.2d 237, 241 (Sur. Ct. 1984) ("In a construction proceeding, extrinsic evidence is admissible to explain the intention of the testator where the subject provisions of the will are too ambiguous to supply an indication.") (citation omitted). In contravention of this well-established principle of trust construction,

the majority at the Appellate Division stated, without any analysis or support, that "the Cup's recent history is a source of relevant extrinsic evidence." (R. at 3308.) The majority then went on to base its holding on a single piece of extrinsic evidence—the ACAP 31 decision opining that "[n]either the Deed of Gift nor the Protocol have any provision requiring the annual regatta to have been held prior to the lodging of a challenge." (R. at 664.) This decision by an ad hoc lay panel more than a century removed from the Deed of Gift, deciding an uncontested issue with no adverse party, is completely irrelevant to any real inquiry into Mr. Schuyler's intent in 1887.

The ACAP 31 decision provides no more—and arguably much less—insight on the settlor's intent in crafting the fourth paragraph of the Deed than Justice Cahn's thoughtful opinion in this very case. A trust more than a century and a half old is not like an executory contract, where the ongoing "course of performance" *by the original contracting parties* fairly sheds light on their intent at the moment of contracting. Only a handful of trust decisions have relied on extrinsic evidence of trust performance—and those that have did so in unique circumstances directly involving the settlor. In *Rice v. Halsey*, for instance, the court looked to the trustee's conduct only because it determined that the settlor "never intended to divest himself of the power to direct how the proceeds derived from the foreclosure of the mortgage should be used." 156 A.D. 802, 805 (1st Dep't 1913), *aff'd*, 215

N.Y. 656 (1915). Since the trustee administered the trust at the express direction of the still-living settlor, the trustee's activity remained indicative of the settlor's intent. Likewise, in *Newman v. Newman*, 223 N.Y.S. 488, 491 (Sup. Ct. Erie County 1927), the court noted that it, "fortunately, can turn to the administration of the trust by the creator which ought to be the best evidence of intent." Once again, only the direct involvement of the settlor in the administration of the trust made the subsequent course of conduct relevant. And in *Commercial National Bank & Trust Co. of New York v. Erwin*, 277 A.D. 378, 383-84 (1st Dep't 1950), the court looked to evidence of how the trust was administered because the trustees allowed the still-living settlor continued use of the trust asset: his house.[13]

Here, by contrast, Mr. Schuyler's involvement in the administration of the trust ceased more than a century before the ACAP 31 decision. The ACAP 31

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[13] The Appellate Division in *Mercury Bay*, while reversing the order below, agreed with the motion court "that if consideration of extrinsic evidence is appropriate, the trustee's administration and interpretation of the trust would be persuasive in construing it." 150 A.D.2d at 94; *see Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, No. 21299/87, slip op. at 10 (Sup. Ct. N.Y. County Mar. 28, 1989) ("A trustee's administration of a trust may also be instructive as to the way in which a trust should be construed.") (citing *Rice v. Halsey*, 156 A.D. 802). *Rice* is distinguishable for reasons explained above. In addition, both the motion court and Appellate Division in *Mercury Bay* agreed that the most relevant extrinsic evidence involved Mr. Schuyler directly. The only extrinsic evidence about later trustees actually relied on by the motion court in *Mercury Bay* were the facts that in the history of the Cup no participant had ever raced a multihull, and that Defenders virtually always defended in a vessel closely comparable to that specified by the Challenger of Record. Slip op. at 11. The analogous evidence in this case reveals that in the history of the Cup there has never been a Challenger of Record that had not actually held annual regattas before the time of challenge. (R. at 722.) And of course, in *Mercury Bay* this Court held that "[b]ecause the deed provisions on these issues are unambiguous, we may not look beyond the four corners of the deed in ascertaining the donors' intent and therefore may not consider any extrinsic evidence on the meaning of these provisions." 76 N.Y.2d at 269-70.

decision is evidence of what those particular lay arbitrators believed to be fair and consistent with the AC 31 Protocol in the context presented to them at the time, but it tells us nothing at all about what Mr. Schuyler intended.

