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

REPLY MEMORANDUM OF LAW IN SUPPORT OF 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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STATUTES

CPLR § 2221 1

Plaintiff Golden Gate Yacht Club ("GGYC") submits this reply memorandum of law and supporting affidavits in support of its motion (i) for relief at the foot of a judgment to enforce compliance with the Order and Judgment entered on April 7, 2009 and (ii) to renew its motion pursuant to Civil Practice Law and Rules ("CPLR") § 2221(e) regarding applicable rules for the match decided by order and memorandum decision entered on July 29, 2009.[1]

PRELIMINARY STATEMENT

As demonstrated in GGYC's opening brief, Société Nautique de Genève's ("SNG") actions show that despite its representations to the Court, it does not intend to apply standard ISAF rules to the 33rd America's Cup, but instead intends to change those rules in any way it wishes (having secretly secured blanket approval from ISAF to do so) between now and the date of the match. Indeed, SNG has already issued measurement rules that disqualify GGYC's boat (again, despite assurances to the Court that it would not), and has eliminated provisions of ISAF's rules that ensure a review of rules and race day decisions by a neutral and impartial Sailing Jury. SNG does not dispute that this is what it has done, but instead argues that its actions are sanctioned by the Court's July 29, 2009 decision.

SNG's actions demonstrate why, when the Defender and Challenger cannot mutually agree on the terms for the match, the Defending Club's *existing rules* apply, as directed by the plain language of the Deed of Gift and confirmed by the practice at the time the Deed was

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[1] In its Opposition Brief, Société Nautique de Genève ("SNG") stated that it does not object to the removal of the confidentiality obligations the Court placed on GGYC with respect to the agreement between SNG and the International Sailing Federation ("ISAF") relating to the 33rd America's Cup dated June 5, 2009 (the "AC 33 Agreement"). (Opposition Br. at 18, n.8.) On September 9, 2009, SNG and ISAF published the AC 33 Agreement. GGYC respectfully submits that GGYC's request to remove the confidentiality designation from the AC 33 Agreement has been mooted in light of the foregoing.

Because the AC 33 Agreement was extant, but concealed from GGYC by SNG at the time of the motion, the court should consider this motion to renew pursuant to CPLR § 2221(e). Contrary to SNG's assertion (Opposition Br. at 10), this motion to renew is not premised on SNG's release of its measurement procedures on August 6, 2009.

drafted. SNG's interpretation, under which the Defender can unilaterally custom-make rules for the match, allows the Defender to do precisely what SNG seeks to do, that is, eliminate a Challenger that it does not want to race by issuing measurement rules that disqualify it and, in case that fails, eliminate any neutral review of rules changes and race day decisions so that, if it has to race GGYC, it can ensure a win. That cannot be what the settlor intended, and GGYC therefore respectfully asks the Court to reconsider its July 29 decision. *See* Part I.

GGYC also demonstrated in its opening brief that the plain language of the Deed of Gift requires only that the challenge vessel "not exceed" the dimensions provided to the Defender at the time of challenge, and that the challenge vessel may be smaller than the dimensions provided at the time of challenge. This interpretation is confirmed by historical practice, in which vessels measuring in below the challenge dimensions were not disqualified. SNG argues that every challenger could disguise its vessel by specifying the maximum for all dimensions in the challenge certificate, and then race a totally different boat. This is a straw-man. SNG cannot credibly argue that it designed its vessel in response to the specific measurements given by GGYC at the time of its challenge. *See* Part II.

GGYC also demonstrated in its opening brief that the term "length on load water-line" as used in the Deed of Gift does not include the rudder. SNG cannot dispute that the term "length on load water-line" has consistently been interpreted to exclude the rudder. The only counter-example SNG provides is for one class of radio controlled model yachts. *See* Part III.

GGYC also demonstrated that SNG's measurement rules will allow SNG's own boat to race with a length on load water-line that exceeds ninety feet, in violation of the Deed of Gift, by allowing its boat to be measured without its full load, and then adding additional weight during the race. Again, SNG can come up with no example of a length on load water-line measurement

being made without movable ballast (or any other part of a boat's racing load) on board at the time of measurement. *See* Part IV.

