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

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S CROSS-MOTION TO DISQUALIFY PLAINTIFF FROM THE AMERICA'S CUP

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May 11, 2009

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Golden Gate Yacht Club ("GGYC") respectfully submits this memorandum of law in opposition to Defendant Societe Nautique de Geneve's ("SNG") cross-motion of May 1, 2009.

I. SNG ACKNOWLEDGES ITS CONTEMPTUOUS CONDUCT AND COMPOUNDS IT BY A FRIVOLOUS PLOY TO INVALIDATE GGYC AS THE LAWFULLY DECLARED AMERICA'S CUP CHALLENGER

In response to GGYC's contempt motion of April 28, 2009, SNG retaliated with the instant cross-motion and accompanying brief which prove beyond doubt and by its own papers its contempt for lawful process. In its brief, SNG boldly declares that "May 3, 2010 . . . is the earliest date on which the next Cup can be held." (SNG Br. at 3.)[1] This is undeniably in direct conflict with the unequivocal mandate in this Court's judgment of April 7, 2009 ("Order and Judgment"), issued pursuant to the Remittitur from the Court of Appeals (Ex. C), that the next Cup match be held in February 2010 -- which is ten months from service of the Order and Judgment on April 7, 2009. (Ex. B at 4-5.) As SNG itself correctly calculated in its brief: "Ten months from April 7, 2009 is February 7, 2010." (SNG Br. at 3.)

SNG's brief offers several excuses for violating the definitive mandate of the Order and Judgment. First, it asserts that the February 2010 race dates, mandated in the Order and Judgment, are inconsistent with SNG's self-proclaimed and self-serving interpretation of the hemisphere provision in the Deed of Gift. (SNG Br. at 3-4.) As detailed below (infra Section II), New York courts have consistently and categorically rejected this type of self-generated evasion of compliance with court orders. It is also factually inaccurate that the Deed and the Order and Judgment are irreconcilable. Id.

Second, SNG artfully suggests that it really did not mean to unilaterally dictate that the

[1] Accompanying this memorandum of law is the affirmation of James V. Kearney, sworn to May 11, 2009 (the "Kearney Aff."). As used herein, "Ex. __" refers to exhibits to the Kearney Aff.; "SNG Br." refers to SNG's Memorandum of Law in Support of its Order to Show Cause, dated April 30, 2009; and, "SNG Aff. Ex." refers to affirmation of Barry R. Ostrager, sworn to April 30, 2009, accompanying the SNG Br.

race shall be held in May 2010; rather, it merely expected that the conflict it constructs between the Deed and the Order and Judgment regarding the race date "would be the subject of ongoing discussions among the parties." (SNG Br. at 4.) SNG is plainly attempting to squirm around the factual history to avoid being held in contempt. Truth is in its April 23, 2009 letter to GGYC; SNG unequivocally states that "*if no further mutual consent agreement can be reached . . . the scheduled date of the match shall be . . . May, 2010.*" (SNG Aff. Ex. I at 2) (emphasis supplied). These are not the words of friendly discussions and negotiations exhorted by the Court of Appeals. See Golden Gate Yacht Club v. Societe Nautique De Geneve, 2009 NY Slip Op. 2480, at *7 (N.Y. Apr. 2, 2009) ("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.'") SNG's unmistakable ultimatum is also repeated in its racing team's website, which contains a copy of its April 23rd letter, and in its media statements. (See, e.g., Exs. F; G.) This latest maneuver directly conflicts with the Order and Judgment which explicitly provides that absent mutual consent to modify the match race dates, the match shall occur in February 2010. (Ex. B at 4-5.)

Third, in a letter sent after GGYC's motion for contempt, and dated May 5, 2009, SNG disingenuously proposes the "potential involvement of other yacht clubs in the multi-hull match that GGYC has proposed." (Ex. W at 1.) This "proposal" is merely a ruse, fabricated for this litigation, that SNG is using to further delay the race date. The reality is, as SNG has represented to the court on numerous occasions, that "[GGYC's] challenge . . . specifies a boat that is so large and so expensive that no other yacht clubs can afford to compete against it." SNG brief to the Appellate Division, at 2, dated May 15, 2008. And as the CEO of the racing team of the previous America's Cup trustee stated on April 24, 2009: "In practical terms it's completely impractical. No challenger will build a multihull to be involved." (Ex. X.) The ultimate irony

of this ploy is that it was SNG that on April 23, 2009 chose to reject GGYC's offer for a conventional multi-challenger America's Cup event in mono-hulls; as evidenced in Exhibit J of SNG's affirmation, at 2: "When the two sides met in Geneva last week, the Swiss rejected the American group's proposal for a conventional, multi-challenger America's Cup in monohulls."

