

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

PRESENT: \_\_\_\_\_

PART 64

**JUSTICE SHIRLEY WERNER KORNREICH**

GOLDEN GATE YACHT CLUB

INDEX NO. 602446/07

- v -

SOCIÉTÉ NAUTIQUE

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that ~~this motion~~ the August 10, 2009

hearing held in this court is decided  
in accordance with the assessed  
decision and order.

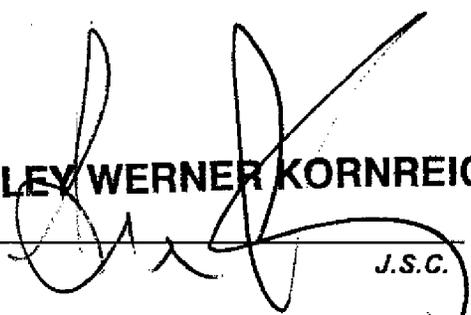
**FILED**

SEP 21 2009

NEW YORK  
COUNTY CLERKS OFFICE

Dated: 9/18/09

**JUSTICE SHIRLEY WERNER KORNREICH**



J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

-----X

GOLDEN GATE YACHT CLUB

Plaintiff,

-against-

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant,

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor/Defendant.

-----X

Index No.:602446/2007

**DECISION and  
ORDER**

**KORNREICH, SHIRLEY WERNER, J.:**

Société Nautique de Genève (SNG) is the defending holder and plaintiff Golden Gate Yacht Club (Golden Gate) is the challenger for the 33<sup>rd</sup> America’s Cup (Race). By Decision and Order dated July 29, 2009, the court ordered the parties to appear for an evidentiary hearing on August 10, 2009, to present evidence regarding the phrase “as soon as possible” as used in the Deed of Gift governing the America’s Cup. The phrase speaks to when the challenger must provide the defending holder of the Cup with a Custom House Registry (CHR) specific to the vessel the challenger will use in the Race. Thus, the CHR would identify the vessel which is to be raced. Familiarity with the court’s July 29, 2009 Decision is presumed.

At the hearing, plaintiff Golden Gate presented a single witness. Defendant SNG presented no witnesses.

*The Hearing Evidence*

Golden Gate’s witness, Thomas L. Willis, the Director of the Coast Guard’s National Vessel Documentation Center (NVDC) from 1994 to 2008, testified as follows. The Coast Guard

issues Certificates of Documentation (CODs) at the NVDC. The COD now substitutes for a CHR and is virtually identical in content. During his tenure, Willis was the final arbiter of the issuance of CODs. He, previously, had served as the chief of the Merchant Documentation and Tonnage Survey branch of the Merchant Vessel and Documentation Division of the Coast Guard, among other positions. He has lectured and testified regarding the issuance of CODs.

Willis explained that the primary purpose of a COD is to evidence nationality and that it cannot be issued until construction on a vessel and sea trials are completed. Willis defined “completed” as meaning completed for its intended use, and “sea trials” as the period during which a vessel is tested to see if it is going to meet the requirements for which it was built. The regulations do not require the vessel owner to apply for a COD before the sea trials are done, as long as the vessel is not engaged in coastwise trade or fisheries. Any vessel over five tons and owned by an American is eligible for documentation.

In Willis’ opinion, construction would not be considered completed where: an engine is being installed; the vessel’s manual power system for trimming the sails is being removed; movable water ballast systems are being installed; skin friction reduction technology is being installed; and sea trials have revealed structural features which require re-engineering or changing the volume of the hulls. An application for issuance of a COD, however, can be filed before the vessel is completed. The COD would not issue, however, until the NVDC has received all of the necessary supporting documentation, including a Builder’s Certificate and a Tonnage Certificate.

A Builder’s Certificate describes the particulars of the build and the identity of the vessel’s owner. It is issued and title is transferred when the vessel is completed. It is not issued until the owner and builder are in agreement that the vessel is completed and delivery has been

made. A Tonnage Certificate is required for vessels over 79 feet that are going to undertake a foreign voyage. It can be issued prior to completion if the tonnage surveyor can assess the accuracy of the drawings. Nothing can be out of place that affects tonnage. If the weight changes, a new Tonnage Certificate will be required.

For recreational vessels, it now takes about one month to issue a COD after all of the documents have been received. A COD can be issued within one or two days for commercial vessels. Moreover, the COD can be expedited where the vessel will have to go through Customs.

