To be Argued by:
MAUREEN E. MAHONEY
(Time Requested: 30 Minutes)

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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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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REPLY OF PLAINTIFF-APPELLANT GGYC

The Deed of Gift creates eligibility criteria obviously designed to ensure that the Challenger of Record is independent of the Defender and is already capable and experienced enough to mount a challenge worthy of the pinnacle event in sailing. The Deed clearly requires that the Challenger of Record must be an "organized Yacht Club," not a paper entity, and that it must have held an "annual regatta" on an ocean course.

If SNG and CNEV prevail, then the "organized Yacht Club" condition in the Deed means nothing at all. CNEV does not even deny that it is a shell entity—an alter ego for the sailing *federation* RFEV that is admittedly *not* a yacht club. CNEV is not an organized yacht club: it has no members beyond its small board of directors, no boats, no facility, and no telephone number. (GGYC Br. at 10, 23.) SNG's racing team's own general counsel concedes that CNEV is a "paper club." (R. at 730.) SNG and CNEV also concede that CNEV had never held a regatta before its challenge was accepted. CNEV was not even formed until a few days before that challenge.

GGYC initiated this litigation to hold SNG to the terms of the Deed, after SNG and CNEV "agreed" to a Protocol so one-sided that it was swiftly denounced by six teams from the 32nd America's Cup and prompted Louis Vuitton to abandon its long-time sponsorship of the event. (R. at 680-91, 210.) GGYC has

repeatedly emphasized that it wants a multi-challenger event, in conventional monohulled yachts, governed by evenhanded rules like the ones that produced the highly successful 32nd America's Cup. (R. at 102; GGYC Br. at 3.) But the America's Cup is special—indeed, it is unique in the sporting world—precisely because it is not just an open competition among many teams under preexisting rules. It is a *Challenge Cup*, begun anew each cycle when an independent and experienced yacht club claims the right to put the Cup's current holder to the test on whatever terms can be negotiated between relative equals—or under the Deed's default match race terms if negotiations fail.

Elementary grammar and syntax, the overall structure of the Deed, and simple common sense all confirm that the Deed of Gift's eligibility criteria must be satisfied *at the time of challenge*. The tenth paragraph explicitly confirms that these criteria are "conditions required by this instrument," and that the challenge period is ended only by a challenger "fulfilling" all of them. An interpretation allowing a Challenger of Record to *promise* to satisfy the conditions after the notice of challenge but before the time of the match race would contradict the plain language and import of the Deed and would be unworkable. It would expose the Defender, the rest of the sailing world, and the Cup's reputation to dilettante challengers that do not follow through. It also would allow an unscrupulous Defender to tilt the competition in its own favor, as SNG has done with its one-

sided Protocol, or even keep the Cup forever by collaborating with pseudo-challengers willing to do its bidding.

SNG and CNEV offer no real answer to these points. Instead, they argue for a "liberal" interpretation of the Deed so that as many unqualified entities as possible can be Challenger of Record—based primarily on the fact that a few unqualified teams may have been permitted to compete *as mutual consent challengers* in recent years. A few recent oversights as to peripheral competitors cannot be allowed to subvert the Deed's core terms. SNG and CNEV cannot deny that every Challenger of Record in history has complied strictly with the terms of the Deed of Gift. A qualified, strong, and independent Challenger of Record is essential to the basic structure of the competition that the Deed envisions. SNG and CNEV are entitled to hold a different kind of sailing regatta if they choose. If they seek to race in the America's Cup, however, then they must respect and comply with the express terms of the Deed of Gift.

I. FACTUAL CLARIFICATION

Much of SNG's brief is devoted to irrelevant and intemperate attacks on GGYC's motivations. GGYC had no reasonable alternative but to bring this action to enforce the terms of the Deed of Gift, a trust document governed by New York

law as interpreted by the courts of this State. The legal issues presented here[1] center on the Deed's language and the settlor's intent. Complaints that GGYC has too much money, or that GGYC is refusing to go along with SNG's own peculiar conception of what is "fair" or in the best interests of the Cup, are as irrelevant as the similar complaints that this Court rejected almost twenty years ago in *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256 (1990).

SNG implies that GGYC gained some kind of unfair advantage by building a multihull vessel. (SNG Br. at 5, 20, 47.) However, this Court's decision in *Mercury Bay*, which held that the Defender may always defend in a multihull, means as a practical matter that every serious Challenger of Record must specify a large multihull in its initial challenge or be defenseless if the Defender ultimately insists on a default match. GGYC has made it perfectly clear that it built that boat only because SNG refused (and still refuses) to negotiate reasonable rules for a conventional America's Cup. And SNG fails to disclose that *it* began designing a multihull as early as December 2007. (R. at 3159-60.)

