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

GOLDEN GATE YACHT CLUB, Plaintiff, v. SOCIÉTÉ NAUTIQUE DE GENÈVE, Defendant, v. CLUB NÁUTICO ESPAÑOL DE VELA, Intervenor-Defendant.	Index No. 602446/07 IAS Part 54 Hon. Shirley Werner Kornreich

SOCIÉTÉ NAUTIQUE DE GENÈVE'S MEMORANDUM OF LAW IN OPPOSITION TO GGYC'S MOTION TO ENFORCE THE APRIL 7, 2009 ORDER AND JUDGMENT, RENEW ITS SAILING RULES MOTION, AND TO PERMIT DISCLOSURE OF SNG'S 33RD AMERICA'S CUP AGREEMENT

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Defendant Société Nautique de Genève ("SNG") submits this memorandum of law, the affirmation of Barry R. Ostrager, dated September 18, 2009, and the exhibits annexed thereto ("Ostrager Aff."), the affidavit of Rolf Vrolijk ("Vrolijk Aff."), the affidavit of Thomas William Schnackenberg ("Schnackenberg Aff."), and the affidavit of Lucien Masmejan ("Masmejan Aff.") in support of its Opposition to Golden Gate Yacht Club's ("GGYC") Motion to Enforce the April 7, 2009 Order and Judgment, Renew Its Sailing Rules Motion, and to Permit Disclosure of SNG's 33rd America's Cup Agreement (the "Motion").

PRELIMINARY STATEMENT

GGYC's Motion is more of the same. It has been five months since the Court of Appeals named GGYC the Challenger of Record for the 33rd America's Cup, guaranteeing GGYC's first entry into an America's Cup match after almost ten unsuccessful years of racing. In that time, GGYC has focused on gaining further competitive advantage through frivolous litigation filings and disparaging SNG in the courtroom and in the press. It therefore comes as no surprise that GGYC has brought another motion that raises issues that this Court has already clearly and conclusively resolved. Other than GGYC's pending appeal from this Court's July 29th ruling on these issues, nothing has changed to warrant this Court revisiting that decision. GGYC's motion should be denied on this ground alone. Further, assuming *arguendo* that any of the issues raised by GGYC were not previously resolved by this Court, the Court may dispose of them as they are wholly lacking in merit.

GGYC's motion is premised on the incorrect assertion that SNG's rules violate the Deed of Gift. Unfortunately for GGYC, nothing in the Deed supports the allegations. Stripped of its pretense, GGYC's Motion simply rehashes its previously rejected argument that it believes that some of the rules are unfair and the Court should therefore restrict SNG's right

under the Deed of Gift to set the rules and regulations governing the 33rd America's Cup. Taking each of GGYC's arguments in turn, it is clear that they have already been rejected by this Court and are without merit.

First, the Court has already stated twice that "the deed does require that [GGYC's challenge] vessel conform to the challenge dimensions" found in GGYC's Certificate of Name, Rig and Specified Dimensions of Challenging Vessel ("Certificate"). Ostrager Aff., Ex. A, at 2 (July 29 Order and Decision) (quoting May 14 hearing transcript at 27:8-17). GGYC's interpretation of the Deed of Gift to permit it to race in any vessel that falls within the maximum specifications it designated in its Certificate is unsupportable. In practical application, the Deed of Gift's express requirement that the challenger provide a boat certificate would be meaningless. Every challenger could disguise its challenge vessel by specifying the maximum figure for all dimensions. That would deprive the defender of a key competitive advantage it is awarded in the Deed of Gift.

Second, as SNG represented, it issued precise measurement procedures on August 6th that are perfectly consistent with the Deed of Gift. Ostrager Aff., Ex. B (Letter from Fred Meyer and Alec Tournier of SNG to Marcus Young of GGYC, dated August 6, 2009). GGYC's specific complaint is that the inclusion of the rudder in the measurement of the vessel's length on load waterline would unfairly disqualify their challenge vessel. The Deed requires a certificate of "dimensions of the challenging *vessel*." Ostrager Aff., Ex. C (Deed of Gift). GGYC does not and cannot contend that the rudder is not part of its challenging vessel. Indeed, GGYC says the opposite—that it is an *integral* part of its vessel. GGYC Br. at 7 ("It is impossible to move the rudders forward without a complete redesign and rebuild of the vessel.") If the rudder will

protrude from the back of the boat at the load waterline, then it is properly included in the length measurement.

