To Be Argued By:
BARRY R. OSTRAGER
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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.

BRIEF FOR DEFENDANT-RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1(c) of the Rules of Practice for the Court of Appeals of the State of New York, Respondent Société Nautique de Genève states that it has no parents, subsidiaries or affiliates.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the twenty-one yacht clubs which are planning to compete in the properly organized multi-challenger 33rd America's Cup in July 2010 in accordance with the historic America's Cup protocols can be precluded from competition through litigation calculated to transform the 33rd America's Cup into a match race between the America's Cup holder and Golden Gate Yacht Club.

The Appellate Division answered this question in the negative.

2. Whether the validity of Golden Gate Yacht Club's boat certificate may be properly determined in court notwithstanding this Court's express holding that questions relating to the validity and sufficiency of America's Cup boat certificates are properly referred to and determined by an international jury of experienced sailors.

The Appellate Division did not need to reach this question as it determined that Club Náutico Español de Vela was the proper Challenger of Record and therefore Golden Gate Yacht Club's challenge was invalid. This question need only be reached here if this Court disagrees with the Appellate Division on the first question.

COUNTERSTATEMENT OF THE NATURE OF THE CASE

The America's Cup is a widely followed and internationally revered yacht competition. The 32nd America's Cup was held in Valencia, Spain and was the most successful "friendly competition between foreign countries" in America's Cup history, drawing enormous spectator and television audiences. Immediately upon the conclusion of the 32nd America's Cup in July 2007, Respondent Société Nautique de Genève ("SNG"), the successful defender of the Cup, accepted a challenge for the 33rd America's Cup from Club Náutico Español de Vela ("CNEV") and embarked upon preparations for a Valencia-based multi-challenger 33rd America's Cup. SNG expected the 33rd America's Cup to be one of the most popular worldwide sporting events of 2009, as only the Olympics and the World Cup draw larger audiences.

Unfortunately and regrettably, Appellant Golden Gate Yacht Club ("GGYC"), sponsored by multi-billionaire Larry Ellison, has spent the past seventeen months prosecuting a protracted litigation calculated to usurp the role of Challenger of Record from CNEV, the rightful Challenger of Record. In the process, GGYC sought to rewrite the protocol and boat classifications that twenty-one other yacht clubs have now endorsed, all with the objective of excluding all yacht clubs from the America's Cup who cannot compete in a $20 million trimaran. This litigation has already delayed the next America's Cup by a year and

would, if successful, transform the next America's Cup into a match race with just two boats. It will also plunge the competition into further prolonged rounds of litigation before the courts over other interpretative issues, causing further delay and damage to a widely desired multi-national competition.

In its effort to paint SNG as a villain, GGYC's opening brief ignores altogether the substantial and game changing real-world consequences of its litigation tactics. GGYC wants, quite simply, to eliminate all challengers for the America's Cup and have the courts declare GGYC the finalist in a match against the current America's Cup holder, an achievement that GGYC has been unable to earn "on the water" in all of the prior America's Cup competitions in which GGYC has participated. Significantly, nothing is preventing GGYC from competing on equal terms with the twenty-one yacht clubs that intend to participate in the 33rd America's Cup.

In modern times, the America's Cup has been organized as a multi-challenger regatta involving many yacht clubs. In order to earn the right to race against the defending Cup holder, the challengers compete in races amongst themselves in a challenger series. The winner of the challenger series goes on to race against the Cup holder in the final round of the America's Cup. The challenger series, of course, is widely followed around the world as teams from many nations compete in it. The previous two America's Cups, both of which

were won by SNG, were marked by broad participation among nations and intensely competitive sailing. The 31st America's Cup had nine competitors in a challenger series (during which GGYC was eliminated) and the 32nd America's Cup had eleven competitors in a challenger series (during which GGYC was again eliminated).

The 33rd America's Cup was organized to be—and is, with the Appellate Division's ruling, back on track to be—an even larger regatta with even more widespread participation by yacht clubs around the world. At last count, as many as twenty-one teams plan to compete in the next Cup. The practical effect of granting GGYC's requested relief would be the elimination of these yacht clubs and the transformation of the storied and revered America's Cup into a two-boat match race.

In its brief, GGYC attempts to convince this Court that GGYC is not seeking an uncontested place in the America's Cup final competition. GGYC asserts that it is prosecuting this case to "improve" the protocol pursuant to which all challengers will compete, a purpose which would be rejected under *Mercury Bay*. But GGYC's actions cannot disguise its true intentions. First, GGYC is seeking to disqualify CNEV, which was and is the proper Challenger of Record. Second, GGYC complains vociferously about the protocol agreed to between SNG and CNEV, despite its awareness that criticism of protocols is common in

America's Cup history and has been typically and properly resolved through negotiation and amendments, not litigation. For example, the 32nd Protocol—*which GGYC negotiated as Challenger of Record*—required eleven amendments. Third, GGYC's challenge specifies a multi-hull boat literally the size of a baseball diamond—90 feet by 90 feet. Such a boat would be so large and so expensive to construct that no other yacht club (except perhaps, SNG) could reasonably afford to build it. Moreover, such a multi-hulled gargantuan vessel—which GGYC's multi-billionaire sponsor has already constructed— would be dangerous to sail. Fourth, GGYC's true intention—to avoid a challenger selection series—was revealed after the trial court issued its erroneous decision and GGYC insisted upon an immediate two-boat match against SNG in 2008, without a challenger selection series. In short, Mr. Ellison seeks to obtain through litigation that which he has failed to obtain through competition. The oldest and most important international sporting event should not be hijacked by a billionaire "sportsman" utilizing Tonya Harding litigation tactics, replete with half-truths, obfuscations, and outright misrepresentations.

The Appellate Division's ruling has put the 33rd America's Cup back on track to be an immensely successful open multi-challenger, multi-nation event in 2010 (delayed from 2009 due to GGYC's litigation) in which yacht clubs from all around the world will sail. Indeed, eleven of the yacht clubs that plan to

compete in the 33rd America's Cup have taken the extraordinary step of signing a petition earlier this month formally requesting GGYC to drop its litigation. *See* http://multimedia.alinghi.com/multimedia/docs/2008/10/081030_AC_competitors_meeting_signed_document.pdf. Extensive planning and preparations have been begun not only by SNG and other yacht clubs, but also by the City of Valencia. Valencia, which served as the venue for the highly successful 32nd America's Cup, has committed to invest millions of dollars to ensure the continued success of the event by taking the requisite steps in order to host the much anticipated 33rd America's Cup.

Without any basis in fact, GGYC slanders SNG by asserting SNG selected a "sham" or "convenience" yacht club in order to "fix" the rules for the next America's Cup. To the contrary, SNG accepted a valid challenge from CNEV, which qualifies as a yacht club under the Deed of Gift. CNEV is a duly organized and incorporated Spanish yacht club and is and always has been an appropriate Challenger of Record. As mandated by the Deed of Gift, CNEV's issuance of a valid challenge accepted by SNG made CNEV the Challenger of Record under the Deed of Gift. While GGYC issued a subsequent challenge, the Deed of Gift prohibits consideration of any other challenge while a valid accepted challenge is pending.

GGYC attacks CNEV, as well as its racing team Desafío Español and the Spanish yachting federation Real Federation Español de Vela ("RFEV"). But what GGYC does not and cannot deny is that, unlike GGYC, CNEV has *not* sought to foist itself into the final round of the America's Cup by forcing a one-on-one match with the Defender, but rather promptly negotiated and agreed to an open-competition protocol to which numerous yacht clubs have already signed on. This Court should not allow GGYC to move the America's Cup off the Spanish coast and into the American courtroom.

