

## PROCEEDINGS

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TRIAL TERM PART 54  
- - - - - X  
GOLDEN GATE YACHT CLUB,

PLAINTIFF,

- against -

SOCIETE NAUTIQUE DE GENEVE, ET AL.,

DEFENDANTS.

- - - - - X  
INDEX NO: 602446/07 60 Centre Street  
New York, New York  
July 21, 2009

BEFORE: HONORABLE SHIRLEY W. KORNREICH, Justice

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NINA J. KOSS, C.S.R., C.M.  
Official Court Reporter

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THE COURT: Good morning.

Before the Court today are two Orders to Show Cause, one from each party.

The first ORDER to Show Cause is from Golden Gate, and it involves the issue of whether or not the rules for the race need be issued at this point. The rules including, I believe, whether or not the ISAF rules will be followed, and whether or not there would be a moveable ballast and power winches. I believe that's the main issue.

Golden Gate asks for contempt, and they argue that the original trust document requires that the rules be mutually decided.

The second Order to Show Cause is brought by SNG, and Golden Gate is the challenger in the race, SNG is the defender.

It involves, if I recall, whether or not the custom house registry called something else at this point, whether that should have been issued and SNG's request that be issued within the next 14 days.

Let me just say something about the concerns of the Court.

It seems to the Court that in the past, the Court of Appeals, as well as Justice Cahn, as well as the case in Mercury Bay, I believe which is the 1980's

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case, has read the document very strictly. And, it's noted that a lot is not said in the document, although there are certain things that are required.

Reading the document, and I am not going to say I have made a decision as yet, it appears to me in looking at the document, if -- and let me get to the document first, dealing with the first issue about the rules, it appears to the Court that under the document the two sides, "the challenger and defender may " -- and the word is "may", "by mutual consent, make any arrangement and issue any rules."

There is a second paragraph in that same document, which addresses the circumstances when there is no mutual consent, as we have here. There it says, "these ocean courses shall be practicable" and it lays out -- this is later on in the paragraph -- lays out what the race will be and talks about what rules are required. It says, "these races shall be sailed subject to its rules -- " and I believe they are referring to the Defender -- "and sailing regulations, so far as the same don't conflict with the provisions of this Deed of Gift, but without any time allowances whatever."

I believe that it's up to the challenged club or the Defender, to set the rules. There is no time

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limit listed here, although I assume, it has to come before the race because the next sentence says, "the challenged club shall not be required to name its representative vessel until a time agreed upon for the start, but the vessel, when named, must compete in all the races, and each of such races must be completed within seven hours."

Now, moving on to SNG's claim, in regard to the custom house registry, all it says there is that it must also "be sent as soon as possible."

There is no definition of what "as soon as possible" means. Although the Court, from reading this document, would assume that it has to be prior to the race date, since the challenged club is given clear advantage by specifically not being required to name its vessel.

I must also state that after having read Mercury, and that seems to be the law now, and also the Court of Appeals case, there seems to be agreement that a specific vessel need not be named either by the challenger or by the challenged club at the time of the challenge.

Now, having said all of that, I will hear argument first from Golden Gate.

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1  
2 MR. KEARNEY: I will try to our explain our  
3 issue. It is, the first point, that the sailing rules  
4 and regulations of the club of the defender apply.

5 When you analyze the document, you must look  
6 at that provision which refers to rules and sailing  
7 regulations, along with the other paragraph that also  
8 refers to rules and sailing regulations, which is the  
9 mutual consent paragraph.

10 Your Honor is absolutely right, the mutual  
11 consent paragraph says the rules and sailing  
12 regulations must refer to the defender's rules and  
13 regulations in the default context. They may be  
14 changed by mutual consent. They may be, but they don't  
15 have to be.

16 THE COURT: It doesn't say "may be changed".  
17 The first paragraph is separate from the second  
18 paragraph dealing with mutual agreement and mutual  
19 consent. Says, "the same may, by mutual consent, make  
20 any arrangement satisfactory to both". Then comes the  
21 default paragraph -- "if there is no mutual consent".

22 MR. KEARNEY: Yes.

23 THE COURT: That's the way I read it.

24 MR. KEARNEY: I think that's correct. So  
25 therefore, if there is no mutual consent satisfactory  
26 to both parties pertaining to the rules and sailing

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1  
2 regulations, all right, then the defender's rules and  
3 sailing regulations apply, right.

4 So, what are the defender's rules and sailing  
5 regulations? That's the question I think you are at  
6 right now in your analysis.

7 THE COURT: Yes.

8 MR. KEARNEY: Are they rules and sailing  
9 regulations that the Defendant can make up two days  
10 before the race?

11 THE COURT: I think the real question, and  
12 maybe I am wrong and you can correct me if I am wrong,  
13 when do those rules and sailing regulations have to be  
14 issued?

15 Is that part of the argument and part of the  
16 request?

17 MR. KEARNEY: I don't really -- that's another  
18 way of saying it. It's really not the question of when  
19 they have to be issued, but whether or not they can be  
20 changed.

