SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Golden Gate Yacht Club,	:	**Index No. 602446/07**
Plaintiff,	:	**IAS Part 54**
v.	:	**NOTICE OF MOTION**
Société Nautique De Genève,	:	
Defendant,	:	
Club Náutico Español de Vela,	:	
Intervenor-Defendant.	:	**ORAL ARGUMENT REQUESTED**

PLEASE TAKE NOTICE that, upon the annexed Combined Affirmation Of Cory E. Friedman And Memorandum Of Law In Support Of Motion, Movants will move this Court at the Motion Support Courtroom – Submissions Part, Room 130, at the New York County Courthouse, 60 Centre Street, New York, New York 10007, on the 18th day of September, 2009 at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order directing public disclosure of the Agreement between the International Sailing Federation and Société Nautique De Genève regarding the 33rd America's Cup Match.

PLEASE TAKE FURTHER NOTICE that, pursuant to CPLR 2214(b), all answering papers, if any, including any memoranda of law, and any notice of cross motion with supporting papers shall be served upon the undersigned at least seven (7) days prior to the return date of this motion.

Dated: New York, New York
September 2, 2009

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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

Golden Gate Yacht Club,	:	**Index No. 602446/07**
Plaintiff,	:	**IAS Part 54**
v.	:	**COMBINED AFFIRMATION OF**
Société Nautique De Genève,	:	**CORY E. FRIEDMAN AND MEMORANDUM**
Defendant,	:	**OF LAW IN SUPPORT OF MOTION**
Club Náutico Español de Vela,	:	
Intervenor-Defendant.	:	**ORAL ARGUMENT REQUESTED**

CORY E. FRIEDMAN affirms under penalties of perjury, pursuant to CPLR 2106:

1. I am an attorney duly admitted to practice before the Courts of the State of New York and attorney for Movant Inbox Communications, Inc., d/b/a Scuttlebutt ("Scuttlebutt") and Movant *pro se* ("Movants") on this motion (the "Motion") for an order directing public disclosure of the agreement between the International Sailing Federation ("ISAF") and Société Nautique De Genève ("SNG") regarding the 33rd America's Cup Match (the "Agreement"). I am also a longtime competitive sailor and the father of two competitive sailors much more accomplished than I.

2. Although Movants do not believe intervention pursuant to CPLR §1012(a)(1) or §1013 is necessary for the limited purpose of this Motion, to the extent intervention is necessary, Movants move for such intervention. Movants' interests on this Motion are not represented by the parties and certainly not by the missing in action

Attorney General of the State of New York, statutory guardian, protector and overseer of charitable trusts.

3. Scuttlebutt is an e-mail and online newsletter, published Sunday through Thursday evenings, providing a digest of major sailing news, commentary, opinions, features and dock talk, with a North American focus. *See* http://www.sailingscuttlebutt.com. It has 18,000 e-mail subscribers and 60,000 unique visitors per month to its website and is the leading daily source of sailing news. Filling a unique niche it is widely subscribed and read by the worldwide sailing community, from the most casual occasional club racers to Olympians and members of the America's Cup community. Thus, Scuttlebutt reaches a very large number of the members of the sailing public, which, under the terms of the Deed, are the beneficiaries of the charitable trust created by the Deed of Gift ("Any organized Yacht Club or a foreign country, . . . having . . . shall always be entitled to the right of sailing a match for this Cup"). In particular, Scuttlebutt reaches the portion of sailing public following the America's Cup.

4. As soon as this action was commenced many sailors reflexively expressed the opinion that this Court was incapable of competently resolving this controversy in any reasonable period of time and that the legal system was a Dickensian quagmire. In addition, the parties commenced well funded dueling public relations/propaganda campaigns, each claiming certain victory. Many sailors were baffled.

5. Having practiced in the Commercial Division, I wrote a letter to the editor of Scuttlebutt pointing out that "The Commercial Division of the [Supreme] Court was instituted for one purpose -- to get important cases done quickly, efficiently, and

correctly. It is staffed with a small number of excellent justices with excellent support," that the Appellate Division, First Department and the Court of Appeals were highly competent and fully capable of expedition, and that this Court was the best venue to resolve this dispute. As a result, Craig Lewek, publisher of Scuttlebutt, offered me space to publish a series on this litigation with a view of explaining the litigation and the legal system to lay sailors. The result has been over forty (40) pieces as this litigation has progressed. http://www.sailingscuttlebutt.com/news/07/cf/. In the process, I have attended every hearing and read every submission. Based upon comments received, it is apparent that my pieces are widely read and appreciated in the sailing community. I have also provided on the air commentary for TV New Zealand and other radio and TV media. Many other internet media link to my pieces and I have been interviewed and quoted in both internet and print general interest media.

