To Be Argued By:
BARRY R. OSTRAGER

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

GOLDEN GATE YACHT CLUB,

Plaintiff-Respondent,

—against—

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Appellant,

—and—

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

BRIEF FOR DEFENDANT-APPELLANT

BARRY R. OSTRAGER
JONATHAN K. YOUNGWOOD
GEORGE S. WANG
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for Defendant-Appellant

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Defendant-Appellant Société Nautique de Genève ("SNG") respectfully submits this memorandum of law in support of its appeals from the October 30, 2009 Order of the Supreme Court, New York County (Shirley W. Kornreich) ("October 30 Order") and from the November 2, 2009 Memorandum Decision and Order of the Supreme Court, New York County (Shirley W. Kornreich) ("November 2 Order").

The October 30 Order granted Plaintiff-Appellee Golden Gate Yacht Club's ("GGYC") motion for an order declaring SNG's selection of Ras Al Khaimah ("RAK") as the venue for the 33rd America's Cup invalid. The November 2 Order ruled, *inter alia*, that "rudders" may not be included in measuring a yacht's length on load water-line.

QUESTIONS PRESENTED

1. Whether the April 7, 2009 Order of the Court of Appeals, which unambiguously states the match may be held in "Valencia, Spain or any other location selected by SNG", permits SNG to select a Northern Hemisphere location other than Valencia as the venue for the 33rd America's Cup.

The trial court answered this question in the negative.

2. Whether GGYC, through gamesmanship and unsportsmanlike conduct, should be permitted to deny SNG of its rights under the Deed of Gift to select the venue for the America's Cup.

The trial court declined to expressly address this issue.

3. Whether a yacht's rudder should be included in the load waterline measurement of a yacht when it is undisputed that the rudder is a part of the yacht and the Deed of Gift expressly excludes certain parts, but not the rudder, from the yacht's load waterline measurement.

The trial court answered this question in the negative.

NATURE OF THE CASE

The America's Cup is a revered yacht competition governed by a Deed of Gift that dates back to 1857. It is a "challenge cup" whereby after one yacht club wins the America's Cup, another yacht club may challenge for the Cup. SNG is the current holder and two-time defender of the America's Cup. The next America's Cup, the 33rd, will, by order of the Court of Appeals in this case, take place in February 2010.

These appeals concern two enormously critical issues relating to the conduct of the America's Cup, both of which involve the application of clear and unambiguous language that was misapplied by the trial court.

First, the trial court erred when it disregarded the plain language of an order of the Court of the Appeals and the Deed of Gift and rejected SNG's choice of RAK as the venue for the race. Second, the trial court misapplied the plain language of the Deed to exempt a significant portion of GGYC's vessel from

measurement. Reversal of both orders is necessary to preserve SNG's unambiguous right to select the venue of the next Cup (a right unilaterally afforded to all Defenders) and race against a GGYC challenge boat that is no longer than is permitted under the Deed.

The Venue

By its express terms, the Deed of Gift prohibits matches in the Northern Hemisphere from November to May. Nevertheless, a May 13, 2008 Order of the trial court ("May 13 Order"), reinstated on April 7, 2009 by the Court of Appeals ("April 7 Order"), departed from the plain meaning of the Deed of Gift as it provided that a winter race could be held in the Northern *or* Southern Hemispheres. That order, which now governs the 33rd America's Cup, stated:

> [T]he location of the match shall be in Valencia, Spain *or any other location selected by SNG*, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races.

(R. at 238) (emphasis added).

The April 7 Order operated to set the date of the 33rd Cup for February 2010. SNG, a yacht club based in the Northern Hemisphere, advised the trial court in May 2009 that it would in fact choose a Northern Hemisphere location. SNG ultimately chose RAK because it is one of the few Northern Hemisphere locations that has excellent sailing conditions in February. RAK has already invested more

than $120 million dollars in preparation for the match and its facilities are close to complete. In the October 30 Order, however, the trial court found that the words "any other location" mean something less than what they say. In doing so, the trial court disregarded the plain language of the April 7 Order, the Deed of Gift, and its own prior ruling interpreting the very same provision of the April 7 Order.

The trial court's ruling is manifestly incorrect. There are no hemisphere restrictions or modifications placed upon the phrase "any other location" in the April 7 Order. Moreover, were there any question as to whether a Northern Hemisphere location would be permitted, these questions are erased by the reference in the order to Valencia, which is, of course, in the Northern Hemisphere. Rather than follow the plain text of the April 7 Order, the trial court read it to mean any other location *except* locations in the Northern Hemisphere.[1] This was error and in violation of black letter law, restated by the United States Supreme Court earlier this year, that "where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2204 (2009).

At the time of the original issuance of the May 12 Order and at the time the Court of Appeals reinstated the order, the Order permitted a race in winter

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[1] GGYC argues that SNG now does not even have the option of choosing a Southern Hemisphere location because the February 2010 race is less than six months away.

(March 2009 originally, followed by February 2010 after the April Order) in the Northern Hemisphere. Before issuance of the May 12 Order, GGYC had argued that it was entitled to have a match ten months after entry of the memorandum decision dated November 27, 2007 and SNG had argued that, being a Northern Hemisphere yacht club, it should be allowed to select a Northern Hemisphere venue. The May 12 Order was issued to address both parties' concerns. It effectively gave GGYC the priority of the date and SNG the priority of the Northern Hemisphere location.[2] Immediately following the issuance of the Order, GGYC publicly acknowledged that the May 12 Order overrode the hemisphere restrictions in the Deed of Gift. As the skipper of the GGYC boat stated in reference to the order:

> But the court's also allowed, you know, gave the defender the flexibility to choose, in fact, *any venue in the world, north or southern hemisphere*, the way the order's worded. So it's interesting. It's part of the America's Cup game and for us it's an interesting challenge because we have to prepare for all eventualities, as I said.

(R. at 1409) (emphasis added).