The Appellate Division majority also misunderstood the meaning and context of the ACAP 31 decision, which did not even address the issues before this Court. SNG actually *held* its first ocean course regatta before the Defender accepted its participation as a mutual consent challenger in the 31st America's Cup. (R. at 664.) The arbitration panel thus had no occasion to reach the issue of whether a challenger *intending* to hold a regatta would be eligible. The Panel had already found that SNG "has such a regatta." (R. at 665.)

SNG's status as a *mutual consent challenger*, not the Challenger of Record, also means that the arbitration panel was not squarely faced with the issues before this Court. The status of mutual consent challengers is governed, at least arguably, by the Protocol and the mutual consent process rather than the Deed. The Appellate Division majority thought that any distinction between mutual consent challengers and Challengers of Record would be untenable because it "would mean that a yacht club, such as SNG in 2000, could win the Cup, serve as its trustee, and defend it, but lack the capacity to be a Challenger of Record." (R. at 3309.)

Perhaps.[14] But the Appellate Division majority drew the wrong lesson from its own observation, which more naturally suggests that mutual consent challengers must also satisfy the paragraph four qualifications in order to be "entitled to the right of sailing a match of this Cup." (R. at 98.) It makes no sense to defer to the judgment of a lay arbitration panel, a century after trust formation, about the debatable status of mutual consent challengers—and then allow that tail to wag the dog of the Deed's core provisions governed by the settlor's intent at the time of the creation of the Deed.[15] Indeed, as this Court has held, arbitral decisions are "based on the *ad hoc* application of broad principles of justice and fairness in the particular instance," and so "do not have … the precedential value that we attach to judicial determinations." *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 793 (1976). Regardless, the panel was not interpreting the Deed itself, so any implications its reasoning might have for the Deed are arbitral dicta without bearing on this case.

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[14] On the other hand, defeating all other challengers and then also defeating the Defender would arguably prove a mutual consent challenger capable of serving as Defender and trustee of the America's Cup, which is the primary concern of the Deed. It would remain appropriate, however, to require all new Challengers of Record to meet the conditions of the Deed—because they would not have similarly proven themselves worthy either by satisfying the paragraph four criteria or by prevailing against the world's best on the water. This Court need not resolve that issue here.

[15] The majority opinion also sought to draw some significance from the fact that "ACAP 31 received submissions from three other yacht clubs, including the New York Yacht Club, none of which disputed the validity of SNG's challenge." (R. at 3308.) Given that the arbitration was uncontested—perhaps because the Protocol for the 31st America's Cup was already in place and SNG was merely seeking to compete as a mutual consent challenger—it is not surprising that no parties protested SNG's eligibility.

In sum, if extrinsic evidence is to be considered at all (and we urge that it is not at all necessary), the Appellate Division majority clearly erred by focusing only on the ACAP 31 decision, while ignoring the far more relevant and compelling available evidence of the settlor's actual intent.

III. GGYC IS THE LEGITIMATE CHALLENGER OF RECORD

SNG's last-ditch strategy is an effort to question the legitimacy of GGYC's Notice of Challenge on the grounds that the Certificate accompanying it is somehow ambiguous or contradictory, because a superfluous introductory paragraph not required by the Deed characterized GGYC's challenging vessel as a "keel yacht." Although the Appellate Division majority did not reach this issue—and in fact should have summarily dismissed SNG's appeal in this regard[16]—this Court has plenary authority to decide it because the issue was fully briefed and decided by the motion court, and was addressed by the Appellate Division dissent. GGYC respectfully urges this Court to resolve all the open legal issues in this case, because a remittal for further proceedings of any kind would simply introduce

[16] Through its motion to reargue and order to show cause on December 27, 2007 and January 15, 2008 respectively, SNG sought to relitigate its summary judgment motion, which had raised only an unclean hands defense in response to GGYC's claim that it issued a valid challenge. (R. at 26.) Doing so violated the well-established rule against "successive fragmentary attacks upon a cause of action," which requires movants to "assert all available grounds when moving for summary judgment." *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801, 801 (1st Dep't 1962). The Appellate Division should have affirmed the *nisi prius* court's denial of SNG's motion and dismissed SNG's appeal of this issue.

further harmful delay before the next America's Cup can begin, damaging all potential participants.

