

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

**AFFIRMATION OF JAMES V.
KEARNEY IN SUPPORT OF
MOTION TO ENFORCE ORDER
AND JUDGMENT AND FOR
CONTEMPT**

JAMES V. KEARNEY, an attorney duly admitted to practice before the Courts of the State of New York and not a party to the above-captioned action, hereby affirms the following to be true, under penalty of perjury, pursuant to CPLR § 2106:

1. I am a partner with Latham & Watkins LLP, counsel for plaintiff Golden Gate Yacht Club ("GGYC") in the above captioned action.

2. I respectfully submit this affirmation in support of GGYC's Motion seeking relief at the foot of a judgment and to hold defendant Societe Nautique de Geneve ("SNG") in contempt for its willful violation of an Order and Judgment of this Court, dated April 7, 2009.

3. Attached hereto as Exhibit A is a true and correct copy of the Order and Judgment of this Court dated April 7, 2009 (the "Order and Judgment") which, *inter alia*:

ORDERED that the dates for the challenge match raced 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

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.

4. Attached hereto as Exhibit B is a true and correct copy of the Court of Appeals Remittitur and its opinion, dated April 2, 2009, directing the entry of the Order and Judgment.

5. Attached hereto as Exhibit C is a true and correct copy of an Affidavit of Service of Rachel Feld attesting that the Order and Judgment was duly served by personal delivery, with notice of entry, upon counsel for SNG on April 7, 2009; which thus, pursuant to the Order and Judgment, set the match dates for February 8th, 10th, and 12th of 2010, and required SNG to notify GGYC in writing on or before August 8, 2009 whether the match will take place in Valencia, Spain, or some other location.

6. Attached hereto as Exhibit D is a true and correct copy of a letter from SNG to GGYC, dated April 23, 2009, stating 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,” (*Id.* at p. 2, paragraph 3) and that it will notify GGYC before December 3, 2009 of the location it has selected for the match. (*Id.* at p. 3, paragraph 5.)

7. Attached hereto as Exhibit E is a true and correct copy of an article in the *New York Times* entitled *Alinghi Rejects Proposal*, dated April 24, 2009, reporting that SNG’s racing team stated “it was preparing to race BMW Oracle in multihulls *as soon as May 2010.*” (emphasis supplied).

8. Attached hereto as Exhibit F is a true and correct copy of *The Times (London)* article entitled *Alinghi and Oracle remain in deadlock*, dated April 24, 2009, reporting that “the

Swiss side now say they will accept the challenge to race in May 2010.”

9. Attached hereto as Exhibit G is a true and correct copy of an article in *The New Zealand Herald* entitled *Cooler heads notable by absence*, dated April 24, 2009, in which “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.”

10. Attached hereto as Exhibit H is a true and correct copy of an article from *The New Zealand Herald* entitled *Yachting: Standoff may spark cup-like regattas*, dated April 26, 2009, reporting that “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.”

11. Attached hereto as Exhibit I is a true and correct copy of an article from the *Detroit Free Press (Freep.com)* entitled *Debate continues to rage over the 2010 America's Cup*, dated April 24, 2009, reporting: “But 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.”

12. Attached hereto as Exhibit J is a true and correct copy of an article from *Sail-World* entitled *Gladwell's Line: America's Cup likely to return to NY Supreme Court*, dated April 23, 2009, reporting that “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.”

13. Attached hereto as Exhibit K is a true and correct copy of the affirmation submitted by Dave G. Hille on behalf of SNG dated December 6, 2007, submitted as part of the settle order process on the cross-motions for summary judgment.

14. Attached hereto as Exhibit L is a true and correct copy of a letter sent to Hon. Herman J. Cahn from Barry Ostrager, counsel to SNG, dated December 12, 2007, submitted as part of the settle order process on the cross-motions for summary judgment.

15. Attached hereto as Exhibit M is a true and correct copy of a letter sent to Hon. Herman J. Cahn from Barry Ostrager, counsel to SNG, dated March 26, 2008, submitted as part of the settle order process on the cross-motions for summary judgment.

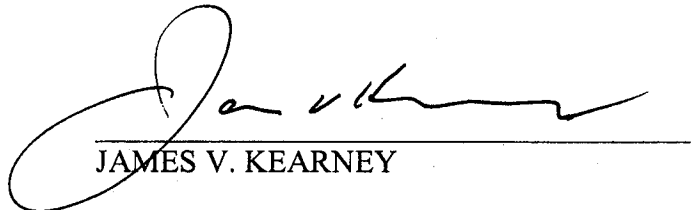
16. Attached hereto as Exhibit N is a true and correct copy of a letter sent to Hon. Herman J. Cahn from Barry Ostrager, counsel to SNG, dated April 2, 2008, submitted as part of the settle order process on the cross-motions for summary judgment.

17. Attached hereto as Exhibit O is a true and correct copy of the slip opinion Mercury Bay Boating Club v. San Diego Yacht Club, Index No. 21299/87, at 1, (N.Y. Sup. Ct. April 7, 1989).

18. Attached hereto as Exhibit P is a true and correct copy of the Deed of Gift governing the America's Cup, dated October 24, 1887, as amended on December 17, 1956 and April 5, 1985 by orders of the Supreme Court of the State of New York.

19. No prior application has been made for the relief requested herein.

Dated: April 27, 2009
New York, NY



JAMES V. KEARNEY

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 49

-----X
GOLDEN GATE YACHT CLUB,

Plaintiff,

- against -

SOCIÉTÉ NAUTIQUE DE GENÈVE,

FILED

Index No. 602446/07

ORDER

Defendant, MAY 13 2008

CLUB NÁUTICO ESPAÑOL DE VELA,

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

MAY 13 2008

IAS MOTION
SUPPORT OFFICE

Intervenor-Defendant.

-----X
HERMAN CAHN, J.:

Plaintiff Golden Gate Yacht Club ("GGYC") in motion sequence number 001 having moved this Court for a preliminary injunction and expedited discovery and an expedited trial, and non-parties Reale Yacht Club Canottieri Savoia and Mascalzone Latino (collectively, "Amici") in motion sequence number 002 having moved this Court for leave to file an amici curiae brief, and Defendant Société Nautique de Genève ("SNG") in motion sequence number 003 having moved this Court to dismiss and for summary judgment, and GGYC in motion sequence number 003 having cross-moved this Court for an order pursuant to N.Y. C.P.L.R. 3211(c) and 3212 granting GGYC's cross-motion for summary judgment, together with such further and other relief as this Court deems just and proper, and Intervenor-Defendant Club Náutico Español de Vela ("CNEV") in motion sequence number 004 having moved this Court for summary judgment and an order dismissing Plaintiff's claims;

NOW, upon reading and filing the following papers submitted to the Court: **Motion Sequence number 001**: GGYC's Order to Show Cause, dated August 22, 2007, and the accompanying Memorandum of Law, the Affirmation of Gina M. Petrocelli and the Affidavit of Thomas F. Ehman, including the exhibits attached thereto; SNG's September 5, 2007 Memorandum of Law in Opposition and the September 5, 2007 Affidavits of Hamish Ross and Miquel Terrasa Monasterio, including the exhibits attached thereto; **Motion Sequence number 002**: Amici's October 5, 2007 Order to Show Cause and the Affirmation of Lance J. Gotko, including the exhibits attached thereto; SNG's October 12, 2007 Response to Proposed Amici's Application; **Motion Sequence numbers 003 and 004**: SNG's September 21 Notice of Motion and Memorandum of Law, the Affidavit of Hamish Ross and Affirmation of David G. Hille including the exhibits thereto, and SNG's September 21, 2007 Commercial Division Rule 19-a Statement of Material Facts; CNEV's September 21, 2007 Notice of Motion and the Affidavit of Manuel Jose Chirivella Bonet; GGYC's October 5, 2007 Notice of Cross-Motion, Memorandum of Law, the Affidavit of Thomas F. Ehman, Jr. and Affirmation of James V. Kearney including the exhibits thereto, and GGYC's Commercial Division Rule 19-a Statement of Material Facts, and Response to SNG's Commercial Division Rule 19-a Statement of Material Facts; SNG's October 12, 2007 Memorandum of Law, Response to Plaintiff's Commercial Division Rule 19-a Statement, the Affidavit of Hamish Ross, including the exhibits thereto and CNEV's October 12, 2007 Reply Memorandum of Law and Response to Plaintiff's Commercial Division Rule 19-a Statement and the Affidavit of Manuel Jose Chirivella Bonet and Affirmation of Catherine M. Doll, including the exhibits attached thereto, and GGYC's October 19, 2007 Reply Memorandum of Law and Affirmation of Gina M. Petrocelli, including the exhibits attached thereto;

AND upon reading and filing the following additional papers submitted to the Court:
SNG's December 27, 2007 Notice of Motion and Memorandum of Law in Support of Motion to Renew and Reargue pursuant to CPLR 2221, the Affidavit of Fred Meyer and the exhibits attached thereto; GGYC's January 2, 2008 Memorandum of Law in Opposition to SNG's Memorandum of Law in Support of Motion to Renew and Reargue, the Affirmation of Gina M. Petrocelli and the exhibits attached thereto; SNG's January 14, 2008 Order to Show Cause, the Affirmation of Jonathan K. Youngwood and the exhibits attached thereto; the January 23, 2008 Affirmation of Gina M. Petrocelli and the exhibits attached thereto; the January 28, 2008 Affirmation of Barry R. Ostrager and the exhibits attached thereto; GGYC's March 26, 2008 Notice of Filing and the exhibit attached thereto; SNG's March 28, 2008 Notice of Filing and the exhibit attached thereto; GGYC's April 1, 2008 Notice of Filing and the exhibit attached thereto; SNG's April 2, 2008 Notice of Filing and the exhibit attached thereto;

AND upon hearing oral argument from counsel for the parties on September 10, 2007, October 22, 2007, January 14, 2008, January 23, 2008, and April 2, 2008;

AND, upon all prior pleadings and proceedings hereto;

AND, upon the Decision and Order issued by this Court on November 27, 2007 (the "November 27, 2007 Decision") granting Plaintiff GGYC's cross-motion for summary judgment, dismissing GGYC's breach of fiduciary duty claim against SNG and directing the parties to "Settle Order", a true copy of which is annexed hereto as Exhibit A;

AND, whereas, on July 11, 2007, GGYC issued a "Notice of Challenge for the America's Cup" ("Notice of Challenge") that the Court determined to be a valid challenge in its November 27, 2007 Decision; whereas, at a September 10, 2007 hearing before the Court on GGYC's motion for preliminary injunction and expedited discovery, the Court inquired whether

the parties would enter into an agreement, pursuant to which the date for the challenge match races prescribed in the Deed of Gift would be extended following a final decision on the merits of this litigation, and counsel for the parties agreed to attempt to negotiate a stipulation tolling the notice period pending a final decision on the merits; it is hereby

ORDERED that the Motion, sequence number 001 for preliminary injunction and expedited discovery and an expedited trial, is denied as moot; and it is further

ORDERED that the Motion, sequence number 002 for leave to file an amici curiae brief, is granted; and it is further

ORDERED that Defendant SNG's Motion to Dismiss and for Summary Judgment in sequence number 003 is granted to the extent it dismisses GGYC's breach of fiduciary duty cause of action, and Plaintiff GGYG's Cross-Motion for Summary Judgment in sequence number 003 is granted; and it is further

ORDERED that the Motion, sequence number 004 by CNEV for Summary Judgment and to Dismiss GGYC's claims, is denied; and it is further

ORDERED and adjudged that CNEV's challenge is invalid, and CNEV is not a valid Challenger of Record pursuant to the Deed of Gift; and it is further

ORDERED and adjudged that GGYC's challenge is valid, and GGYC is the Challenger of Record pursuant to the Deed of Gift; and it is further

ORDERED that the dates for the challenge match races shall be the date 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.