In addition to the trial court's erroneous application of the May 12 Order, the trial court should have denied the relief regarding the venue sought by

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[2] The May 12 Order provides that "the dates for the challenge match races shall be the date ten calendar months from the date of service of a copy of this order, with notice of entry, upon the attorneys who have appeared herein . . .." (R. at 237-238)

SNG on equitable grounds. At the time of the August 5, 2009 announcement of RAK as the venue, GGYC declined to file any protest with the Court. Notably, with the 33rd America's Cup rapidly approaching in time, GGYC filed its regular notice motion:

- two months *after* SNG announced the venue;
- a month *after* GGYC's sailing, technical, and support staffs had spent [several weeks] in RAK in September;
- a month *after* GGYC's security advisor pronounced the venue to be satisfactory;
- a week *after* the date by which GGYC certified under penalty of perjury to the U.S. Coast Guard that its vessel would be shipped to the Persian Gulf; and
- the day *after* SNG successfully spent 30 days transporting its America's Cup vessel to RAK.

This delay was unsportsmanlike and GGYC should be barred from the relief it sought and obtained from the trial court under the doctrine of laches. While the trial court explicitly noted GGYC's dishonorable behavior, it erroneously did not disallow the motion on that basis:

> The Court, however, does want to state on the record that it feels again that *what occurred here was unsportsmanlike on the part of GGYC*. I believe there were tactics involved that should not have been employed in an unsportsmanlike fashion if there really was going to be good sportsmanship. However, that is not – this is not the forum for deciding whether or not GGYC in a unsportsmanlike manner, this is only a legal forum, and if it's going to be taken up, should be taken up somewhere else.

(R. at 37-38).

In short, this unsportsmanlike delay and the venue order have caused substantial prejudice to SNG, including:

- The extraordinary prospect of having to relocate SNG's vessel, which already arrived in RAK after a 30 day journey;
- The massive dislocation and expense to the U.A.E., an important ally of the United States, after spending more than $120 million to build an island, among other facilities, for the event;
- The gross uncertainty surrounding the venue of the third most watched international sporting event just three months before the race;
- The stripping of SNG's right to select the venue in accordance with the Deed of Gift; and
- The potential for a preposterous outcome pursuant to which the Defender is forced to race in a venue it would not have chosen that violates the express terms of the Deed of Gift.

These harms must be remedied through this appeal by reversal of the October 30 Order.

Measurement Of The Yacht

The plain language of the Deed of Gift restricts "yachts" to not more than ninety feet on the "load waterline" (a measure taken from the forward most point to the aftmost point of the yacht that cuts through the water, in load condition). The Deed of Gift further provides that, in measuring yachts, that neither the "centre board" nor the "sliding keel" shall "be considered part of the vessel for any purposes of measurement."

In a fundamental misapplication of this language, the trial court read additional limitations into the Deed and held that the rudder also should *not* be included in the load waterline measurement. The Deed contains no such exclusion of rudders. The trial court ignored the plain language of the Deed and relied upon irrelevant extrinsic evidence to come to a conclusion that is contrary to basic contract construction and the Court of Appeals' opinion in *Mercury Bay.* In *Mercury Bay,* the Court held that, where the terms of the Deed of Gift were unambiguous, "resort to extrinsic evidence to impute a different meaning to the terms expressed is improper." *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y. 2d 256, 270 (1990). Here as well, the language of the Deed is clear – it requires the entire yacht, excluding only the "centre board" and "sliding keel", but including the rudder, to measure 90 feet or less in waterline length for a one-mast vessel. In concluding otherwise, the trial court erroneously allowed GGYC to challenge in a vessel that exceeds the Deed's strict and express limit on length.

STATEMENT OF FACTS

A. The America's Cup And Deed of Gift

The America's Cup, so named for an 1851 regatta won by the schooner *America,* is sailing's most prestigious trophy. *Mercury Bay*, 76 N.Y. 2d at 260. Today, it is a "challenge cup" governed by a Deed of Gift conveyed in

1887 to be "preserved . . . for friendly competition between foreign countries."[3] (R. at 345). The Deed of Gift expressly grants the Defender and the Challenger the right to mutually consent to the terms of the race for the America's Cup:

> The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived.

(R. at 346).

In the modern history of the America's Cup, every race has been sailed under the "mutual consent" provision, except this race and the 27th America's Cup between Mercury Bay Boating Club and San Diego Yacht Club and this 33rd America's Cup. *See Golden Gate Yacht Club v. Société Nautique de Genève*, 12 N.Y.3d 248 (2009). Where, as in this case and the *Mercury Bay* case, the Challenger of Record and the Defender cannot reach agreement, the Deed of Gift provides for a two-boat match race, at a location selected by the Defender and subject to the Defender's rules and sailing regulations, with the Challenger of Record racing the boat specified in its certificate. (R. at 346).

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[3] The Deed of Gift was later modified by court orders dated December 17, 1956 and April 5, 1985. A true and correct copy of the Deed of Gift, as amended, can be found in the Record at 344-347. For a more in depth analysis of the history of the America's Cup *see Mercury Bay*, 76 N.Y. 2d at 260; *Golden Gate Yacht Club v. Société Nautique de Genève*, 55 A.D.3d 26 (1st Dep't 2008), *rev'ed* 12 N.Y.3d 248 (2009).

The Challenger of Record is entitled to select a date, provided it is upon at least ten-months notice and if the Defender selects a Northern Hemisphere venue, the date is not between November 1st and May 1st. Likewise, if the Defender selects a Southern Hemisphere venue, the date may not be between May 1st and November 1st. (R. at 345).

B. GGYC Commences Litigation

On July 20, 2007, GGYC filed suit in the Supreme Court of New York County alleging that SNG breached the terms of the Deed of Gift and violated its fiduciary duties as the trustee of the America's Cup. *Golden Gate Yacht Club,* 12 N.Y.3d at 254. GGYC's suit sought to dislodge the original Challenger of Record for the 33rd America's Cup, Club Náutico Español de Vela ("CNEV") primarily on the basis that CNEV was a new yacht club that had never held an annual regatta as of July 2007.

C. The Trial Court's Clear And Unambiguous May 12 Order Allows For Selection Of A Northern Or Southern Hemisphere Venue

On November 27, 2007, the trial court issued a memorandum decision dismissing GGYC's claim than SNG breached its fiduciary duties, but sustained GGYC's claim that CNEV's challenge was invalid because it had not held an annual regatta at the time of the challenge and declared GGYC as the Challenger of Record. (R. at 270).

On March 17, 2008, the trial court entered another decision, following its issuance of an Order to Show Cause why GGYC's challenge and certificate should not be declared invalid and non-compliant with the Deed of Gift, declaring GGYC's challenge and certificate to be valid. (R. at 163).

