To Be Argued By:
DAVID W. RIVKIN
Time Requested: 15 Minutes

New York County Clerk's Index No. 602446/07

Court of Appeals

STATE OF NEW YORK

GOLDEN GATE YACHT CLUB,

Plaintiff-Appellant,

—against—

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Respondent,

—and—

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant-Respondent.

BRIEF FOR INTERVENOR-DEFENDANT-RESPONDENT

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Date of Completion: November 13, 2008

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CORPORATE DISCLOSURE STATEMENT

Pursuant to NYCRR 500.1(c) of the Rules of Practice for the Court of Appeals for the State of New York, Club Náutico Español de Vela ("CNEV") makes the following disclosure:

1. CNEV is a sports entity of private character incorporated under the Spanish Law 4/1993 of December 20, on Sports of the Generalitat Valencia.

2. CNEV is a club member of the Valencian Community Sailing Federation ("FVCV") in Valencia, Spain and is registered with the Registro de Entidades Deportivas de la Comunitat Valenciana (Registry of Sports Organizations of the Valencian Community).

3. CNEV has neither parents nor subsidiaries.

QUESTION PRESENTED

Did the Appellate Division correctly hold that CNEV meets the requirements of the Deed of Gift for the America's Cup sailing race (the "Deed") to be Challenger of Record for that race?

STATEMENT OF THE CASE

Two simple requirements of the Deed are at issue. CNEV satisfies them both under a plain reading of the Deed. Treating the Deed as ambiguous and considering extrinsic evidence lead to the same conclusion: CNEV is a proper challenger.

The requirements at issue are the "organized Yacht Club" requirement and the "having for its annual regatta" requirement. The Deed provides in relevant part 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***, 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.

(R. at 98) (emphasis added).

CNEV satisfies the "organized Yacht Club of a foreign country" requirement. CNEV was a newly organized yacht club at the time that it submitted

its challenge for the America's Cup. It undisputedly was then, and remains today, a properly organized legal entity under the laws of Spain.

Likewise, CNEV satisfies the "having for its annual regatta" requirement. At the time that CNEV submitted its challenge for the America's Cup, the club undisputedly had a bona fide intention to hold an annual regatta going forward. It undisputedly has held two annual regattas, and other regattas, since that time.

The challenge to CNEV's qualifications by Golden Gate Yacht Club ("GGYC") lacks merit. GGYC effectively asks this Court to read the simple words "organized Yacht Club" and "having for its annual regatta" as if they carried additional, highly specific requirements not found on the face of the Deed itself. This effort finds no support in the plain language of the Deed or in New York law. The Appellate Division correctly held that CNEV is a proper challenger under the Deed.

STATEMENT OF FACTS

A. Organization Of CNEV

CNEV is a private Spanish yacht club of unlimited duration that was organized on June 19, 2007, by the members of the Royal Spanish Sailing Federation ("RFEV"). (R. at 1038.) CNEV is a licensed yacht club of Valencian community. (R. at 1038–40, 1045.) Since June 20, 2007, CNEV has been a member of the Valencian Community Sailing Federation ("FVCV") in Valencia,

Spain. *Id.* CNEV was registered with the Registro de Entidades Deportivas de la Comunitat Valenciana (Registry of Sports Organizations of the Valencian Community) on June 28, 2007. (R. at 1038.) Its board of directors, comprised of well-known yachting experts, was duly appointed on June 19, 2007, and its membership and governance rules were established on that date. *Id.* CNEV's purpose, as reflected in Chapter 1 of CNEV's Articles of Incorporation, is to promote sailing practices through the organization of national as well as international regattas within the national territory and to organize at least one regatta per year in the open sea. (R. at 513.) CNEV negotiated a collaboration agreement with the Center of Sailing Training in Santander, where the Spanish Sailing Olympic Team is trained. (R. at 1040.)

Upon the completion of an America's Cup competition, the first qualified club to submit a challenge for the next competition becomes "Challenger of Record." (R. at 1006.) The Challenger of Record and the incumbent cup holder then negotiate a protocol that sets terms for the next competition. (R. at 3329–30.)

On July 3, 2007, following the victory of Société Nautique de Genève ("SNG") in the 32nd America's Cup, CNEV was the first club to submit a challenge for the 33rd Cup. SNG accepted CNEV's challenge. (R. at 792–93.)

CNEV organized two smaller regattas soon after it was organized: one on July 14, 2007, of the Optimist Class, and one in September 2007 called the Vuelta

España a Vela, organized jointly with RFEV and a company called Deporevents. (R. at 1040, 1063.)