SNG attempts to obscure the issues with a host of *new* factual allegations about its supposed preparations for the next America's Cup. Those claims are

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[1] SNG's brief starts from the mistaken premise that "the Appellate Division's reversal was as a matter of law based on findings of fact made at the Supreme Court and are therefore not subject to review." (SNG Br. at 21.) Given that the Supreme Court's order resolved cross motions for summary judgment, neither it nor the Appellate Division made *any* factual findings. This appeal presents a pure legal question appropriate for plenary review by this Court.

outside the record, wholly improper, and should be entirely disregarded. They also are irrelevant to the legal issues before this Court and largely inaccurate. Only because SNG has attempted to place such inappropriate considerations before this Court, GGYC finds itself constrained for fairness and accuracy to correct a few of the misstatements. For example:

- SNG repeatedly suggests that GGYC's victory at the Supreme Court "derailed" planning for the 33rd America's Cup. (SNG Br. at 9, 16.) In fact, SNG itself postponed the event several days *before* Justice Cahn's first ruling on November 27, 2007.[2] SNG's suddenly revived "preparations" began immediately after GGYC filed its opening brief in this Court.

- SNG asserts that "GGYC insisted upon an immediate two-boat match against SNG in 2008, without a challenger selection series." (SNG Br. at 5.) To the contrary, on the very day of Justice Cahn's ruling, GGYC made clear its preference for "a conventional America's Cup competition in Valencia in 2009."[3] GGYC began preparations for a default match only after SNG rejected numerous offers to negotiate toward a fair multi-challenger event.[4] SNG insists on a match race if GGYC prevails in this litigation, and is building its own giant multihull yacht that is "close to being completed."[5] It

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[2] Complaint ¶ 46, *Team New Zealand Ltd. v. Société Nautique de Genève* (N.Y. Sup. Ct. Mar. 6, 2008) (No. 600662/2008).

[3] Matthew Sheahan, "BMW Oracle Wins Court Case," *Yachting World*, Nov. 27, 2007, *at* http://www.ybw.com/auto/newsdesk/20071027215241ywamericascup07.html. Team New Zealand, one of the teams that SNG points to as a supporter of its current plans, has explained in court filings that "Defendants [SNG, Alinghi, and Ernesto Bertarelli] postponed the Cup despite the fact that GGYC offered a settlement proposal to SNG that would have preserved the plans for the 2009 America's Cup race in Valencia. Other challengers, including TNZ, supported this proposal. SNG rejected the proposal." Complaint ¶ 47, *Team New Zealand Ltd.*

[4] Associated Press, "BMW Oracle offers settlement to save '09 Cup," *ESPN Olympic Sports*, Nov. 16, 2007, *available at* http://sports.espn.go.com/oly/news/story?id=3114063; "Golden Gate Yacht Club: Time is running out," *Valencia Sailing*, Dec. 6, 2007, *at* http://valenciasailing.blogspot.com/2007/12/golden-gate-yacht-club-time-is-running.html.

[5] Andy Rice, "No choice but to race Multihulls, says Bertarelli," *SailJuice Blog*, Dec. 11, 2007, *at* http://sailjuiceblog.com/2007/12/11/no-choice-but-to-race-multihulls-says-bertarelli/; Richard

is SNG's intransigence, not GGYC or the Supreme Court's ruling in this case, that threatens to exclude teams from a challenger selection series.

- SNG states that "as many as twenty-one teams plan to compete in the next Cup." (SNG Br. at 4.) SNG later admits that its figure includes teams that are merely "in the process" of submitting a Notice of Entry. (SNG Br. at 16.)[6] Those teams are not necessarily endorsing the SNG-dictated Protocol; they simply have to register (by December 15, a deadline recently set by SNG[7]) in order to preserve their ability to compete should SNG prevail in this litigation, as *amicus* Reale Yacht Club Canottieri Savoia and Mascalzone Latino point out (at 17 n.7).

- SNG says that Protocols are often controversial (SNG Br. at 15), but this one is truly unprecedented—the "worst text in the history of the America's Cup" that has "jeopardi[zed] the participation and survival of the event." (R. at 680-81.) SNG tries to convey the false impression that it has relented on some of the more outrageous aspects of the current Protocol. (SNG Br. at 15.) But SNG continues, for example, to insist on a right to change any of the rules at any time, and to compete against the challengers in most of the challenger selection series races with no scoring consequences to itself. (*Compare* R. at 123 ¶ 5.4(c) *and* R. at 127 ¶ 13.5 *with* R. at 1244-47.) And even if SNG makes additional accommodations in response to this lawsuit, it retains the power to reverse them at will.

- The City of Valencia claims that due to GGYC the next America's Cup may not be held in Valencia. As the Supreme Court recognized, the Deed gives the Defender the right to choose the venue of a default match and therefore SNG has the power to place the next America's Cup in Valencia. (R. at 3347.) Additionally, GGYC has expressed its own preference for Valencia if SNG finally chooses to negotiate for a conventional Cup. (R. at 735, 765, 1420.) And GGYC has already offered to hold the *next* Cup in Valencia if it prevails. (R. at 677, 771.)

