

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

Golden Gate Yacht Club

Plaintiff,

v.

Societe Nautique de Geneve

Defendant.

Index No. 60244607

**GGYC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR  
PRELIMINARY INJUNCTION AND EXPEDITED TRIAL AND DISCOVERY**

August 22, 2007

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Plaintiff Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in support of its motion for expedited trial and discovery and for a preliminary injunction, pursuant to CPLR 6301.

### **PRELIMINARY STATEMENT**

The Verified Complaint describes how Societe Nautique de Geneve (“SNG”), the successor trustee under the Deed of Gift for the America’s Cup and current holder of the Cup, refused to accept the challenge of the Golden Gate Yacht Club (“GGYC”) in violation of the terms of the Deed of Gift (“Deed”). (Ex. A, Verified Complaint, dated July 20, 2007).<sup>1</sup>

Almost two decades ago, the courts of New York were called upon to enforce the terms of the Deed of Gift, which created a trust under the laws of New York. *See Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 575 N.Y.S. 2d 851 (1990); 150 A.D.2d 82, 88 (1st Dep’t 1989). In *Mercury Bay*, the challenger similarly alleged that the successor trustee under the Deed of Gift refused to recognize a valid challenge. As described by the New York Court of Appeals, the trial court, on the challenger’s motion for preliminary injunctive and declaratory relief, held that the trustee’s options under the express terms of the Deed of Gift were to “accept the challenge, forfeit the Cup, or negotiate agreeable terms with the challenger.” 76 N.Y.2d at 263.

Here, the Court should similarly find that SNG’s options, as successor trustee under the Deed of Gift, must be the same; GGYC seeks similar relief for a similar violation of the Deed of

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<sup>1</sup> Citations in the form “(Ex. \_\_\_)” refer to exhibits to the Affidavit of Thomas F. Ehman, Jr., dated August 20, 2007 (“Ehman Affidavit”). Citations in the form “(Ehman Aff.)” refer to the Ehman Affidavit.

Gift. As detailed below (*infra* § III), GGYC's challenge met all the requirements of the Deed of Gift. GGYC's interest, upon the acceptance of its challenge by SNG, is to negotiate mutually agreeable terms with SNG regarding the conditions to govern the next America's Cup. If negotiation is unsuccessful, GGYC intends, through the racing team representing it, BMW ORACLE Racing, to compete against SNG's representative yacht for the Cup in a match, scheduled in GGYC's challenge for July 2008, and conducted within the specified terms of the Deed of Gift.

This arrangement is entirely consistent with the terms of the Deed of Gift. As the Court of Appeals in *Mercury Bay* noted, "the America's Cup competitions generally were conducted under the mutual consent provisions of the Deed with contestants agreeing upon the date, time and length of the races and, beginning in 1930, even upon the choice of vessels to be raced." 76 N.Y.2d at 262. Since 1970 (with the exception of the Mercury Bay challenge in 1988), the America's Cup races have been conducted with many challengers competing against each other in an elimination series, with the winner of that series going on to race for the Cup in a match against the trustee/defender. *Id.*; (Ehman Aff. ¶ 8).

SNG's claimed justification for refusing to recognize GGYC's challenge is a pure fabrication by SNG of a bogus challenge by a bogus yacht club, Club Nautico Espanol de Vela ("CNEV") that had no existence before it was fabricated for the sole purpose of challenging for the America's Cup (*see infra* § IV.A). CNEV's challenge violated the express terms of the Deed of Gift in that CNEV is not an organized yacht club, is not properly licensed in its jurisdiction, and held no annual regatta, all conditions required by the Deed of Gift. *Id.*

SNG's acceptance of the CNEV challenge violated the terms of the Deed of Gift and thus

constitutes a breach of its fiduciary duty. Further, it proceeded to publish, with CNEV, a Protocol for the conduct of the next America's Cup in which SNG usurped the power to unilaterally determine virtually all of the match conditions. As described below (*infra* Section IV.B), the terms of the Protocol demonstrate conclusively that SNG violated the mutual consent provision of the Deed of Gift and breached its fiduciary duty.