Finally, SNG's justification for having stripped away the authority of the Sailing Jury is also unavailing. SNG argues that there are always restrictions on the power of the Sailing Jury. Be that as it may, SNG can point to no example in which the Sailing Jury was not permitted to review for fairness decisions by the organizing authority, particularly where the organizing authority is one of only two competitors. The fact that ISAF's rules might allow such a change is irrelevant. As noted above and discussed in Part I, the question is not whether a defending club's rules can generally be changed, but whether the Deed of Gift permits the Defender to change them for an America's Cup match once a challenge has been issued. *See* Part V.

I. THE DEED OF GIFT DOES NOT PERMIT THE DEFENDER TO SET THE RULES AND SAILING REGULATIONS.

SNG's position is that as Defender of the America's Cup, it has the "right under the Deed of Gift *to set the rules and regulations* governing the 33rd America's Cup." (Opposition Br. at 1-2 (emphasis added).) The Deed of Gift gives SNG no such right.

To the contrary, the Deed of Gift unambiguously states:

> "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 sailed subject to [the Club holding the Cup's] 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." (Kearney Aff., Ex. A (Deed of Gift) (emphasis added).)[2]

If the settlor had intended to give the defending club the power to set the rules, the Deed would have said that the default races would be "subject to such rules and sailing regulations as

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[2] References in the form of "Kearney Aff. Ex. __" shall refer to the Affirmation of James Kearney dated September 2, 2009; "Ostrager Aff. Ex. __" shall refer to the Affirmation of Barry R. Ostrager dated September 18, 2009; and "Bowman Reply Aff. Ex. __" shall refer to the Affirmation of Philip M. Bowman dated September 29, 2009.

may be set from time to time by the defending club". It did not do so.[3] Thus, the plain meaning of the Deed of Gift is that, if the Defender and Challenger cannot agree on terms for the match, a best-of-three match is to be held and the races are to be in accordance with the defending club's existing rules.

This is also the only interpretation of the Deed that makes sense in light of the Deed's "mutual consent" clause. The Deed of Gift permits the Challenger and Defender to "by mutual consent, make any arrangement satisfactory to both as to the . . . rules and sailing regulations, and any and all other conditions of the match." (*Id.*) If the Challenger and Defender cannot reach mutual agreement, as they have not here, then the default rules under the Deed of Gift match become operative. It would simply make no sense to say in one part of the Deed that any rules and sailing regulations can be promulgated as long as they are satisfactory to both the Challenger and the Defender, and in another part to say that any rules and sailing regulations can be promulgated as long as they are satisfactory to the Defender.

As discussed in GGYC's opening brief, this plain and common sense reading of the Deed is confirmed by the historical practice contemporaneous with its creation, in which the Defender would promptly, after receiving a challenge, provide to the Challenger its "club book" containing the club's existing rules. (Opening Br. at 14, n.9.) SNG does not contest this.

SNG's interpretation also leads to absurd results. Under SNG's interpretation, nothing prevents SNG from declaring that the Challenger must race while dragging an anchor, or that the Challenger, if leading at a certain point in the course, must wait for the Defender's vessel to catch up. Indeed, as discussed below, SNG has already used its purported rule-making power to issue rules that will disqualify GGYC's vessel and to manipulate the officiating process so that

[3] Indeed, when either the Challenger or Defender receive an advantage under the Deed of Gift, that advantage is explicit. For example, the Deed of Gift permits the Defender to "name its representative vessel" at the time of race and states that the location for the race "shall be selected" by the Defender.

the competition is not on equal terms. SNG's conduct highlights why the only reasonable interpretation of the Deed of Gift is that if the Defender and Challenger cannot agree on terms for the match, a set of existing default rules (the defending club's) apply, not that the defending club then has the power to establish whatever rules it wants. Any other interpretation would simply invite the kind of manipulation that SNG has engaged in.