Third, GGYC also complains of SNG's rules regarding moveable ballast. This Court has already explained to GGYC that there is nothing in the Deed of Gift to prohibit its use and "[n]or does the court find that the change in the rules to permit movable ballast and power winches to trim sails in any way violates the controlling rules." Ostrager Aff., Ex. A, at 8-10. The need to measure the competing vessels with all weight on board is not a requirement of the Deed. SNG's measurement procedures with regard to the use and placement of water ballast is, therefore, wholly consistent with the Deed.

Fourth, GGYC's protestations regarding the appointment of the jury ring hollow. The Court has already reviewed the International Sailing Federation ("ISAF")-SNG agreement and found that there was nothing "untoward" about the agreement. Ostrager Aff., Ex. A, at 11. GGYC's attacks on the integrity of ISAF and SNG's right to promulgate its own rules free of interference from GGYC are wholly unfounded.

Finally, the Court has unambiguously spoken about SNG's right to set the rules for the match: "Nothing in the [Deed of Gift] prohibits the defending organization from changing its rules, right up to the start of the race, so long as they do not conflict with the Deed." Ostrager Aff., Ex. A, at 9. GGYC itself recognizes that the Court has already heard and resolved all of these issues, and in an effort to create new facts where none exist, GGYC makes a passing reference to the recently promulgated measurement procedures. These measurement procedures, however, are not new facts. The Court based its decision upon the plain language of Deed. That has not changed.

Equally unavailing is GGYC's reliance on SNG's and its counsel's statements that SNG would not issue measurement procedures with the intent to disqualify GGYC.[1] SNG has not done so. GGYC suggests that SNG issued these rules for the sole purpose of disqualifying GGYC's boat. This allegation is entirely spurious given the fact that GGYC did not confirm their challenge boat until *after* SNG announced the measurement procedures for the Deed of Gift match.[2] In short, there is nothing new to justify revisiting the clear ruling of this Court and GGYC's Motion should be denied.

ARGUMENT

I. GGYC'S MOTION MUST BE DISMISSED BECAUSE IT DOES NOTHING MORE THAN REARGUE ISSUES THAT THIS COURT HAS ALREADY RESOLVED, AND DOES NOT SATISFY THE STANDARDS FOR A MOTION TO RENEW UNDER CPLR 2221(E)

GGYC's Motion does nothing more than rehash issues this Court previously decided in its July 29 Order and Decision. Dissatisfied with this result, GGYC is appealing that order. It is of course entitled to pursue an appeal. It is not, however, entitled to simultaneously seek a "do-over" in this Court and by requesting this Court to resolve, again, the same issues GGYC is appealing to the First Department on a non-expedited basis. There is no authority or law whatsoever to support the suggestion that GGYC can have a mulligan before this Court on the same issues it is appealing. The Motion should be denied solely upon this ground. This is, in

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1 SNG has made significant efforts to ensure that GGYC's boat is not disqualified. SNG voluntarily issued the measurement procedures far in advance of the actual race and has repeatedly offered to measure GGYC's boat well in advance of the race so that GGYC can resolve any measurement issues.

2 Indeed, SNG has been trying to obtain a custom house registry ("CHR") to confirm that the dimensions of GGYC's boat match the dimensions in the boat certificate that GGYC filed in connection with its notice of challenge. The CHR has yet to be produced although GGYC launched its boat more than a year ago and has modified it at least twice. Instead, GGYC continues to assert that it must "re-engineer" its vessel to avoid having to provide a CHR.

essence, a motion for leave to renew, which must "be based upon new facts not offered on the prior motion that would change the prior determination." CPLR 2221(e). Where, as here, a party fails to present new facts, the motion must be denied. *Burgess v. Greenthal Mgmt. Corp.*, 830 N.Y.S.2d 48, 49 (1st Dep't 2007); *Chernysheva v. Pinchuck,* 871 N.Y.S.2d 621, 623 (2d Dep't 2008).

