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Court of Appeals

STATE OF NEW YORK

GOLDEN GATE YACHT CLUB,

Plaintiff-Appellant

–against–

SOCIETE NAUTIQUE DE GENEVE,

Defendant-Respondent,

–and–

CLUB NAUTICO ESPANOL DE VELA,

Intervenor-Defendant.

BRIEF OF *AMICI CURIAE* REALE YACHT CLUB CANOTTIERI SAVOIA AND MASCALZONE LATINO

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 3

THE *AMICI CURIAE* 4

FACTS 9

ARGUMENT 12

I. THE MANIPULATIONS OF SNG AND ITS CAPTIVE "CHALLENGER" VIOLATE THE DEED OF GIFT'S CORE MANDATE THAT THE AMERICA'S CUP BE A *CHALLENGE* CUP 13

II. CNEV WAS NOT QUALIFIED TO BE A CHALLENGER BECAUSE IT WAS NOT AN "*ORGANIZED* YACHT CLUB . . . , HAVING FOR ITS *ANNUAL* REGATTA AN OCEAN WATER COURSE ON THE SEA, OR ON AN ARM OF THE SEA, OR ONE WHICH COMBINES BOTH." 17

CONCLUSION 25

TABLE OF AUTHORITIES

CASES

PAGE

Bailey v. Fish & Neave,
8 N.Y.3d 523, 528 (2007) 15

Copelin v. Board of School Directors,
64 A. 542, 545 (Pa. 1906) 17

Estate of Margolin,
259 A.D.2d 396 (1st Dep't 1999) 15

OTHER AUTHORITIES

John Parkinson, THE HISTORY OF THE NEW YORK YACHT CLUB FROM ITS FOUNDING THROUGH 1973 (1975).. 18

PRELIMINARY STATEMENT

The core principle of the Deed of Gift—which, of course, is the primary source of law to be applied in this matter—is that the America's Cup shall be a "perpetual *Challenge* Cup for friendly *competition* between foreign countries." (Emphasis added.) If, however, the manipulations of defendant-respondent Société Nautique De Genève ("SNG") and its accomplice, intervenor-defendant Club Nautico Espanol De Vela ("CNEV"), are allowed to stand, the America's Cup will be reduced to a "*Defender's* Cup," that is neither a challenge nor necessarily competitive. Instead, the America's Cup will become entirely controlled by the Defender. To see the harm that can be done when the Deed's qualification provisions are ignored, one need look no further than the Protocol for the 33rd America's Cup that CNEV agreed to, which is wildly one-sided in favor of SNG, seriously devalues the role of Challenger of Record, and, by doing so, makes clear that the core principle of the Deed of Gift is being subverted.

The mere fact that the Protocol's outrageous provisions exist shows that a core requirement of the Deed of Gift—that the Challenger of Record be an "organized" Yacht Club—is being thwarted in order to entrench SNG's total control of the competition as Defender. An "organized" yacht club worthy of that denomination—i.e., an established yacht club with members, vessels, a history, and a reputation to defend—would not have helped create a Protocol that

essentially strips the Challenger of Record of its role as *challenger*, and makes a mockery of the "mutual consent" process provided by the Deed of Gift. CNEV, however, which did not even come into existence until just days before making its challenge, gladly went along with the Protocol, not for the purpose of creating rules ensuring a competitive race, but to secure its home town Valencia, Spain, as the site for the 33rd Cup. In return for this, CNEV, the supposed Challenger of Record, cravenly handed over the sole power to dictate the terms of the Cup to SNG, the Defender. If the charade that SNG and CNEV perpetrated is held to be capable of creating a proper Challenger of Record, the future of the America's Cup will be one of all-powerful Defenders with stooge "Challengers" at their feet.

In addition, the Appellate Division erred in judicially re-writing the Deed of Gift to require not that CNEV be an organized yacht club "*having* for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both," but merely that CNEV be an organized yacht club "having *or planning to have* for its annual regatta" & etc. Had the settlor wanted to allow a Challenger of Record that was "having *or planning to have*" an annual regatta, he easily could have provided for that, but he did not.

