SUPREME COURT OF THE STATE OF NEW YORK
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.	Index No. 602446/07 IAS Part 54 Hon. Shirley Kornreich

MEMORANDUM OF LAW IN SUPPORT OF SOCIÉTÉ NAUTIQUE DE GENÈVE'S MOTION FOR AN ORDER EXPEDITING APPEAL AND FOR EXPEDITED RELIEF, A STAY PENDING APPEAL, CONSOLIDATION OF APPEALS AND FOR ORAL ARGUMENT

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Defendant-Appellant Société Nautique de Genève ("SNG") submits this memorandum of law in support of its motion for: (1) an order, pursuant to Rule 600.12(a)(2), expediting the briefing of the appeal of the October 27, 2009 bench decision, entered on October 30, 2009 (Shirley Kornreich, J.) (the "October 30 Order") and the November 2, 2009 decision, entered on November 4, 2009 (the "November 4 Order") (Shirley Kornreich, J.) and for a preference; (2) a stay, pursuant to CPLR § 5519(c), of enforcement pending appeal of the October 30 Order; (3) consolidation of its appeals;[1] and (4) oral argument.[2]

PRELIMINARY STATEMENT

The America's Cup is a historic yacht competition governed by a Deed of Gift that dates back to 1857.[3] The next America's Cup was on track to be held in February 2010 in Ras Al Khaimah ("RAK"), United Arab Emirates, the venue selected by SNG, the current holder of the America's Cup in accordance with the right granted SNG, as the America's Cup holder to choose the venue of

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[1] The appeals of the October 30 Order and November 4 Order arise from the same facts and circumstances and both issues must be resolved before the America's Cup match can take place in February 2010. GGYC cannot establish any prejudice from consolidation and, indeed, it is in GGYC's interest to consolidate the appeals and have both resolved expeditiously. *See* David S. Siegel, *New York Practice* § 128 (4th ed. 2005) ("When consolidation is proposed, the burden today is on the resisting party to show that it would prejudice him . . . .").

[2] SNG requests oral argument of its nonenumerated appeals pursuant to N.Y.C.C.R. 600.11(f)(3).

[3] A true and correct copy of the Deed of Gift can be found as Exhibit D to the Affirmation of Barry R. Ostrager ("Ostrager Aff."), dated November 4, 2009.

the next Cup. Those plans became derailed when GGYC filed a motion on October 1, which the trial granted on October 30, declaring that RAK is an improper venue. Notably, GGYC's regular notice motion was filed:

- 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.

As a result of what the trial Court has deemed GGYC's "unsportsmanlike behavior" and gamesmanship, this Court must decide this critical issue at the 11th hour – just three months before the race. The need for expedition is thus apparent. The irreparable harm to SNG and RAK by virtue of this ruling is manifest, as is the trial court's error.

At its core, this appeal concerns the fundamental right of SNG, as Defender, under the Deed of Gift and an Order of the Court of Appeals to select the venue for the America's Cup and the manner in which the vessels will be measured under the Deed of Gift (which determines if a vessel is qualified). The issues are simple and straightforward. Resolution of the venue issue involves the interpretation of one sentence of the Court of Appeals' order, which states that the

race can take place in "Valencia, Spain or any other location selected by SNG." The measurement issue, which was resolved in an Order entered November 4 and is discussed in more detail below, relates to two sentences in the Deed of Gift.[4] These issues will not require substantial judicial resources to resolve.