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 race of the location it has selected for the challenge match races; and it is further

ORDERED that GGYC and SNG may engage in a mutual consent process and 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 challenge match races in accordance with the Deed of Gift; and it is further

ORDERED that the Clerk of Court is directed to enter judgment accordingly.

Dated: May 12, 2008

FILED

ENTER:

MAY 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

Alan Cole

J.S.C.

Norman Cedeno
Clerk

FILED

APR -7 2009

COUNTY CLERK'S OFFICE
NEW YORK

As a Judgment

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

GOLDEN GATE YACHT CLUB,

Plaintiff,

- against -

SOCIETE NAUTIQUE DE GENEVE

Defendant,

CLUB NAUTICO ESPANOL DE VELA,

Intervenor-Defendant.

Index No. 602446 / 07

ORDER AND JUDGMENT

LATHAM & WATKINS LLP
Attorneys for

885 THIRD AVENUE
NEW YORK, NEW YORK 10022-4802
(212) 906-1200

FILED

as a judgment

APR - 7 2009

AT 4:35 P.M.
N.Y., CO. CLK'S OFFICE

To

Service of a copy of the within is hereby admitted.

Dated:20.....

EXHIBIT B

4/6/07

State of New York

Court of Appeals

Remittitur

HON. CARMEN BEAUCHAMP CIPARICK, *Senior Associate Judge, presiding.*

No. 25

Golden Gate Yacht Club,

Appellant,

v.

Societe Nautique De Geneve,

Respondent,

Club Nautico Espanol De Vela,

Intervenor-Respondent.

COPY

Appellant in the above entitled appeal appeared by Latham & Watkins, LLP; respondent appeared by Simpson Thacher & Barlett, LLP; intervenor-respondent appeared by Debevoise & Plimpton, LLP; and amici curiae appeared by Carter Ledyard & Milburn, LLP; Sheppard Mullin Richter & Hampton, LLP; Troutman Sanders, LLP; Menz Bonner & Komar, LLP; Friedman Kaplan Seller & Adelman, LLP; and Meiselman Denlea Packman Carton & Eberz, P.C.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and orders of Supreme Court, New York County, reinstated. Opinion by Judge Ciparick. Judges Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Lippman took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, New York County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.



Stuart M. Cohen, Clerk of the Court

State of New York Court of Appeals

No. 25
Golden Gate Yacht Club,
Appellant,
v.
Societe Nautique De Geneve,
Respondent,
Club Nautico Espanol De Vela,
Intervenor-Respondent.

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

Maureen E. Mahoney, for appellant.
Barry R. Ostrager, for respondent.
David W. Rivkin, for intervenor-respondent.
New York Yacht Club; The San Diego Yacht Club Sailing
Foundation et al.; William I. Koch; Team French Spirit et al.;
Deutscher Challenger Yacht Club et al.; Reale Yacht Club
Canottieri; Savoia et al.; City of Valencia, Spain, amici curiae.

CIPARICK, J.:

This appeal involves the preeminent international sailing regatta and match race, the America's Cup. We had occasion once before to examine the charitable trust that governs the competition. In Mercury Bay Boating Club v San Diego Yacht Club (76 NY2d 256 [1990]), we strictly construed the provisions

of the trust instrument, the Deed of Gift, to allow multihulled vessels to compete in the America's Cup race. Today, we are called upon to reexamine the Deed of Gift to determine the eligibility criteria for a Challenger of Record -- specifically whether the phrase "having for its annual regatta" requires a yacht club to hold an annual regatta on the sea prior to issuing its challenge (Deed of Gift, October 24, 1887, ¶ 4). We conclude that it does.

The story of the America's Cup begins on August 22, 1851, after the schooner yacht, *America*, entered a race against British sailing vessels around the Isle of Wight, winning a large silver cup. In honor of the winning boat, the trophy was christened the "America's Cup," which became the corpus of a charitable trust created under the laws of New York and donated pursuant to a Deed of Gift to the New York Yacht Club in 1857. The Deed of Gift establishes the rules governing the America's Cup and provides that the holder of the Cup becomes its sole trustee and is succeeded only by a successful challenger in a race at sea. The original Deed of Gift required only that the challenger be an "organized" yacht club.

During the first 30 years after its inception, problems arose with the administration of the competition. As a result, the America's Cup was twice returned to George L. Schuyler, the sole-surviving donor, after two disappointing America's Cup races were sailed by Canadian Great Lake yacht clubs under the command

of Captain Alexander Cuthbert. Neither of the challenging vessels could withstand the rigors of open sea competition. The *Countess of Dufferin*, the first challenging vessel, was described as having "fresh water written all over her. . . [h]er hull lacked finish, being as rough as a nutmeg grater. . . and had little of the shipshape appearance expected of a cup challenger."¹ The *Atalanta*, the second challenging vessel, was also denounced by critics as being "a new yacht, hastily built, totally untried, and miserably equipped. . ."² To deal with this "unseaworthiness" issue, Schuyler amended the Deed of Gift with the intent of precluding Great Lakes yacht clubs from competing and reconveyed the America's Cup to the New York Yacht Club to hold in trust. In addition to requiring that a challenger be an "organized" yacht club, the amended Deed of Gift, dated October 24, 1887, added new eligibility requirements that a challenger must meet, including that it be "incorporated, patented or licensed by the Legislature, admiralty or other executive department, having for its annual regatta an ocean water course. . ." (Deed of Gift, October 24, 1887, ¶ 4). The Deed further provides that the Cup "shall be preserved as a perpetual Challenge Cup for friendly competition between foreign

¹ Winfield M. Thompson and Thomas W. Lawson, *The Lawson History of the America's Cup: Record of Fifty Years*, at 78 [Ashford Press Publishing, Southampton 1986] (internal quotations omitted).

² Id. at 88.

countries."³

The Cup has been defended 32 times and it is the events that occurred after the conclusion of the 32nd America's Cup held on July 3, 2007, in Valencia, Spain, which give rise to this appeal. Soci t  Nautique de Gen ve (SNG),⁴ won the Cup on March 2, 2003, in the 31st America's Cup match and successfully defended its right to continue as trustee of the America's Cup in the July 3, 2007 race. Club N utico Espa ol de Vela (CNEV),⁵ on that very same day, submitted a Notice of Challenge to SNG for the 33rd America's Cup, which was accepted.

The Deed of Gift provides that once a Defender accepts a challenge, the two yacht clubs may negotiate and set the conditions of the next America's Cup competition through their mutual consent. Although not named as such by the Deed of Gift, the sailing community refers to the resulting agreement as the "protocol" and the challenging yacht club with the right to negotiate the protocol is called the Challenger of Record. Since 1970, other yacht clubs that wish to compete in the America's Cup have been allowed to participate in the race when the Defender

³ The Deed has been amended twice by orders of the Supreme Court, New York County, dated December 17, 1956 and April 5, 1985.

⁴ SNG is a yacht club organized under the laws of Switzerland.

⁵ CNEV is a Spanish yacht club formed by the members of the Real Federaci n Espa ola de Vela (RFEV), a Spanish sailing federation in June, 2007.

and the Challenger of Record agree to such an arrangement and provide in their protocol for such participation. Traditionally, challengers that are allowed to participate based upon the mutual agreement of the Defender and the Challenger of Record pursuant to their resulting protocol, are known as Mutual Consent Challengers. However, should the Defender and the Challenger of Record fail to reach an agreement as to the terms under which they will race, the Deed of Gift contains a default match provision for a one-on-one race between the Defender and the Challenger of Record.

On July 5, 2007, SNG as the Defender and CNEV as Challenger of Record, published a protocol for the 33rd America's Cup setting forth the conditions of the competition that includes an arbitration provision to resolve disputes. On July 11, 2007, plaintiff Golden Gate Yacht Club (GGYC),⁶ disputing the validity of CNEV's challenge, primarily on the basis that CNEV was not a bona fide yacht club -- formed only a few days before submitting its challenge -- and had never held an annual regatta, presented its own Notice of Challenge. SNG rejected GGYC's challenge on the basis that CNEV's challenge was first in time and since CNEV's challenge had already been accepted, no other challenge could be considered until after CNEV's challenge had been decided.

⁶ GGYC is a yacht club incorporated in the State of California.

On July 20, 2007, SNG, seeking to resolve the validity of CNEV's challenge, initiated an arbitration proceeding pursuant to the dispute resolution mechanism provided for in the 33rd protocol. The 33rd America's Cup Arbitration Panel invited GGYC to participate in the arbitration. GGYC rejected the invitation and commenced this present litigation because it could participate in the arbitration, only by agreeing to the protocol, thereby exposing itself to possible disqualification at SNG's sole discretion. The Arbitration Panel ultimately found that the Deed of Gift does not require a challenging club to have held an annual regatta prior to issuing its Notice of Challenge and therefore CNEV's Notice of Challenge was valid. All parties concede that the arbitration decision is not binding upon us.

In the present action, GGYC alleges that SNG breached the Deed of Gift and its fiduciary duty as trustee by accepting CNEV's challenge because CNEV failed to comply with the challenger eligibility criteria set forth in the Deed of Gift since CNEV was not an organized yacht club and had never conducted an annual regatta.⁷ Both sides moved for summary judgment. Although Supreme Court dismissed GGYC's breach of fiduciary duty claim, it declared that the Notice of Challenge issued by CNEV was indeed invalid because CNEV failed to meet the Deed of Gift's eligibility requirements as it had not held an annual regatta on an ocean water course prior to submitting its

⁷ CNEV was allowed to intervene in this action.

Notice of Challenge to SNG. Supreme Court, strictly interpreting the Deed of Gift, declared GGYC to be the Challenger of Record. A divided Appellate Division reversed, holding the language of the Deed to be ambiguous and declaring the Notice of Challenge issued by CNEV valid, and CNEV the rightful Challenger of Record. GGYC appealed pursuant to CPLR 5601(a) dissent grounds and we now reverse.

In Mercury Bay, where we resolved a dispute regarding a type of vessel that arose relating to the 27th America's Cup match, we stated that the

"[l]ong-settled rules of construction preclude an attempt to divine a settlor's intention by looking first to extrinsic evidence. Rather, the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself. It is only where the court determines the words of the trust instrument to be ambiguous that it may properly resort to extrinsic evidence" (id. 76 NY2d at 267).

The relevant provisions of the Deed of Gift, to be construed here at paragraph 4 provide that:

"[a]ny 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 for this Cup."

The Deed, in paragraph 10, further 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."

Finally, paragraph 11 of the Deed states that the trustee:

"hereby covenants and agrees . . . that it will faithfully and will fully see that the foregoing conditions are fully observed and complied with by any contestant. . ."

Thus, to comply with the eligibility requirements as outlined by the Deed, a challenger must be (1) an organized yacht club, (2) foreign, in that it is not of the same country as the trustee yacht club, (3) incorporated in its local jurisdiction or officially recognized either through a license or patent from its government, (4) and "having for its annual regatta an ocean water course on the sea or an arm of the sea or one which combines both." It is the last requirement that divided the court below⁸ in light of the fact that CNEV had not held an annual regatta on the sea prior to submitting its Notice of Challenge. It is undisputed that the defender has the obligation to address a challenge only when the challenger is a "club fulfilling all the conditions required" (Deed of Gift, October 24, 1887, ¶ 10). When such a challenge occurs, all other challenges are foreclosed.

As we stated in W.W.W. Assoc. v Giancontieri (77 NY2d

⁸ Supreme Court did not decide the question of whether CNEV was "organized" under the Deed and it is not necessary for us to reach this issue to resolve this appeal.

157, 162 [1990]), "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing." The Appellate Division majority deemed the phrase, "having for its annual regatta," ambiguous and therefore found it appropriate to glean the settlor's intention as to the meaning and purpose of this phrase by looking to extrinsic evidence. We disagree and find the phrase to be unambiguous. As we did in Mercury Bay, we must first examine the plain language of the Deed of Gift and determine, as a matter of law, whether the language can be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself.