Moreover, mounting a successful America's Cup challenge is an extraordinary undertaking, involving months of preparation and great expense. When GGYC issued its challenge, it did so in reliance on the Deed's promise that the match would either be raced according to SNG's existing rules or according to rules that would be "satisfactory" to GGYC. GGYC would not have agreed (and, indeed, we believe no club would agree) to participate in a match in which there was not that degree of certainty as to what rules would apply. Certainly neither GGYC nor any other club would agree to participate in a match in which one of the competitors could simply make up whatever rules it wanted to as it went along.

Finally, SNG argues that its rules and sailing regulations (the ISAF RRS) permit SNG to modify its rules in its capacity as the organizing authority. (Opposition Br. at 9.) That is irrelevant. The question is not whether SNG's own rules permit changes. Presumably, every yacht club has a mechanism for changing its own rules. The issue is whether the Deed of Gift permits a rule change by the defending club after a challenge has been accepted and after efforts by the Challenger and Defender to reach satisfactory rules and sailing regulations have failed. For the reasons discussed above, it does not.

II. DISQUALIFYING GGYC'S VESSEL IF ITS DIMENSIONS DO NOT MATCH THE DIMENSIONS IN THE CHALLENGE CERTIFICATE WILL VIOLATE THE DEED OF GIFT.

Despite its representations to this Court that it will not issue measurement rules that will disqualify GGYC's vessel (*see* Opening Br. at 3), SNG announced that GGYC cannot race its vessel "if it does not match the challenge dimensions" contained in GGYC's challenge certificate. (*Id.* at 4 (quoting Kearney Aff. Ex. D (Aug. 13, 2009 Letter from J. Youngwood to J. Kearney)).) That requirement violates the Deed of Gift, which plainly states that the challenging vessel must not exceed the dimensions given at the time of the challenge. As this Court observed in its September 18, 2009 Order:

> "Although the Deed of Gift, as recognized by the Court of Appeals in *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 NY2D 256 (1990), gives the defender ten months' notice of the challenger's critical measurements, it does not preclude the challenger from making structural changes to the vessel *that do not increase the dimensions stated in the Notice of Challenge*." (Bowman Reply Aff. Ex. A (September 18, 2009 Order at 6 (emphasis added)).)

Similarly, in *Mercury Bay,* the Court of Appeals noted that "the challenger's disclosed dimensions [] may not be exceeded. . . ." *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256, 268 (1990).

Despite this unambiguous language, SNG argues that what the Deed really means is that the challenge vessel cannot exceed *or be smaller than* the dimensions given at the time of challenge. SNG argues that permitting GGYC to race a vessel that is in any respect smaller than the dimensions in the challenge notice 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." (Opposition Br. at 12.) However, the history behind the amendment that resulted in the "shall not exceed" language makes clear that the settlor was concerned with a challenger racing a vessel that exceeded the measurements in the

challenge notice, not a vessel that fell short of those dimensions, because vessel length is directly correlated with speed.[4]

SNG's discussion of George Schuyler's decision in the *Thistle* case is misleading. Schuyler did not say that any eighteen inch *difference* between a certified dimension and an actual dimension would amount to a great disadvantage to a defender. In the *Thistle* matter, the challenging vessel arrived 18 inches *longer* than its challenge certificate dimensions. This gave the *Thistle* "a speed advantage over the defending yacht which had been built to match the shorter length." *Mercury Bay*, 76 N.Y.2d at 283. Contrary to SNG's assertion (Opposition Br. at 14), what Mr. Schuyler thought was "so large to be of great disadvantage to the defender of the Cup" was an eighteen inch extension over the certified length dimension, not a shortfall. Schuyler resolved that problem, which occurred because the *Thistle* was still under construction when it issued its challenge, by amending the Deed to include the "shall not be exceeded" language to provide the challenger leeway in estimating its vessel dimensions so that it could race with a shorter vessel (which would not disadvantage the Defender) while ensuring that it would not race a longer, *i.e.* faster, vessel (which would disadvantage the Defender). (Kearney Aff. Ex. G (*Mercury Bay v. Boating Club v. San Diego Yacht Club*, Index No. 21299/87, 21809/87, slip op. at 7-8, 10 (N.Y. Sup. Ct. Nov. 25, 1987) (Ciparick, J.).)

