

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

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GOLDEN GATE YACHT CLUB, :
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Plaintiff, : Index No. 602446/07
:
v. : IAS Part 54
:
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 July 15, 2009 and the exhibits annexed thereto (“Ostrager Aff.”), in support of its order to show cause why an order should not be entered compelling Golden Gate Yacht Club (“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, and relaunched on July 6, 2009) within 14 days, or face disqualification. Because this claim for relief is related to the order to show cause sought on July 14 by GGYC, SNG requests that this order to show cause be heard on the same schedule, with opposition papers due July 20, 2009 and a hearing set for July 21, 2009, at 10:00 am.

PRELIMINARY STATEMENT

On May 14, 2009, this Court “direct[ed] Golden Gate, in good faith, to abide by the deed, to make an application for the CHR as soon as possible and provid[e] it as soon as possible.” Ostrager Aff., Ex. Q (Transcript of May 14, 2009 Hearing, at 27:15-18). GGYC has done neither. This Order was well-supported by the unambiguous language of the Deed of Gift, which states, in relevant part:

The Challenging Club shall give tens 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.

In the two months since this Court’s order (and two years since GGYC issued its Challenge) GGYC has yet to provide a Custom House registry or to offer any hint of when it will do so. GGYC refuses to provide this important document despite the fact that, on July 6, 2009, GGYC relaunched its challenge vessel. Ostrager Aff., Ex. J (July 6, 2009, press release by GGYC’s racing team, BMW Oracle Racing). There is simply no reason whatsoever that GGYC can not now provide a Custom House registry. We ask the Court order that it do so within 14 days or face disqualification.

Further demonstrating GGYC’s utter lack of good faith was GGYC’s unilateral and surprise decision to abandoned court-ordered mediation this week by seeking yet again and without basis a contempt order against SNG. On May 26, 2009, this Court ordered the Parties to

engage in mediation. Ostrager Aff., Ex. K (Court Order dated May 26, 2009). That mediation began, continued voluntarily beyond the four-hour minimum requirement, and was not terminated until GGYC effectively did so by filings its present motion. We will respond to GGYC's baseless motion in full on July 20. But in seeking the order to show cause, GGYC has made it clear once again that it is intent on waging litigation on all fronts against SNG rather than facing GGYC on the water.

PROCEDURAL HISTORY

On July 11, 2007, GGYC issued a Notice of Challenge for the 33rd America's Cup. GGYC's Notice of Challenge 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. On April 2, 2009, the Court of Appeals declared GGYC the Challenger of Record for the 33rd America's Cup. In accordance with the Court of Appeals' opinion, SNG met with GGYC on April 23, 2009 to discuss the next America's Cup race. 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). As early as, April 29, 2008, GGYC stated 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).¹ 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). Despite repeated requests by SNG for the Custom House Registry², GGYC, has refused to provide it.

On May 1, 2009, this Court entered an order to show cause why an order should not be entered disqualifying GGYC as the Challenger of Record for the 33rd America’s Cup for failure to provide a Custom House registry of its challenge vessel as required by the Deed of Gift governing the America’s Cup. Ostrager Aff., Ex. P (Order, dated May 1, 2009).

SNG argued, and still maintains, that given that GGYC’s racing team, BMW Oracle Racing, launched its 90-foot multi-hull racing yacht on August 25, 2008, the Custom House registry is long overdue. Ostrager Aff., Ex. H (August 25, 2008 press release by GGYC’s racing team, BMW Oracle Racing). Furthermore, it is clear that GGYC and its racing team BMW Oracle Racing have repeatedly actively tested 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 spectacular 90ft trimaran last year, and are in their third round of

¹ 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. Ostrager Aff., Ex. D (April 29, 2008 letter from GGYC to SNG). In this and subsequent letters, GGYC repeatedly stated it would provide the Custom House registry as soon as possible. See *id.*; Ostrager Aff. Ex. F (May 20, 2008 GGYC press release).

² SNG has repeatedly requested GGYC to provide a Custom House registry, including its letters of April 23, 2008, Ostrager Affirmation, Ex. I, at 1-2 (April 23, 2008 letter from SNG to GGYC), April 28, 2008, Ostrager Aff., Ex. C (April 28, 2008 letter from SNG to GGYC), 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).

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.”).

In response, GGYC argued before this Court that it was not obligated to provide a Custom House registry because construction of its challenge vessel “has not been completed.” Ostrager Aff., Ex. L (Affidavit of Michael D. Drummond, dated May 11, 2009). GGYC submitted to this court that the “boat that began sea trials in August 2008, referenced in Société Nautique de Genève’s cross-motion dated April 30, 2009, has been since March 2009 taken apart.” *Id.*

On May 14, 2009, this Court ruled as follows:

In regard to SNG's application, I am stating right now that, although the deed does not require a certain date, the deed does require that the vessel conform to the challenge dimensions. If the CHR does not conform to the challenge dimensions, it is this Court's belief, and my direction, that Golden Gate will be disqualified, and I am directing Golden Gate, in good faith, to abide by the deed, to make application for the CHR as soon as possible and providing it as soon as possible. That's the order of the Court.