In looking at the plain language of the Deed of Gift itself, as we must, we first note that the annual regatta requirement is only one of a list of eligibility requirements set forth in the Deed of Gift. The settlor clearly placed the requirements of "organized" and "incorporated, patented, or licensed" in the past and intended that a challenger would continue to meet these eligibility requirements in the present and future. For example, the term "incorporated" refers both to a past event of incorporation and to a continuing status. We believe that the settlor intended the same to be true for the "annual" regatta requirement. By using the word "annual," the settlor suggested an event that has already occurred at least once and will occur regularly in the future. Taken as a whole,

we conclude that the settlor intended to link the annual regatta requirement to the other eligibility requirements in that the challenging yacht club has in the past and will continue in the future "having" an annual regatta on the sea. Any other interpretation would render the annual regatta requirement a nullity.⁹

The settlor clearly intended that for a challenging yacht club to be within the eligibility requirements, it must have held at least one qualifying annual regatta before it submits its Notice of Challenge to a Defender and demonstrate that it will continue to have qualifying annual regattas on an ongoing basis. Thus, SNG is wrong in its claim that the regatta requirement can be satisfied by race time rather than at the time of challenge. We conclude there is no ambiguity as to the annual regatta clause at issue. When read in the context of the entire Deed of Gift, the challenger must demonstrate that its Notice of Challenge "fulfill[s] all the conditions required" (Deed of Gift, October 24, 1887, ¶ 10) at the time it submits its challenge.

SNG and CNEV assert that the existing practice among Defenders and Challengers of Record to allow Mutual Consent Challengers to participate in the America's Cup, even without having held an open sea course regatta is evidence that the

⁹ The fact that CNEV has since held two ocean course regattas, one in November, 2007 and a second in November, 2008 is of no moment since none had been held in July, 2007 prior to CNEV submitting its Notice of Challenge to SNG.

settlor intended that a challenging yacht club is not required to have held a regatta on the open sea prior to issuing its Notice of Challenge. This assertion has no merit because the plain language of the Deed of Gift itself forecloses such an illogical conclusion. Even if the language of the Deed of Gift were ambiguous, evidence of these practices would not qualify as extrinsic evidence of the settlor's intent in 1887 as these practices emerged much later. Thus, the decision of the Defender and the Challenger of Record to waive the eligibility requirements for yacht clubs seeking to participate as Mutual Consent Challengers has no bearing on whether a yacht club seeking to establish itself as the Challenger of Record must meet the requirements imposed by the Deed of Gift itself.

Since CNEV has failed to show that at the time it submitted its Notice of Challenge it was a "[c]lub fulfilling all the conditions required by" the Deed of Gift, it does not qualify as the Challenger of Record for the 33rd America's Cup competition and Supreme Court was correct in declaring GGYC to be the valid Challenger of Record.

It has been posited that the right to act as trustee of the America's Cup should be decided on the water and not in a courtroom. We wholeheartedly agree. It falls now to SNG and GGYC to work together to maintain this noble sailing tradition as "a perpetual Challenge Cup for friendly competition between foreign countries" (Deed of Gift, October 24, 1887, ¶ 3).

Accordingly, the order of the Appellate Division should be reversed, with costs, and the orders of Supreme Court reinstated.

* * * * *

Order reversed, with costs, and orders of Supreme Court, New York County, reinstated. Opinion by Judge Ciparick. Judges Graffeo, Read, Smith, Pigott and Jones concur. Chief Judge Lippman took no part.

Decided April 2, 2009



*State of New York
Court of Appeals*

*Stuart M. Cohen
Clerk of the Court*

*Clerk's Office
Albany, New York 12207-1095*

Decided April 2, 2009

No. 25

Golden Gate Yacht Club,
Appellant,

v.

Societe Nautique De Geneve,
Respondent,
Club Nautico Espanol De Vela,
Intervenor-Respondent.

Order reversed, with costs, and orders of
Supreme Court, New York County,
reinstated.

Opinion by Judge Ciparick.

Judges Graffeo, Read, Smith, Pigott and
Jones concur.

Chief Judge Lippman took no part.

EXHIBIT C

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

GOLDEN GATE YACHT CLUB,

Plaintiff,

- against -

SOCIETE NAUTIQUE DE GENEVE,

Defendant,

- against -

CLUB NAUTICO ESPANOL DE VELA,

Intervenor-Defendant.

Index No. 602446/07

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

RACHEL FELD, being duly sworn, deposes and says:

1. I am over 18 years of age and am employed by Latham & Watkins LLP and am not a party to this action.

2. On Tuesday, April 7, 2009, at approximately 5:54 P.M., I served a true and correct copy of the attached Notice of Entry of Order and Judgment & Notice of Taxation of Bill of Costs, dated 4/7/09, by hand delivery upon:

Simpson Thacher & Bartlett LLP
Barry R. Ostrager, Esq.
Jonathan K. Youngwood, Esq.
George S. Wang, Esq.
425 Lexington Avenue
New York, New York 10017
Attorneys for Defendant
Societe Nautique de Geneve

by delivering and leaving the same at the above address, with an individual who identified himself only as "Peter," an employee of Simpson Thacher & Bartlett LLP and a person who expressed that he was duly authorized to accept service of the aforementioned document on

behalf of Barry R. Ostrager, Esq., Jonathan K. Youngwood, Esq., George S. Wang, Esq., and Simpson Thacher & Bartlett LLP.

3. I would describe "Peter" as a Caucasian male with brown hair, between the ages of 25 and 30, between 5 feet 9 inches and 5 feet 10 inches tall, and weighing between 165 and 180 pounds.

4. On Tuesday, April 7, 2009, at approximately 6:14 P.M., I also served a true and correct copy of the attached Notice of Entry of Order and Judgment & Notice of Taxation of Bill of Costs, dated 4/7/09, by hand delivery upon:

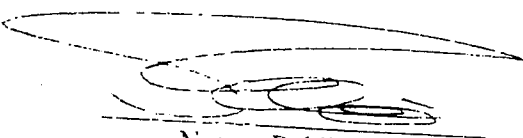
Debevoise & Plimpton LLP
David W. Rivkin, Esq.
Jeremy Feigelson, Esq.
Catherine M. Doll, Esq.
919 Third Avenue
New York, NY 10022
Attorneys for Intervenor-Defendant
Club Nautico Espanol de Vela

by delivering and leaving the same with Manny Erosa at the above address, who identified himself as a Clerk in the Managing Attorney's Office of Debevoise & Plimpton LLP and a person who expressed that he was duly authorized to accept service of the aforementioned document on behalf of David W. Rivkin, Esq., Jeremy Feigelson, Esq., Catherine M. Doll, Esq., and Debevoise & Plimpton LLP.

5. I would describe Manny Erosa as a Latino male with black hair, between the ages of 30 and 35, between 5 feet 5 inches and 5 feet 6 inches tall, and weighing between 160 and 165 pounds.


RACHEL FELD

Sworn to before me this
8th day of April, 2009


Notary Public

JASON A. GROSSMAN
Notary Public, State of New York
No. 02GR6144344
Qualified in Suffolk County
Commission Expires April 24, 2010

EXHIBIT D



SOCIÉTÉ NAUTIQUE DE GENÈVE

Mr Marcus Young
Commodore
The Golden Gate Yacht Club
1 Yacht Road
San Francisco
California 94123
USA

23 April 2009

33rd America's Cup

Dear Commodore

We are writing to you following the second meeting we had with representatives of your Yacht Club at SNG on April 23, 2009.

Contrary to what you indicated in your letter dated April 7, 2009, you have unilaterally elected to breach the confidentiality of our discussions and decided to make public all your letters and proposals. We deeply regret it as this is not in the spirit of positive discussions and negotiations.

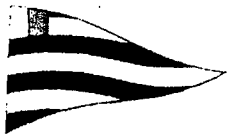
At this stage and as condition for any further mutual agreement discussions, we request that you finally declare your challenging vessel.

On July 11, 2007, you issued a Certificate of Name, Rig and specified Dimensions of a 90 by 90 feet keel yacht named USA. Although your Certificate was referring to a keel yacht, you kept the position throughout the Court proceedings that the Certificate was indeed referring to a multi-hull vessel. As a consequence, Justice Cahn ruled in your favour in two orders, dated March 17, 2008 and May 12, 2008, which have now both entered in force.

At the first meeting that was held with regard to your challenge at SNG on March 27, 2008, your representatives, Mr. Russell Coutts and Mr. Tom Ehman, insisted on setting an early date in October 2008 for us to race your challenging vessel. They indicated that such vessel was well under construction and that it was going to be launched soon. This was confirmed by a press release issued by BMW Oracle Racing on April 9, 2008.

As a consequence, we required you to deliver the Custom House Registry Certificate and in a letter of April 29, 2008, you indicated that you "were in communication with a US Coast Guard approved measurement organization" and that you were "following the customary process for obtaining the tonnage certificate and then the Certificate of Documentation from the US Coast Guard". You confirmed this again in your letter of 19th May 2008.





SOCIÉTÉ NAUTIQUE DE GENÈVE

In your press statements and letters of August 2008, we could read that your challenging vessel had "touched water" and that it was a giant trimaran, which had a waterline beam and length as per your Certificate. However, and contrarily to what you promised, you still have not delivered the Custom's House Registry Certificate and you keep referring in some of your letters to a mono-hull keel yacht.

We now require you to confirm in good faith that the boat that you have launched on August 22, 2008 in Anacortes (USA), is the vessel described in your Certificate dated July 11, 2007, and named USA and we invite you to deliver immediately the corresponding Custom House Registry.

We further draw your attention to the fact that – based on your Certificate and your aforementioned declarations – we have been building a giant multi-hull to meet your challenge on the water. We did so in good faith based on the aforementioned declarations and we have assumed that you were acting like us in good faith. If it were proven not to be the case, we would have to reserve the right to claim for the damages arising for our Yacht Club.

We now assume that you will declare your boat in the coming days and we confirm that we are happy to discuss with you any other issue related to the Match for the America's Cup including the organisation of a Challenger Selection Series and a reasonable extension of time to allow challengers an opportunity to prepare.

At this stage, we wish to confirm arrangements for the 33rd America's Cup, if no further mutual agreement can be reached and it had to be conducted under the default terms of the Deed of Gift. We have been guided by the terms of your notice of challenge, the Deed of Gift and the rulings of the New York Courts. We advise as follows:

1. It is our intention to meet you on the water in accordance with the terms of the Deed. To accomplish this, we will adhere strictly to all aspects of your notice of challenge dated 11 July 2007, the Deed and the decisions of the Courts.
2. Our vessel, if of one mast, shall be not less than forty-four (44) feet nor more than ninety (90) feet on the load water-line; if of more than one mast it shall not be less than eighty (80) feet nor more than one hundred and fifteen (115) feet on the load water-line.
3. In accordance with your notice of challenge which specified Match dates for a Northern Hemisphere venue and given both clubs are situated in the Northern Hemisphere, you are advised that Société Nautique de Genève will select a venue in the Northern Hemisphere, with the consequence that pursuant to the express terms of the Deed under which we are both bound, 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. In any case, one (1) week shall intervene between the conclusion of one (1) race and the start of the next race. These dates are the very earliest dates permitted for the Match by the Deed after expiry of your tolled 10 month notice period.





SOCIÉTÉ NAUTIQUE DE GENÈVE

4. Three (3) races shall be sailed and the winner of two (2) of such races shall be entitled to the Cup. All such races shall be on ocean courses, which may include a venue in the Mediterranean, Baltic, North, Red, Black or other similar Sea, free from headlands, as follows:

The first race twenty (20) nautical miles to windward and return; the second race an equilateral triangular race of thirty nine (39) nautical miles, the first leg of which shall be a beat to windward; the third race (if necessary) twenty (20) nautical miles to windward and return.