The "keel yacht" description in GGYC's challenge is both accurate and irrelevant. (R. at 139.4.) As the motion court properly held, SNG has not established that the term "keel yacht" is incompatible with a multihulled vessel. (R. at 30.) Indeed, the record evidence demonstrates that multihull vessels can and do have keels. (R. at 1864, 1872, 2733-35, 2811-36.) A "keel," as defined by *The Sailor's Illustrated Dictionary*, is "a structural member that is the backbone of the ship; it runs along the centerline of the bottom." (R. at 1889.) There is no evidence to suggest that one or more hulls of a multihull vessel cannot contain such a "structural member."

Regardless, it is undisputed that GGYC's disclosure accurately provided to SNG all of the information required by the Deed. The Deed itself demands only the most basic dimensions of the Challenger of Record's vessel:

> Accompanying the ten months' notice of challenger there must be sent the name of the owner and a certificate of the name, rig and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water ....

(R. at 98.) GGYC provided all of that information, and the Deed requires nothing more. (R. at 139.4.) As the *Mercury Bay* court emphasized, the Deed "broadly defines the vessels eligible to compete in the match." 76 N.Y.2d at 266. "Nothing in the deed limits the design of the defending club's vessel other than the length on

water-line limits applicable to all competing vessels, nor are the competing vessels expressly limited to monohulls." *Id.* at 261.

SNG's claims of ambiguity in this respect are also wholly disingenuous. As the dissenting Justices observed at the Appellate Division, "even if the certificate contained a possible ambiguity, SNG was not at any time actually confused or misled by the Certificate, as the record indicates that SNG fully understood that GGYC was going to race a catamaran." (R. at 3325.) "SNG's protestations of confusion are belied by its own reply brief in which SNG acknowledges that GGYC has proposed to compete with a 'catamaran goliath.'" (R. at 3326.) GGYC made it perfectly clear with its challenge, and repeatedly since then, that it was specifying a giant multihull in order to ensure a competitive race if this dispute ends in a default match under the bare terms of the Deed—since this Court held in *Mercury Bay* that in such cases the *Defender* is always entitled to show up at the last minute with a multihull. But GGYC has also made it clear that its preference, then and now, is to negotiate terms for a conventional America's Cup regatta governed by a Protocol similar to the one used in the last Cup. Either way, notwithstanding SNG's unconscionable strategic stall throughout the course of this litigation, GGYC is prepared as Challenger of Record to specify a race date that will give SNG at least another full ten-month period to prepare under the Deed.

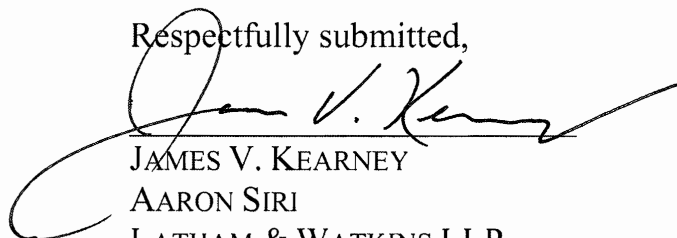
This Court should thus ratify and reinstate the motion court's ruling that GGYC's Certificate of Notice complies with the Deed requirements. (R. at 32.)

CONCLUSION

For the foregoing reasons, Appellant-Plaintiff GGYC respectfully requests that this Court reverse the Appellate Division's order granting Respondent-Defendant SNG summary judgment, and instead reinstate the motion court's order granting summary judgment in favor GGYC, declaring that CNEV is not the valid Challenger of Record, and declaring that GGYC is the valid Challenger of Record.

Dated: September 29, 2008

Respectfully submitted,



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