In its Motion, GGYC asks the Court to:

(i) rule that GGYC's challenge vessel need ***not*** conform with or even come remotely close to the dimensions specified in GGYC's Certificate, so long as those dimensions are not exceeded;

(ii) impose restrictions on the use of movable ballast even though the Deed of Gift contains no such restrictions;

(iii) alter SNG's measurement procedures as it relates to measurement of the length of a boat;

(iv) invalidate the method for appointing the jury and dealing with race officials applicable under the agreement between ISAF and SNG; and

(v) prohibit SNG from issuing a Notice of Race or Sailing Instructions that alter or supplement in any way the ISAF Racing Rules of Sailing ("RRS").

This Court has already heard and decided each of these issues. Other than through the present litigation, GGYC has never succeeded in being a finalist in the America's Cup. Apparently concerned that it will once again lose on the water, GGYC is continuing its efforts to disrupt the Deed's balance of rights by telling SNG what SNG's own rules and regulations must provide.

The Court has clearly resolved each of the issues GGYC has reasserted.

First, on the issue of whether GGYC's vessel must conform to the dimensions GGYC certified in its Certificate, the Court has spoken twice on this issue. As explained in this Court's July 29 Order and Decision:

> This court heard argument at a hearing on May 14, 2009 and issued an oral ruling on the record:
>
> ... In regard to SNG's application, ***I am stating right now that, although the deed does not require a certain date, the deed does require that the vessel conform to the challenge dimensions. If the CHR does not conform to the challenge dimensions, it is this Court's belief, and my direction, that Golden Gate will be disqualified***, and I am directing Golden Gate, in good faith, to abide by the deed, to make application for the CHR as soon as possible and providing it as soon as possible.

Ostrager Aff., Ex. A, at 2 (quoting May 14 transcript at 27:8-17 (emphasis added)).

Second, on how to measure the boat, this Court quoted SNG's counsel's letter of July 22, 2009 stating that "SNG will issue precise measurement procedures for the 33rd America's Cup, on or before August 6, 2009." Ostrager Aff., Ex. A, at 5. SNG did, in fact, issue precise measurement procedures on August 6 as it said it would – before GGYC declared its challenge vessel. Ostrager Aff., Ex. B. And the measurement procedures are perfectly consistent with Deed of Gift. The Deed requires a certificate of "dimensions of the challenging vessel." There is no question that the rudder is an integral part of GGYC's vessel. If the rudder will protrude from the back of the boat at the load waterline, then it must be counted in the length measurement.

GGYC's citations to other provisions in the Deed of Gift and from New York Yacht Club rules from the 19th Century are self-defeating. The Deed expressly carves out the center-board and sliding keel from all measurements. But the Deed contains no carve out of rudders. Thus, the rudder counts in the measurement. According to GGYC, 19th Century

NYYC rules expressly specified that length on waterline was to be measured "exclusive of any portion of the rudder or rudder-stock." GGYC Br. at 5. No such carve out appears in the Deed of Gift. GGYC's own evidence confirms that sailors knew how to exclude the rudder from length measurements when they wanted to, and did not do so in the Deed of Gift.

The Deed of Gift and the Challenger Certificate refer to the dimensions of "competing yachts or vessels" and not only to the dimensions of the hulls of such yachts and vessels. In English language, the plain concept of yacht or vessel includes a direction system, which is normally a rudder. Schnackenberg Aff., ¶5. Hence, by essence and definition, a yacht or vessel comprises rudders as opposed to a hull, which designates a limited and specific part of the boat. *Id.* Not including rudders as part of a vessel or a yacht is the same as if wheels were deemed not to be part of a car. Hence and unless the rudders are explicitly excluded from measurement by the Deed of Gift, they have to be counted in the length on load waterline measurement of the competing yacht or vessel. *Id.* Finally, excluding an outboard rudder from the measurement of modern racing vessels would fatally undermine the accuracy of length measurement – a 90-foot boat with a rudder that measures 20 feet on the waterline cannot be considered a 90-foot boat.