GGYC has manufactured this litigation through a strained interpretation of a clause in the Deed of Gift stating that any yacht club "having for its annual regatta an ocean water course . . . shall always be entitled to the right of sailing a match for this Cup . . . ." (R. 98.) The stated purpose of the Deed of Gift is to ensure that the Cup be "preserved as a perpetual Challenge Cup for the friendly competition between foreign countries." (R. at 98.) GGYC turns the Deed on its head by asking this Court to interpret its various provisions not to promote friendly competition on the waters, but rather to play a game of "gotcha" in the courts. In an argument improperly advanced for the first time upon this appeal, GGYC argues for a construction of the Deed that involves combining a snippet of the fourth paragraph of the Deed with a snippet of the tenth paragraph while ignoring the friendly competition language and disregarding all past

America's Cup history as legally irrelevant. Under GGYC's strained interpretation of the Deed, CNEV would be an improper challenger because it never held an annual regatta prior to challenging.

But GGYC's position is irreconcilable with the text of the Deed itself, which contains no requirement that a challenger have held an annual regatta prior to submitting a notice of challenge. And this reading is contrary to the fact that the Deed of Gift, in accordance with its stated intent to promote friendly competition, *has consistently and invariably been interpreted to allow yacht clubs who never previously held an annual regatta to challenge for the Cup as long as they conduct, as CNEV has, a regatta in advance of the America's Cup.*

The most striking historical analogue involves SNG itself. Based in Switzerland, a land-locked country, SNG had never held for its "annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both" when it issued a challenge for the 31st America's Cup. SNG held its first such annual regatta *after* it lodged its challenge, but prior to when it sought to sail against the defender of the 31st America's Cup. After the validity of SNG's challenge was questioned, SNG agreed with the Cup holder to present the matter to an arbitration panel established by mutual consent of all participating yacht clubs—*including GGYC*—to resolve America's Cup disputes. The 31st America's Cup Arbitration Panel concluded that the Deed of Gift did *not* require a

challenging yacht club to have held an annual regatta prior to the date of the challenge. Neither GGYC nor any one else challenged or appealed this ruling, and SNG was allowed to sail—and ultimately won the 31st America's Cup.

Finally, GGYC's opening brief is replete with scurrilous allegations that SNG is attempting to "fix" the 33rd America's Cup Protocol in order to defend the Cup. Again, such charges ignore the history of the America's Cup. SNG won the 31st America's Cup on the water. GGYC was eliminated in a challenger series match against SNG. Thereafter, SNG won the 32nd America's Cup, repeating its prior success on the water, while GGYC was eliminated again in the challenger series of the 32nd Cup.

It is true that GGYC came close to competing in the final round against the Cup holder when it temporarily prevailed in the trial court by securing a one-on-one match race with SNG. GGYC's "victory" derailed the multi-challenger regatta planned for the 33rd America's Cup in 2009. In doing so, GGYC disappointed the expectations, aspirations, and plans of hundreds of sailors and their yacht clubs eager to race for the Cup in 2009. In short, as a result of GGYC's well-financed litigation, 2009 will not see a multi-challenger regatta with a record number of competitors. The centerpiece of the America's Cup in 2009 will be oral argument before this Court.

GGYC's actions are antithetical to the spirit of the America's Cup and would be ruinous to the integrity of the 33rd America's Cup and the twenty-one competitors that would be excluded from the competition if GGYC were to succeed on this appeal. GGYC's motive in pursuing this litigation is not to "protect the historic spirit of the Cup," as GGYC states, but rather to put Larry Ellison a step away from the Cup by eliminating competition from other challengers.

I. THE AMERICA'S CUP DEED OF GIFT

The America's Cup is the most prestigious regatta in the sport of sailing and, indeed, one of the most significant events in all the world of sport. The America's Cup, a silver trophy, was donated by several donors, including but not limited to George Schuyler, to the New York Yacht Club in 1857 pursuant to a Deed of Gift. (R. at 788.)[1]

A. The Deed Of Gift's Terms

The Deed of Gift sets forth broad standards on who may challenge for the Cup, how a challenge must be lodged, and the conditions under which a match may be sailed. The Deed provides that:

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[1] The Cup was twice returned to George Schuyler, the sole surviving donor, when questions arose as to the terms of the trust in which the Cup was to be held. *Id.* Schuyler executed the present Deed of Gift in 1887, donating the Cup to the New York Yacht Club, to be held in trust "upon the condition that it shall be preserved as a perpetual Challenge Cup for the friendly competition between foreign countries." (R. at 98.)

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

(R. at 98.) While the Deed of Gift provides that any challenging yacht club who satisfies the above conditions "shall always be entitled to the right of sailing a match" for the Cup, it does *not* specify these as necessary preconditions to challenge. Nor does the Deed of Gift specify any qualifications that must be met at the time a challenge is submitted, rather than at the time "of sailing a match for this Cup." (R. at 98.)

What *is* a necessary requirement under the Deed of Gift (absent mutual consent) is that the challenger tender a proper and complete notice of challenge and certificate setting forth the proposed race details and vessel dimensions. For a challenge to be valid, it must be accompanied by "a certificate of the name, rig and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible." (R. at 98-99.) The purpose of the certificate is to notify the Cup holder of the type of vessel the Challenger will race so that the Defender may mount an appropriate defense. (R. at 1551-1552.) If the certificate contains inaccuracies whose intent or effect is to mislead the

Defender by, for example, disguising the true nature of the challenge vessel, then the certificate (and hence the challenge) is invalid. (R. at 1553.)

The Deed of Gift provides that, when a valid challenge and certificate compliant with the Deed of Gift is received, the defending club cannot, absent agreement, consider any other challenges until the pending event has been decided. (R. at 99.)

B. Historical Interpretation

In the long history of the America's Cup, yacht clubs which had never previously held an annual regatta have nevertheless consistently been permitted to race for the America's Cup.

SNG itself challenged for the 31st America's Cup having never previously held "an annual regatta on the sea or an arm of the sea." After submitting its entry, SNG agreed to hold a qualifying regatta, but did not do so until *after* its challenge was tendered. (R. at 663-664.) Royal New Zealand Yacht Squadron ("RNZYS"), as Defender of the 31st America's Cup, agreed to accept SNG's challenge only if SNG could obtain ratification of its challenge through arbitration. (R. at 662.)

Thus, the parties put before the 31st America's Cup Arbitration Panel the precise question now before this Court—*i.e.*, whether a yacht club who had never previously held an annual regatta nevertheless qualified as 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." (R. at 98) (emphasis added.) That panel found that SNG's challenge was valid under the Deed of Gift, reasoning 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) (emphasis added.) The rest is history. Despite never having held an annual regatta on an ocean course prior to submitting its challenge, SNG went on to defeat nine teams in the elimination round and win the 31st Cup.