The first America's Cup races following the 1887 amendment confirm that the amendment was not intended to require the challenger to exactly match its certified dimensions. During the 1899 America's Cup, the challenger *Shamrock* was 22 inches shorter than its

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[4] It bears noting that while load water-line and beam length affect a vessel's speed capacity, that capacity is also affected by other factors that the Deed does not require to be disclosed in the challenge notice, including the overall weight of the vessel, the length of the mast, and the sail area. (*See* Bowman Reply Aff. Ex B (Affidavit of Gino Morrelli, ¶¶ 2-5) (hereinafter "Morelli Aff.").) Speed is also a function of wind conditions. Thus, a challenge notice that is required only to contain the maximum beam, beam at water-line, and length on load water-line does not provide the information necessary to assess the speed of a vessel in variable race conditions.

challenged length on load water-line.[5] No effort was made to disqualify the *Shamrock* on this ground..

Indeed, SNG cannot plausibly argue that it would have designed its boat any differently had GGYC provided the current dimensions in its challenge notice. (*See* Morelli Aff., ¶¶ 2-5.) Mr. Vrolijk's blanket statement that SNG would have done so rings hollow in light of Mr. Vrolijk's prior public statement that SNG did not base the design of its vessel on what it knew about GGYC's vessel. When asked how Alinghi was "addressing the challenge of not knowing what the challenger's boat is," Mr. Vrolijk, the head of SNG's design team, responded in part: "*We are not really looking over our shoulder saying 'they have this kind of boat and we have to match it'*. You look at options, you look at concepts and you decide which is the best choice for the time available, the build procedures and how you will handle the boat." (Bowman Reply Aff. Ex. D (Sept. 1, 2009 *Seahorse* interview with R. Vrolijk) (emphasis added).)[6] Thus, SNG's only purpose in insisting that GGYC's boat conform precisely to the dimensions given at the time of challenge is to disqualify GGYC's boat.

III. SNG'S INCLUSION OF THE RUDDER IN THE MEASUREMENT OF THE "LENGTH OF LOAD WATER-LINE" VIOLATES THE DEED OF GIFT.

In its opening brief, GGYC demonstrated that the term "length on load water-line," as used in the Deed of Gift, excludes the measurement of a vessel's rudder. (Opening Br. at 5-7.) SNG responds by arguing that the rudder is part of the vessel and therefore must be included in

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[5] In the 1899 America's Cup, the Challenger's vessel, *Shamrock*, had a certified length on load water-line of 89.5 feet. (Bowman Reply Aff. Ex. C (*The Lawson History of the America's Cup*) at 200.) The actual length on load water-line of the *Shamrock* was 87.69 feet. (*Id.* at 206.) The difference between the certified length on load water-line and the actual length on load water-line for the *Shamrock I* was 1.81 feet or approximately 22 inches.

[6] *See also* Bowman Reply Aff. Ex. E (BYM Magazine Interview with Murray Jones). When asked in July whether GGYC might challenge with a catamaran, Alinghi design and sailing team member Murray Jones replied, "I've no idea. We haven't focussed [sic] on them very much at all. We decided on our concept way back in November 2007 and we've focussed [sic] on making our boat as quick as we can for a windward leeward course. We've focussed [sic] all our efforts on our own boat and not worried too much about what they are doing."

the "length on load waterline". (Opposition Br. at 2-3.) The question is not, however, whether the rudder is part of the vessel (it is), but whether the settlor intended it to be part of the "length on load water-line" (he did not).