Gladwell, "Butterworth explains America's Cup options," *Sail-World.com*, Nov. 10, 2008, *at* http://www.sail-world.com/USA/Butterworth-explains-Americas-Cup-options/50671.

[6] The 33rd America's Cup website only lists twelve entries plus SNG. *See* http://33rd.americascup.com/en/entry.php (last visited Dec. 2, 2008).

[7] "Hill 33," *Seahorse Int'l Sailing* (Jan. 2009), *available at* http://www.seahorsemagazine.com/2009-January/alinghi.php (last visited Dec. 4, 2008).

II. THE PLAIN LANGUAGE OF THE ELIGIBILITY CONDITIONS

As noted above, if SNG and CNEV prevail, then the "organized Yacht Club" condition in the Deed means nothing at all. CNEV claims that it is "a properly organized legal entity under the laws of Spain," which simply equates "organized" with the separate criterion "incorporated" (rendering "organized" superfluous) and completely ignores the requirement that challenges must come from an organized "Yacht Club." (CNEV Br. at 2.)

SNG and CNEV cannot even agree on any consistent reading of the Deed's "having for its annual regatta an ocean water course" requirement. It is quite telling that neither SNG nor CNEV attempts to defend the Appellate Division Majority's obviously flawed reasoning—that this requirement is ambiguous because the sentence lacks any verb to locate the participle "having" in time.[8] As GGYC earlier explained, "having" draws its tense from the other criteria in the fourth paragraph, such as "organized" and "incorporated," which are clearly located in the past tense continuing up to the present. (GGYC Br. at 24-26.)[9] In

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[8] SNG itself demolishes the Appellate Division's other premise—that one cannot "hav[e]" an intangible like a regatta—by suggesting that the word "'having' ... more accurately relates to the course on which a regatta is held rather than the timing of the regatta." (SNG Br. at 26 n.5.) Even if it were somehow improper to speak of "having" or "possessing" an annual regatta, a yacht club can certainly "have" a set course on the sea or an arm of the sea.

[9] CNEV's suggestion that the "imperfect" tense of "having" was "purposely chosen" is nonsense. (CNEV Br. at 11.) As explained in W. M. Baskervill and J. W. Sewell, *An English Grammar for the Use of High School, Academy, and College Classes* §§ 264-65 (1896) (R. at 1363-67), for participles the "imperfect" is a "voice," not a "tense," and means only that an action is "incomplete"—*i.e.*, that it has started in the past but is not finished yet. Mr. Schuyler purposely

context, "having" means "with," indicating that the Challenger of Record must be a yacht club that already has an ongoing tradition of "annual" regattas.

There is no plausible justification for distinguishing the regatta condition from the others. CNEV concedes that "the [yacht] club must have been 'incorporated, patented, or licensed' prior to issuing a challenge." (CNEV Br. 12.) Use of the canon of construction *noscitur a sociis* here does not, as CNEV suggests, "change the tense" of the word "having" because, as SNG recognizes, "the word 'having' is neutral as to timing." (CNEV Br. at 13; SNG Br. at 23; *see also* R. at 3307.) Rather, *noscitur a sociis* provides a tell-tale sign as to what its tense *is*. [10]

CNEV attempts to distinguish the regatta condition on the grounds that "having" is "naturally forward-looking" or cast into the future by the verb "shall." (CNEV Br. at 11-12.) The Deed does use the word "shall" to refer to a future right. From Mr. Schuyler's perspective, all the matches governed by the Deed would be in the future. But to claim that right in the future, the challenger must *already* "hav[e]" an annual regatta. The phrasing is like the Twelfth Amendment, which provides that "[t]he person having the greatest number of votes" in the

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chose an imperfect participle to distinguish the regatta condition, which requires an ongoing state, from the other conditions ("organized," etc.) which can be fully accomplished.

[10] SNG misunderstands the purpose of canons of construction when it claims that *noscitur a sociis* is inapplicable "unless the relevant language is ambiguous." (SNG Br. at 26.) Canons help to determine *whether* an unclear word or phrase is ambiguous—*i.e.*, whether it is capable of more than one reasonable interpretation.

Electoral College "shall be the President." U.S. Const. amend. XII. A "bona fide intention" to have the most votes does not make one president, and a "bona fide intention" to have an annual regatta is not the same as "having" one. (CNEV Br. at 2.) CNEV even concedes that "for a historical regatta to be deemed 'annual' or 'usual,' it must of course have been held at least twice." (CNEV Br. at 14.)[11]

Finally, SNG argues that the Deed does not "specify *any* qualifications that must be met at the time a challenge is submitted, rather than at the time 'of sailing a match for this Cup.'" (SNG Br. at 11 (quoting R. at 98) (emphasis added).) SNG appears to be suggesting in the alternative (1) that the eligibility conditions—all of them—need only be satisfied by race time rather than at the time of challenge, or (2) that the eligibility conditions are optional and can be cast aside by the Defender (SNG Br. at 28). As explained below, neither argument is a reasonable interpretation of the Deed.