The modern history of the Cup[2] is replete with other examples of yacht clubs that participated in the America's Cup even though they had not previously held an annual regatta or strictly satisfied the Deed of Gift's requirements as narrowly interpreted by GGYC. *See infra* pp. 35-39. For

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[2] In its early history the America's Cup was a two-boat race between the Defender and the Challenger. By mutual consent, the Defender and the Challenger of Record may allow other yacht clubs who wish to challenge to participate through a "protocol" that is agreed upon between the Defender and Challenger of Record. (R. at 99, 791.) In the America's Cups that have taken place in recent history, the Defender and Challenger of Record agree to include an elimination series in which a number of challengers compete in an initial regatta against each other, the winner of which ultimately competes against the Defender. (R. at 791, 796.) When the Challenger of Record and the Defender cannot reach agreement the Deed of Gift provides for a two-boat match race, at a location selected by the Defender and subject to the Defender's rules and sailing regulations, with the Challenger of Record racing the boat specified in its certificate. (R. at 99.) Since 1970, every race has been sailed under the "mutual consent" provision, except for the litigation-ridden 27th America's Cup between Mercury Bay Boating Club and San Diego Yacht Club. (R. at 791.)

example, RNZYS challenged for the America's Cup, won and served as Defender prior to being incorporated. (R. at 800.)

II. PREPARATIONS FOR THE 33RD AMERICA'S CUP

Preparations for the 33rd America's Cup are substantially underway. The America's Cup is currently scheduled to be held in summer 2010, just eighteen months from today. Twenty-one yacht clubs are scheduled to compete. Br. of *Amicus* City of Valencia at 3. These yacht clubs are actively engaged in costly and time-consuming plans to construct the new racing yachts agreed upon by all of the many current challengers for the 33rd America's Cup. Br. of *Amici* Team French Spirit, Argo Challenge, Green Comm Challenge, Team Shosholoza and Ayre Challenge at 5. And the City of Valencia has begun preparations to host the 33rd America's Cup as a multi-challenger event, committing a total cash sum of over € 200 million, as well as other valuable consideration, in support of a multi-challenger event. (R. at 795-796.)

These plans to organize the 33rd America's Cup in Valencia began immediately upon SNG winning the 32nd Cup. On July 3, 2007, the day that SNG's racing team Alinghi defeated RNZYS's racing team in "some of the most hotly-contested racing in recent Cup history," CNEV submitted a challenge for the 33rd America's Cup. (R. at 792-93.) Although GGYC suggests wrongdoing in issuing a challenge on the last day of the previous America's Cup, this is precisely

what GGYC did following the 31st America's Cup. (R. at 791, 565-566.) Accordingly, CNEV acted no differently than GGYC had done in the preceding Cup. (R. at 792-793.)

SNG and CNEV negotiated and published a Protocol for the 33rd America's Cup ("Protocol") that allows for open competition among multiple challenging yacht clubs in a series of qualifying regattas. (R. at 568.) While GGYC catalogs virtually all of the initial criticisms of the Protocol in its brief, criticism of protocols is not unusual in America's Cup history and is typically and properly resolved through negotiations and amendments, not litigation. (R. at 791.) The 32nd Cup protocol negotiated with GGYC as Challenger of Record, for example, required eleven amendments. (R. at 566, 791.)

The negotiation and amendment process for the 33rd Cup Protocol is far progressed and has resulted in twenty-one yacht clubs planning to participate in the 33rd America's Cup. Yacht clubs submitting Notices of Entry prior to the trial court proceedings included (i) the Deutscher Challenger Yacht Club e.V. of Germany through its team United Internet Team Germany, a prior America's Cup competitor; (ii) RNZYS, a former Cup holder and runner-up in the 32nd Cup, through Team New Zealand; (iii) the Royal Thames Yacht Club of England through Team Origin; and (iv) the Royal Cape Yacht Club of South Africa through Team Shosholoza, which competed in the 32nd Cup. (R. at 794-795.) The yacht

clubs that subsequently submitted a Notice of Entry or are in the process of doing so include Circolo di Vela Gargano, Real Club Náutico de Denia, Gamla Stans Yacht Skallskap, Club Nautico Gaeta, Yacht Club de Saint Tropez, Royal Belgian Sailing Club, Yacht Club Italiano, Circolo Canottieri Roggero de Lauria de Palermo, Real Club Nautico Barcelona, Cercle de la Voile de Paris, Club Nautique Russe, and Qingdao International Yacht Club. Br. of *Amicus* City of Valencia at 3.

III. GGYC DERAILS THE 33RD AMERICA'S CUP

Soon after SNG, CNEV and the City of Valencia began preparing for the 33rd America's Cup to be held in 2009, GGYC initiated its multi-pronged litigation strategy.

First, it disputed the validity of CNEV's challenge primarily on the basis that CNEV was a new yacht club that had never held an annual regatta as of July 2007. CNEV was organized, incorporated and licensed under Spanish law as a yacht club by members of the well-established Spanish yachting federation, Real Federation Español de Vela ("RFEV"). While CNEV is a relatively new yacht club, CNEV's racing team, Desafío Español, is a well-established Spanish racing team. For example, in the 32nd Cup, Desafío Español, like GGYC's racing team BMW Oracle, made it to the semi-finals. CNEV held its first annual regatta on November 24 and 25, 2007. (R. at 1535, 1921.) Its second annual regatta took place on November 7 through 9, 2008.

Second, GGYC submitted its own notice of challenge and boat certificate representing that it would race a "keel yacht"— a distinctive class of mono-hulled vessel—that was 90 feet long and 90 feet wide (in more precise terms, measuring 90 feet at the length on load waterline and 90 feet at the beam on load waterline). (R. at 103.) SNG promptly informed GGYC that it had received a valid challenge from CNEV and that the Deed of Gift expressly precluded it from considering any other challenge during the pendency of CNEV's challenge. (R. at 140.)

A. The 33rd America's Cup Arbitration Panel Decision

In an effort to promptly resolve any issues regarding the validity of CNEV's challenge, SNG turned to the dispute resolution mechanism set forth in the 33rd Protocol. (R. at 889, 893-979.)[3] The 33rd America's Cup Arbitration Panel asked GGYC to participate in the proceedings and expressly apprised GGYC that it would accept submissions from GGYC without any prejudice to GGYC's right to continue to argue that the Panel lacked jurisdiction. (R. at 798, 360-362.)[4] GGYC did in fact present substantive arguments to the arbitration panel on July

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[3] Arbitration has been and remains the most common dispute resolution agreed to by the competitors of virtually every protocol of the modern era of the America's Cup. (R. at 570, 797.) In fact, GGYC, as Challenger of Record for the 32nd America's Cup, similarly included arbitration as the dispute resolution mechanism under the 32nd Protocol. (R. at 348-352.)

[4] The Arbitration Panel includes three well-regarded lawyers, two of whom served on previous America's Cup arbitration panels. (R. at 887-888.)

27, 2007, but chose to simultaneously commence the present litigation. (R. at 363-365, 53-66, 936-939.)

Upon review of all the submissions, including GGYC's objection strenuously attacking CNEV's challenge, the Panel concluded that CNEV was a properly organized yacht club and that, under the Deed of Gift, "CNEV was not required to hold an annual regatta prior to acceptance of its challenge." (R. at 968.) The Panel reviewed prior America's Cup precedent on this issue and found that, as a matter of consistent practice in prior America's Cup matches, it was well recognized that a yacht club need *not* have held an annual regatta before making a challenge. (R. at 968-969.) The current 33rd America's Cup Arbitration Panel found notable the fact that the 31st America's Cup Arbitration Panel had addressed the exact same question and reached the exact same conclusion in a dispute involving SNG and directly relevant to GGYC. (R. at 968.)

