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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.").

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.

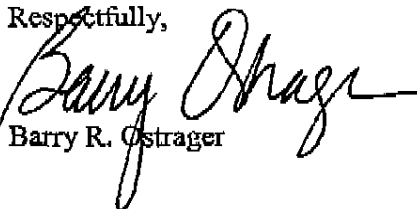
of the key dimensions of the yacht, so as to give the defender a clear idea of the nature of the challenging yacht. Challengers in the past have uniformly complied with these provisions, and whenever the information has been deemed inadequate by the defender, the parties have worked to correct the deficiencies 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

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