In settling the order on the November 27, 2007 and March 17, 2008 decisions, the parties directly addressed the issue of a proper race date via letters to the trial court, and a hearing was held on April 2, 2008 regarding the appropriate application of the 10-month notice period. (R. at 159-225). The trial court was asked to specifically address the hemisphere restrictions in the Deed of Gift. More specifically, GGYC sought race dates in either July 2008 (the date specified on its original Notice of Challenge) or October 2008 (10 months from entry of the Court's November 27, 2007 memorandum decision). (R. at 163-166). SNG argued that the race could not begin until at least 10 months from entry of a final order. (R. at 171-174). SNG also argued that since the race was to be held in the Northern Hemisphere, and the Deed prohibits a race in the Northern Hemisphere between November and May, the 10-month notice period necessarily must be extended so as not to deprive SNG, as the Defender, the right to select the venue of its choosing. *Id.*

On May 12, 2008, the trial court issued a final order, settling its prior decisions and directing that the next America's Cup be held ten months from the

date of that order. (R. at 234-238). In addition, the court ruled that "the location of the match shall be in Valencia, Spain or any other location selected by SNG, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races." (R. at 238). When the trial court issued its ruling, it clearly was aware that even if the 10-month period ended between November and May, SNG, a Northern Hemisphere yacht club, would not be deprived of its right to select a Northern Hemisphere venue for the 33rd America's Cup.

Indeed, it was shortly after entry of this order that Russell Coutts, CEO of BMW ORACLE Racing[4], stated that the court "gave the defender the flexibility to choose, in fact, *any venue in the world, north or southern hemisphere.*" (R. at 1409) (emphasis added). Mr. Coutts further confirmed this understanding that the order permitted the race to take place in February in the Northern Hemisphere: "[W]e believe that the order ... does allow the race to take place in the Northern Hemisphere, outside of the Deed of Gift restraints, if that's what you call it. The order was very clear." (R. at 1413).

Thomas F. Ehman, Jr., Head of External Affairs for BMW ORACLE Racing, confirmed this view:

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[4] GGYC's racing representative is Oracle Racing, Inc. d/b/a BMW ORACLE Racing. (R. at 1645).

> In this case the Judge has said the *defender may choose any venue in the world in either hemisphere, irrespective of the date*. But it will be in March. So he has the power, our lawyers tell us, to make such a decision, which we believe he has made. And we, as Russell said, we think the appellate court will probably uphold Justice Cahn's decision, and we hope sooner rather than later.

(R. at 1414) (emphasis added).

D. The Court Of Appeals' April 7 Order Reinstates The Trial Court's May 12 Order

SNG filed appeals (which were consolidated) of the March 17 and May 12 orders to the Appellate Division, First Department. At SNG's request, the Appellate Division heard the appeals on an expedited basis. GGYC elected not to appeal the order dismissing its breach of fiduciary duty claim against SNG or any other aspect of the trial court's ruling.

On July 29, 2008, the Appellate Division reversed the court's order and reinstated CNEV as Challenger of Record, in a decision reported at 55 A.D.3d 26 (1st Dep't 2008). In light of its holding, it did not need to and did not address the issue of when or where the next America's Cup would be held.

On April 7, 2009, the Court of Appeals reversed the First Department's decision, reinstating the Supreme Court's decision and declaring GGYC the Challenger of Record, in a decision reported at 12 N.Y.3d 248 (2009). In doing so, the Court of Appeals reinstated the May 12 Order of the Supreme Court, ordering that the race take place "ten calendar months" from service of a

copy of the order in "Valencia, Spain or any other location selected by SNG, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races." (R. at 237-238). This Order was entered as the order and judgment of the Supreme Court on April 7, 2009, thus setting the dates of the next America's Cup race as February 8, 10, and 12, 2010. (R. at 231).

E. The Trial Court Interprets the April 7 Order to Permit a Northern Hemisphere Race in February

Shortly after entry of this order, SNG attempted to mutually agree with GGYC to move the dates of the race to May 2010. Instead of engaging in this process, GGYC immediately brought a motion for contempt against SNG alleging that SNG was attempting to alter the order of the Court of Appeals setting the race in February 2010. (R. at 260-262).

On May 14, 2009, the trial court held a hearing regarding GGYC's "application for contempt in terms of when the ... America['s] Cup Race, is to be run." (R. at 427). At this hearing, SNG represented unequivocally that it "will have a match race in the northern hemisphere, either Valencia or another location that we're entitled to pick." (R. at 447); (R. at 441) ("SNG is absolutely committed to a northern hemisphere race. There will be *a northern hemisphere race.*") (emphasis added); (R. at 446) ("And I'm representing to the court that we are going to have a match *in the northern hemisphere.* It may be Valencia, or it

may be *another location in the northern hemisphere.*") (emphasis added). The Court then issued its ruling "directing SNG to hold the race as per the order of the Court of Appeals and Justice Cahn in February as the order required." (R. at 448). On the same day, this Court signed an Order adopting the transcript of this hearing as the Order and Judgment of the Court. (R. at 450-451). In a subsequent order, dated July 29, 2009, the Court republished SNG's stated commitment to a Northern Hemisphere venue.

F. SNG Announces Selection of RAK in Reliance on the April 7 Order and May 14, 2009 Order

After entry of the Court's order affirming the dates for the race to be held in February 2010, SNG once again confirmed its intention to select a Northern Hemisphere race. (R. at 1503-1508). Relying upon the unequivocal language of the April 7 Order, on August 5, 2009, SNG announced the selection of RAK as the site for the 33rd America's Cup. (R. at 1510-1511).

While GGYC expressed reservations regarding the selection of RAK in correspondence with SNG, GGYC did not file any papers before the court seeking to disqualify the location. Indeed, GGYC representatives attended and participated in an evidentiary hearing before the trial court the week after the venue announcement and remained silent regarding the venue selection. In the weeks and months following the venue selection, GGYC gave every appearance that it was preparing to race in RAK in February. In early September 2009, BMW ORACLE

Racing representatives visited RAK, met with senior government officials and reviewed the course for the match. (R. at 1302, 1306). BMW ORACLE Racing sent its equipment and an advance team to RAK after its security advisor visited the venue, gave it a "positive" risk assessment and informed RAK officials that he was "more than impressed" with RAK's arrangements. (R. at 1302, 1306).

