

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

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GOLDEN GATE YACHT CLUB, :  
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Plaintiff, : Index No. 602446/07  
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v. : IAS Part 54  
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SOCIÉTÉ NAUTIQUE DE GENÈVE, : Hon. Shirley Werner Kornreich  
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Defendant, :  
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:  
v. :  
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CLUB NÁUTICO ESPAÑOL DE VELA, :  
:  
Intervenor-Defendant. :  
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**SOCIÉTÉ NAUTIQUE DE GENÈVE'S MEMORANDUM OF LAW  
IN OPPOSITION TO GOLDEN GATE YACHT CLUB'S MOTION FOR CONTEMPT**

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Defendant Société Nautique de Genève (“SNG”) submits this memorandum of law, the Affidavit of Barry R. Ostrager, dated May 11, 2009 (“Ostrager Aff.”), and the Affidavit of Lucien Masméjan, dated May 11, 2009 (“Masméjan Aff.”) in opposition to the Golden Gate Yacht Club’s (“GGYC”) motion to enforce order and judgment and for contempt (the “Motion”).

### **PRELIMINARY STATEMENT**

GGYC’s Motion is at best premature and appears, on its face, to be a cheap publicity stunt. In bringing this motion, GGYC rebuffed SNG’s efforts to engage in discussions about the proper race date, and violated the desire of the Court of Appeals that “the right to act as trustee of the America’s Cup should be decided on the water and not in a courtroom”. At an April 23, 2009 meeting in Geneva, Switzerland, SNG’s representatives stated their understanding that, under the April 7, 2009 Order (the “Order”) and the Deed of Gift, the 33<sup>rd</sup> America’s Cup race needed to be held beginning May 3, 2010. None of GGYC’s multiple representatives at the meeting, including a Board member of GGYC who is also General Counsel of GGYC’s representative BMW Oracle Racing, uttered a word in protest. Nor did GGYC suggest in any way that the race should be held in February. In fact, GGYC’s representatives refused substantively to discuss the topic at all. Instead, GGYC’s representatives made clear that they preferred to discuss the issue at a later meeting, perhaps during the week of April 27. SNG took this offer to continue the discussions as an honest one.

But on April 27, rather than continuing the dialogue and notwithstanding its own continuing failure to provide the required Custom House registry for its challenging vessel,<sup>1</sup> GGYC filed this application. GGYC’s true intent is to continue to wage a litigation and public

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<sup>1</sup> On May 1, this Court signed SNG’s Order to Show Cause why an order should not be entered disqualifying GGYC as Challenger of Record for failure to provide a Custom House registry of its challenge vessel as required by the Deed, with a hearing scheduled for May 14.

relations war against SNG even if it must do so by manufacturing baseless charges of wrongdoing. As reflected in the attached press clipping, GGYC is trying to make a mockery of the proceedings before this Court by planting stories in the press about its confected contempt claim. Ostrager Aff., Ex. D (April 30, 2009 *The New Zealand Herald*). GGYC's unclean hands further manifested itself in the fact that it hired a team of agents to illegally spy on and try to secure information about the defense boat being designed and constructed by SNG. Masmajan Aff. ¶ 18-19. An individual detained and questioned by Swiss authorities admitted that he was one of a team of spies hired by GGYC's racing team, BMW Oracle Racing, to illegally break into facilities to take photographs and secure information about the defense boat. *Id.* This individual had been hired by BMW Oracle Racing in December 2007 for the specific purpose of spying on their competitors, and had been paid a monthly salary of €10,000 to do so. Masmajan Aff. ¶ 19.

GGYC's Motion, while filled with rhetoric and animosity, is ultimately devoid of substance. The Motion is premised on the notion that SNG breached a clear order of this Court. SNG did no such thing. However, the Court's Order, read in conjunction with the Deed of Gift, and GGYC's own Notice of Challenge (which was upheld by the Court of Appeals) that expressly put forth a Northern Hemisphere challenge, specifies a May 3, 2010 race date. Voicing this well-founded position, compelled by the express terms of the Deed, does not disobey or disregard the Order. GGYC's motion should be denied and the start date of the next Cup confirmed as May 3, 2010.