6. Apparently, the Agreement is sharply contended by the parties, although the current confidentiality agreement prevents disclosure of the Agreement or the nature of the dissatisfaction. Given the propensity of both parties to proclaim victory at every turn and the unprecedented acrimony of this legopathic dispute, the sailing public cannot evaluate the dispute without public disclosure of the Agreement. Neither I, nor anyone else, can attempt to provide unbiased commentary without public access.

7. Although agreements similar to this one have been customary, but not required, in recent America's Cup matches, a secret agreement is unprecedented. It would be like the defense bar negotiating revisions to the Civil Practice Law and Rules in secret. Worse yet, although the parties have been extremely circumspect so as not to violate the confidentiality agreement, based upon guarded complaints, some

observers have postulated that it can be argued that the Agreement is so one sided that, to extend the example, the defense bar would have the power to change the CPLR at will, as well as hire and fire the justices and judges of New York's courts at will. Conversely, SNG apparently believes that the Agreement is entirely proper. Only public disclose will allow sunlight, the universal disinfectant, to bring out the truth on a matter of great significance to the sailing public.

8. As the parties have built what arguably are the most magnificent sailing vessels since the China clippers that raced for fame and profit from the East Indies to London in the nineteenth century to be the first to deliver the year's tea crop, it is essential that the sailing public be able to satisfy itself that the sailing rules of the competition will be even handed and fundamentally fair. Undue influence by one competitor over the sailing rules or the jury cannot be fair. Indeed, in its obituary of George L. Schuyler, grantor of the Deed, the New York Times reported that he had stated in an interview that "if he ever became convinced that there was unfair or unsportsmanlike conditions in the deed he would be willing to have them changed." http://query.nytimes.com/mem/archive-free/pdf?res=9C07E3DA133BE533A25752C0A96E9C94619ED7CF. Only public access to the Agreement will allow the sailing public to make that determination for itself.

9. Not only is secrecy unprecedented, it is unjustifiable under governing law. As the Court of Appeals wrote in *Courtroom TV Network, LLC v. State*, 5 N.Y.3d 222, 228 (2005), it is axiomatic that:

> The *First Amendment to the United States Constitution* guarantees the press and the public a right of access to trial proceedings. Without the right to

attend trials, "which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated' " (*Richmond Newspapers, Inc. v Virginia, 448 U.S. 555, 580, 65 L. Ed. 2d 973, 100 S. Ct. 2814 [1980]*; *see also Globe Newspaper Co. v Superior Court, County of Norfolk, 457 U.S. 596, 605, 73 L. Ed. 2d 248, 102 S. Ct. 2613 [1982]*; *Press-Enterprise Co. v Superior Court of Cal., Riverside Cty., 464 U.S. 501, 510, 78 L. Ed. 2d 629, 104 S. Ct. 819 [1984]* [*Press Enterprise I*]; *Press-Enterprise Co. v Superior Court of Cal. County of Riverside, 478 U.S. 1, 9, 92 L. Ed. 2d 1, 106 S. Ct. 2735 [1986]* [*Press Enterprise II*]).

As the First Department wrote in *Danco Lab., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6 (1st Dept. 2000):

> We start by taking note of the broad constitutional proposition, arising from the First and Sixth Amendments, as applied to the States by the Fourteenth Amendment, that the public, as well as the press, is generally entitled to have access to court proceedings. Since the right is of constitutional dimension, any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access . . . . The media's right of access and the public's right of access are on the same footing . . . . The right of access to proceedings as well as to court records is also firmly grounded in common-law principles . . . ." (citations omitted.)

Moreover:

> Numerous federal and state courts have also extended the *First Amendment* protection provided by *Richmond Newspapers* to particular types of judicial documents, determining that the *First Amendment* itself, as well as the common law, secures the public's capacity to inspect such records. [citations and discussion of each case omitted.]

Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 92 (2d Cir. 2004).

> Courts [. . .] have viewed the media's and public's qualified right of access to judicial documents as derived from or a necessary corollary of the capacity to attend the relevant proceedings. In explaining the importance of the ability to ascertain the substance of particular proceedings, the Third Circuit stated that "it would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?" *Antar, 38 F.3d at 1360*. This Court has followed a similar logic, deeming that the right to inspect documents derives from the public nature particular tribunals. Our decision in *In re The New York Times Company*, considering the right of access to documents filed in connection with pretrial motions, observed that "other circuits that have addressed [the] question have

> construed the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access. We agree that a qualified *First Amendment* right of access extends to such documents." *828 F.2d 110, 114 (2d Cir. 1987)*; *see also United States v. Gerena, 869 F.2d 82, 85 (2d Cir. 1989)*.