Further, to avoid compliance with the Deed of Gift, SNG commenced a sham arbitration - against itself -- regarding the validity under the Deed of Gift of SNG's acceptance of CNEV's challenge and its rejection of GGYC's challenge. (*See infra* § IV.C). Along with its bogus challenger, CNEV, SNG selected the three arbitrators in secret, did not disclose their identity and retained both the right to replace them and to modify the rules of the arbitration after it started. (*See infra* p. 16). The only parties to this so-called arbitration are CNEV and SNG, along with SNG's agent, the management entity selected by SNG to coordinate the 33<sup>rd</sup> America's Cup. All three are in complete agreement regarding the issue presented by SNG to the panel. Thus, no party to the arbitration disputes SNG's claim that it has not violated the Deed of Gift.

Moreover, *Mercury Bay* holds that the New York courts have jurisdiction over this dispute, and, ironically, in a recent book edited by SNG's hand-picked arbitration chairman, he agreed that New York courts have jurisdiction to interpret the Deed of Gift and to determine the validity of challengers. (*See infra* p. 17 - 19).

There should be no dispute that expedited resolution of the merits is necessary in order to preserve the rights of the parties. In this case, justice delayed is justice denied. In order to preserve its ability to compete with SNG in the match in July 2008, GGYC's racing representative has already had to commence preparations and incur significant costs. These

preparations have included and will include hiring design personnel, leasing manufacturing facilities, sourcing and purchasing large amounts of raw building materials (including carbon fiber), seeking sponsorships, arranging for base operations at the race site, hiring sailors and practicing in the race yacht. Because these preparations require sizable financial commitments, GGYC's right to participate in that race must be determined expeditiously. (*See infra* § V).

It also cannot be disputed that prospective contestants for the next America's Cup elimination series need to commence preparations. As detailed below (*infra* p. 19), these potential competitors must obtain financial sponsors, design and build racing vessels, arrange for an operations base at the race site, and retain and train crew, among other arrangements. SNG is actively soliciting and accepting challengers for the match prescribed in the Protocol with CNEV. As time goes by, other potential contestants, who are awaiting resolution of this dispute, are threatened with exclusion from the next race because they will not be left with sufficient time to prepare. These would-be competitors need to know whether the 33<sup>rd</sup> America's Cup ("AC 33") will be held under the conditions established in the one-sided and illegal Protocol published by SNG and CNEV, under conditions established in a protocol negotiated by SNG and GGYC which could include a challenger elimination series prior to the America's Cup match, or whether the 33<sup>rd</sup> America's Cup will be a match solely between the vessels representing SNG and GGYC in July 2008, under the default provisions of the Deed of Gift.

For these reasons, the merits of this action must to be decided on an expedited basis with trial scheduled for no later than October of 2007 and expedited discovery concluded by September 15, 2007.

Further, in order to minimize the disruption caused by SNG's violation of the terms of the

Deed of Gift -- and thus preserve the status quo so that the Court can render effective relief after expedited trial or on summary judgment -- it is necessary to enjoin SNG to select a location for the match with GGYC in July 2008 and provide GGYC with a copy of its club rules and sailing regulations, which, according to the Deed of Gift, will apply for the match absent mutual consent to other rules. GGYC and its racing representative cannot adequately prepare for a July 2008 race without knowing the location and rules of that race. Moreover, it is necessary that SNG provide this information in sufficient time for GGYC and SNG to resolve any dispute as to whether the location and rules meet the requirements of the Deed of Gift. The potential for such a dispute is made clear by SNG's aforementioned violation of the Deed of Gift.

## STATEMENT OF FACTS<sup>2</sup>

### **I. Background**

The America's Cup, a silver cup trophy, is the corpus of a charitable trust created in the 19<sup>th</sup> century in a Deed of Gift to the New York Yacht Club. *See Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 260 (1990). The courts in the *Mercury Bay* decisions have set out the historical background of the America's Cup, beginning in 1851 when the Cup's namesake, the yacht *America*, first wrested the Cup from its British challengers. *See Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82, 84-87, 93-95 (1st Dep't 1989).

On July 3, 2007, yacht SUI 100 ("Team Alinghi"), as representative of SNG, defended its title in the 32<sup>nd</sup> America's Cup sailing match against the yacht NZL 92 ("Emirates Team New Zealand"), as representative of the Royal New Zealand Yacht Squadron. (Ex. A ¶ 6). SNG is therefore the current holder and trustee of the America's Cup.

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<sup>2</sup> This Statement of Facts is drawn from GGYC's Verified Complaint (Ex. A) and from the Ehman Affidavit, dated July 20, 2007 and August 20, 2007 respectively.