The Motion seeks to present SNG with an option of either abdicating its unambiguous right to select the location of the next America's Cup or risk an allegation of breach of fiduciary duties by holding the Cup in the Northern Hemisphere in the middle of the

winter in contravention of the Deed of Gift. This is a false choice – this Court’s April 7, 2009 Order along with the prior orders it encompasses does not require a race before May 2010. Ostrager Aff., Ex. C (Order). The Order does reference a race date 10 months in the future. But the Order also sets Valencia, Spain as the presumptive location of the next Cup and, as does the Deed of Gift itself, grants the ultimate right to select a different location to SNG. The Deed of Gift further states that no race may be held in the Northern Hemisphere between November 1 and May 1 of any year. Read together, the Order and the Deed of Gift require that a Northern Hemisphere Cup – as contemplated by both parties – be held no earlier than May 3, 2010.<sup>2</sup> At a minimum, were this Court to order the race to begin on February 8, 2010, it should confirm that racing in Valencia or elsewhere in the Northern Hemisphere as SNG may designate in accordance with the Order will not be a breach of fiduciary duty under the Deed of Gift. To do otherwise would deprive SNG of its clear right under the Deed of Gift to select a venue of its choice.

### **BACKGROUND**

The text of the Deed of Gift vests the Defender with the express and absolute right to select the venue for the Cup regatta: “All such races shall be on ocean courses, free from headlands . . . [t]hese 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”. Ostrager Aff., Ex. A (Deed of Gift). All past defenders have respectively selected the venue for each of the prior 32 America’s Cups, and there is nothing in the text or history of the Deed of Gift to suggest that the Defender can be deprived of its right to choose the location of its defense of the Cup.

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<sup>2</sup> May 1, 2010 is a holiday in most of Europe and May 2, 2010 is a Sunday, which is not a race day under the Deed of Gift.

GGYC issued its Notice of Challenge for the 33<sup>rd</sup> America's Cup on July 11, 2007. Ostrager Aff., Ex. B (GGYC Notice of Challenge). In its Challenge, GGYC explicitly acknowledged the period permitted by the Deed of Gift for a match in the Northern Hemisphere. *Id.* at 4. (“To comply with the requirements of the Deed of Gift that ten months’ notice be given, and recognizing the period permitted by the Deed of Gift for a match in the Northern Hemisphere, we name [dates]”).

Prior to 1985, the Deed barred *any* races from being held between November 1st and May 1st. This rule was to prevent sailing in conditions generally less conducive to racing. Upon the motion of The Royal Perth Yacht Club of Western Australia, which was then Cup holder and defender following its victory in the 25th America's Cup, the Deed was amended in 1985 by order of this Court to allow races to be held in the Southern Hemisphere between November 1 and May 1. The amendment left completely unchanged the prohibition of Northern Hemisphere races during this time period and the right of the defender to select the venue. This amendment permitted The Royal Perth Yacht Club to host the 26th America's Cup at its chosen site in Australia during the summer season there. This express prohibition on certain race dates in the Northern Hemisphere has been observed throughout the history of the Deed. Only since 1985, and only when a match occurred in the Southern Hemisphere because the defending club was situated there, has a race taken place during these prohibited months.

While the question of how the Order's date requirements interact with the Deed had been briefed by both parties earlier, no court had ever addressed the question. The Order does not answer this question. The Appellate Division did not need to reach it, because it held CNEV, and not GGYC, to be the proper challenge. And the Court of Appeals was not called

upon to answer the question because of the procedural posture in which the appeal was presented to it.

In an effort to work through any issue associated with the date of the race, SNG asked GGYC to discuss the race date issue during an April 23 meeting in Geneva, Switzerland. Masmajan Aff., Ex. A (May 5, 2009 letter from SNG to GGYC). At the meeting, SNG explained to GGYC its view that as the Defender of the Cup, it had to comply with the express provision of the Deed of Gift. *Id.* This meant the race would be held on the first permissible date under the Deed of Gift – May 3, 2010. *Id.*

At no time during this meeting did any of GGYC's representatives express that the next America's Cup must be held in February, 2010, or even protest SNG's statement that the race needed to be held in May, 2010. *Id.* GGYC's representatives certainly did not mention that unless the races were held in February, 2010, GGYC would seek to hold SNG in contempt. At the conclusion of the meeting, Lucien Masmajan, a member of SNG, tried again to reach resolution on the race date with Melinda Erkelens, General Counsel of GGYC's racing team BMW Oracle Racing and a member of the Board of GGYC. Mr. Masmajan specifically asked Ms. Erkelens whether she wanted to discuss the race date. *Id.* Ms. Erkelens responded that she preferred to do it in another meeting. *Id.* On behalf of GGYC, she proposed a meeting for the following week (the week of April 27). *Id.* GGYC, however, never followed up in response to SNG's repeated requests to discuss the date. Instead, on April 27 it filed the instant Motion.

On May 5, 2009, SNG reached out to GGYC to continue the dialogue begun at the April 23 meeting. *Id.* SNG invited GGYC to continue to discuss the details of the next America's Cup, including the date of the race and the participation of other yacht club's in the multi-hull regatta concept that GGYC proposed.

