

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

Golden Gate Yacht Club
Plaintiff,
v.
Societe Nautique de Geneve
Defendant,
Club Nautico Espanol de Vela,
Intervenor-Defendant.

Index No. 602446/07

Part 54

Hon. Shirley Werner
Kornreich

**MEMORANDUM OF LAW IN SUPPORT OF GGYC'S MOTION
TO ENFORCE COMPLIANCE WITH THE ORDER AND JUDGMENT ENTERED
APRIL 7, 2009 REGARDING VENUE LOCATION FOR THE 33RD AMERICA'S CUP**

BOIES, SCHILLER & FLEXNER LLP
575 Lexington Avenue
New York, New York 10022
Tel: (212) 446-2300

LATHAM & WATKINS LLP
885 Third Avenue, Suite 1000
New York, New York 10022
Tel: (212) 906-1200

*Attorneys for Plaintiff Golden Gate
Yacht Club*

Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in support of its motion for relief at the foot of a judgment to enforce compliance with the Order and Judgment entered on April 7, 2009, directing that the venue for the February, 2010 America’s Cup match shall be Valencia, Spain, unless the parties mutually consent otherwise.

PRELIMINARY STATEMENT

The April 7, 2009 Order and Judgment provides that the next America’s Cup match be held in Valencia, Spain (a location initially designated by each party during the settle-order process) unless defendant Societe Nautique de Geneve (“SNG”) notifies GGYC six months before the match (August 8, 2009) of its selection of another venue. SNG failed to select an alternative Deed-compliant venue by August 8, 2009. Accordingly, the Order and Judgment requires the match be held in Valencia, Spain unless the parties agree otherwise.

Valencia, which had been selected by SNG for the 32nd America’s Cup, and where both competing teams still have team bases, was a logical choice for the 33rd America’s Cup. Indeed, as late as March, 2009, SNG’s racing team publicly stated that the next Cup match would be in Valencia. Nevertheless, in good faith, GGYC offered on numerous occasions to discuss alternative venues with SNG. SNG consistently declined these invitations. Rather, it secretly made a deal to hold the next America’s Cup on a course off of Ras al-Khaimah, an emirate on the Strait of Hormuz between the Persian Gulf and the Indian Ocean. GGYC was advised of the selection on August 6, 2009, and promptly notified SNG of its objection to that choice.

As detailed below, Ras al-Khaimah is in the Northern Hemisphere and is thus plainly prohibited under the Deed of Gift as the venue for a February match. As this Court has held, New York law requires strict adherence to the terms of the Deed. Except for its directive that the

match can be held in Valencia, the Order and Judgment does not otherwise revise the requirements of the Deed or release SNG from strict adherence to the Deed's express restrictions on the location of the match. Therefore, the match must be held on an ocean course, free of headlands, practicable for vessels of twenty-two feet draught, and in the Southern Hemisphere if held between November 1st and May 1st.

As a venue for the America's Cup, Ras al-Khaimah, as discussed below, presents grave safety concerns for the team members of an American challenger, named "USA," that flies an American flag on a 200-foot mast. It also presents huge logistical concerns for GGYC (but not SNG). SNG has never explained why it selected Ras al-Khaimah over Valencia.

To enforce the Order and Judgment and compel SNG's compliance with the Deed, the court should direct that Valencia, Spain, shall be the venue for the February, 2010, America's Cup match, unless the parties mutually agree otherwise.

FACTUAL BACKGROUND

Following the April 7, 2009 Order and Judgment, GGYC repeatedly expressed its willingness to sit down with SNG to discuss an alternative venue for the next America's Cup match. (Exs. A at 2; B at 2; C; D at 1; E ¶ 3.)¹ SNG refused each invitation. (Ex. E ¶ 3.) Instead, SNG secretly negotiated with and then on August 6, 2009 unilaterally selected Ras al-Khaimah, abutting the Strait of Hormuz that separates the Persian Gulf from the Indian Ocean. The Iranian island of Abu Musa is only 32 nautical miles away from the UAE mainland and as little as 17 miles from the race area designated by SNG; and Iranian contiguous waters abut the

¹ (Ex. A at 2) ("We are [] willing to negotiate with you alternative Northern Hemisphere locations for the February 2010 Match if SNG so desires."); (Ex. B at 2) ("We would be willing to have . . . discussions immediately . . ."); (Ex. C) ("we remain willing to negotiate"); (Ex. D at 1) ("If you would like to choose

length of the race area. (Exs. E ¶ 3; K ¶ 6.)

Valencia (which had been selected by SNG to host the last America's Cup match in 2007) (Ex. E ¶ 3; Ex. F) was designated to host the next match by both GGYC and SNG in their Notice of Settlement and Notice of Counter-Settlement, respectively, leading up to the Court's May 12, 2008 order. (Exs. G; H.) That order was eventually affirmed by the Court of Appeals. (Ex. J.) Indeed, before the Court of Appeals ruling, SNG's Racing Team CEO, Ernesto Bertarelli, announced on March 2, 2009 that the venue for the 33rd America's Cup would be Valencia irrespective of how the Court of Appeals were to rule. (Ex. F at 1.) Valencia spent three years investing in and preparing its city and marina to support the 32nd America's Cup, and now has a world-class dedicated infrastructure for hosting an America's Cup match.

Ras al-Khaimah, by contrast, is totally unprepared. In order to host the America's Cup, it proposes to develop an island and dredge a lagoon that will house the base compound for GGYC's competing vessel and racing team. GGYC will be required, over the next four months, to construct its own boat shed, mast shed, sail loft, sponsor fulfillment area, and other structures.

