

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

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: GOLDEN GATE YACHT CLUB, :
: :
: Plaintiff, : Index No. 602446/07
: :
: v. : IAS Part 54
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: SOCIÉTÉ NAUTIQUE DE GENÈVE, : Hon. Shirley Werner Kornreich
: :
: Defendant, :
: :
: v. :
: :
: CLUB NÁUTICO ESPAÑOL DE VELA, :
: :
: Intervenor-Defendant. :
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**SOCIÉTÉ NAUTIQUE DE GENÈVE'S MEMORANDUM
OF LAW IN SUPPORT OF ITS ORDER TO SHOW CAUSE**

Defendant Société Nautique de Genève (“SNG”) submits this memorandum of law, the affirmation of Barry R. Ostrager, dated April 30, 2009 and the exhibits annexed thereto (“Ostrager Aff.”), in support of its order to show cause why an order should not be entered disqualifying Golden Gate Yacht Club (“GGYC”) as the Challenger of Record for failure to provide a Custom House registry of its challenge vessel as required by the Deed of Gift governing the America’s Cup, or in the alternative, compelling GGYC to provide SNG with a Custom House registry of its challenge vessel described in its Notice of Challenge (and launched on August 25, 2008) within 30 days. Because this claim for relief is related to the order to show cause sought by GGYC, SNG requests that this order to show cause be heard on the same schedule, with opposition papers due May 11, 2009 and a hearing set for May 14, 2009, at 9:30am.

PRELIMINARY STATEMENT

GGYC, the current Challenger of Record for the 33rd America's Cup, has flagrantly disregarded its obligation under the Deed of Gift to provide SNG with a copy of the Custom House registry of its challenge vessel "as soon as possible" after issuing its challenge. Nearly two years ago, in July 2007, GGYC invoked the provisions of the Deed of Gift to seek the disqualification of Club Náutico Español de Vela ("CNEV"), the first challenger for the Cup, for failure to strictly comply with requirements in the Deed of Gift. After GGYC prevailed before this Court, SNG repeatedly asked GGYC to provide a copy of the Custom House registry "as soon as possible," as required by the Deed of Gift. GGYC refused. Although GGYC lost in the Appellate Division, it nevertheless proceeded to launch its challenge vessel boat. GGYC ultimately prevailed before the Court of Appeals. SNG thereafter asked again for the Custom House registry of GGYC's challenge vessel. But GGYC persists in its refusal to provide it.

GGYC is flouting its obligations under the Deed of Gift. The Deed requires that a challenging yacht club "must" provide a "custom-house registry . . . as soon as possible." Ostrager Affirmation, Ex. A, at 2 (Deed of Gift). GGYC's failure for two years to comply with this express term compels its disqualification as Challenger of Record. In the alternative, this Court should require GGYC to provide a United States Coast Guard Certificate of Documentation—which GGYC acknowledges to be the modern-day equivalent of the Custom House registry—describing the boat GGYC launched on August 25, 2008 to SNG within 30 days.

GGYC's current refusal to comply with the Deed of Gift is but one component of GGYC's improper gamesmanship. Earlier this week, GGYC ran to Court with a baseless contempt motion concerning the date of the 33rd America's Cup race. This surprise move came

after SNG tried to engage GGYC in discussions about the race date in a meeting last week and was told that conversations would continue this week. GGYC never recommenced the discussions and instead sought the order to show cause. GGYC has made it clear that it is intent on waging litigation on all fronts against SNG even if it needs to be by manufacturing baseless charges of wrongdoing. And, as reflected in the attached press clipping, GGYC is making a mockery of the proceedings before this Court by planting stories in the press about its confected contempt claim. Ostrager Aff., Ex. K (April 30, 2009 *The New Zealand Herald*).

By way of brief background (SNG will present its arguments to the Court on this date issue in its papers due May 11 and at the May 14 hearing), SNG originally raised the race date issue with GGYC to avoid any confusion regarding the proper date of the next Cup. An April 7, 2009 Order (the "Order") of this Court provides that "[t]he dates for the challenge match races shall be ten calendar months from the date of service of a copy of this order" but that "[n]otwithstanding the above, the parties may mutually agree in writing to other dates." Order at 4. Ten months from April 7, 2009 is February 7, 2010. The Deed of Gift in turn expressly provides that "no race [for the Cup] shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere." Ostrager Aff., Ex. A, at 2. Thus, the Deed of Gift unambiguously (and for good reason having to do with weather conditions) prohibits a Northern Hemisphere race in February 2010. The Order sets Valencia, Spain as the default race location. Order at 5. And GGYC's Notice of Challenge specifically requested a race date "recognizing the period permitted by the Deed of Gift for a match in the Northern Hemisphere." Ostrager Aff., Ex. B, at 4 (GGYC Notice of Challenge). The first date on or after the ten-month period in the Order that is compliant with the Deed of Gift is May 3, 2010. That is the earliest date on which the next Cup can be held. So, there is a conflict between

