

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

Golden Gate Yacht Club,

Plaintiff,

v.

Societe Nautique de Geneve,

Defendant,

Club Nautico Espanol de Vela,

Intervenor-Defendant.

Index No. 602446/07

**AFFIRMATION OF JAMES V.
KEARNEY IN OPPOSITION TO
DEFENDANT'S CROSS-MOTION
TO DISQUALIFY PLAINTIFF
FROM THE AMERICA'S CUP**

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

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

2. I respectfully submit this affirmation in opposition to Societe Nautique de Geneve's ("SNG") cross-motion of May 1, 2009.

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

4. Attached hereto as Exhibit B is a true and correct copy of an order and judgment of this Court, in the above captioned matter, dated April 7, 2009 ("Order and Judgment").

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

6. Attached hereto as Exhibit D is a true and correct copy of a letter from SNG to the Golden Gate Yacht Club ("GGYC"), dated April 14, 2009.

7. Attached hereto as Exhibit E is a true and correct copy of a letter from SNG to GGYC, dated July 23, 2007.

8. Attached here to as Exhibit F is a true and correct copy of a press release from SNG's racing team's website entitled "Societe Nautique de Geneve statement," dated April 23, 2009, and attaching SNG's letter to GGYC of that same day. (*Available at* <http://www.alinghi.com/en/33ac/news/index.php?idIndex=656&idContent=19307> (last accessed May 11, 2009)).

9. Attached hereto as Exhibit G is a true and correct copy of a press release from SNG's racing team's website entitled "Alinghi launches multihull training programme on Lake Geneva," dated April 30, 2009, stating that "Alinghi launches multihull training programme . . . as training platforms towards a multihull America's Cup in May 2010." (*Available at* <http://www.alinghi.com/en/news/news/index.php?idIndex=200&idContent=19382> (last accessed May 11, 2009)).

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

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

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

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

14. Attached hereto as Exhibit L is a true and correct copy of an excerpt from Winfield M. Thompson & Thomas W. Lawson, *The Lawson History of the America's Cup*, at 90-91 (1902), containing the full text of the second version of the Deed of Gift, which was conveyed on January 4, 1882.

15. Attached hereto as Exhibit M is a true and correct copy of a letter from James D. Smith, of the New York Yacht Club, dated August 29, 1893, regarding the Custom House Measurement's of the yacht *Valkyrie II*.

16. Attached hereto as Exhibit N is a true and correct copy of a letter to the New York Yacht Club from G. L. Watson & Co., dated July 22, 1895, and received August 8, 1895, enclosing the Certificate of Registry of the yacht *Valkyrie III*.

17. Attached hereto as Exhibit O is a true and correct copy of the Excerpt from Certificate of British Registry of Yacht Shamrock II, dated September 16, 1901.

18. Attached hereto as Exhibit P is a true and correct copy of the letter sent to Commodore C. Douglas Alford from H. Michael Fay, dated June 8, 2008, enclosing a Certificate of Registry of the yacht *New Zealand*.

19. Attached hereto as Exhibit Q is the affidavit of Michael D. Drummond, sworn May 8, 2009.

20. Attached hereto as Exhibit R is a true and correct copy of the Certificate of Documentation of the vessel *Island Paradise*, issued by the Department of Homeland Security, United States Coast Guard, dated August 8, 2005.

21. Attached hereto as Exhibit S is a true and correct copy of the Decision of the Court in Mercury Bay Boating Club v. San Diego Yacht Club, Index No. 21299/87, No. 21809/87, slip op. (Sup. Ct. New York County Nov. 25, 1987) (Cipatrick, J.).

22. Attached hereto as Exhibit T is a true and correct copy of GGYC's Certificate of Name, Rig, and Specified Dimensions of Challenging Vessel.

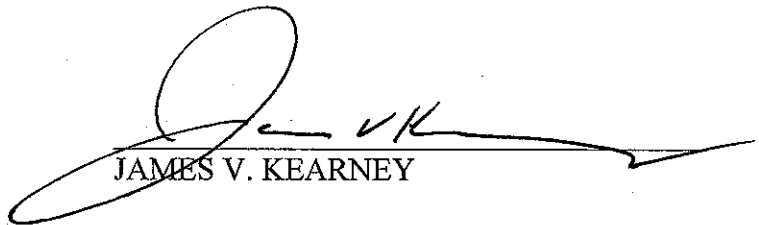
23. Attached hereto as Exhibit U is a true and correct copy of the Order in Little Prince Prods. v. Scoullar, Index No. 108849/94, slip op. (Sup. Ct. New York County Nov. 19, 1997).

24. Attached hereto as Exhibit V is a true and correct copy of wepages from the 32nd America's Cup website (http://www.americascup.com/en/index_archive.php) regarding the America's Cup defenders *Vigilant* (which raced against *Valkyrie II* in 1893), *Defender* (which raced against *Valkyrie III* in 1895), and *Columbia* (which raced against *Shamrock II* in 1901).

25. Attached hereto as Exhibit W is a true and correct copy of a letter from SNG to GGYC, dated May 5, 2009.

26. Attached hereto as Exhibit X is a true and correct copy of "Team NZ rule out building multihull boat," NZ City News, dated April 24, 2009. (*Available at <http://home.nzcity.co.nz/news/article.aspx?id=99295&fm=video-latest,nrhl> (last accessed May 11, 2009).*)

Dated: May 11, 2009
New York, NY



JAMES V. KEARNEY

EXHIBIT A

DEED OF GIFT

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

WITNESSETH

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

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

Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

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

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere. Accompanying the ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be

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

The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived.

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

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

No vessel which has been defeated in a match for this Cup can be again selected by any Club as its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time of such defeat. And when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided.

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

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

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

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

EXHIBIT B

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

-----X
GOLDEN GATE YACHT CLUB,

Plaintiff,

- against -

SOCIÉTÉ NAUTIQUE DE GENÈVE,

FILED

Defendant, MAY 13 2008

Index No. 602446/07

ORDER

CLUB NÁUTICO ESPAÑOL DE VELA,

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

MAY 13 2008

IAS MOTION
SUPPORT OFFICE

Intervenor-Defendant.

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

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

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

AND upon reading and filing the following additional papers submitted to the Court:

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

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

AND, upon all prior pleadings and proceedings hereto;

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

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

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

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

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

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

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

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

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

ORDERED that the dates for the challenge match races shall be the date ten calendar months from the date of service of a copy of this order, with notice of entry, upon the attorneys who have appeared herein, unless said date is a Sunday or legal holiday, in which case the next day shall be the first date of the challenge match races. The second date shall be two business

days thereafter and the third date, if necessary, shall be two business days after the second race. Notwithstanding the above, the parties may mutually agree in writing to other dates.

ORDERED that the location of the match shall be in Valencia, Spain or any other location selected by SNG, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races; and it is further

ORDERED that GGYC and SNG may engage in a mutual consent process and make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the challenge match races in accordance with the Deed of Gift; and it is further

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

Dated: May 12, 2008

FILED

ENTER:

MAY 13 2008

NEW YORK
COUNTY CLERK'S OFFICE

Ann Cal
J.S.C.

Norman Cardman
Clerk

FILED
APR -7 2009
COUNTY CLERK'S OFFICE
NEW YORK

As a judgment

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

GOLDEN GATE YACHT CLUB,

Plaintiff,

- against -

SOCIETE NAUTIQUE DE GENEVE

Defendant,

CLUB NAUTICO ESPANOL DE VELA,

Intervenor-Defendant.

Index No. 602446 / 07

ORDER AND JUDGMENT

LATHAM & WATKINS LLP
Attorneys for

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

FILED

as a judgment

APR - 7 2009

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

To

Service of a copy of the within is hereby admitted.

Dated:20.....

EXHIBIT C

4/6/07

State of New York

Court of Appeals

Remittitur

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

No. 25

Golden Gate Yacht Club,
Appellant,

v.

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

COPY

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

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

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

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

Stuart M. Cohen

Stuart M. Cohen, Clerk of the Court

State of New York Court of Appeals

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

OPINION

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

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

CIPARICK, J.:

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

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

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

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

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

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

² *Id.* at 88.

countries."³

The Cup has been defended 32 times and it is the events that occurred after the conclusion of the 32nd America's Cup held on July 3, 2007, in Valencia, Spain, which give rise to this appeal. Société Nautique de Genève (SNG),⁴ won the Cup on March 2, 2003, in the 31st America's Cup match and successfully defended its right to continue as trustee of the America's Cup in the July 3, 2007 race. Club Náutico Español de Vela (CNEV),⁵ on that very same day, submitted a Notice of Challenge to SNG for the 33rd America's Cup, which was accepted.

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

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

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

⁵ CNEV is a Spanish yacht club formed by the members of the Real Federación Española de Vela (RFEV), a Spanish sailing federation in June, 2007.

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

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

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

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

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

⁷ CNEV was allowed to intervene in this action.

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

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

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

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

"[a]ny organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup."

The Deed, in paragraph 10, further provides that:

"when a challenge from a Club fulfilling

all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* . * * * * * * * * * * * * * * * * * *

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

Decided April 2, 2009 .



*State of New York
Court of Appeals*

*Stuart M. Cohen
Clerk of the Court*

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

Decided April 2, 2009

No. 25

Golden Gate Yacht Club,
Appellant,

v.

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

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

Opinion by Judge Ciparick.

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

Chief Judge Lippman took no part.

EXHIBIT D



SOCIÉTÉ NAUTIQUE DE GENÈVE

14 April 2009

Marcus Young
Commodore
Golden Gate Yacht Club
#1 Yacht Road
San Francisco, California 94123

Dear Commodore,

We are in receipt of your letter of April 7, 2009. We are ready and happy to meet with you at the earliest convenience. We would propose a meeting on April 23, 2009 at 10.30 am (CET) at SNG's offices in Geneva, Switzerland. Please let us know if this date works for you, and, if so, let us know who will be attending this meeting.

SNG accepts GGYC's challenge for the America's Cup on the terms set forth in its Notice of Challenge including its enclosed certificate of its challenging vessel.

Finally, we have repeatedly requested and have still yet to receive the custom-house registry for GGYC's challenge vessel, which the Deed of Gift required GGYC to deliver "as soon as possible". Please provide that certificate as soon as possible.

Yours sincerely,

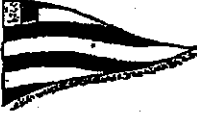


Fred Meyer
Vice Commodore



EXHIBIT E

Exhibit H to Ehman Affidavit-
 Letter from Fred Meyer and Jean-Claude Rey, dated July 23, 2007
 [pp. 140-146]



SOCIÉTÉ NAUTIQUE DE GENÈVE

23rd July 2007

Golden Gate Yacht Club.
 #1 Yacht Road
 San Francisco
 California USA 94123

Dear Commodore,

We refer to your letters dated 11th July 2007.

You are referred to the terms of the Deed of Gift which expressly prevents Société Nautique de Genève from consideration of another challenge until the pending challenge of Club Nautico Español de Vela has been decided.

The first challenge received by Société Nautique de Genève following its successful defence of the America's Cup on 3rd July 2007 was a challenge from Club Nautico Español de Vela. It is a valid challenge under the terms of the Deed of Gift in all respects. Société Nautique de Genève was obliged to accept the challenge, and in the exercise of its duties, it accepted the challenge, and will honour it.

Having accepted the challenge, Société Nautique de Genève and Club Nautico Español de Vela have made, in accordance with the terms of the Deed of Gift, arrangements by way of mutual consent satisfactory to both for the prospective 33rd America's Cup. It is entirely up to the Golden Gate Yacht Club to decide whether or not it wishes to apply, in due course, to participate in the prospective 33rd America's Cup under these agreed terms, once further details are announced as provided in the Protocol Governing the Thirty-third America's Cup.

Your challenge is herewith returned with this letter.

Your attention is drawn to Article 2.4 and Article 2.7(d) and the possible consequences should you dispute the binding effect of the Protocol Governing the 33rd America's Cup, or you pursue a course of action that damages the image and reputation of the America's Cup.

Kind regards.