5. These ocean courses shall be practicable in all parts for vessels of twenty two (22) feet draught of water and shall be selected by the America's Cup Committee of Société Nautique de Genève. The Committee will undertake a selection process over the next several months and will announce its decision not later than six months prior to the Match.
6. The races shall be sailed subject to such rules and sailing regulations as may now or hereafter be promulgated by the Société Nautique de Genève, so far as they do not conflict with the provisions of the Deed of Gift. No time allowances shall be permitted.
7. The representative vessel of the Société Nautique de Genève shall be named at the time agreed upon for the start of the Match. This vessel shall be of such dimensions as are consistent with the Deed of Gift. All design and construction elements, including such items as number of hulls and particulars of rigging, shall be of our choosing.
8. Société Nautique de Genève may adopt regulations clarifying and implementing the provisions of the Deed of Gift related to measurement of the challenging vessel and its compliance with the notice of challenge. We will promptly advise you of the adoption of any such regulations.

We look forward to racing in the 33rd America's Cup and if successful we hope to welcome a challenger for the 34th America's Cup, providing for an open multi challenger event where the cost of competition allows all competitors a realistic chance of winning.

Fred Meyer

Vice-Commodore and Chairman of America's Cup Committee



EXHIBIT E

EXHIBIT F



FOCUS - 9 of 17 DOCUMENTS

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THE  **TIMES**
The Times (London)

The crest of The Times newspaper, featuring a central shield with a crown on top, flanked by two figures holding a banner.

April 24, 2009 Friday
Edition 1

SECTION: NEWS; Pg. 79

LENGTH: 97 words

HEADLINE: Alinghi and Oracle remain in deadlock

BODY:

Sailing Doubts over the future of the America's Cup remained yesterday after a meeting in Geneva between Alinghi, the Swiss holders, and BMW Oracle, the American team, who won a legal battle last month to be the official challenger.

Oracle, whose original challenge was to race in 90ft trimarans, had recently proposed a multiboat regatta in monohulls, which Alinghi wanted all along, in exchange for joint management of the next Cup regatta, but the Swiss side now say they will accept the challenge to race in May 2010 in giant multihulls, having already spent money on such a boat.

LOAD-DATE: April 24, 2009

EXHIBIT G

Dana Johannsen: Cooler heads notable by absence

7:48PM Friday Apr 24, 2009

By [Dana Johannsen](#)

Inevitable as it was, yesterday's announcement that the 33rd America's Cup will be a one-on-one showdown between Alinghi and Oracle is extremely disappointing.

The two warring syndicates had the opportunity to restore normality to the Cup by mutually agreeing upon a set of rules for a traditional multi-challenger regatta.

But the bickering continued and, with no resolution reached, Alinghi and Oracle are now headed for an extremely rare Deed of Gift challenge.

One would have hoped cooler heads would prevail, but that would necessitate cooler heads being involved.

It's hard to imagine either party was genuinely willing to negotiate a conventional multi-challenger regatta when they have both spent millions of dollars designing and building state-of-the-art multihulls in preparation for a Deed of Gift challenge.

Oracle launched their spectacular 90ft trimaran late last year, and are in their third round of testing, while Alinghi are in the construction phase with their multihull.

The fact that these two teams have invested so much in building new boats specifically for this eventuality meant a compromise to avoid such an outcome was extremely unlikely. Once they went down this path there was no turning back.

Which makes all the legal wrangling over the past 10 months seem rather ludicrous.

Alinghi could have saved themselves two further rounds of litigation and pretty much had the Deed of Gift Challenge out of the way by now if they had just accepted Justice Cahn's original ruling in the New York Court.

But while this bitter feud is headed for the water, don't be fooled into thinking the legal arguments are over.

The two warring parties appear destined to wind up back in the courts again after 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.

It may appear to amount to further uncertainty for other America's Cup syndicates, but in effect the parameters have narrowed somewhat. The wider challenger group now only need plan on just two venue options.

Should Alinghi win the one-on-one showdown they are likely to dust off the protocols they drew up at previous competitor meetings with the timing and format to remain unchanged.

Oracle have yet to announce the basis of the 34th America's Cup should they prevail in the 33rd match, but are on record as saying it would be 2011.

Team New Zealand and their fellow aspiring challengers need to ride out the next 10-12 months, which in these current dire economic times is no mean feat, but it is still easier than trying to get Alinghi and Oracle to agree on anything.



Dana Johannsen

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EXHIBIT H

Yachting: Standoff may spark Cup-like regattas

4:00AM Sunday Apr 26, 2009

By Paul Lewis

The next steps in the becalmed and beleaguered America's Cup saga are likely to see the emergence of new, Cup-like, global yachting regattas involving Louis Vuitton.

Alinghi and Oracle continue their remarkable inability to agree on anything - meaning the Cup could bounce back into court if 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.

However, this time, court action is unlikely to delay matters and, as Emirates Team New Zealand boss Grant Dalton put it yesterday "the clock will not stop ticking now".

Perhaps the most interesting facet is the possible - if not probable - emergence of the Louis Vuitton series as a genuine, global series to take up some of the slack between now and 2010 (and 2011, when the next multi-challenger America's Cup will be held).

The inaugural Louis Vuitton Pacific Series, held in Auckland this summer, was highly successful and Vuitton emissary Bruno Trouble has been flying round the world, looking at the possibility of similar regattas.

While all involved are careful to position the possibility of the regattas running 'alongside' the America's Cup, there is little doubt such a development, if it occurs, will tighten the screws on the Swiss Cup holders.

"Discussions are continuing," said Dalton, "there's quite a bit to be put together and it's not something that can be done in five minutes."

However, yachting sources have hinted that Louis Vuitton, Oracle and Team NZ could reprise their roles as instigators of a Vuitton series - with regattas likely in Auckland again, San Francisco (home of Oracle's Golden Gate Yacht Club), Valencia and maybe an Asian venue, probably Hong Kong but possibly Singapore.

"It makes sense to do something like that," said Dalton, "and it has the support of all the America's Cup teams. It gets people back on the water and it's pretty obvious, from what has happened over the past 18 months, that you can't allow a defender to dictate terms to challengers.

"The America's Cup has always been played on a much more level field than it is now. Alinghi's tactics have been to divide and conquer, but this [the Louis Vuitton regattas] would allow challengers to act collectively in the same way, for example, as the manufacturers do in Formula 1 motor racing," said Dalton.

"The Acts [America's Cup pre-regattas] proved hugely successful and this would be using the same principle and might also make Alinghi consult and listen to a collective of challengers.

"They will say they have consulted and listened but there is a difference between consultation and being part of the decision-making process."

It is not known yet if any Vuitton regattas will involve Team NZ and Oracle boats, or whether teams might bring their own boats.

Meanwhile, most attention is now on the 'big boat' challenge date. Most observers believe the court date of February overrides the America's Cup Deed of Gift stipulation of May - for which Alinghi is arguing.

Asked if he thought Oracle might agree to a May date, Dalton said: "Why should they? Why would they give them



Dean Barker with the Pacific Series trophy. Photo / Getty Images

any more time to prepare?"

Oracle have been trialling their 90-foot trimaran, worth about \$20 million. Alinghi are still building a huge catamaran and some have wondered if Alinghi is foxing by waiting to build a craft more suited to light airs than Oracle's 'rocket ship'.

Finding a light airs venue in Europe in February would be difficult unless Alinghi chose - as is their right - to race at a Southern Hemisphere regatta.

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EXHIBIT I



April 24, 2009

Debate continues to rage over the 2010 America's Cup

Swiss team says multihull race should be in May, not February as ruled by court

BY ERIC SHARP

FREE PRESS OUTDOORS WRITER

The Swiss defenders of the America's Cup announced Thursday that they would meet an American challenger from the Golden Gate Yacht Club of San Francisco in huge multihulls, virtually eliminating the possibility of a multi-challenger America's Cup in conventional monohulls next year.

But the Swiss Alinghi Team continued to insist that the multihull race would take place in May 2010, rather than by February 2010 as the New York Supreme Court has ruled.

The Swiss announcement also said that Alinghi would be amenable to opening the event to other foreign yacht clubs that wanted to build a giant catamaran or trimaran and urged Golden Gate to agree to a further delay so that other clubs would have time to design and build the boats.

The Americans are already testing a 100-foot trimaran and the Swiss reportedly have built a 115-foot catamaran, but it is believed that few other syndicates, if any, would have the resources to build a competitive boat in the time allowed.

Golden Gate replied that it was the Swiss who rejected a conventional America's Cup and insisted on the match in big multihulls under rules from the 1887 Deed of Gift that governs the competition.

Under those rules, the event will be decided by three races, one a triangular course and the other two upwind and downwind courses.

If Alinghi continues to insist on a race in May 2010, it probably will require intervention by the court to settle the date and venue for the race.

EXHIBIT J

Sail-World.com News

Gladwell's Line: America's Cup likely to return to NY Supreme Court
8:49 PM Thu 23 Apr 2009 GMT



'Deal Broken? Larry Ellison in a contemplative mood at the RC44 Cup Regatta in Cagliari (ITA) before the AC meeting in Geneva' Nico Martinez, RC44 Cup - [Click Here to view large photo](#)

The America's Cup seems to be destined to return to Court as a result of the action of Defender, Societe Nautique de Geneve rejecting the offer of a Multi Challenger event sailed in yachts to the AC33 rule, made by the Challenger of Record, Golden Gate Yacht Club.

At a meeting in Geneva, on Thursday, SNG/Alinghi did not accept the Multi Challenger proposal, instead they opted for a Match in 90ft or 115ft LWL multihulls, the maximum sized yacht allowed in the Deed of Gift.

SNG/Alinghi also announced that they would Defend in May 2010, and apparent contravention of a New York Supreme Court order requiring a match to be sailed on 8 February 2010.

The response from Golden Gate YC and their team BMW Oracle Racing was to request that the statement regarding a Defence date be put in writing.

Once that is done it seems that the matter will be referred back to the New York Supreme Court for further decision and action. The confirmation of dates by the Court could be done either by a letter to the Court, or at a full Hearing with a new Judge, as Justice Cahn has returned to private practice.

SNG/Alinghi did make the offer to allow other teams to participate in a Multihull Challenge, however few would be expected to take this option seriously, unless they already had a craft under design/build, or could secure the use of such a boat, and it complied with the construction requirements of the Deed of Gift.

The reason for the changed date announcement by SNG/Alinghi is that the Deed of Gift states that for a Match in the Northern Hemisphere it must be sailed between May and October. In his last ruling the since retired Justice Herman Cahn determined that the Match should be staged in

February 2010, and the 8 February 2010 date was constructed from the date of the Appeal decision by the New York Court of Appeals on the question of whether Club Nautico Espanol de Vela was a legitimate Challenger of Record.

The question of the date set by Justice Cahn was not the subject of Appeal and the date issue was not decided by the Appeal Court.

While the May 2010 date is in accordance with the Deed of Gift, it is believed that a decision of the Supreme Court on a point of interpretation will override the provisions of the Deed of Gift.

The date, when promulgated by the Defender will trigger a Court Hearing for non-compliance.

The move does of course give the Defender more time to build and prepare for the America's Cup. At best they are believed to be two months away from launch date, while the Challenger is already on its third set of sea trials off San Diego.

Should GGYC take no formal action to dispute the date, then it will be deemed to have accepted the May 2010 schedule, and that would in turn delay for another two months the announcement of the venue for the Defence, which must be made six months before the Match, buying further time for Alinghi.

That timeline would also mean that the match would finally take place 34 months after the Challenge was lodged by Golden Gate YC in July 2007. A Match that, barring legal argument, should have been sailed 10 months later.