B. GGYC Commences This Protracted Litigation

On the same day SNG submitted the dispute to arbitration, GGYC filed suit in the Supreme Court of New York County alleging that SNG breached the terms of the Deed of Gift and violated its fiduciary duties as the trustee of the America's Cup. (R. at 53-66.)

SNG moved to dismiss and for summary judgment on the ground that CNEV was a valid challenger under the Deed of Gift. (R. at 1011-1035.) CNEV

submitted briefing in support of SNG. (R. at 1070-1072.) GGYC opposed SNG's motion and cross-moved for summary judgment. (R. at 1073-1074.)

On November 27, 2007, the Supreme Court, by memorandum decision, dismissed GGYC's claim that SNG breached its fiduciary duties, but sustained GGYC's claim that CNEV's challenge was invalid because it had not held an annual regatta at the time of the challenge. (R. at 50-52.) Without any substantive analysis of the validity of GGYC's challenge and boat certificate, the Supreme Court also stated that GGYC was therefore the Challenger of Record. (R. at 50, 52.)

Prior to settlement of the order, SNG filed a motion for leave to renew and reargue on the ground that the court improperly adjudicated the validity of GGYC's challenge. Justice Cahn agreed the issue deserved renewed attention and, on January 15, 2008, entered an Order to Show Cause why GGYC's challenge and certificate should not be declared invalid and non-compliant with the Deed of Gift (R. at 1898-1899.) In a memorandum decision issued on March 17, 2008, the trial court declined to refer the validity of GGYC's certificate to an international sailing body, as SNG requested in accordance with this Court's instruction in *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 270-272 (1990), and declared GGYC's challenge and certificate to be valid. (R. at 32-33.)

In settling the order on these decisions, GGYC continued its effort to seize the Cup through legal maneuvering. In an ultimate set of unsportsmanlike conduct, GGYC expanded its legal campaign to a new level of effrontery by seeking to deprive SNG of any opportunity to prepare a defense to the $20 million vessel that GGYC has already constructed and launched on the water. Knowing that it would be impossible for SNG to construct a boat that could compete with the $20 million GGYC technical marvel in just a few months, GGYC demanded not only that all other competitors be excluded, but also that the match race be held in either July 2008 or October 2008. Race dates in either July 2008 or October 2008 would have virtually guaranteed that SNG would not be able to compete with GGYC in the 33rd America's Cup and thus granted GGYC the Cup by default. GGYC's last request, however, was too much for the trial court. On May 12, 2008, the court issued a final order, settling its prior decisions and directing that the next America's Cup be held ten months from the date of that order. (R. at 3271-3278.)

SNG appealed the March 17 and May 12 orders to the Appellate Division, First Department. At SNG's request, the Appellate Division consolidated the appeals and heard them on an expedited basis. GGYC elected *not* to appeal the order dismissing its breach of fiduciary duty claim against SNG or any other aspect of the trial court's ruling.

On July 29, 2008, the Appellate Division reversed the court's order and reinstated CNEV as Challenger of Record. The Appellate Division concluded that the word "having" in the Deed of Gift is ambiguous and that GGYC's construction was untenable as a matter of standard English usage. In light of its holding, it did not need to and did not address the issue of whether GGYC submitted a valid challenge. (R. at 3299-3326.)

ARGUMENT

Pursuant to CPLR 5501(b), this Court "shall review questions of law only, except that it shall also review questions of fact where the Appellate Division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered." Here, the Appellate Division's reversal was as a matter of law based on findings of fact made at the Supreme Court and are therefore not subject to review. To the extent the Appellate Division's decision was based on new factual findings, the Court of Appeals can determine which of the findings more nearly comports with the weight of the evidence. *Loughry v. Lincoln First Bank,* 67 N.Y.2d 369, 380 (1986); *Suria v. Shiffman*, 67 N.Y.2d 87, 97-98 (1986). Here, the weight of the record evidence demands a finding that CNEV is a duly qualified yacht club that satisfies each and every element of the Deed of Gift.

I. CNEV IS THE VALID CHALLENGER OF RECORD UNDER THE DEED OF GIFT

It is undisputed that CNEV filed the first challenge for the 33rd America's Cup. SNG accepted that challenge because CNEV satisfies all of the prerequisites that might fairly be read into the Deed of Gift.

In accordance with its stated intentions at the time it challenged SNG to a July 2009 race, CNEV held an annual regatta in November 2007 and held a second annual regatta in November 2008. (R. at 1535, 1921.) With the 33rd America's Cup now delayed to at least 2010 because of this litigation by GGYC, it is likely CNEV will have held three annual regattas before the competition takes place.

There is thus no need to look beyond the words of the Deed of Gift to confirm that, CNEV is a challenging club "having for its annual regatta an ocean water course on the sea, or on an arm of the sea." (R. at 98.) As this Court has repeatedly stated, "when the meaning of a contract is plain and clear it is entitled to be enforced according to its terms." *Uribe v. Merchs. Bank of New York*, 91 N.Y.2d 336, 341 (1998) (quoting *Loblaw, Inc. v. Employers' Liab. Assurance Corp.*, 52 N.Y.2d 872, 877 (1982)). But if extrinsic evidence is required to interpret the Deed of Gift, the Appellate Division manifestly reached the correct decision. GGYC's arguments to the contrary are inconsistent with the plain language of the Deed of Gift, multiple America's Cup arbitration decisions, and

the historical precedent and practice consistently permitting newly formed challengers to compete for the America's Cup.

A. The Word 'Having' Unambiguously Refers To An Intent That Must Be Satisfied By The Time Of The Match—Not The Time Of The Challenge

1. The Deed Of Gift Is Intentionally Neutral As To Timing

GGYC portrays the word "having" as meaning already having occurred and continuing to occur in the future. However, the plain meaning of the word "having" is neutral as to timing. It can refer to an event that has occurred or is occurring, but can alternatively refer to something that is to occur in the future, but has not yet. For example, in the question, "are we having turkey for dinner?" the word "having" refers to an event that has not yet occurred, but is expected.

Likewise, the "having for its annual regatta an ocean water course on the sea or arm of the sea" phrase is satisfied where the yacht club intends to have an ocean water course on the sea for its annual regatta. Nothing in the Deed of Gift forecloses this result. The Deed does not expressly or by implication require that a challenging club must have held an annual regatta prior to its challenge being lodged, or that any number of annual regattas need to have taken place before the challenge can be held.

Put simply, as used in the Deed, the word "having" includes regattas yet to occur. This was confirmed by the Appellate Division, citing *An English*

Grammar for the Use of High School Academy, and College Classes, published shortly after the Deed of Gift was last conveyed. (R. at 3307.) According to this treatise, participles such as "having" "express action in a general way, without limiting the action to any time, or asserting it of any subject" and "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.)

GGYC concedes that a participle such as "having" can indeed be cast into the past, present, or future tense depending upon its usage. (GGYC Br. at 25.) Here, the "having" clause logically relates to the clause later in the sentence, "shall always be entitled to the right of sailing a match for this Cup." Such right does not mature until the race is sailed, thus casting "having" into the future.

GGYC attempts to avoid this logical result through the argument that the word "having" relates to something not in the same sentence or even the same paragraph or on the same page. GGYC instead contends that having should be tied to a sentence six paragraphs later in the tenth paragraph of the Deed of Gift. Such an argument—which was never raised in its briefing to the Appellate Division—is precisely the sort of strained construction of the English language that this Court rejected in *Mercury Bay* in explaining that it is improper to read additional requirements into the Deed of Gift.