21 Our opposition is that defender's sailing  
22 rules that will apply in a default match, are those  
23 that were extant, those that were in existence at the  
24 time of the challenge, which is July of 2007, and we  
25 contend that a parsing of the Deed requires that  
26 conclusion.

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1  
2 And, how does it require that conclusion? It  
3 requires it that way -- if there is no mutual consent,  
4 it says, on sailing rules and regulations the Deed must  
5 apply. Right.

6 Now, if that were to mean, your Honor, that if  
7 there is no mutual consent, then the Trustee, the  
8 defender can choose whatever rules he wants, can make  
9 them up, whatever he wants them to be, and can do that  
10 after the challenger has printed a notice of challenge,  
11 after the challenger constructs their boat, then  
12 according to their reading of this language, the  
13 Defendant could implement whatever rules they want to  
14 implement.

15 That could have a material effect on the boat  
16 that we constructed. It could create a huge  
17 disadvantage once they see the boat.

18 Think about it this way. Once they see the  
19 boat we are going to come with, and we provide a CHR,  
20 they are saying we must provide a CHR before they  
21 provide the rules, including the measurement rules.

22 THE COURT: I think the measurement rules, I  
23 think the document is specific about that. The  
24 measurement rules must be given by the challenger when  
25 they challenge.

26 MR. KEARNEY: I want to make that more clear.

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1  
2 You are absolutely right with respect to that. The  
3 dimensions must be given at the time of the challenge.

4 THE COURT: Right.

5 MR. KEARNEY: The Deed is precisely clear in  
6 what it says. It says those dimensions cannot be  
7 exceeded by the boat we come with. We are talking  
8 about something different.

9 We are talking about -- this is in their  
10 April 23rd letter to us, after our challenge became  
11 acknowledged.

12 SNG said they have the right to implement and  
13 change the measurement rules pertaining to the Deed.  
14 That means this: They are going to put out some kind  
15 of a rule that explains how our vessel is going to be  
16 measured, to determine whether or not it is in  
17 compliance with the certificate.

18 And, I am advised, your Honor, that depending  
19 on how they develop that rule, that can have an impact  
20 on what the measurement is. We must know that rule  
21 before we finish our boat. It goes without saying --  
22 they are thrusting us into a Catch 22 in so many  
23 respects here, your Honor.

24 THE COURT: When you say the measurement rule,  
25 if the measurement rule says they measure a certain way  
26 and your dimensions are beyond those required in the



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Deed, you are disqualified; am I not correct?

MR. KEARNEY: Sorry?

THE COURT: When you say measurement rules, measurements of what?

MR. KEARNEY: You are assuming there is only one way to measure a vessel.

THE COURT: Yes.

MR. KEARNEY: I understand they can propose rules how that measurement takes place. You and I assume you take a measure stick here and laser beam here and you measure the distances. There are measurement rules that can effect what that calculation is. We should know how the calculation would be made.

THE COURT: How would it effect it? How would the type of measuring effect it?

Because, the Deed specifically states where the measurement is to take place, at the time, I believe the water line?

MR. KEARNEY: That's right. It's the beam, it's the three or four dimensions that are in the certificate, and we have got to meet that certificate.

We have got to not exceed those dimensions. That's what the Deed says, right. We are going to comply with that. We know we have to comply with that.

THE COURT: So that the measurement rules

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would then impact on that, would it not?

MR. KEARNEY: The measurement rules is how these measurements will be taken. When you send the people out there -- and there is a measurement committee there. There is measurements provided for in these rules. They will talk about what the measurer is supposed to do, how they are supposed to do work, in order to determine whether or not the boat complies with the Deed requirements. We should know how those measurements are going to be made.

In addition --

THE COURT: Wouldn't you have to know how those measurements would be made prior to the challenge because if, in fact, your measurements exceed those in the Deed, you would be disqualified.

So then, what I am saying is, you would need to know how the measurements were taking place prior to the challenge, not after the challenge, not when you challenge?

MR. KEARNEY: I would say, your Honor, that would be very nice to know, but it's better to know now before we finish the boat, rather than November, which is what they are telling you to do.

It's not just on the measurement rules. It's also on the rules that could govern how that vessel,

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our vessel, will be completed.

That gets us, your Honor, to the issue you raised. The engines in the boat, the engines in the boat are permitted and moveable ballast permitted.

THE COURT: You are talking about for the sail, for the sails?

MR. KEARNEY: Put it this way. There is -- the question is this: Can the contenders have engines on the boats that will put the sails up and down and trim the sails. Can the contending boats have moveable ballast, which as I understand it, is ballast that can be moved hydraulically one place to the next. That's an issue right here.

The ISAF rules that apply to the -- in 2007 when we challenged -- precluded those engines. You couldn't have an engine, you couldn't have water ballast. That's what the 2007 ISAF rules apply.

They admitted in their papers, they are subject to those or, were subject to those rules in July 2007 when we challenged.

THE COURT: A word -- the way I read the papers and the Deed, that they may not well be subject to all of the ISAF rules, but it also is the rules of the club, and each nation has its own rules, which change the ISAF rules to some degree, and then each

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1  
2 club changes it to some degree, and from the papers  
3 from SNG, it appears that they, in fact, have changed  
4 the rules to some degree and waive certain of the rules  
5 now.