For the other Challengers and America's Cup teams, all eyes now turn to Paris and Louis Vuitton, whose emissaries have been working behind the scenes since the Louis Vuitton Pacific Series in Auckland.

It would seem likely that some racing will be attempted this year, probably with bid venues at little real cost to Louis Vuitton.

The question now to be faced by the America's Cup teams as to whether they can financially survive to May 2010.

The outcome for the next multi challenger America's Cup is probably unaltered, and that should take place starting in May 2011, at the earliest, in AC33 yachts.

How the teams operate in the meantime will be interesting, some will no doubt fold or be mothballed. others will survive in alternate competition.

Of course, the way is now clear for the former Challengers to form their own group, and promote their own competition free of negotiations with America's Cup Management. They would probably find a willing sponsor, in Louis Vuitton, and a willing backer in Golden Gate Yacht Club.

Such a move could pave the way to a (Louis Vuitton) World Series, hosted at various bidded venues around the world, sailed in America's Cuppers to the V5 rule, or modified, on an own boat, or borrowed boat basis. The series of regattas would be along similar lines to the Louis Vuitton Pacific Series, and now that the America's Cup is a Multihull event, there can be little risk of legal obstacles through 'passing off'.

Such an event would mesh very well with a re-vitalised America's Cup, should Golden Gate YC win in February/May 2010 and it is likely that such a Series would grow and be partnered with a traditional 34th America's Cup.

It has been mooted that a Mediterranean LV series could take place this year, replacing the ACM planned regatta series. For 2010 a true LV World Series would seem to be an option, with venues such as San Francisco, Valencia, Hong Kong, and Auckland, giving a true global spread in the course of a year or so - which has never been possible under the Defender-centric model. Earlier there was talk of an event in South Africa to coincide with the buildup for the 2010 World Football Cup.

Now is a time for leadership within the America's Cup family, rather than being mesmerised by the latest outpourings from Geneva.

That move could come from Golden Gate YC who now have the ability to take a leaf from the New York Yacht Club's America's Cup Manual and announce the basis of the 34th America's Cup should they prevail in the 33rd Match. That statement would probably be sufficient to give most teams the lead on likely timing of the 34th America's Cup and the shape of the preliminary event schedule.

Given that the 34th Match is likely to be a single boat affair for the Challengers, building would have to start for a Team NZ boat in May/June 2010, for a launch in October/November 2010 and start of competition in April 2011 in Valencia, or maybe later if the event moved to San Francisco.

An announcement of the basic details plus formulation of the AC34 rule would enable Challengers to proceed in parallel with the Multihull Match, and worst case if the event were sailed in May 2010, the timing would be rather tight. Best case if the 33rd match is sailed in February 2010, then there is time for some preliminary organisation.

But on either date the announcement by GGYC would be sufficient for design work and testing to be got underway, without waiting for the outcome of the Multihull Match to be known.

Should Alinghi prevail in February/may 2010, then it is expected that they would dust off the work that had already been undertaken in the six Competitor Meetings that have been held, and make a similar statement about their intentions regarding timing and venue.

The only possible delay could be with further Supreme Court litigation subsequent to the Multihull Match.

However the decision taken overnight by SNG/Alinghi has very little upside for them. For the wider Challenger group some definition has been bought to the process for the 34th Match, and once an announcement is made by GGYC, then they can plan on just two scenarios and two venue options.

by Richard Gladwell, Sail-World.Com

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EXHIBIT K

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

GOLDEN GATE YACHT CLUB,

Plaintiff,

-against-

SOCIETE NAUTIQUE DE GENEVE,

Defendant,

-against-

CLUB NAUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

Index No. 602446/07

(IAS Part 49; Cahn, J.)

AFFIRMATION OF
DAVID G. HILLE

DAVID G. HILLE, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under the penalty of perjury:

1. I am a member of the firm of White & Case LLP, counsel to Defendant Societe Nautique de Geneve ("SNG"). I base this Affirmation on my personal knowledge and, where indicated, upon information and belief.
2. I submit this Affirmation in support of the Notice of Counter-Settlement, dated December 6, 2007, submitted by SNG in response to the Notice of Settlement submitted by Plaintiff Golden Gate Yacht Club ("GGYC"), dated December 3, 2007.
3. By memorandum decision dated November 27, 2007 (the "Decision"), this Court granted summary judgment in favor of GGYC and granted in part SNG's motion for summary judgment dismissing GGYC's claims for breach of fiduciary duty. The Decision directed the parties to settle an order. On December 3, 2007, GGYC provided counsel for

SNG with a notice of settlement. Counsel for GGYC did not contact counsel for SNG before serving its notice of settlement and therefore the parties had no opportunity to discuss GGYC's proposed order (the "Proposed Order") before it was submitted. As noted below, SNG believes that GGYC may well agree with some of the proposed changes to the Proposed Order.

4. In accordance with Section 202.48 of the Uniform Rules for the New York State Trial Courts, SNG submits a proposed counter-order (the "Counter-Order") to address the defects in and problems with GGYC's Proposed Order. (For the Court's convenience, annexed hereto as Exhibit A is a copy of the GGYC Proposed Order (without exhibit) and annexed hereto as Exhibit B is a black-line version of the GGYC Proposed Order showing all changes made in SNG's Counter-Order.)

5. There are four problems with the Proposed Order:

- First, the Proposed Order incorrectly describes certain of the parties' submissions that were the subject of the Decision and/or the proceedings before the Court, and also contains an unnecessary statement from the Mercury Bay decision. The attached Counter-Order corrects these items.
- Second, the Proposed Order fails to include that the Court granted SNG's motion dismissing GGYC's breach of fiduciary duty claims. The attached Counter-Order captures this holding from the Court's Decision.
- Third, the Proposed Order asks the Court for an extension of the dates of the challenge match between GGYC and SNG to October 2008 which is impractical. For reasons described below, SNG requests that the challenge match dates be extended to July 2009 – the date when both parties presumed they would otherwise be racing for the 33rd America's Cup.

- Fourth, the Proposed Order calls for SNG to notify GGYC of the location for any match races by December 31, 2007. As discussed below, this is inconsistent with SNG's rights under the Deed of Gift, and otherwise infeasible.

Challenge Match Dates Should Be In July 2009

6. In the Proposed Order, GGYC provides that "the dates for the challenge match races shall be October 1, 2008, October 3, 2008 and, if necessary, October 5, 2008 unless other dates are agreed to by mutual consent of GGYC and SNG in writing." SNG does not dispute that an extension of the match race dates from the July 2008 dates in GGYC's challenge is both necessary and appropriate under the circumstances. However, holding the match races in October 2008 is not feasible for reasons of which GGYC (and the Court) may not be aware. SNG submits that the date for the challenge match race should be July 18, 21 and, if necessary, 23, 2009.
7. Under the Deed of Gift (the "Deed"), SNG as Defender is to have a minimum of ten months to prepare its defense. As GGYC has recognized, that period should not be shortened by the effect of legal proceedings and the uncertainty created by those proceedings – especially given the expense faced by all the parties in preparing for an America's Cup defense. It is undisputed that SNG and Club Nautico Espanol de Vela ("CNEV") both have a right to appeal this Court's interpretation of the Deed. Under any circumstances, the pursuit of any appeal will encompass much of 2008, making an October 2008 race date impossible.
8. It also is undisputed that SNG is entitled under the Deed to select the venue for a match race with GGYC. SNG intends to select a venue in the Northern Hemisphere, and if possible, in Europe. A match race cannot be held in the Northern Hemisphere between November 1, 2008 and May 1, 2009, because the Deed states that "no race shall be sailed in

the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere.”

9. GGYC has made plain that it favors Valencia, Spain as the venue as indicated in GGYC's Proposed Order which provides that “the location of the match shall be in Valencia, Spain or any other location selected by SNG...” GGYC has also repeatedly made public its preference that the next America's Cup match be held in Valencia. Although SNG reserves the right to choose any appropriate venue under the Deed (which is its right), SNG had selected Valencia as the venue for the 33rd America's Cup under the prior challenge from CNEV and may consider designating Valencia as the venue for a match race with GGYC.

10. As GGYC and the Court know, SNG had an agreement in place with the City of Valencia for an America's Cup event. That agreement did not provide for racing in October 2008. Quite the contrary, it is infeasible to organize an event in Valencia in the fall of 2008 because Valencia is at that time hosting a Formula 1 Grand Prix motor race. Upon information and belief, that Formula 1 event is scheduled to begin in late August 2008.

11. In order to hold a Formula 1 race car event on the streets of Valencia, the City of Valencia needs to make significant changes and literally to take over and use facilities that are otherwise used in the America's Cup event. Thus, the venue agreement that had been entered into with Valencia for the 33rd America's Cup when CNEV was the challenger of record provides that part of the America's Cup venue needs to be transferred back to the City of Valencia for an 11 day period in connection with the Formula 1 event. The venue agreement provides that during that 11 day period, access is limited to the America's Cup facilities and that there can be no offshore operations, concessions or advertising on the team's bases without approval from the Formula 1 organizers, etc. Thus, for an 11 day period just over one month before the match races on the dates proposed by GGYC in the Proposed

Order, there will be significant restrictions on the ability of both parties to prepare for, or market, any sailing event held in Valencia.

12. In addition, the venue agreement further provides that following the 11 day period, the Valencian authorities have a further 30 day period to "reinstate" the infrastructure and America's Cup facilities to their condition before the Formula 1 event. Even if Valencia could achieve the 30 day schedule (and there is always a risk it may not), these are plainly not suitable conditions for the weeks leading up to the America's Cup match. The Formula 1 event leaves insufficient time to properly prepare for an America's Cup match race and event, significantly diminishing its competitive and commercial potential. (SNG believes that GGYC may agree with this position but was probably not fully aware of the implications of the venue agreement or the Formula 1 motor racing event leading up to October 2008.)

13. In addition, an October 2008 racing date raises serious issues as to the weather because in the Northern Hemisphere the autumn equinox brings the risk of uncertain winds and storms that could make it difficult to complete any match before November, and which, in light of the Deed's prohibition on Northern Hemisphere racing from November 1 to May 1, could well leave the SNG-GGYC match undecided for several months. This is as compared to a summer racing date – like July 2009 – which, as GGYC will likely agree, ensures much better racing weather (as proven by the 32nd Cup matches, which were hugely successful as run in the month of July).

14. In light of the foregoing, the Proposed Counter-Order sets the challenge match race for July 18, 21 and, if necessary, 23, 2009 unless the parties agree otherwise via mutual consent. If the Court is for any reason not inclined to set those dates in its order, then SNG submits that the October 2008 dates in the Proposed Order should be used as July 2008 would be unfair to both parties.

The Deed Does Not Provide For Ten Months Notice Of Venue

15. The third from last "ORDERED" paragraph of GGYC's Proposed Order provides as follows: "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 by December 31, 2007 of the location it has selected for the challenge match races..." Although this paragraph properly reflects SNG's right to designate the venue in the Deed, there is no basis to require SNG to do so by December 31, 2007.

16. GGYC is attempting to use the settle order process to gain a strategic advantage to which it is not entitled under the Deed. SNG submits in its Counter-Order that it will designate the venue no later than six months prior to the match race, which, in the case of a July 18, 21 and 23, 2009 match race as proposed above, would mean on or before January 18, 2009. Alternatively, the language that requires SNG to designate a venue by a specific date (i.e., "...provided SNG notify GGYC in writing by December 31, 2007 of the location it has selected for the challenge match races...") should simply be stricken from the Proposed Order as beyond the Deed of Gift.