Yours sincerely

Fred Meyer
 Vice-commodore
 Société Nautique de Genève

Jean-Claude Rey
 Central Committee Member
 Société Nautique de Genève



EXHIBIT F



Alinghi 33rd AC News Images Goodies Guestbook Racing Media



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LATEST ON 33RD AC

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HISTORY

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LATEST NEWS

10.05.2009

Ernesto Bertarelli's Alinghi SUI1 wins first regatta of the D35 series on Lake Geneva

09.05.2009

Two wins for Ernesto Bertarelli on Alinghi SUI1 at D35 regatta, day two

08.05.2009

Maiden race for Alinghi SUI6 on day one of the D35 Championship

POLL

Have you visited our video section, **Alinghi TV**?

- Yes, frequently
- Yes, but not often
- No, I haven't

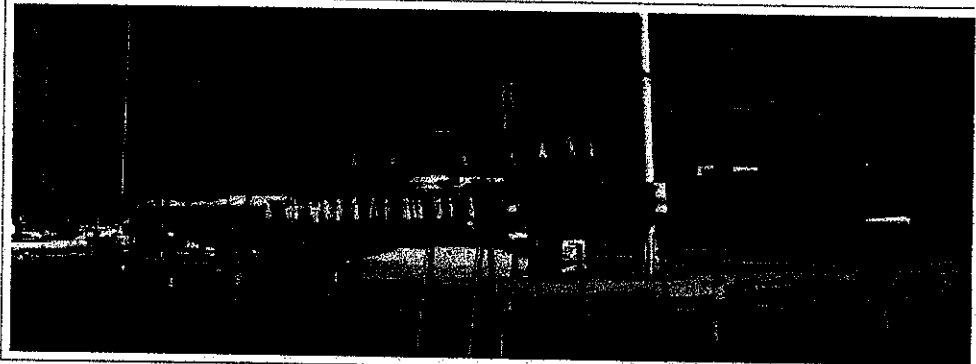
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News

23.04.2009 (15:05 CET) - Geneva, Switzerland - Alinghi

Société Nautique de Genève statement



The Société Nautique de Genève, the 33rd America's Cup defending yacht club
(Photo credit: Carlo Borlenghi/Alinghi)



(Left to right) Lucien Masmajan, SNG counsel; Fred Meyer, SNG vice-commodore and Brad Butterworth, Alinghi team skipper

(Photo credit: Carlo Borlenghi/Alinghi)

At a meeting today in Geneva, the America's Cup defending yacht club, Société Nautique Genève (SNG), confirmed that it accepts the Golden Gate Yacht Club's (GGYC) challenge to the 33rd America's Cup and informed representatives of the American yacht club that the Alinghi team, will be ready to race their 90x90ft boat (as stated in the GGYC Notice of Challenge) in 2010.

SNG expressed its willingness for the challenger selection to be open to other teams and encouraged GGYC to do so by offering them more time for teams to prepare if necessary. It was also stated that the SNG would be flexible and ready to discuss other terms of the

America's Cup such as race format, venue or calendar.

» **The SNG writes to the GGYC after the meeting on 23 April**



SOCIÉTÉ NAUTIQUE DE GENÈVE

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

23 April 2009

33rd America's Cup

Dear Commodore

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

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

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

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

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

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





SOCIÉTÉ NAUTIQUE DE GENÈVE

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

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

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

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

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

1. It is our intention to meet you on the water in accordance with the terms of the Deed. To accomplish this, we will adhere strictly to all aspects of your notice of challenge dated 11 July 2007, the Deed and the decisions of the Courts.
2. Our vessel, if of one mast, shall be not less than forty-four (44) feet nor more than ninety (90) feet on the load water-line; if of more than one mast it shall not be less than eighty (80) feet nor more than one hundred and fifteen (115) feet on the load water-line.
3. In accordance with your notice of challenge which specified Match dates for a Northern Hemisphere venue and given both clubs are situated in the Northern Hemisphere, you are advised that Société Nautique de Genève will select a venue in the Northern Hemisphere, with the consequence that pursuant to the express terms of the Deed under which we are both bound, the scheduled dates for the match shall be 3 May 2010 for the first race, 5 May 2010 for the second race and if required 7 May 2010 for the third race. In any case, one (1) week day shall intervene between the conclusion of one (1) race and the start of the next race. These dates are the very earliest dates permitted for the Match by the Deed after expiry of your tolled 10 month notice period.





SOCIÉTÉ NAUTIQUE DE GENÈVE

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

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

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

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


Fred Meyer

Vice-Commodore and Chairman of America's Cup Committee



EXHIBIT G



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NEWS

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SEAHORSE COLUMNS

News

30.04.2009 (19:35 CET) - Geneva, Switzerland - Alinghi

Alinghi launches multihull training programme on Lake Geneva



LATEST NEWS

10.05.2009

Ernesto Bertarelli's Alinghi SUI1 wins first regatta of the D35 series on Lake Geneva

09.05.2009

Two wins for Ernesto Bertarelli on Alinghi SUI1 at D35 regatta, day two

08.05.2009

Maiden race for Alinghi SUI16 on day one of the D35 Championship

POLL

Have you visited our video section, **Alinghi TV**?

- Yes, frequently
- Yes, but not often
- No, I haven't

>Vote

Alinghi, 33rd America's Cup Defender, has started its 2009-2010 multihull campaign in Switzerland launching the two D35 catamarans that will be used as training towards a multihull America's Cup in May 2010. The sailing team will be dedicated to training, racing the Challenge Julius Baer on Lake Geneva for the rest of the season withdrawing from other monohull commitments.

In addition to Ernesto Bertarelli's original SUI1, the team has chartered a second D35 (SUI16) for the season and the two grand prix multihulls will race the eight events that summer, starting on 8 May with the Grand Prix Corum.

-->



Alinghi launches multihull training programme for 2009-2010 season
The D-35's launched by helicopter from the boatyard in Lausanne will be alongside SUI1 as a training platform towards a multihull America's Cup 2010 and to race the Challenge de Genève on Lake Geneva

(Photo credit: Stefano Gattini/Alinghi)

Ed Baird will helm Alinghi SUI6 with Brad Butterworth as tactician while Ernesto Bertarelli, president, will helm Alinghi SUI1. "Ernesto and his team have been strong in this class, we look forward to learning from and with them throughout the season," said Baird. "We have a lot to learn, and there will be a number of great crews to race against, so we'll have the opportunity to get back on the water in a competitive environment."

The Alinghi multihulls will face a strong 10-boat fleet that includes some of the best multihull sailors in the world, and while an Alinghi team has won the last two championships on the Lake, the team is candid in its expectations: "We are here to try to win, just as we did last year, but this season is going to be tough: the circuit has two new boats (Veltigroup and Populaire) manned by highly professional multihull sailors with lots of experience, so the races will be more challenging. We will definitely be trying to keep the trophy in our hands though!" said Yves Detrey, Alinghi bow/mastman.

The first event, the Grand Prix Corum is from 8-10 May at the Société Nautique de Genève. Alinghi teams will start training from next Monday, "the D-35's represent a more sophisticated racing multihull than we have experienced before, and we need all the training opportunities we can get as we prepare for an America's Cup in multihulls," Baird concluded.

Crew lists

Alinghi SUI1

Club: Société Nautique de Genève
Ernesto Bertarelli, helmsman
Pierre-Yves Jorand, mainsail trimmer, performance
Nils Frei, trimmer
Yves Detrey, bow/mastman, boat captain
JC Monnin, trimmer, performance
Luc Dubois, helmsman, performance
Tanguy Cariou, tactician
Coraline Jonet, trimmer
Andrew Graham, spare
Claudy Dewarrat, coach
Christian Wahl, tactician

Alinghi SUI6

Club: Société Nautique de Genève
Ed Baird, helmsman
Brad Butterworth, tactician

Warwick Fleury, mainsail trimmer
 Lorenzo Mazza, trimmer
 Piet van Nieuwenhuijzen, bow/mastman
 Curtis Blewett, bow/mastman
 Murray Jones, tactician

Note to the Editor:

D35 racing programme
 Challenge Julius Baer 2009

Dates	Events	Organi
8-10 May 2009	Grand Prix Corum	SNG
23-24 May 2009	Grand Prix Romandie.com - Act I	SNR
6 June 2009	Genève-Rolle-Genève	YCG
13 June 2009	Bol d'Or Mirabaud	SNG
27-28 June 2009	Grand Prix Romandie.com - Act II	CNV
22-23 August 2009	Open de Nyon	SNR
5-6 September 2009	HP Cup La Réserve	YLSN
18-20 September 2009	Grand Prix Beau-Rivage Palace	CVV

D35 teams for the Challenge Julius Baer 2009

- SUI1 Alinghi SUI1
- SUI2 Okalys-Corum
- SUI3 Julius Baer
- SUI4 Zen Too
- SUI5 Foncia
- SUI6 Alinghi SUI6
- SUI7 Zebra 7
- SUI8 Romandie.com
- SUI9 Smart Home
- SUI10 Ladycat
- SUI11 Veltigroup
- SUI12 Banque Populaire

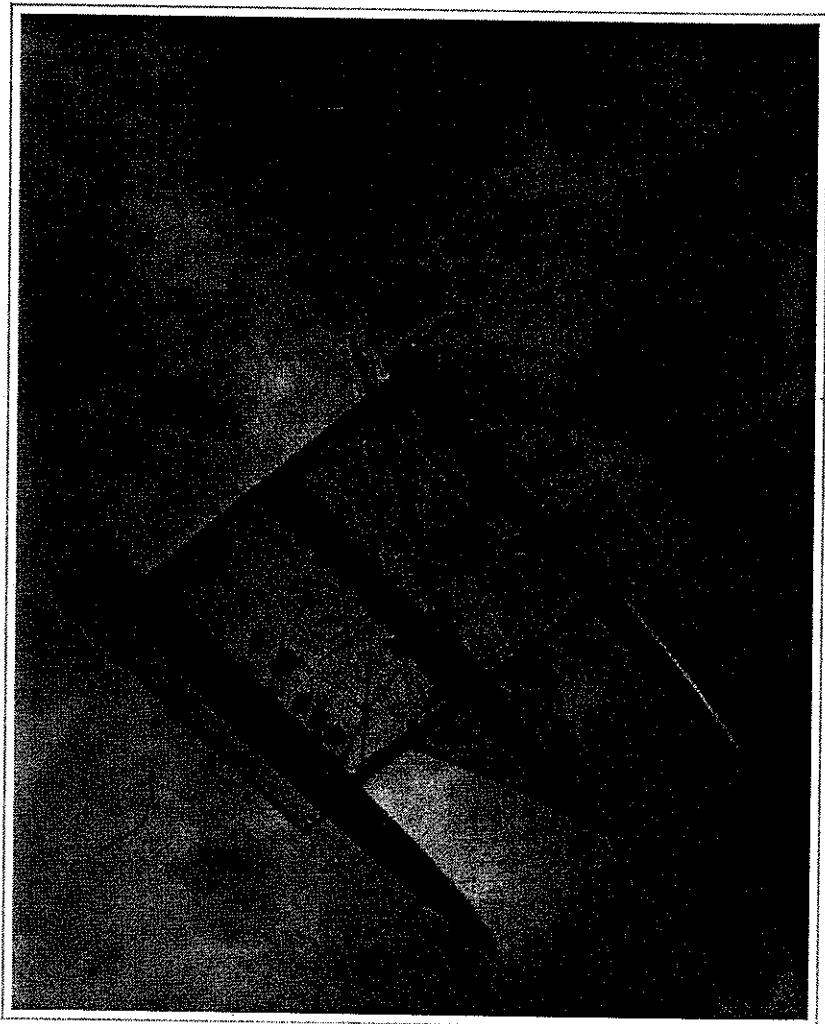
Additional information on the Décision 35 class

The D35 catamaran is a strict one design concept constructed with materials produced edge technology – its improved aerodynamics result in a lighter and faster craft. distinctive feature of three hulls – the outer two acting as floats and the central hull a strengthening structure – this catamaran is well suited to racing.