As GGYC has repeatedly informed this Court over the past couple months, the reason it cannot provide a CHR yet is that it is still actively re-engineering and modifying its vessel. If true, it should modify its vessel to comply with the Deed of Gift's requirement that the vessel be no longer than 90 feet in length at the load waterline.

Third, on whether movable ballast can be used, this Court has already explained to GGYC that there is nothing in the Deed of Gift to prohibit its use and "[n]or does the court find that the change in the rules to permit movable ballast and power winches to trim sails in any

way violates the controlling rules." Ostrager Aff., Ex. A, at 8-10. In multi-hull races, movable water ballast is commonly *not* included in the boat measurement process. For instance, the Association des Clubs de la Région Lémanique ("ACVL") Measurement Procedures for 2009 do *not* include water ballast in measurement of load waterline. Schnackenberg Aff., ¶¶ 19-20. And in SNG's multi-hull regatta held on Lake Geneva, water ballast is not included in the measurement process. *Id.* at ¶ 20. The reason for this is because including water ballast in boat measurement would defeat the purpose of moveable ballast, as there is no one fixed or normal position for water ballast on board a multi-hull yacht. *Id.* Given the open design limitations of the Deed of Gift, it would not be possible for SNG or ISAF to write a rule that defined where the water ballast could be for load condition – by definition movable ballast can be moved, reduced or increased while racing. Therefore, it is impossible to define the normal racing quantity and position of movable ballast for measurement purpose. Hence, movable ballast tanks must be emptied for any measurement.

Fourth, on the manner of appointment of the jury, the Court has already reviewed the ISAF-SNG agreement, and found that there was nothing "untoward" about the agreement: "As for the appointment of a jury, the court finds that the method for appointing a jury contained in the confidential agreement between ISAF and SNG is not inconsistent with anything in the Deed or the applicable rules." Ostrager Aff., Ex. A, at 11.[3] GGYC's attacks on the integrity of

[3] GGYC's claim that SNG has eliminated the "normal recourse to the sailing jury" is fanciful and not supported by facts. SNG has yet to publish the Notice of Race, which will set out the jurisdiction of the sailing jury. To the extent there are restrictions on the jury's role for the 33rd America's Cup, they are normal and usual for a race of this scope. GGYC agreed to such restrictions on the jury in the Protocol for the 32nd America's Cup. Masmejan Aff., ¶ 3. And ISAF's own rules restrict jury functions. For instance, ISAF RRS 62 and 64 can be amended by the organizing authority under RRS 86.1(b), and all yacht clubs are authorized to do so without special permission from ISAF or from their national member authority. Masmejan Aff., ¶ 4. While GGYC makes much of the fact that SNG is both defender and organizer for the

ISAF and SNG's right to promulgate its own rules free of interference from GGYC are wholly unfounded.

Fifth, on whether SNG can modify its rules, the Court has also clearly spoken: "Nothing in the [Deed of Gift] prohibits the defending organization from changing its rules, right up to the start of the race, so long as they do not conflict with the Deed." Ostrager Aff., Ex. A, at 9. GGYC's prior motion alleged that SNG's rules and regulations must mirror ISAF's RRS. GGYC claimed that SNG may only alter its rules and regulations by mutual consent of GGYC. On July 29, 2009, this Court unequivocally rejected this argument and ruled that SNG, as defender, is permitted to alter the rules governing the 33rd America's Cup. Ostrager Aff., Ex. A at 9.[4] The Court recognized that the controlling rules, *inter alia* the ISAF RRS, specifically at RRS 86.1(b) permits SNG to modify many of those rules through the issuance of its Notice of Race. Ostrager Aff., Ex. A at 10-11.

