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

Golden Gate Yacht Club, Plaintiff, v. Societe Nautique de Geneve, Defendant, Club Nautico Espanol de Vela, Intervenor-Defendant.	Index No. 602446/07

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE ORDER AND JUDGMENT AND FOR CONTEMPT

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Golden Gate Yacht Club ("GGYC") respectfully submits this memorandum of law in support of its motion for relief at the foot of a judgment and to hold defendant Societe Nautique de Geneve ("SNG"), current defender and trustee of the America's Cup ("Cup"), in contempt for its willful violation of an order and judgment of this Court dated April 7, 2009 ("Order and Judgment").

UNDISPUTED FACTS PROVE THAT SNG HAS WILLFULLY DEFIED THIS COURT'S ORDER AND JUDGMENT

The Order and Judgment was entered pursuant to the direction of the Court of Appeals in its Remittitur dated April 2, 2009. (Exs. A, B).[1] It provides that GGYC is the Challenger of Record for the next America's Cup match against the current holder and defender of the Cup, defendant SNG. Id. Further, it set the dates for that match:

> [T]he dates for the challenge match races *shall be ten calendar months from the date of service of a copy of this order, with notice of entry, upon the attorneys who have appeared herein*, unless said date is a Sunday or legal holiday, in which case the next day shall be the first date of the challenge match races. The second date shall be two business days thereafter and the third date, if necessary, shall be two business days after the second race. Notwithstanding the above, the parties may mutually agree in writing to other dates.

(Ex. A at 4-5) (emphasis supplied).

GGYC served a copy of the Order and Judgment, with notice of entry, upon SNG's attorneys on April 7, 2009. (Ex. C). Ten calendar months from that date of service is Sunday, February 7, 2010, and hence the Order and Judgment provides that the first race for the next America's Cup match shall be held on February 8, 2010, the second on February 10, 2010 and a third, if necessary, on February 12, 2010.

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[1] All citations in the form "Ex. __" refer to exhibits to the affirmation of James V. Kearney, dated April 27, 2009.

In willful violation of the Order and Judgment, and the authority of this Court and that of the Court of Appeals, SNG unilaterally dictated that "the scheduled dates for the match *shall be* 3 May 2010 for the first race, 5 May 2010 for the second race and if required 7 May 2010 for the third race." Letter from SNG to GGYC, dated April 23, 2009 ("SNG's April 23rd Letter") (Ex. D at 2 ¶ 3) (emphasis supplied).

Worse yet, SNG has publicly defied the legitimate authority of this Court and the Court of Appeals by announcing to the media that the match will be in May, not February, 2010, which has then been reported by media outlets and publications around the world, including, *inter alia*:

- The New York Times, April 24, 2009 (SNG's racing team, Alinghi, stated "it was preparing to race BMW Oracle in multihulls *as soon as May 2010.*"). (Ex. E) (emphasis supplied).
- The Times (London), April 24, 2009 ("the Swiss side now say they will accept the challenge to race in May 2010"). (Ex. F).

Certain of the worldwide media have reported that SNG's selection of a May 2010 match is in defiance of the Order and Judgment, including, *inter alia*:

- Sailing-World, April 23, 2009 ("SNG/Alinghi also announced that they would Defend in May 2010, and [sic] apparent contravention of a New York Supreme Court order requiring a match to be sailed on 8 February 2010."). (Ex. J).
- The New Zealand Herald, April 24, 2009 ("Alinghi announced that they would defend in May 2010 - an apparent contravention of a New York Supreme Court order requiring a match to be sailed on February 8, 2010."). (Ex. G).
- Detriot Free Press, April 24, 2009 ("the Swiss Alinghi Team continued to insist that the multihull race would take place in May, 2010, rather than February, 2010 as the New York Supreme Court has ruled"). (Ex. I).

See also (Ex. H at 1) ("the Cup could bounce back into court if [SNG's racing team] Alinghi maintain their insistence the one-on-one America's Cup challenge in giant multi-hulls should be run in May 2010 rather than the February 8 date as set down by the US Court of Appeal ").

SNG has also refused to comply with a second mandate of the Order and Judgment. It provides:

> ORDERED that the location of the match shall be in Valencia, Spain or any other location selected by SNG, *provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match* of the location it has selected for the challenge match races.