Worse yet, SNG compounds its contemptuous conduct by advancing on this cross-motion a new, frivolous and post-judgment justification for excluding GGYC from racing for the Cup -- namely, that GGYC has not provided SNG with a Custom House Registry ("CHR") for its challenging vessel. (SNG Br.) This latest excuse by the trustee of the America's Cup is ridiculous considering that SNG advised GGYC by letter dated July 23, 2007 that it could not even consider GGYC's challenge (Ex. E), and consistently maintained that position until its letter to GGYC of April 14, 2009 in which it for the first time recognized GGYC as the Challenger of Record (as it ultimately became legally compelled to do). (Ex. D.)[2] SNG nonetheless now proposes to this Court to declare GGYC disqualified for not having submitted a CHR during that litigation limbo. One may anxiously anticipate: how many more SNG gambits are lurking around the bend and how many more times will the Court be compelled to enforce its rightful Order and Judgment?

As discussed below (<u>infra</u> Section III(B)), the Deed does not require submission of a CHR with the notice of challenge but rather only "as soon as possible" after the notice of challenge and the commencement of the ten months' notice of race period, which for the next America's Cup began on April 7, 2009 by Court of Appeals mandate implemented in the Order

[2] For example, SNG asserts in its April 21, 2008 brief to the Appellate Division, at 40, that "GGYC's Challenge is Invalid"; and even after entry of this Court's May 12, 2008 order declaring GGYC the valid Challenger of Record, SNG in its May 15, 2008 brief to the Appellate Division, at 9, asserts that "CNEV is the valid challenger of record," an argument it repeats in its briefing of May 23, 2008 at 3. There is more, SNG's own affirmation attaches a August 22, 2008 letter it sent to GGYC asserting that "GGYC continues its baseless claim to be Challenger of Record" (SNG Aff. Ex. G); a position it maintained in its brief to the Court of Appeals of Nov. 13, 2008, at 47, which asserts that "GGYC's Challenge Is Invalid."

and Judgment. Indeed, if there were such a requirement to submit the CHR with the other notice of challenge documents at the very beginning of the ten month period (as SNG would have it), the Court of Appeals could not have concluded that GGYC's notice of challenge was valid and that it was the legally recognized Challenger of Record. See Golden Gate, 2009 NY Slip Op 2480, at *7.

Having been reinstated as the Challenger of Record by the Order and Judgment on April 7, 2009, and having been recognized as such by SNG on April 14, 2009, GGYC will of course proceed now to obtain a Certificate of Documentation ("CoD"), the modern-day equivalent of the CHR in the United States, from the U.S. Coast Guard National Vessel Documentation Center ("NVDC"). It will provide its CHR to SNG "as soon as possible" when its challenge vessel is completed, as required by the express language of the Deed. (Infra Section III(D).) That will occur when the NVDC completes processing GGYC's application, which is expected to be submitted when construction of its challenge vessel is completed, as an application for a CoD cannot be submitted until a vessel is completed. Id. That is the Deed requirement; and that is lawful, sensible and reality-based compliance.[3]

II. SNG'S MANIPULATION OF THE ORDER AND JUDGMENT IS INEXCUSABLE

SNG is profoundly wrong to assert that its self-serving interpretation of the Deed's hemisphere provision permits it to flout the Order and Judgment of this Court. Permitting litigants through their counsel to get away with such conduct would generate disrespect and disobedience for the proper administration of justice and create "chaos" in the courts. See, e.g., Mt. Sinai Hospital v. Davis, 8 A.D.2d 361, 364 (1st Dep't 1959) ("Defendants could not

[3] The combined effect of SNG's stratagem here is to usurp the authority to dictate when the ten month notice of race period is to begin, delay the race as it may wish (after already delaying it for more than two and a half years), and require GGYC to have completed its challenge vessel even before the ten month period begins.

cavalierly ignore . . . orders and then relitigate their propriety on the merits before another justice of the same court upon motions to punish them for contempt. Such procedure creates chaos in the enforcement of court orders."). Simply put, litigants and their lawyers could then unilaterally undo or redo final adjudications.