III. THE STRUCTURE AND PURPOSES OF THE DEED

A settlor's intent is determined "not from a single word or phrase but from a sympathetic reading of the will as an entirety." *In re Fabbri's Will*, 2 N.Y.2d 236, 240 (1957); *see also Williams v. Jones*, 166 N.Y. 522, 532-33 (1901) (the donor's "intention is to be ascertained from the whole will taken together, rather than from

[11] CNEV downplays the import of this concession by pointing to GGYC's observation (GGYC Br. at 40) that SNG was not allowed to participate as a mutual consent challenger until after it had held a *single* regatta. GGYC never stated that SNG was eligible to be *Challenger of Record* under the Deed. (GGYC Br. at 40.)

any particular provision considered by itself"). SNG itself urges this Court to consider the words of the Deed "'in the light of the obligation as a whole.'" (SNG Br. at 27 (quoting *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998).)

However, Respondents ignore the tenth paragraph of the Deed, 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.) The only reasonable reading of the Deed, in light of this provision, is that a Challenger of Record must satisfy "all" of the eligibility conditions *by the time its challenge is "received."*[12]

SNG disparages paragraph ten as a "snippet" and argues that it would be a "strained construction" to use that paragraph "to read additional requirements into the Deed of Gift." (SNG Br. at 7, 24.)[13] SNG misses the point. Paragraph ten imposes no "requirements" itself, but it does provide a crucial temporal reference point for the eligibility conditions. It shows that George Schuyler expected that it would be possible, *at the time the challenge is received,* for the Defender and other

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[12] SNG's suggestion that GGYC never raised this argument before is simply mistaken. *See* Br. for Plaintiff-Respondent at 27-28, 33 (May 9, 2008).

[13] SNG understands the relationship between paragraphs four and ten. In its April 21, 2008 brief to the Appellate Division (at 17), SNG explained that upon receiving GGYC's challenge "SNG promptly informed GGYC that SNG had already received a valid challenge from CNEV and that the Deed of Gift explicitly barred consideration of another challenge until the pending challenge of CNEV had been decided." *See also* (R. at 140). And SNG's brief to this Court explains that "[w]hile GGYC issued a subsequent challenge, the Deed of Gift prohibits consideration of any other challenge while a valid accepted challenge is pending." (SNG Br. at 6.)

interested parties to ascertain whether a challenger was already "fulfilling" the eligibility conditions, so that other prospective challenges must be declined. A mere intention to fulfill those conditions *by the time of the race* does not provide the Defender and other potential challengers with enough information to determine objectively whether a challenge is valid, and whether the challenge period is closed. And under the plain words of the Deed, the conditions "required by this instrument," are not optional and waivable as SNG contends. (SNG Br. at 28.) This Court has repeatedly rejected interpretations of legal instruments rendering provisions meaningless or of no effect. *See, e.g., Corhill Corp. v. S. D. Plants, Inc.*, 9 N.Y.2d 595, 599 (1961) ("It is a cardinal rule of construction that a court should not adopt an interpretation which will operate to leave a provision ... without force and effect.") (internal quotation marks and citations omitted).

CNEV mistakenly contends that the word "fulfilling" "leaves open when the conditions may be fulfilled instead of requiring that they have been fulfilled by the time of the challenge." (CNEV Br. at 13-14.) However, the Deed closes the challenge period only when a challenge from a yacht club "fulfilling" the paragraph four requirements "*has been* received"—indicating that all of the conditions must already have been met at the time of challenge. Paragraphs four, seven, eight, and nine of the Deed similarly use imperfect participles immediately following the word "Cup," such as "the Club holding the Cup" or "[t]he Club

challenging for the Cup." (R. at 98-99.) Those phrases clearly refer to a yacht club that *already* holds the Cup, or is *already* challenging for it. CNEV's reading would permit yacht clubs that merely *aspire* to defend the Cup and challenge for it to stage an America's Cup race between themselves, which is clearly absurd.

Respondents' proposed reading of the Deed also would produce a challenge process that is utterly unworkable as a practical matter, and that Mr. Schuyler could not have intended. This Court should reject a construction of the Deed that would lead to such an "absurd and illogical result." *In re Farmers' Loan & Trust Co.*, 189 N.Y. 202, 205 (1907); *see also In re Med. Soc'y of N.Y. v. State of N.Y. Dep't of Health*, 83 N.Y.2d 447, 451-52 (1994). In its opening brief, GGYC made four points to which SNG and CNEV offer no response at all.