The term "length on load water-line" was a term of art in 1887, like the terms "center-board" or "rig". New York law looks to the meaning of trust terms in light of their usage at the time of settlement to construe their meaning. (*See* Opening Br. at 6-7 (*citing In re Gross*, 426 N.Y.S.2d 1008, 1009-1010 (1st Dep't 1980)).) *See also McArthur v. Gordon*, 27 N.E. 1033, 1035 (N.Y. 1891) ("giving a construction to such instrument, regard may be had to the situation of the parties, and the surrounding circumstances, as well as the language of the instrument, for the purpose of arriving at the intent of the author in making it"). SNG does not dispute that the New York Yacht Club ("NYYC") rules at the time the 1887 Deed was executed provided that length on load water-line was measured "exclusive of any portion of the rudder or rudder-stock." (*See* Kearney Aff. Ex. K (1887 NYYC Constitution, By-laws, and Sailing Regulations) at 2.) Neither does SNG dispute that the practice historically adhered to by America's Cup participants, including immediately prior to the adoption of the 1887 Deed, has been to exclude rudders from the length on load water-line measurement. (*See* Kearney Aff. Ex. K, Ex. R (Mar. 10, 1885 letter from NYYC to challenger), Ex. S (Apr. 15, 1889 letter from NYYC to challenger); Ex. V (Affidavit of Halsey C. Herreshoff ("Herreshoff Aff.")) ¶ 6.)[7]

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[7] SNG's construction of the Deed is not supported by the Deed's proclamation that "center-board[s]" and "sliding keel[s]" "shall always be allowed" and shall not be considered for any measurement purpose. (Opposition Br. at 6.) The purpose of specifically listing center-boards and sliding keels was to assure that these types of vessels, predominantly sailed by American yachtsmen (but not British yachtsmen) would not be excluded from competition if the Cup were won by a club of a different nationality. (Bowman Reply Aff. Ex. F (Fisher, *An Absorbing Interest*).) There is no reason to believe that its purpose was to define the universe of included or excluded items when measuring the length on load waterline, as SNG's argument presumes.

SNG does not dispute the sworn testimony of Halsey Herreshoff, a preeminent designer, sailor, and measurer with extensive yachting and America's Cup experience. Mr. Herreshoff testified that he is not aware of any America's Cup competition that included the rudder in the length on load water-line measurement. (Herreshoff Aff. ¶ 6.) Significantly, the rudder was not included in the measurement procedures for length on load water-line in the 1988 America's Cup, which measurement procedures SNG claims it relied upon for its August 6, 2009 measurement procedures. The 1988 America's Cup measurement procedures for length on the load water-line were detailed in a section entitled "Measurement (Hulls)," meaning that the load water-line measurement was a measurement of the hull, not the yacht as a whole. (Bowman Reply Aff. Ex. G (Amended Notice of Regatta for the America's Cup XXVII) § 9.3.) Kenneth McAlpine, who was an official measurer for the 1988 America's Cup, testified that the measurement procedures for that event would have excluded from the length on load water-line any rudder extending beyond the water-line of the hull. (Bowman Reply Aff. Ex. H (Affidavit of Kenneth McAlpine ("McApline Aff.")) ¶ 4.).

Moreover, the standard ISAF measurement rules (which SNG represented to the Court on July 21, 2009 would apply to the match) define length on the load water-line as excluding the rudder. (Kearney Aff. Ex. J (ISAF Equipment Rules of Sailing for 2009-2012).) Those rules define the "***waterline length***" as "*the longitudinal distance between the aftermost point and the foremost point of the* ***waterline***"; and "***waterline***" is defined as "*the line(s) formed by the intersection of the outside of the* ***hull(s)*** *and . . . the water surface.*" (*Id.* at C.6.3(c); C.6.4(c) (emphases added).) And the term "***hull,***" defined as a boat's "shell" (*Id.* at D.1.1), explicitly excludes "***hull appendage,***" defined as anything attached to the "shell" (*Id.* at E.1.1.), specifically listing "***rudder***" as a type of "***hull appendage***" (*Id.* at E.1.2(j) (emphases added).)