The Appellate Division also erred by focusing on the phrase "having for its annual regatta" in isolation. The entire relevant phrase is "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." The settlor specified both that the Yacht Club be "organized" *and* that it be "incorporated, patented, or licensed." Unless the latter words are just surplusage (which is an interpretation to be avoided), the word "organized" was intended to have a meaning different than just "incorporated, patented, or licensed"—and here meant "established." When the Deed of Gift is read as an organic whole, requiring an *established* yacht club with an *annual* regatta, it is inconceivable that the settlor could have intended a days-old entity (with no members, vessels, or history), that has never had a regatta, to qualify as a Challenger of Record, capable of meaningfully engaging the Defender in the "mutual consent" process. To reach a contrary result, the Appellate Division failed to give meaning to the entire relevant phrase.

Accordingly, the Appellate Division's order should be reversed, and the motion court's decision—which held CNEV ineligible to be a Challenger of Record under the Deed of Gift—should be reinstated, thus ensuring the integrity of the mutual consent process.

THE AMICI CURIAE

The *amici curiae* (who were granted *amici curiae* status by the motion court) have a personal stake in and abiding interest that the America's Cup—yacht racing's most prestigious trophy—maintain its historically high standards in international sport competition. Accordingly, the *amici curiae* have a tremendous interest in the outcome of this case, which will determine whether the America's Cup will retain its luster, or whether it will lose its reputation and its essential competitive nature through the manipulations of sharp Defenders and beholden, and thus compliant, Challengers of Record.

Amicus RYCCS is a yacht club established in 1893. Rapidly acquiring prominence, it was granted a royal patent by King Vittorio-Emanuele III in 1900. It currently has 860 members. In its 115 years of sports history, RYCCS has won prestigious victories in sailing: World Championships, European Championships, and the Olympics. In January 2003, the Italian National Olympic Committee conferred upon RYCCS the Golden Collar for Sports Merit —a first for any Italian yacht club. This award represents the highest medal in Italian sports, and only is given to exceptional athletes that have won races of particular international importance. RYCCS has an immediate and real interest in the America's Cup, having been a contestant through *amicus* team Mascalzone Latino

in the last two editions of the America's Cup (the 31st and 32nd), and a prospective contestant for the 33rd Cup.

Amicus Mascalzone Latino is a sailing team owned by Vincenzo Onorato, a highly motivated, expert, and passionate sailor who possesses an impressive sailing record. In 2008 alone, Mr. Onorato and his team Mascalzone Latino won the Rolex Farr 40 World Championship for an unprecedented third consecutive year; they also won the Farr40 Copenhagen Regatta and the Circuit Nordic European Farr40, and placed second in the Acura Key West Race Week, the Acura Miami Race Week, and the Rolex Sardinia Cup ISAF Team Offshore World Championship. As a result of Mascalzone Latino's achievements this year, Mr. Onorato has been nominated as the ISAF Rolex World Sailor of the Year.

Mascalzone Latino has made several public statements about its position with respect to the current conflict.[1] In these statements, Mascalzone Latino has deplored the attempt of SNG to hijack the oldest and most prestigious trophy in international competition through the simple expedient of colluding with a fake "Challenger" and, in so doing, destroying the fundamental stipulation of the Deed of Gift that the America's Cup be a "perpetual Challenge Cup for friendly competition between foreign countries." Mascalzone Latino has pointed out that SNG's actions, in addition to thwarting the intent of the Deed of Gift, have caused

[1] *See, e.g.*, http://www.mascalzonelatino.it/home.html?MainID=5

the America's Cup to lose credibility, forcing its long-time sponsor, the French luxury goods company Louis Vuitton, to pull its important and long-standing sponsorship of the event.

Mascalzone Latino also was one of the six original signatory parties (a seventh, Victory Challenge, joined later) of the letter, quoted by the dissent in the Appellate Division, see ___ A.D.3d ___, 2008 WL 2885725, at *7, that was sent to CNEV when the Protocol was published. The letter questioned the legitimacy of the "newly created and purely instrumental entity" CNEV to "advance a challenge under the provisions of the Deed of Gift." The letter also condemned the Protocol as "the worst text in the history of the America's Cup and more fundamentally [because] it lacks precisely the mutual consent items which are required [by the Deed of Trust]" and "all the neutral management provisions that guarantee a fair contest," and because it so heavily favors the Defender by shifting the balance of the competition in its favor, that it "jeopardi[z]es the survival . . . of the event."