- *First*, allowing the Challenger of Record simply to promise to fulfill eligibility criteria makes a mockery of George Schuyler's choice of the phrase "conditions required by this instrument." (GGYC Br. at 29.)
- *Second*, permitting the Challenger of Record to satisfy the conditions at any point prior to the match would introduce an unacceptable degree of uncertainty into the competitive architecture of the America's Cup, forcing the Defender and the sailing community to make judgments about the Challenger of Record's subjective intentions. (GGYC Br. at 30.)
- *Third*, this uncertainty would expose Defenders and the Cup's long-term reputation to the risk of unqualified or even unscrupulous Challengers of Record that default at the last minute or simply fail to field a serious challenge in the end. At least ten months of preparation by the Defender would be squandered—including the enormous expense of building a defending yacht, training a crew, and organizing the event—during which time no other yacht club could submit a challenge. (GGYC Br. at 30-31.)

- *Fourth*, the conditions are obviously designed to ensure that the Challenger of Record has, at the time of challenge, the means and desire to serve as an independent counterweight and adversary for the Defender. Without objective eligibility criteria the Defender can set up a sham challenger and gain complete control over the Cup. (GGYC Br. at 32-33.) The Deed specifically describes the event as a Challenge Cup and contemplates a *challenge* that the Defender must meet or otherwise forfeit the Cup—not a race that the Defender can delay indefinitely or in which the Defender can dictate the terms of engagement to avoid a real defense of the Cup.

SNG's suggestion that the Deed allows "the Defender to accept a challenge from a yacht club" that will not *ever* "strictly satisfy[] the challenge criteria set forth in the Deed of Gift" takes these absurdities to a whole new level. (SNG Br. at 28.) SNG claims that the word "always" would otherwise be superfluous, but the word "always" is there to protect the Challenger of Record against a Defender erecting additional eligibility conditions beyond those named specifically in the Deed. George Schuyler believed that the eligibility conditions were crucial to protecting the spirit and prestige of the America's Cup as he envisioned it. SNG's reading would allow the Defender to ignore the eligibility criteria entirely—which would render them meaningless and make paragraph ten unworkable. SNG suggests that the Defender's whim would nonetheless be constrained by its "fiduciary duty to tend to the Cup while it possesses it," which "requires screening 'mediocre and unqualified yacht clubs.'" (SNG Br. at 29.) Mr. Schuyler's intent was obviously not to depend on general fiduciary principles as he wrote a trust instrument that contains explicit and objective requirements for eligibility. SNG's

resort to fiduciary principles alone threatens to enmesh the New York courts in exactly the kind of endless litigation over subjective judgments that this Court sought to foreclose in *Mercury Bay*.

Even CNEV does not agree with SNG's radical interpretation of the Deed. Its brief admits that the "organized Yacht Club" and "incorporated" conditions are "requirements of the Deed" that must be satisfied at the time of challenge. (CNEV Br. at 1, 12.) CNEV was created because the sailing federation RFEV believed that it was ineligible, and that it was necessary to incorporate as a yacht club in order "to meet the requirement in the Deed of Gift that a challenge be made by a yacht club." (SNG Br. at 43.) In the 32nd America's Cup, SNG itself interpreted the Deed to require proof of eligibility at the time of challenge *even for mutual consent challengers*. (SNG Br. at 42-43.) In response to an inquiry from the New York Yacht Club ("NYYC"), SNG wrote that it confirmed RFEV's eligibility "'[b]efore accepting [its] challenge.'" (GGYC Br. at 22 (quoting R. at 706).)

IV. EXTRINSIC EVIDENCE

In order to argue for a "liberal and inclusive" interpretation of the Deed, SNG claims that the Deed "has consistently and invariably been interpreted to allow yacht clubs who never previously held an annual regatta to challenge for the Cup as long as they conduct ... a regatta in advance of the America's Cup." (SNG Br. at 8.) SNG's "challenge for the Cup" phrasing is misleading, as its meager

examples relate only to *mutual consent challengers*, not Challengers of Record. SNG's arguments should be rejected, for three reasons.

First, SNG's arguments are irrelevant as a matter of law. Trust documents are to be interpreted according to their terms and the settlor's intent, not a litigant's view of what would be more "liberal" or "inclusive." And neither SNG nor CNEV respond meaningfully to GGYC's point that extrinsic evidence of a trustee's "course of performance" is relevant only to the extent that it sheds light on the *settlor's* intent. (GGYC Br. at 37-39.) The one case SNG cites (at 34), *Starr v. Starr*, 132 N.Y. 154, 159 (1892), involved an interpretation that "was adopted by the parties to the contract" so that their actions were directly relevant to determining their own original intent. Neither the decisions of recent trustees nor the decisions by recent arbitral bodies can shed any meaningful light on Mr. Schuyler's intentions when he drafted this trust 120 years ago. Indeed, Mr. Schuyler was skeptical of appeals to America's Cup precedent over the Deed's text. In a decision rendered in September 1887, resolving a dispute over the dimensions of competing vessels, he stated that "any decision reached in any one case cannot be used as a precedent in any other which may arise." (R. at 1851.)