Recognizing the need to protect its courts, New York law is unequivocal that "an order of the court must be obeyed, no matter how erroneous it may be [in the opinion of the particular litigant or lawyer], so long as the court is possessed of jurisdiction and its order is not void on its face." New York v. Congress of Racial Equality, 460 N.Y.S.2d 58, 60 (1st Dep't 1983), see also Rivera v. Smith, 63 N.Y.2d 501, 516 (1984) ("an individual against whom an injunction has been granted must comply with the terms of the injunction or be liable for contempt for failure to do so, notwithstanding that the injunctive order is illegal"); In re Fidelity Brokerage Services, 743 N.Y.S.2d 81, 83 (1st Dep't 2002) (finding trustee in contempt and "reject[ing its] contention that the absence of a specific deadline in the consent order rendered the requirement of written authorization equivocal").

Further, in its brief, at 3-4, SNG attempts to revive the precise argument for violating the Order and Judgment that it repeatedly raised during the settle-order process leading up to the Supreme Court's May 12, 2008 order. (Exs. H at 3-4 ¶¶ 6-8; I at 4; J at 4; K at 1-2.) That argument was soundly rejected by this Court's order of May 12, 2008, which was subsequently reinstated by the Court of Appeals, and then entered as the Order and Judgment of April 7, 2009. (Ex. B at 3-4.) New York law does not permit a litigant to rehash old and soundly rejected arguments to justify disobedience of a judgment and to open a redundant round of litigation. See GGYC's brief in support of its contempt motion, dated April 27, 2009, at 6-7.

Finally, SNG is plainly wrong in its assertion in its brief, at 3-4, that there is an irreconcilable conflict between the Deed of Gift and the Order and Judgment. Even if there

were, the Order and Judgment trumps all. But the reality is that far from being irreconcilable, they are readily reconciled by an America's Cup trustee willing (and legally bound) to abide by the judgments of the Court. If SNG believes that a Southern Hemisphere location for a match in February 2010 is more faithful to the Deed's prescription, the Order and Judgment expressly grants SNG the range of choice to select a location in the Southern Hemisphere for the court-directed February 2010 match. (Ex. B at 3-4.) SNG, instead, did the one thing it could not do: just flat out disobey the Order and Judgment by unilaterally declaring different match race dates.

III. SNG'S CROSS-MOTION TO DISQUALIFY GGYC SHOULD BE DENIED

A. COURT'S AUTHORITY LIMITED TO ENFORCEMENT OF JUDGMENT

This Court should not even entertain SNG's retaliatory cross-motion. The only specific power that a New York court retains in an action after entry of a final judgment and exhaustion of all appeals is to enforce the judgment. See Ex. U (Little Prince Prods. v. Scoullar, Index No. 108849/94, slip op. at 2 (N.Y. Sup. Ct. Nov. 19, 1997) ("The application for injunctive relief [after entry of final judgment is] denied, as there is no predicate in the pleadings which would permit this Court to grant injunctive relief to defendants.")), aff'd, 258 A.D.2d 331, 332 (1st Dep't 1999) ("injunction restraining plaintiff from infringing on defendants' exclusive rights was correctly denied, the court having no jurisdiction to entertain applications for additional relief after entry of final judgment"). In legal and functional effect, SNG is now seeking to artfully amend the Order and Judgment and the Remittitur of the Court of Appeals. See, e.g., 1-11 New York Appellate Practice § 11.12 (2007) ("When the Court of Appeals makes a final determination . . . [n]o lower court may do any act other than what the Court of Appeals has directed.").

B. GGYC HAD NO OBLIGATION TO PROVIDE A CHR BEFORE COMMENCEMENT OF THE 10 MONTH NOTICE-OF-RACE PERIOD

The Deed provides that the "Challenging Club shall give ten months' notice . . . naming the days for the proposed races." (Ex. A at 1.) It is only *after* the "ten months' notice of challenge" is given that "a custom-house registry of the vessel must also be sent *as soon as possible*." (Ex. A at 1-2) (emphasis supplied). See Golden Gate, 2009 NY Slip Op 2480 (GGYC's notice of challenge accompanied by its Certificate of Challenging Vessel was valid without having provided a CHR).