Mr. Onorato publicly has stated:

> The whole problem stems from the Protocol drawn up by [SNG] for the 33rd America's Cup which was presented at the end of the [32nd Cup] in Valencia. This affirmation might appear a trite observation but, as time has passed, I have become increasingly convinced that very few people, including journalists have taken the trouble of reading this document. Whoever has done so with a minimum of attention, but with a sense of humour, will not have been able to hold back a smile, because this is a document designed to regulate a competition which totally lacks any sense of fair play: [SNG] claims the right to choose, at its sole discretion, the regatta judges, the

committee, the umpires and the measurers, even going so far as to state that they must be its employees; in short, it unilaterally lays down the rules of the game. [SNG], again at its sole discretion, claims the right to accept a challenge or to penalise a rival. There were some who realised this immediately: it was immediately challenged by the seven teams who, a few days after the protocol had been published, signed a letter of objection (Oracle, Mascalzone Latino, Team New Zealand, Germany, Victory, K-Challenge, Luna Rossa); it was challenged by the historic sponsor of the challenger selection series, Louis Vuitton, who announced, in a press release dated 13 July 2007, its withdrawal on the grounds that it did not agree with the rules for the 33rd Cup. . . . .

. . . . Therefore, I do not agree with Alinghi's avidity, which unfortunately is not even backed by an intelligent commercial strategy. One particular detail has escaped most people: Louis Vuitton decided to back out of the Cup before and not after the legal action brought by [GGYC] before the Supreme Court of New York. When I think of the America's Cup, I automatically think of the Louis Vuitton Cup. The two are inseparable, not only blending tradition but also class and culture. . . .

. . . .

It's a harsh precedent that will weigh on the future of the Cup and those who love sailing, but leaving irony aside, we must seriously consider that this event has been profoundly damaged by [SNG]. The sponsors have disappeared and people are tired of all these controversies.

. . . .

I am profoundly saddened about what has happened to this event. . . .[2]

Mascalzone Latino also has actively attempted to resolve this dispute, proposing a revised Protocol for the 33rd America's Cup that would essentially

[2] The entire statement is available at http://www.mascalzonelatino.it/home.html?MainID=1&SubID=35&ArticleID=198

mirror the one used for the 32nd Cup which was created through a real mutual consent process. SNG, however, showed no interest in this proposal.[3]

Although RYCCS, represented by Team Mascalzone Latino, would like to participate in the 33rd America's Cup, it cannot make adequate commercial and technical preparations until this action is resolved.

The *amici curiae* hope that by being afforded an opportunity to express their views they will help the Court resolve this action in a way that will preserve this historic and illustrious sporting event. The *amici curiae* wish to stress that to ensure the continued greatness of the America's Cup, the Court should protect the terms of Deed, the intention of the settlor, the respective roles of the Defender and the Challenger, and the mutual consent procedure by which the rules of the race are determined. To this end, the Court should take into account the terms of the Deed of Gift in the full context of the Deed itself.

The Appellate Division's decision has aggravated the concerns that the *amici curiae* expressed in their previous *amici curiae* brief filed in the motion court, and has compelled the *amici curiae* to file this brief in order to bring before the Court a voice from the yachting community outside the immediate parties to this dispute.

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[3] *See* http://www.mascalzonelatino.it/home.html?MainID=5&SubID=39&ArticleID=198 (detailing Mr. Onorato's efforts to resolve this matter).

FACTS

The *amici curiae* will not repeat all facts relevant to this action, which will be set forth in detail in the parties' briefs. A few undisputed facts, however, are worthy of emphasis and are relevant to the arguments made below:

- The America's Cup is the most prestigious regatta and match race in the sport of sailing, and the oldest active trophy in international sport, predating the modern Olympics by 45 years.

- By Deed of Gift, dated October 24, 1887, George L. Schuyler donated the Cup to the New York Yacht Club upon the condition "that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

- The Deed of Gift further provides that whoever is the holder of the Cup at any given time, holds it in trust pursuant to the terms of the Deed of Gift, until a successful challenge is mounted by a qualified Challenger.

- The Deed of Gift further provides the qualifications a Challenger must meet. The Deed of Gift provides, in pertinent part, that only the following may be a Challenger:

> 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 both . . . .

- The Deed of Gift further provides that by "mutual consent" the Defender and the Challenger of Record may establish rules and regulations to govern the race.

- Since the 27th America's Cup in 1988, the Defender and the Challenger of Record, pursuant to the Deed's "mutual consent" provision, have established "Protocols" designed to foster a fair and competitive race.

- On July 3, 2007, SNG won the 32nd America's Cup.