In *Mercury Bay*, the Mercury Bay Boating Club filed an action asking the court to set aside the results of the 1988 America's Cup match because it believed that the defending yacht club, the San Diego Yacht Club, violated the Deed of Gift by racing in a faster catamaran. Under the Deed of Gift, the San Diego Yacht Club, as Defender, was not required to disclose the type of vessel it intended to race until after the Mercury Bay Boating Club had disclosed its racing vessel. Mercury Bay argued that the Deed of Gift prohibited the defending yacht club from using a catamaran because a race between a catamaran and a mono-hull yacht was inherently unfair, with the mono-hull having no chance of winning. It further argued that the Deed of Gift intended to restrict the Defender's choice of vessel to the type selected by the challenger. Thus, this Court was asked to determine whether the Deed of Gift excludes catamarans or otherwise restricts the Defender's choice of vessel by the vessel selected by the challenger. 76 N.Y.2d at 266-67. The *Mercury Bay* Court stressed that it would not look beyond the "four corners" of the Deed of Gift to ascertain the donor's intent, refusing in particular to imply into the Deed of Gift additional requirements not expressly stated therein. *Id.* at 270 ("[B]ecause the plain language of the Deed of Gift is unambiguous, [] resort to extrinsic evidence to impute a different meaning to the terms expressed is improper.").

In addition, GGYC misapplies the doctrine of *noscitur a sociis* (it is known from its associates) to try to import into the Deed of Gift additional requirements for the Challenger of Record. The doctrine and others like it (for instance *ejusdem generis*, of the same kind) have no application unless the relevant language is ambiguous. *See* McKinney's N.Y. Statutes § 239(a) (noting that the maxim *noscitur a sociis* is applied as a rule of statutory construction where the meaning of a statute is ambiguous); *see also Uribe*, 91 N.Y.2d at 340 (applying McKinney's N.Y. Statutes § 239 as a rule of contract interpretation). Here, however, GGYC itself characterizes the language as unambiguous and the doctrine is thus inapplicable. GGYC Br. at 27.[5]

2. GGYC's Improperly Attempts To Add New Words to the Deed of Gift

In another twist on the plain meaning of the Deed of Gift, GGYC pretends that rather than stating "*having for* its annual regatta an ocean water course on the sea, or on an arm of the sea," the Deed should be seen to read, "*having had* its annual regattas *on* an ocean water course on the sea, or on an arm of the sea." GGYC Br. at 24-25 (emphasis added). Those, of course, are not the words in the Deed.

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[5] Furthermore, to the extent "having" is included in challenger requirements, it more accurately relates to the course on which a regatta is held rather than the timing of the regatta. This is confirmed by the history of the America's Cup, as discussed *infra*. The subject of "having" is the course, and the participle and its subject are "having ... an ocean water course."

The framers of the Deed clearly knew how to establish temporal restrictions when necessary, but chose not to do so with respect to the annual regatta requirement. For example, the Deed specifies that in the event the Cup Holder is dissolved, the America's Cup will be transferred "within three months" to a club of the same nationality. It also specifies that a vessel which has been defeated cannot race again in the America's Cup "until the expiration of two years from the time of such defeat." (R. at 99.)

Accordingly, in considering the words of the Deed "not as if isolated from the context, but in the light of the obligation as a whole," *Kass v. Kass*, 91 N.Y.2d 554, 566 (1998), the short, plain, and broadly inclusive statement of the challenger requirements in the Deed stands in contrast to the detail lavished on the boating and course-related limitations specified elsewhere in the Deed. GGYC's strained reading of the Deed would "constitute a semiotic and substantive transformation" of its language, and therefore must be rejected. *Uribe*, 91 N.Y.2d at 341; *see also Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985); *Rodolitz v. Neptune Paper Prods., Inc.*, 22 N.Y.2d 383, 386 (1968); *Morlee Sales Corp. v. Manufacturers Trust Co.*, 9 N.Y.2d 16, 19-20 (1961); *Bethlehem Steel Co. v. Tuner Const. Co.*, 2 N.Y.2d 456, 459 (1957).

In short, if the Deed of Gift was intended to be read as GGYC submits, it would have said "a yacht club ... that had and will continue to have an

annual regatta ... shall always be entitled the right of sailing in the match." But the Deed says no such thing. The only legitimate inference to be drawn, from the lack of a specific statement that a yacht club must already have had an annual regatta prior to challenging for the Cup, is that the drafters chose not to include such limiting language. *See Breed v. Ins. Co. of N. Am.*, 46 N.Y.2d 351, 354-55 (1978) (in construing an insurance policy provision, holding that phrase found in other contract provisions that did not appear in the provision at issue "bears no relevance to our inquiry").

3. The Language of the Deed of Gift Leaves Room for the Defender to Exercise its Discretion in Accepting Challenges

The language of the Deed of Gift also suggests that the there is room for the Defender to accept a challenge from a yacht club not strictly satisfying the challenge criteria set forth in the Deed of Gift. The Deed expressly states that a yacht club meeting these qualifications "*shall always be entitled to the right of sailing a match of this Cup.*" This language plainly states that a Defender must accept a challenge from a yacht club meeting these criteria, but may nonetheless accept a challenge from a yacht club not explicitly satisfying these criteria. Another interpretation would render the word "always" within the sentence superfluous, which is contrary to rules of interpretation. *See Lawyers' Fund for Client Protection v. Bank Leumi Trust Co.*, 94 N.Y.2d 398, 404 (2000) (rejecting an interpretation that "would render the second paragraph superfluous, a view

unsupportable under standard principles of contract interpretation"); *Suffolk County Water Auth. v. Vill. of Greenport*, 21 A.D.3d 947, 948 (2d Dep't 2005) ("an interpretation which renders language in the contract superfluous is unsupportable").

In an attempt to conjure some malfeasance on the part of SNG and CNEV, GGYC suggests that this interpretation opens the door to a bakery or pizza parlor challenging for the Cup. (GGYC Br. at 33.) The fundamental purpose of the Deed—to ensure a "perpetual Challenge Cup for friendly competition between foreign countries" (R. at 98)—and the proper reading of the fourth paragraph of the Deed does not in any way open the door to absurdist challenges for the Cup from spurious competitors or any of the other doom and gloom possibilities GGYC suggests. The Defender has a fiduciary obligation to ensure that a prospective challenger's intent to hold a regatta is sincere, and SNG's faith in the sincerity of CNEV's desire to have an annual regatta before the time of its challenge for the Cup was proved correct when CNEV had its first annual regatta in November 2007 and a second in November 2008. (R. at 1535, 1921.) The Defender has a fiduciary duty to tend to the Cup while it possesses it, and that relationship requires screening "mediocre and unqualified yacht clubs," as GGYC suggests. (GGYC Br. at 35.) Here, GGYC was unable to support a claim that SNG breached its

fiduciary duties. The trial court dismissed GGYC's breach of fiduciary duty claim against SNG, which ruling GGYC did not appeal.

B. The Extrinsic Evidence Confirms That CNEV Is The Proper Challenger Of Record

While we submit it is unnecessary to look beyond the words of the Deed itself, the extrinsic evidence that does exist also supports affirmance of the Appellate Division's decision.