33rd America's Cup, the Deed and the ISAF rules permit SNG to serve in both roles. This is no different from all past America's Cup matches since the first match in 1870, including the New York Yacht Club from 1870 until 1983, The Royal Perth Yacht Club of Western Australia during the 1987 match, the San Diego Yacht Club from 1987 to 1995 (including the last match under the default provisions of the Deed, the Mercury Bay challenge held in 1988, when the San Diego Yacht Club performed precisely the same roles now being performed by SNG without contest), and the Royal New Zealand Yacht Squadron from 1995 to 2003.

4 As this Court ruled, absent mutual consent the races shall be "sailed subject to [SNG's] rules and sailing regulations so far as the same do not conflict with the provisions of this Deed of gift." GGYC does not dispute that SNG's rules and regulations shall govern the 33rd America's Cup. GGYC, instead, asks this Court to grant GGYC the right to veto any of SNG's rules and regulations it does not approve of. As this Court previously explained to GGYC: "Unfortunately for Golden Gate, there is nothing in the Deed that would disallow" SNG from changing the rules "because the parties have not been able to mutually agree on the terms of the match." Ostrager Aff., Ex. A, at 8-9. Further, there is nothing in the Deed that permits GGYC to interfere with or influence how SNG's rules and regulations govern the 33rd America's Cup. This Court has likewise already rejected GGYC's strained reading of the mutual consent clause juxtaposed with the default paragraph as contrary to the clear and unambiguous words in the Deed of Gift. Under the plain language of the Deed, the match is to be sailed under *either* mutual consent rules or the defender's rules. *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 266 (1990). Here, there is no dispute this is not a mutual consent match.

Recognizing that the Court has already heard and resolved all of these issues, GGYC makes a passing reference to the recently promulgated measurement procedures as a basis for its motion to renew. These measurement procedures, however, are not new facts. Rather, as noted in this Court' Order, SNG advised this Court and GGYC prior to this Court's July 29 Order of its intent to release the measurement procedures on or before August 6. In any event, nothing in the measurement procedures is relevant to this Court's prior determination that SNG has the right to establish and implement its own rules and regulations. On its face, the Court based its decision upon the plain language of Deed. That has not changed.

Equally unavailing is GGYC's reliance on SNG's and its counsel's statements that SNG would not issue measurement procedures with the intent to disqualify GGYC. SNG has not done so. GGYC suggests that SNG issued these rules for the sole purpose of disqualifying GGYC's boat. This absurd notion is belied by the fact that SNG issued its Measurement Procedures ***before*** the August 10, 2009 hearing at which GGYC first announced that its challenge vessel would be the vessel its racing team has been publicly testing for more than a year. GGYC had previously denied that this boat was the challenge vessel. It is further belied by the fact that the rules to which GGYC objects were actually taken from previous America's Cup documents drafted for the 1988 race by Tom Ehman, who is currently Head of External Affairs for GGYC's racing representative BMW ORACLE Racing. Ostrager Aff., Ex. D, at ¶ 29 (Affidavit of Fred Meyer, dated July 20, 2009); Ostrager Aff., Ex. E, at ¶ 5 (Affidavit of Tom Schnackenberg dated July 20, 2009). These objections too are nothing more than an attempt to obtain a competitive advantage that is not afforded under the Deed of Gift.[5]

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[5] To the extent GGYC presents new technical objections to rules to be set forth in the Notice of Race and Sailing Instructions, such objections are premature. *Mercury Bay* instructs that challenges to how a race is conducted should be brought in a court (if at all) only *after* the

II. GGYC'S CHALLENGE VESSEL MUST CONFORM TO THE DIMENSIONS IT SPECIFIED IN ITS BOAT CERTIFICATE

This Court has already told GGYC that it would be disqualified if its boat does not conform to the dimensions of its boat Certificate. While claiming that the vessel it declared on August 10' 2009 is still being constructed and is not yet complete, GGYC suddenly announced on August 18, 2009 that its challenge vessel does ***not*** conform to the dimensions in its Certificate, stating that "the current dimensions approximate, do not exceed, but cannot precisely match those provided on GGYC's Certificate." Ostrager Aff., Ex. G (Letter from James V. Kearney of Latham & Watkins LLP to Jon Youngwood of Simpson Thacher & Bartlett LLP, dated Aug. 18, 2009). At no time prior to August 18 did GGYC ask SNG what measurement procedures would apply to the 33rd America's Cup. GGYC simply built a vessel, and now insists that its vessel must be allowed to compete regardless of whether it conforms with its Certificate – even while claiming that its boat is incomplete. If GGYC is not going to modify its boat to conform to dimensions and description it specified in its Certificate, it should forfeit

