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HIGHLIGHTS OF GGYC'S RESPONSE TO SNG AND CNEV BRIEFS AT THE NEW YORK STATE COURT OF APPEALS

December 5, 2008 – Today, the Golden Gate Yacht Club (GGYC) submitted its reply brief to the New York State Court of Appeals in its suit over the future of the America's Cup. The San Francisco-based club is asking the court to declare GGYC the legitimate Challenger of Record, and to reinstate the initial Supreme Court ruling that Club Náutico Español de Vela's (CNEV's) challenge in 2007 to Société Nautique de Genève (SNG), the Swiss club that holds the Cup, is invalid under the "Deed of Gift," the 19th century document that governs the oldest trophy in international sport.

The following are verbatim excerpts from today's 26-page brief illustrating SNG's and CNEV's disregard for the facts in their arguments to the Court:

Why GGYC Brought This Action (pp. 1-2):

"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. 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."

What the Deed of Gift Requires (pp. 1, 14):

"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. SNG's racing team's own general counsel concedes that CNEV is a 'paper club.' 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."

"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."

Why the Eligibility Criteria of the Deed of Gift Matter (pp. 2, 3):

"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."

"[T]he 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."

"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."

Why GGYC Built a Trimaran (p. 4):

"SNG implies that GGYC gained some kind of unfair advantage by building a multihull vessel. 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."

How SNG Twists the Truth About the Next America's Cup (p. 5-6):

"SNG repeatedly suggests that GGYC's victory at the Supreme Court 'derailed' planning for the 33rd America's Cup. In fact, SNG itself postponed the event several days *before* Justice Cahn's first ruling on November 27, 2007. 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.' 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.' GGYC began preparations for a default match only after SNG rejected numerous offers to negotiate toward a fair multi-challenger event. 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.' It 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 later admits that its figure includes teams that are merely 'in the process' of submitting a Notice of Entry. Those teams are not necessarily endorsing the SNG-dictated Protocol; they simply have to register (by December 15, a deadline recently set by SNG) 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.

"SNG says that Protocols are often controversial, 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.' SNG tries to convey the false impression that it has relented on some of the more outrageous aspects of the current Protocol. 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. And even if SNG makes additional accommodations in response to this lawsuit, it retains the power to reverse them at will."

SNG and CNEV Offer No Response to Four Key Points Made in GGYC's Opening Brief (pp. 12-13):

"*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.'

"*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.

"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.

"*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. 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."

Why GGYC's Challenge is Valid (pp. 22, 24-25):

"SNG's brief does not raise any serious question about the correctness of the Supreme Court's decision, confirmed by the Appellate Division dissenters, that GGYC's own challenge is valid. SNG does not respond to the procedural defects of SNG's appeal on this issue. And SNG does not contest that GGYC provided in its challenge certificate all the information required by the Deed."

"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. Nor can SNG's private rules displace this Court's jurisdiction to interpret and enforce the terms of a New York trust document."

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