Second, SNG paints a misleading portrait of the Cup's history, in several ways. Every Challenger of Record in history had already sailed its annual regatta before its challenge was accepted. SNG points to various examples of arguably

unqualified *mutual consent challengers*, but this case is about whether CNEV is qualified to be the Challenger of Record. And the record does not even contain one clear example of a mutual consent challenger that was accepted before its first regatta. SNG points to itself, and to the decision of the 31st America's Cup arbitration panel that allowed it to compete. But SNG had held a regatta on the sea before its entry was even conditionally accepted. (R. at 663-64.) The arbitration panel's holding was that "SNG has such a regatta." (R. at 665.) SNG tries to make something of the fact that GGYC did not object to SNG's participation in the 31st America's Cup, but GGYC had no obligation or reason to object at that time. GGYC was not in charge of evaluating eligibility—and SNG was only a prospective mutual consent challenger, it was a real organized yacht club, and it had already held a regatta by the time its participation was accepted.

SNG says that the NYYC accepted the Secret Cove Yacht Club as a mutual consent challenger prior to its first regatta, but the letter it cites does not support that assertion. (SNG Br. at 35; R. at 646.) To the contrary, it explains that the NYYC is only "prepared to accept" Secret Cove's challenge if it has at least 100 members, maintains a legitimate clubhouse and anchorage, and holds an annual regatta in each year leading up to the 1983 Cup, including in 1983. (R. at 646.) The NYYC characterizes Secret Cove as merely a "potential challenger." *Id.*

Other correspondence in the record confirms that both the NYYC and the Royal New Zealand Yacht Squadron ("RNZYS"), another former Defender and trustee, have concluded that the Deed's eligibility criteria are mandatory and must be satisfied at the time of challenge. In a letter to SNG concerning the possibility of RFEV becoming a mutual consent challenger, the NYYC explained that "the clear mandate of the Deed of Gift ... require[s] that each and every challenge be submitted by a yacht club," and that the Deed "does not invest Société Nautique de Genève with the authority to waive or alter the express requirements that a challenge must be submitted by a yacht club." (R. at 713.) The RNZYS agreed that "a challenge must be submitted by a yacht club." (R. at 708.)

SNG points to six other clubs that it contends were accepted as mutual consent challengers in the past twenty years despite only recent or questionable *incorporation* status. But SNG admits that Mercury Bay Boating Club[14] (which is the only Challenger of Record in its list and which was a club of long standing before its formal incorporation) and Sun City Yacht Club were both incorporated prior to their challenges. (SNG Br. at 36.) The RNZYS was licensed by the British Admiralty—designated by a warrant to fly the Blue Ensign—more than one hundred years ago. (R. at 716, 719-20.) And the record provides no support for SNG's disingenuously phrased insinuation that the Nippon Yacht Club "does not

[14] CNEV's brief claims inaccurately that the Mercury Bay Boating Club "eventually won and defended the Cup." (CNEV Br. at 10.)

appear" to have been incorporated. (SNG Br. at 36; R. at 573.) In the end, SNG can point to only the Southern Cross Yacht Club and the Cortez Sailing Association as clubs that may have been permitted to participate as mutual consent challengers despite a defect in incorporation, plus RFEV—which SNG forthrightly concedes is "not even a yacht club." (SNG Br. at 37.)[15] Three recent mistakes by trustees (the most egregious of which was committed by SNG itself) concerning mutual consent challengers do not constitute a "consistent[] and invariabl[e]" tradition with regard to Challengers of Record. (SNG Br. at 8.) As noted, every Challenger of Record in history has complied strictly with the Deed's terms.[16]

SNG argues that a distinction between Challengers of Record and mutual consent challengers "finds no support in the Deed of Gift." (SNG Br. at 37.) The Deed of Gift does not provide for mutual consent challengers at all; it contemplates one challenger at a time conducting consecutive one-on-one match races with the Defender, and assigns that single challenger (what we now call the Challenger of Record) particular rights—to agree by mutual consent to the conditions governing

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[15] SNG cites the Supreme Court's approval of the Chicago Yacht Club, which held its regattas on a lake. The ACAP 31 panel correctly concluded that "the *Chicago Yacht Club* decision is of limited if any value as a binding or persuasive precedent" because the proceeding was uncontested, the court supplied no reasoning, and its decision is plainly wrong. (R. at 666.)