CNEV then proceeded to hold its first two full-fledged annual regattas on an ocean water course, the Trofeo Desafío Español:

- CNEV held the Trofeo Desafío Español I on November 24–25, 2007 in Valencia, Spain. Approximately 80 boats from 17 yacht clubs raced. (R. at 1535.)

- CNEV held the Trofeo Desafío Español II in Valencia on November 7–9, 2008. Almost 100 boats from over 20 yacht clubs competed. The club held competitions for seven classes of boats, including America's Cup class boats. *See* http://www.clubnauticoev.com/index.php?regatas; *Alinghi lidera el trofeo Desafío*, El Mundo, Nov. 7, 2008, http://www.elmundo.es/accesible/elmundodeporte/2008/11/07/masdeporte/1226094993.html; J. Aguadé, *Desafío, Alinghi y Luna Rossa harán una regata el 8 y 9 de noviembre en Valencia*, Las Provincias, Nov. 11, 2008, http://www.lasprovincias.es/valencia/20081021/deportes/vela/desafio-alinghi-luna-rossa-20081021.html; Neus Jordi, *Victory for Alinghi at Trofeo Desafío Español*, YachteE.com, Nov. 10, 2008, http://www.yachte.com.au/news/story.asp?story=14693.[1]

[1] The Trofeo Desafío Español II was held after the conclusion of the proceedings below, so it is not formally in the record. Because the regatta was widely reported, it is a proper subject of judicial notice. *See Am. Broad. Cos. v. Wolf*, 76 A.D.2d 162, 169 n. 2 (1980) ("Courts may take judicial notice of facts which are part of the general knowledge of the public") (*citing Hunter v. N.Y., Ont. & W.R.R.*, 116 N.Y. 615, 621 (1889)); *Stawski v. John Hancock Mut. Life Ins. Co.*, 163 N.Y.S.2d 155, 157–58 (N.Y. Sup. Ct. 1957) (noting that courts may take judicial notice of historical events); 3–9 *Bender's New York Evidence* § 9.01 (2008) ("Facts that are part of the general knowledge of the public may be judicially noticed").

B. Proceedings Below

GGYC sued in New York Supreme Court on July 20, 2007, asking that the court displace CNEV as Challenger of Record and install GGYC in that role. (R. at 55–66.) On September 20, 2007, the parties executed a stipulation agreeing to allow CNEV to intervene in the case, which was signed by the court on November 19, 2007. (R. at 774). On September 21, 2007, SNG filed a motion to dismiss and for summary judgment, which CNEV joined. On October 5, 2007, GGYC filed a cross-motion for summary judgment.

On November 27, 2007, the Supreme Court issued a memorandum decision that rejected GGYC's cause of action for breach of fiduciary duty and upheld GGYC's challenge to CNEV's qualifications under the Deed. The Supreme Court held that CNEV was not a qualified challenger under the Deed because it did not hold an annual regatta prior to issuing a challenge. The Supreme Court did not rule on GGYC's "organized Yacht Club" argument. (R. at 35–52.) On May 13, the Clerk entered an order implementing the November 27, 2007 ruling. (R. at 3269–78.)

SNG appealed. On July 29, 2008, the Appellate Division reversed. (R. at 3299–3326.) The Appellate Division held that CNEV was a qualified challenger under the Deed. The court said that the term "having for its annual regatta" was ambiguous. To resolve this ambiguity, the court considered the history of the

America's Cup and, in particular, the decision issued by the 31st America's Cup Arbitration Panel ("ACAP"). The 31st ACAP, comprised of distinguished sports arbitrators, considered the same issue that GGYC now litigates. The 31st ACAP found that the Deed does not require a challenging club to have held an annual regatta prior to issuing a challenge. The Appellate Division agreed. (R. at 3306–10.) The Appellate Division also held that CNEV complied with the "organized Yacht Club" requirement. (R. at 3309–10.)

GGYC then filed this appeal.

ARGUMENT

I. The Appellate Division Correctly Held That CNEV Is A Qualified Challenger Under The Deed Of Gift

A. CNEV Meets The "Organized Yacht Club" Requirement

1. Plain Meaning

CNEV clearly meets the plain requirements of the Deed of Gift, *i.e.*, it is an "organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department." As noted at pp. 2–4 above, CNEV is a legitimate legal entity duly organized in Spain for the promotion of sailing races. The Appellate Division stated that an "entity is 'organized' if it has taken all steps 'necessary to endow [itself] with the capacity to transact the legitimate business for which it was created.'" (R. at 3309.) The Appellate Division correctly held that CNEV met all the organizational requirements of the Deed.