America's Cup matches are, by the express terms of the Deed of Gift prohibited in the Northern Hemisphere from November to May. Nevertheless, a May 13, 2008 order of the trial court, reaffirmed on April 7, 2009 by the Court of Appeals, explicitly departed from the plain language of the Deed of Gift as it expressly provided that a winter race could be held in "Valencia, Spain *or any other location selected by SNG*". The April 7, 2009 Court of Appeals Order acted 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 for the venue which had hospitable conditions for the 33rd America's Cup. It chose RAK because it is one of the few Northern Hemisphere locations that has excellent sailing conditions in February. In the October 30 Order, the trial court disregarded the plain language of the April 7 Order, the Deed of Gift, and its own May 14, 2009 order interpreting the very

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[4] The relevant sentences of the Deed of Gift state: "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*. . . . Center-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such center-board or sliding keel, *nor shall the center-board or sliding keel be considered a part of the vessel for any purposes of measurement*." Ostrager Aff., Ex. D.

same provision of the order by ruling that the words "any other location" mean something less than what they say. As a result, the trial court has brought chaos to the most important and prestigious event in the sailing world.

In short, SNG is now faced with the prospect of moving its boat and crew to an unknown venue at this eleventh hour and of being deprived of its fundamental right under the Deed of Gift of choosing the venue. Equally significant, RAK has already invested over $120 million to develop appropriate facilities to host the 33rd America's Cup. These facilities, some of which were specifically designed and built for the 33rd America's Cup, are now temporarily left with no purpose. SNG urgently needs to know whether it must find a new venue, which involves the negotiation of an agreement with the new host city and reassembling and retesting its vessel at the new location, and whether it must move its boat and crew, which is time consuming and laborious.

SNG therefore respectfully requests a stay of the October 30 Order pending expedited consideration of this appeal. (SNG is not seeking a stay of the rudder order.) SNG is filing its brief on the merits today and requires no more than one Court day to file any reply to GGYC's opposition brief. SNG's briefing schedule, to which GGYC has agreed and is attached hereto as Exhibit A, would, if granted, allow this Court to hear and potentially resolve the simple issues presented on this appeal very quickly. SNG's utmost desire is to have this appeal resolved as

soon as possible, and before the Thanksgiving holiday, so that the 33rd America's Cup is not put in jeopardy.

The significant and irreparable harm caused by the October 30 Order includes:

- 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;
- The extraordinary prospect of having to relocate SNG's vessel, which already arrived in RAK after a 30 day journey; 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.

SNG seeks a stay of the October 30 Order to help ensure that RAK continues to ready the venue for the February race. SNG and the Cup itself will be irreparably harmed absent a stay because if work on the venue slows or stops, there is a risk that the site will not be completely ready for the Cup. A stay would encourage RAK to continue to live up to the obligations it owes to SNG.

By contrast, GGYC, which has twice been called unsportsmanlike by the trial court, will suffer no prejudice whatsoever if a brief stay is granted. It has not shipped its boat out of the country (notwithstanding its false certification to the

U.S. Coast Guard that its boat was departing for the U.A.E. on September 25) and can continue to train off the waters of San Diego while the appeal is pending.

The trial court's ruling is so incorrect that SNG must prevail in this appeal. As previously noted, the April 7, 2009 Order of the Court of Appeals unambiguously states that the 33rd America's match take place in "Valencia, Spain or any other location selected by SNG." (Ostrager Aff., Ex. C.) There are no restrictions or modification on the phrase "any other location". And were there any question as to whether a Northern Hemisphere location would be permitted, that doubt is resolved by the reference to Valencia, which is, of course, in the Northern Hemisphere. But the trial court read the order to mean any other location *except* locations in the northern hemisphere. The trial court's order violated black letter law when it failed to give effect to the plain terms of the Court of Appeals order. *See Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2204 (2009) ("[W]here the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect.").

This appeal also concerns the November 2, 2009 Order regarding the exclusion of the rudder from the load waterline measurement. (Ostrager Aff., Ex. B.) The trial court misapplied the language of the Deed of Gift, which limits the length of a "yacht" to 90 feet on the load waterline exclusive of centre boards and sliding keels, and held that rudders – even if they pass through the waterline should

not be included in the waterline measurement. Not only is this contrary to the Deed, it gives GGYC a very significant competitive advantage to which it is not entitled. Specifically, the potential maximum speed of a vessel increases as the length of the vessel increases.