6 MR. KEARNEY: Let me address that right now.  
7 Your Honor, I must clarify your reference to "some  
8 degree".

9 You are absolutely right. To some degree  
10 they have waived them, and I will take you through  
11 that, and to some degree they haven't. That's what is  
12 critical to understand when you wade through their  
13 papers.

14 What they have said, they have agreed that the  
15 ISAF 2007 rules generally apply. They have agreed  
16 that Rule 51 and 52 of the ISAF rules preclude the use  
17 of an engine and moveable ballast.

18 What they then say is tricky. What they then  
19 say is, there is hierarchy of rules, and under that  
20 hierarchy of rules there is a regional authority in  
21 Switzerland that has and did change those ISAF rules,  
22 so now you have can an engine and have ballast.

23 They don't tell us when that change happened,  
24 but more importantly, they do tell us in the papers  
25 that that change effected regattas on the Lake Geneva.  
26 This is not on Lake Geneva.

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1  
2 It also said it effected three classes of  
3 regattas, M1, 2 and 3. These America's Cup vessels  
4 are not those classes. So, all they are saying to  
5 you, and we agree with this, all they are saying to you  
6 is that SNG had the ability to opt out of ISAF Rule 51  
7 and 52, and permit engines and permit a ballast. They  
8 had the ability to do that. Their papers do not say  
9 that they ever did that for an America's Cup race by  
10 July 2007.

11 We cited in our papers their annual, their  
12 yacht book, the Yacht Club Book for 2007, and normally,  
13 as we cite in our papers, if a club opts out for all  
14 purposes, opts out of those two provisions for all  
15 purposes, it will be in their club book. It wasn't in  
16 the club book.

17 What happens? We challenge and look at what  
18 the rules are, and the rules for the America's Cup,  
19 which are not a Lake Geneva race or this class, here or  
20 there.

21 We look at the ISAF. You can't have engines  
22 and you can't have ballasts. We look at the club book  
23 for 2007 and we say have they opted out of that? They  
24 didn't. We look at their notice of race for their  
25 annual race, their regatta, their annual regatta for  
26 2006 and 2007. We see there, they didn't opt out of

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those two provisions. Still, engines were not permitted and ballast was not permitted.

We say they are not permitted, and we proceed to build a boat on that basis. Now, they come to you and say two things. They say we changed that rule because we can change it for other races, and we can change it under ISAF, and they are also saying, even if the rule applied or, okay, even if we tried, SNG tried to apply that rule, we couldn't, because the Deed contradicts it. The Deed did not permit a rule that limits this design construction.

Let me put it this way. If SNG had a rule no ballast, and it would violate the Deed, that's wrong. That's their whole point, and I would like to take a minute to explain it to you, why it's wrong.

THE COURT: Tell me.

MR. KEARNEY: It's wrong because you look in the Deed. The Deed is the only concrete thing we got although, I admitted to you, it's simple and elegant, but not complete.

THE COURT: It was complete in 1850 whatever.

MR. KEARNEY: Right. That's absolutely right. I wish I was arguing this case in 1850.

We look at the Deed. It says that, "absent consent, the Defendant's rules apply". Right. That's

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1  
2 what the Deed says. The defender's rules we know,  
3 constrain design. They do in this case. No engines,  
4 no ballast.

5 Then, you look at the Deed and say well, is  
6 that provision in conflict with any other provision of  
7 this Deed? Is it in conflict with any other provision  
8 in it? You look in the Deed, and there is no place  
9 that says the defender cannot preclude engines and  
10 ballasts. There is no place where it says that.

11 But, what it does say, to add strength to our  
12 argument, it does set out in the top of the first  
13 paragraph, on page two of the Deed, those instances  
14 where the defender's rules cannot effect design, and  
15 that's, your Honor, where they say there shall be no  
16 restrictions or limitations whatever, shall be placed  
17 on the center board or sliding keels. So, the Deed  
18 only restricts the defender's rules to the extent they  
19 effect design in these respects.

20 Their argument falls because this paragraph  
21 does not say and the defender cannot restrict or limit  
22 power or use of moveable ballast. Right. So, to  
23 give force to all of those paragraphs, that's the way  
24 you would parse it out.

25 I will stop after my reference to Mercury Bay.  
26 That says nothing different from what I just said.

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Mercury Bay tells us how to analyze the questions, mainly to look to see if there is a provision in the Deed that precludes the design restriction. There is none, and Mercury Bay did not deal with this issue. There was no issue in Mercury Bay about engines and power.

In Mercury Bay, the defender was governed by the defender's rules, who were the predecessor of ISAF. It was the International Sailing Federation that's contained --

THE COURT: They did deal with design -- it was the design. It was the measurements rather than --

MR. KEARNEY: Right, so there was no question. The defender's rules said no power, no ballast. Nobody -- there was no issue about that. Never went to the Court.

What went to the Court was this: Could the defender come up with a catamaran. They look at it, and the Court said, is there any place in the Deed where the defender can't come up with a catamaran.

The Court concluded there was no place -- it was a different issue -- but the analysis set out in Mercury Bay, all the decisions right down, the analysis we just did applied here, tells us that the rules were



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no power, where defender's rule say no power. No engines -- they don't conflict with the Deed.