[16] SNG suggests that as Challenger of Record in the 32nd America's Cup, GGYC was complicit in RFEV's illegitimate participation. (SNG Br. at 37.) The record demonstrates, however, that the Protocol for the 32nd America's Cup empowered the Event Authority controlled by SNG to set "[t]he terms and conditions on which all challenges (other than the challenge of the Challenger of Record) must and will be accepted to compete in the Challenger Selection Series." (R. at 323 ¶ 3.4.) The Protocol also defined "Challenger" as "'a Yacht Club whose challenge has been accepted by SNG.'" (R. at 319 ¶ 1.1(e).) GGYC had no role in this process.

the match, and to keep the Defender honest by insisting on a match under the default provisions if necessary. Until that challenge is completed, the challenge period is closed to other prospective challengers. Mutual consent challengers do not have those rights and do not play those roles, and therefore are quite peripheral to the basic scheme of the Deed. For that reason, trustees (and other competitors) might be excused for occasional lapses in policing the eligibility requirements for mutual consent challengers—assuming those requirements in the Deed apply to mutual consent challengers at all. Such oversights cannot be permitted to corrupt how the Deed's core provisions are interpreted. RFEV also admits that the distinction matters. Although RFEV had competed as a mutual consent challenger, it felt compelled to create CNEV because it did not believe it (RFEV) was qualified to be the Challenger of Record. (SNG Br. at 43.) And several Protocols have imposed eligibility criteria on mutual consent challengers that are much *more* stringent than those in the Deed, criteria that could never be enforced against the Challenger of Record. (*E.g.,* R. at 740-41.)

Third, the *relevant* extrinsic evidence shows that America's Cup history is *not* "replete with evidence of liberal, inclusive interpretation[s] of the Deed of Gift," particularly when it comes to the qualifications of the Challenger of Record. (SNG Br. at 30.) Mr. Schuyler amended the Deed several times in order to ensure challenges would be from *eminent* yacht clubs. (R. at 742; *see also* R. at 744 ("It

has been assumed by the donors of the Cup that 'friendly competition' for it would involve only champion vessels and expert crews.").) Notes from a member of the NYYC America's Cup committee who was a contemporary of Mr. Schuyler indicate that Mr. Schuyler expected that a challenging yacht would be "the proved and acknowledged champion of the section of the globe from which she hails." (R. at 743.) The failure of two Canadian yacht clubs to meet this standard led Mr. Schuyler to revise the Deed and impose stricter eligibility requirements. (R. at 744.)[17] Those requirements are not "liberal" and "inclusive" to "ensure[] that the widest possible number of international competitors are given the opportunity to sail." (SNG Br. at 31.) They are deliberately *exclusive*, to ensure that second-rate competitors are *not* given the opportunity to challenge for the America's Cup. Calling for a "liberal" interpretation of restrictions on eligibility is just another way of saying that the Deed's restrictions and requirements should be ignored.

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[17] SNG claims that the "[t]he problem with these challenges was not that the clubs had not held a regatta prior to lodging a challenge, but [that] the vessels used to race were unseaworthy." (SNG Br. at 39.) "The purpose of the annual regatta clause," SNG reasons, "was therefore not on the timing or frequency of the regattas, but rather on the location of the regatta." (SNG Br. at 40.) This is a false distinction; Mr. Schuyler cared about both timing and location. He elected not just to require an ocean water course, but also to demand that an annual regatta take place on it. SNG speculates that "[s]o long as the challenging yacht club held a qualifying regatta prior to the time it sailed a match for the right to hold the America's Cup, Mr. Schuyler's purpose was served because the likelihood that the challenging yacht club would show up to race for the America's Cup in a non-'seagoing' vessel was greatly diminished." (SNG Br. at 40.) Mr. Schuyler would have wanted the challenger to have real ocean racing experience prior to beginning construction of its boat and before putting the Defender to the considerable expense of preparing to defend.

SNG protests that "[t]here is simply nothing to support the inference that Mr. Schuyler intended to exclude a yacht club that was *capable of* and *intended to* hold a qualifying regatta on an ocean water course on the sea before its vessel sailed a match for the Cup." (SNG Br. at 41.) The text of the Deed best manifests Mr. Schuyler's intent. But history also proves SNG wrong. The very first challenge ever tendered for the America's Cup, from James Ashbury with the yacht *Cambria*, was rejected by the NYYC because it did not "come through a regularly organized foreign yacht club." Winfield M. Thompson & Thomas W. Lawson, *The Lawson History of the America's Cup* 48 (1902). Mr. Ashbury was clearly capable of finding a yacht club sponsor and later did so, but the NYYC did not consider either potential or promises to be sufficient under the Deed. *Id.* at 48, 51.

Indeed, SNG's arguments ignore the "organized Yacht Club" requirement altogether. The Cup's history reveals that trustees (other than SNG) have always insisted upon strict adherence to the rule that no challenge will be entertained unless and until it comes through an appropriate, organized yacht club. That tradition stretches from the NYYC's rejection of the *Cambria* challenge in Mr. Schuyler's own day, to the strong objections by the NYYC and the RNZYS to RFEV's challenge just a few years ago. *Supra*, at 17, 21. Mr. Schuyler thought it was crucially important that the Cup be contested by *yacht clubs* rather than by individuals or other proxies. Laundering a non-qualifying challenge through a

shell entity that exists only on paper is plainly inconsistent with his intent and with the Deed's core requirements.