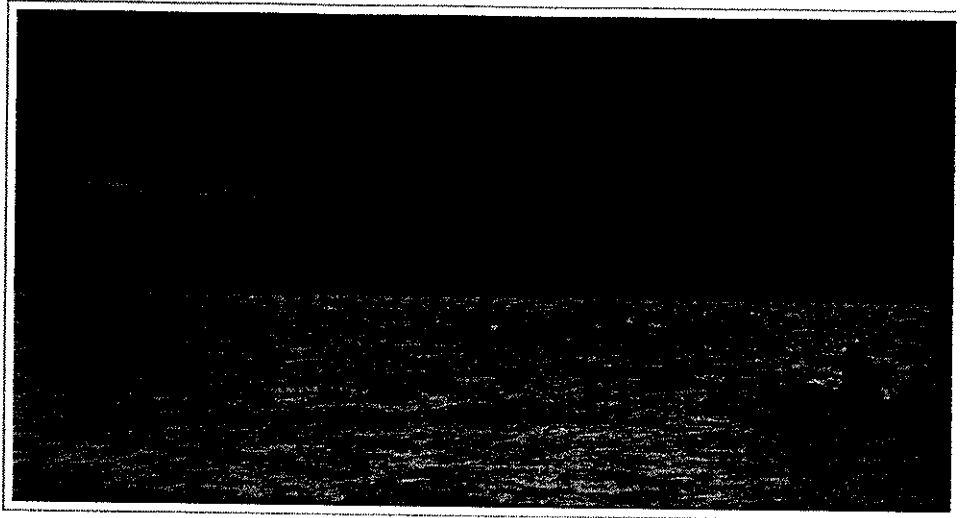
The D35 Class was founded in 2004 by Swiss sailors for friendly competition on Swiss lal

Design team	Damien Cardenoso, Bertrand Cardis, Christia Jean-Marie Fragnière, Gérard Gautier, Rémy Jeantet, Sébastien Schmidt and Steve Wasserr
Length overall LOA	14.95m (49ft)
Beam	8.74m (29ft)

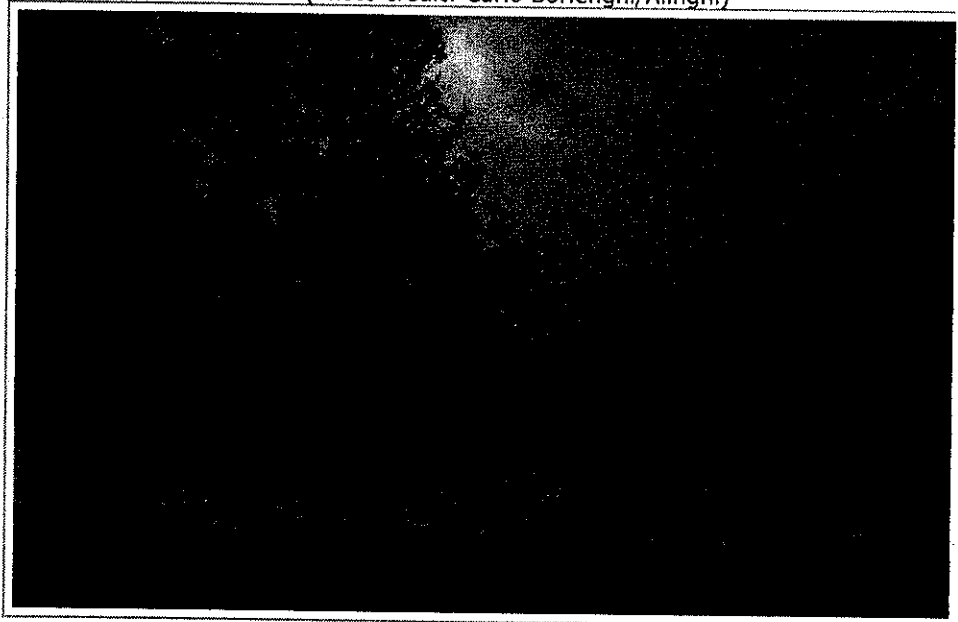
Dry weight	1200kg
Draft	3.2m (10.5ft)
Mast height	20m (65.6ft)
Mainsail area	81.6m ² (878ft ²)
Gennaker area	70.8m ² (762ft ²)
Jib area	40.7m ² (438ft ²)
Top speed	25 knots
Crew	5 (minimum) - 6 men or 7 women (maximum)



(Photo credit: Stefano Gattini/Alinghi)



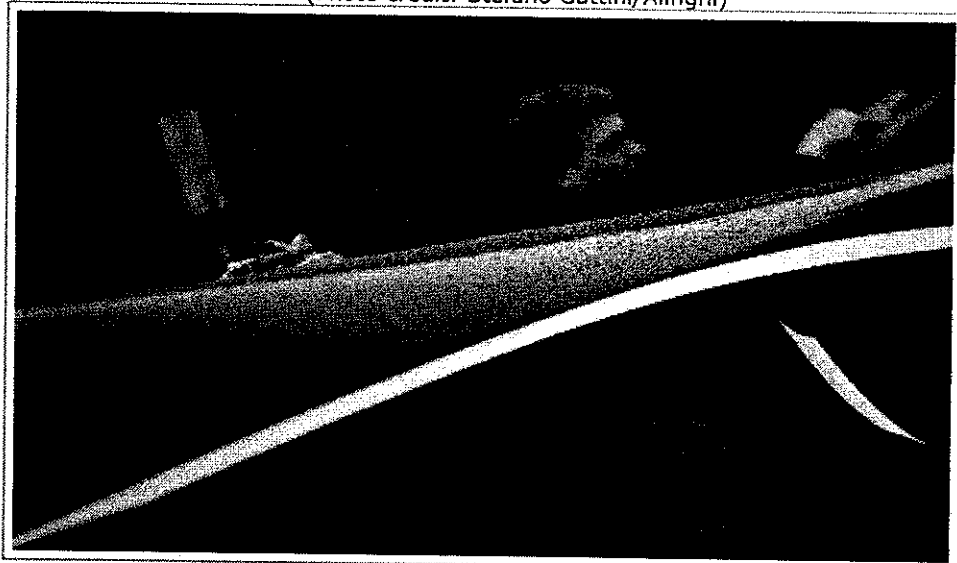
(Photo credit: Carlo Borlenghi/Alinghi)



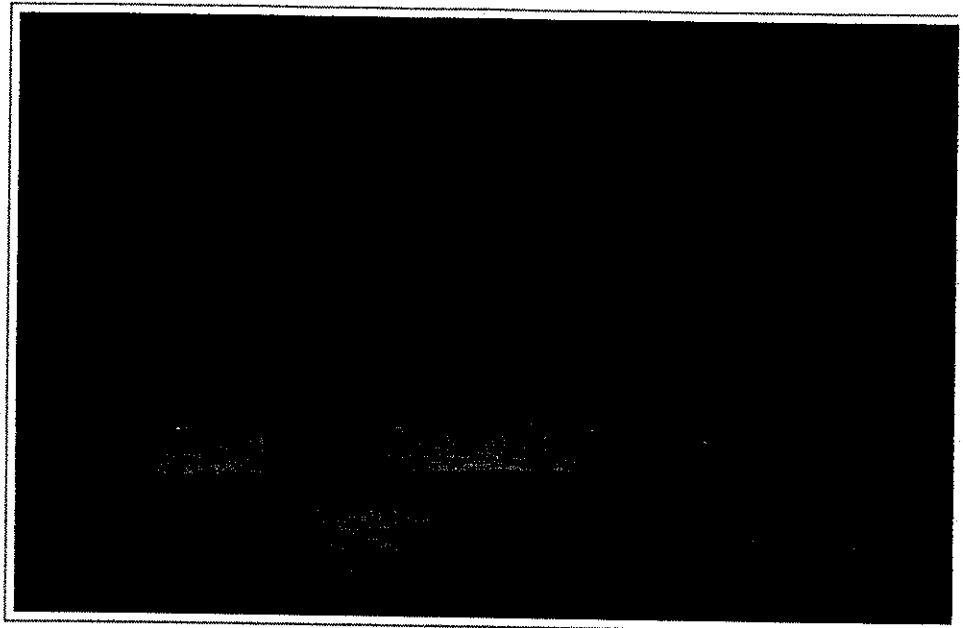
(Photo credit: Carlo Borlenghi/Alinghi)



(Photo credit: Stefano Gattini/Alinghi)



(Photo credit: Stefano Gattini/Alinghi)



(Photo credit: Carlo Borlenghi/Alinghi)

EXHIBIT H

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

GOLDEN GATE YACHT CLUB,

Plaintiff,

-against-

SOCIETE NAUTIQUE DE GENEVE,

Defendant,

-against-

CLUB NAUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

Index No. 602446/07

(IAS Part 49; Cahn, J.)

AFFIRMATION OF
DAVID G. HILLE

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

1. I am a member of the firm of White & Case LLP, counsel to Defendant Societe Nautique de Geneve ("SNG"). I base this Affirmation on my personal knowledge and, where indicated, upon information and belief.

2. I submit this Affirmation in support of the Notice of Counter-Settlement, dated December 6, 2007, submitted by SNG in response to the Notice of Settlement submitted by Plaintiff Golden Gate Yacht Club ("GGYC"), dated December 3, 2007.

3. By memorandum decision dated November 27, 2007 (the "Decision"), this Court granted summary judgment in favor of GGYC and granted in part SNG's motion for summary judgment dismissing GGYC's claims for breach of fiduciary duty. The Decision directed the parties to settle an order. On December 3, 2007, GGYC provided counsel for

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

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

5. There are four problems with the Proposed Order:

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

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

Challenge Match Dates Should Be In July 2009

6. In the Proposed Order, GGYC provides that "the dates for the challenge match races shall be October 1, 2008, October 3, 2008 and, if necessary, October 5, 2008 unless other dates are agreed to by mutual consent of GGYC and SNG in writing." SNG does not dispute that an extension of the match race dates from the July 2008 dates in GGYC's challenge is both necessary and appropriate under the circumstances. However, holding the match races in October 2008 is not feasible for reasons of which GGYC (and the Court) may not be aware. SNG submits that the date for the challenge match race should be July 18, 21 and, if necessary, 23, 2009.

7. Under the Deed of Gift (the "Deed"), SNG as Defender is to have a minimum of ten months to prepare its defense. As GGYC has recognized, that period should not be shortened by the effect of legal proceedings and the uncertainty created by those proceedings – especially given the expense faced by all the parties in preparing for an America's Cup defense. It is undisputed that SNG and Club Nautico Espanol de Vela ("CNEV") both have a right to appeal this Court's interpretation of the Deed. Under any circumstances, the pursuit of any appeal will encompass much of 2008, making an October 2008 race date impossible.

8. It also is undisputed that SNG is entitled under the Deed to select the venue for a match race with GGYC. SNG intends to select a venue in the Northern Hemisphere, and if possible, in Europe. A match race cannot be held in the Northern Hemisphere between November 1, 2008 and May 1, 2009, because the Deed states that "no race shall be sailed in

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

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

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

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

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

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

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

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

The Deed Does Not Provide For Ten Months Notice Of Venue

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

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

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

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

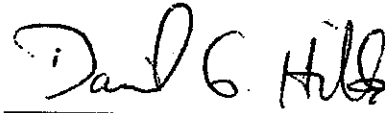
18. In addition, as GGYC is aware, SNG cannot just designate a venue without knowing if the relevant government authorities will approve that choice and/or at least reach agreement as to certain basic terms regarding the event. This is particularly true of SNG which is a Swiss club and therefore does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

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

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

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

Dated: New York, New York
December 6, 2007

A handwritten signature in cursive script that reads "David G. Hille". The signature is written in dark ink and is positioned above a horizontal line.

DAVID G. HILLE

EXHIBIT I

1506

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

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BY HAND

December 12, 2007

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

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

Dear Justice Cahn:

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

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

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

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

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

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

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

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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. Paravounis Comm.*, 222 A.D.2d 17, 22-23 (1st Dep't

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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. Hills, 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. Hills's affirmation in this respect or to present this Court with any evidence that it would somehow be possible to hold the America's Cup match at this venue in October 2008. More significantly, not only do the proposed October 2008 dates contemplate scheduling the America's Cup in a time frame that substantially interferes with existing plans for the match, it potentially precludes the America's Cup holder from building a boat and negotiating and agreeing on protocols for the race.