(Ex. A at 5) (emphasis supplied). SNG is thus required to inform GGYC by August 8, 2009 -- which is six months from the date set for the first challenge match -- whether the match will be held in Valencia, Spain, or some other location. Id. In willful defiance of the Order and Judgment, SNG has declared that it will provide such notice of the location of the match race as late as December, 2009 -- not August 8, 2009 as required by the Order and Judgment. (Ex. D at 3 ¶ 5).

ARGUMENT

This Court has the authority to impose fines and to award other relief under its inherent and statutory authority to enforce a judgment. See, e.g., Jud. Law § 753(A)(3) (2009) (court has the power to punish, by "fine and imprisonment, or either . . . [a] party to the action or special proceeding . . . for any . . . disobedience to a lawful mandate of the court"); Jud. Law § 773 (2009) (authorizing fines "sufficient to indemnify the aggrieved party" or for "costs and expenses" plus additional specified amount); McCain v. Dinkins, 84 N.Y.2d 216, 228-30 (1994) (affirming "remedial" relief as "within the discretionary, equitable powers of the courts," noting that even ordering city officials to spend a night in an emergency assistance unit as punishment for civil contempt is "within a court's power to induce compliance or remedy noncompliance with a court's mandate for particularly egregious conduct or willful inaction"); Dep't of Env't Prot. v. Dep't of Env't Conservation, 70 N.Y.2d 233, 239 (1987) ("penalty [may be] imposed . . .

to coerce compliance with the court's mandate"); Baralan Int'l, S.p.A. v. Avant Indus., 242 A.D.2d 226, 227 (1st Dep't 1997) ("Courts have inherent authority to impose remedial fines for failure to obey their orders."); 21 NY Jur Contempt § 4 (2008) ("[a]s to civil contempt, the court may, if necessary, look beyond the specific statutory provisions and resort to its inherent common-law power").

Here, the criteria for holding a party in contempt are easily satisfied. The elements for civil contempt are as follows:

> a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed. Moreover, the party to be held in contempt must have had knowledge of the order . . . . In addition, prejudice to the rights of a party to the litigation must be demonstrated.

McCain v. Dinkins, 84 N.Y.2d 216, 226 (1994).

The Judgment and Order is in effect. (Ex. A). Its mandate on the dates of the match race and when SNG must inform GGYC of the match race location are unequivocal. See Id.; infra pp. 2-3. It is indisputable that SNG received notice of the Judgment and Order on April 7, 2009. (Ex. C). SNG's public defiance of those clear mandates is also indisputable. See infra pp. 2-3.

The substantial prejudice to GGYC is evident. The trust instrument governing the America's Cup, the Deed of Gift ("Deed"), provides that the defender meet the challenger on the race dates of the challenger's choosing at least ten months after the notice of challenge; this is intended to limit the defender's preparation time for the match as a counter-balance to the many advantages the Deed grants the defender. (Ex. O at 1-2). While GGYC's challenge noticed a race for July 2008, SNG has succeeded in extending the ten-month period and therefore its preparation time to February 2010 (for a total of nineteen months) by forcing a litigation over GGYC's rightful challenge. SNG's April 23rd letter to GGYC states that "we have been building a giant multi-hull to meet your challenge on the water," so clearly it has not been

standing by idly during the litigation, but has used that time to design and construct its vessel. (Ex. D at 2). However, it appears that SNG's appetite for advantage through delay has no bounds. It now seeks to further unravel the competitive balance struck under the Deed by unilaterally mandating a further three-month delay. With each passing day beyond the ten-month advance notice prescribed in the Deed, SNG gains a competitive advantage with respect to GGYC to which it is not entitled under either the Deed or the Order and Judgment. Moreover, each additional day of delay caused by SNG's dilatory tactics causes another day of operational expenses and costs for GGYC's racing team.