THE COURT: It doesn't say no power or engines. It says the boat or yacht cannot be powered by an engine.

MR. KEARNEY: Right. No, no, no, no -- it says that Rule 51 says --

THE COURT: You are talking about Rule 51. I am talking about the Deed itself. The Deed itself does not say you can't have an engine or moveable ballast.

MR. KEARNEY: That's correct -- explicitly, it doesn't. The only place where it does, as I said, your Honor, is this paragraph where it says the defender's rules apply. The defender's rule says there is no power and ballast.

THE COURT: Your argument is the defender's rules at the time of the challenge are the rules that apply?

MR. KEARNEY: Yes, and it can only be that way, otherwise the following happens. You completely eliminate the power and effect and meaning of the mutual consent clause because it permits them to make up whatever rules they want to.

Whereas, mutual consent says, hey, wait a minute. If they are not the defender's rules, they are

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going to be changed to something different. There has to be mutual consent.

The other reason why their argument doesn't work, it has absurd results. The Court's have said clearly, you cannot interpret the Deed to have absurd rules.

What it means, it will come right out -- it's totally absurd what they are saying. They don't have to give us the rules until 12 days before the race. They don't have to give us the rules until we finish our vessel or our sea trial, and they don't have to give us the rules, make the decision to put the engine in or not put the engine in.

How is that possible, that a fiduciary can take that position? They can come in here, your Honor, seriously, and come in here and say to you, we have got to have the CHR. They have to complete their boat without knowing what the rules will be or else, they are disqualified. That's the position they have here.

The solution is absolutely clear. The conclusion is, they must give us the rules now and must give us an opportunity to conform our boat to the rules, because the CHR is presented.

THE COURT: Okay.

MR. KEARNEY: Thank you, your Honor.

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1  
2 THE COURT: I am looking for a phrase in here,  
3 but at this moment, I can't find it. When I say "in  
4 here", I am referring to the Deed.

5 Let me ask, counsel, I have a couple of  
6 questions. Your argument, and I am talking about your  
7 opposition to the Order to Show Cause --

8 MR. OSTRAGER: Yes.

9 THE COURT: How does, by your position in  
10 regard to not having to issue the rules until after the  
11 custom house registry is sent to you, how does that  
12 comply with the intent of the Deed of Gift, which  
13 speaks to friendly competition and also, how does that  
14 fit in with the good faith?

15 It would seem to me, that if you can change  
16 the rules, and to the extreme, and I would say absurd  
17 results, as to disqualify the challenger, that's  
18 neither good faith, nor is it very friendly.

19 MR. OSTRAGER: Well, I wanted to preface  
20 everything, your Honor, by commending your Honor on  
21 your knowledge of sailing and familiarity with the  
22 Mercury Bay case.

23 In response to your specific question, while  
24 this was intended to be a friendly competition, I think  
25 your Honor can take judicial notice that this has not  
26 been a friendly competition since this is the second

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1  
2 time in less than six months that GGYC has frivolously  
3 advanced a contempt motion against SNG. And, I think  
4 the short answers to your Honor questions are that what  
5 Mr. Kearney is trying to do is re-litigate the Mercury  
6 Bay case.

7 The Mercury Bay case is very, very clear about  
8 how a Deed of Gift operates, and that the only relevant  
9 document that we have to concern ourselves with is the  
10 Deed of Gift, and the only relevant case law is the  
11 authoritative holding of the New York Court of Appeals  
12 in the only other Deed of Gift match that's taken place  
13 in the last century.

14 Now, the Mercury Bay case, I have some  
15 excerpts on the board and your Honor has a copy, which  
16 I handed up to you, and gave to Mr. Kearney, where the  
17 New York Court of Appeals said in 90's, "nothing in the  
18 Deed limits the design of the defending club's vessel  
19 other than the length of the water-line limits  
20 applicable to all competing vessels." That's that.

21 That means that when they issue their notice  
22 of challenge and specify the dimensions of their boat,  
23 they are going to be measured and they are going to  
24 have to comply with the requirements of the boat  
25 certificate that they gave, as reflected in the CHR.

26 THE COURT: Is it your position, you can

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1  
2 change the way the boat is measured which, in that way,  
3 disqualifies the challenger?

4 MR. OSTRAGER: The boat has to be a 90 by 90  
5 by 90.

6 THE COURT: Is there a different way to  
7 measure it?

8 MR. OSTRAGER: No. You measure it on the  
9 water-line. I don't know what Mr. Kearney is talking  
10 about.

11 There is, under ISAF rules, and your Honor has  
12 attached, as the last exhibit to my affidavit, a copy  
13 of the letter that I issued just on July 17th saying,  
14 "International Sailing Federation, the world governing  
15 body of the sport, SNG, the trustee and holder of the  
16 America's Cup, are pleased to announce the 33rd  
17 America's Cup match will be conducted under the Deed of  
18 Gift provisions, the SNG rules, and the ISAF racing  
19 rules of sailing and ISAF regulations as required by  
20 the Deed of Gift. Any changes to the ISAF rules and  
21 regulations not already covered by provisions within  
22 the ISAF rules and regulations, will require sanction  
23 from ISAF."