- On that same day, CNEV tendered a challenge to SNG for the 33rd America's Cup.

- CNEV did not exist before June 19, 2007, which is when it was incorporated as a sporting association under the laws of the Valencia region of Spain.

- When it filed its challenge, CNEV had not yet held an annual regatta.

- Nor at that time did CNEV—purportedly a yacht club—have any yachts or other vessels (or even members) associated with it.

- On July 5, 2007, two days after CNEV filed its challenge, SNG and CNEV jointly issued The Protocol Governing the Thirty-Third America's Cup (the "Protocol"). While the Protocol purports to be a set of rules agreed to by equals, pursuant to the Deed of Trust's "mutual consent" provision and its mandate that the America's Cup forever be "a *Challenge* Cup for friendly *competition*," the

Protocol contains unprecedented provisions shifting the balance of power to SNG, the Defender.

- The last-minute creation of CNEV raised cries of indignation from the yachting world. Strong objections also were voiced regarding the Protocol. On July 16, 2007, seven racing teams—including *amicus* Mascalzone Latino[4]—signed a letter that questioned the legitimacy of the "newly created and purely instrumental entity" CNEV to "advance a challenge under the provisions of the Deed of Gift." The letter also condemned the Protocol as "the worst text in the history of the America's Cup and more fundamentally [because] it lacks precisely the mutual consent items which are required" and "all the neutral management provisions that guarantee a fair contest," and because it so heavily favors the Defender by shifting the balance of the competition in its favor, that it "jeopardi[z]es the survival . . . of the event."

- On July 13, 2007, Louis Vuitton, which had been affiliated with the America's Cup for twenty years, withdrew its sponsorship for the 33rd America's Cup, citing the criticized Protocol as a reason for its decision.

[4] The signing teams were Mascalzone Latino, Emirates Team New Zealand, BMW Oracle Racing, Luna Rosa, Areva Challenge, United Internet Team Germany, and, later, Victory Challenge.

- On July 26, 2007, CNEV was repaid for going along with the Protocol when it was announced that the 33rd Cup would be hosted by the city of Valencia, Spain.

- After the motion court's November 27,2007 decision invalidating its challenge, CNEV became a totally inactive entity.[5]

ARGUMENT

The *amici curiae* assert that the settlor's intent was to qualify as a potential Challenger of Record only a Yacht Club that is an established and independent entity, experienced in the running and organizing of regattas; that will be a real and effective counterpart to the Defender; that, through real and effective negotiations, will establish appropriate rules for the race; and that is able to become, in the event it wins the Cup, a respected and respectable Defender.

If allowed to stand, the Appellate Division's decision will be a very dangerous precedent, opening the door for Defenders to manufacture challenges for the Cup in order to strengthen their hand. Under such a perversion of the

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[5] *See* http://valenciasailing.blogspot.com/2008/02/cnev-not-to-repeat-its-annual-regatta.html (reporting that CNEV would not be repeating its "annual" regatta, according to official Spanish sailing calendars); http://www.sailr.com/news88587.html (same); http://elblogdejaumesoler.blogspot.com/2008/04/adis-al-club-nutico-espaol.html (reporting that team Desafío Español has abandoned the "phantasmoric" CNEV in favor of *El Real Club Marítimo del Abra*, a proper yacht club with a history, tradition, and members); http://www.levante-emv.com/secciones/noticia.jsp?pRef=2008040300_11_427987__Deportes-Desafio-cambia-Valencia-Bilbao (reporting that Desafío Español has decided to participate in the 33rd America's Cup via *El Real Club Marítimo del Abra*); http://www.marca.com/edicion/marca/vela/es/desarrollo/1107045.html (same; "CNEV is on the verge of disappearing after being invalided by the Supreme Court of New York as the 'Challenger of Record'.").

challenge process, the Challenger would become an instrument to enhance the hegemony of the Defender, and the Defender-Challenger roles would be a charade, thus violating the settlor's intent which specified a "Challenge Cup" event.

I.

THE MANIPULATIONS OF SNG AND ITS CAPTIVE "CHALLENGER" VIOLATE THE DEED OF GIFT'S CORE MANDATE THAT THE AMERICA'S CUP BE A *CHALLENGE* CUP

The Deed of Gift leaves no doubt about its core mandate. It provides:

> This Cup is donated upon the conditions that it shall be preserved as a perpetual *Challenge* Cup for friendly *competition* between foreign countries. (Emphasis added)

Thus, *challenge* and *competition* are concepts at the very heart of the settlor's intent, and have been the governing principles of the thirty-two America's Cup races held over the past 120 years. Now, however, the future of the America's Cup as "a perpetual *Challenge* Cup for friendly *competition*" is threatened by SNG's abuse of its role as trustee of the Cup.