Further, on September 18, 2009, GGYC's racing representative BMW ORACLE Racing submitted a request for priority handling for its Certificate of Documentation to the United States Coast Guard. (R. at 1431). Through this request, GGYC certified to the United States Coast Guard that GGYC's challenging vessel was to depart the United States on September 25, 2009 for the "Persian Gulf, United Arab Emirates." (R. at 1431). This representation was made with the understanding that "a false statement when applying for vessel documentation may subject the vessel to seizure by and forfeiture to the United States government." (*Id.*)

G. GGYC's Untimely Motion to Prevent SNG From Holding the America's Cup in RAK

Thirteen days after certifying to the United States Coast Guard that it would ship its boat to the U.A.E., three weeks after traveling to the U.A.E. to examine the venue, two months after SNG's timely announcement of the venue, and one day after SNG's boat arrived in RAK, on October 1, 2009, GGYC filed a motion with the Court seeking to have the venue declared invalid. (R. at 1163).

RAK submitted a Notice of Motion for an order granting RAK leave to file as *amicus curiae* a memorandum of law in support of SNG's Opposition to GGYC's Motion challenging the venue. (R. at 1264-1266).

H. The Trial Court's Erroneous Decision Preventing the Race From Taking Place in RAK

On October 27, 2009 the trial court held a hearing to determine the validity of RAK as the venue for the 33rd America's Cup. (R. at 8). The trial court granted RAK's *amicus curiae* motion. (R. at 25). With regard to GGYC's venue motion, the trial court ruled from the bench as follows:

> I believe that the order of Justice Cahn, as affirmed by the Court of Appeals, permits the race to take place in Valencia, Spain, and this was by virtue of previous preparation that took place in Valencia, Spain, there had been mutual agreement prior to the order that it would take place in Valencia, Spain, and I believe that may well be the reason Valencia, Spain was mentioned. Whether it is or not, Valencia, Spain was permitted, and it is a Northern Hemisphere venue, it was permitted for the race. Other than that, the judge specifically said -- and, again, this order was affirmed by the Court of Appeals "-- or any other location selected by SNG." It is the belief of this Court that that phrase must be read in conjunction with the Deed of Trust, and the Deed of Trust specifically requires that the race, if it takes place between November 1 and May 1, must take place in the Southern Hemisphere. *Therefore, since RAK is in the Northern Hemisphere, it cannot under the Deed of Trust take place in RAK.*

(R. at 36-37) (emphasis added). On October 30, 2009 the trial court so ordered the transcript as the decision and order of the court. (R. at 8). On October 30, 2009, SNG served a Notice of Entry. (R. at 6). Notice of Appeal was served on November 2, 2009. (R. at 137).

I. The Trial Court's Misapplication Of The Deed Of Gift's Unambiguous Measurement Requirements

The Deed prescribes the maximum dimensions of the challenging vessel:

> The competing yachts or vessels, if of one mast, shall be not less than forty-four feet *nor more than ninety feet on the load water-line*; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

(R. at 345). On August 6, 2009, SNG, as Defender and Trustee, voluntarily issued precise measurement procedures for the 33rd America's Cup. (R. at 1513-1516). SNG's measurement procedures, consistent with the Deed, state:

> For the purposes of measurement, the "length on load water line" is the distance between a line perpendicular to the yacht's centre line and passing through the furthest forward point of intersection of the yacht with its water-line plane, and a line perpendicular to the yacht's centre line and passing through the aftermost point of intersection of the yacht with its water line plane.

(R. at 1515).

Following receipt of these measurement procedures, on August 10, 2009, GGYC sought clarification of whether the rudder was being included in the

"length on load water line" measurement. (R. at 582). Counsel for GGYC stated that they needed clarification "very, very quickly because it goes to whether or not we've got to move the rudder before we finish the boat." (R. at 586).[5]

On September 2, 2009 GGYC filed a motion arguing, *inter alia*[6], that the rudders should not be included in the measurement of its challenging vessel. The trial court heard oral arguments on October 27, 2009. (R. at 838-861). On October 30, 2009, the trial court issued a memorandum decision and order ruling that "SNG may not include rudders in measurement of the 'length on load water-line.'" (R. at 157). That ruling was memorialized into a November 2, 2009 Order. (R. at 152). SNG served Notice of Entry of the Order on November 4, 2009. (R. at 150-151).

STANDARD OF REVIEW

The trial court's interpretation of the April 7 Order and the Deed of Gift, an issue of law, is reviewed *de novo* by this Court. *See Gulf Insur. Co. v. Transatlantic Reinsur. Co.*, 788 N.Y.S.2d 44, 45 (1st Dept. 2004) (applying *de novo* standard of review to trial court's interpretation of a contract clause as a matter of law). The function of the appellate court is to apply the meaning intended by the

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[5] Russell Coutts, Skipper and Chief Executive Officer of BMW ORACLE Racing, in an affidavit, dated August 7, 2009, stated that "until" the issue of whether "the rudder [would] be included in the length at load waterline measurement" GGYC "cannot schedule the completion of [its] vessel." (R. at 1647).

[6] GGYC's motion sought further relief that is still before the trial court.

parties, as derived from the language of the order. *See Duane Reade, Inc. v. Cardtronics, L.P.*, 863 N.Y.S.2d 14, 16 (2008) ("On appeal, the standard of review is for this Court to examine the contract's language de novo").

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT SNG'S VENUE SELECTION FOR THE 33RD AMERICA'S CUP WAS INVALID

A. The Trial Court Failed To Apply The Unambiguous Terms Of The April 7 Order And Its Statement That The 33rd Cup May Take Place In "Any Other Location Selected By SNG"

The plain language of the April 7 Order is clear. It states:

> [T]hat the dates for the challenge match races shall be the date ten calendar months from the date of service of a copy of this order, with notice of entry, upon the attorneys who have appeared herein, unless said date is a Sunday or legal holiday, in which case the next day shall be the first date of the challenge match races. The second date shall be two business days thereafter and the third date, if necessary, shall be two business days after the second race. Notwithstanding the above, the parties may mutually agree in writing to other dates.
>
> [T]hat the location of the match shall be in Valencia, Spain *or any other location selected by SNG,* provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races.

(R. at 271-272). There is nothing ambiguous, confusing or unclear about the Order. It in no way bars selection of RAK or another Northern Hemisphere location.