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

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

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

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

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

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

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

Respectfully,



Barry R. Ostrager

cc: Carolyn T. Ellis
Assistant Attorney General
Section Chief
Charities Bureau
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The Honorable Herman Cahn

December 12, 2007

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EXHIBIT J

3136

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

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EXHIBIT

March 26, 2008

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

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

Dear Justice Cahn:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Honorable Herman J. Cahn

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March 26, 2008

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

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

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

Respectfully,



Barry E. Ostrager

Encl.

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

The Honorable Herman J. Cahn

-5-

March 26, 2008

James V. Kearney, Esq.
Latham & Watkins
885 Third Avenue
New York, New York 10022

Jeremy Fiegelson, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022

EXHIBIT K

3188

Letter to Hon. Herman J. Cahn from Barry Ostrager, dated April 2, 2008

(with enclosure)

[pp. 3188-3194]

SIMPSON THACHER & BARTLETT LLP

400 LEIKWORTH AVENUE
NEW YORK, N.Y. 10017-0854
(212) 455-9000

FACSIMILE (212) 455-8508

PHONE DIAL NUMBER

212-455-2635

E-MAIL ADDRESS

ostrager@stb.com

BY HAND

April 2, 2008

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

Attention: Deborah E. Edelman, Esq.

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

Dear Justice Cahn:

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

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

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

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

Los Angeles

PAID AHEAD

WASHINGTON, D.C.

BALTIMORE

HONG KONG

LONDON

TOKYO

The Honorable Herman J. Cahn

-2-

April 2, 2008

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

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

Respectfully,

Barry R. Ostrager
Barry R. Ostrager

Enclosure

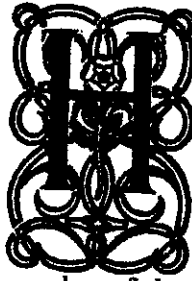
cc: Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
120 Broadway
New York, New York 10271

James V. Kearney, Esq.
Latham & Watkins
885 Third Avenue
New York, New York 10022

Jeremy Fiegelson, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022

EXHIBIT L

ENGLAND SENDS A CUTTER, WHICH IS DEFEATED BY AN EASTERN YACHT CLUB VESSEL: 1885. CHAPTER VII.



HISTORY, in every field of human effort, naturally divides itself into epochs. The annals of the America's cup which ended with the last Canadian races, may be set down as forming the first epoch in its history, in which mistakes were not wanting, but much progress toward better sport was made.

The next epoch begins with the return of the cup by the New York Yacht Club to the only surviving member of the company of original owners, in order that it might be conveyed by him back to the club under a more specific deed of gift. The club believed the original deed, though a simple and direct document, was no longer adequate to cover all the points that had developed in the growth of the sport. For example, it was found it permitted a challenger built on the borders of the United States to be brought to New York by canal, and it did not prevent such a boat from being kept there from season to season for the purpose of challenging for the cup. As the races were to bring out seamanship as well as speed, according to the ideas of both American and English yachtsmen, it was deemed desirable that vessels should come to contend for the cup under their own sail, and not in tow through a canal, or perhaps on the deck of an ocean steamer. The question as to whether challengers should be met thereafter vessel for vessel was deemed an important one to settle forever. These points the new transfer of the cup to the club were designed to cover.

The question of returning the cup to Mr. Schuyler for reconveyance came up after the races of Mischief and Atalanta.

The club, by resolution, on the 17th of December, 1881, returned the cup to Mr. Schuyler, who, on Jan. 4th, 1882, reconveyed it to the club by a letter of gift, in which the cup was vested in the club as trustee under the following conditions :

Any organized yacht club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty or other executive department, having for its annual regatta an ocean water-course on the sea or on an arm of the sea (or one which combines both), practicable for vessels of 300 tons, shall always be entitled, through one or more of its members,



GEORGE L. SCHUYLER

From a woodcut, after a copy of a portrait in oils by Leon Bonnat.

of THE AMERICA'S CUP

[1885]

to the right of sailing a match for this cup, with a yacht or other vessel propelled by sails only, and constructed in the country to which the challenging club belongs, against any one yacht or vessel as aforesaid, constructed in the country of the club holding the cup.

The yacht or vessel to be of not less than 30 or more than 300 tons, measured by the custom-house rule in use by the country of the challenging party.

The challenging party shall give six months' notice in writing, naming the day for the proposed race, which day shall not be later than seven months from the date of the notice.

The parties intending to sail for the cup may, by mutual consent, make any arrangement satisfactory to both as to the date, course, time allowance, number of trials, rules, and sailing regulations, and any and all other conditions of the match, in which case also the six months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then the challenging party shall have the right to contest for the cup in one trial, sailed over the usual course of the annual regatta of the club holding the cup, subject to its rules and sailing regulations, the challenged party not being required to name its representative until the time agreed upon for the start.

Accompanying the six months' notice there must be a custom-house certificate of the measurement, and a statement of the dimensions, rig, and name of the vessel.

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

Vessels intending to compete for this cup must proceed under sail on their own bottoms to the port where the contest is to take place.

Should the club holding the cup be for any cause dissolved, the cup shall be handed over to any club of the same nationality it may select which comes under the foregoing rules.

It is to be distinctly understood that the cup is to be the property of the club, and not of the owners of the vessel winning it in a match, and that the condition of keeping it open to be sailed for by organized yacht clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it perpetually a Challenge Cup for friendly competition between foreign countries.

GEORGE L. SCHUYLER.

EXHIBIT M

James D. Smith & Co.

42 Broad Street.

Edison Building

New York Aug 29th 1893

My dear Sir

By the same mail that brings your letter, I have received the Custom House measurement of the "Valkyrie", as registered at Lloyd's.

Tonnage 106.55

Length 97.8

Breadth 21.7

Depth 12.95

Rating 148.

I am advised in the same letter that the official document will be sent to you, though these are given to me as the official dimensions.

W. S. Oddie & Seal
New York Club.

Yours truly

James D. Smith
Chairman

EXHIBIT N

G. L. WATSON & CO.,
NAVAL ARCHITECTS AND SURVEYORS.
AGENTS FOR THE BUILDING, PURCHASE, AND SALE
OF STEAMERS, SAILING SHIPS, AND YACHTS.
108 WEST REGENT STREET,
GLASGOW, 22/7/ 1895.
TELEGRAPH ADDRESS:
"VRIL, GLASGOW."
ALL BUSINESS COMMUNICATIONS TO BE ADDRESSED TO THE FIRM.

Handwritten: 22/7/95
Handwritten: Watson & Co.

The Secretary;

New York Yacht Club.

Dear Sir,

In accordance with Lord
Dunraven's request, I herewith send
your certified copy of Certificate of
Registry of yacht "Valkyrie".—

Kindly acknowledge receipt &
believe me to be,

Faithfully yours,

J. Watson.

Encl.

EXHIBIT O



S.Y. ERIN.

ERIE BASIN. 16th September 1901.

Excerpt from Certificate of British Registry of Yacht Shamrock II.
Official Number 114,671. Registry Number 99, in the Port of London
in the year 1901.

British built Sailing Ship. Built at Dumbarton in year 1901 by
William Denny & Brothers. Dumbarton. N.B.

Number of Decks.....	One
Number of Masts	One
Rigged	Cutter
Stern	Square
Build	Clencher
Galleries	None
Head	None
Framework	Nickel Steel and Manganese Bronze.
Bulkheads	None
Ballast Tanks	None
Length from fore part of stem, under the bowsprit, to the aft side of the head of the stern post	108.ft:
Length at quarter of depth from top of weather deck at side amidships to bottom of keel.	71.50
Main breadth to outside of plank	24.4
Depth in hold	10.ft
Depth from top of beam amidships to top of keel	25.5
Depth from top of deck at side amidships to bottom of keel ...	25.ft
Round of beam5
Tonnage under tonnage deck	128.77
No deductions.	
Registered tonnage	128.77

Commander Edward Sycamore.

Owner, Sir Thomas Johnstone Lipton, K.C.V.O.
of "Osidge" Southgate, in the
County of Middlesex .

Owner of 54/54ths.

Certificate is dated at the Custom House, London, first day of June
1901; and signed by

C. J. STEBBING. Registrar of Shipping.

EXHIBIT P

MERCURY BAY BOATING CLUB
INC.

ESTABLISHED 1948

*file - NZ
challenge docs*

8 June 1988

DELIVERY BY COURIER

Commodore C Douglas Alford
San Diego Yacht Club
1011 Anchorage Lane
San Diego
CA 92106

Dear Commodore Alford

RE: CUSTOMHOUSE REGISTRY

I enclose a true copy of the Certificate of New Zealand Registry for the yacht "NEW ZEALAND".

The original of the Certificate of Registry is now with the yacht at the New Zealand Challenge headquarters in San Diego and is available for your inspection.

Yours sincerely



H Michael Fay
Chairman
AMERICA'S CUP CHALLENGE COMMITTEE

EXHIBIT Q

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

**AFFIDAVIT OF MICHAEL D.
DRUMMOND**

VALENCIA, SPAIN) ss.:

MICHAEL D. DRUMMOND, being duly sworn, deposes and says:

1. I am over 18 years old and have personal knowledge of the facts set forth in this affidavit.

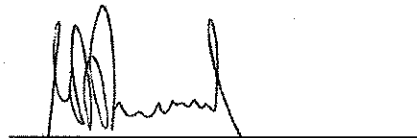
2. I am a member of the design team building Golden Gate Yacht Club's ("GGYC") America's Cup challenge vessel, as described in its Notice of Challenge with accompanying Certificate of Challenging Vessel. Construction of GGYC's challenge vessel has not been completed.

3. The boat that began sea trials in August 2008, referenced in Societe Nautique de Geneve's cross-motion dated April 30, 2009, has been since March 2009 taken apart.

4. Based on a construction schedule premised on a February 2010 race date, completion of GGYC's challenge vessel is expected to occur this summer.



DATED: May 11, 2009



Michael D. Drummond

Pasaporte de Nueva Zelanda nº AB295218.-----

LEGITIMACIÓN: En Valencia, mi residencia a once de Mayo de dos mil nueve.-----
Yo, JOSE-MANUEL FUERTES VIDAL, Notario del Ilustre Colegio de Valencia.-----
DOY FE de que la firma que precede, es la perteneciente a Don Michel-David Drummond, con Pasaporte de su nacionalidad número AB295218. Dicha firma ha sido puesta en mi presencia, y así resulta del Acta número 865/09 del Protocolo, autorizada por mí el día de hoy conforme al artículo 207,2,2ª del Reglamento Notarial.-----
En dicha acta, Don Michel-David Drummond declara conocer el contenido del documento, cuya firma aquí se legitima y quiere que produzca los efectos que le sean aplicables conforme a lo previsto en la legislación de Estados Unidos.--
Libro Indicador 329/2009.-----