the Deed of Gift provision that entitles the Defender to select the location of the race, GGYC's designation of a Northern Hemisphere location, the prohibition in the Deed of Gift of a Northern Hemisphere match before the month of May, and the Court of Appeals indication that the match should take place in February. This conflict is the subject of what SNG believed would be the subject of ongoing discussions among the parties.

PROCEDURAL HISTORY

On July 11, 2007, GGYC issued a Notice of Challenge for the 33rd America's Cup. GGYC's Notice of Challenge, according to GGYC, specified a 90-foot multi-hull yacht and identified as GGYC's challenge vessel a boat named USA. Ostrager Aff., Ex. B, at 5 (GGYC Notice of Challenge). In its Notice of Challenge, GGYC stated that it would provide SNG with a copy of its custom house registry as soon as possible. *Id.* at 4 (representing that "[t]he 'Custom House' registry of the challenging vessel will be sent as soon as possible").

Nine days later, on July 20, 2007, GGYC commenced an action in New York Supreme Court contending that GGYC was the proper Challenger of Record for the 33rd America's Cup. In this litigation, GGYC asked this Court to require strict compliance with the requirements contained in the Deed of Gift. GGYC succeeded in obtaining a November 27, 2007 Decision disqualifying CNEV for non-compliance with the Deed of Gift and declaring GGYC to be the proper Challenger of Record.

After GGYC prevailed before this Court, SNG repeatedly requested that GGYC provide the Custom House registry required by the Deed of Gift as soon as possible, and reiterated the need for GGYC to comply with the terms of the Deed of Gift. In its letter of April 28, 2008, SNG reminded GGYC that, as the Challenger of Record, GGYC had to comply with

the Deed's requirement to provide SNG with a Custom House registry of its challenge vessel as soon as possible. Ostrager Aff., Ex. C (April 28, 2008 letter from SNG to GGYC).¹

On April 29, 2008, GGYC responded that it was actively in the process of obtaining a Custom House registry for its challenge vessel. Ostrager Aff., Ex. D (April 29, 2008 letter from GGYC to SNG). In this letter, GGYC acknowledged that a Certificate of Documentation issued by the U.S. Coast Guard is the modern-day equivalent of a Custom House registry. *Id.* In this and subsequent letters, GGYC repeatedly stated it would provide the Custom House registry as soon as possible. GGYC even issued a press release publicly stating that it would provide a Custom House registry "as soon as possible." *See* Ostrager Aff. Ex. F (May 20, 2008 GGYC press release).

On July 29, 2008, the Appellate Division, First Department, issued an Order ruling in favor of SNG. Nevertheless, on August 25, 2008, GGYC's racing team, BMW Oracle Racing, issued a press release announcing the launch of its 90-foot multi-hull racing yacht. Ostrager Aff., Ex. H (August 25, 2008 press release by GGYC's racing team, BMW Oracle Racing). By that point, there was no reason whatsoever that GGYC could not have provided a Coast Guard Certificate of Documentation. Indeed, four of the articles GGYC itself sponsors as "fact evidence" in its Motion to Enforce Order and Judgment and for Contempt demonstrate unequivocally that GGYC and its racing team BMW Oracle Racing have long since built, and actively tested at least three times, their challenge vessel. Affirmation of James V. Kearney in Support of Motion to Enforce Order and Judgment and For Contempt, dated April 27, 2009 ("Kearney Aff."), Ex. G (April 24, 2009 *The New Zealand Herald*) ("Oracle launched their

¹ SNG repeated this request in its letters of May 6, 2008, Ostrager Aff., Ex. E (May 6, 2008 letter from SNG to GGYC), and August 22, 2008, Ostrager Aff., Ex. G (August 22, 2008 letter from SNG to GGYC).