SNG has breached its fiduciary duties and violated the Deed of Gift by accepting as the Challenger of Record CNEV, a newly manufactured entity of no substance whatsoever which had never held an annual regatta. SNG did this to get CNEV to go along with the outrageous and unprecedented Protocol for the 33rd America's Cup which grants SNG unchecked authority and eliminates challenger

rights. The offensive provisions of the Protocol – which speak volumes as to SNG's usurpation of authority – include the following:

1. *Unlimited authority of SNG through ACM as organizer; unlimited power on the appointment of the officials.*

   - Through America's Cup Management ("ACM"), the management company that SNG controls, SNG possesses unilateral power to disqualify a challenging team for disputing the Protocol. Indeed, SNG can even disqualify CNEV if it disputed the Protocol. (Article 2.7(d))

   - The Protocol eliminates the 32nd America's Cup requirement that the Event Authority (i.e., ACM) and all Regatta Officials be neutral. (Thirty Second America's Cup Protocol, Article 5.9)

   - SNG possesses powers and rights, through its control of ACM, that significantly exceed those of any Defender in any other protocol in history, including its powers to appoint the Race Committee (Article 7), the Measurement Committee (Article 8), and the Umpires (Article 9); to control the Competitors' Commission (Article 10); to control the conduct of the Trials, Qualifying Regattas, Challenger Selection Series and Match (Article 13); and to publish and amend Competition Regulations (Article 17).

2. *No Challenging Competitor representation*

   - The Protocol replaces the 32nd America's Cup Challenger Commission with a "Competitors' Commission" that "shall have no voting powers" (Article 10.1), and is forbidden even "to make application to or make any submission to the Sailing Jury or the Arbitration Panel (Article 10.5). Driving home the point that SNG and CNEV are cojoined, and that the Competitors should not look to CNEV to protect the Competitors from unfair treatment, the Protocol expressly provides that CNEV "shall not owe any additional duties to the Challenging Competitors over and above any duties that may be owed as between Competitors generally." (Article 3.4)

3. *Authority over the rules*

- Challengers are to be given the new class rules by SNG (though ACM) only 18 months before the event (Article 14); and SNG (through ACM) is given the power to establish "unilaterally" the rules for all the events, including the Challenger Selection Series, giving SNG a crucial and unfettered role in determining the Challengers for the America's Cup. (See Art. 5.4(b))

- The essential rules of the event will be imposed by ACM, and changed at any time without even consultation with the Challengers. (See Art. 17).

- The important Racing Rules will be known only 60 days before racing (whereas in the last America's Cup they were known many months ahead). (Article 17.3) There is absolutely no certainty on the format, schedule, or venue of the competition, qualifying regattas, defender series or scoring. (See Arts. 11 or 13).

4. *Participation of the Defender in the Challenger Series*

- SNG has the unprecedented "option to participate wholly or partly at its discretion in the Trials and Challenger Selection other than the final between the two Challengers to select a Challenger for the Match." (Article 13.5). As SNG already is guaranteed a place in the race, by participating in the preliminary races it can eliminate teams and influence the outcome of the series at no risk to itself.[6]

By setting up as Challenger of Record a paper entity that would agree to these provisions, SNG has altered the nature of the America's Cup from the competitive "*Challenge* Cup," mandated by the Deed of Gift, to an event totally governed by the Defender. While the Deed of Gift permits the making of

[6] As a result of pressure caused by this lawsuit, the Protocol was slightly modified but, as discussed in appellant's brief, the amendments did not bring any substantial changes to the above listed points.

arrangements by "mutual consent," it never anticipated that by mutual agreement the Defender could arrogate to itself all of the decisions, devalue the role of the Challenger, and thus change the fundamental nature of the event into something other than a "*Challenge* Cup." But SNG has done that here.