Despite GGYC's gamesmanship and multiple litigation initiatives, SNG is attempting to have the critical issues presented by this appeal resolved expeditiously given the planning needed to prepare for the February 8, 2010 commencement of the 33rd America's Cup. The time table proposed by SNG and agreed to by GGYC is highly reasonable in light of how much time and effort the parties have already spent briefing the issues here, and the Court's existing calendar.

STATEMENT OF FACTS

A. The America's Cup and the 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 Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256, 260 (1990). Today, it is a "challenge cup" governed by a Deed of Gift conveyed in 1887 to be "preserved . . . for friendly competition between foreign countries." (Ostrager Aff., Ex. D.) 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.

In the modern history of the America's Cup, every race has been sailed under the "mutual consent" provision, except for 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, 253 (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. The Challenger of Record is entitled to select a date, provided it is upon at least ten-months notice. (Ostrager Aff., Ex. D.)

B. GGYC Commences Litigation

GGYC began its quest to determine the 33rd America's Cup in the court rooms of New York, rather than on the water, on July 20, 2007, when it 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*, 12 N.Y.3d at 254. GGYC's suit dislodged the original Challenger of Record for the 33rd America's Cup, Club Náutico Español de Vela ("CNEV"), scuttled a multi-challenger series with 19 teams, and inserted itself as the valid Challenger of Record for the 33rd America's Cup in order to force

a one-on-one Deed of Gift match. GGYC's suit disputed the validity of CNEV's challenge primarily on the basis that CNEV was a new yacht club that had never held an annual regatta as of July 2007. Both sides moved for summary judgment. *Id.*

On November 27, 2007, the Supreme Court, by memorandum decision, dismissed 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. After hearing arguments on a motion to renew and reargue filed by SNG, the Supreme Court, on March 17, 2008, issued a second memorandum decision affirming its prior decision.

In settling the order on these decisions, the Court was presented with three issues: (i) when would the 10 month notice period begin; (ii) should the date of the race occur exactly at the end of the 10 month notice period or should the date be extended until May so as to avoid the Deed's hemisphere restrictions; and (iii) could the race occur between November and May in the Northern Hemisphere despite the Deed's hemisphere restrictions. GGYC sought to force SNG to race 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). (Ostrager Aff., Ex. E.) SNG argued that the race could not begin until at least 10 months from entry of a final order. (Ostrager Aff., Ex. F.) 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 earliest the race could begin was May 1, 2009. (*Id.*)

C. The Trial Court's May 12, 2008 Order

On May 12, 2008, the 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. (Ostrager Aff., Ex. C.) 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." (*Id.* (emphasis added).) 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, shortly after entry of this Order, Russell Coutts, CEO of BMW ORACLE Racing, speaking specifically about the May 12, 2008 Order, stated:

> 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.

(Ostrager Aff., Ex. G, at 23:17-24 (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." (*Id.*, at 27:17-21.) Likewise, Thomas F. Ehman, Jr., Head of External Affairs for GGYC's racing representative BMW ORACLE Racing, has agreed that "the Judge has said the *Defender may choose any venue in the world in either hemisphere, irrespective of the dates*." (*Id.*, at 28:11-13 (emphasis added).)

D. The Court of Appeals' Order Reinstates the May 13 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, this Court reversed the trial 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, this Court 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, 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, 2008 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." (Ostrager Aff., Ex. C, at 5.)

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. (Ostrager Aff., Ex. C.)

E. The Trial Court Interprets the April 7, 2009 Order to Permit a Northern Hemisphere Race in February

Shortly after entry of the order of the Court of Appeals, SNG attempted to reach agreement with GGYC concerning the dates and location of the race. 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, which set the race in February 2010. (Ostrager Aff., Ex. H.)

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." (Ostrager Aff., Ex. I, at 3:7-10.) 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." (*Id.* at 26:5-8; 19:6-8) ("SNG is absolutely committed to a northern hemisphere race. There will be *a northern hemisphere race*." (emphasis added)); (*id.* at 25:12-15) ("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." (*Id.* at 26:25-27:2.) On the same day, this Court signed an Order adopting the transcript of this hearing as the Order and Judgment of the Court. (Ostrager Aff., Ex. J.) The Court also republished SNG's stated commitment to a Northern Hemisphere venue.