17. There is nothing in the Deed that requires the Defender to designate the venue by any particular date. (A copy of the Deed is annexed hereto as Exhibit C.) Although SNG will strongly consider Valencia as a potential venue as described above, it has the right under the Deed to consider other venues as well. As required under the Deed, GGYC has committed in its challenge to the exact dimensions of the boat with which it will race. The Deed leaves to SNG the decisions of where that race will occur and what kind of boat SNG will race against the challenger's designated boat. Tellingly, although the Deed specifies the minimum time the challenger must give the Defender (at least ten months), the Deed does not so limit the Defender. Choosing a race course obviously will take time and consideration and there is no

basis under the Deed or elsewhere for GGYC to try to require SNG to designate a venue in less than a month.

18. In addition, as GGYC is aware, SNG cannot just designate a venue without knowing if the relevant government authorities will approve that choice and/or at least reach agreement as to certain basic terms regarding the event. This is particularly true of SNG which is a Swiss club and therefore does not have a "home" ocean course for its Cup races. This, again, is a process that obviously takes time and it is unreasonable for GGYC to expect it to be completed during a few weeks within a holiday month.

19. Significantly, there is a relevant analog for this circumstance. Following the Supreme Court decision in the Mercury Bay case upholding the challengers' challenge, the defender, the San Diego Yacht Club, sent a letter to the challenger, Mercury Bay, advising that it would "undertake a selection process over the next several months and will announce its decision not later than ninety (90) days prior to the match." (A copy of the letter is annexed hereto as Exhibit D.) Notably that letter was authored by Thomas Ehman, Jr., the main affiant for GGYC in this action. Although we understand that the venue was actually designated by the San Diego Yacht club in advance of that date, as could well be the case here, this was the position taken by the defender and by the witness whose affidavits formed the factual basis of GGYC's submissions in this case.

20. Under the circumstances, SNG submits that to the extent the Court is inclined to set a date by which SNG must designate a venue, that such date be no less than six months prior to the match race, which, in the case of a July 18, 21 and 23, 2009 match race as proposed above, would mean on or before January 18, 2009. This is set out in the Counter-Order. Alternatively, the language requiring SNG to designate a venue by a specific date should simply be deleted from the Proposed Order altogether as beyond the Deed of Gift.

WHEREFORE, SNG respectfully requests that the Counter-Order be entered.

Dated: New York, New York
December 6, 2007



DAVID G. HILLE

EXHIBIT L

1506

Letter to Hon. Herman J. Cahn from Barry Ostrager re request to participate in
conference call on competing orders submitted to Court, dated December 12, 2007
[pp. 1506-1511]

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BY HAND

December 12, 2007

Re: Golden Gate Yacht Club v. Société
Nautique de Genève, Index No. 602446/07

The Honorable Herman J. Cahn
The Supreme Court of the State of New York
County of New York
60 Centre Street, Room 615
New York, New York 10007

Dear Justice Cahn:

We have been retained to represent Société Nautique de Genève ("SNG") in connection with the above-captioned matter. We are in the process of filing a formal notice of substitution for White & Case LLP as counsel of record. We write in response to Golden Gate Yacht Club's ("GGYC") letters of yesterday and December 10 to the Court, and request permission to participate in any conference call that your Honor schedules to discuss the competing orders that have been submitted to the Court. We understand that your Honor plans to schedule a conference call to discuss the competing orders that have been submitted to your Honor in this matter and we would hope to participate in the call. Alternatively, if your Honor is inclined to hold a formal court conference to discuss the matters raised in this letter, we would be pleased to make ourselves available to attend such a conference.

We submit that the proposed order sponsored by GGYC improperly asks this Court to interject itself into the manner in which the next America's Cup match is organized and executed without fully appreciating the enormous dislocations associated with this type of court supervision; proposes a date for the match that is, as a practical matter, unworkable in the location that all parties presently view as the optimum location for the America's Cup match; and fails to give SNG appropriate advance notice from a final, non-appealable order necessary to deal with the complexities of building a boat and selecting a site.

We respectfully submit that the November 27, 2007 memorandum opinion issued by the Court diverges from prior precedent,¹ and engages in an inappropriate level of court

¹ See, e.g., *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 266 (1990) (refusing to be drawn into a debate about rules that went beyond the terms of the

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supervision of the conduct of the America's Cup competition that would create substantial dislocations which the Court may not have fully appreciated at the time it issued the opinion. By both rejecting the challenger to the Cup holder deemed appropriate by SNG and an arbitration panel and summarily anointing a new one, without any evidentiary hearing on the appropriateness of substituting GGYC as an appropriate challenger (including the appropriateness of the specifications GGYC submitted), for the reasons fully particularized below, the Court has placed SNG in an impossible position. While SNG plans to pursue an expedited appeal, GGYC's proposed order would multiply the serious issues raised by this Court's Order and the parties should be given "breathing room" to deal with the enormous complexities associated with organizing a world class America's Cup match.

The proposed GGYC order, which provides that this Court will both select a challenger for the next America's Cup match *and* dictate the schedule for the race, would substantially interfere with well-established plans for the next match, deprive SNG of its rights as the defender of the America's Cup, and give the putative challenger GGYC a major and unfair tactical advantage. Specifically, SNG has had an agreement in place since July, 2007 with the City of Valencia, Spain, which would be the first European site for the America's Cup in more than 150 years. But GGYC's proposed timetable would effectively require a change of venue. As outlined in the Affirmation of David G. Hille, Esq., dated December 6, 2007, it would be logistically impossible to hold the match in Valencia on the proposed October 2007 dates. Under the Deed of Gift, a rightful challenger to the America's Cup has the right to choose the date, but the defender has the right to choose venue of the match. Passing the issue of whether GGYC has properly been chosen as the challenger (which SNG vigorously contests), allowing GGYC to set the date in a manner that effectively nullifies the defenders' chosen venue would improperly cede to GGYC tactical control over the conduct of the race. Significantly, scheduling the America's Cup in a time frame that substantially interferes with existing plans would preclude SNG from agreeing on protocols in a time frame suitably in advance of the next match and preclude SNG, the America's Cup holder, from building a boat in accordance with agreed-upon protocols. The foregoing issues are not advanced for pure advocacy purposes. These are issues that go to the heart of the reason why the New York Court of Appeals explicitly held that it is "most inappropriate and counterproductive for courts to attempt to fix the rules and standards of competition of any particular sport", particularly where, as here, there is evidence in the record about the dislocations that the GGYC proposed order will create and the implications of the impossibly telescoped time frame proposed by GGYC in terms of allowing SNG to build a boat and for the America's Cup to successfully organize what has become one of the greatest sporting

Deed of Gift); *id.* ("As sporting activities evolve in light of changing preferences and technologies, it would be most inappropriate and counterproductive for the courts to attempt to fix the rules and standards of competition of any particular sport. To do so would likely result in many sporting contests being decided, not in the arena of the sport, but in the courts. Moreover, the Deed of Gift governing the conduct of the America's Cup competitions contemplates that such issues of fairness and sportsmanship be resolved by members of the yachting community rather than by the courts.").

SIMPSON TEACHER & BARTLETT LLP

The Honorable Herman Cahn

3

December 12, 2007

events in the world. And, as further outlined below, GGYC's proposed order includes more relief than GGYC requested in its pleading.

We respectfully request that this Court refrain from undertaking to manage the conduct of the America Cup's race without a full appreciation of the logistical nightmares that the timetable contained in the GGYC's proposed order would create. If SNG were given the opportunity to present the Court with evidence of the underlying motivations for GGYC's conduct, we are confident that the Court would decline to enter any order that contains the fourth paragraph on page 4 of GGYC's proposed order. That paragraph states: "ORDERED that the dates for the challenge match races shall be October 1, 2008, October 3, 2008, and, if necessary, October 5, 2008 unless other dates are agreed to by mutual consent of GGYC and SNG in writing". Instead, the order should appropriately provide that: "ORDERED that, should GGYC ultimately be held to be the rightful challenger, the dates for the challenge match races shall be set by mutual consent of GGYC and SNG in writing, on mutually agreeable dates between May 2009 and July 2009".

GGYC's Proposed Order Seeks Relief Beyond That Requested Through The Sole Count On Which It Has Prevailed

In addition to all of the foregoing, GGYC's proposed order goes well beyond the relief it requested on the sole Count on which it has prevailed. The only cause of action sustained by the Court was for breach of terms of the Deed of Gift. In that count, GGYC requested a declaration that the Club Náutico Español de Vela notice of challenge was invalid. To go beyond that and declare GGYC's challenge valid is, in SNG's view, improper. We submit that for the Court to go even further and set dates and notice periods violates the core holding of the *Mercury Bay* decision.

SNG has not been provided with a full opportunity to explain the impediments to fixing dates for the holding of the next America's Cup races other than the dates previously chosen. Even with the removal of the paragraph specifying the match dates—the sole paragraph in dispute—this Court would grant GGYC *all* of the relief that it requested. There is simply no reason for this Court to dictate at this time the specific dates on which the next America's Cup match will be held.

GGYC Proposed A Date That Is Impractical For The Contemplated Location

The Deed of Gift instructs the challenging Club and the Club that is defending the America's Cup to reach "mutual consent" as to the date of the match. Here, each party in their proposed order lists Valencia, Spain as the location of the match. However, GGYC has proposed match dates that it must know are impractical for that location and which SNG has demonstrated could not work at that location. GGYC is obligated to negotiate in good faith towards mutual agreement on the date. *E.g., Jaffe v. Paramount Comms.*, 222 A.D.2d 17, 22-23 (1st Dep't

1996). Proposing a date that will not work for the agreed upon site hardly satisfies this requirement.

As explained in the December 6, 2007 Affirmation of David G. Hille, it will be logistically unworkable to hold the America's Cup race in Valencia in October 2008 because the City of Valencia has commitments to another city-wide event, a Formula 1 Grand Prix motor race, from August 2008 through late September 2008, which would leave insufficient time to prepare the necessary infrastructure and facilities for the America's Cup match. Notably, GGYC has not even attempted to contest Mr. Hille's affirmation in this respect or to present this Court with any evidence that it would somehow be possible to hold the America's Cup match at this venue in October 2008. More significantly, not only do the proposed October 2008 dates contemplate scheduling the America's Cup in a time frame that substantially interferes with existing plans for the match, it potentially precludes the America's Cup holder from building a boat and negotiating and agreeing on protocols for the race.

SNG's proposed date of July 2009 date was not randomly chosen. To the contrary, that date duly recognizes the Deed of Gift's express prohibition against any race being held in the Northern Hemisphere between November 1st and May 1st. In light of this strict prohibition, it is impossible to hold a match in Valencia until May 2009. SNG has accordingly proposed dates in July 2009, and, should GGYC ultimately be held to be the rightful challenger, SNG would be prepared, as contemplated in the Deed of Gift, to negotiate in good faith with GGYC a date between May and July 2009.²

GGYC Has Failed to Give Ten Months Notice of the Days of the Proposed Race And Has Yet to Establish That It Has Made A Valid Challenge

GGYC has failed to comply with its obligation as purported challenger to meet the conditions expressly stated in the Deed of Gift, to provide ten months' notice of the race, accompanied by the "following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water, which dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible." Deed of Gift, at 1-2. To date, GGYC has not provided SNG with essential information concerning the dimensions and concept of the GGYC boat. It has long been established practice that challenges under the Deed of Gift must be accompanied by a certificate

² We note that SNG offered in its proposed order to provide GGYC with six months advance notice of the venue in return for a mutual agreement to hold the match in July 2009. If GGYC is rejecting the July 2009 date, then the offer to provide six months advance notice (the Deed of Gift does not provide for such a notice period) is no longer warranted or valid. If GGYC is permitted to unilaterally select dates and dictate a match in October 2008, it will be logistically impossible for SNG to select and finalize arrangements for an alternative venue, as will be required in light of the unavailability of Valencia in October 2008.