The trial court erred when it failed to give effect to the plain and unambiguous terms of the April 7 Order and denied SNG the right to select "any other location." As recently stated by the United States Supreme Court, "where the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *See Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2204 (2009); *see also United States v. Spallone,* 399 F.3d 415, 421 (2d Cir.2005) ("[I]f a judgment is clear and unambiguous, a court must adopt, and give effect to, the plain meaning of the judgment") (citation omitted); *cf. Majewski v. Broadalbin-Perth Cent. Sch. Dist.,* 696 N.E.2d 978 (N.Y.) ("[I]t is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning which involves no absurdity or contradiction, there is no room for construction and courts have no right to add or take away from that meaning.") (citation omitted).

If the trial court had correctly applied the plain meaning of the April 7 Order, it would have held that the race could take place at "any location selected by SNG", *including* RAK. Instead, the court disregarded the plain meaning of the Order and held that "any other location" means "any location in the Southern

Hemisphere." The trial court erred as a matter of law and the October 30 Order should be reversed.

The Court's October 30 Order preventing the race from taking place in RAK is not only a violation of the April 7 Order, it is also directly contrary to the Deed of Gift. The Deed of Gift provides that in a match under the default rules – which is the case here – the venue "*shall* be selected by the Club holding the Cup." (R. at 346). SNG has repeatedly and consistently stated that it would select a Northern Hemisphere venue for the match. (R. at 441, 446-447). In addition, GGYC similarly indicated its desire for a Northern Hemisphere race in its Notice of Challenge. (R. at 378-379).

B. The October 30 Order Is Inconsistent With The Parties' Understanding And Previous Interpretations Of The April 7 2009 Order

The trial court's decision that the April 7 Order must be "harmonized" with the Deed of Gift is not only contrary to black letter law, it is contrary to the parties' own intentions and the trial court's previous order interpreting the April 7 Order. The language of the Order simply *cannot* be harmonized with the Deed of Gift, at least on the issue of the Deed of Gift's hemisphere restrictions. The same basis that led to the rejection of RAK as a northern hemisphere venue during the winter months necessarily leads to the rejection of Valencia as a Northern Hemisphere venue during the winter months. But the April 7 Order expressly

permits Valencia as a venue, which necessarily means that RAK is equally permitted.

Prior to when the May 12 Order was first entered by Justice Cahn, he was presented with submissions by both parties regarding their respective rights under the Deed of Gift. (R. at 159-225). GGYC sought to preserve its right to have a match a soon as ten months after issuance of the Order. (R. at 163-166). SNG sought to preserve its right to select a Northern Hemisphere venue. (R. at 171-174). In consideration of these interests and notwithstanding the Deed, Justice Cahn entered an order permitting a race any where SNG selected, regardless of date, and specifically stated that a race in Valencia, Spain was permitted. (R. at 238). The Order also required the race to take place ten months from his order, dated May 12, 2008, which would have been March 2009. (R. at 237-238). Thus, at the time of the order, the Court was aware of the hemisphere restrictions but expressly disregarded the Deed by permitting a race in March 2009 in Valencia, Spain, a Northern Hemisphere location.[7]

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[7] GGYC argued before the trial court that a literal interpretation of the April 7 Order would be non-sensical because it would allow races to be held on Walden Pond or Lake Geneva. That interpretation is wrong. The April 7 Order resolved that CNEV was not a valid yacht club and dealt with the consequences of such invalidation including the tolling of the ten months notice of the GGYC challenge. That Order addressed the venue issue in relation to the tolling of the ten months notice period and to the date of the Match. Hence, the paragraph of the April 7 Order setting the venue as "Valencia, Spain or any other location selected by SNG" has to be read in connection with the previous one, which deals with the date of the match. In other words, "any other location" is waiving the hemisphere restriction to the extent it has to be waived to hold the match ten months from the issuance of the court order. Reading, as one must, the word "any" in

Unlike other provisions in the Order issued by Justice Cahn that are expressly subject to the Deed of Gift, such as the order that "CNEV is not a valid Challenger of Record pursuant to the Deed of Gift" or that "GGYC and SNG may engage in mutual consent process . . .in accordance with the Deed of Gift", the paragraph regarding SNG's right to select the venue *does not* state that it is to be "pursuant to the Deed of Gift" or "in accordance with the Deed of Gift". (R. at 237-238). This too removes any doubt as to whether SNG's right to select the venue in any way restricted by the Deed of Gift.

Also significant, GGYC itself interpreted the order to permit SNG to choose a Northern Hemisphere venue. GGYC representatives stated that the order "gave the defender the flexibility to choose, in fact, *any venue in the world, north or southern hemisphere*, the way the order's worded." (R. at 1409). Mr. Coutts further confirmed this understanding that the Order permitted the race to take place in February in the Northern Hemisphere: "[W]e believe that the order ... does allow the race to take place in the Northern Hemisphere, outside of the Deed of Gift restraints, if that's what you call it. The order was very clear." *Id.*; *see also* (R. at 1414).

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connection with the date, the hemisphere rule and the specification of Valencia as a permissible venue, "[a]ny location" means a location in either hemisphere. Had the intent been to preserve the hemisphere restriction, the Order would not have allowed the selection of "*any* other location" but rather would have used more limiting words.

After the Court of Appeal's April 7, 2009 entry of judgment reinstating the May 12 Order, the trial court again interpreted the Order to be free from the hemisphere restrictions in the Deed of Gift.[8] At a May 14, 2009 hearing, SNG submitted that it was "*absolutely committed to a northern hemisphere* race. There will be *a northern hemisphere race*" and therefore the race *could not* take place in February 2010, but rather could only take place as early as May. (R. at 447, 441). The trial court rejected this interpretation of the order and held that the race must take place in February 2010. (R. at 448). Thus, the May 14 order ratified SNG's right to select Valencia or "any other location" for the February match. The October 30 Order is thus inconsistent with the trial court's previous interpretation of the April 7 Order.