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

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. (Ostrager Aff., Exs. K, L.) Relying upon the unequivocal affirmed order of April 7, 2009, SNG undertook a negotiation with several

potential venues and on August 5, 2009, SNG announced the selection of RAK as the site for the 33rd America's Cup. (Ostrager Aff., Ex. M.)

In early September 2009, BMW ORACLE Racing representatives visited RAK, met with senior government officials and reviewed the course for the match. (Ostrager Aff., Ex. N at ¶¶ 23, 33.) BMW ORACLE Racing sent its equipment and an advance team to RAK after its security advisor visited the venue and gave it a "positive" risk assessment and informed RAK officials that he was "more than impressed" with RAK's arrangements. (*Id.*)

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. (Ostrager Aff., Ex. O.) 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." (*Id.*) 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, on October 1, 2009, and one day after SNG's boat arrived in RAK, GGYC elected to file a motion with the Court seeking to have the venue declared invalid. GGYC argued that although the April 7, 2009 Order permits SNG to choose any venue, RAK is nonetheless improper because it is in the Northern Hemisphere. On October 13, 2009, RAK sought leave to file as *amicus curiae* a memorandum of law in support of SNG's Opposition to GGYC's Motion challenging the venue. (Ostrager Aff., Ex. P.)

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. 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.

(Ostrager Aff., Ex. A, at 29:20-30:19.) On Friday, October 30, 2009 the trial court so ordered the transcript as the decision and order of this court. (*Id.*) On the same day, SNG served Notice of Entry of the trial court's "so ordered" transcript. (*Id.*)

ARGUMENT

I. EXPEDITED CONSIDERATION OF THIS APPEAL IS IMPERATIVE

In this Court, "[a] preference under CPLR § 5521 may be obtained upon good cause shown." 22 N.Y.C.R.R. § 600.12(a)(2); NY CPLR § 5521 ("preferences in the hearing of an appeal may be granted in the discretion of the court to which the appeal is to be taken"). This Court has long recognized that appeals raising issues of significant public importance satisfy the "good cause" standard. *See, e.g., Amalgamated Transit Union, Local 1202 v. Greyhound Lines, Inc.*, 157 A.D.2d 167 (1st Dep't 1990); *McCain v. Koch*, 117 A.D.2d 198, 211 (1st Dep't 1986); *Am. Broadcasting Cos. v. Wolf and CBS Inc.*, 76 A.D.2d 162, 169 (1st Dep't 1980).

Here, the trial court expressly recognized the need for expeditious appellate review:

> [T]he reason I am making this ruling now and on the record rather than reserving is because I believe that *it is*

> *an important issue*, and I think you can take this decision, and I will so order the decision, the transcript, *you can take it to the Appellate Division immediately*. I am not going to sit on this decision. I think there were -- there may well have been tactical reasons that this motion was brought, things were done, but I don't believe that is sufficient for me to deviate from the Deed of Gift. But perhaps the Appellate Division will believe so, and I would invite you to get the transcript and go to the Appellate Division.

(Ostrager Aff., Ex. A, at 34:25-35:15); *see also id.* at 29:14-17 ("I'm ready to render a decision on this one motion, and I feel it necessary to do so from the bench because of the time constraints."). The necessity of expedition cannot reasonably be disputed. The America's Cup is the oldest, most prestigious sailing event in the world. It is both parties' interest to see that this litigation comes to an end. It is also in both parties' interest to know where they are going to race as soon as possible so that they may prepare for the February 2010 match.