## II. The Deed of Gift

The Deed of Gift provides that holders of the Cup accept it “subject to the said trust, terms and conditions” and agree to ensure that its conditions are “fully observed and complied with by any contestant for the said Cup during the holding thereof by it.” (Ex. B, p.2-3). The Deed of Gift requires that a bona-fide yacht club challenge for the Cup. Pursuant to the Deed of Gift, “[a]ny organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup.” (Ex. B, p.1); *Mercury Bay*, 76 N.Y.2d at 260 (quoting same). The Deed of Gift provides that “when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided.” (Ex. B, p.2).

The Deed of Gift, by its express terms, contemplates a consensual process for the determination of the conditions to govern the match. Specifically, the Deed provides that “[t]he 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.” (Ex. B, p.2). As noted in *Mercury Bay*, “[p]rior to 1988, the America's Cup competitions generally were conducted under the mutual consent provisions of the deed, with the contestants agreeing upon the date, time and length of the races and, beginning in 1930, even upon the choice of vessels to be raced.” *Mercury Bay*, 76 N.Y.2d at 262.

In accordance with the mutual consent clause, for the past decades (except for 1988), the America's Cup has been conducted with multiple challengers competing in an elimination series,

with the winner of that series going on to compete in a match against the defending club. *Id.* at 262; (Ehman Aff. ¶ 8). If the defending and challenging clubs cannot reach mutual agreement, then the Deed prescribes particular match rules (“Default Match Conditions”). *See Mercury Bay*, 76 N.Y. 2d at 260 (“unless otherwise agreed by the parties, the terms of the challenge are specified in the deed.”); (Ex. B, p.2).

### III. GGYC’s Valid Challenge

On July 11, 2007, GGYC representatives hand-delivered to the SNG Secretary-General at the SNG clubhouse in Geneva a formal challenge to sail the 33<sup>rd</sup> America’s Cup match in accordance with the terms and conditions of the Deed of Gift. (Ex. C). On July 23, 2007, SNG rejected GGYC’s valid challenge. (Ex. H).

There can be no question that GGYC is a bona-fide yacht club within the meaning of the Deed of Gift.<sup>3</sup> SNG had recognized that GGYC met all the requirements of the Deed of the Gift as the challenger of record for the 32<sup>nd</sup> America’s Cup. (Ex. FF ¶ 3.1). GGYC is “an organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department.” (Exs. B, p.1; C, p.1). GGYC is incorporated in the United States of America, in the State of California. (Ex. C, p.1). GGYC maintains a membership of more than 200 members. *Id.* It operates as a yacht club and has objectives consistent with the furtherance of yachting activities. *Id.* GGYC holds an annual regatta, the Sea Weed Soup Perpetual Trophy that, among other GGYC regattas, is and has been held annually on an arm of the sea -- namely San Francisco Bay. *Id.* GGYC is the representative of BMW ORACLE Racing, which raced on behalf of GGYC in the 32<sup>nd</sup> America's Cup. (Ehman Aff. ¶ 3).

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<sup>3</sup> *See* Golden Gate Yacht Club, [www.ggyc.com](http://www.ggyc.com) (Last visited August 20, 2007.)

The Deed of Gift requires that “[t]he Challenging Club shall give ten months’ notice, in writing, naming the days for the proposed races... Accompanying the ten months’ notice of challenge there must be sent the name of the owner and a certificate of the name, rig and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible.” (Ex. B, pp.1 - 2).

GGYC complied with the requirements of the Deed of Gift by naming July 4, 2008 as the date of the first race of the 33<sup>rd</sup> America’s Cup, July 6, 2008 for the second race, and if necessary, July 8, 2008, for the third race. (Ex. C, p.2). GGYC also provided a Certificate as to the name, rig and specified dimensions of the challenging vessel. (Ex. C, p.3). GGYC acknowledged that the Deed of Gift contemplates negotiations between the Challenger and the Defender that may alter and supplement these terms. (Ex. C, p.2). GGYC also acknowledged that should SNG be unwilling to participate in the establishment of a protocol through a consensual process, the match shall proceed under the Default Match Conditions as expressly set forth in the Deed of Gift. *Id.*

#### **IV. SNG’s Acceptance of CNEV’s Invalid Challenge and the Resulting Protocol Violate the Terms of the Deed of Gift**