(*See also* Affidavit of Thomas Schnackenberg ("Schnackenberg Aff.") ¶¶ 7, 9 ("rudders and other appendages").)[8]

The Schnackenberg Affidavit states that rudders were not excluded in length measurements in the 12m Rule, the America's Cup Class Rule, and various other venues. (Schnackenberg Aff. ¶¶ 7-10.) However, as Mr. Schnackenberg concedes, those length measurement rules are *not* for the measurement of length *on load water-line*. (*Id.* ¶ 7.) The question here is what does "length on load water-line" mean, not whether there is some other length measurement that may include the rudder. Those examples are thus wholly irrelevant.

IV. SNG SEEKS TO RACE A BOAT THAT EXCEEDS THE MAXIMUM LENGTH PERMITTED BY THE DEED OF GIFT.

The Deed requires that competing vessels "shall be not less than forty-four feet nor more than ninety feet on the load water-line." (Kearney Aff., Ex. A (Deed of Gift).) SNG does not – and cannot – deny that the "load water-line" means the water-line measured with maximum weight, including ballast, onboard. (Opening Br. at 7-9.)[9] However, SNG's rules would make an exception for movable ballast, for which their yacht has been specifically designed. SNG would allow movable ballast to be added *after* the yacht has been measured. The addition of ballast

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[8] SNG also directs the Court's attention to the ISAF international rules for model yachts. Schnackenberg Aff. ¶ 10. Model yachts are remote-controlled miniature vessels, commonly seen floating in ponds in city parks, and their measurement rules are irrelevant here. And, in fact, only one of the four model yacht classes actually includes the rudder in the length on load water-line measurement. As discussed, the ISAF rules that govern the yachts that will race for the 33rd America's Cup do not include the rudder in the measurement of length on load waterline. Additionally, Mr. Schnackenberg's claim that the measurers of the *Amaryllis* "should have" included the rudder in their load water-line measurement, even though they actually did not, is puzzling to say the least. Under New York law, this Court must look to what the term "length on load water-line" meant in 1887 when the Deed was settled. The "choice," as Mr. Schnackenberg puts it, of the measurers of the *Amaryllis* was to exclude the rudder, in conformity with the universal practice at the time. This is extremely probative of the meaning of the term as used in the Deed. Mr. Schnackenberg's opinion that the *Amaryllis*'s measurers should have done something differently is entirely irrelevant to the meaning of the term at the time of settlement.

[9] SNG does not, and cannot, controvert the definition of "load water-line" provided in GGYC's papers. (*See, e.g.*, Bowman Reply Aff. Ex. I (Oxford English Dictionary, 2nd Ed. 1989) ("Load-water-line" *Naut.* "The line of floatation of a ship when she has her **full cargo on board**.") (emphasis added).) The etymology provided by the OED confirms this was the meaning contemporaneous with the Deed. (*Id.* ("1887 *Daily News* 28 Sept. 5/1 The Thistle has a load-water length of 86ft. 4in. 1895 *Funk's Stand. Dict.*, *Load-water*, pertaining to a loaded vessel; as, load-water draft.").)

would sink the vessel deeper in the water and increase its water-line length – after measurement and during the race – above the maximum ninety feet permitted under the Deed.

SNG has represented to the court that its measurement rules "are, almost without exception, word for word, [] the Mercury Bay measurement rules" (Kearney Aff. Ex. L (Aug. 10, 2009 Hearing Transcript) at 90; Ostrager Aff. Ex. O (July 21, 2009 Hearing Transcript) at 26-28.) The actual *Mercury Bay* measurement rules, however, required that all ballast be on board for the measurement of "load water-line" so that the measurement could capture the vessel's actual load water-line length as required by the Deed.[10] SNG's version of these same rules removes "ballast" from the list of items required to be included in the load condition during measurement.[11]

SNG argues that there is no "fixed or normal position for water ballast on board a multi-hull yacht" and that it would therefore be impossible to write a rule to define "the normal racing quantity and position of movable ballast for measurement purpose." (Opposition Br. at 8.) SNG's argument is irrelevant. The Deed does not exclude from the "load" things that do not have a "normal racing quantity and position." SNG's argument is also wrong. It is entirely feasible for the 33rd America's Cup measurement committee to develop an appropriate process for measuring the load water-line for a vessel that will utilize movable ballast during the race. (McAlpine Aff. ¶ 6.) Nothing prevents the measurement committee, which uses its judgment and expertise to properly distribute crew and other equipment that necessarily move around during a race, to do the same for movable ballast. (*Id.*)