SNG's abject public defiance of the Order and Judgment does more than prejudice GGYC. Coming after two years of litigation, it challenges the integrity of the New York courts at every level and makes a mockery of the judicial process. The mere finding of contempt and imposition of a statutory fine is in this instance insufficient to protect the Court's judicial process and ensure GGYC's rights. In instances such as this, the court is empowered to go beyond the remedies of contempt and provide relief "at the foot of the judgment" to enforce its provisions. See (Ex. O) (Mercury Bay Boating Club v. San Diego Yacht Club, Index No. 21299/87, at 1, (N.Y. Sup. Ct. April 7, 1989) ("Plaintiff . . . having moved for relief at the foot of the judgment . . ." the court ruled that the America's Cup defender forfeit the Cup to the challenger.)) rev'd 545 N.Y.S.2d 693 (1st Dep't 1989) (while finding that forfeiture of the Cup is available when the party's conduct merits the ultimate remedy, it was not warranted under the facts therein) aff'd 76 N.Y.2d 256 (1990) see also Berlitz Publications, Inc. v. Berlitz, 37 N.Y.2d 878, 880 (1975) (an application at the foot of the judgment "seeks enforcement of the judgment

as it stands").[2]

SNG's purported justification for flouting this Court's Order and Judgment is patently without merit. SNG argues, notwithstanding the provisions of the Order and Judgment, that because the Deed provides that match races between November 1 and May 1 be held in the Southern Hemisphere, and it is a Northern Hemisphere club, the earliest that a match race can be held is May 1. (Ex. D at 2 ¶ 3). However, this precise argument was raised by SNG on no less than four separate occasions during the settle order process leading up to this Court's May 12, 2008 order (Exs. K at 3-4 ¶¶ 6-8; L at 4; M at 4; and N at 1-2). It was soundly rejected in that order, which was subsequently affirmed and reinstated by the Court of Appeals. (Exs. A, B).[3]

New York law does not permit a litigant to rehash old arguments to justify disobedience of a judgment. See, e.g., Mt. Sinai Hospital, Inc. v. Davis, 8 A.D.2d 361, 364 (1st Dep't 1959) ("Defendants could not cavalierly ignore these orders and then relitigate their propriety on the merits before another justice of the same court upon motions to punish them for contempt. Such procedure creates chaos in the enforcement of court orders.") Rather, "[w]hatever the appellate court has ordered in the remittitur must be done; its directions must be strictly followed[; and] where the appellate court has affirmed an order of the trial court . . . it is the duty of the trial court to enforce obedience to the order and not to hear further excuses for disobedience." 4 N.Y. Jur App. Review § 791 (2008) see also 1-11 New York App. Practice § 11.12 (2007) ("When the Court of Appeals makes a final determination and remits a matter to a lower court with instructions for implementing its order . . . [n]o lower court may do any act other than what the

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[2] At this time, GGYC does not request the ultimate penalty of forfeiture, but rather requests the court to reserve this penalty for use if SNG persists in its defiance of the Order and Judgment.

[3] Of course, if SNG thinks that a Southern Hemisphere location is more true to the Deed, the Order and Judgment permits SNG to select a Southern Hemisphere location instead of Valencia, Spain, for the match race. It does not permit SNG to unilaterally select a different date for the match.

Court of Appeals has directed."). Indeed, this is so important to the proper functioning of the court system that failure to enforce the remittitur can be remedied by way of direct petition to the Court of Appeals. See, e.g., 1-11 New York Appellate Practice § 11.12 (2009) ("If a lower court takes action assertively inconsistent with the Court's remittitur, the party asserting the inconsistency may take an appeal as of right to the Court of Appeals.").

RELIEF REQUESTED

GGYC thus requests an order (i) holding SNG in contempt for its willful and intentional refusal to comply with the Order and Judgment; (ii) imposing upon SNG a fine in the maximum amount permitted by statute; and (iii) awarding GGYC its attorney's fees and expenses incurred in bringing this motion for contempt pursuant to Judicial Law § 773.

Further, pursuant to the Court's inherent power to enforce its judgments, GGYC requests that SNG be directed to purge itself of its violation of the Order and Judgment by issuing, within five days of service of a copy of this Court's order directing the same, with notice of entry, upon the attorneys for SNG, a public announcement and verifying to GGYC in writing that, as required by the Order and Judgment, it has scheduled the first race for the next America's Cup match for February 8, 2010, the second for February 10, 2010 and the third, if required, for February 12, 2010. This remedy is necessary to avoid the ongoing violation of the Order and Judgment and to protect GGYC from needlessly expending millions of dollars in preparation for a match in February 2010 that SNG plans on forfeiting.

Dated: New York, New York
April 27, 2009

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