##### **A. CNEV’S Invalid Challenge**

SNG’s purported justification for its refusal to accept GGYC’s challenge is the bogus challenge of CNEV. (Ex. H). On July 2, 2007, prior to SNG’s 32<sup>nd</sup> America’s Cup victory, it was announced that CNEV would challenge to sail a match for the 33<sup>rd</sup> America’s Cup as “Challenger of Record,” provided that SNG defended its position as holder and trustee of the

Cup. (Ex. D). On July 3, 2007, after SNG defended its title, CNEV issued, and SNG accepted, a purported challenge to sail a match for the 33<sup>rd</sup> America's Cup. (Ex. E). Only two days after winning the 32<sup>nd</sup> America's Cup, on July 5, 2007, SNG and CNEV published a 25 page document entitled "The Protocol Governing the Thirty Third America's Cup" ("Protocol"). (Ex. F; Ehman Aff. ¶ 12).

CNEV does not qualify as an "organized Yacht Club," within the meaning of the Deed. It was created only a few days before issuing its challenge. (Ex. P ¶ 6, 8; I ¶ 2.3). CNEV concedes that it is not a "normal" yacht club. (Ex. I ¶ 2.3). It concedes that its sole purpose is to become the challenger of record for the 33<sup>rd</sup> America's Cup. (Ex. I ¶ 2.5). Indeed, it admits that it does not commit to holding any regattas after the close of the 33<sup>rd</sup> America's Cup. (Ex. I ¶ 6.3, KK ¶¶ 5(c)-(d); Ehman Aff ¶ 27). CNEV does not possess any vessels. (Ex. L). CNEV is repeatedly described as a "phantom club" in the Spanish media. (Exs. L; M; X). CNEV apparently does not have a phone number. (Ex. P ¶ 14). CNEV apparently does not have a website. (Ex. P ¶ 13). The first mention of CNEV on the internet was on July 1, 2007 -- only one day before it was announced that SNG accepted CNEV's challenge and four days before SNG and CNEV published their 25 page Protocol. (Ehman Aff. ¶ 22).

CNEV does not possess the club license required to operate as a yachting club in Valencia, CNEV's place of domicile. (Ex. P ¶¶ 9-11). Without this license, CNEV cannot hold or organize official or non-official yachting competitions in Valencia. (Ex. P ¶ 10).

Indeed, CNEV's concession that it is a "successor of Real Federacion Espanol de Vela" ("RFEV") underscores CNEV's failure to qualify as an "organized Yacht Club." (Ex. I ¶ 2.4). RFEV is not a yacht club; it is a federation of Spanish yacht clubs that concededly created

CNEV because of its own failure to qualify as an “organized Yacht Club” under the Deed of Gift. (Exs. KK ¶ 3; I ¶ 2.5). CNEV and RFEV both admit that CNEV is an alter-ego -- and entirely under the control -- of RFEV. (Ex. KK ¶¶ 3-4; Y ¶ 2). Thus, CNEV is entirely controlled by an entity outside the definition of an “organized Yacht Club.” (Ehman Aff. at ¶¶ 18 - 21).

RFEV’s conceded reasons for creating CNEV are also inconsistent with the objectives and purposes of an “organized Yacht Club.” Traditionally, yacht clubs strive to maintain a membership, maintain vessels, organize regattas and issue rules and regulations regarding these activities. (Exs. R; EE; Ehman Aff. ¶¶ 29 - 30). RFEV concedes that it created CNEV for budgetary reasons and to assure that Valencia was chosen for the 33<sup>rd</sup> America’s Cup. (Ex. KK ¶ 2). These reasons also reveal that CNEV’s puppeteer, RFEV, never had any intention of racing under the Default Match Conditions; thus, CNEV was a foil for SNG to impose whatever conditions SNG wanted in the Protocol for the elimination series. (Ehman Aff. ¶ 20).

In a July 12, 2007 article, CNEV admitted that a challenger must hold an annual regatta to qualify under the Deed of Gift, and that it has never held an annual regatta. (Ex. Q, p.2; Ehman Aff. ¶ 26). Since CNEV’s challenge, it has sought twice to fabricate the appearance of a CNEV regatta, in collaboration with its controlling entity, RFEV. (Ehman Aff. ¶¶ 34 - 46). First, CNEV stated it would meet the annual regatta requirement by holding a regatta in Santander. (Ex. Q, p.2). This so-called competition was organized on the very day of the regatta and was only for children between the ages of seven and fourteen racing in Optimist boats. (Exs. S; U). Apparently sufficiently shamed by the Spanish media over this sham regatta, CNEV eventually conceded that it did “not try to comply with the requirement of having an annual Regatta at the Sea organizing an optimist race in Santander.” (Ex. I ¶ 2.7).