The only way that SNG's usurpations could have occurred is through the cooperation of CNEV who, in return for SNG's acceptance of its faulty challenge, rolled over and gave SNG whatever it wanted in the guise of "mutual consent." A real yacht club acting in the role of Challenger of Record would have engaged in a true negotiation process designed to generate rules to ensure a fair and competitive race—which is why the requirements of the Deed of Gift are so important, and why the Appellate Division's decision is so dangerous. The Appellate Division sanctioned an effort transparently—indeed, admittedly—designed to create a Challenger of Record out of whole cloth. If the Appellate Division's decision is allowed to stand, it will forever encourage Defenders to manufacture "Challengers" in name only, destroying the America's Cup as a competitive challenge cup, and violating the Deed of Gift.

This Court should reverse the Appellate Division and, by making sure that only established and real yacht clubs are accepted as Challenger of Record, prevent SNG from transforming the America's Cup into something other than "a perpetual *Challenge* Cup for friendly *competition*," and preserve the genuine

mutual consent process that, since 1988, has generated Protocols designed to foster fair competition.[7]

II.

CNEV WAS NOT QUALIFIED TO BE A CHALLENGER BECAUSE IT WAS NOT AN "*ORGANIZED* YACHT CLUB . . . , HAVING FOR ITS *ANNUAL* REGATTA AN OCEAN WATER COURSE ON THE SEA, OR ON AN ARM OF THE SEA, OR ONE WHICH COMBINES BOTH."

The Deed of Gift sets forth important qualifications that an entity must meet to be a Challenger of Record. The Challenger must be an "organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta

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[7] The Court should reject SNG's facile argument that the validity of CNEV and the Protocol are shown by the mere fact that the Protocol has been accepted by several yacht clubs. First of all, merely because certain clubs—including RYCCS—have preserved their ability to compete in the 33rd Cup by registering for it does not mean that they have no objection to the Protocol and its outrageous terms. Indeed, the July 16, 2007 letter cited by the dissent below clearly expresses the repugnance the signatories have for the Protocol, even though some of them subsequently registered to compete. As Mr. Onorato of Mascalzone Latino has noted, "a citizen accepts the laws even if he doesn't agree with them and . . . in a democracy there is freedom of speech and criticism." http://www.mascalzonelatino.it/home.html?MainID=1&SubID=35&ArticleID=198 Secondly, and more insidiously, SNG has used its power to extort acceptance of the Protocol. Noting this, Mr. Onorato of Mascalzone Latino has publicly stated:

> [SNG's] media-oriented defence was to state that the other challengers, including Team New Zealand, had been ready to accept the protocol. Today, after the action filed by Team New Zealand [alleging anti-trust violations by SNG], what we already knew has come to light: [SNG] took advantage of the extremely weak economic position in which most of the teams found themselves to impose its own will. It promised cash to Team New Zealand in the form of waiving registration fees and even going so far as to offer an option on [GGYC]'s base!

Id.

an ocean water course on the sea, or on an arm of the sea, or one which combines both."

The Appellate Division erred by re-writing this provision, and holding that the newly-created CNEV—which had never held a regatta—qualified as a Challenger of Record. And it is clear that the Appellate Division did indeed engage in judicial re-writing. In order for the provision to mean what the Appellate Division said it meant, it would have to be written, "having, *or will be having*, for its annual regatta an ocean water course" & etc. SNG realizes that this significant re-write of the Deed of Gift is necessary for it to go its way. Accordingly, in the entry form for the 33rd America's Cup, SNG is requiring each entrant to certify that it "has *or will have* an annual regatta on the sea or an arm of the sea."[8]

But the Deed of Gift does not say "having *or will be having*"; it does not refer both to Challengers that already have an annual regatta *and* Challengers that merely plan to have an annual regatta—although it certainly would have been easy for the settlor to have done so. The fact of such ease, coupled with the dramatic insertion that must occur in order for the Deed of Gift to carry SNG's meaning, show that the Appellate Division did violence to the settlor's intent in order to reach the result urged by SNG. *See Bailey v. Fish & Neave*, 8 N.Y.3d 523,

[8] Notice of Entry 33rd AC, *available at* http://www.americascup.com/multimedia/docs/2007/08/notice_of_entry_33rd_ac.doc (emphasis added).

528 (2007) ("courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing") (internal quotations omitted).

Furthermore, it is a mistake—one that the Appellate Division committed—to analyze the phrase "having for its annual regatta" in a vacuum. *See id.* ("agreements should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases"). Those words are just one part of a phrase that, when read as a whole, evinces the settlor's intent that a Challenger be a real, established yacht club, with a preexisting, annual regatta.