The United States Department of State advises that Americans visiting Ras al-Khaimah "should exercise a high level of security awareness," warning that "current information suggest that al-Qa'ida and affiliated organizations continue to plan attacks against Western targets; these attacks may employ a wide variety of tactics including suicide operations, assassination, kidnapping, hijacking and bombing." (Ex. I at 2.) This is of particular concern for an America's Cup match, which is a highly publicized event that takes place on a date and time certain, broadcast to over a billion people in its last edition.

an alternative Northern Hemisphere venue, we are more than willing to discuss venues with you.")

The affidavit of Graeme Gibbon Brooks, a 16 year veteran of the British Royal Navy who provided terrorism advice to the Volvo Ocean Race in 2008 describes the risks presented by holding the America's Cup race 17 nautical miles from Iranian territory, and abutting Iranian contiguous waters, just 43 days after the December 10, 2009 deadline set by the United Nations for inspection of Iran's newly disclosed nuclear site. It also discusses the risk of action against America's Cup participants, and related watercraft, by al-Qaeda cells and Iranian naval commanders.

The Department of State advises that Americans traveling in Ras Al-Khaimah "should maintain a low profile, vary routes and times for all required travel." (Ex. I at 2.) This is, of course, impossible for an American racing team (traveling with over two hundred people, including families) to train and sail in a world-wide publicized America's Cup match in a vessel named USA the size of a baseball diamond and bearing the American flag on its two-hundred foot mast.

ARGUMENT

The Deed of Gift provides that "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." (Ex. L at 1.) In its May 11, 2009 brief to this Court, SNG acknowledged the meaning of this plain language, stating that "[t]he Deed [] unambiguously prohibits sailing a match between November 1 and May 1 in the Northern Hemisphere." (SNG Memo. of Law in Opposition to GGYC Motion for Contempt (May 11, 2009), at 7.)

The match will be held in February 2010. (Ex. J.) Accordingly, under the unambiguous plain language of the Deed, Ras al-Khaimah, which is in the Northern Hemisphere, is an

improper venue. This Court has observed that it is bound to adhere strictly to the literal terms of the Deed of Gift. See, e.g., Golden Gate Yacht Club v. Societe Nautique de Geneve, Index No. 602446/07 (September 18, 2009 Order), at 6 (“The court is bound by the Deed of Gift, [which] the court must strictly construe.”). The April 7, 2009 Order and Judgment does not change that. Indeed, SNG has conceded that “[t]here is nothing in the Order that suggests that a race should be held in contravention of the terms of the Deed of Gift.” (SNG Memo. of Law In Opposition to GGYC Motion for Contempt (May 11, 2009), at 7.)

The Order and Judgment can -- and must -- be read in harmony with the Deed of Gift. What the Order and Judgment requires is clear. It provides that SNG may select Valencia, Spain (Ex. J at 5), or “any other location.” *Id.* The only way to read that language consistent with the Deed is that it allows SNG to select “any other location” that complies with the Deed. Valencia was a venue that both parties agreed on initially during the settle-order process, and therefore in the May 14, 2008 order (affirmed by the Court of Appeals in 2009), the Court provided Valencia as a default option if SNG did not provide GGYC with a deed-compliant venue six months prior to the match (which was set at ten months from the entry of the Order).

The Order and Judgment indisputably requires SNG’s venue selection to comply with the terms of the Deed in every respect, including that the match must be “on ocean courses, free of headlands . . . [which are] practicable in all parts for vessels of twenty-two feet draught of water,” and that a February match cannot be in the Northern Hemisphere. (Ex. L at 2.) Just as SNG cannot select Lake Geneva (because it is not an “ocean course”) SNG cannot select Ras al-Khaimah (because it is in the Northern Hemisphere and the race is in February).

By specifying that Valencia shall be the venue, the Order and Judgment provided a single exception to the Deed's prohibition on a Northern Hemisphere race between November and May. This exception was necessary to limit SNG's preparation period to the ten months prescribed by the Deed, while providing a venue both parties agreed upon.

Finally, to allow SNG to select a Northern Hemisphere venue other than Valencia would give SNG an advantage as a result of its violation of the Deed (*i.e.* its failure to treat GGYC as the proper Challenger of Record, which resulted in a two year delay of the event). That should not be permitted.²

Accordingly, because the Deed of Gift expressly prohibits a Northern Hemisphere venue for a February match, the 33rd America's Cup cannot be held in the Ras al-Khaimah venue as unilaterally selected by SNG.

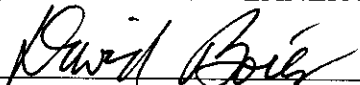
CONCLUSION

For the foregoing reasons, GGYC requests that the Court issue an Order directing that the 33rd America's Cup will be contested in Valencia, Spain in February 2010, unless the parties mutually consent otherwise.

² See, e.g., 55 N.Y. Jur. 2d Equity § 100 (2008); N.Y. Real Estate Inst., Inc. v. Edelman, 839 N.Y.S.2d 488 (1st Dep't 2007) (defendant's breach of agreement would not act to prejudice plaintiff's rights under the agreement); see also Osetek v. Osetek, 427 N.Y.S.2d 884, 886 (2d Dep't 1980) (a party may not "reap an inequitable benefit from his own wrongful conduct").

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BOIES, SCHILLER & FLEXNER LLP

By: 
David Boies
333 Main St.
Armonk, New York 10504
Tel: (914) 749-8200

Philip M. Bowman
575 Lexington Avenue
New York, New York 10022
Tel: (212) 446-2300

LATHAM & WATKINS LLP
James V. Kearney
Aaron Siri
885 Third Avenue, Suite 1000
New York, New York 10022
Tel: (212) 906-1200

*Attorneys for Plaintiff Golden Gate
Yacht Club*