1. The Deed Of Gift Has Been Consistently Interpreted To Favor Inclusion of Yacht Clubs

America's Cup history, old and new, is replete with evidence of liberal, inclusive interpretation of the Deed of Gift, rather than hyper-technical efforts to exclude qualified yacht clubs. Even as early as 1881, the New York Yacht Club America's Cup committee advised that "we sincerely trust that the interpretation of the Deed of Gift *may be so liberal and sporstmanlike as to be beyond cavil.*" Winfield M. Thompson & Thomas W. Lawson, *The Lawson History of the America's Cup* 83-84 (1902) (emphasis added). George Schuyler, the last remaining settlor, concurred. In his obituary, the New York Times states:

> While Mr. Schuyler had always stoutly maintained that the last deed is a fair one, holding this belief to his death, he was willing to discuss the question, and in fact, he said in his last public interview, published in The Times, that if he ever became convinced there was any unfair or unsportsmanlike conditions in the deed he would be willing to have them changed. This declaration showed Mr. Schuyler's fairness, and no matter what

> complications may occur in [the] future in relation to the deed the New York Yacht Club will remember the words of Mr. Schuyler in support of the document he executed.

George L. Schuyler Dead, N.Y. Times, Aug. 1, 1890. He believed that the fundamental purpose of the Deed of Gift was to ensure a "perpetual Challenge Cup for friendly competition between foreign countries." (R. at 98.)

A liberal interpretation of the Deed of Gift as an inclusive rather than exclusive document ensures that the widest possible number of international competitors are given the opportunity to sail a "spirited contest for the Championship." (R. at 742.) The trustees, Challengers of Record, New York Courts and Arbitration Panels that have been asked to interpret the Deed of Gift over the past 100 plus years have approached the task with a liberal and inclusive mindset. Never has the Deed of Gift been interpreted to exclude valid challengers simply because they were "new" or "young" yacht clubs. Nor has the Deed ever been applied to exclude valid challengers simply because they held an annual regatta after the notice of challenge but before the America's Cup competition. Certainly, the Deed has never been interpreted so as to exclude valid challengers whose racing team has already competed in the America's Cup.

As the Arbitration Panel for the 31st America's Cup aptly noted "the interpretation of the Deed of Gift in a manner appropriate for specific circumstances of 1881 (or 1887) but no longer relevant to present circumstances, is

contrary to the spirit of the Deed of Gift." (R. at 744.) Likewise, the Arbitration Panel for the 33rd America's Cup accepted that "historically one of the traditions of the America's Cup is broad and liberal interpretation of the requirements of the Deed of Gift as regards the qualifications of challenging yacht clubs and receiving of challenges. The concept has been to permit rather than deny entry of Challengers." (R. at 960.)

Numerous competitors have been allowed to sail in a match for the America's Cup even though they had never held an annual regatta at the time of their challenge. Indeed, the history of the America's Cup is replete with examples where newly formed yacht clubs—created by organizations, federations, or wealthy individuals solely to challenge for the Cup—have been permitted to compete as challengers. (R. at 799-801.)

(a) The 31st America's Cup Arbitration Panel Allowed SNG To Challenge Even Though It Had Yet To Hold An Annual Regatta On An Ocean Course

The Appellate Division found it compelling that the 31st America's Cup Arbitration Panel, composed of sports and sailing experts, addressed the precise issue raised herein and concluded that the Deed of Gift did not require a challenger to hold an annual regatta prior to lodging a challenge. (R. at 3308-3309.)

The 31st America's Cup Arbitration Panel was asked to determine whether SNG was a valid challenger when it had not held a qualifying regatta as of the date of its challenge for the 31st America's Cup, but agreed to and did in fact hold its first annual regatta on the sea before the America's Cup race. At the request of the then-Cup holder, the validity of SNG's challenge was presented to the 31st America's Cup Arbitration Panel under a protocol agreed to by all competitors for the 31st America's Cup, *including GGYC*. (R. at 802.)

After receiving and considering submissions by all interested parties, the 31st America's Cup Arbitration Panel confirmed the validity of SNG's challenge, explaining that:

> Neither 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. The only requirement is that the challenging club must be a yacht club 'having for its annual regatta an ocean water course on the sea' . . . . If it has such a regatta, it is eligible.

(R. at 664-665.) SNG was thus permitted to compete in the 31st America's Cup and went on to win two consecutive America's Cups. GGYC, as a competitor in the 31st America's Cup, had tremendous incentive to raise any legitimate question it might have had regarding SNG's qualifications as a yacht club that had never held an "annual regatta . . . on the sea, or on an arm of the sea" prior to its challenge. It did not raise any such challenge.

GGYC completely dismisses this decision as "irrelevant." But where a relevant interpretation of the Deed of Gift has "been accepted and acted upon for so many years," this Court should consider such evidence and "should not feel justified in overturning the same," where the accepted interpretation has been reasonable. *Starr v. Starr,* 132 N.Y. 154, 159 (1892). This was the approach adopted by the 33rd America's Cup Arbitration Panel when it declared CNEV to be the Challenger of Record. Relying upon the 31st America's Cup Arbitration Panel decision and the tradition of "broad and liberal interpretation of the requirements of the Deed of Gift," the 33rd America's Cup Arbitration Panel reached the same conclusion as the Appellate Division. It properly concluded that CNEV is the rightful Challenger of Record for the 33rd America's Cup. (R. at 971.)

(b) There Is A Long Tradition Of Accepting Challenges From New Yacht Clubs

The approach taken by the 31st and 33rd America's Cup Arbitration Panels is consistent with the practice among Defenders, as trustees, of accepting challenges from newly created yacht clubs. This is significant because the trustee's administration and interpretation of the trust is persuasive evidence of how the Deed of Gift should be interpreted. *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82, 94 (1st Dep't 1989), *rev'd* 76 N.Y.2d 256 (1990); *see also In re Estate of Ryan,* 169 N.Y.S.2d 804, 809 (Surr. Ct. 1957) ("A construction of the will accepted and acted upon for many years and eminently fair

to the parties interested, will not be overturned by the court when the language of the will is capable of that construction."); *In re Estate of Von Miklos,* 170 N.Y.S.2d 405, 406-07 (Surr. Ct. 1957) (refusing to disregard an interpretation that the parties have acquiesced to, "particularly when the language of the [trust instrument] is capable of the construction which the trustees and the parties have given it in practice.").

One telling example is that of the Secret Cove Yacht Club. Secret Cove Yacht Club challenged for the 25th America's Cup despite never having held an annual regatta. Its Notice of Challenge stated that "[t]he Club will be holding its first annual regatta in September, 1981. The ocean waters available for it for this purpose are those of the Strait of Georgia." (R. at 645.) The Secret Cove Yacht club was incorporated only three months prior to its challenge, and was openly established for the purpose of challenging for the Cup as a Canadian representative. (R. at 799, 643-648.) The New York Yacht Club, which has served as trustee twenty-five times out of the thirty-two times the America's Cup has been held, adopted the precise interpretation urged by SNG here and accepted the challenge of Secret Cove Yacht Club of Canada, provided that it would have an annual regatta going forward. (R. at 646.)

Moreover, yacht clubs throughout the world have competed with success in the America's Cup despite their failing to strictly satisfy the terms of the

Deed of Gift at the time of the challenge. (R. at 799-801.) Many of these challengers would be deemed unfit under GGYC's narrow reading of the Deed:

- RNZYS first challenged for the 1987 Cup and again in 1992 and 1995, despite not ever being incorporated. RNZYS won the America's Cup in 1995 and was the Defender in 2000 and in 2003. It was not "incorporated, patented, or licensed by the legislature, admiralty, or other executive department," as required by the Deed, until after it had lost the America's Cup to SNG and ceased to be the trustee. (R. at 572.)