GGYC's argument to the contrary depends on finding explicit requirements within the word "organized" that cannot be found on the face of the Deed or in a common-sense reading. Specifically, GGYC argues that CNEV is unqualified because it is newly formed, and argues that only a yacht club that has vessels, individual members, a telephone number, a website, and a physical facility of its own may be considered "organized" under the Deed. (Appellant Br. at 23.) Nothing in the Deed states such requirements or compels their imposition.

The Deed similarly does not support GGYC's argument that CNEV is a "fictitious" club and not "organized" simply because it was created by the members of Real Federacion Española de Vela, the Royal Spanish Sailing Federation ("RFEV"). Nothing in the Deed prohibits a yacht club organized by the members of a sailing federation from competing in the America's Cup. If anything, the fact that the members of RFEV, a well-known Spanish sailing organization that competed in the 32nd America's Cup, established CNEV actually runs counter to GGYC's suggestion that CNEV has no substance.

GGYC would expand without basis on the plain words of the Deed. This proposed expansion contradicts the strict reading of the Deed that GGYC purports to advocate. (Appellant Br. at 21.) It would replace a simple standard (any legally organized club can compete) with a vague and standardless approach (courts must decide case by case what facts will satisfy the "organized" requirement as to any given club).

The decision in *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256 (1990), makes clear that such new requirements should not be read into the Deed. The San Diego Yacht Club chose to compete in a type of boat that was inherently faster than the boat selected by the Mercury Bay Club. Mercury Bay argued that, in order to follow the intent of the settlors and to foster "friendly competition" as the Deed expressly calls for, San Diego had to choose a boat that

"evenly matched" Mercury Bay's. *Id.* at 264–69. This Court held that if the settlors had intended such a meaning, they would have included this express requirement in the Deed. *Id.* at 269. GGYC's proposed new criteria for determining whether a club is sufficiently "organized" likewise should be rejected.

2. Extrinsic Evidence

Because the plain meaning of "organized" is clear, consideration of extrinsic evidence is unnecessary. *See Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82, 90 (1st Dep't 1989), *aff'd* 76 N.Y.2d 256 (1990) (extrinsic evidence only relevant where language of legal document is ambiguous). To the extent that this Court may choose to consider extrinsic evidence, it will find strong support for the proposition that CNEV meets the "organized" requirement of the Deed.

The record shows that it was common for past trustees of the America's Cup to accept challenges from *newly* organized clubs and from clubs that were *specifically* created for the purpose of challenging the then-holder of the Cup. Such challengers have included the Deutscher Challenger Yacht Club, which was created on August 2, 2004, specifically for the purpose of representing all of Germany for the 32nd America's Cup (R. at 801); The Secret Cove Yacht Club, which was organized only three months prior to issuing a challenge for the 1983 America's Cup and which was also created specifically to challenge for the Cup,

(R. at 799, 644–45); The Southern Cross Yacht Club, which was incorporated in 1993 six months after its challenge was accepted by the San Diego Yacht Club (R. at 800); and the Sun City Yacht Club from Western Australia, which was incorporated the day before it challenged for the 1977 America's Cup. (R. at 799.) The Mercury Bay Yacht Club, which challenged in 1987 and eventually won and defended the Cup, was incorporated less than nine months before it issued its challenge and operated out of a derelict car on a beach, which was well publicized and photographed at the time. (R. at 572, 799–800.)

These precedents show that past trustees of the America's Cup have consistently understood the term "organized Yacht Club" to require simply that the challenging club be legally organized to conduct sailing-related activities. GGYC's own conduct confirms this understanding. The notice of challenge for the 32nd America's Cup race, for which GGYC acted as a Challenger of Record, only required that the challenger provide any document evidencing its incorporation. (R. at 1305.) CNEV's proof of incorporation is in the record. (R. at 440–555.) Past practice in the sport thus supports the conclusion that CNEV is an "organized Yacht Club."

B. CNEV Meets The "Having For Its Annual Regatta" Requirement

1. Plain Meaning

Plain reading of the Deed also makes clear that a challenging yacht club is not required to have held an annual regatta at the time of its challenge. GGYC's argument that CNEV should be disqualified because it had not held an annual regatta at the time of its challenge is not supported by the language of the Deed.