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[10] "'Load condition' shall mean the yacht has on board all equipment normally aboard while racing and shall include *all* sails, spars, computers, spares, consumables, *ballast*, anchors, warps, safety equipment and crew. All of the above shall be in its normal position." (Bowman Reply Aff. Ex. G (Amended Notice of Regatta for the America's Cup XXVII) § 9.3.5 (emphasis added).)

[11] 'Load condition' shall mean the yacht has on board all equipment aboard while racing and shall include all sails, spars, computers, spares, consumables, anchors, warps, safety equipment and crew. All of the above shall be in their normal position. *Ballast used during measurement shall be maintained in the same location whilst racing.* (Kearney Aff. Ex. I (Aug. 6, 2009 Letter from SNG to GGYC) ¶ 5 (emphasis added).)

SNG's only evidentiary support for excluding ballast during measurement is that the Association des Clubs de Voile de la Région Lémanique ("ACVL") Measurement Procedures for 2009 (used, *inter alia*, for multi-hull regattas held on Lake Geneva) "do *not* include water ballast in measurement of load waterline." (Schnackenberg Aff. ¶¶ 19, 20.) This assertion is simply untrue. The ACVL Measurement Procedures for 2009 do not provide for any waterline measurements.[12] Because the ACVL Measurement Procedures do not include waterline measurement, it does not matter whether ballast is included or excluded under those procedures: adding or reducing the weight of a vessel has no impact on its non-waterline dimensions.

SNG's motivation is clear: by measuring its boat without all of its weight, SNG will be able to race a boat that is longer than ninety feet, in direct violation of the Deed of Gift.

V. SNG CANNOT BE PERMITTED TO MODIFY ITS STANDARD RULES REGARDING THE POWERS OF THE RACING OFFICIALS

As discussed in GGYC's opening brief, SNG secretly agreed with ISAF on a set of changes to ISAF's standard rules that would eviscerate the powers normally granted to the Sailing Jury to review for fairness decisions by SNG regarding the conduct of the races.

SNG does not dispute that this is what they have done. Instead, SNG seeks to justify its action by arguing that nothing in the Deed "prohibits the defending organization from changing its rules, right up to the start of the race." (Opposition Br. at 3.) This, again, shows why SNG's interpretation of the Deed – that SNG can promulgate any rules it wants to that do not conflict with the Deed – is wrong.

SNG also argues that there have been restrictions on the power of the Sailing Jury in past America's Cup races. SNG can point to no example, however, in which the Sailing Jury was

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[12] *See* Bowman Reply Aff. Ex. J (Certified Translation of ACVL Measurement Procedures for 2009); Ex. K (Certified Translation of ACVL Class M1 Measurement Rules dated November 22, 2006). Neither of these documents contains a procedure for measuring the length or beam of a vessel based on the load water-line.

forbidden from reviewing decisions by the organizing authority for fairness, particularly where the organizing authority is one of only two competitors. The fact that ISAF's rules might allow such a change has no bearing. As noted above and discussed in Part I, the question is not whether a defending club's rules can generally be changed, but whether the Deed of Gift permits the Defender to change them for an America's Cup match.

* * *

We do not know all the ways in which SNG will seek to change its rules for its own advantage between now and the time of the match. It has expressly reserved the right to do so and its position is that there are no limits on its powers in that regard (other than that the rules cannot conflict with the Deed of Gift). What is clear is that SNG will continue to manipulate the rules to its own advantage unless this Court orders that, as directed by the Deed of Gift, the match be sailed according to SNG's standard rules, not whatever rules SNG decides to adopt for the upcoming match.

CONCLUSION

For all the foregoing reasons, GGYC respectfully requests that the Court order the relief requested in GGYC's opening brief.

Dated: New York, New York
September 29, 2009

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