After the blizzard of criticism for CNEV's purported Santander regatta, RFEV again attempted to fabricate a regatta for CNEV. (Ehman Aff. ¶¶ 39 - 46). RFEV opted to convert RFEV's Sailing Tour of Spain into a regatta "organized" by CNEV. (Exs. W; AA). The Sailing Tour of Spain had been announced as an RFEV event as early as March 13, 2007. (Ex. BB). A former seven-year director for RFEV, two time press chief for Spain's Olympic sailing team, and "one of Spain's most authoritative sailing journalists" commented that CNEV's participation in this regatta will likely be similar to its participation in its "bizarre, ridiculous and so-called" first attempted regatta; CNEV will be "*missing*." (Exs. Z; W; CC, p.2-3) (emphasis in original). Indeed, the Notice of Race for the Sailing Tour of Spain evidences that it is not an annual regatta of CNEV. (Ex. I, Annex B; Ehman Aff. ¶¶ 41-43, 45 ). Among other things, the Notice of Race for the Sailing Tour of Spain is printed on pages with RFEV letterhead and with RFEV and Deporevents' names in the footer, solicitations for pre-entry are to be mailed and addressed to RFEV in its Madrid office; this office is apparently where registrations will be formalized, and all commercial and press rights are to be signed over to RFEV and Deporevents. (Ex. I, Annex B p.1-6 ¶ 7.2, 7.5 - 7.8, 18). Apart from an introductory statement that the Sailing Tour of Spain will be organized by RFEV, Deporevents and CNEV, there is no mention of CNEV. (Ex. I, Annex B ¶ 1).

Indeed, CNEV concedes that it has no commitment to hold an annual regatta past the 33<sup>rd</sup> America's Cup -- a concession that is entirely consistent with CNEV's admission that it was formed solely to become challenger of record for the 33<sup>rd</sup> America's Cup. (Exs. I ¶ 6.3; KK ¶¶ 5(c)-(d)); Ehman Aff. ¶ 27). And even RFEV, CNEV's puppeteer, concedes that CNEV does not have enough resources to hold its own regattas. (Ex. Y ¶ 4).

**B. The Resulting Protocol Demonstrates SNG's Failure to Enforce the Deed of Gift**

The terms of the Protocol make it manifestly clear that SNG, as defender, and CNEV, as purported challenger, did not perform their respective roles in the mutual consent process as outlined in the Deed of Gift. By way of illustration, Louis Vuitton, sponsor of the challenger elimination series for the last twenty-four years, cited the questionable nature of the Protocol as one of the reasons for the withdrawal of its sponsorship of the America's Cup. (Ex. N). One of Spain's most widely circulated Spanish newspapers, in an article entitled "Desafio Espanol Drops Down its Pants and Signs Kafkaesque Protocol," reported that SNG is given total control of the competition. (Ex. GG).

**1. SNG Assumes Near Total Control Over the Next America's Cup Contest**

According to the Protocol, SNG may appoint America's Cup Management ("ACM") as the Event Authority. (Ex. F ¶ 1.1(c)). ACM is required to "act in a manner that is consistent with the provisions of...this Protocol," which provides that "SNG shall have the sole responsibility to organize and manage the Event." (Ex. F ¶¶ 5.1, 5.3).

SNG, through its control of ACM, enjoys near exclusive power over the next contest for the America's Cup. By way of illustration, "ACM may, at its sole and entire discretion, accept or reject any entry received." (Ex. F ¶ 4.4.) In addition, ACM may "fine Competitors." (Ex. F ¶ 5.4(e)). ACM possesses the exclusive power to appoint the Race Committee, Measurement Committee, Umpires, and "other necessary persons" under the Protocol, in sharp contrast to the 32<sup>nd</sup> America's Cup Protocol, in which all racing teams could effectively elect and replace key race officials.<sup>4</sup> (Exs. F ¶ 5.4; FF ¶ 5). Unlike the 32<sup>nd</sup> America's Cup protocol, this Protocol

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<sup>4</sup> Under the Protocol, the Challenger of Record's only role is limited to objecting to senior

nowhere requires that these committees or ACM act neutrally. (Exs. F ¶ 5; FF ¶ 5). No legitimate challenger would have agreed to such terms in any bona-fide consensual process contemplated by the Deed of Gift.