Willis viewed a video and pictures of Golden Gate's boat and opined that it is a "vessel" for which a COD could be filed. He described changes that could permissibly be made to a vessel after the COD has been issued as including new sails or new masts, but not structural work. He admitted that changes can be made in bulkheads and the volume of the hull that would not change the 90 foot length on load waterline. If changes are to tonnage, however, a new Tonnage Certificate would be necessary.

A Notice of Challenge in the Race and a COD both contain the name of the vessel, and entries for the length, breadth and depth of the vessel. Although the breadth measurement on the COD is the same as the extreme beam measurement on the Notice of Challenge, the length and depth measurements are different measurements. On a COD the length measurement is closer to the overall length of the vessel, and the depth measurement is the depth of the hull, not just the portion in the water as required on the Notice of Challenge. Also, the COD has the gross and net tonnage, information not on the Notice of Challenge.

In addition to documents already filed in the litigation, the parties submitted the following documents: The Equipment Rules of sailing for 2009-2012 issued by the International Sailing Federation; SNG's measurement procedures for the 33<sup>rd</sup> America's Cup, posted August 6, 2009;

a picture of Golden Gate's vessel, the BOR 90; an on-line release by BMW Oracle about an August 11<sup>th</sup> "special event" to celebrate its team; a representative COD application; a blank Builder's Certification; a representative COD; and an additional copy of Golden Gate's Notice of Challenge.

*Argument by Counsel*

SNG's counsel argued that when Golden Gate issued the Notice of Challenge they had to have a specific boat in mind with specific dimensions, and that the vessel Golden Gate ultimately races must match what they originally notice. SNG offered to measure Golden Gate's vessel early and not wait until the date of the match. SNG posted its measuring rules early to dispel any notion that they were going to try to disqualify Golden Gate. SNG does not want Golden Gate to be disqualified, just that they meet the 90 by 90 dimensions they included in the Notice of Challenge. Counsel emphasized that SNG wants the COD immediately because they are entitled to it under the Deed and because they want to see whether the boat Golden Gate intends to race matches the measurements provided in the Notice of Challenge. Counsel argued that the challenger's boat may not be smaller than the originally provided dimensions.

Golden Gate's counsel argued that the vessel did not have to be in existence at the time of the challenge. Counsel acknowledged that the vessel must not exceed the original dimensions provided in the challenge. Although SNG had said it would not use measurement rules to disqualify the challenger, under SNG's posted rules the ballast in the boat when it is measured must remain in the same place during the race, which would necessarily exclude movable ballast. Also, the rules of the International Sailing Federation (ISF) and SNG's measurement rules differ regarding the method for measurement; the ISF measures the waterline from the front of the hull

to the end, but under 's SNG rules, which refer to the "yacht" as opposed to the "hull," the rudder would be included in the measurement.

Golden Gate's Counsel also argued that CODs are used to establish nationality and not to help the defender develop its boat. In the America's Cup race held immediately after the Deed of Gift was amended to add the "as soon as possible" language regarding provision of a CHR, the CHR was provided seven weeks before the race. In subsequent races the CHR was provided six weeks before the race, then two weeks, then three months. Counsel represented that Golden Gate would try to get the COD by November, that the boat on its website – BOR 90 -- is the boat it will race and that the owner will be Oracle Racing.. The boat is not yet completed as Golden Gate is still making changes to be competitive with SNG's boat. They are adding power for raising, lowering and trimming the sails, as well as movable ballast.

Counsel for the parties agreed to communicate regarding the measurement rules and whether clarification would be necessary. The court offered to intercede at the parties' request. To date no such request has been made.

### *Discussion*

The vessel of an America's Cup challenger is by nature a yacht undergoing intense technical development. Obtaining a COD<sup>1</sup>, it can be argued, would freeze many of the significant development options for the challenging yacht at the time that measurement is performed. The Deed of Gift requires the challenger to provide the vessel's critical dimensions in the Notice of Challenge. It does not appear that the COD information is intended to provide the defender with

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<sup>1</sup>The court will use the term "Certificate of Documentation," or "COD" as it is the current name of the required certificate, as opposed to the name "Custom House Registry" originally used in the Deed of Gift.

additional significant information, but rather to help confirm that the as-built measurements of the challenging vessel correspond to those in the Notice of Challenge.