The whole relevant phrase is "*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 both.*" Because the settlor required both that the yacht club be "organized" *and* that it be "incorporated, patented, or licensed," the word "organized" necessarily means something more than just "incorporated." *See In re Estate of Margolin*, 259 A.D.2d 396 (1st Dep't 1999) (interpretation that would render word in agreement surplusage should be avoided where possible). Thus, the relevant criteria are that the Challenger of Record be an "*organized*" (not just incorporated) yacht club having for its "*annual* regatta" an ocean course on the sea & etc.

When the "annual regatta" and "organized Yacht Club" requirements are viewed together, they lend meaning to each other. The "*annual* regatta" requirement—which necessarily denotes something that happens year after year—supports the idea that the Challenger of Record must be an *established* Yacht Club; and the "*organized*" requirement—which bespeaks a Yacht Club that is not just duly incorporated, but one of substance—enforces the idea that the *annual* regatta must already have happened at least once.

The *amici curiae* respectfully submit that, when thus viewed as a whole, the requirements of the Deed of Gift are clear and unambiguous, and that the Appellate Division thus erred in looking at extraneous evidence in order to "interpret" the Deed.

But if it were appropriate to resort to extraneous evidence, the Appellate Division was way off in taking into account relatively recent events. As set forth in appellant's brief, whatever may have happened in the 31st America's Cup in 2003—sanctioned by an arbitral tribunal that, unlike the courts of this State, does not have the ultimate say on the meaning of the Deed of Gift—has little bearing on the settlor's intent in 1857 or 1887, and the Appellate Division erred in

relying heavily on SNG's anomalous participation not as the Challenger of Record but as one of the many mutual consent challengers.[9]

Obviously, if resort is to be had to extraneous evidence to shed light on the settlor's intent, evidence contemporaneous with the execution and amendment of the Deed of Gift is the proper focus of attention. That evidence shows that the words "organized" as used in the Deed meant "established," in the sense of *accepted* or *settled securely*—just as one speaks of *organized* or *established* religion. *See Copelin v. Board of School Directors*, 64 A. 542, 545 (Pa. 1906) ("organized" in its broader sense means "erected, *established*, constituted, composed, and formed as to its constituent parts") (emphasis added).

The one sure example of an "organized Yacht Club" that the settlor had in mind when writing the Deed of Gift was the New York Yacht Club ("NYYC"). By 1857, when the Deed of Gift originally was executed, the NYYC had been in active existence for 13 years, had had a clubhouse for 12 years, had held an annual regatta every year since 1845, and had many members (amounting

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[9] In any event, whatever SNG may or may not have done with respect to an annual regatta before the 31st America's Cup (though SNG, unlike CNEV, already had had an annual regatta on the sea before its challenge was accepted by the then-Defender [R 664]), the arbitration panel found it significant that SNG "was formed on 3 March 1872," is "one of the oldest yacht clubs in Europe," and "currently has 3,044 members." [R 663] Furthermore, as the panel also noted, SNG (unlike CNEV) had held organized series of regattas on Lake Geneva for many years. [R 664] Thus, rather than supporting CNEV's eligibility, SNG's participation in the 31st Cup drives home the point that any Challenger must be an established yacht club of substance.

to 765 when the Deed of Gift was amended in 1887).[10] The other "organized Yacht Club" that the settlor would have had in mind was the Royal Yacht Squadron, from which the yacht-schooner *America* had originally won the Cup back in 1851. By 1857, the Royal Yacht Squadron had been in existence for 38 years, had held an annual regatta for 27 years, and, until his death in 1830, had had King George IV as one of its members (hence the "Royal" in its name).[11]

Accordingly, when George L. Schuyler wrote of an *organized*, capital-*Y* capital-*C* "Yacht Club"—and reiterated that requirement in 1887—he was referring to one that was established and real.[12]

Also indicative of the settlor's intent that the Challenger be an established yacht club of substance is the general history behind the core precept of the Deed, requiring a perpetual Challenge Cup for friendly "competition between foreign countries." The foreign country most obviously in the settlor's mind would have been England—from which the Cup had been originally won, and which at that time led the Industrial Revolution with its technological advances. Those

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[10] See http://www.nyyc.org/history/ (setting forth milestones in NYYC's history); *For The America's Cup: A New Deed of Gift and a New Challenge*, N.Y. TIMES, Oct. 28, 1887 (noting that "[t]here was an unusually large attendance of the 765 members."); *see generally* John Parkinson, THE HISTORY OF THE NEW YORK YACHT CLUB FROM ITS FOUNDING THROUGH 1973 (1975).