**2. SNG Eliminates Challenger Voice and Rights in the Conduct of the Next America's Cup Contest**

While empowering itself, SNG eliminates challenger authority. The Protocol renders challengers and prospective challengers entirely without recourse to dispute any Protocol provisions; the Protocol grants to SNG itself -- even without its handpicked event organizer, ACM -- the power to disqualify any challenger that so much as raises a dispute over the binding effect of any Protocol provisions. (Ex. F ¶ 2.7(d)). Indeed, SNG's usurpation of the rights and powers of challengers goes to the extent that it can even disqualify CNEV, if CNEV so much as raises a dispute over any Protocol provision. *Id.* CNEV's purported "agreement" to grant SNG such power -- without granting CNEV any reciprocal rights -- further demonstrates that SNG did not conduct negotiations with a legitimate challenger as required by the Deed of Gift.

Under the 32<sup>nd</sup> America's Cup Protocol, the Challenger of Record was required to form a Challenger Commission, on which all challengers had a voting representative, and the Challenger Commission was granted broad powers. (Ex. FF ¶¶ 3-6, 12-14, 16-19, 21, 22). The Protocol replaces that commission with a Competitors' Commission that "shall have no voting powers." (Ex. F ¶ 10.1). The Protocol expressly provides that CNEV "shall not owe any additional duties to the Challenging Competitors." (Ex. F ¶ 3.4).

SNG also protects its powers to unilaterally control the competition in the event of CNEV's withdrawal. Unlike the 32<sup>nd</sup> America's Cup protocol, which provided for the immediate replacement of a Challenger of Record with another challenger, this Protocol grants

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appointments made by SNG solely on the grounds of neutrality. (Ex. F ¶ 5.4).

SNG 120 days to operate without *any* Challenger of Record, even if there were another club that had challenged. (Ex. F ¶¶ 3.2, 3.3). No bona-fide Challenger of Record would have consented to such a provision. Nor would a trustee, mindful of the provisions of the Deed of Gift, have done so.

### 3. SNG May Unilaterally Set Fundamental Rules and Conditions for the Next America's Cup Contest

ACM is empowered -- at its discretion and at a time of its choosing -- to issue new America's Cup Class Rules that specify the class of boat that will race and then give the challengers and prospective challengers only 18 months to prepare, finance, design and build a vessel and train for the event. (Ex. F ¶14.1). SNG, which controls ACM, is therefore empowered to design and build a vessel and train for the event under its own rules, without disclosing those rules to challengers until 18 months prior to the first race. *Id.*

And, it gets even worse for prospective challengers. ACM may determine the racing schedule for the event only 16 months prior to the first race. (Ex. F ¶ 13.2). Upon issuing this schedule, ACM may publish yet more rules "which may include (but are not limited to) limiting the number of supporting boats; limiting the number of sails; limiting modification of yachts; training and testing restrictions; meteorological and oceanographic restrictions, reconnaissance restrictions, further crew and designer restrictions...[as well as] [t]he Race Area and the Course Area including their format and dimensions for the Qualifying Regattas and the Regatta." (Ex. F ¶¶ 13.7, 17.1). Similarly, ACM may also withhold the Notice of Race, Sailing Instructions and Racing Rules until approximately 60 days before the first race. (Ex. F ¶¶ 17.2, 17.3).<sup>5</sup>

ACM remains free to "amend the Competition Regulations *from time to time.*" (Ex. F ¶

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<sup>5</sup> Under the 32<sup>nd</sup> America's Cup protocol, the "courses, rules and sailing regulations, and any and all other conditions of the match" were agreed by mutual consent with the Challenger of Record, as is required by the Deed of Gift. (Ex. B, p.2).

17.1) (emphasis added). Nowhere does the Protocol constrain ACM's timing of those amendments. Thus SNG, by virtue of its relationship with ACM, enjoys unfettered access to this vital information, while challengers lack any certainty as to the venue, schedule, format and rules for the races.