So far, at least one other yacht club wants to participate in an 33<sup>rd</sup> America's Cup multi-challenger regatta and has submitted a notice of challenge for the race. On May 6, 2009, Circolo di Vela Gargnano ("CVG"), which sponsored the +39 Challenge for the 32<sup>nd</sup> America's Cup, wrote to GGYC in support of its multi-challenger regatta idea. Masmajan Aff., Ex. B (May 6, 2009 letter from CVG to GGYC). CVG stated its intent to compete in multi-hulled boats, "provided enough time is given to the challengers to prepare". GGYC stonewalled CVG's proposition, using this litigation they initiated as an excuse for their refusal to even engage in discussions about a multi-challenger regatta. Masmajan Aff., Ex. C (May 6, 2009 letter from GGYC to CVG). It did so even though it has previously repeatedly expressed an affirmative and strong desire to open the 33<sup>rd</sup> America's Cup to multiple challengers. And instead of continuing discussions with SNG to avoid the need for continued and protracted litigation, GGYC wrote back to SNG on May 6 and essentially refused to meet or continue discussions with us at all. Masmajan Aff., Ex. D (May 6, 2009 letter from GGYC to SNG). On May 11, 2009 CVG submitted a notice of challenge for the 33<sup>rd</sup> America's Cup using its own multi-hulled vessel. Masmajan Aff., Ex. E (May 11, 2009 CVG Notice of Challenge).

Rather than acknowledge interest in the multi-hull regatta concept they put forward, and rather than accept an invitation to work together with SNG regarding the details of the 33<sup>rd</sup> America's Cup, GGYC insists on pursuing further court litigation. In addition to waging a war on the litigation front, GGYC has been conducting other improper activities. Masmajan Aff., ¶ 18-19. An agent of GGYC's racing team, BMW Oracle Racing, was detained in Montpellier, France at the request of a Swiss criminal judge less than a month ago while trespassing to attempt to photograph the site where SNG has been working on constructing its boats. While this criminal case has not been resolved, this employee admitted during



interrogation by the judge in the case that he was part of a larger scheme to take pictures of SNG's boats. This is in contravention of the spirit of the America's Cup, and possibly Swiss criminal law.

## ARGUMENT

### **I. The Order, Read Together With The Deed Of Gift, Specifies A First Race Date Of May 3, 2010**

In ruling in favor of GGYC on the issue of the identity of the Challenger, the Court of Appeals at GGYC's urging held that the Deed of Gift must be strictly interpreted. *Golden Gate Yacht Club v. Société Nautique de Genève*, 2009 WL 856301 (N.Y. Apr. 2, 2009) (agreeing with this Court's opinion which the Court of Appeals described as "strictly interpreting the Deed of Gift"). GGYC has now abandoned this position. Instead, it flip flops and asks this Court to disregard the Deed and to interpret the Order in a manner expressly contrary to both the Deed and GGYC's own Notice of Challenge.

The Deed of Gift unambiguously prohibits sailing a match between November 1 and May 1 in the Northern Hemisphere: "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". Ostrager Aff., Ex. A. The Order specifies a default race location of Valencia, Spain or at another location of SNG's choosing. Ostrager Aff., Ex. C at 5 ("[I]t is hereby ... ordered that the location of the match shall be in Valencia, Spain or any other location selected by SNG ..."). SNG reiterated to GGYC on April 23 that it will select a Northern Hemisphere location consistent with the location of both Clubs in the Northern Hemisphere, its Notice of Challenge and the default location specified by the Order. Masmajan Aff., Ex. B (April 23, 2009 letter from SNG to GGYC). There is nothing in the Order that suggests that a race should be held in

contravention of the terms of the Deed of Gift. Thus, the first permissible race date under the Order and Deed of Gift is the first non-Sunday, non-holiday in May— May 3, 2010.<sup>3</sup>

GGYC reads into the Deed of Gift’s ten-month notice requirement an intent to “limit the defender’s preparation time for the match as a counter-balance to the many advantages the Deed grants the defender”. Mot. at 4. While the Deed does require that the challenging club provide *at least* ten months notice to the defending club of its chosen race dates, GGYC’s suggestion that the notice provision erases the longstanding prohibition on winter America’s Cup races in the Northern Hemisphere collapses of its own weight.<sup>4</sup>

The 1887 Deed of Gift prohibited *any* match between November 1 and May 1 to prevent a challenge being made that would force the Defender to race during the winter months when the weather was less conducive to racing. While the Deed of Gift was amended in 1985 to facilitate races in the Southern Hemisphere, where the seasons are reverse of the Northern Hemisphere, there is nothing at all in such amendment suggesting any intention to permit winter America’s Cup races in the Northern Hemisphere or to alter the right of the defender to select the venue.