Ostrager Aff., Ex. Q, at 27:8-18. On, May 15, 2009 the Court issued a written order stating that “it is ordered that this motion is decided in accordance with the decision/order of the court on the May 14/09 record.” Ostrager Aff., Ex. N (Orders, dated May 15, 2009)³.

On May 26, 2009, this Court ordered the Parties to engage in mediation. Ostrager Aff., Ex. K. That mediation began and was voluntarily extended beyond the four-hour minimum requirement.

³ The Court issued two identical orders addressing both GGYC’s motion sequence 007 and SNG’s motion sequence 008.

On July 6, 2009, GGYC relaunched its challenge vessel. Ostrager Aff., Ex. J. The Associated Press reported in an article entitled “BMW Oracle Racing refloats its America’s Cup boat” that: “BMW Oracle Racing of San Francisco, relaunched its massive trimaran on Monday after the carbon-fiber boat was significantly modified during the last four months.” Ostrager Aff., Ex. M (Bernie Wilson, “BMW Oracle Racing refloats its America’s Cup boat”, Associated Press State & Local Wire, July 6, 2009).

On July 8, 2009, GGYC “started sea trails of their 90-foot by 90-foot high-tech racing machine in the waters off Point Loma in San Diego.” Ostrager Aff., Ex. O (July 8, 2009, press release by GGYC’s racing team, BMW Oracle Racing). GGYC’s press release stated that “[w]e still have plenty to do to complete sea trial and be ready for the America’s Cup in February so every day counts. It is only seven months until the America’s Cup so we are now in the home stretch.” Ostrager Aff., Ex. J.

Despite all this, however, GGYC still has not provided a Custom House registry.

ARGUMENT

There is no dispute GGYC is obligated to provide a Custom House registry “as soon as possible”. In fact, GGYC has told the Court that “GGYC will of course proceed now to obtain a Certificate of Documentation (“CoD”), the modern-day equivalent of the CHR in the United States, from the U.S. Coast Guard National Vessel Documentation Center (“NVDC”). It will provide its CHR to SNG ‘as soon as possible’....” GGYC Memorandum of Law in Opposition to Defendant’s Cross-Motion to Disqualify Plaintiff from the America’s Cup, dated

May 11, 2009, at p. 4 (“GGYC Opp. Brief”).⁴ Accordingly, this Court, nearly two months ago “direct[ed] Golden Gate, in good faith, to abide by the deed, to make an application for the CHR as soon as possible and provid[e] it as soon as possible.” Ostrager Aff., Ex. Q, at 27:15-18. GGYC has done neither.

GGYC’s argument that it could not provide its Custom House registry until it had completed construction of its vessel, was and still is without merit. GGYC Opp. Brief at p. 4. The Deed of Gift’s requirement that the challenger provide the Custom House registry “as soon as possible” reasonably implies an obligation to construct its challenge vessel in a good faith, timely manner. It would render such a requirement meaningless if GGYC could delay providing the Custom House registry simply by continually testing and modifying and not “completing” construction of its vessel.

Likewise, the Deed contemplates the challenger’s designation of a specific boat, rather than of some amorphous dimensions that the challenger can later design within. The Deed of Gift’s language clearly requires the challenger to challenge in a specific vessel. Ostrager Aff., Ex. A, at 1-2 (quoted above at page 2). It requires the challenger to provide with its challenge information about “the challenging vessel,” including the name, rig and specified dimensions of the challenging vessel. Later in the same sentence the Deed obligates that “a custom-house registry of the vessel must also be sent as soon as possible.” This language makes clear the Deed

⁴ 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. Ostrager Aff., Ex. A, at 1-2 (quoted above at page 2). The Deed of Gift thus compels the Challenger of Record to give adequate notice of its challenge.

contemplates a challenge in a specific vessel. GGYC is not entitled to continually build new vessels in order to evade the Custom House registry requirement. After relaunching its challenge vessel last week, GGYC is now out of excuses. Ostrager Aff., Ex. J.

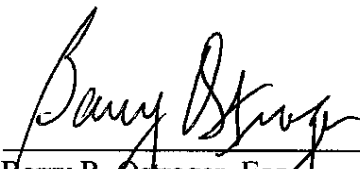
It has now been (i) over two years since the Notice of Challenge, (ii) over a year since GGYC stated in letters that it was in the process of obtaining a Custom House registry and it would be soon forthcoming; (iii) over ten months since GGYC's racing team publicly launched its challenge vessel on the waters; (iv) nearly two months since this Court "direct[ed] Golden Gate, in good faith, to abide by the deed, to make an application for the CHR as soon as possible and provid[e] it as soon as possible"; and (v) over a week since GGYC relaunched its challenge vessel. GGYC cannot be permitted to delay further.

CONCLUSION

For the foregoing reasons, Defendant SNG respectfully requests that the Court enter an order requiring GGYC to produce a Custom House registry of its challenging vessel within 14 days and, if it fails to do so, disqualify GGYC as Challenger of Record.

Dated: New York, New York
July 15, 2009

Respectfully submitted,
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