In addition, a swift reversal of the Orders is necessary to prevent further damage to the relations of the United States and the United Arab Emirates. In the trial court, GGYC raised several unfounded assertions about the safety of RAK. These assertions were unequivocally contradicted by the testimony of several security experts, as well as an *amicus* submission from the emirate of RAK itself. (Ostrager Aff., Exs. N, T-V, AA.) Although the trial court did not premise its decision on the false security concerns raised by GGYC, the order has the potential of being interpreted by the general public as a rejection of RAK on the

ground that it is unsafe. The United Arab Emirates is a significant ally of the United States. (Ostrager Aff., Exs. AA, R at ¶ 2.) Indeed, the United Arab Emirates is home to more U.S. Naval ships than any other port outside of the United States. (*Id.*) United States ships pass through the same waters that the race will be sailed on a daily basis without harm. (Ostrager Aff., Ex. W at ¶ 9.) It is imperative that the Court correct this fundamental misapplication of the Court's order.

Based on these considerations, expedited treatment is necessary here. SNG respectfully requests that its appeal be granted a preference and that it be resolved before the Thanksgiving holiday so that the parties can adequately prepare for the February 2010 match.

II. THE MERITS AND THE EQUITIES WEIGH IN FAVOR OF GRANTING A STAY OF THE TRIAL COURT'S ORDER PENDING SNG'S APPEAL

N.Y. CPLR 5519(c) provides that:

> The court from or to which an appeal is taken or the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a) or subdivision (b), or may grant a limited stay or may vacate, limit or modify any stay imposed by subdivision (a), subdivision (b) or this subdivision, except that only the court to which an appeal is taken may vacate, limit or modify a stay imposed by paragraph one of subdivision (a).

Whether to grant a stay is entirely within the Court's discretion. *See, e.g., Grisi v. Shainswit*, 119 A.D.2d 418, 421 (1st Dep't 1986) (noting that stays pending appellate review of interlocutory orders are "a matter of discretion" for the courts); *Wilkinson v. Sukiennik*, 120 A.D.2d 989, 989 (4th Dep't 1986) (granting stay where party "demonstrated that his appeal from [the Supreme Court] order may have merit").

"In considering whether to grant a stay under subdivision (c), the court's discretion is the guide. It will be influenced by any relevant factor, including the presumptive merits of the appeal and any exigency or hardship confronting any party." David D. Siegel, Practice Commentaries, McKinney's Consolidated Laws of New York, CPLR § 5519:4. The party seeking the stay must demonstrate the merits of the appeal, harm that might accrue to the appellant if the stay is denied, and lack of prejudice to the respondent if the stay is granted. *Herbert v. City of N.Y.*, 126 A.D.2d 404, 407 (1st Dep't 1987) ("[S]tays pending appeal will not be granted . . . in cases where the appeal is meritless or taken primarily for the purpose of delay."); *Cavanagh v. Hutcheson,* 232 A.D. 470, 470-71 (1st Dep't 1931) (granting a stay because of the unfairness that would result otherwise).

Here, both the merits and the equities weigh in favor of granting a stay pending SNG's appeal. SNG will prevail in its appeal because the trial court's

order is a plain misapplication of the Court of Appeals' order. SNG will suffer irreparable harm if a stay is not granted absent a stay, RAK might not continue to prepare the venue for the February 2010 match. GGYC, by contrast, will suffer little, if any, prejudice from a stay. To the contrary, it is GGYC's unsportsmanlike behavior, including its decision to delay bringing an action to challenge the venue until the eve of the race that has caused SNG the need to seek a stay in the first place.

A. SNG Will Prevail in the Appeal

1. The Court of Appeals Failed to Apply the Order on Its Face, In Violation of Black Letter Law

The April 7, 2009 Order 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.

(Ostrager Aff. Ex. C, at 5 (emphasis added).) The Order was issued on May 12, 2008 and was affirmed by the Court of Appeals on April, 7, 2009. (*Id.*) The trial court erred when it failed to give effect to the plain and unambiguous terms of the Order and denied SNG the right to select "any other location." *Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2204 (2009) ("[W]here the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect.")