The historical record is replete with evidence that the donor required the CHR to be provided only "as soon as possible," and not at the time of the challenge, so as to give *the challenger* time to design and construct its vessel during the 10 month notice period leading up to the match. A brief explanation of the circumstances surrounding the amendment of the Deed on this point is instructive. The second version of the Deed, executed in 1882, required that the CHR be provided *with* the challenge and thus at the commencement of the ten month period. (Ex. L.) In March 1887, while a challenging boat named *Thistle* was still under construction, her owner sent a formal notice of challenge to the Cup holder. (Ex. V (Mercury Bay Boating Club v. San Diego Yacht Club, No. 1299/87, slip op. at 7 (Sup. Ct. N.Y. County Nov. 25, 1987)).) The then-effective Deed required the *Thistle* to enclose its CHR along with its notice of challenge. (Ex. L. at 3.) However, because the *Thistle* was still under construction, the designer had to estimate her dimensions. (Ex. V (Mercury Bay, No. 1299/87, slip op. at 7.) Sure enough, this estimation was wrong; in September 1887, days before the scheduled America's Cup races, official measurements taken at the race venue revealed that one of the *Thistle*'s measurements was over one foot longer than expected; a front page scandal and uproar ensued. Id. at 7-8. The very next month, the donor inserted, *inter alia*, the now operative "as soon as possible" language

into the CHR provision of the Deed to provide *the challenger* sufficient time to complete design and construction of its vessel, without the need for guessing its final dimensions at the time it delivered its challenge.[4] Indeed, as explained in Mercury Bay, No. 1299/87, slip op. at 10, "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."

History reveals that in the first Cup match held after the inclusion of the "as soon as possible" language, the CHR for the challenge vessel *Valkyrie II* was delivered to the defender fewer than seven weeks before the first match race on October 7, 1893. (Exs. M; V at 1.) In the next Cup match of 1895 the CHR for the *Valkyrie III* was sent fewer than six weeks before the first match race on September 7, 1895 (Ex. N; V at 3.), and in the Cup match of 1901 the CHR for *Shamrock II* was provided fewer than two weeks before the first match race on September 28, 1901. (Ex. O; V at 5.)[5]

Accordingly, the purpose of the CHR itself is not, as SNG would have it, to "ensure the Defender sufficient information and time to prepare its defense," (SNG Br. at 7); that is what the Certificate of Challenging Vessel is for, which accompanies the Notice of Challenge. The Deed's donor made plain that the Certificate of Challenging Vessel submitted at the time of challenge, providing various dimensions of the challenger vessel, is the notice to be provided and relied upon by the defender in preparing for its defense. Mercury Bay Boating Club v. San Diego Yacht Club, 150 A.D.2d 82, 91 (1st Dep't 1989) ("the notice provision [providing for the Certificate of Challenging Vessel] was designed to afford the trustee sufficient time to build an

[4] To this same end, the Deed was amended from requiring that the precise dimensions of a challenger vessel be provided in the Certificate of Challenging Vessel with the notice of challenge, to merely requiring that the "dimensions [on the Certificate of Challenging Vessel] shall not be exceeded." (Ex. A at 1-2.)

[5] In the only match in recent history governed by the Deed, as opposed to mutual consent terms agreed to by the defender and challenger of record, the CHR for Mercury Bay's challenge vessel in the 1988 America's Cup was provided fewer than three months before the match. See (Ex. P); Mercury Bay, 150 A.D.2d at 100 ("matches held on September 7 and 9, 1988").

adequate vessel to defend the Cup . . . [and] to afford the defender a limited initial advantage"). Had the donor intended that any information contained in the CHR that is not already contained in the Certificate of Challenging Vessel should be part of the information relied upon by the defender in preparing for the match, the donor could have simply provided that such information also be included in the Certificate of Challenging Vessel. The donor, of course, did not do that. See Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269 (1990) ("the donors, who chose to be specific about other aspects of the match, including the load water-line lengths of the competing vessels, could have easily included [other] express requirement [for] the vessels . . . but did not do so.").