II. GGYC SHOULD NOT BE PERMITTED TO BENEFIT FROM ITS UNCLEAN HANDS AND UNSPORTSMANLIKE BEHAVIOR

While reversal is appropriate as a matter of law, GGYC also should not be permitted to benefit from its inequitable conduct. In light of the fact that the trial court has already noted GGYC's unsportsmanlike conduct, laches bars the relief GGYC currently seeks. Under the doctrine of laches, a court of equity does not grant relief to a party if, as a result of that party's inexcusable delay in

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[8] SNG does not dispute that the April 7 Order did not waive the requirement that the race be sailed on an "ocean course" and also "free of headlands". These additional requirements are set forth in a *separate* paragraph of the Deed of Gift from and cannot be read in conjunction with the paragraph regarding the hemisphere restriction. The course selected by SNG is an ocean course, free of headlands. (R. at 1253-55, 1257-60).

requesting it, the relief would work inequity. "[L]aches requires a showing of unreasonable and inexcusable delay by plaintiff resulting in prejudice to the defendant." *Macon v. Arnlie Realty Co.*, 207 A.D.2d 268, 271 (1st Dep't 1994). "The essential element of this equitable defense is delay prejudicial to the opposing party." *Barabash v. Barabas*, 31 N.Y.2d 76, 81 (1972); *see also Macon*, 207 A.D.2d at 271 ("Delay alone, without prejudice, will not suffice.").

A. GGYC's Delay In Filing Its Motion Is Unreasonable

The length of the delay, in isolation, "do[es] not . . . resolve th[e] issue." *Schultz v. State*, 81 N.Y.2d 336, 347 (1993). Rather, the Court "must examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Id.*; *see also* N.Y. Jurisprudence 2d § 364 (updated 2009) ("Whether the doctrine applies depends on the facts of each case . . . ."). In this Court, the inquiry rests solely on the elements of delay and prejudice. *Macon,* 207 A.D.2d at 271.

There can be no dispute that GGYC unreasonably delayed its motion to enjoin SNG's selection of RAK to gain a tactical advantage on the water. On August 5, SNG announced the venue for the race. (R. at 1510-1511). Over the next two months, GGYC furiously litigated its various complaints concerning SNG's preparations for the race. But it sat on its hands on the central venue issue.

In the eight weeks between August 5 and October 1, GGYC clearly had every opportunity to assert its claim concerning the race venue. Indeed, GGYC was in (or submitting papers to the) court regularly during that time – attending an evidentiary hearing on August 10 (R. at 497-595) concerning the filing of certain documents with the Coast Guard, and filing a motion on September 2 complaining of the rules that SNG announced for the race the day after SNG announced the venue. (R. at 838-861). If GGYC had any objection to the venue, which it voiced in a few letters to SNG but not in any Court proceedings, it chose not to take prompt action but instead to sit and wait until after SNG had made substantial commitments in anticipation of a February 2010 race in RAK. In an ultimate act of unsportsmanlike behavior and gamesmanship, GGYC delayed filing its venue motion until after SNG sent its vessel and crew to RAK, and after RAK had spent substantial sums of money and resources preparing for the race. (R. at 1295-1307).

B. SNG Will Suffer Significant Prejudice As A Result of GGYC's Delay

SNG will suffer significant prejudice if it is prevented from selecting RAK as the venue for the America's Cup. Astonishingly, GGYC is now arguing that SNG cannot select any venue other than Valencia because the timing of the trial court's ruling renders it impossible for SNG to provide GGYC with six months notice of a Southern Hemisphere venue. Venue selection is one of the few

advantages granted to the Defender under the Deed of Gift. SNG reasonably relied upon the plain text of the April 7 Order in selecting RAK, a venue it believed to be not only proper, but preferential to other venues it considered, including Valencia, Spain. (R. at 1261-1263). SNG prepared its boat and crew to race in the sailing conditions that exist in RAK in February. (*Id.*). By enjoining SNG from proceeding with the match in RAK, the Court has vitiated an advantage to which SNG is entitled under the Deed of Gift.

III. THE TRIAL COURT ERRED IN HOLDING THAT SNG MAY NOT INCLUDE RUDDERS IN MEASUREMENT OF THE LENGTH ON LOAD WATER-LINE

The trial court erred when it interpreted the Deed of Gift as excluding rudders in measurement of the length on load water-line. (R. at __) The Deed of Gift is clear that "yacht" and that only "centre-board" and "sliding keel" must be excluded from measurement. By excluding the rudders from measurement, the Court misapplied the plain language of the Deed of Gift. The trial court reached its erroneous conclusion by resorting to irrelevant and unhelpful extrinsic evidence. (R. at __). But the Deed is clear and it is unnecessary to look outside of the document to reach the conclusion that the rudder must be included in the load waterline measurement. The result of this error is that GGYC, which concedes that its boat measures more than 90 feet when its rudders are included in the measurement (R. at 845, 847), will be permitted to race in a boat that exceeds the

permissible dimensions of the Deed of Gift. It is undisputed that lengthening a boat can increase its speed. (R. at 848). It is for that reason that the Deed has strict measurement rules. The rudder is therefore not an inconsequential matter and the trial court's misapplication of the relevant and unambiguous provision of the Deed of Gift must be reversed to have the type of fair competition envisioned by the Deed of Gift.

A. The Deed Of Gift Unambiguously Requires Inclusion of Rudders In The Measurement Of The Length At Load Water-Line

The Deed of Gift is exhaustively detailed and highly specific in its commands regarding boat measurments. It provides that competing "*yachts or vessels*, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line." (R. at 345). By its express terms, the Deed of Gift requires measurement of "yachts or vessels", not just hulls, as argued by GGYC below. The trial court erred by substituting the narrow term "hulls" for the more inclusive term "yachts or vessels".

The Deed is also very specific about what parts of the "yacht" should *not* be measured. It states "center-board or sliding keel [*shall not*] be considered a part of the vessel for any purposes of measurement." (R. at 346). Significantly, the Deed of Gift says *nothing* about excluding rudders for purposes of

measurement. The Deed must be read, pursuant to the maxim of *expressio unius est exclusio alterius*, to measure the entire "yacht or vessel", except for any "centre-board" or "sliding keel." *In re New York City Asbestos Litigation,* 838 N.Y.S.2d 76, 80 (1st Dep't 2007) ("Under the standard canon of contract construction *expressio unius est exclusio alterius* ... the provision's narrow exclusion for liability based upon Con Edison's sole active negligence must clearly be understood to mean that otherwise, where the liability is *not* the result of the *sole active negligence* of Con Edison, the indemnification provision remains applicable."). Any other construction would be contrary to the Court of Appeals instruction in *Mercury Bay* to strictly interpret the Deed. *Mercury Bay*, 76 N.Y. 2d at 260 ("Because the deed provisions on these issues are unambiguous, we may not look beyond the four corners of the deed in ascertaining the donors' intent.").