- The Southern Cross Yacht Club was incorporated in April 1993 six months *after* its challenge was accepted by the San Diego Yacht Club but before racing for the Cup. (R. at 572.)

- The Nippon Yacht Club which challenged for the 29th America's Cup in 1995 and whose challenge was accepted by the San Diego Yacht Club, for the 30th America's Cup in 2000 does not appear to have ever been "incorporated, patented, or licensed." (R. at 573.)

- The Mercury Bay Boating Club was incorporated less than nine months before it issued its challenge in 1987. It was widely publicized to have operated without formal offices, but rather out of a car on a beach. (R. at 572, 799-800.)

- The Sun City Yacht Club from Western Australia was incorporated the day before it challenged for the 1977 America's Cup. (R. at 799, 639-642.)

- The Cortez Sailing Association, led by Dennis Connor, commonly known as "Mr. America's Cup," was accepted as a Challenger by the RNZYS although it was not incorporated until 2002, more than two

> years after it competed in the 2000 America's Cup. (R. at 572-573.)

GGYC dismisses these examples because they are "mutual consent challengers" rather than a Challenger of Record, but this is a distinction that finds no support in the Deed of Gift. While the Deed of Gift may permit the Challenger and Defender to modify the rules of the match, all these challenges were made under protocols requiring challengers to satisfy the criteria set forth in the Deed of Gift. (R. at 822, 841.) Thus, these are legitimate examples of numerous yacht clubs accepted to be valid challengers under the Deed of Gift in an effort to foster inclusion despite the fact that they would have been rejected under GGYC's restrictive interpretation of the Deed of Gift.

Indeed, GGYC itself (though it has never earned the title of Defender) has approved of challengers who did not meet its strict sense of qualification under the Deed of Gift. In the most recent America's Cup, in which GGYC was the Challenger of Record, GGYC did not seek to exclude RFEV, a yachting federation—not even a yacht club—when it challenged and competed for the 32nd America's Cup. (R. at 673.) It is only now, when GGYC, having failed to succeed in the last two Cups, and seeking to promote its own agenda, that it complains about CNEV, the successor to RFEV.

Finally, New York Courts have promoted a liberal and inclusive determination of the Deed of Gift. In 1984, the Royal Perth Yacht Club of

Western Australia, petitioned the Supreme Court of the State of New York as to whether the Chicago Yacht Club was entitled to challenge. (R. at 747-748.) The issue was whether the Chicago Yacht Club, which held regattas on a lake rather than the ocean, met the obligation in the Deed of Gift to have an annual regatta on "ocean water course on a sea, or an arm of the sea, or one which combines both." (R. at 961.) The Supreme Court plainly declared that "the Deed of Gift entitles the Chicago Yacht Club, a yacht club of foreign (*i.e.* competing) country as contemplated by the Deed of Gift, to enroll and compete as a contestant for the 'America's Cup'." (R. at 748.)

These examples reinforce the well-established practice and tradition of inclusion among America's Cup trustees. The liberal interpretation adopted by so many America's Cup trustees, beneficiaries (including GGYC), sailing experts and Courts alike is consistent with George Schuyler's own realization that the Deed of Gift could at times become "inadequate to meet the intentions of the donors." George L. Schuyler Dead, N.Y. Times, Aug. 1, 1890.

2. The 1882 Amendments Do Not Support CNEV's Exclusion as Challenger of Record

GGYC makes much of the 1882 amendments to the Deed of Gift to squeeze its own interpretation of the Deed into the supposed purpose behind the amendments. However, the circumstances surrounding the amendments bear no similarity to this case and no statements of George Schuyler, the settlor of the

current Deed of Gift, support GGYC's conclusion that he intended to exclude "new" or "young" yacht clubs.

The record is devoid of any reference to statements by Mr. Schuyler indicating a desire to exclude "new" or "young" yacht clubs. George Schuyler amended the Deed of Gift in 1882 to address a very specific problem: "The changes were designed specifically to prevent further challenges from Captain Alexander Cuthbert whose two previous challenges in the *Countess of Dufferin* and secondly in *Atalanta* representing respectively the Royal Canadian Yacht Club of Toronto and secondly the Bay of Quinte Yacht Club, both situated on the Canadian Great Lakes, failed poorly and were much criticised." (R. at 742.) The problem with these challenges was not that the clubs had not held a regatta prior to lodging a challenge, but the vessels used to race were unseaworthy. The New York Yacht Club felt that due to these inferior vessels, the America's Cup should be returned to Mr. Schuyler, who made several amendments to the Deed of Gift in an attempt to prohibit such inferior vessels from challenging again for the America's Cup. (R. at 742.)

One such amendment was the insertion of the annual regatta clause at issue in this case, which requires the challenging yacht club's annual regatta to be "on an ocean water course on the sea or an arm of the sea." Mr. Schuyler felt that by adding such a requirement, a challenger would be forced to compete only with

"seagoing vessels." (R. at 743.) The purpose of the annual regatta clause was therefore not on the timing or frequency of the regattas, but rather on the location of the regatta. So long as the challenging yacht club held a qualifying regatta prior to the time it sailed a match for the right to hold the America's Cup, Mr. Schuyler's purpose was served because the likelihood that the challenging yacht club would show up to race for the America's Cup in a non-"seagoing" vessel was greatly diminished.

The additional amendments made in 1882 support the conclusion that the annual regatta amendment was intended to limit the type of vessel used by the Challenger at the match, rather than the timing of the regatta. Mr. Schuyler also included a requirement that the "vessels selected to compete for this cup must proceed under sail on their own bottoms to the port where the contest is to take place." *Mercury Bay,* 76 N.Y.2d at 262.[6] "[I]t was deemed desirable that vessels should come to contend for the cup under their own sail, and not in tow through a canal," thus ensuring their seaworthiness. (R. at 743.) By definition, such a requirement could only be met at the time of the race for the Cup and not at the time of the challenge, which also established that the settlor sought to insure the

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[6] This language was eventually stricken from the Deed of Gift by court order dated December 17, 1965. *Mercury Bay,* 76 N.Y.2d at 262.

challenger's qualifications were satisfied at the time of the match rather than the time of the challenge.

Noticeably absent from this well-established history is any indication that Mr. Schuyler intended to create a new requirement whereby a Challenger of Record could be disqualified simply because it held its qualifying regatta after the issuance of its Notice of Challenge, but before racing for the America's Cup. There is simply nothing to support the inference that Mr. Schuyler intended to exclude a yacht club that was *capable of* and *intended to* hold a qualifying regatta on an ocean water course on the sea before its vessel sailed a match for the Cup. Likewise, it certainly cannot be inferred that it was Mr. Schuyler's intent to exclude a yacht club whose racing team had already competed with distinction in a previous America's Cup in a seaworthy vessel. (R. at 567-568.)