What purpose, then, is served by the CHR? It supplies proof of compliance with the requirement that the challenger's vessel be "constructed in the country to which the Challenging Club belongs" and to provide assurance that the Cup would be a "competition between foreign countries." (Ex. A at 1.)[6] Indeed, while the calculation of and type of vessel information contained on a CHR varied from country-to-country, the one consistent piece of information any country's CHR could be relied upon to provide was the vessel's nationality.[7]

SNG's demand in its cross-motion for a CHR immediately, when the 10-month notice period has just begun -- and before GGYC has completed its challenge vessel -- is without precedent and is yet another manipulation of the Deed, and SNG's duties as the trustee. It would functionally compel GGYC to approximate the dimensions of its vessel on its application to the

[6] Cf. Sharp v. United Ins., 14 Johns. 201, 204 (N.Y. 1817) ("The object of the register is to show the [national] character of a vessel, and to entitle her to the advantages secured by law to vessels of our own country.").

[7] A practical consideration also demonstrates that SNG cannot be anything but disingenuous when asserting that it needs GGYC's CoD to prepare. The three dimensions provided on the CoD (Ex. R (sample CoD)) provide far less vessel information than the five dimensions and rig information provided on GGYC's Certificate of Challenging Vessel (Ex. T.)

NVDC -- which requires precise and accurate specifications.[8] That catch-22, of course, is exactly what the donor intended to avoid by amending the Deed to include the "as soon as possible" language.

C. GGYC WAS NOT OBLIGATED TO PROVIDE A CHR DURING THE PERIOD WHEN SNG EXPLICITLY REFUSED TO RECOGNIZE, OR EVEN CONSIDER, GGYC'S CHALLENGE

GGYC was not obligated to begin the process of obtaining a CHR "as soon as possible" until April 2009 for yet another reason. It was not until April 14, 2009 that SNG finally acceded to its obligations as trustee and the mandates of the New York courts by recognizing GGYC as the court-ordered valid Challenger of Record. (Supra Section I.)

SNG's failure to recognize GGYC's challenge as valid, as a matter of law, placed GGYC's obligations under the Deed in legal limbo for the time in which SNG refused to recognize GGYC's proper challenge. GGYC thus has no obligation under law (or common sense) to deliver the CHR during that hiatus. See, e.g., P.A. Building v. New York, 305 A.D.2d 244, 245 (1st Dep't 2003) ("The rule is that a party's failure to perform its obligations under a dependent covenant results in the suspension of the complying party's obligation to perform under the agreement until such time as the defaulting party complies."); Isbrandtsen, v. City of N.Y., 33 A.D.2d 1018, 1018 (1st Dep't 1970) (holding that party is "exculpated presently from its own covenant" due to adverse party's failures "in respects of its obligations"). The compelling logic of this rule is evident -- it makes no sense for a party who is denied the privilege of being a beneficiary to be subjected to its obligations.

This is especially true where, as here, the trustee of a charitable trust is demanding the

[8] It is a violation of the applicable federal regulations to estimate dimensions in an application for a CoD, as such would constitute a misrepresentation that the vessel's construction is complete, subjecting the applicant to fines and the vessel to forfeiture. See 46 U.S.C. § 12151 (2009) ("A vessel and its equipment are liable to seizure by and forfeiture to the Government if . . . the owner of the vessel or the representative or agent of the owner knowingly falsifies or conceals a material fact, or knowingly makes a false statement or representation, about the documentation of the vessel or in applying for documentation of the vessel.").

beneficiary provide a CHR immediately while denying the beneficiary its right to race for the Cup. GGYC could only obtain a CoD from the NVDC after the design and construction of the challenge vessel have been "completed." (Infra Section III(D).) It is preposterous for SNG to argue now that GGYC was "duty bound" by the Deed to design, construct and complete a multi-million dollar challenge vessel during the time that SNG was simultaneously asserting that GGYC was not the America's Cup challenger and that the Deed precluded even consideration of GGYC's challenge. (Ex. D.)[9] Indeed, SNG has acknowledged (until its instant cross-motion, of course): "America's Cup racing vessels costs tens of millions of dollars to build, and *it did not make sense for SNG to incur such expenses on a boat to meet GGYC's challenge when SNG believed GGYC's challenge to be invalid* (which remains SNG's view)." (Ex. J at 2 (SNG letter to this Court of March 26, 2008) (emphasis supplied).) What was truth to SNG then is proof for GGYC now. SNG cannot disqualify GGYC for not completing its vessel in the period in which SNG acknowledges that it made no sense for SNG to construct its defending vessel.