Id. at 93.

10. Movants indisputably have standing to make this Motion. Although the procedural devices used by the media to vindicate the First Amendment's guaranty of press freedom are myriad, the many cases in which the media has been granted access to proceedings and documents would not exist if standing were a colorable issue. *See* cases cited *supra* and collected within those cases. So obvious is media standing that, where even mentioned, usually in a footnote, standing is routinely found. *E.g.*, *In re Search Warrant for Four Contiguous Parcels of Real Civ. Case Prop. in Milford*, 2006 U.S. Dist. LEXIS 42750 (E.D. Mich. June 26, 2006) (media has standing to seek documents); *United States v. Carriles*, 2009 U.S. Dist. LEXIS 75243 (W.D. Tex. Aug. 25, 2009) (media has standing to oppose protective order); *In re Alterra Healthcare Corp.*, 353 B.R. 66 (Bankr. D. Del. 2006) (media has standing to seek previously sealed documents). Without media standing, the First Amendment's guaranty of press freedom would be meaningless.

11. Movants' standing is particularly appropriate on this Motion, as the conduct of the trustee of this charitable trust has come into question and there is no party representing the beneficiaries of the charitable trust.

12. While sealing documents may be appropriate in limited circumstances based upon compelling need, this is neither such a case nor such a

document. Section 216.1 of the Uniform Rules for the New York State Trial Courts, 22 NYCRR §216.1, provides:

> (a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.
>
> (b) For purposes of this rule, "court records" shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in *CPLR 3103(a)*.

13. The Agreement, which is likely to be the subject of litigation, is clearly not a disclosed document not filed with the clerk. First of all, it was not obtained through disclosure, but rather submitted to the Court without having been filed with the clerk. Clearly, this is not the typical situation in which, for example, privilege claims are resolved in camera by the Court. Thus, although reviewed by the Court and subject to an order of the Court, the Agreement is not part of the Court record and would not be available as part of the record for consideration by the Appellate Division on an appeal. That irregularity should have been avoided by a motion to seal the Agreement and file it under seal. The fact that the proper procedure was not followed does not avoid the mandate of section 216.1.

14. Had a proper motion to seal been made, there would have been and remains no good cause for sealing in light of the interests of the sailing public. First of all, no evidence other than vague hearsay statements of counsel regarding supposed ISAF concerns has been offered. Indeed, although the Agreement is before the Court,

ISAF itself has not appeared or made any submission. That is hardly surprising, as any ISAF claimed need for secrecy is hard to take seriously.

15. Thanks to the International Olympic Committee's designation of ISAF as the world governing body for competitive sailing, ISAF has a worldwide monopoly and no competitor. Thus, unlike the days before mergers when the American Football League competed with the National Football League and the World Hockey League competed with the National Hockey League, no competitor can read the Agreement, steal the recipe for ISAF's secret sauce, and unfairly compete with ISAF. Moreover, the only piece of information that might affect ISAF's negotiations with other sailing event organizers is the price – which already has been publicly disclosed.

16. ISAF is not a league like the National Football League or Major League Baseball. It is a federation (the F in ISAF) of Member National Authorities ("MNA") like US Sailing in the United States and the Canadian Yachting Association in Canada. While ISAF claims to govern those organizations, in reality it is governed by those organizations in the form of a Council, which is elected every four years. http://www.sailing.org/tools/documents/Articles2008-[4937].pdf. No one exercises executive power over sailing or sailors even remotely similar to the Commissioners of the National Football League or the Baseball Commissioner who, wielding the draconian "best interests of baseball" clause, controls baseball with an iron hand. In fact, the vast majority of ISAF functions are performed by volunteer members of the organizations that make up ISAF, aided by a small paid staff.

17. Unlike organized leagues which grant franchises to teams, police those franchises and are involved in a vast array of commercial relationships, ISAF is