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race is sailed: **"The time has come for the sailors to be permitted to participate in the America's Cup. The parties are directed to proceed with the races and to reserve their protests, if any, until after completion of the America's Cup races."** Ostrager Aff. Ex. F, at 9-10 (*Mercury Bay Boating Club, Inc. v San Diego Yacht Club*, No. 21299/87 (N.Y. Sup. July 25, 1988)) (emphasis added). The time to put down the litigation pen and race has come in this case as well. In any event, GGYC's technical objections to rules to be set forth in the Notice of Race and Sailing Instructions are premature. The applicable rules for the 33rd America's Cup, as in any yacht club regatta, will be set upon issuance of a Notice of Race and Sailing Instructions. Ostrager Aff., Ex. D, at ¶¶ 2, 6, 12. SNG's rules and regulations permit SNG to issue a Notice of Race and Sailing Instructions that alter the ISAF rules and regulations. SNG has committed to issue the Notice of Race on November 6, 2009, which is almost two and a half months *earlier* than the San Diego Yacht Club issued the final version of its Notice of Race to Mercury Bay. Pursuant to RRS 89.2 and Rule J1.1, SNG must issue a Notice of Race that specified the rules governing the match. Ostrager Aff., Ex. D, at ¶ 12. GGYC is trying to preemptively interfere with SNG's right to have the race governed by its own rules and regulations, as will be set forth in the Notice of Race. To the extent GGYC has any right to dispute issues not already addressed about these rules, it cannot do so until they are issued.

its challenge so that SNG can accept the next Challenger and move forward with organizing a multi-challenger regatta, as has been SNG's goal from the very beginning.

According to GGYC, it matters not whether its vessel is 10 feet wide or 89.9 feet wide. All it needs to do, the argument goes, is show up in a vessel that does not exceed the 90 feet width dimension specified. Such an interpretation is unsupportable. The Deed of Gift's express statement that "the dimensions shall not be exceeded" does not mean that the required certificate can specify any dimensions and then show up with a different boat. If this were so, the Deed of Gift's express requirement that the challenge provide a boat certificate would be meaningless. Every challenger could disguise its challenge vessel by specifying the maximum figure for all dimensions. That would deprive the defender of extraordinarily relevant information, in contravention of the purpose behind the Deed of Gift's requirement that the defender be provided with a boat certificate.

A. The Deed Requires a Challenger to Provide a Certificate of Challenge Vessel as a Counter-Balance to Other Advantages Held by the Challenger

The Court of Appeals explained in *Mercury Bay,* "[b]y requiring the challenger to disclose certain dimensions with its ten month notice, the *Deed* provides the defender with notice of the vessel it will be facing and thus removes the competitive advantage which would otherwise inure to the challenger." *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club,* 76 N.Y.2d 256, 268 (1990). Thus, the Deed provides that:

> The Challenging Club shall give ten months' notice, in writing, naming the proposed races . . . 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.

Ostrager Aff., Ex. C at 1-2.

This Court similarly acknowledged in its July 29, 2009 decision that: "Stated simply, Golden Gate, the challenger, complains that SNG, the defender, would have the benefit of knowing the design of Golden Gate's boat prior to designing its own craft. Unfortunately for Golden Gate ... the Deed gives the defender this very advantage." Ostrager Aff., Ex. A, at 8.

Without this requirement that the defender be provided an accurate description of the challenger's vessel, the challenger would have unfair competitive advantage against the defender. *Mercury Bay,* 76 N.Y.2d at 268. The Deed makes clear that the Challenger of Record must provide precise dimensions of its challenging vessel, not general guideposts that must not be exceeded.