In addition, at the time of the original issuance of the Order and at the time the Court of Appeals reinstated the Order, the order permitted a race in either March 2009 or a February 2010 race in the Northern Hemisphere. Before issuance of the order, GGYC had argued that it was entitled to have a match as soon as ten months after issuance of the order and SNG had argued that being a Northern Hemisphere yacht club it should be allowed to select a Northern Hemisphere venue. The order was issued to address both parties concerns giving GGYC the priority of the date and SNG the priority of the Northern Hemisphere location.

Notwithstanding the Deed, Justice Cahn entered an order permitting a race any where SNG selected, regardless of date.[5] Furthermore, the order required

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[5] 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

the race to take place ten months from his order, dated May 12, 2008, which would have been March 2009. Thus, the only logical conclusion that can be drawn is that the Court considered and rejected the hemisphere restrictions of the Deed of Gift and gave SNG the right to select any venue in either hemisphere. And that is exactly how GGYC interpreted the order until recently. Russell Coutts, CEO of BMW ORACLE Racing, speaking specifically about Justice Cahn's order stated:

> 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.

(Ostrager Aff., Ex. G at 23:17-24 (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." (*Id.* at 27:17-21.)

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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 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. 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.

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

> In this case the Judge has said the *defender may choose any venue in the world in either hemisphere, irrespective of the date* . . . 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.

(Ostrager Aff., Ex. G at 28:11-19 (emphasis added).)

After the Court of Appeal's April 7, 2009 entry of judgment on this order, the trial court similarly interpreted the Order to be free from the hemisphere restrictions in the Deed of Gift. 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. (Ostrager Aff., Ex. I.) While SNG suggested that a Northern Hemisphere race was problematical, the trial court rejected this interpretation of the order and held that the race must take place in February 2010. However, the trial court did not modify the Court of Appeals ruling that the race take place in "Valencia, Spain or any other location selected by SNG." Thus, the May 14 order ratified SNG's right to select Valencia or "any other location" for the February match.

The Court's order enjoining 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." (Ostrager Aff., Ex. D.) SNG has repeatedly and consistently stated that it would select a Northern Hemisphere venue for the match. (Ostrager Aff., Ex. I, at 19:6-8; 25:12-15; 26:5-8.) In addition, GGYC similarly indicated its desire for a Northern Hemisphere race in its Notice of Challenge. (Ostrager Aff., Ex. O.)

2. In All Events, GGYC Should Be Estopped From Objecting to RAK On The Ground of Laches

Reversal is appropriate based solely upon the plain language of the Order. Nonetheless, in light of the fact that the trial court has twice noted GGYC's unsportsmanlike conduct, laches also 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 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 (1971); *see also Macon*, 207 A.D.2d at 271 ("Delay alone, without prejudice, will not suffice.").

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.

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. 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 court regularly during that time – attending an evidentiary hearing on August 10 concerning the requirements for the race, and filing a motion on September 1 complaining of the rules that SNG announced for the race the day after SNG announced the venue. 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 repeatedly ***agree*** that SNG had every right to

select a venue in the Northern Hemisphere. As noted above, on July 16, 2008, the CEO of GGYC's racing team affirmed at a press conference that the Supreme Court's Judgment in GGYC's suit against SNG "does allow the race to take place in the Northern Hemisphere, outside of the Deed of Gift restraints." (Ostrager Aff., Ex. G at 27:17-21.) GGYC delayed its action to challenge the venue, until after SNG had made substantial commitments in anticipation of a February 2010 race in RAK. In the ultimate act of unsportsmanlike behavior and gamesmanship, GGYC waited to make 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.

SNG will suffer significant prejudice if it is enjoined 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 six months notice of a Deed compliant venue in the Southern Hemisphere. The venue selection is one of the explicit 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. SNG prepared its boat and crew to race in the sailing conditions that exist in RAK in February. 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.

3. Under the Deed of Gift, the Rudder Must Be Included in the Load Waterline Measurement[6]

SNG is also appealing the trial court's decision interpreting the Deed of Gift to exclude rudders in measurement of the length on load water-line. (Ostrager Aff., Ex. B at 4.) This decision is wrong under the plain language of the Deed. Under the Deed of Gift, a "yacht" may not measure more than ninety feet on the "load water-line." The Deed is very specific that "centre boards and sliding keels" shall not be included for purposes of measurement.