D. GGYC CANNOT PROVIDE A CHR UNTIL CONSTRUCTION OF ITS CHALLENGING VESSEL IS COMPLETED

As is its obligation, GGYC will obtain a CoD from the NVDC and provide it to SNG "as soon as possible." That will be when the NVDC completes processing GGYC's application, which will be submitted when final sea trials and construction of its challenge vessel are completed. (Ex. Q.) The vessel is now still under construction. Id. To apply for a CoD, GGYC must obtain a tonnage certificate from one of five organizations authorized to issue such certificates after, *inter alia*, physically inspecting and measuring the vessel. 46 C.F.R. § 67.105(b) (2009). In addition, a builder's certificate must be submitted to the NVDC after

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[9] When this Court's first order declaring GGYC the Challenger of Record was entered on May 12, 2008, SNG had already filed its notice of appeal raising the validity of GGYC's challenger certificate. At no point between May 12, 2008 and July 29, 2008, when the Appellate Division acceded to SNG's view that GGYC's challenge could not be considered by SNG, did SNG accord GGYC the rights and privileges of the valid challenger. (Supra footnote 2.)

construction of a vessel has been "completed." 46 C.F.R. § 67.99 (2009). Thus, an application for a CoD cannot be made until the applicant can represent that construction of the vessel is "complete[]." Id. see also footnote 8 ("vessel . . . liable to . . . forfeiture to the Government if . . . the owner . . . knowingly makes a false statement or representation . . . in applying for documentation of the vessel").

On a construction schedule based on the Court-directed February 2010 race dates in the Order and Judgment, GGYC expects its challenge vessel will be completed this summer, with the CoD to follow "as soon as possible." (Ex. Q at 1.) However, SNG -- in this cross-motion and in its ultimatum letter of April 23, 2009 -- asserts the authority to unilaterally postpone the commencement of the ten month notice of race period, declaring that the match will not occur in February 2010. Any delay in holding the Order and Judgment-directed match of February 2010 necessarily is likely to result in an extension of GGYC's expected completion date for its vessel, since it would need additional time to optimize the design and construction of GGYC's vessel before starting the process of training on the vessel. Id. see also Mercury Bay, 76 N.Y.2d at 269 ("the deed makes clear that the design and construction of the yachts as well as the races, are part of the competition contemplated"); Mercury Bay, 150 A.D.2d at 104 ("The over-all thrust of the deed . . . is . . . that the contestants . . . compete with the fastest boats on the water.").

E. SNG SUBMITS NO ADMISSIBLE EVIDENCE TO SUPPORT ITS CROSS MOTION

Finally, SNG's entire cross-motion rests solely, and impermissibly, on unsupported conclusions (*e.g.*, "there was no reason whatsoever that GGYC could not have provided a Coast Guard Certificate of Documentation" SNG Brief at 5) and inadmissible media "spin" attachments.[10] SNG therefore has presented not a shred of probative documentation or evidence

[10] SNG references press releases (SNG Brief at 5-6) which each describe BMW Oracle Racing as "testing," "trialing," or "sea trials" a multi-hull vessel; these terms, however, by their plain meaning

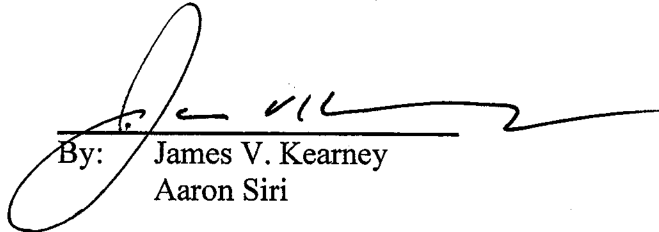
that it was feasible, appropriate or required for GGYC to have provided a CHR at any time before SNG's frivolous cross-motion, or to provide it immediately now.

CONCLUSION

For the foregoing reasons, GGYC respectfully requests that the Court deny SNG's cross-motion to disqualify GGYC as the lawfully adjudicated and court mandated Challenger of Record.[11]

Dated: New York, New York
May 11, 2009

LATHAM & WATKINS LLP



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describe part of a design and construction process that is incomplete and, as discussed above (supra Section III(D) and footnote 8) only "completed" vessels may apply for a CoD.

[11] If the Court finds SNG's cross-motion frivolous it is empowered to award costs and attorney's fees pursuant to C.P.L.R. § 8303-a(a) (2009) and 22 N.Y.C.R.R. § 130-1.1 (2009).