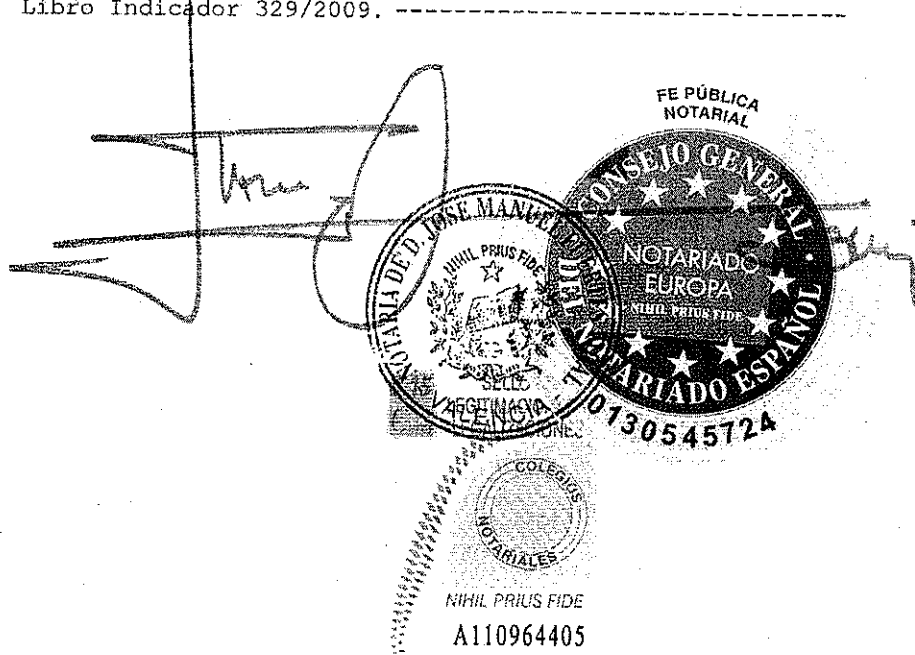


EXHIBIT R



UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

NATIONAL VESSEL DOCUMENTATION CENTER

CERTIFICATE OF DOCUMENTATION

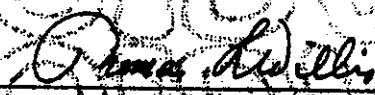
VESSEL NAME ISLAND PARADISE		OFFICIAL NUMBER 975190	IMO OR OTHER NUMBER SGU01601D191	YEAR COMPLETED 1991	
HAILING PORT SALT LAKE CITY, UT		HULL MATERIAL STEEL		MECHANICAL PROPULSION YES	
GROSS TONNAGE 25 GRT	NET TONNAGE 20 NRT	LENGTH 63.0	BREADTH 15.0	DEPTH 4.0	
PLACE BUILT LA CROSSE, WI					
OWNERS WESLEY L INGRAM DONNA A INGRAM			OPERATIONAL ENDORSEMENTS RECREATION COASTWISE		
MANAGING OWNER WESLEY L INGRAM 2408 SHERIDAN ROAD SALT LAKE CITY, UT 84108					
RESTRICTIONS NONE					
ENTITLEMENTS NONE					
REMARKS NONE					
ISSUE DATE AUGUST 08, 2006					
THIS CERTIFICATE EXPIRES AUGUST 31, 2008		SAR		 DIRECTOR, NATIONAL VESSEL DOCUMENTATION CENTER	



EXHIBIT S

Decision dated November 25, 1987 .

38

JA 821

(JA 821 - JA 839)
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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

Plaintiff,

- against -

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

Defendants.
-----X

In the Matter of the Application of
SAN DIEGO YACHT CLUB,

Petitioner,

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

Index No.

21299/87

Case 1

Index No.

21809/87

Case 2

CARMEN BEAUCHAMP CIPARICK, J.:

This controversy arises out of the refusal of the San Diego Yacht Club to entertain the July 15, 1987 challenge of the Mercury Bay Boating Club of New Zealand (and Michael Fay) to sail a match in June 1988 for the America's Cup, using yachts measuring ninety feet on the load-water line, or J-class yachts. "J-boats" are large ocean-going yachts that were used in the America's Cup competition prior to World War II and are approximately two times the size of the twelve-metre yachts used in the races since 1958. San Diego Yacht Club is the current holder of the America's Cup (since 1987 when it took the cup from the Royal Perth Yacht Club) and the trustee under the Deed of Gift of the Cup. Cases #1 and #2 have been consolidated for

CAG000072

disposition.

In case #1, Mercury Bay Boating Club seeks declaratory relief against San Diego Yacht Club relating to the validity of its challenge as well as an injunction precluding consideration or solicitation of other challenges until Mercury Bay's challenge, which is concededly the first one received by San Diego, is decided. In support of its request for injunctive relief Mercury Bay Boating Club relies upon the express language of the deed which mandates: ". . . when a challenge from a club fulfilling all the conditions required in this instrument has been received, no other challenge can be considered until the pending event is decided."

Following receipt of Mercury Bay's challenge, San Diego Yacht Club commenced action #2 for interpretation or amendment of the America's Cup Deed of Gift and certain declaratory relief. The relevant instrument is the 1887 Deed of Gift (incorporating two prior amendments and one order of interpretation) of the America's Cup by the donor George L. Schuyler to the New York Yacht Club. The cup was donated "upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries." The deed provides that "[a]ny organized Yacht Club of a foreign country . . . having for its annual regatta an ocean water course on the sea, or an arm of the sea . . . shall always be entitled to the right of sailing a match for this cup."

San Diego Yacht Club ("SDYC") specifically objects to the

dimensions or size of the boat provided for in the New Zealand challenge (a ninety footer, the largest boats provided for in the deed, rather than the smallest, twelve metre yachts) and to the proposed time of the race ten months following receipt of the notice of challenge. Under the deed the challenger may determine the dimensions of the boat, within a limited size range as well as the time of the race, subject to the minimum ten month notice period. The defender sets the venue and the courses for the race, subject to a mutual consent provision. The mutual consent clause states that "[t]he Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match in which case also the ten months' notice provision may be waived." In the following paragraph the deed dictates certain terms for the match which govern absent mutual agreement.

The problem here is that the challenger wants to race for the cup in a yacht measuring ninety feet on the load-water line which is at the upper size limit under the deed. The deed reads: "[t]he competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load-water line" In 1956 the deed was amended for the first time to eliminate the requirements that the boats sail to the place of the race "on its own bottom." More relevant to this dispute, the deed was also amended to reduce the minimum load-water line from sixty-five feet to forty-four feet to permit the

use of the twelve-metre boats used in recent years. The post-World War II amendment was sought to revive the cup since the New York Yacht Club had not been challenged for a race in almost twenty years. The smaller boats were thought to be cheaper to build than the large yachts.

The only other amendment to the deed was ordered in 1985 to provide for races in the Southern hemisphere between certain dates so that the Royal Perth Yacht Club, which won the cup in 1983, could host the event in Australia. Thereafter, in 1987, the San Diego Yacht Club defeated the Australians for the cup.

In 1985, the "arm-of-the-sea provision", which relates to which clubs are qualified to challenge for the cup, was interpreted by the court to include Lake Michigan to allow the Chicago Yacht Club to participate in the elimination series for the right to challenge Royal Perth for the cup. With the exception of the 1956 and 1985 amendments, the 1887 deed (the third deed) remains unchanged.

PROPER PARTIES

The court agrees that the Attorney General is a necessary party to this litigation (EPTL 8-1.1). Any defect regarding the absence of the Attorney General as a party to case #1 is cured by the prior consolidation of cases #1 and #2. The court notes that the Attorney General has always been on notice by service of all papers in action #1 and has been a party to action #2 since its commencement. In view of the foregoing, San Diego Yacht Club's argument that this proceeding is procedurally or jurisdictionally

defective due to the absence of the Attorney General in case #1 is without merit.

STANDING

San Diego Yacht Club contends that Mercury Bay Boating Club, as a mere beneficiary of a charitable trust, lacks standing to bring case #1 or to participate in case #2. Consolidation of the two proceedings renders the standing issue largely academic since the issues (with the exception of Mercury Bay's request for injunctive relief) have been submitted to the court in case #2 by the San Diego Yacht Club as a trustee and can be decided in the context of the trustee's request for interpretation or amendment of the deed. Therefore, standing by Mercury Bay to allow the club to maintain a separate action is not crucial. It appears that Mercury Bay has standing in any event. Although a person having a special interest is sometimes permitted to maintain a suit to enforce a charitable trust, the mere possibility that one may be a beneficiary does not confer standing to maintain a suit to enforce the trust (18 N.Y. Jur. 2d Charities Sec. 40). Generally, it is for the Attorney General to act as the representative of the beneficiaries of charitable trusts (EPTL 8-1.1[f]). However, Mercury Bay Boating Club is more than just a possible beneficiary under the deed, having issued a formal challenge for the cup. As a general rule, the remedy of a beneficiary is to petition the Attorney General to champion the cause. However, in this case, the Attorney General supports the position of the San Diego Yacht Club in all respects requiring Mercury Bay to participate or not have its position represented.

VALIDITY OF THE CHALLENGE

Turning to the substantive issues, San Diego Yacht Club contends that Mercury Bay's challenge is invalid because the challenger's boat has not yet been completed. In short, SDYC claims that unless the parties mutually agree otherwise, the boat must be in existence at the time the challenge is issued. Nowhere in the deed is such a requirement expressly set forth. The deed states that: "[t]he Challenging Club shall give ten months' notice, in writing, naming the days of 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 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 be sent as soon as possible"

The Mercury Bay/Michael Fay notice of challenge and accompanying certificate contain all the information required under the deed. San Diego Yacht Club argues, however, that the deed of gift uses the term "vessel" and therefore the challenge is invalid since the boat is not completed and in existence. SDYC points to the legal definition of the word "vessel" and to general principles of Maritime Law which provide that something is a vessel once it is built, measurable and perhaps even launched. SDYC also points out that the custom-house registry (or equivalent) which is required to be sent "as soon as possible" by the deed cannot be obtained until a vessel is

completed and measured. San Diego claims that the "as soon as possible" language was added to the 1887 deed because pleasure craft do not uniformly require such registration and a challenger with an existing boat may have to obtain the requisite registry and send it to the defender later. However, another interpretation of the phrase might indicate that the trust instrument anticipated that the challenging craft might not be completed and therefore the registry was to follow at a later date. The court further notes that the trust instrument, contrary to SDYC's argument, does not address the term vessel in the present tense at the time of the challenge. A reading of the instrument indicates a more feasible use of the term vessel, by applying it to the boat at race time.

The history of the cup, in particular the events of 1887, shed light on the contention that the boat must be in existence at the time of the challenge. In October, 1887, the America's Cup deed was redrafted following the 1887 race between "Volunteer", representing the New York Yacht Club and the challenger "Thistle" sent by the Royal Clyde Yacht Club of Scotland.

The Thistle challenge was made when the yacht was not yet built. The specified dimensions based upon information provided by Thistle's designer stated that the boat would measure eighty-five feet on the load-water line. When the Thistle was completed and measured at the site of the race, it was longer on the water line than specified in the notice of challenge (86.46 feet rather than 85 feet) and longer than the defender, Volunteer. The

discrepancy of 1.46 feet was significant since a longer boat is potentially more powerful and faster. Therefore, the question of whether the Thistle should be allowed to race was ultimately referred to the surviving donor of the cup, George L. Schuyler. Mr. Schuyler found that the discrepancy was not so great as to disqualify the challenger especially since the error was thought to be the fault of the ship's designer. Thistle was permitted to race, subject to a time allowance penalty based upon the extra length. Volunteer won, but only with the benefit of the time correction used to equalize the boats.

Shortly after completion of the 1887 defense the New York Yacht Club received a sort of "challenge" from Charles Sweet, a member of both the New York Yacht Club and the Royal Clyde Yacht Club. Mr. Sweet sent a letter offering to resign from the New York Yacht Club and informing the Club of his future intent to challenge for the cup. Sweet told the club that ". . . the formal challenge with the documents and particulars required by the deed of gift will be forwarded as soon as possible . . ."

After receiving Sweet's letter, the New York Yacht Club as trustee made preparations to draft a new (third) deed, the 1887 deed at issue herein. The same day (October 27, 1887) that the new deed was accepted by the New York Yacht Club, the Sweet "challenge" was rejected.

A classic book on the history of the cup until 1901, The Lawson History of the America's Cup: A Record of Fifty Years (W. Thompson & T. Lawson, 2d ed. 1986) indicates that the Sweet

challenge was rejected because it involved a boat not yet built and not in accordance with the new deed of gift. With due deference, the court notes that the copies of the New York Yacht Club minutes for the meeting held on October 27, 1887 do not support the above and instead indicate that the ostensible "challenge" was rejected because Sweet merely made known his intention to make a future challenge. The club determined not to consider the matter further until a formal challenge was submitted.

The new deed of 1887, whereby the cup was reconveyed to the New York Yacht Club, set out the relevant requirements for making a challenge. For instance, as noted above, the deed provides that the challenger sets the dates of the match but shall give a minimum of ten months' notice. Again, "accompanying the ten months' notice of challenge there must be sent 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."