Finally, SNG suggests that Mr. Schuyler "realiz[ed] that the Deed of Gift could at times become 'inadequate to meet the intentions of the donors.'" (SNG Br. at 38.) The quotation is journalistic commentary, not Mr. Schuyler's words, and it refers to the 1857 Deed that Mr. Schuyler amended to *add* the heightened eligibility conditions now in place. The same article recounts that "Mr. Schuyler had always stoutly maintained that the last deed is a fair one, holding this belief to his death." (SNG Br. at 30.) If SNG believes that the Deed does not meet the donors' intentions because circumstances have changed, its only remedy is to bring a cy pres action under EPTL § 8-1.1 before the proper New York court.

V. GGYC'S VALID CHALLENGE

SNG's brief does not raise any serious question about the correctness of the Supreme Court's decision (R. at 28-31), confirmed by the Appellate Division dissenters (R. at 3324-26), that GGYC's own challenge (R. at 101-03) is valid. SNG does not respond to the procedural defects of SNG's appeal on this issue. (GGYC Br. at 42 n.16.) And SNG does not contest that GGYC provided in its challenge certificate all the information required by the Deed. (SNG Br. at 43-47.) Mr. Schuyler wanted the Defender to know the basic maximum dimensions of the challenging yacht, so that the Defender could choose to meet the challenge in a

vessel of similar size if it chose. *See Mercury Bay*, 76 N.Y.2d at 267-68. SNG has that information. SNG tries to read into the Deed a new requirement for an "accurate and complete description of the challenging vessel so that the Defender may prepare its defense" (SNG Br. at 45), but the Deed requires only minimal dimensions from the challenger. (R. at 98.) As this Court explained in *Mercury Bay*, the design and construction of the vessels is an integral part of the competition. 76 N.Y.2d at 269. The Deed gives the Defender many advantages, but no right to blueprints for the Challenger's yacht, and no right to evade a valid challenge by demanding additional information. There is nothing unfair about that. The Deed does not give the Challenger of Record a right to know *anything* about the Defender's yacht.

SNG argues that GGYC's certificate "contains inaccuracies and inconsistencies that make it invalid," specifically that GGYC used the term "keel yacht" when the specified dimensions clearly describe a multihull. (SNG Br. at 46.) As GGYC's opening brief explained, according to the *Sailor's Illustrated Dictionary*, a "keel" is "'a structural member that is the backbone of the ship; it runs along the centerline of the bottom.'" (GGYC Br. at 43 (quoting R. at 1889).) There is ample evidence in the record that multihulls can and do have keels and can contain such a "structural member." (R. at 1872; 2733-36 ¶¶ 3, 5, 6; 2811-36.)

Regardless, as the Supreme Court cogently concluded, SNG was not actually confused by GGYC's phrasing. (R. at 3325-26.) SNG has repeatedly conceded that it was well aware that GGYC's certificate referenced a multihull. (*E.g.*, R. at 797 ("These dimensions can only be for a multi-hulled vessel ...."); R. at 1022 ("These dimensions (a square) can only be a multi-hulled vessel ...."); R. at 1876 ("GGYC expressly demands to race an exclusive match race against the Defender in 90ft catamarans ....").) True to form, even SNG's brief before this Court notes that "GGYC's challenge specifies a multi-hull boat literally the size of a baseball diamond—90 feet by 90 feet." (SNG Br. at 5.)

SNG claims that the Supreme Court should have referred determination of the validity of GGYC's certificate to an international sailing jury. (SNG Br. at 43.) In *Mercury Bay* this Court held that certain racing disputes should be resolved in that manner pursuant to the Defender's sailing rules and the Deed's provision that races "'shall be sailed subject to [the Defender's] rules and sailing regulations *so far as the same do not conflict with the provisions of this deed of gift.*'" 76 N.Y.2d at 266 n.1 (quoting R. at 99) (emphasis altered). But the basic eligibility criteria for the Challenger of Record are spelled out in the Deed of Gift, not the Defender's sailing regulations. SNG's sailing regulations, whatever they might be, cannot nullify the Deed of Gift's clear mandate that a Challenger of Record satisfying *the*

Deed's criteria shall always be entitled to challenge.[18] Nor can SNG's private rules displace this Court's jurisdiction to interpret and enforce the terms of a New York trust document.

VI. CONCLUSION

For the foregoing reasons, and for all the reasons presented in its opening brief, Appellant-Plaintiff GGYC respectfully requests that this Court reverse the decision of the Appellate Division and reinstate the orders issued by the Supreme Court in their entirety.

[18] SNG tacks on a new argument that GGYC failed to supply a custom-house registry of the challenge vessel "'as soon as possible.'" (SNG Br. at 47 (quoting R. at 99).) SNG did not raise this argument at the Supreme Court or in the Appellate Division, and it rests on unsupported extra-record factual allegations. SNG's registry allegations are not a part of this case and should be wholly disregarded.

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