24 Now, in the Mercury Bay case, the Court of  
25 Appeals said very explicitly, we are not going to deal  
26 with Deed of Gift issues, and anything having to do

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1  
2 with sailing rules, anything having to do with boat  
3 construction issues. That gets dealt with by ISAF or  
4 what was then the predecessor of ISAF, because that's  
5 not something that the Courts are going to sit in  
6 judgment on.

7 The Courts aren't going to sit in judgment and  
8 decide whether this rule or that rule is an appropriate  
9 sailing rule or whether this, you know, manner of  
10 construction or that manner of construction is  
11 appropriate. The Courts are only going to interpret  
12 the literal terms of the Deed of Gift.

13 Now, when the First Department dealt with the  
14 Mercury Bay case, they said "the only constraints on  
15 boat design are set forth in the Deed, which states  
16 that a challenger is entitled to a match against any  
17 yacht or vessel, propelled by sails only, which are  
18 single masted, and must measure between 44 and 90 feet  
19 on the load water-line." They said they will produce a  
20 boat that will measure 90 feet square on the  
21 water-line.

22 THE COURT: Let me ask you this, and I will  
23 repeat what I said before.

24 Can you change the rules as to measuring?

25 MR. OSTRAGER: No. ISAF has rules as to who  
26 measures the boat, and what kind of measuring stick one

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1  
2 uses, but the Deed of Gift clearly indicates that, what  
3 the size of the boat can be.

4 THE COURT: That's not what I am asking.

5 I am asking whether ISAF rules, at the time  
6 the challenger measured their boat are still extant,  
7 and will those be the same rules used for measuring  
8 now, when you issue your rules or when the ISAF issues  
9 its rules?

10 Did I get an answer on that?

11 MR. OSTRAGER: The answer is that the rules  
12 can change. There is rules -- various rules can  
13 change. That's been the case with respect to any Deed  
14 of Gift challenge.

15 THE COURT: That's not what I am asking. I  
16 am asking specifically, in regard to the measuring, the  
17 way the measuring is done.

18 MR. OSTRAGER: It's going to be 90 feet on the  
19 water-line. I am not sure I understand your question  
20 beyond that.

21 THE COURT: I am asking, according to the  
22 challenger, Golden Gate, the way the water-line, the  
23 boat is measured on the water-line can change.

24 MR. OSTRAGER: I don't believe that to be the  
25 case. I think there is only one way to measure the  
26 boat on the water-line. It has to be 90 feet. That's

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my understanding.

THE COURT: So that the measuring, the way it's measured, is in the ISAF rules now, it was in the ISAF rules -- I am talking about measuring the boat -- was in the ISAF rules at the time of challenge, and it will be the same rules as to measuring when you issue, when ISAF issues its rules; am I correct?

MR. OSTRAGER: The other time, at the time of the challenge, was April 29th, 2009. That's when the Court of Appeals declared Golden gate to be the challenger of record, but I want to call your attention --

THE COURT: I am just asking you, is it going to be the same rules of measurement?

MR. OSTRAGER: I honestly don't understand the question, your Honor. I don't believe there is a different way of measuring what 90 feet on the water-line is.

THE COURT: Can you --

MR. OSTRAGER: ISAF rules can positively change. That's been recognized by the Court of Appeals.

THE COURT: So, you are saying that the argument as to how one would measure, can't be changed? It's going to be the same way to measure?



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1  
2 MR. OSTRAGER: I believe, your Honor, that  
3 measurement is going to be 90 feet on the water.

4 THE COURT: I am not asking whether it's 90  
5 feet on the water. I am asking --

6 MR. OSTRAGER: However ISAF decides  
7 measurements are supposed to be made, that's how they  
8 should be made -- correct.

9 THE COURT: Well, so --

10 MR. OSTRAGER: That's precisely what the Court  
11 of Appeals sanctioned in the Mercury Bay case.

12 THE COURT: I am still not clear on whether  
13 you answered my question.

14 The way that one measures, the stick one uses,  
15 or whatever one does to find that 90-foot measurement,  
16 is that going to be the same as it was on the date of  
17 challenge?

18 MR. OSTRAGER: I believe so, your Honor. I  
19 believe so, your Honor.

20 But, let me get to the --

21 THE COURT: Is that a commitment? Because,  
22 what I am saying is, if not, it is not, it would be  
23 absurd.

24 MR. OSTRAGER: No, it would not be absurd.

25 THE COURT: Let me tell you why I think so.  
26 Because, if the measurements, the way of measuring

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changes and it's more than 90 feet or is it 90 feet or 90 meters -- I forget -- but, if it's more than 90, the challenger is disqualified.

MR. OSTRAGER: Let me explain what happened in the Mercury Bay case so there is no misunderstanding about this.

In the Mercury Bay case, Mr. Ehman, now chief operating officer of the Golden Gate Yacht Club, was then the Chief Operating Officer of a sister club called the San Diego Yacht Club.

THE COURT: I remember reading that in your papers.