SNG also enjoys the "option to participate wholly or partly at its discretion in the Trials and Challenger Selection other than the final between the two Challengers to select a Challenger for the Match." (Ex. F ¶ 13.5). It is difficult to believe that a bona-fide Challenger of Record would grant SNG the opportunity to eliminate its potentially strongest adversaries before the ultimate title match -- without risking its own elimination. Provisions such as these strongly evidence SNG's invalid choice of challenger and improper match determination process.

**C. SNG's Attempts to Usurp the Authority of this Court Through a Secret Arbitration Against Itself**

Using its unfettered powers under the Protocol, SNG has devised two schemes to escape adjudication of this dispute by the New York courts. (Ehman Aff. ¶¶ 51 - 59). Its first scheme relies upon a provision in the Deed of Gift which states that if a "Club holding the Cup be for any cause dissolved, the Cup shall be transferred to some Club of the same nationality . . . [but] [i]n the event of the failure of such transfer within three months after such dissolution, such Cup shall revert to the preceding Club holding the same." (Ex. B, p.2). SNG has considered resigning as trustee and refraining from transferring the Cup to another Swiss yacht club within three months. (Ehman Aff. ¶ 51). It would then invoke the above-quoted provision as a basis for returning the Cup to the preceding trustee, the Royal New Zealand Yacht Squadron ("RNZYS"). *Id.* In turn, RNZYS would accept SNG as the challenger of record, and decline or ignore GGYC's challenge of July 11, 2008. *Id.*

SNG's second scheme to escape adjudication of this dispute by the New York courts was

to commence a secret arbitration against itself. (Ehman Aff. ¶¶ 52 - 59). On July 20, 2007, SNG submitted a secret application to a secret group of “arbitrators,” a portion of which provides that “[t]here has been issued [sic] raised by prospective competitors in the 33<sup>rd</sup> America’s Cup, including the Golden Gate Yacht Club, as to the validity of the challenge of Club Nautico Espanol de Vela.” (Ex. HH ¶ 2). The identity of the arbitrators was secret because the Protocol provides that “the Parties hereto have agreed in a separate document on the names of the Arbitration Panel members.” (Ex. F ¶ 24.2). The Protocol does not provide the names of these arbitrators, and this secret letter selecting these arbitrators, and the timing of their selection, remain a secret. (Ehman Aff. ¶ 52).

GGYC first learned of the America’s Cup Arbitration Panel 33 (“ACAP 33”) through an unsigned letter from the Chairman of the panel, Henry Peter. (Ex. HH). Until notification from Henry Peter, GGYC did not even know that he was on the panel, and at that time also did not know the identity of the other two arbitrators. (Ehman Aff. ¶ 53). Only after GGYC complained about SNG’s secrecy were the identities of other arbitrators revealed. (Ex. II).

The SNG application was a secret because SNG, acting through Alinghi, sought to keep the proceedings “confidential and confined only to the parties taking part in the case.” (Ex. JJ ¶ 5). The arbitration panel, while admitting there is no “substantive reason for granting any confidentiality order,” nonetheless acquiesced to SNG’s demand and ruled that there is “no proper basis [for non-parties] . . . to receive from any party copies of any further submission, document or, generally, communication.” *Id.*

SNG and CNEV, the parties to the supposed arbitration, can remove the arbitrators and change the rules of procedure at any time and for any reason, under the terms of the Protocol.

(Ex. F ¶¶ 24.3, 26). SNG and CNEV also retain the sole power and unfettered discretion to modify anything they desire regarding the arbitration, including, but not limited to, the powers of the arbitration panel, the jurisdiction of the arbitration panel and even the language of the arbitration panel. (Ex. F ¶ 36.1).

Only a challenger who accepts the Protocol has standing. (Ex. F ¶ 28). However, once a challenger accepts the Protocol, the challenger can be disqualified from the competition by SNG, at its sole discretion, for disputing the binding force of the Protocol. (Ex. F ¶ 2.7(d)). SNG made plain its intent to utilize that power to disenfranchise GGYC in its letter rejecting GGYC's Notice of Challenge, stating that "[y]our attention is drawn to Article 2.4 and Article 2.7(d) and the possible consequences should you dispute the binding effect of the Protocol Governing the 33<sup>rd</sup> America's Cup." (Ex. H, p.1). As a result, the issue of the validity of CNEV's challenge cannot realistically be contested under the rules established by SNG. CNEV and SNG, along with the agent that SNG controls and selected to manage AC 33 -- all of which agree on the issue -- are the only parties to the supposed arbitration. (Ex. I).