The Deed does not state any temporal requirement about when a regatta must take place. The Deed simply says that a yacht club is a qualifying club if it is "*having* for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both." (emphasis added). The Deed does not use the past tense, as GGYC argues, but only requires that the foreign yacht club holds an annual regatta. "Having" is an imperfect participle, *An English Grammar for the Use of High School Academy, and College Classes*, by W.M. Baskervill and J.W. Sewell (R. 1364–65), and the Court must assume that this tense was purposely chosen. The settlors of the Deed knew when to use the past tense when requirements had to be met prior to issuing a challenge.

Common sense and everyday usage confirm that "having" is a naturally forward-looking term. New York City is "having" a mayoral election next year. Those hosting for the holidays would say ahead of time, "We are having my in-laws for Christmas this year."

The contrast with the prior clause in the Deed makes the point even clearer. As noted above, the club must have been "incorporated, patented, or licensed" prior to issuing a challenge, as was CNEV. The settlors of the Deed chose to say only that the club qualifies if it is "having" an annual regatta, not that it must "have held" an annual regatta, as GGYC seeks to read into the Deed. The failure to use the past tense here, unlike the prior clause, is conclusive on the settlors' intent.

The rest of the sentence also supports this conclusion. The Deed states that a club "having for its annual regatta . . . shall always be entitled to the right of sailing a match for this Cup . . . ." Rather than looking backward in time, the clause refers to the future event of sailing the match. So long as a club has annual regattas on a going-forward basis, it meets this requirement of the Deed.

CNEV has met this requirement. At the time of the challenge, it intended to organize its annual regattas, (R. at 1007), and since then it has done so: specifically, the Trofeo Desafío Español, which has now been held twice. *See supra* at 4. In any common-sense reading of the Deed, these undisputed facts support the conclusion that CNEV meets the "having for its annual regatta" requirement.

GGYC advances several textual arguments that actually support CNEV's reading of the Deed. *First*, as noted above, GGYC argues that the word "having" should take on the same tense as the words "incorporated" or "organized" in the

prior clause, even though the settlor chose "having" instead of "having had." In an attempt to resolve this inconsistency, GGYC relies in error on the canon of construction *noscitur a sociis*, or a word is known by the company it keeps. This canon is used to interpret a word from the surrounding words but not to change the tense of a word itself. *See, e.g., Popkin v. Security Mut. Ins. Co. of New York*, 48 A.D.2d 46, 47–48 (1st Dep't 1975) (interpreting the word "flood" by looking at the words following it: surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water); *Audax Const. Corp. v. Metro. Transp. Auth.*, No. 28888/99, 2003 WL 24011940, at *2 (N.Y. Sup. Ct. Queens Co. Jan. 7, 2003) (interpreting the term "construction" through the surrounding terms "remodeling" and "renovation"). The phrase "having for its annual regatta" cannot be attributed a tense that it does not have.

Second, GGYC's attempt to find support in another provision of the Deed similarly fails. GGYC relies on the provision in the Deed 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." (R. at 98–100.) GGYC would again assign a different tense to the present participle "fulfilling." GGYC's argument proves the opposite point. The settlor chose to use the present tense participle "fulfilling" and not "having fulfilled." The use of the term "fulfilling" leaves open when the conditions may be

fulfilled instead of requiring that they have been fulfilled by the time of the challenge.

GGYC also suggests for the first time on this appeal that the terms "annual" and "usual" mean that the regatta must have been held prior to the challenge. (Appellant Br. at 27 & n. 11.) It is understandable why GGYC had not made this argument previously, because it proves too much. In order for a historical regatta to be deemed "annual" or "usual," it must of course have been held at least twice. GGYC has previously argued, however, that it was only necessary for a club to have held a single "annual" regatta before its challenge was accepted. GGYC argued in its brief that SNG, which did not hold an annual regatta prior to challenging for the Cup, was nonetheless a qualified challenger because its challenge was accepted after it held the single regatta. (Appellate Br. at 40.) GGYC cannot rely on these words to support its interpretation.

2. Extrinsic Evidence

Even if this Court finds that "having for its annual regatta" is susceptible to different interpretations, affirmance is still in order. The Appellate Division found the phrase "having for its annual regatta" to be ambiguous. Quoting from *An English Grammar for the Use of High School Academy, and College Classes*, by W.M. Baskervill and J.W. Sewell, the court correctly stated that a participle, such as the word "having," "express[es] action in a general way, without limiting the

action to any time, or asserting it of any subject" and that "[p]articiples 'cannot be divided into tenses . . . because they have no tense of their own, but derive their tense from the verb on which they depend.'" (R. at 3307.)