This is also the only logical conclusion that can be reached where a rudder does, in fact pass through the waterline. GGYC concedes that the longer the length on load water-line, the faster the vessel. Thus, if the rudder extends the waterline of the yacht, the boat will be faster. This is why the rudder location is ordinarily restricted in competitions. While the Deed of Gift does not directly restrict the rudder location, it restricts the yacht as a whole to be 90 feet or less in load waterline length. *No prior America's Cup vessel has ever had a load waterline length of more than 90 feet* ***counting the rudder.***

GGYC's challenging vessel, USA,[9] has an overall length of 113 feet. (R. at 1575). It has a rudder that crosses the water line and thus is properly counted in the measurement of load water line. Exclusion of that rudder in the measurement of GGYC's vessel effectively decreases USA's length on load water from something closer to 113 feet to within the 90-feet maximum. If the November 2 Order is not overturned, GGYC will succeed in circumventing the maximum measurement specifications proscribed by the clear language of the Deed.

B. Evidence of Custom of Practice is Irrelevant Here, Where the Deed Is Clear And GGYC's Boat Is Unlike Previous America's Cup Vessels

Because the Deed of Gift is clear and unambiguous, the Court improperly resorted to extrinsic evidence on whether to include the rudder in the load water line measurement. *See Mercury Bay,* 76 N.Y.2d at 270 ([B]ecause the plain language of the Deed of Gift is unambiguous, . . . resort to extrinsic evidence to impute a different meaning to the terms expressed is improper."). As stated by the *Mercury* Bay court:

> Long-settled rules of construction preclude an attempt to divine a settlor's intention by looking first to extrinsic evidence. Rather, the trust instrument is to be construed

[9] GGYC's announced the boat it intended to race on August 10, 2009, four days after SNG published its measurement procedures. (R. at 570, 1374-1375, 1510-1511). Thus, any suggestion that SNG's measurement procedures are designed to disqualify GGYC is simply fanciful.

> as written and the settlor's intention determined solely
> from the unambiguous language of the instrument itself.

Mercury Bay, 76 N.Y.2d at 267 (citing *Loch Sheldrake Assocs. v Evans,* 306 N.Y. 297, 304 (1954); *Central Union Trust Co. v. Trimble,* 255 N.Y. 88, 93 (1930); *Gross v Cizauskas,* 53 A.D.2d 969, 970 (3d Dep't 1976). Here, the trial court improperly credited extrinsic evidence such as affidavits from "a number of racing experts", New York Yacht Club rules, and previous America's Cup practice. Resort to this evidence was improper not only because the Deed is crystal clear, but also because there has never been an America's Cup boat remotely like the boat GGYC intends to race, and prior custom and practice is of no moment here. "As sporting activities evolve in light of changing preferences and technologies, it would be most inappropriate and counterproductive for the courts to attempt to fix the rules and standards of competition of any particular sport." *Mercury Bay,* 76 N.Y.2d at 268. There has never been a trimaran in the America's Cup nor a vessel with a stern hung rudder. What that means is that every America's Cup boat ever sailed has had a rudder within the 90 foot limitation – not one that extended beyond the end of the vessel. GGYC's vessel would be the first to compete for the America's Cup while measuring 113 feet in overall length including a stern hung rudder – a boat far longer than the Deed of Gift ever countenanced. Accordingly, the fact that previous yacht clubs or boat class rules may or may not have included the rudder in measurement of load water-line is meaningless.

CONCLUSION

For the foregoing reasons, Appellant-Defendant SNG respectfully requests that this Court reverse the trial court's orders granting Appellee-Plaintiff GGYC motion to disqualify RAK was the venue for the 33rd America's Cup and excluding the rudder from the load waterline measurement.

Dated: New York, New York
November 4, 2009

Respectfully submitted,

SIMPSON THACHER & BARTLETT LLP

By: _____

Barry R. Ostrager
Jonathan K. Youngwood
George S. Wang
Laura D. Murphy

425 Lexington Avenue
New York, New York 10017
Tel: (212) 455-2000
Fax: (212) 455-2502

Attorneys for Defendant-Appellant
Société Nautique de Genève

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

GOLDEN GATE YACHT CLUB, Plaintiff, v. SOCIÉTÉ NAUTIQUE DE GENÈVE, Defendant, and CLUB NÁUTICO ESPAÑOL DE VELA, Intervenor-Defendant.	Index No.. 602446/07 IAS Part 54 Hon. Shirley Werner Kornreich **PRE-ARGUMENT STATEMENT**

Defendant Société Nautique de Genève ("SNG") by its attorneys, Simpson Thacher & Bartlett LLP, submit this pre-argument statement pursuant to 22 N.Y.C.R.R. § 600.17:

1. The full title of this action is set forth in the caption.

2. The full names of the original parties are Société Nautique de Genève and Golden Gate Yacht Club ("GGYC"). Since commencement of this action, Club Náutico Español de Vela ("CNEV") was added by stipulation between the parties on September 20, 2007.

3. The name, address and telephone number of counsel for Defendant- Appellant SOCIÉTÉ NAUTIQUE DE GENÈVE is:

SIMPSON THACHER & BARTLETT LLP
Barry R. Ostrager, Esq.
Jonathan K. Youngwood, Esq.
George S. Wang, Esq.

425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2000

4. The name, address, and telephone number of counsel for Plaintiff-Appellee GOLDEN GATE YACHT CLUB is:

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

BOIES, SCHILLER & FLEXNER LLP
David Boies, Esq.
333 Main Street
Armonk, New York 10504
Tel: (914) 749-8200

5. The name, address and telephone number of Intervenor-Defendant CLUB NÁUTICO ESPAÑOL DE VELA is:

DEBEVOISE & PLIMPTON LLP
David W. Rivkin, Esq.
919 Third Avenue
New York, New York 10022
Telephone: (212) 909-6000

6. This appeal is taken from the Decision and Order of Hon. Shirley Werner Kornreich, J.S.C. of the Supreme Court of the State of New York, County of New York, dated October 30, 2009, notice of entry of which was served by hand delivery on October 30, 2009.