MR. OSTRAGER: This is what Mr. Ehman said when he was representing the San Diego Yacht Club, which was the defender for the 2007 America's Cup.

He said, the race shall be sailed subject to such rules and sailing regulations as may now or hereafter be promulgated by the San Diego Yacht Club, so far as they don't conflict with the provisions of the Deed of Gift. No time allowance shall be permitted." That's what Mr. Ehman said about the San Diego Yacht Club.

Well, we took Mr. Ehman's exact language and the only change that we made was, we substituted SNG for San Diego Yacht Club. So, we said, "the race shall

## PROCEEDINGS

1  
2 be subjected to such rules and regulations as may now  
3 or hereafter be promulgated by SNG, so far as they do  
4 not conflict with the provisions of the Deed of Gift.  
5 No time allowances shall be permitted."

6 What the Court of Appeals sanctioned in the  
7 Mercury Bay case is exactly verbatim, verbatim, what we  
8 have advanced here.

9 THE COURT: I have two questions.

10 MR. OSTRAGER: This is verbatim.

11 THE COURT: I have two issues here.

12 One, if you follow that, it can go to absurd  
13 lengths, in that rules could be issued which would  
14 disqualify the challenger.

15 Are you telling me now that that will not  
16 happen?

17 MR. OSTRAGER: I don't believe that's going to  
18 happen. I am telling you, it's not going to happen.  
19 I am telling you this is all confected. They got a  
20 letter in April, and here we are in July on content  
21 issue.

22 THE COURT: Then, I will move on to the next  
23 issue I have. Let me ask you something else.

24 Is it your position, that the rules, Rules 49  
25 to 54, because I believe those are the ones in  
26 contention, and within those rules are the rules

## PROCEEDINGS

1  
2 dealing with the moving ballast and the wenches, is it  
3 your position, that that may or may not happen and that  
4 is within the ability and --

5 MR. OSTRAGER: Absolutely. That's the  
6 purpose of my showing you these excerpts from the San  
7 Diego Yacht Club, 2007, this America's Cup, and our  
8 yacht club.

9 THE COURT: It's your position, that the rules  
10 need not be issued until shortly before the race?

11 MR. OSTRAGER: Well, the notice of race in the  
12 Mercury Bay case was issued 16 days before the race was  
13 commenced.

14 THE COURT: I read that.

15 MR. OSTRAGER: 16 days. Now, what I would  
16 also like to call to your Honor's attention is this is  
17 what Mr. Ehman said, and it's in the Shackenberg (ph)  
18 affidavit that we submitted in connection with our  
19 opposition here.

20 He said, "most of you will realize that -- "  
21 this is a direct quote, "most of you will realize that  
22 in this Cup, there are no rules except that the yacht  
23 must be built in the country of the yacht club. There  
24 are no standing rules, no materials limitations on  
25 using exotic materials."

26 So, years ago, the engineering that BMW is

## PROCEEDINGS

1  
2 able to bring -- probably is just an open world. There  
3 are no rules. It's a brave, new world. Very exciting,  
4 very interesting, and more than a little scary."

5 The point of Mr. Eman's comments, which we  
6 quoted, these are -- he is the representative of Golden  
7 Gate -- the point of his rules is that the America's  
8 Cup is a design contest. It's a design contest --  
9 just like a Formula One car race is a design contest.

10 It's as much a design content as it is a  
11 sailing contest, and because the Court of Appeals has  
12 previously held that there is nothing in the Deed that  
13 limits the design of the defender cup vessel other than  
14 the length of the water-line limits, applicable to all  
15 competing vessels, this is a frivolous application.

16 We have the international body that's in  
17 charge of promulgating rules for the sailing  
18 communities. We have the Deed of Gift provision that  
19 says you run the race in accordance with the defender's  
20 rules, and except to the extent that they are  
21 inconsistent with the Deed of Gift, there are no  
22 prohibitions on any designs. That's what the Deed of  
23 Gift says.

24 Now, I find it incredibly ironic that Golden  
25 Gate, which went to the New York Court of Appeals  
26 arguing so vociferously and successfully, as was the

## PROCEEDINGS

1  
2 case in the Mercury Bay case, that the Deed of Gift has  
3 to be construed narrowly and literally. You can't add  
4 anything to the Deed of Gift, you can't imply anything  
5 from the Deed of Gift. You have to apply it as it is  
6 written.

7 As it is written, nothing in the Deed limits  
8 the design of the defending club's vessel, other than  
9 the length of the water-lines applicable to all  
10 competing vessels.

11 THE COURT: If you have been relying on  
12 Mercury, and also on the recent Court of Appeals  
13 case -- but looking at those cases, isn't it clear that  
14 the challenger need not be a specific vessel?

15 MR. OSTRAGER: I would say that Golden Gate  
16 has announced what its boat is. They have launched it  
17 now twice.

18 THE COURT: Well, this is my problem with  
19 that.

20 The Deed of Gift states that they are to give  
21 the CHR and send the CHR, quote, as soon as possible,  
22 unquote.

23 It doesn't say, "as soon as" -- what that  
24 means. Now, can't that be interpreted to mean as soon  
25 as the design, the trials are over? And that maybe,  
26 that may not happen until they are sure that their boat

## PROCEEDINGS

conforms to the rules?