spectacular 90ft trimaran last year, and are in their third round of testing.”); *see also* Kearney Aff., Ex. H (April 26, 2009 *The New Zealand Herald*) (“Oracle have been trialing their 90-foot trimaran, worth about \$20 million.”); Kearney Aff., Ex. I (April 24, 2009 *Detroit Free Press*) (“The Americans are already testing a 100-foot trimaran.”). Likewise, the April 24, 2009 *Sail-World.com* article cited by GGYC states “the Challenger is already on its third set of sea trials off San Diego.” Kearney Aff., Ex. J. In addition, a recent Associated Press article, describing GGYC’s decision to once again compete in the court room rather than the water, reiterated that “BMW Oracle Racing has already held three testing sessions aboard its 90-foot trimaran.” Ostrager Aff., Ex. J, at 1 (April 28, 2009 *San Francisco Chronicle*).

On April 2, 2009, the Court of Appeals reversed the Order of the Appellate Division and reinstated GGYC as Challenger of Record. In accordance with the Court of Appeals’ opinion, SNG met with GGYC on April 23, 2009. At this meeting, SNG’s representatives reiterated to GGYC’s representatives the need for GGYC to comply with the Deed of Gift’s requirement that the Challenger of Record provide a Custom House registry of its challenge vessel. Ostrager Affirmation, Ex. I, at 1-2 (April 23, 2008 letter from SNG to GGYC). GGYC, however, still refuses to provide it.

ARGUMENT

The Court of Appeals has ruled that the Deed of Gift must be strictly interpreted. *See Golden Gate Yacht Club v. Société Nautique de Genève*, 2009 WL 856301 (N.Y. Apr. 2, 2009) (agreeing with this Court’s opinion which the Court of Appeals described as “strictly interpreting the Deed of Gift”). The Deed of Gift by its plain language imposes an obligation on GGYC to provide a Custom House registry of its challenge vessel named USA as soon as possible: “a custom-house registry of the [challenger’s] vessel must also be sent as soon as

possible.” Ostrager Aff., Ex. A, at 2. This specific requirement is one component of several aspects of the Deed of Gift that are intended to ensure that the Defender has sufficient time and information about the challenge vessel to defend the Cup:

The Challenging Club shall give ten months’ notice, in writing, naming the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere . . . Accompanying the ten months’ notice of challenge there must be sent the name of the owner and a certificate of the name, rig and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible. Ostrager Aff., Ex. A, at 1-2.

The Deed of Gift thus compels the Challenger of Record to give adequate notice of its challenge. It also unambiguously requires that the Challenger of Record supply specific details concerning its vessel, including specifically a Custom House registry. All of these requirements ensure the Defender sufficient information and time to prepare its defense. GGYC’s objective is to strip SNG of these rights, both by refusing to provide a Custom House registry and by ignoring the clear mandate prohibiting a race in the Northern Hemisphere in February.

In its July 2007 Notice of Challenge, GGYC recognized its obligation to provide such a certificate and represented that “the ‘Custom House’ registry of the challenging vessel will be sent as soon as possible.” Ostrager Aff., Ex. B, at 4. It has now been (i) over twenty-one months since the Notice of Challenge, (ii) a year since GGYC stated in letters that it was in the process of obtaining a Custom House registry and it would be soon forthcoming and (iii) over eight months since GGYC’s racing team publicly launched its challenge vessel on the waters.

Throughout this time, GGYC has offered no excuse why it could not have provided a Custom House registry. It has none. As a result of GGYC's failure to comply with an express requirement of the Deed of Gift, this Court should disqualify it as Challenger of Record or, in the alternative, order GGYC to provide a United States Coast Guard Certificate of Documentation, the modern-day equivalent of the Custom House registry, describing fully the boat GGYC launched on August 25, 2008, to SNG within 30 days.

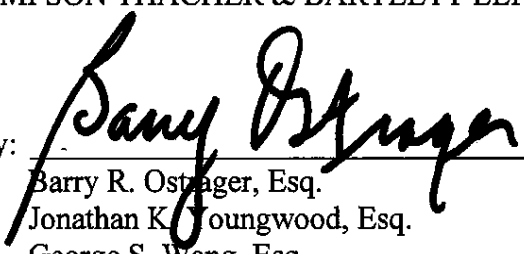
CONCLUSION

For the foregoing reasons, Defendant SNG respectfully requests that the Court enter an order disqualifying GGYC as Challenger of Record, or in the alternative, requiring GGYC to produce a Custom House registry of its challenging vessel within 30 days.

Dated: New York, New York
April 30, 2009

Respectfully submitted,
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