B. The Historical Evidence Confirms that the Purpose and Intent of the Deed Was For the Challenger to Accurately Identify Its Vessel

The history of the Deed confirms that the purpose of that provision in the Deed is for the challenger to provide accurate and timely information concerning its challenging vessel to the defender, in order to allow the defender to prepare a defense of the Cup. George L. Schuyler, the last surviving donor of the original five donors of the America's Cup, and the donor of the current Deed of Gift, repeatedly emphasized the importance of accurate measurements. For example, when arbitrating a measurement dispute between the New York Yacht Club and the challenger the Royal Clyde Yacht Club ("RCYC") when its challenging vessel, the *Thistle*, was found to be about 18 inches longer on the waterline than the RCYC notice of challenge had indicated it would be, Mr. Schuyler wrote:

> The clause in the Deed of Gift which requires besides the Custom House measurements, a statement of the "dimensions" of the vessel, ***is intended to convey a just idea of the capacity of the same*** without reference to any rule for racing tonnage which may be in force at the time the challenge is given. ... [I]f that

> information was withheld [load waterline] it would be ***impossible to determine with any approach to accuracy the power of his*** [the challenger's] ***boat.*** ... The importance of ***accuracy*** in giving the dimensions of a yacht challenging for the Cup ***is so great*** that any decision reached in any one case cannot be used as a precedent in any other that might arise. ***A great error in any of the "dimensions", whether through mistake or design, would vitiate the agreement*** – a small one should be governed by the circumstances attending it, and always on the liberal side.

Ostrager Aff., Ex. H (Letter from George Schuyler to James Smith Esq., Chairman, America's Cup Committee, New York Yacht Club, dated Sept. 24, 1887) (emphasis added).

Schulyer wrote in his decision in the *Thistle* case that he found the variance between the stated and the actual load water line dimension (a difference of about 18 inches over an almost 90 foot waterline) was "*so large to be of great disadvantage to the defender of the Cup*". Ostrager Aff., Ex. H (emphasis added). It is clear that Schuyler's intent and his expectation was that a "*great error*" would "*vitiate*" the match, and it is clear that an 18-inch variation over an almost 90-foot length is so large as to disadvantage the defender. *See also,* Vrolijk Aff., ¶¶ 6-8. As discussed, GGYC is in the process of "re-engineering the major structure of that boat." Ostrager Aff., Ex. I, at 80:16-17 (Aug. 10, 2009 Tr.). Surely in "re-engineering" its vessel, GGYC can ensure that its vessel matches the dimensions set forth in its Certificate.

Likewise, Mr. Schuyler made clear that the defender has a right to know the challenger's vessel. For example, "when the present Deed was written in 1887, Schuyler responded to charges of unfairness leveled against, *inter alia*, the provision requiring the challenger to give 10 months' notice of four principal dimensions of its boat, while permitting the defender to nominate its boat as late as the start of the first race." *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club,* 545 N.Y.S.2d 693, 700 (1st Dep't 1989). Schuyler addressed that clause directly:

> The main reason we ask for the load waterline length, draught of water, beam at the waterline and extreme beam is to know what kind of vessel we have to meet, I believe the challenged party ***has a right to know*** what the yacht challenging is like, so it can meet her with a yacht of her own type if it is so desired.

Id.; see also Ostrager Aff., Ex. J (A Question of Fair Play, N.Y. Times, May 14, 1890) (emphasis added).

To allow GGYC's position to stand would defeat the express intent of the Donor to give the defender notice of the "capacity" or "power" of the challenging yacht and lead to an absurd result, leaving all future defenders in the hopeless position of being given a very short period of time to build a defending yacht against an infinitely variable challenging vessel, about which all that will be known of the dimensions is that it will be something less than the maximum specifications permitted under the Deed of Gift.[6]

C. SNG Has Materially Relied on the Information in GGYC's Certificate, As Well as GGYC's Statements Regarding Its Challenge Vessel