Having found the provision ambiguous, the Appellate Division properly looked to the past practices of the America's Cup trustees and considered the decision of the 31st ACAP that resolved exactly the same issue. *Mercury Bay Boating Club v. San Diego Yacht Club*, 150 A.D.2d 82, 94 (1st Dep't 1989) (stating that "if consideration of extrinsic evidence is appropriate, the trustee's administration and interpretation of the trust would be persuasive in construing it"); *see also Geigle v. Flacke*, 768 F.2d 259, 262 (8th Cir. 1985) (citing the "well-established rule that actions by trustees, in this case their prior interpretation of the Pension Plan, are to be upheld unless arbitrary and capricious").

Contrary to GGYC's argument, the decisions of expert arbitrators traditionally are entitled to substantial weight. New York law supports enforcing the agreement of the parties to resolve by arbitration disputes arising under this charitable trust. *See, e.g., Washington Mutual Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir. 2004) ("all doubts concerning the arbitrability of claims should be resolved in favor of arbitration"). Both federal and New York courts have held arbitrable a wide variety of disputes, including disputes with a strong public policy component, such as claims under the securities laws and the antitrust laws.

Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (arbitrability of antifraud claims under the Securities Exchange Act); *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (arbitrability of antitrust claims). It is appropriate to assign substantial weight to arbitration decisions, issued by a panel of distinguished arbitrators with experience in sports law, just as in *Mercury Bay* the Court of Appeals emphasized that the disputes in that case should have been decided by an international jury of yachting experts. *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256, 265–66 (1990).

Here, the decision of the ACAP for the 31st Cup decided the exact same issue GGYC now tries to litigate. At the time of its challenge for the 31st Cup, SNG had not held a regatta on an ocean water course but submitted that it was planning on organizing one. GGYC, a competitor for that same Cup, did not object to SNG's challenge. The Panel held that "[n]either the Deed of Gift nor the Protocol have any provision requiring the annual regatta to have been held prior to the lodging of a challenge, nor that the annual regatta must have been held more than once." (R. at 664–65.)

GGYC tries to disregard past practices of the America's Cup trustees by manufacturing an artificial distinction between the so-called "Challengers of Record" and "Mutual Consent Challengers." The Appellate Division properly

recognized that there is no such distinction in the Deed.[2] All challengers, whether acting as the Challenger of Record or not, must comply with the same Deed requirements. Past practice and submissions to compete for the America's Cup, including GGYC's, amply prove this point. Furthermore, GGYC's arguments about the particular Protocol negotiated between CNEV and SNG have no bearing on the interpretation of the Deed itself, and GGYC's proposed reading of the Deed would run counter to 150 years of the America's Cup history.

GGYC also incorrectly suggests that only extrinsic evidence of the settlor's intent can be used to interpret the Deed. Assuming arguendo that this is so, and it is not, none of the evidence cited by GGYC speaks directly to the interpretation of the provision "having for its annual regatta." The fact that Mr. Schuyler amended the Deed to require a challenging club to have a regatta on an ocean course says nothing about when Mr. Schuyler intended that regatta to take place.

GGYC paints a parade of horribles that supposedly would occur if CNEV's status as Challenger of Record is upheld. (Appellant Br. at 29–34.) These speculations have nothing to do with the interpretation of the Deed itself. GGYC argues that the Appellate Division's interpretation of the Deed is unreasonable, makes no sense and somehow is "inconsistent with the manifest purposes of the

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[2] Both terms are created via a protocol, a document that is negotiated between the current holder and the first challenging club.

Deed." *Id.* None of the arguments made by GGYC have any merit. The Appellate Division's interpretation does not reduce the eligibility conditions to a nullity because a yacht club wishing to compete for the America's Cup has to have an annual regatta by the time the match is sailed. Likewise, GGYC's arguments that permitting a newly formed yacht clubs, such as CNEV, to compete "would inject uncertainty and potential for mischief" or somehow would open doors "for abuse by an unscrupulous Defender" have no basis in reality. History shows that newly formed yacht clubs and clubs that had not held an annual regatta at the time of the challenge were permitted to compete. The America's Cup has continued to flourish.

There is no reason to conclude that it will be otherwise if CNEV is permitted to serve as a Challenger of Record, particularly given that CNEV has now been in existence for over a year, has distinguished members of the Royal Spanish Sailing Federation as members of its governing body, and has now organized its first two annual regattas. Given the undisputed evidence of CNEV's accomplishments, and the straightforward language of the Deed, the requirements of the Deed are plainly satisfied in these circumstances.

CONCLUSION

For the foregoing reasons, CNEV respectfully requests that the Court affirm the Appellate Division's order.

Dated: November 13, 2008
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Respectfully submitted,

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