7. This is an action for breach of the terms of the Deed of Gift governing the America's Cup. On July 20, 2007, Plaintiff-Appellee GGYC filed a complaint alleging that Defendant-Appellant SNG violated the terms of the Deed of Gift that governs the America's Cup by accepting a challenge from CNEV and seeking a declaratory judgment that CNEV's challenge for the Cup is void and GGYC is the rightful Challenger of Record for the 33rd

America's Cup. In decisions dated November 27, 2007, March 17, 2008 and May 12, 2008, the Supreme Court granted Plaintiff-Appellee GGYC's Cross-Motion for Summary Judgment, denied in part Defendant-Appellant SNG's Motion to Dismiss and for Summary Judgment, and declared GGYC's challenge to be valid and GGYC to be the Challenger of Record; denied SNG's motion for an order declaring GGYC's Notice of Challenge and Certificate to be in non-compliance with the Deed of Gift; and entered an order setting dates for the next America's Cup. The Appellate Division, First Department, reversed in a decision reported at 55 A.D.3d 26 (1st Dep't 2008). The Court of Appeals reversed the First Department's decision, reinstating the Supreme Court's decision and declaring GGYC the Challenger of Record. 12 N.Y.3d 248 (2009). Since that time, CNEV has declined to participate in the proceedings.

8. Following the remittitur to the Supreme Court, and entry of Judgment on April 7, 2009, on October 1, 2009 GGYC filed Motion to Enforce Compliance with the Order and Judgment Entered April 7, 2009 Regarding Venue Location for the 33rd America's Cup. On October 27, 2009, the Supreme Court held hearing regarding GGYC's motion.

9. In a decision and order dated October 30, 2009, Justice Shirley Werner Kornreich of the Supreme Court, New York County, Commercial Division, granted GGYC's Motion to Enforce Compliance. In doing so, the Court invalidated Ras al Khaimah as the venue for a February, 2010 America's Cup race. The Notice of Entry is dated October 30, 2009. A copy of the Notice of Entry and Memorandum Decision are attached hereto as exhibit A.

10. The grounds for modification are errors of law in part of Justice Kornreich's decision and order, dated October 30, 2009.

11. The following appeal is pending in this action: On September 2, 2009, GGYC issued a Notice of Appeal of the July 29, 2009 decision and order of Justice Shirley Werner

Kornreich of the Supreme Court, New York County, Commercial Division. The July 29, 2009 decision was entered on August 3, 2009, and the Notice of Entry is dated August 4, 2009. A copy of the Notice of Appeal and preargument statement are attached hereto as exhibit B.

Dated: New York, New York
November 2, 2009

SIMPSON THACHER & BARTLETT LLP

By: _____

Barry R. Ostrager
Jonathan K. Youngwood
George S. Wang
425 Lexington Avenue
New York, N.Y. 10017-3954
Telephone: (212) 455-2000
Facsimile: 212-455-2502

Attorneys for Defendant-Appellant
SOCIÉTÉ NAUTIQUE DE GENÈVE

TO: OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
New York, New York 10271
Telephone: (212) 416-8389

LATHAM & WATKINS, LLP
James V. Kearney, Esq.
885 Third Avenue
New York, New York 10022
Telephone: (212) 906-1200
Attorneys for Plaintiff-Respondent Golden Gate Yacht Club

BOIES, SCHILLER & FLEXNER LLP
David Boies, Esq.
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Attorneys for Plaintiff-Respondent Golden Gate Yacht Club

DEBEVOISE & PLIMPTON LLP
David W. Rivkin, Esq.
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000
Attorneys for Intervenor-Defendant-Appellant Club Nautico Espanol de Vela

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Jeffrey A. Rosenthal, Esq.
One Liberty Plaza
New York, NY 10006
Telephone: (212) 225-2000
Attorneys for *Amicus Curiae* The Emirate of Ras Al Khaimah

SUPREME COURT OF THE STATE OF NEW YORK
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SIMPSON THACHER & BARTLETT LLP
Barry R. Ostrager, Esq.
Jonathan K. Youngwood, Esq.
George S. Wang, Esq.

425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2000

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

BOIES, SCHILLER & FLEXNER LLP
David Boies, Esq.
333 Main Street
Armonk, New York 10504
Tel: (914) 749-8200

5. The name, address and telephone number of Intervenor-Defendant CLUB NÁUTICO ESPAÑOL DE VELA is:

DEBEVOISE & PLIMPTON LLP
David W. Rivkin, Esq.
919 Third Avenue
New York, New York 10022
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8. Following the remittitur to the Supreme Court, and entry of Judgment on April 7, 2009, on September 2, 2009 GGYC filed Motion to Enforce Compliance with the Order and Judgment Entered April 7, 2009, Renew Its Sailing Rules Motion. On October 27, 2009, the Supreme Court held hearing regarding GGYC's motion.

9. In a decision and order dated November 2, 2009, Justice Shirley Werner Kornreich of the Supreme Court, New York County, Commercial Division, granted in part GGYC's Motion to Enforce Compliance. In doing so, the Court ruled SNG may not include rudders in measurement of the length on load water-line. The Notice of Entry is dated November 4, 2009. A copy of the Notice of Entry and Memorandum Decision are attached hereto as exhibit A.

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Dated: New York, New York
November 4, 2009

SIMPSON THACHER & BARTLETT LLP

By: _____

Barry R. Ostrager
Jonathan K. Youngwood
George S. Wang
425 Lexington Avenue
New York, N.Y. 10017-3954
Telephone: (212) 455-2000
Facsimile: 212-455-2502

Attorneys for Defendant-Appellant
SOCIÉTÉ NAUTIQUE DE GENÈVE

TO: OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
New York, New York 10271
Telephone: (212) 416-8389

LATHAM & WATKINS, LLP
James V. Kearney, Esq.
885 Third Avenue
New York, New York 10022
Telephone: (212) 906-1200
Attorneys for Plaintiff-Respondent Golden Gate Yacht Club

BOIES, SCHILLER & FLEXNER LLP
David Boies, Esq.
333 Main Street
Armonk, New York 10504
Telephone: (914) 749-8200
Attorneys for Plaintiff-Respondent Golden Gate Yacht Club

DEBEVOISE & PLIMPTON LLP
David W. Rivkin, Esq.
919 Third Avenue
New York, NY 10022
Telephone: (212) 909-6000
Attorneys for Intervenor-Defendant-Appellant Club Nautico Espanol de Vela

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Jeffrey A. Rosenthal, Esq.
One Liberty Plaza
New York, NY 10006
Telephone: (212) 225-2000
Attorneys for *Amicus Curiae* The Emirate of Ras Al Khaimah