GGYC's Certificate "***certif[ied]*** the ***details*** [] as to the name, rig and ***specified dimensions*** . . ." of its challenge vessel. Ostrager Aff., Ex. K, at 4 (GGYC Certificate, dated July 11, 2007) (emphasis added). And GGYC continuously asserted that its boat would measure 90 feet by 90 feet. For example, GGYC publicly confirmed, just two months ago, that their vessel was 90 feet by 90 feet: "BMW ORACLE Racing today launched their trimaran in San Diego as the team prepares to sea trial the 90-foot by 90-foot high-tech racing machine." Ostrager Aff., Ex. L (BMW ORACLE Racing Press Release, dated July 6, 2009); Ostrager Aff.,

6 Furthermore, the Deed requires a separate document from the challenger as to its vessel's dimensions and description. The Donor has clearly distinguished this additional document from the "notice" of its challenge. The Deed requires instead of a "notice" a "certificate" imposing a differing but more stringent obligation on the challenger as to the description and dimensions of its vessel.

Ex. M (BMW ORACLE Racing Press Release, dated July 8, 2009) ("BMW ORACLE Racing today started sea trials of their 90-foot by 90-foot high-tech racing machine in the waters off Point Loma in San Diego."). Russell Coutts, the CEO of BMW Oracle Racing stated recently: "[U]nder the deed of gift you have to give certain dimensions for your challenge yacht and we've given those dimensions and that is 90 feet wide by a 90 foot waterline boat. So in other words, 90 foot flotation. We also had to give the draft of the boat and so forth. So we've given that ..." Ostrager Aff., Ex. N (July 16, 2008 BMW Oracle Racing press conference in Munich, Germany Tr. at 25:6-12). Through these and other statements, GGYC encouraged SNG to rely on the dimensions in the Certificate in the context of defending its failure to deliver the required CHR. Ostrager Aff., Ex. O (July 21, 2009 Hearing Tr. at 37:8-15) ("[W]e don't think the CHR gives them any real information. The real issue is whether we will abide by the certificate. We still have to come with a boat that complies with those, the Deed requirements and the certificate.").

Because GGYC refused until last month's hearing to confirm which vessel it would be racing, SNG had to and did in fact rely since the beginning upon GGYC's Certificate in constructing its defense vessel for the 33rd America's Cup. As described in the Vrolijk Affidavit, SNG designed, built and launched its challenging vessel to meet a vessel with the dimensions set forth in GGYC's Certificate: specifically, a single-masted sloop rigged vessel measuring 90 feet in length on load water line by 90 feet in width on the load waterline, with an extreme beam of 90 feet, and a draft of 3 feet. Had GGYC declared a different vessel, SNG would have prepared its defense and constructed its vessel differently. Vrolijk Aff., ¶ 14. Permitting GGYC to race in a boat that is different than that in which it certified it would race

would deprive SNG as the defender of its right to an adequate opportunity to prepare its defense – a right it is given under the Deed of Gift.[7]

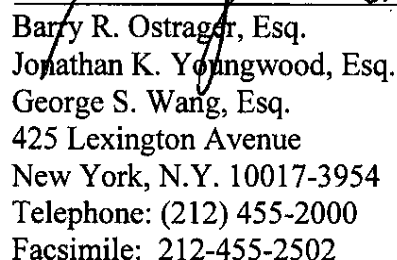
[7] To be clear, SNG does not intend to quibble over or object to standard modern boatbuilding and measurement tolerances or margins of error resulting in immaterial deviations from the 90 feet by 90 feet dimensions GGYC specified in its boat certificate.

CONCLUSION

For the foregoing reasons, Defendant SNG respectfully requests that the Court deny GGYC's Motion[8] and reaffirm that SNG, as defender, is entitled under the Deed of Gift to set the rules for the 33rd America's Cup and that GGYC, as challenger, must challenge in a vessel that matches the dimensions set forth in its Certificate.

Dated: New York, New York
September 18, 2009

Respectfully submitted,
SIMPSON THACHER & BARTLETT LLP



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8 SNG has secured ISAF's agreement to allow public release of the 33rd America's Cup Agreement and does not object to the removal of the confidentiality obligations the Court placed on GGYC in respect of that agreement.