MR. OSTRAGER: Well, I am not going to argue with what "as soon as possible" means. I am not going to argue about that.

We think that, and I thought your Honor said last May, that as soon as practicable meant after the boat is launched.

If they want to quibble with that, that's fine. I am only here to say that, you know, there are --

THE COURT: Aren't you asking me to issue an Order directing Golden Gate to send you the CHR within 14 days?

MR. OSTRAGER: I am saying that we think that we undertook a mediation in good faith, pursuant to your Honor's suggestion.

There were discussions in the mediation which were confidential. I am not going to, you know, disclose who said what to whom. That would be inconsistent with the spirit of the mediation.

But, I will say that in the middle of the mediation, papers were filed holding us, seeking to hold us in contempt. When that happened, we thought that there had been, you know, a breach of good faith.

We think that this CHR is something that needs

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1  
2 to be filed as soon as practicable, and whenever that  
3 turns out to be, that's fine.

4 The ISAF rules, racing rules of sailing, you  
5 know, have been promulgated by the ISAF. They will be  
6 promulgated. There will be further rules that will be  
7 promulgated.

8 We have attached to the Meyer affidavit, the  
9 current version of those rules. ISAF has said if  
10 there are any further changes in the rules, they have  
11 to be approved by ISAF.

12 I am telling you, in the interest of full  
13 disclosure, that Rules 49 through 54, are not going to  
14 apply to any boat in this upcoming America's Cup.

15 THE COURT: So, that is the position of SNG?

16 MR. OSTRAGER: The position of ISAF and SNG.

17 I am telling you, there is no basis for  
18 contempt.

19 I am telling you, there is nothing in the Deed  
20 that limits the design of the Defendant boat. I am  
21 telling you, that the motion for contempt should be  
22 denied.

23 The Order to Show Cause should be dismissed,  
24 and in all events, since the notice of race hasn't been  
25 issued, it's entirely premature to be challenging  
26 what's in a notice of race that hasn't even been issued



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1  
2 yet.

3 So, I am telling you we shouldn't be here this  
4 morning on their application, and as far as the  
5 issuance of the CHR, we will leave that to your Honor's  
6 discretion as to when you think is a reasonable time  
7 for them to submit it.

8 THE COURT: Let me -- I have a couple of  
9 questions for the other side.

10 Frankly, in reading these papers, I agree with  
11 your opponents or adversary, there is no basis for  
12 contempt. I cannot figure out why you would make a  
13 contempt motion.

14 MR. KEARNEY: Let me answer that, your Honor.  
15 It's, as far as I know, maybe you can correct me, it's  
16 the only vehicle to come before this Court.

17 We understand he is not going to be held in  
18 contempt. The contempt provision, in cases cited  
19 under it, permit you to enforce the Deed, to enforce  
20 the judgment to require compliance. We are here to  
21 require compliance.

22 That's what why we brought that motion.

23 Let me also say, I do think that the press  
24 release that counsel referred to, the joint SNG/ISAF  
25 press release that came out a day or two ago, no doubt  
26 in the context of this hearing, and the statement of

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1  
2 Mr. Fred Meyer, that they put in the affidavit at  
3 paragraph 14, both of those are, in fact, right now, a  
4 violation of the judgment or violation of the Order,  
5 because they violate the Deed.

6 In both instances, in the press release they  
7 put out and in paragraph 14 of the Meyer affidavit,  
8 they said all right, that they can change the rules to  
9 apply, that will apply to the match, without our mutual  
10 consent.

11 THE COURT: I don't see why they can't.

12 What, in the Deed, says they cannot do so?

13 MR. KEARNEY: What the Deed says they can't do  
14 is in a reading of the two paragraphs together. The  
15 two paragraphs together say in that default match, the  
16 defender's rules apply. All right.

17 But, if the defender's rules can be any rules  
18 they make up at any time, it obliterates the meaning,  
19 effect, and force of a mutual consent provision. It  
20 says that you can have whatever rules you want. You  
21 don't have to -- it does not have to be mutual consent  
22 with GGYC. That's why it violates the Deed.

23 THE COURT: The way I read the Deed, the  
24 mutual consent paragraph is separate from the default  
25 paragraph.

26 MR. KEARNEY: It is separate, but clearly, the

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1  
2 New York rules of trust construction and contract  
3 construction, requires that you read them together.  
4 You harmonize them, to the extent you can. You can't  
5 read one, such as it gives no effect and meaning to the  
6 other, and the rules also say you can't read them  
7 collectively to result in absurd results.

8 Those are absolutely clear principles of  
9 construction that guide the Court.

10 THE COURT: Well, at this point, there have  
11 been what I view as two concessions by the other side.  
12 One, that ISAF and SNG will not apply Rules 49 through  
13 54 and I believe that's been stated here in open  
14 Court -- and you now know that.

15 And, also, that counsel does not believe that  
16 the measurement rule, whatever comes out, will  
17 disqualify Golden Gate.