The above requirements are fixed under the deed and are not subject to the mutual consent clause. After a valid challenge has been made, the parties are free to make arrangements by mutual agreement, for example as to dates and courses of the race. Other than the size range for competing boats, the deed makes no design constraints other than that center boards and sliding keels shall always be permitted and are not considered

part of the boat for measurement purposes. The 1887 deed provides that time allowances would be abandoned and that all races are to be held over ocean courses free from headlands and practicable for vessels of twenty-two feet draught.

The dimensions of the challenging vessel were to be sent along with the notice of challenge so that the defender would know what kind of boat it would face. If either boat were inaccurate on its dimensions, there would be a default, rather than a correction by time allowance.

Again, nowhere in the deed is there listed a requirement that the challenging boat must be in existence to render a challenge valid. Even after the Thistle incident, the donor did not expressly require the boat to be in existence. Instead, the time correction penalty was eliminated to indicate that if the dimensions exceeded those sent with the notice of challenge, the challenger would forfeit the right to sail a match for the cup.

Clearly, if the donor had intended to respond to the Thistle incident by requiring the challenging boat to be in existence at the time of the challenge the deed could have been amended to so provide. Instead, the grantor provided for the challenger to build at its peril.

Furthermore, the court rejects San Diego's contention that prior challenges accepted when the yachts were not yet built were plausible only under the mutual consent provision. The mutual consent clause refers to the arrangements for a match and not to the validity of the notice of challenge. Based upon a

comprehensive review of the relevant provisions of the deed as well as past practice, the court concludes that the challenge by Mercury Bay Boating Club is valid and that it conforms to the terms of the deed. Both past practice and the trust instrument support a finding that the challenging boat need not be completed at the time of the challenge.

REQUESTED CY PRES RELIEF

As an additional ground for relief if faced with a valid challenge, San Diego Yacht Club contends that adherence to the literal terms of the deed by allowing the Mercury Bay challenge to proceed would destroy the cup. Relying on the statutory cy pres doctrine (EPTL 8-1.1[c]) San Diego as trustee of the cup requests that the court interpret or amend the deed in part to conform with certain post-World War II customs and practices utilized by the New York Yacht Club and the Royal Perth Yacht Club.

San Diego wants the America's Cup to be sailed in twelve-metres in 1990 or 1991 (rather than using ninety footers in 1988).

As already noted, the use of twelve-metre yachts for the America's Cup began in 1958 after the deed was amended to reduce the length on the load water-line to make it possible (by mutual consent) to sail the match in twelve-metres. The amendment was sought to revive interest in the cup since the New York Yacht Club had not received a challenge in nineteen years. The lack of interest in the cup was believed to be related in part to the expense of building the large J-class yachts at the time compared

with the cost of sailing in twelve-metres. As a result, the deed was amended to reduce the length on the load water-line from sixty-five to forty-four feet which made it possible under the deed size limitations and the mutual consent clause to use twelve-metre yachts.

In any event, if single masted yachts are to be used, as in this case, the deed mandates that the boats "shall not be less than forty-four feet nor more than ninety feet on the load water-line." If the parties cannot mutually agree on the terms and conditions for the match the race is governed by the terms of the deed. For example, with three races to be sailed on ocean courses which would accommodate yachts of twenty-two feet of draught, under the rules and regulations of the club holding the cup if those rules do not conflict with the provisions of the deed. No time allowances are permitted.

The New York Yacht Club, the holder of the America's Cup for most of its history, prevented the type of unwelcome challenge that now faces the San Diego Yacht Club by following the practice of issuing an announcement during the course of a match that if it was successful in defending the cup, it would hold the next race at a certain time (generally three to four years later) and at a certain place (generally Newport, R.I.). The club would also announce that the match would be sailed in twelve-metres and that all challenges received by a given date would be treated as received simultaneously. By following that practice, the New York Yacht Club and later the Royal Perth Yacht Club managed to

prevent preemption of the field by one challenger. At one time, after interest in the cup grew, the New York Yacht Club had a problem with several potential challengers attempting to issue the first challenge as the successful defender crossed the finish line. The solution worked out was to treat valid challenges as received simultaneously and beginning in the 1970's to hold a multinational elimination series every three to four years, with the winner getting the right to challenge the holder for the America's Cup. The competitors all complied with these arrangements which were authorized by the deed under the mutual consent clause.

Here, rather than issuing a statement of intent before it won or even shortly after, the San Diego Yacht Club was apparently delayed by disagreements with its contractual agent for the defense of the cup, Sail America Foundation, on how the defense should be handled. In the interim, before San Diego sent out such a statement, Mercury Bay issued the disputed challenge.

In the face of the Mercury Bay challenge, San Diego asks the court to retroactively interpret or amend the deed to allow it to ignore the Mercury Bay challenge to give the defender the right to designate, among other things, the size of the boat, the dates of the races and to organize an elimination series between challengers. In effect, San Diego seeks to have fundamental changes written (or interpreted) into the deed to take away rights given to the challenger under the deed, rather than relying on the mutual consent provisions as has been done in the past. In addition, San Diego wants to limit future challenges to

a maximum of once every three years, instead of the ten month minimum notice period provided for under the deed.

The San Diego Yacht Club relies on ex pres principles (EPTL 8-1.1[c]) and argues that literal adherence to the terms of the deed would virtually destroy the international sporting event that the America's Cup has become by allowing the club submitting the first valid challenge to designate the size of the yachts to be raced and the dates of the races and by barring the defender from considering other challenges until the first valid challenge is decided. San Diego contends that following the terms of the deed would render it impossible or impracticable to carry out the donor's purpose of promoting friendly yachting competition among foreign nations. The City of San Diego and the yacht club also contend that organizing a proper defense is like hosting the Olympic games and requires three to four years "lead time" so that the ten month minimum provided for under the deed is wholly insufficient.

Specifically, San Diego seeks interpretation or amendment of the deed as follows, to provide that the holder or trustee of the cup may:

1. Within a reasonable time after winning or successfully defending the cup, designate the particular class or design rule of yachts in which competitors shall race in the next match, with not less than two years notice if the preceding match was held in a different class or design rule;
2. Within a reasonable time after winning or successfully

defending the cup, set the venue, dates, times and number of races for the next match and provide that the next match is to be held within a reasonable time after the last match and in any event, not less than three years apart;

3. Prescribe a reasonable time within which any qualified club may submit a challenge; and

4. Make arrangements for a series of elimination races to select a challenger.

San Diego asserts that "literal adherence to the outmoded terms of the deed would in the face of changed circumstances thrust the cup into a bygone age when only those of vast wealth could compete." The new circumstances not foreseen by the donor which allegedly justify such fundamental changes in the deed are the status of the America's Cup as a premiere international sailing competition and the worldwide following that it has attained in recent years.

The basic problems that San Diego has with sailing ninety footers on ten months' notice are that: 1) it would be too expensive; 2) the City and the yacht club need more time to organize the event; and 3) that the requirement that the first challenge be determined before others are considered would exclude other competitors.

The merits of the arguments raised by San Diego are vigorously disputed. Supporters of both San Diego and Mercury Bay have made their respective positions well known to the court. It is not at all clear that a challenge involving ninety footers would be more expensive than racing in twelve-metre yachts. In

fact, racing ninety footers may turn out to be more economical given the shorter interval proposed between competitions. In preparing for recent twelve-metre matches held three to four years apart, the competitors often spent millions of dollars building several boats to practice and test technological innovations. If the larger boats are raced at more frequent intervals some yachtsmen believe that the cost will be less than that involved in holding a twelve-metre campaign. In addition, it appears that ninety footers may be ideal and twelve-metre boats ill-suited for a competition to be held in San Diego with its light winds.

The potential exclusivity problem raised by a one-on-one challenge does not appear to be a realistic concern at this juncture. Although San Diego has declined to negotiate with the challenger, Mercury Bay expresses its willingness to participate in a multi-national elimination series, in 1988 using ninety footers, for the right to challenge for the cup and to negotiate other terms.

In any case, it is clear that the donor structured the America's Cup competition as a "challenge cup." The challenger is given the right to designate the size or dimensions of its boat within the limits of the deed and to set the dates and times for the races. The holder/defender has the right to set the courses for the race and to have its clubs' rules and sailing regulations govern. It should be stressed that much if not all of the above can be altered under the mutual consent provision.

In fact, the multi-national elimination format that San Diego basically wants written into the deed was worked out by the participants under the more flexible mutual consent provision, as was the three to four year gap between races. It is not at all clear that maintaining a minimum three to four year period between races is in the best interests of the sport or more importantly, within the donor's intent. No prejudice will result if the minimum ten months' notice period is not lengthened through negotiation. The same time limitations apply to all the participants. Finally, San Diego has failed to support its contentions that the Mercury Bay challenge will hurt the level of competition for the cup.

Clearly, New York courts have cy pres power over charitable trusts under EPTL 8-1.1(c). The statute provides that whenever it appears to the court having jurisdiction over a charitable trust that circumstances have so changed since the execution of the instrument making the charitable disposition as to render impossible or impracticable literal compliance with the terms of the deed, the court may make an order directing that the disposition be administered or applied in such a manner as in the court's judgment will most effectively accomplish the instrument's general purposes, free from any specific restriction, limitations or direction contained in the instrument.

Cy pres relief as applied to a general charitable trust is applicable on the basis of changed circumstances only when it has become impracticable or impossible beneficially to literally

comply with the terms of the instrument or to apply the property in the exact way that the donor directed. Only then is the court permitted to reform the deed to give effect to the will of the donor (Matter of Wilson's Estate, 87 A.D. 2d 98, aff'd 59 N.Y. 2d 461). In other words, the court may not resort to cy pres relief until it first determines that the donor's specific charitable purpose is no longer capable of being carried out under the precise terms of the trust (see, e.g., Matter of Wilson's Estate, id; Matter of Scott, 8 N.Y. 2d 419).


Applying the relevant standard the court finds that the San Diego Yacht Club has failed to make the required showing to justify making truly radical and fundamental changes in the deed. The deed of gift of the America's Cup is a relatively simple and flexible document that has served well for 100 years to foster the intent of the donor to create a challenge cup to promote friendly competition among foreign nations. Many of the customs that San Diego seeks to have formalized into the deed through interpretation or amendment were adopted under the mutual consent provision and are not precluded now or in the future. It appears that the strength and validity of the America's Cup is derived in large part from the flexibility provided by the mutual consent clause. The deed as written has and can continue to accommodate changes in circumstances. Clearly, fundamental revision is not required to effectuate the intent of the donor. Failing mutual agreement, the race can be sailed under the terms of the deed.

There being no compelling justification to formally alter

the terms of the deed to change the America's Cup into an event virtually dominated by the defender, ex parte relief is unwarranted. Therefore, in the face of a properly tendered challenge, San Diego Yacht Club, having accepted the cup pursuant to the terms of the deed, may either accept the challenge, forfeit the cup, or negotiate agreeable terms with the challenger. For the court to decide otherwise would be to allow the holder of the America's Cup to virtually unilaterally dictate conditions for future competitions. That result is unjustified in view of the workable deed and would clearly violate the donor's intent.

Accordingly, the relief requested by the parties is granted solely to the extent of declaring that Mercury Bay Boating Club has tendered a valid challenge and that San Diego Yacht Club must treat it as such in accordance with the terms of the deed. The ten month notice period previously tolled pending determination of this litigation shall continue running from the date of service of a copy of the order to be settled herein with notice of entry. In view of the foregoing, the court need not consider Mercury Bay Boating Club's request for injunctive relief, which is denied as moot.

Settle order.