The Deed of Gift says nothing about excluding rudders for purposes of measurement. And the common definition of "yacht" or "vessel" is not exclusive of appendages. Indeed, GGYC concedes that rudders are properly considered part of a "yacht" (Ostrager Aff., Ex. X at 9.) Thus, the Court misapplied the plain language of the Deed of Gift. The result of this error is that GGYC, who has conceded that its boat measures more than 90 feet when its rudders are included in the measurement, will be permitted to race in a boat the exceeds the permissible dimensions of the Deed of Gift. The Court reached this

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[6] Although the rudder order is not the subject of the stay request, SNG includes for purposes of completeness this discussion of the merits concerning that order.

erroneous conclusion by resorting to irrelevant and unhelpful extrinsic evidence. But, 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 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 (citations omitted); *see also 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). 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 rudder issue is not an inconsequential matter and the trial court's misapplication of the relevant and clear and unambiguous provision of the Deed of Gift must be reversed to have the type of fair competition envisioned by the Deed of Gift.

B. SNG Will Suffer Substantial Prejudice Absent a Stay

The trial court's analytically unsound order on the venue did violence to both the Deed of Gift and a clear and unambiguous court order that was entered in contemplation that SNG, the defender, would choose the venue. There was no basis to reject a proper venue just three months prior to the start of the race.[7]

Absent a stay, there is a substantial risk that RAK will not continue its preparations for the February 2010 race. RAK has already spent more than $120 million and still needs to make further expenditures to complete preparations for the 33rd America's Cup. If RAK stops preparations in light of the October 30 Order rejecting it for the venue and this Court ultimately reverses the October 30 Order and reinstates RAK as the venue, there is a significant risk that the RAK facilities will not be ready for race. SNG will suffer irreparable harm because it will be in the impossible position of having no venue for the 33rd America's Cup. For the Cup to be held in February 2010, these preparations need to continue. SNG needs a stay of the October 30 Order to help ensure that RAK continues to ready the venue for the February race. A stay would encourage RAK to continue to live up to the contractual obligations it owes to SNG and to the Cup.

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[7] As respects the rudder issue, GGYC will have to determine for itself whether it wishes to modify its boat (as it has done several times) to have a Deed compliant vessel or risk being unable to make modifications that will potentially be required after this Court rules. GGYC has admitted that it can modify its boat to move the rudder. (Ostrager Aff, Exs. Y at 90:8-10; Ex. Z at ¶ 6.)

C. Respondent Will Suffer No Prejudice From A Stay

GGYC cannot point to any prejudice it will suffer if the Court stays the October 30th Order while the Court considers this highly expedited appeal. Its crew can continue to train in its trimaran while the Order is reviewed by this Court. Its boat has not left for the venue so it does not face the costly and difficult prospect of removing its boat from the venue. GGYC also cannot claim prejudice with respect to the venue selection because it has *no right* to select the venue for the match. It has used legal strategy and gamesmanship – which the trial court already called "unsportsmanlike" on two separate occasions – to strip SNG of its rights and try to change the rules SNG is entitled to promulgate.

CONCLUSION

For the foregoing reasons, SNG respectfully requests that the Court enter an order granting (1) expedited briefing of its appeals of the October 30 Order and November 4 Order and for a preference; (2) a stay, pursuant to CPLR § 5519(c), of enforcement pending appeal of the October 30 Order; (3) consolidation of its appeals; and (4) oral argument.

Dated: New York, New York
November 4, 2009

Respectfully submitted,

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

Exhibit A

Proposed Schedule

Appellants' brief served:	November 4, 2009
Respondent's brief due:	November 12, 2009 (by noon)
Appellants' reply brief due:	November 13, 2009
Oral Argument:	Week of November 16, 2009