primarily a rules and standards setting organization. Once committees of volunteers set those rules and standards, MNAs, Yacht Clubs, Classes and other Organizing Authorities go about setting up regattas, championships and other sailing events, with little if any supervision by ISAF. They may use those rules and standards free of charge, without further ISAF involvement. While International Judges are certified by ISAF, they are typically paid by event organizers. Thus, the Agreement is not required. Only the quadrennial Olympic Regatta and activities leading up to and concerning the Olympic Regatta, as well as certain ISAF Championships, are actually run by ISAF. Unlike a league, the vast majority of non-Olympic competitive sailors have virtually no substantial involvement with ISAF unless they sail in an ISAF championship or chose to become involved with an ISAF committee or ISAF governance. Instead, sailors are involved with their MNAs, Yacht Clubs, Classes or other local organizations. Unlike a league which is involved in web of commercial relationships, starting with its franchised teams, which generate large budgets and extensive staff, ISAF operates on a shoestring contributed by MNAs and affiliates. Indeed, not counting quadrennial Olympic Regatta income, which is banked to cover perennial deficits, ISAF's 2008 financials show non-investment income barely more than £1 million. http://www.sailing.org/tools/documents/2008ISAFAnnualReport-[7449].pdf – little more than a rounding error in the competition and litigation budgets of the parties in this case. In 2007, ISAF ran an operating deficit of £700,000. *Id.* By contrast, the National Football Leagues' 2008 sales are reported to be $6.9 billion. http://www.hoovers.com/nfl/--ID__40330--/free-co-factsheet.xhtml. There has been no evidence submitted to substantiate that ISAF is a commercial organization like a league

with major business dealings. Thus, the claim that ISAF's commercial relationships will be harmed by public disclosure of the Agreement is neither substantiated nor plausible.

18. Moreover, sailing does not compete with American football, soccer, baseball, hockey, boxing, or professional wrestling for sponsors or advertisers. While there likely is some minor overlap, sailing sponsors and advertisers are either part of the marine industry and, therefore, unlikely to be interested in other sports, or sellers of luxury goods such as autos (e.g., Volvo, BMW), watches (e.g., Rolex), spirits (e.g., Bacardi, Mount Gay), and other haute luxe goods (e.g., Louis Vuitton, Prada) with limited markets. While those sponsors and advertisers may also target other sports with premium audiences like golf, equestrian and Formula 1 auto racing, they are extremely sophisticated and there is no evidence at all that any would be adversely influenced regarding ISAF or even interested in the contents of the Agreement.

19. Secrecy is particularly inappropriate for a governing body like ISAF, just as it would be unacceptable for the State of New York to enter into a secret agreement with a union or vendor. The only conceivable reasons for secrecy are that for a relatively few dollars ISAF has agreed to terms that favor one competitor over the other and does not want anyone to know, or that ISAF's supposed concerns actually have been importuned by its counter party for its own reasons. If ISAF has been compromised and is favoring one of the competitors, instead of using its position to insure the upmost fairness in this competition, that is newsworthy and the sailing public is entitled to know. If ISAF has acted properly, ISAF should have no objection to public disclosure to clear the air.

20. New York courts, and in particular the Appellate Division, First Department, are hostile to document sealing absent good cause shown. *Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V.*, 28 A.D.3d 322, 324, 325 (1st Dept. 2006)("Generally, this Court has been reluctant to allow the sealing of court records . . . ." "This court has authorized sealing only in strictly limited circumstances."). Finding that the Supreme Court's "failure to target precise areas where redaction should occur violated *section 216.1 (a),*" and after cataloging Federal First Amendment law, the First Department instructed in *Danco Lab., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 7, 8 (1st Dept. 2000):

> In New York, too, we have stated that "statutory and common law ... have long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly and fairly" (*Matter of Brownstone, 191 AD2d 167, 168)*. New York's presumption of public access is broad (*Matter of Newsday, Inc. v Sise, 71 NY2d 146, 153, n 4, cert denied 486 US 1056*; *Matter of Herald Co. v Weisenberg, 59 NY2d 378, 381-382, supra; see,* Carpinello, *Public Access to Court Records in Civil Proceedings: The New York Approach*, 54 Alb L Rev 93 [1989]). We have required that a "legitimate basis" justify the sealing of court documents (*Matter of Brownstone, supra, at 168*). Pursuant to these general policy objectives, New York promulgated Uniform Rules for Trial Courts (22 NYCRR) *§ 216.1 (a)*. . . . . Although the rule does not further define "good cause," a standard that is " 'difficult to define in absolute terms,' " a sealing order should rest on a " 'sound basis or legitimate need to take judicial action,' " a showing properly burdening the party seeking to have a sealed record remain sealed (*Coopersmith v Gold, 156 Misc 2d 594, 606, supra*).

21. Here, no burden at all has been met and there is no admissible evidence that the burden which must be met for sealing can be met. The Agreement should be publicly disclosed so that the public interest will be served.

22. Movants respectfully request that oral argument on this Motion be calendared for the next hearing in this action.

WHEREFORE, for all of the foregoing reasons and upon the entire record of this action, Movants respectfully request that the Court enter an order directing that the Agreement forthwith be publicly disclosed.

Dated: New York, New York
September 2, 2009

Respectfully submitted,

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