The Deed of Gift’s Northern Hemisphere time restrictions should be followed here for several additional reasons:

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<sup>3</sup> There remains the possibility that, due to sea and wind conditions, the race may not start on the originally scheduled day, but will have to be re-scheduled from day to day under the sailing rules and regulations applicable under the Deed of Gift.

<sup>4</sup> GGYC suggests that SNG has been focused on “building a giant multi-hull to meet [GGYC’s] challenge” (Mot. at 4) but the fact is that SNG laid off approximately over a dozen boat-builders after the Appellate Division’s decision. From then until the Court of Appeals’ decision last month, SNG has directed its efforts towards preparing a multi-challenger event and working with the numerous other entrants towards that end. During that time, GGYC continued actively to sail and train on its challenge vessel.

*First*, GGYC specifically requested a race date “recognizing the period permitted by the Deed of Gift for a match in the Northern Hemisphere” in its Notice of Challenge.

Ostrager Aff., Ex. B, at 4.

*Second*, GGYC’s recognition that it needed to honor the Deed of Gift’s restrictions on Northern Hemisphere race dates flows naturally from the fact that SNG and GGYC are both located in the Northern Hemisphere (in Geneva, Switzerland and California, respectively).

*Third*, this Court contemplated a Northern Hemisphere race in designating Valencia, Spain as the default location for the race. Ostrager Aff., Ex. C, at 5.

*Fourth*, SNG, in exercise of its right of selection in the Deed and confirmed in the Order, has advised it will select a Northern Hemisphere venue to be disclosed within the period required by the Order. The Deed of Gift expressly entitled SNG as defender to select the location of the race. The original Donor’s intent from the original 1887 Deed is clear and unambiguous in vesting the Defender with the right to select the venue: “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 . . . .” Ostrager Aff., Ex. A.

*Finally*, GGYC’s suggestion that SNG’s current arguments were previously raised with this Court and “soundly rejected” in the Order (Mot. at 6) is irreconcilable with the Order itself. The Order does not consider much less decide whether, if the ten-month period ends in the winter, a race could or would have to be held in Valencia in the winter notwithstanding it would violate the Deed of Gift’s express terms.

## **II. GGYC’s Contempt Motion Is Baseless**

To establish civil contempt, a movant must demonstrate that the party violated a clear and unequivocal mandate of the court, thereby prejudicing the rights of another party to the

litigation. *Wheels Am. New York, Ltd. v. Montalvo*, 856 N.Y.S.2d 247, 248 (2d Dep't 2008). As GGYC acknowledges, contempt rests fundamentally upon a showing that "a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed". Mot. at 4 (citing *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994)). That did not happen here.

SNG has *not* disobeyed the Order in any respect. The race is, even under GGYC's own contentions, over nine months away. GGYC is apparently trying to invent a concept of "anticipatory contempt" premised on the suggestion that SNG will disobey the Order. That will not happen. SNG will hold the race on whatever date the Court states is the date it intended for the race. Indeed, in raising the issue of the date at the April 23 meeting and asking for further meetings to discuss the issue, SNG has shown utmost good faith regarding this matter. SNG intention is clearly stated in its referred letter April 23, 2009, which is self-explanatory: "*At this stage, we wish to confirm arrangement for the 33<sup>rd</sup> 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*". Masmajan Aff., Ex. B, at 2. It is GGYC that disregarded its obligation to attempt to resolve disputes where possible without the intervention of the Court.

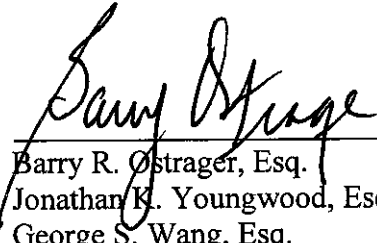
## CONCLUSION

For the foregoing reasons, Defendant SNG respectfully requests that the Court enter an Order (i) denying GGYC's Motion and (ii) confirming that (a) the 33<sup>rd</sup> America's Cup race is to be held, absent mutual consent, beginning May 3, 2010, the earliest date permitted by the Deed of Gift and (b) that SNG shall select a Northern Hemisphere venue and need not announce the location for the Cup earlier than six months prior to May 3, 2010.

Dated: New York, New York  
May 11, 2009

Respectfully submitted,  
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By: \_\_\_\_\_

  
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