The court credits the testimony of Golden Gate's witness Thomas Willis and finds that: a COD will not be issued until submission of a Builder's Certificate and a Tonnage Certificate to the NVDC; that a Builder's Certificate is issued after a vessel and sea trials are completed; that "completed" means completed for intended use; and that construction is not "completed" where a vessel is undergoing structural change, such as adding a movable ballast system or an engine to mechanically trim the sails. Counsel for Golden Gate represented that the vessel undergoing sea trials and identified as BOR 90 is the America's Cup vessel it intends to race, and that the owner is Oracle, but that a COD is premature because the vessel is undergoing structural changes to add movable ballast and mechanized rigging systems. Under these circumstances the court agrees that the vessel is not completed for purposes of a COD.

Although the Deed of Gift, as recognized by the Court of Appeals in *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 NY2d 256 (1990), gives the defender ten months' notice of the challenger's critical measurements, it does not preclude the challenger from making structural changes to the vessel that do not increase the dimensions stated in the Notice of Challenge. Willis testified that changes can be made in bulkheads and the volume of the hull that would not change the 90 foot length on load waterline. If Golden Gate does make changes that increase the dimensions from those originally noticed, then the vessel will be disqualified. Until the vessel is completed, however, a COD cannot be obtained.

The court is bound by the Deed of Gift, a document dating back to the 19<sup>th</sup> Century and one the court must strictly construe. *Mercury Bay, Id.* The Deed provides, in relevant part, that

The Challenging Club shall give ten months' notice, in writing, naming the days for 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 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.....

There is no additional language from which the court can attribute the proscription against exceeding the measurements.

On the other hand, the Deed of Gift provides that should the challenging and defending clubs not “mutually consent” to the details of the Race, the race “shall be sailed subject to the rules and sailing regulations [of the defending club] so far as the same do not conflict with the provisions” of the Deed of Gift. Nowhere in the Deed of Gift is mention made of the ISAF rules. As Willis testified, measurement of length of the vessel on the COD is different from the measurement on the Notice of Challenge, since the means for taking the measurement differs. Similarly, measurement under the ISAF rules may differ from the measurement rules for the 33<sup>rd</sup> America’s Cup pursuant to the Deed of Gift.

Allowing the challenger to continue construction after it issues the Notice of Challenge, and to reduce the size of the vessel below the noticed measurements, does appear to be inconsistent with the distinct advantage afforded the defender by the Deed’s requirement of ten months’ notice, but the court is mindful of the simpler state of technology that existed when the deed was drafted. There was only so much the challenger could do to its vessel once it learned the details of the defender’s vessel, which under the Deed do not have to be revealed until the date of the match.

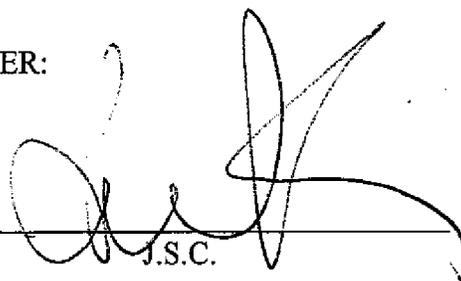
It is not only advances in technology, but the unsportsmanlike behavior of Golden Gate that has resulted in substantially reducing SNG’s advantage as originally contemplated by the Deed. Nonetheless, Golden Gate’s actions are not contrary to law or sanctionable in this limited forum. Because Golden Gate’s vessel is still being constructed and the Deed permits the

challenger to continue construction after the Notice of Challenge has been issued, the court will not compel Golden Gate to obtain a COD within a specific period of time. To do so would be contrary to the Deed and counterproductive. Willis explained that even if Golden Gate had the necessary supporting paperwork for issuance of a COD and one was issued, subsequent structural changes to the vessel would require issuance of an amended COD. Therefore, issuance of the COD does not freeze the vessel in time. The court does find that Golden Gate must complete its vessel sufficiently in advance of the challenge date to allow for the approximate one month delay in obtaining a COD from the NVDC, and Golden Gate must provide SNG with the actual, final COD at least two weeks prior to the challenge date. Accordingly, it is

ORDERED that SNG's Order to Show Cause why Golden Gate should not be disqualified for failure to provide SNG with a CHR (COD) is denied.

Date: September 18, 2009  
New York, N. Y.

ENTER:



J.S.C.

**FILED**  
SEP 21 2009  
NEW YORK  
COUNTY CLERK'S OFFICE