 J. S. C.

Dated: *November 25, 1987*

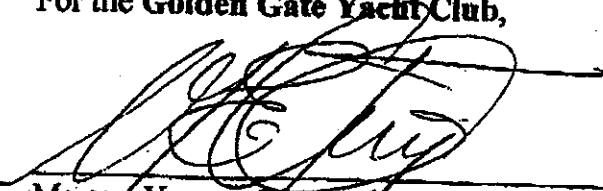
EXHIBIT T

**CERTIFICATE
OF NAME, RIG AND SPECIFIED DIMENSIONS OF
CHALLENGING VESSEL**

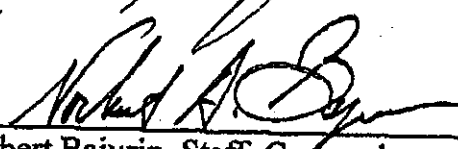
I, Commodore Marcus Young, certify the details set out below as to the name, rig and specified dimensions of the keel yacht to represent **Golden Gate Yacht Club** in a match for the America's Cup to be sailed in accordance with the Notice of Challenge herewith:

1. **Name:** *USA*
2. **Owner:** Oracle Racing, Inc.
3. **Rig:** Single-masted, sloop-rigged
4. **Dimensions:**
 - (a) Length on Load Waterline – 90 feet
 - (b) Beam at Load Waterline – 90 feet
 - (c) Extreme Beam – 90 feet
 - (d) Draught of water (hull draft) – 3 feet
 - (e) Draught of water (boards down) – 20 feet

For the Golden Gate Yacht Club,



Marcus Young, Commodore



Norbert Bajurin, Staff Commodore

EXHIBIT U

Order dated November 19, 1997.....6-9

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY (a)

PRESENT: Hon. BEATRICE SHAINSWIT
Justice

PART 10

Little Prince Productions, Ltd.

INDEX NO. 108849/94

MOTION DATE 2/25/97

MOTION SEQ. NO. 006

MOTION CAL. NO. 9

John Scoullar and et al

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED
COUNTY CLERK'S OFFICE
NEW YORK
MAR 4 1997

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are denied in conformity with the decision and ORDER filed herewith.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: _____ J.S.C.

Dated: November 19, 1997

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

BS
BEATRICE SHAINSWIT, J.S.C.

MORI
6

SUPREME COURT: NEW YORK COUNTY
-----X

LITTLE PRINCE PRODUCTIONS, LTD.,

Plaintiff,

-against-

Index No. 108849/94

cal. #9 - 8/25/97

JOHN SCOULLAR and RICK CUMMINS,

Defendants.
-----X

BEATRICE SHAINSWIT, J.:

Plaintiff Little Prince Productions, Ltd. ("Little Prince") moves this Court for an order, "clarifying or modifying" the Order/Judgment of this Court, dated December 18, 1996 ("the Judgment") to provide that the rights of defendants are subject to a contract between Little Prince and an entity known as TheatreWorks USA Corp., dated December 31, 1992. Defendants cross-move for injunctive and related relief.

Little Prince formerly enjoyed extensive contractual rights to produce performances of the childrens' classic *The Little Prince*, created by the late Antoine De Saint-Exupery. This Court held, in the Judgment, that as a result of a contract entered into between *The Little Prince* and the defendants, many of those rights were transferred to the defendants. The papers before this Court indicate that the Judgment is presently on appeal.

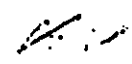
The present application is nothing more than a collateral attack on the Judgment, and there is no colorable reason to grant the relief sought. Little Prince has failed to demonstrate that this is a case of "fraud, mistake, inadvertence, surprise or excusable neglect." *McKenna v. County of Nassau*, 8 NYC2d 219

(1984). The application for injunctive relief is also denied, as there is no predicate in the pleadings which would permit this Court to grant injunctive relief to defendants. Arvey v. New York Tel Co., 81 AD2d 600 (2d Dept 1981). The application for sanctions is also denied.

It is ORDERED that the motion and crossmotion are denied.

Dated: November 19, 1997

E N T E R:



BEATRICE SHAINSWIT, J.S.C.

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

LITTLE PRINCE PRODUCTIONS, LTD. : Index No. 108849/94

Plaintiff. : Affidavit of Service

v. :

JOHN SCOULLAR and RICK CUMMINS :

Defendants. :

State of New York)
County of New York) ss.:

I, Anita C. Benskin, being sworn, say:

I am not a party to the action, am over 18 years of age and reside in Brooklyn, New York.

On January 27, 1998, I served the Notice of Appeal in the above entitled action upon the attorney with the address listed below, by depositing one copy thereof into the custody of United State Post Office, postage prepaid first class mail.

Deutsch Klagsbrun Blasband
800 Third Avenue
New York, NY 10022


Anita C. Benskin

Sworn to before me this
27th day of January, 1998


Notary Public

KAREN CHEIGH PARK
Notary Public, State of New York
No. 08CH6070314
Qualified in New York County
Commission Expires Dec. 8, 1998

EXHIBIT V



VIGILANT

New York Yacht Club, USA, Edition 8(1893)

Architecte : Nathanael Greene Herreshoff

Chantier : Herreshoff Manufacturing Company

- 1893: Victorious defender of the eighth America's Cup (1893). Winner over **Valkyrie II** (GBR).

1893

Vigilant was the first victorious defender designed and built by the ingenious American designer, nicknamed the Wizard of Bristol, Nathanael Greene Herreshoff. Nat Herreshoff repeated this success in 1895, 1899, 1901, 1903 and in 1920.

Vigilant won the 1893 American selection trials for the Cup defence and had beaten **Colonia**, **Jubilee** and **Pilgrim**.

America's Cup races: Sailed October 7 to 13, 1893 in New York
Best three out of five races.

Vigilant vs. **Valkyrie II**

Alternating courses: the first one, 15 miles to windward off Scotland Lightship and return; the second one, equilateral triangle, 30 miles.

Races: three sailed.

Results:

Vigilant beats **Valkyrie II** by three wins to nil!

- October 7, 1st race, 30 miles, Windward-Leeward Course: **Vigilant** beats **Valkyrie II** by 8 minutes 48 sec in corrected time.
- October 9, 2nd race, 30 miles, Triangular Course: **Vigilant** beats **Valkyrie II** by 10 minutes 35 sec in corrected time.
- October 13, 3rd race, 30 miles, Windward-Leeward Course: **Vigilant** beats **Valkyrie II** by 40 seconds in corrected time.

1894

Vigilant was sold to Howard Gould. It was the first defender to sail in Europe to race the British yachting season. The boat's reputation was harmed. It raced sixteen times against the already famous **Britannia** (1893), the future royal cutter designed by George Lennox Watson. **Vigilant** was beaten twelve times by **Britannia** in the Solent!

1895

Vigilant raced the elimination trials for the 1895 America's Cup defence won by **Defender** the last new Nathanael Greene Herreshoff Cup craft.

1896 - 1906

Five different owners for **Vigilant**. It was only sailed for cruising.

1906

Bought by William Iselin who sailed it until 1910.

1910

Vigilant was sold to a junkyard in New London. It was broken up in 1910...

J.T.

VIGILANT

1893

USA

Yacht Club: New York Yacht Club, New York, USA

Victorious defender of the eighth America's Cup (1893). Winner over **Valkyrie II** (GBR).

Owner: Syndicate led by C. Oliver Iselin, and formed by Edwin D. Morgan, Augustus Belmont, Cornelius Vanderbilt, Charles R. Flint, Chester W. Chapin, George R. Clark, Henry Astor Carey, Dr. Barton Hopkins, E.M. Fulton, Jr. and Adrian Iselin.

Centerboard sloop

Length and sail area rule

Rating: 96.78

Designer: Nathanael Greene Herreshoff

Builder: Herreshoff Manufacturing Company, Bristol, Rhode Island, USA
Sailmaker: Herreshoff

Year of building: 1893
Launched: June 14th, 1893

Skipper: Nathanael Greene Herreshoff
Captain: William Hansen
Afterguard: Edward A. Willard, Herbert C. Leeds, Newberry Thorne, Woodbury Kane, W. Butler Duncan, Jr. and Captain Norman Terry.

Data:

Construction -

Construction: all metal
Frames: Steel
Its under-water body was of Tobin bronze. Its top strakes were of steel.
Centerboard: Tobin bronze made.

Dimensions -

L.O.A.: 38.50 m
L.W.L.: 25.90 m
Beam: 7.92 m
Draft: 3.96 m, centerboard up
Displacement: 138 tons
Centerboard weight: 7.7 tons
Sail area: 1014.50 m²
Mast: 26.67 m
Boom: 29.60 m
Bowsprit: 9.80 m
Topmast: 17.90 m

Date de construction 1893
Première sortie 14/6/1893

Edition 8(1893)

Equipage	
Matériau coque	Steel
Matériau mat	Steel
Longueur hors tout	38.5
Longueur de flotaïson	25.9
Hauteur mat	26.67
Largeur	7.92
Bôme	29.6
Surface de Voile (m²)	
Déplacement (tonnes)	138
Tirant d'eau	3.96
Jauge	
Lest (tonnes)	

LOUIS VUITTON

 endesa

 Santander

Alcatel-Lucent 

SUPPORTERS

Nespresso • Adecco • Ford • El Corte Inglés • Estrella Damm • Grupo Leche Pascual • Coca-Cola • Vodafone



DEFENDER

New York Yacht Club, USA, Edition 9(1895)

Architecte : Nathanael Greene Herreshoff

Chantier : Herreshoff Manufacturing Company

- 1895: Victorious defender of the 1895 America's Cup

1895

Defender is Nathanael Greene Herreshoff's second victorious defender. The boat is designed in the utmost secrecy and her construction shrouded in mystery. No one was allowed to enter the yard, especially not press or photographers.

In building **Defender**, the Herreshoff brothers' special innovation is the use of Aluminum. But, just after the boat is launched, it becomes evident that it suffers from a little known phenomenon: corrosion due to electrolysis. This type of construction allowed a weight saving of 17 tonnes over classical building methods.

During the defence selection trials, **Defender** sails against **Vigilant**, **Volunteer** and **Jubilee**. During the final, only **Vigilant** (1893) skippered Charlie Barr races against **Defender**. On August 10 **Vigilant** notches up a win. **Defender** does not finish due to rig problems. **Defender** strikes back on August 29 and 30 with two easy wins against **Vigilant** and is selected to defend the America's Cup against the British yacht **Valkyrie III**.

America's Cup

September 7 to 12, 1895, off New York

Defender races against **Valkyrie III** in the best of five series

Three different courses.

The first one: 15 miles to windward off Scotland Lightship and return.

The second one: equilateral triangle, 30 nautical miles

The third one: 15 miles to leeward and return from Sandy Hook Lightship.

Results

Defender beats **Valkyrie III** by three wins to nil

September 7, first race, 30 nautical mile windward-leeward course: **Defender** beats **Valkyrie III** by 8 minutes and 49 seconds on corrected time.

September 10, second race, 30 nautical mile triangular course: **Defender** is beaten by **Valkyrie III** by 47 seconds, but **Valkyrie III** is disqualified by the race committee after the two yachts clash on the start line. **Defender** is awarded the win.

September 12, third race, 40 nautical mile windward-leeward course: **Defender** beat **Valkyrie III**, although **Valkyrie III** crosses the start line, but immediately retires.

Following the Cup, **Defender** is towed to New Rochelle and stays four years without sailing.

1899

J. Pierpont Morgan and W. Buttler Duncan rebuild **Defender** as a trial horse for the 1899 America's Cup defence candidate, **Columbia**.

The yacht is towed to Herreshoff's Bristol yard for restoration to enable it to race in the selection trials for the 1899 defence.

Following the selection trials, **Defender** returns to its mooring.

1901

Defender is broken up.

J.T.

Defender

1895

United States

Sloop

Yacht club: New York Yacht Club, New York, United States

Victorious defender of the 1895 America's Cup

Owners: William K. Vanderbilt, Edwin D. Morgan and C. Oliver Iselin.

Rating: 100.36

Designer: Nathanael Greene Herreshoff

Builder: Herreshoff Manufacturing Company, Bristol, Rhode Island, United States
Sailmakers: Herreshoff (Bristol) and MM. Wilson & Silsby (Boston)

Year of building: 1895

Launched: June 29, 1895

Skipper: Henry C. Haff

Afterguard: Herbert C. Leeds, Newberry Thorne, Woodbury Kane, W. Butler Duncan, Jr., Mrs. C. Oliver Iselin, C. Oliver Iselin and Nathanael Greene Herreshoff.