[11] *See* http://www.rys.org.uk/da/11662 (Royal Yacht Squadron history).

[12] This meaning is reinforced by the settlor's capitalization of "Yacht Club." In keeping with the style of the day, the settlor capitalized terms of particular importance. In the Deed of Gift, only "Yacht Club," "Deed of Gift," "Cup," "Challenge Cup," and "Challenging Club" receive this treatment.

advances extended to yachts "of such celerity in sailing and beauty of construction" that they were of utility to the Royal Navy.[13] The young and proud United States, of course, was anxious to make its mark in that era, and to prove (among other things) its superiority over British yachting—as witnessed by the 1851 challenge and victory of *America*. (Indeed, the 1865 bylaws of the NYYC specified that the club's purpose was "to promote superiority in naval architecture," and as late as 1886 every time the America's Cup race was held the U.S. Secretary of the Navy requested a model of each of the yacht-contestants.) Having helped win the Cup for his country, the settlor conceived of his "perpetual Challenge Cup" as a way to prove on the water the technical superiority of one country over another. This kind of competition—with the competitors representing the technological prowess of their respective *nations*—could only be achieved between real, established yacht clubs.[14]

The Appellate Division thus erred in holding that the settlor's intent could be satisfied simply by an incorporated entity that calls itself a "yacht club."

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[13] *See* http://www.rys.org.uk/da/11662 (Royal Yacht Squadron history).

[14] As stated, the *amici curiae* do not believe it appropriate to consider modern history in order to determine the settlor's intent back in the mid-to-late-1800's. If it were proper, however, a significant fact to note would be that in order to qualify as an "organized" yacht club, the 30th and 31st Protocols (in 2000 and 2003, respectively) required all contestants to have an elected board of directors, have been in existence for a minimum of five year, have a membership of at least 200 members, be financially supported by a majority of its membership on a pro rata basis, operate as a yacht club and have objectives consistent with the furtherance of yachting activities, and be a member of the national authority of its country. SNG—whose participation in the 31st Cup the Appellate Division seized upon to justify its decision—met these requirements, *see supra* n.9, thus reinforcing the notion that a challenger must be a real and established yacht club.

That the settlor wanted only established and real yacht clubs as Challengers was driven home even more forcefully by his later addition of the annual-regatta-sea requirement. As shown by the early history of the Cup recounted in appellant's brief, the settlor added this requirement to prevent unestablished, ill-prepared "yacht clubs" from making challenges that resulted in disappointing races. Indeed, the technical terms of the amended Deed signify that a Challenger needs to be a serious entity—such as the NYYC, or the Royal Yacht Squadron—capable of running races of thirty miles or longer at sea, in significant yachts as large as ninety feet (if one-masted) or one hundred-fifteen feet (if two-masted). Furthermore, as the motion court correctly observed, because the Deed of Gift appoints the Challenger co-creator of the "mutual consent" rules that will govern the race, the Deed necessarily contemplates an established yacht club that will have sufficient knowledge and experience to do so.

Thus, to ensure that the Challenger would have the requisite experience to be a proper participant in a perpetual "*Challenge* Cup," the settlor demanded that it be an *organized* Yacht Club with an *annual* regatta at sea.

In light of the foregoing, it is inconceivable that the settlor would have considered a days-old entity, incorporated solely for the purpose of mounting a challenge, that lacks members, vessels, and any kind of history, and that has never had a regatta, to be an *organized Yacht Club, duly incorporated, having for its*

its annual regatta an ocean water course on the sea, or on an arm of the sea, or both. The Appellate Division misinterpreted the Deed of Gift and frustrated the settlor's intent by holding otherwise.

CONCLUSION

For the foregoing reasons, *amici curiae* RYCCS and Mascalzone Latino respectfully submit that this Court should reverse the Appellate Division's order, and confirm that only qualified yacht clubs—those who, by meeting the requirements of the Deed of Gift, will have (in the words of the dissent below) "experience in holding a regatta of this magnitude," and thus will be a real counterparty to the Defender—may be accepted as Challengers. By doing so, the Court will ensure that the "mutual consent" process envisioned by the Deed of Gift

will be bona fide, and that the America's Cup will remain "a perpetual *Challenge* Cup" as demanded by the settlor.

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