C. CNEV Meets All Other Requirements Under The Deed Of Gift

CNEV is a foreign yacht club that is duly incorporated and licensed under the applicable Spanish law. As the lower court noted, 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." *Matter of Corp. of Yaddo*, 216 A.D. 1, 4-5 (3d Dep't 1926). CNEV is incorporated as a sports entity whose purpose is to support "sports activities practiced on the sea, and especially to promote the sport of sailing by organizing national and international regatta held

in national territory." (R. at 513.) GGYC has not offered any interpretation of Spanish law under which CNEV would not be considered incorporated or licensed. GGYC ignores the record and claims that CNEV "lack[s] any and all of the characteristics of a real yacht club—such as members, vessels and facilities." (GGYC Br. at 18.) This is despite the fact that CNEV has officers, a board of directors, and members (R. at 510, 513-524); CNEV has a facility on the water at Base Number 3 on the Interior Pier of the Port at Valencia (R. at 513); and there is not and has never been a requirement in the Deed of Gift that a challenging yacht club have a specific minimum number of vessels.

GGYC also resurrects its baseless argument that RFEV's sponsorship of CNEV somehow invalidates CNEV as an organized yacht club, and asserts without one iota of evidence that RFEV is "in league with" SNG and "traded control of the event in return for keeping the Cup in Valencia, Spain." (GGYC Br. at 18.) GGYC uses the fact that RFEV is a "sailing federation" as evidence of some kind of nefarious purpose, but it is widely accepted that contemporary America's Cup competition requires independent racing teams to represent yacht clubs, as BMW Oracle Racing does for GGYC and Alinghi does for SNG; similarly, CNEV's representative for the 33rd America's Cup, Desafío Español, competed in the 32nd America's Cup as RFEV's representative. (R. at 567-568, 1036.) RFEV is a well-respected and internationally recognized sailing federation,

an affiliated member of ISAF, whose racing team has challenged for the Cup in the past, and it helped create, organize and incorporate CNEV to meet the requirement in the Deed of Gift that a challenge be made by a yacht club. (R. at 567-568.)

CNEV is clearly an organized yacht club within the meaning of the Deed that properly meets all the requirements of the Deed of Gift, as held by the Appellate Division.

II. GGYC CANNOT FORCE A MATCH RACE BY SUBMITTING AN INVALID NOTICE OF CHALLENGE AND BOAT CERTIFICATE

The Appellate Division did not reach the issue of the validity of GGYC's Notice of Challenge because it declared CNEV to be the Challenger of Record and this Court similarly need not reach this issue. Nonetheless, in declaring GGYC to be Challenger of Record, the trial court failed to follow this Court's instruction in *Mercury Bay* that issues such as the validity of a boat certificate must be submitted for determination by an international sailing jury in accordance with the applicable sailing rules.

A. *Mercury Bay* Requires That The Validity Of GGYC's Notice Of Challenge Be Submitted To An International Jury

The Court of Appeals in *Mercury Bay* followed the Deed of Gift's mandate that the defending yacht club's rules and regulation must be followed to resolve disputes about the vessels to be used in the race:

> In this case, the *dispute over the eligibility of the chosen vessels should have been governed and determined by the*

> *rules of yacht racing promulgated by the International Yacht Racing Union (IYRU) and followed by the defending San Diego Yacht Club.* Pursuant to these rules, an international jury referees the match and decides all protests jointly submitted to it by the parties.

Mercury Bay, 76 N.Y.2d at 265-66 & n.1 (emphasis added). The Deed of Gift expressly provides that "[default] races shall be sailed subject to [the Defender's] rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift." (R. at 99.)

The IYRU identified in *Mercury Bay* is now known as the International Sailing Federation ("ISAF"). GGYC itself contends that ISAF rules "*must* apply to the Default Match under the Deed." (R. at 678.) Thus, here, as in *Mercury Bay*, the rules and regulations followed by the defending yacht club SNG (as alleged by GGYC) require that the sufficiency of GGYC's certificate be "submitted to the international jury." *Id.* at 266.

As relevant here, ISAF's Racing Rules expressly provide that an "international jury" of experienced sailors appointed by the organizing authority in accordance with ISAF Racing Rules "*shall decide questions of* eligibility, measurement or *boat certificates*." (R. at 3090.) Thus, under the Deed of Gift, ISAF, as the sailing authority followed by SNG, is the only body with the authority to rule on the adequacy of GGYC's certificate. The trial court erroneously usurped

the role of the international jury and declared GGYC's Notice of Challenge and Certificate valid.

Even assuming *arguendo* that it were proper for a court to delve into technical sailing issues, GGYC's boat certificate contains conflicting information making it invalid and non-compliant with the Deed of Gift. The Deed of Gift expressly requires the tendering of a boat certificate meeting the requirements of the Deed of Gift along with the notice of challenge. (R. at 98-99.) The boat certificate is a critical document that must provide an accurate and complete description of the challenging vessel so that the Defender may prepare its defense. (R. at 1551, 2837.) As George Schuyler wrote when arbitrating a measurement dispute: "The importance of accuracy in giving the dimensions of a yacht challenging for the Cup is so great that any decision reached in any one case cannot be used as a precedent in any other that might arise. A great error in any of the 'dimensions', whether through mistake or design, would vitiate the agreement." (R. at 1851.) Schuyler later explained that "[t]he main reason we ask for the load waterline length, draught of water, beam at the waterline and extreme beam is to know what kind of vessel we have to meet, I believe the challenged party has a right to know what the yacht challenging is like, so it can meet her with a yacht of her own type if it is so desired." (R. at 1852.)

GGYC's boat certificate contains inaccuracies and inconsistencies that make it invalid. Specifically, its certificate contains the following introductory paragraph:

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

(R. at 103.) (emphasis added) However, GGYC has since stated and repeats in its opening brief that it intends to race in a multi-hulled vessel. A multi-hull is, by definition, not properly classified as a keel yacht.

While this is obviously an issue better addressed by experts in sailing rather than experts in law, a "keel yacht" or "keel boat" is a term used in the sailing world precisely to distinguish from multi-hulls, a fundamentally different category of boat. As described by US Sailing, the governing body of sailing in the United States, "the term 'keelboat' refers to those sailboats which have a weighted keel (the vertical fin at the bottom of the boat) which is of sufficient weight to counterbalance the force of the wind in the sails" and prevent the boat from tipping over. Significantly, the International Sailing Association has unequivocally stated that "*a 'multihull' yacht would not be classified as a 'keel' yacht.*" (R. at 3128.) The trial court wholly ignored the opinion of this authoritative organization and gave no weight to its conclusions.

It is impossible on the record to resolve these inconsistencies. Accordingly, the trial court should not have decided as a matter of law that this facially ambiguous certificate qualified GGYC to be the Challenger of Record.

B. GGYC's Challenge Is Invalid For The Independent Reason That It Has Failed To Supply A Custom-House Registry As Required By The Deed Of Gift

The Deed of Gift also requires that the challenger supply a custom-house registry of the challenge vessel "as soon as possible." (R. at 99.) The need for a registry that would supply details about the dimensions, configuration and design of the intended challenge vessel is amplified here in light of the ambiguities in and deficient nature of GGYC's certificate. Although it has been sixteen months since GGYC issued its challenge, GGYC has yet to provide a custom-house registry, despite repeated requests from the Defender to do so. It has been almost three months since it commissioned and launched its challenging vessel on August 25, 2008, and commenced sailing it on September 1, 2008.

CONCLUSION

For the foregoing reasons, Respondent-Defendant SNG respectfully requests that this Court affirm in all respects the Appellate Division's order and allow the multi-challenger 33rd America's Cup to go forward as planned.

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Respectfully submitted,

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