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The Honorable Herman Cahn

5

December 12, 2007

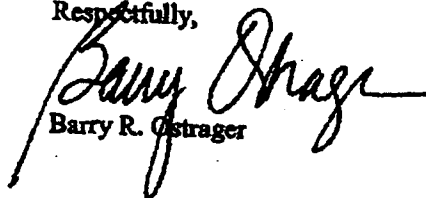
of the key dimensions of the yacht, so as to give the defender a clear idea of the nature of the challenging yacht. Challengers in the past have uniformly complied with these provisions, and whenever the information has been deemed inadequate by the defender, the parties have worked to correct the deficiencies in an equitable manner. The certificate that accompanied GGYC's challenge was, however, ambiguous in multiple respects, open to various interpretations and in some instances self-contradictory. For example, the challenge is unclear as to how many hulls GGYC's yacht has and, if more than one, missing the key dimensions specified in the Deed of Gift for each hull, including length and beam of load waterline and draught of water. Thus, GGYC has not yet properly established that it has made a valid challenge in accordance with the Deed of Gift. In light of these deficiencies, GGYC's request for a match to commence less than ten months from the present date is squarely contrary to the Deed of Gift.

In addition, as GGYC acknowledged in its December 10 letter to the Court, the ten months' notice of the match date required by the Deed of Gift must be "uninterrupted by this lawsuit." Letter from James V. Kearney to Hon. Herman J. Cahn, dated December 10, 2007. GGYC's proposed first race date of October 1, 2008 is less than ten months from today. Moreover, it is far less than ten months from the date this matter will be fully resolved and not subject to further appeals. Even with the expedited appellate review of this matter that SNG intends to seek, any appeal will inevitably take into the New Year to resolve. Thus, setting any race date in October 2008 would violate the Deed of Gift.

* * *

For the reasons outlined above, we respectfully request that the Court replace the fourth paragraph of page 4 of GGYC's proposed order specifying the match date with the following paragraph: "ORDERED that, should GGYC ultimately be held to be the rightful challenger, the dates for the challenge match races shall be set by mutual consent of GGYC and SNG in writing, on mutually agreeable dates between May 2009 and July 2009"; or, in the alternative if the Court intends to retain GGYC's proposed language in regard to the match date, decline to enter any order that contains the fifth paragraph of page 4 of GGYC's proposed order, in light of the practical impossibility of providing six months advance notice if the match date is any earlier than July 2009.

Respectfully,



Barry R. Ostrager

cc: Carolyn T. Ellis
Assistant Attorney General
Section Chief
Charities Bureau
120 Broadway
New York, New York 10271

SIMPSON THACHER & BARTLETT LLP

The Honorable Herman Cahn

December 12, 2007

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EXHIBIT M

3136

Letter to Hon. Herman J. Cahn from Barry Ostrager, dated March 26, 2008
[pp. 3136-3140]

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BY HAND

March 26, 2008

Re: *Golden Gate Yacht Club v. Société
Nautique de Genève, Index No. 602446/07*

The Honorable Herman J. Cahn
The Supreme Court of the State of New York
County of New York
60 Centre Street, Room 615
New York, New York 10007

Dear Justice Cahn:

We represent Société Nautique de Genève in the above-referenced action and respectfully submit this letter in accordance with the Court's instruction that the parties request a hearing if they could not amicably "resolve issues pertaining to the 10-month notice period, in view of any delay entailed by this litigation or otherwise". Order at 10.

Over the past ten days, SNG has reached out to GGYC and made repeated efforts, including a meeting held earlier today, to avoid additional court proceedings. However, GGYC is making this impossible. Specifically, GGYC is insisting on race dates in July or October 2008 and refusing to take into account in any way the uncertainty created by the proceedings pending before your Honor, which was resolved at the trial court level only last week when your Honor issued an Order entered March 19, 2008. GGYC's intransigence requires us to request an immediate hearing (hopefully this week) to raise with the Court certain issues that could potentially end the need for further litigation.

**The Deed of Gift Requires the Defender Be Allowed
No Less Than 10 Months to Prepare for the Match**

GGYC's present effort to dictate a race date in 2008 is, simply stated, an effort to seize the America's Cup through litigation rather than by winning on the water. If the Court is to set the race dates in either July or October 2008, it would virtually guarantee that SNG would not be able to compete with GGYC in the 33rd America's Cup and thus grant GGYC a victory without a competitive race.

It was not until last week that this Court declared in a final, appealable order GGYC's status as challenger of record. Until then, there was uncertainty (which has not been conclusively resolved) over either the challenger or the type of boat that would be

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competing in the next America's Cup race, and hence SNG has not begun construction of any boat.

America's Cup racing vessels cost tens of millions of dollars to build, and it did not make sense for SNG to incur such expense on a boat to meet GGYC's challenge when SNG believed GGYC's challenge to be invalid (which remains SNG's view). SNG has publicly declared that it is prepared to forego further legal proceedings and decide the next America's Cup on the water on or after May 1, 2009, a timeframe that would allow SNG to prepare for the race. But, the six months and one week before October 1, 2008 is insufficient time for SNG to build and test a boat to have any chance to defend the Cup successfully.

The Deed of Gift contains a 10-month notice period precisely in order to ensure that the Cup holder and trustee is given sufficient time to prepare its defense of the Cup and organize a successful event in the best interest of the Cup. Furthermore, given that the proposed match contemplates boats of a novel type and scale not yet ever built, the 10-month notice period which was adequate in 1887 is itself marginal at best for this event. Ordering the parties to race in July or October of 2008 would improperly deprive SNG of the period of notice guaranteed by the Deed of Gift.

SNG Has Stated It Will Race GGYC on Any Date on or after May 1, 2009

SNG has made clear that it will meet GGYC on the water on any date GGYC may choose to specify on or after May 1, 2009, which (as described further below) is the earliest possible race date that would give SNG ten months notice of the race running from the entry of this Court's order last week holding that GGYC is the challenger of record. SNG has stated that it is willing to forego its appellate rights both as respects to CNEV's disqualification and GGYC's defective notice of challenge so long as GGYC agrees to race in good faith in 2009 consistent with the Deed of Gift's requirements.¹

Unfortunately, rather than agreeing to meet SNG on the water in a fair contest, GGYC is pressing for the originally noticed date of July 2008 and offering October 1, 2008 as a supposed compromise, knowing that six months is simply not adequate to construct a boat that can be competitive against the vessel that GGYC has apparently already designed and whose construction is well underway. GGYC confirmed during the meeting between GGYC and SNG that GGYC is well underway in its construction of the vessel to be raced in any Deed of Gift match against SNG as described in its certificate. GGYC recognizes that SNG has not begun construction of its vessel, but suggests that SNG

¹ Specifically, SNG is prepared to waive this appellate right if and only if GGYC agrees to a race between May 1, 2009 and November 1, 2009 and agrees to respect the rights of the Cup holder under the Deed of Gift including as respects the selection and disclosure of the race location and the rules of the race.

should race an existing 41-foot catamaran even though it recognizes that such vessel would not be competitive against GGYC's 90-foot vessel. As well, the 41-foot vessel is less than the minimum size of 44 feet specified in the Deed of Gift, and extensions to its length necessarily involve compromises both in design and construction.

The Parties' Agreement to Toll the 10-Month Notice Period

As your Honor may recall, during a September 10, 2007 hearing on GGYC's preliminary injunction motion, GGYC argued that emergency relief was necessitated by the imminency of the 2008 race date proposed in GGYC's challenge. At your Honor's suggestion, this concern was obviated through an agreement between SNG and GGYC to toll the 10-month notice period before the race during the pendency of the litigation, so that both parties could have a fair and reasonable opportunity to prepare for the race.

Subsequent to the hearing, GGYC's lead counsel, James Kearney, wrote to SNG and CNEV to confirm "the tolling arrangement agreed to before Justice Chan at the September 10, 2007 hearing." Letter from James V. Kearney to David G. Hille and David W. Rivkin, dated Sept. 25, 2007 (attached hereto as Exhibit A). GGYC attached a stipulation that purported to memorialize the agreement reached during the hearing. This stipulation was executed on behalf of GGYC by its attorney James Kearney and provided that:

The Notice Period is tolled, so that the time to the Races is extended until:

1. *ten months after the latest of the following events: (a) service of a notice of entry of the trial court's final order or judgment on the merits; (b) service of a notice of entry of any Appellate Division, First Department's final order or judgment on the merits, if any; (c) service of a notice of entry of any New York State Court of Appeals' final order or judgment on the merits, if any or (d) the expiration of the time to pursue all appellate rights, if any, or*
2. *a date mutually agreed upon by GGYC and SNG. (emphasis added)*

Although this stipulation was never fully executed and filed with this Court because of ongoing negotiations over whether there should be 10 or 12 months notice subsequent to the final order, no one ever disputed that the notice period would be at least 10 months or that such period would be tolled during the pendency of this litigation.

The Honorable Herman J. Cahn

-4-

March 26, 2008

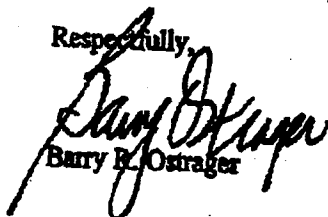
The parties' agreement to toll the notice period through the entry of a final order is consistent with the *Mercury Bay* court's tolling of the notice period through service of the order resolving the pending motions in that case. *Mercury Bay Boating Club v. San Diego Yacht Club*, Index No. 21299/87, Order dated December 21, 1987, at 6 (attached hereto as Exhibit B).

In light of the fact that GGYC has not yet served notice of entry of this Court's order entered on March 19, 2008, the earliest possible date that would afford the requisite notice and comply with the Deed of Gift's requirements for a Northern Hemisphere match would be May 1, 2009. While a 10-month notice period that began to run again from entry of your Honor's final order on March 19, 2008 would expire in January 2009, the Deed of Gift requires races in the Northern Hemisphere to be held between May 1 and November 1. The Deed of Gift match between GGYC and SNG must be held in the Northern Hemisphere because (i) SNG is located within the Northern Hemisphere, (ii) SNG is entitled under the Deed of Gift to select the location and has previously advised GGYC of its intention to hold the 33rd America's Cup in the Northern Hemisphere and (iii) GGYC's challenge specified a race in the Northern Hemisphere (Ex. C). Thus, the earliest permissible date for this Northern Hemisphere race is May 1, 2009.

* * *

For the reasons stated above, without prejudice to any rights SNG retains either as the holder of the America's Cup or as a litigant in this Court, SNG respectfully requests that this Court hold an immediate hearing to direct that any challenge from GGYC that SNG accepts take place on or after May 1, 2009 in the Northern Hemisphere.

Respectfully,



Barry R. Ostrager

Encl.

cc: Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
120 Broadway
New York, New York 10271

The Honorable Herman J. Cahn

-5-

March 26, 2008

James V. Kearney, Esq.
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EXHIBIT N

3188

Letter to Hon. Herman J. Cahn from Barry Ostrager, dated April 2, 2008
(with enclosure)

[pp. 3188-3194]

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425 LEXINGTON AVENUE
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BY HAND

April 2, 2008

Re: *Golden Gate Yacht Club v. Société
Nautique de Genève, Index No. 602446/07*

Attention: Deborah E. Edelman, Esq.

The Honorable Herman J. Cahn
The Supreme Court of the State of New York
County of New York
60 Centre Street, Room 615
New York, New York 10007

Dear Justice Cahn:

We represent Société Nautique de Genève ("SNG") in the above-referenced action and respectfully submit this letter and the attached proposed updated order in response to Your Honor's request at today's hearing.

As explained at today's hearing, entry of an order that requires SNG to race before May 1, 2009 would effectively award the 33rd America's Cup to Golden Gate Yacht Club ("GGYC") by means of litigation rather than competitive sailing. SNG will not be able to compete in October 2008, the date requested by GGYC, because it has not yet begun to build a boat. SNG will likely have to forfeit the America's Cup. GGYC's initiation of this lawsuit has already foreclosed the possibility of having other yacht clubs compete in the 33rd America's Cup and it is now trying to preclude SNG from adequately preparing for a race to defend the Cup. This outcome would be extremely detrimental to the America's Cup competition as well as the entire sailing community.