18 Why is that not sufficient? It gets rid of  
19 any absurdity.

20 MR. KEARNEY: It's not sufficient for two  
21 reasons.

22 First, you have to decide whether or not they  
23 are permitted to change the rule under the Deed. Once  
24 we know that they are permitted to change the rules, 51  
25 and 52, that changes -- so engines are permitted --  
26 once we know that, we know how we can design or

## PROCEEDINGS

redesign the boat. That's the number one problem.

Yes, he made the concession. We contend he --  
I can't make the concession. You have to decide it.

THE COURT: I don't understand. If 49 through  
54 do not apply, don't you also already know what the  
rules are?

MR. KEARNEY: We have designed our boat on the  
basis of our reading of this Deed, which we think is  
correct, that the rules proscribed did not permit an  
engine, and did not permit moveable ballast.

Now they are saying so it does permit it. We  
are saying to you, they can't make that change.

Once you decide that, we know what we must do  
to prepare our boat, to make sure we can compete, to be  
sure we can't have delays in completing of the boat.

THE COURT: You have already taken the boat  
apart once, and now are doing second trials.

If you know 49 through 54 don't apply, what  
prejudice is there to you now in --

MR. KEARNEY: We have got the -- if we know  
that they apply,, we have got to do what we need to do  
to the boat, to get ready for that kind of a race, and  
we need time to do that. The prejudice, that's number  
one.

Number two, we have relied on those rules in

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1  
2 what we have done already. To the extent we have got  
3 to take time to reconstruct, re modify the boat, that  
4 takes time from our other preparations for the race.

5 THE COURT: To the extent that you don't give  
6 the other side a CHR, and re modify, also effects the  
7 other side.

8 MR. KEARNEY: We have had that argument  
9 before. We don't think it effects the other side  
10 because we don't think the CHR gives them any real  
11 information.

12 The real issue is whether we will abide by the  
13 certificate. We still have to come with a boat that  
14 complies with those, the Deed requirements and the  
15 certificate.

16 I will end, your Honor, with just directing  
17 your attention to one other piece in the record that  
18 may be useful for you to consider. And that is, the  
19 letter, April 23rd letter that counsel had up from SNG  
20 to us, April 23rd of this year.

21 He didn't read or highlight paragraph eight on  
22 that, and I will read it to you, and it appears in the  
23 affirmation supporting our motion at J. It was right  
24 here, your Honor, and I thought he was talking about  
25 the word ironic -- I thought it was ironic to listen to  
26 Mr. Ostrager standing right in front of that paragraph.

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I will read that paragraph to you.

It says Societe Nautique de Geneve, may adopt regulations clarifying and implementing the provisions of the Deed of Gift related to measurements of the challenging vessel and its compliance, with no notice of challenge. We will promptly advise you of the adoption of any such regulations."

So, they retain, they are retaining their -- they maintain the ability and the authority to clarify and implement how this is going to happen.

That concerns us greatly, as we are finishing our vessel. There is no reason on God's earth, they haven't given us those regulations, those clarifying and implementing regulations. They state here they will give us to April, and they haven't given them to us yet, but they want to disqualify us for not completing our boat.

THE COURT: Okay. I believe I have heard enough.

I will reserve decision on this, although I will tell you right now, I am not holding SNG in contempt.

Can the parties step up?

(Whereupon, there was a discussion had off the record, at this time).

NK

THE COURT: It's been agreed by the parties that, and this is something I had not touched upon, there is agreement between ISAF and SNG. The agreement will be submitted to the Court in camera. That's been agreed to?

MR. OSTRAGER: Yes, your Honor.

THE COURT: It's also been agreed that if the Court feels it necessary, that agreement may be turned over to Golden Gate with a -- if Golden Gate signs a confidentiality agreement; am I correct?

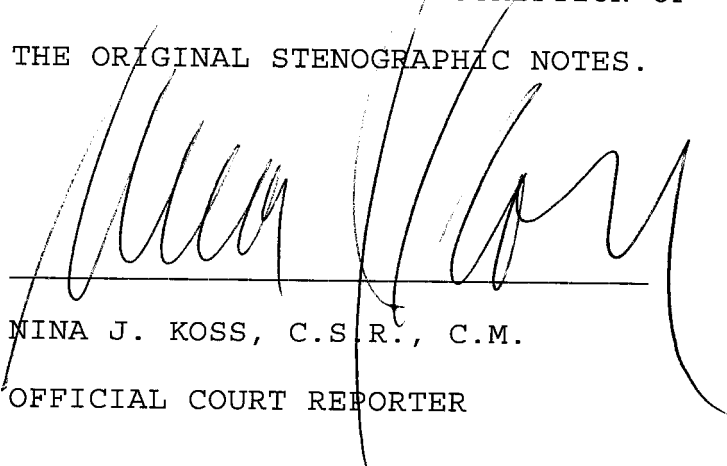
MR. OSTRAGER: Correct, your Honor.

MR. KEARNEY: Correct, your Honor.

THE COURT: Okay. Thank you.

XXX

THE FOREGOING IS CERTIFIED TO BE A  
TRUE AND ACCURATE TRANSCRIPTION OF  
THE ORIGINAL STENOGRAPHIC NOTES.



NINA J. KOSS, C.S.R., C.M.

OFFICIAL COURT REPORTER

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