Data

Construction

Construction: all metal - Manganese bronze, Steel and Aluminum
Frames and sternpost: Steel
Keel and bottom plates: Manganese bronze
Topside plating, deck, beams and rails: Aluminum
Ballast: Lead

Dimensions

Length overall (LOA): 37.50 m
Length waterline (LWL): 27.17 m
Beam: 7.03 m
Draft: 5.81 m
Sail area: 1134.30 m²
Displacement: 151.5 tonnes
Ballast: 85 tonnes
Tonnage: 100 tonnes
Mast height: 28 m
Boom: 31.90 m
Bowsprit: 9.29 m
Topmast: 17.50 m

Date de construction 1895
Première sortie 29/5/1895

Edition 9(1895)

Equipage	
Matériau coque	Steel
Matériau mat	Steel
Longueur hors tout	37.5
Longueur de flotaizon	27.17
Hauteur mat	28
Largeur	7.03
Bôme	31.9
Surface de Voile (m2)	
Déplacement (tonnes)	151.5
Tirant d'eau	5.81
Jauge	
Lest (tonnes)	85

LOUIS VUITTON

E. endesa

Santander

Alcatel-Lucent

SUPPORTERS

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COLUMBIA

New York Yacht Club, USA, Edition 11(1901)
New York Yacht Club, USA, Edition 10(1899)

Architecte : Herreshoff Manufacturing Company
Chantier : Nathanael Greene Herreshoff

-1899: Victorious defender of the tenth 1899 America's Cup Challenger, winner over **Shamrock I**
-1901: Victorious Defender of the 1901 America's Cup.

Valencia, 07-11-2005 -
1899

Columbia was the third defender modelled and built by Herreshoff. J. Pierpont Morgan and W. Buttler Duncan rebuilt **Defender** in order to use it as a trial horse for the new 1899 America's Cup defence candidate, **Columbia** which won the elimination trials over **Defender** easily.

America's Cup races: sailed from October 16 to 20, 1899, New York
Best three out of five races.
Columbia vs. **Shamrock I**

Three different courses: the first one, 15 miles to leeward and return from Sandy Hook Lightship; the second one, equilateral triangle, 30 miles; the third one, 20 miles to leeward and return from Sandy Hook Lightship.

Races: three sailed.

Results:

Columbia beat **Shamrock I** by three wins to none

- October 16, 1st race, 30 miles, Windward-Leeward Course: **Columbia** beat **Shamrock I** by 10 minutes and 08 seconds on corrected time.
- October 17, 2nd race, 30 miles, Triangular Course: **Columbia** won, **Shamrock I** withdrew.
- October 20, 3rd race, 40 miles, Windward-Leeward Course: **Columbia** beat **Shamrock I** by 06 minutes and 34 seconds on corrected time.

Columbia sailed back to Bristol to be dry-docked and where an exceptional destiny waited for it.

1909

Columbia is the third defender designed by Herreshoff, although the talented designer focuses on another new candidate for the defence of the Cup, **Constitution**.

But the New York Yacht Club Committee make a fatal error when they sideline Charlie Barr, victorious skipper of the 1899 Cup series, because of his Scottish origins.

Barr bursts back onto the scene as skipper of the 'old' **Columbia**. He turns races against **Constitution** into tactical lessons.

A row erupts when Bostonian Thomas W. Lawson commissions **Independence** as a defence candidate, even though he is not or has any intention, of belonging to the defending club, a requirement outlined in the Deed of Gift.

The scow-type design performs embarrassingly, is too fragile and never a serious candidate. Before the Cup match had been decided, her hull is sold for scrap.

Columbia and **Constitution** compete against each other on 18 occasions over the season, winning nine times apiece.

The final elimination trials are held between August 10 and 25, 1901. **Constitution**, skippered by Uriah Rhodes, proves too inconsistent and **Columbia**, helmed by the aggressive Barr, is selected to defend the Cup against **Shamrock II**.

The America's Cup

September 28 to October 4, 1901 off New York, United States

Columbia races against **Shamrock II** in the best of five race series

There are three course options

The first one is 15-nautical miles to lee leeward and return from Sandy Hook Lightship.

The second one is a 30-nautical mile equilateral triangle.

The third one is 20-nautical miles to leeward and return from Sandy Hook Lightship.

Results

Columbia beat **Shamrock II** by three wins to nil

- September 28, first race, 30 mile windward-leeward course: **Columbia** beats **Shamrock II** by one minute and 20 seconds on corrected time.

- October 3, second race, 30 mile triangular course: **Columbia** beats **Shamrock II** by three minutes and 45 seconds on corrected time.

- October 4, third race, 40 mile windward-leeward course: **Columbia** beats **Shamrock II** by 41 seconds on corrected time (**Shamrock II** beats **Columbia** by two seconds on elapsed time).

Columbia beats **Shamrock II** by three wins to nil

Columbia enters America's Cup legend as the first boat to win the trophy two times in succession. Only two other boats later equal this record: **Intrepid** in 1967 and 1970 and **Courageous** in 1974 and 1977.

The 'old' **Columbia** beat the brand new **Shamrock II** in spite of the Irish challenger's scientific approach to design.

The talent of Charlie Barr is considered the biggest factor in the successful defence. Sir Thomas Lipton concluded: "*We have been beaten by a better boat*". He should have said "*by a better skipper*".

Designer Nathanael Herreshoff still regarded **Constitution** as the faster boat.

1902

Columbia is put on hold in Robert Jacob's yard at City Island.

1903

Columbia is refitted by Edwin D. Morgan and skippered by Captain "Lem" Miller, Charlie Barr's mate during the 1899 and 1901 Cup campaigns, in order to sail the elimination trials for the 1903 America's Cup defence. It is crushed by the impressive **Reliance**.

1904

Businessmen consider converting **Columbia** into a restaurant moored on the North River, but the project is scrapped.

1913

The 1899 and 1901 America's Cup winner is transferred to the Hawkins Yard at City Island and cut up for the scrap.

Columbia

1901

Fin keel sloop
United States

Yacht club: New York Yacht Club, New York, United States

1899: Victorious defender of the tenth 1899 America's Cup Challenger, winner over **Shamrock I**

1901: Victorious defender of the 1901 America's Cup

Owners: J. Pierpont Morgan and Edwin D. Morgan

Designer: Nathanael Greene Herreshoff

Bulder: Herreshoff Manufacturing Company, Bristol, Rhode Island, United States

Sailmaker: 1899, Herreshoff (Bristol); 1901, Ratsey (City Island)

Year of building: winter 1898 and 1899

Launched: June 10, 1899

Skipper: Charlie Barr

Captain: "Lem" Miller

Afterguard 1899: Newberry Thorne, Woodbury Kane, Herbert C. Leeds, W. Buttler Duncan Jr., Mrs. C. Oliver Iselin & C. Oliver Iselin.

Afterguard 1901: James Parker and Herbert C. Leeds

Data

Construction

Construction: Metal

Frames: Nickel Steel

Hull: Tobin Bronze
Ballast: Lead
Mast: Steel, then Oregon Pine

Dimensions

Length overall (LOA): 40.15m
Length overall (LWL): 27.25 m
Beam: 7.39 m
Draft: 5.97 m
Displacement: 148.7 tonnes
Ballast: 90 tonnes
Tonnage: 102 tonnes
Sail area: 1189m²
Mast: 30.10 m
Boom: 32.61 m
Bowsprit: 8.15 m
Topmast: 12.03 m
Rating: 102.355

J.T./nc


Date de construction 1899
Première sortie 10/6/1899

	Edition 11(1901)	Edition 10(1899)
Equipage		
Matériau coque	Steel	Steel
Matériau mat	Steel	Steel
Longueur hors tout	40.15	40.15
Longueur de flotaison	27.25	27.25
Hauteur mat	30.1	30.1
Largeur	7.39	7.39
Bôme	32.3	32.3
Surface de Voile (m2)		
Déplacement (tonnes)	148.7	148.7
Tirant d'eau	5.97	5.97
Jauge		
Lest (tonnes)	90	90

LOUIS VUITTON

 endesa

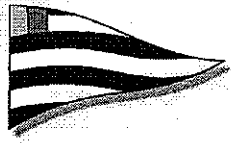
 Santander

Alcatel-Lucent 

SUPPORTERS

Nespresso • Adecco • Ford • El Corte Inglés • Estrella Damm • Grupo Leche Pascual • Coca-Cola • Vodafone

EXHIBIT W



SOCIÉTÉ NAUTIQUE DE GENÈVE

5 May 2009

Marcus Young
Commodore
Golden Gate Yacht Club
#1 Yacht Road
San Francisco, California 94123

Dear Commodore,

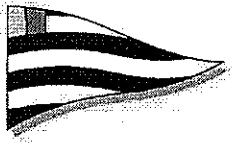
We write to invite you to resume the meeting of April 23, 2009 between SNG and GGYC and to continue our discussions about the details of the next America's Cup, including the race date, the submission of GGYC's Custom House registry, and the potential involvement of other yacht clubs in the multi-hull match that GGYC has proposed.

As you know on April 23, 2009, representatives of SNG met with representatives of GGYC in Geneva, Switzerland. SNG's representatives were Fred Meyer, SNG Vice-Commodore and America's Cup Committee Chairman; Brad Butterworth, SNG member and America's Cup Committee Vice-Chairman; Lucien Masméjan, SNG member and America's Cup Committee Secretary; and Ana Gil-Robles, SNG ad-hoc secretary. GGYC's representatives were Melinda Erkelens, GGYC board member and BMW ORACLE Racing General Counsel; Manuel Ruiz de Elvira, BMW ORACLE Racing Design Team; and Richard Slatter, BMW ORACLE Racing Rules Advisor.

At this meeting SNG asked GGYC to discuss the dates for the race. SNG explained its view that it had to comply with the express terms of the Deed of Gift. This meant the race would be held on the first permissible date under the Deed of Gift, May 3, 2010. None of GGYC's multiple representatives said anything in protest to SNG's statement that it believed the first race date set forth under the New York Court's Order read together with the Deed of Gift was May 3, 2010. No one said that this date was contrary to the Order. No one said that it was inconsistent with the Deed of Gift. No one said the race needed to be held in February, 2010. GGYC's representatives instead chose to remain entirely silent on the race date.

At the conclusion of the meeting, Mr. Masméjan tried again to raise the race date issue with Ms. Erkelens. This was part of an effort to see if the parties could reach mutual agreement on the date of the race. The New York Court's Order expressly allows that:





SOCIÉTÉ NAUTIQUE DE GENÈVE

“Notwithstanding the above, the parties may mutually agree in writing to other dates.” Mr. Masméjan specifically asked Ms. Erkelens whether she wanted to discuss the race date. Ms. Erkelens responded that she preferred to do it in another meeting. Ms. Erkelens asked if Mr. Masméjan would be available for a meeting for the week of April 27 in New York. Mr. Masméjan said he was not so they would need to find another mutually convenient time.

Instead of arranging the follow-up meeting discussed at the conclusion of the April 23 meeting, GGYC decided last Monday to renew its legal proceedings. While we are disappointed with GGYC's decision to turn again to litigation, we remain willing to continue our mutual consent negotiations on the race date and other issues regarding the next America's Cup. To this end, we propose a meeting of representatives from GGYC and SNG on May 11, 2009 at 10.30 local time.

Finally, at our previous meeting we once again insisted on our Deed of Gift right to be timely informed about the Challenging Vessel and to that effect to receive as soon as possible a custom-house registry of such vessel. The Deed of Gift requires deliver of the registry “as soon as possible”. We would encourage GGYC to obviate the need for additional Court intervention by simply complying with its obligations under the Deed of Gift and providing the Custom House registry of its challenge vessel to SNG.

We look forward to meeting with you to continue our negotiations regarding a successful 33rd America's Cup.

Yours sincerely,


Fred Meyer,
America's Cup Committee Chairman


Alec Tournier
General secretary



EXHIBIT X



Power

- 06 Apr: Rescue underway for 2 yachties
- 03 Apr: Regatta brings in \$16m for Auckland
- 03 Apr: Team NZ sceptical about cup chances
- 03 Apr: Oracle wins appeal against Alinghi
- 25 Mar: Minoprio brings in the big guns
- 15 Feb: Emphatic Team NZ victory

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