The 10-month notice period must run from no earlier than the Court's March 17 Order (entered on March 19, 2008). As Your Honor acknowledged, that Order was the first appealable order regarding the validity of GGYC's Notice of Challenge and Certificate. Before that date, it would have been foolhardy and wasteful for SNG to build a vessel capable of racing the boat specified in GGYC's Certificate. Notably, the court in *Mercury Bay* also tolled the notice period pending final resolution of the case.

The notice period, running from no earlier than March 19, 2008, will expire no earlier than January 2009. However, GGYC's Certificate designates a race in the

LOS ANGELES

PALO ALTO

WASHINGTON, D.C.

BEIJING

HONG KONG

LONDON

TOKYO

The Honorable Herman J. Cahn

-2-

April 2, 2008

Northern Hemisphere and SNG intends to select a venue in the Northern Hemisphere, such as Valencia, Spain. The Deed of Gift prohibits races in the Northern Hemisphere between November 1st and May 1st. See Deed of Gift ¶ 6. Thus, the earliest possible race date under the Deed of Gift is May 1, 2009. The attached proposed order contains race dates in July 2009 because the sailing conditions in venues in the Northern Hemisphere, such as Valencia, are generally preferable in July compared with May (e.g. thermic winds). If Your Honor were to select dates in May 2009, however, SNG suggests May 1, 5, and 7, 2009.

* * *

For the reasons stated above and in SNG's March 26, 2008 and April 1, 2008 letters to the Court, without prejudice to any rights SNG retains either as the holder of the America's Cup or as a litigant in this Court, SNG, reserving all rights concerning the substance of the Court's rulings, respectfully requests that the Court enter the Order attached hereto.

Respectfully,

Barry R. Ostrager
Barry R. Ostrager

Enclosure

cc: Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
120 Broadway
New York, New York 10271

James V. Kearney, Esq.
Latham & Watkins
885 Third Avenue
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Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022

EXHIBIT 0

At IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York on the 6 day of April, 1989.

Present: HON. CARMEN BEAUCHAMP CIPARICK, Justice.

-----X
THE MERCURY BAY BOATING CLUB INC., :

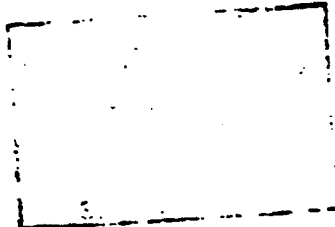
Plaintiff, :

-against- :

SAN DIEGO YACHT CLUB and ROYAL PERTH
YACHT CLUB OF WESTERN AUSTRALIA
(INC.), :

Defendants. :

Index No. 21299/87



-----X
In the Matter of the Application of
SAN DIEGO YACHT CLUB, :

Petitioner, :

ORDER

for an order pursuant to EPTL
Section 8-1.1(c)(1) or otherwise,
interpreting the Deed of Gift
of the America's Cup, or in the
alternative amending the terms of
said Deed of Gift.

-----X
Plaintiff THE MERCURY BAY BOATING CLUB INC., having
moved for relief at the foot of the judgment of December 28,
1987 and pursuant to the Order and Decision of July 25, 1988
for an Order 1) disqualifying the SAN DIEGO YACHT CLUB
catamaran from the September 7 and 9, 1988 races for the

America's Cup, 2) declaring the challenging yacht New Zealand the winner of the September 7 and 9, 1988 races for the America's Cup and 3) directing defendant SAN DIEGO YACHT CLUB to assign and transfer the America's Cup to plaintiff THE MERCURY BAY BOATING CLUB INC. subject to the terms and conditions of the Deed of Gift; and defendant SAN DIEGO YACHT CLUB, having moved for an Order at the foot of the Court's December 28, 1987 judgment declaring that 1) SAN DIEGO YACHT CLUB's September 1988 defense of the America's Cup in a catamaran yacht complied with the Deed of Gift of the America's Cup dated October 24, 1887 between George L. Schuyler and the NEW YORK YACHT CLUB, and with the December 28, 1987 Judgment, and that 2) SAN DIEGO YACHT CLUB is and remains the trustee and defender of the America's Cup under said Deed of Gift, and is entitled to proceed with preparations for its next defense of the America's Cup;

NOW, upon reading and filing the affidavits of George N. Tompkins, Jr. sworn to November 14, 1988, Jerome H. Milgram sworn to November 14, 1988, Simon McKeon sworn to November 9, 1988, Gary Mull sworn to November 9, 1988, John Brian Shuttleworth sworn to November 11, 1988, Joanne A. Fishman sworn to November 9, 1988, Roger Marshall sworn to November 14, 1988, Andrew A. Johns sworn to November 14, 1988 and Ian Colthurst Blake Dear sworn to November 11, 1988 and

exhibits attached thereto, the Memoranda of Law of plaintiff THE MERCURY BAY BOATING CLUB INC. dated November 15, 1988 and November 28, 1988, respectively, and exhibits attached thereto, the Reply Memorandum of Law of plaintiff THE MERCURY BAY BOATING CLUB INC. dated November 30, 1988 and exhibits attached thereto, the reply affidavits of Bruce Kenneth Farr sworn to November 29, 1988 and Humphrey Michael Gerard Fay sworn to November 29, 1988 and exhibits attached thereto, with proof of due service thereof upon the parties or their attorneys, and on the office of the Attorney General of the State of New York, all in support of the motion of plaintiff THE MERCURY BAY BOATING CLUB INC. and in opposition to the motion of defendant SAN DIEGO YACHT CLUB; the affirmation of Mark W. Smith dated November 14, 1988, the Memoranda of Law of defendant SAN DIEGO YACHT CLUB dated November 15, 1988 and November 28, 1988, respectively, and exhibits attached thereto, the Reply Memorandum of Law of defendant SAN DIEGO YACHT CLUB dated November 30, 1988 and exhibits attached thereto, with proof of due service thereof upon the parties or their attorneys, and on the office of the Attorney General of the State of New York, all in opposition to the motion of plaintiff THE MERCURY BAY BOATING CLUB INC. and in support of the motion of defendant SAN DIEGO YACHT CLUB; the affidavits of James W. Rayhill sworn to November 15, 1988 and Frank V.

CAC000055

Snyder sworn to November 28, 1988 and exhibits attached thereto on behalf of NEW YORK YACHT CLUB; and the affidavit of Jill Laurie Goodman sworn to November 1988 and exhibit attached thereto on behalf of the Office of the Attorney General of the State of New York; and due deliberation having been had, and the Court having rendered a written decision on March 28, 1989,

NOW, on motion of Condon & Forsyth, attorneys for plaintiff THE MERCURY BAY BOATING CLUB INC., it is

ORDERED that the motion of plaintiff THE MERCURY BAY BOATING CLUB INC. for relief at the foot of the judgment of December 28, 1987 and pursuant to the Order and Decision of July 25, 1988 for disqualification of defendant SAN DIEGO YACHT CLUB is granted and, it is further

ORDERED that the motion of defendant SAN DIEGO YACHT CLUB for an Order at the foot of the Court's December 28, 1987 judgment is denied in all respects and, it is further

ORDERED that:

1. defendant SAN DIEGO YACHT CLUB's catamaran is disqualified from the September 7 and 9, 1988 races for the America's Cup;

CAG000056

2. the challenging yacht New Zealand is declared to be the winner of the two races on September 7 and 9, 1988 for the America's Cup pursuant to the terms of the Deed of Gift of October 24, 1887;

3. plaintiff THE MERCURY BAY BOATING CLUB INC., as the winner of the two races, is entitled to the America's Cup in accordance with the terms and conditions of the Deed of Gift of October 24, 1887; and ^{4.} PLAINTIFF, THE MERCURY BAY BOATING CLUB INC.

defendant SAN DIEGO YACHT CLUB ~~is~~ ^{ARE} directed to execute ~~on or before April 10, 1989~~ ^{WITHIN THIRTY DAYS of SERVICE of A COPY of THIS ORDER WITHIN 10 DAYS of Entry} an Assignment

and Acceptance in the form attached hereto assigning and transferring the America's Cup to plaintiff THE MERCURY BAY BOATING CLUB INC. subject to the terms and conditions of the

Deed of Gift. *Defendant SHALL forthwith transfer to Plaintiff THE AMERICA'S CUP TROPHY following execution of the Assignment and Acceptance*

ENTER :


CARMEN BEAUCHAMP CIPARICK, J.S.C.

FILED
APR 07 1989
COUNTY CLERK'S OFFICE
NEW YORK

EXHIBIT

P

DEED OF GIFT

This Deed of Gift, made the twenty-fourth day of October, one thousand eight hundred and eighty-seven, between George L. Schuyler as sole surviving owner of the Cup won by the yacht AMERICA at Cowes, England, on the twenty-second day of August, one thousand eight hundred and fifty-one, of the first part, and the New York Yacht Club, of the second part, as amended by orders of the Supreme Court of the State of New York dated December 17, 1956, and April 5, 1985.

WITNESSETH

That the said party of the first part, for and in consideration of the premises and of the performance of the conditions and agreements hereinafter set forth by the party of the second part, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto said party of the second part, its successors and assigns, the Cup won by the schooner yacht AMERICA, at Cowes, England, upon the twenty-second day of August, 1851. To have and to hold the same to the said party of the second part, its successors and assigns, IN TRUST, NEVERTHELESS, for the following uses and purposes:

This Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

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, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere. Accompanying the ten months' notice of challenge 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; which dimensions shall not be

exceeded; and a custom-house registry of the vessel must also be sent as soon as possible. Center-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such center-board or sliding keel, nor shall the center-board or sliding keel be considered a part of the vessel for any purposes of measurement.

The Club challenging for the Cup and the Club holding the same may, 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, in which case also the ten months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses, free from headlands, as follows: The first race, twenty nautical miles to windward and return; the second race an equilateral triangular race of thirty-nine nautical miles, the first side of which shall be a beat to windward; the third race (if necessary) twenty nautical miles to windward and return; and one week day shall intervene between the conclusion of one race and the starting of the next race. These ocean courses shall be practicable in all parts for vessels of twenty-two feet draught of water, and shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any times allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Should the Club holding the Cup be for any cause dissolved, the Cup shall be transferred to some Club of the same nationality, eligible to challenge under this deed of gift, in trust and subject to its provisions. In the event of the failure of such transfer within three months after such dissolution, such Cup shall revert to the preceding Club holding the same, and under the terms of this deed of gift. It is distinctly understood that the Cup is to be the property of the Club subject to the provisions of this deed, and not the property of the owner or owners of any vessel winning a match.

No vessel which has been defeated in a match for this Cup can be again selected by any Club as its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time of such defeat. And 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.

AND, the said party of the second part hereby accepts the said Cup subject to the said trust, terms, and conditions, and hereby covenants and agrees to and

with said party of the first part that it will faithfully and will fully see that the foregoing conditions are fully observed and complied with by any contestant for the said Cup during the holding thereof by it; and that it will assign, transfer, and deliver the said Cup to the foreign Yacht Club whose representative yacht shall have won the same in accordance with the foregoing terms and conditions, provided the said foreign Club shall, by instrument in writing lawfully executed, enter with said part of the second part into the like covenants as are herein entered into by it, such instrument to contain a like provision for the successive assignees to enter into the same covenants with their respective assignors, and to be executed in duplicate, one to be retained by each Club, and a copy thereof to be forwarded to the said party of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused its corporate seal to be affixed to these presents and the same to be signed by its Commodore and attested by its Secretary, the day and year first above written.

GEORGE L. SCHUYLER, (L.S.) In the presence of THE NEW YORK YACHT CLUB H. D. Hamilton. by Elbridge T. Gerry, Commodore (Seal of the New York Yacht Club) John H. Bird, Secretary