On July 27, 2007, GGYC notified SNG that the "arbitration" violates the most basic principles of justice and independence and that GGYC would not participate in the "arbitration." (Ex. II, p.1) Among other things, that letter points out that the *Mercury Bay* opinion held that New York courts have the authority to interpret the trust instrument, the Deed of Gift, and determine whether a successor trustee, in this case SNG, has complied with its terms. (Ex. II, p.2). Indeed, the *Mercury Bay* opinion refers to amicus briefs submitted jointly on behalf of "renowned yachtsmen from the United States, Great Britain and Australia and yacht clubs of undisputed standing" for the proposition that the court has jurisdiction over the administration of the Deed of Gift. *Mercury Bay*, 76 N.Y.2d at 278; (Ex. II, p.2). Henry Peter, the chairman of

the “arbitration” panel concedes that that the “New York Supreme Court ... has jurisdiction over the Deed of Gift” to decide upon the “interpretation of the deed of gift” and whether a “challenge was valid.” (Ex. II, p.2).

## ARGUMENT

### **V. Expedited Trial and Discovery of this Action**

SNG’s refusal to recognize GGYC’s challenge has riddled the 33<sup>rd</sup> America’s Cup competition with uncertainty. An expedited trial of this action in October is necessary to provide the certainty that GGYC -- and all challengers -- require in order to properly plan for the event. By failing to accept GGYC’s valid challenge and by soliciting and accepting challengers for its illegal match, SNG jeopardizes GGYC’s, and other legitimate challengers’, ability to prepare for the contest.

Expedited proceedings are appropriate where, as here, justice delayed is justice denied. *See, e.g., Deutsche Bank Trust v. 120 Greenwich Dev. Assocs.*, 801 N.Y.S.2d 232 (Sup. Ct. N.Y. County 2005) (granting expedited hearing on plaintiff’s request for a license necessary to meet a contractual closing date); *See also, Hochberg v. Maimonides Med. Ctr.*, 37 A.D.3d 660, 660 (2d Dep’t 2007) (“the court providently exercised its discretion...setting an expedited discovery schedule”).

To compete in the America’s Cup, GGYC and its racing representative must now make preparations that require a significant financial commitment. (Ehman Aff. ¶¶ 15-16). These activities include hiring personnel, including vessel designers and sailors, obtaining all necessary commercial and media sponsorship for GGYC’s participation, sourcing a site to build the yacht, sourcing and purchasing raw materials and making logistical arrangements for the race and

properly designing its yacht. (Ehman Aff. ¶ 15). In addition, GGYC must practice and train for the race. *Id.*

The uncertainty generated by SNG has made it difficult for GGYC to hire for the necessary duration the professional designers and sailors that it requires. GGYC's design and racing teams cannot prepare without knowing the location of the race (and therefore the local wind and sea conditions). (Ehman Aff. ¶ 16). Nor can it effectively design, build, practice and train without knowing the rules and regulations of the match. *Id.*

Prospective contestants for the next America's Cup elimination series also need to prepare. (Ehman Aff. ¶ 16). Accordingly, they need to know whether the 33<sup>rd</sup> America's Cup will be held under the conditions established in the one-sided and illegal Protocol published by SNG and CNEV, under conditions established in a protocol negotiated by SNG and GGYC which could include a challenger elimination series prior to the America's Cup match, or whether the 33<sup>rd</sup> America's Cup will be a match solely between the vessels representing SNG and GGYC in July 2008, under the default provisions of the Deed of Gift.

SNG has both rejected GGYC's valid challenge and refused to negotiate with GGYC under the mutual consent clause of the Deed of Gift while it continues to implement aspects of the illegitimate Protocol that it published with CNEV. As SNG makes conclusive arrangements for racing under that Protocol, such as accepting other challengers and dictating the class of boats and match rules, challengers under that Protocol will be compelled to make conclusive arrangements with financial sponsors, boat designers and builders in compliance with SNG's mandate. With the passage of time, GGYC's right to engage in a consensual negotiation process to protect the interests of all challengers will become illusory because several challengers will

have already felt compelled to make arrangements based on the dictates contained in SNG's Protocol.

Unless an expedited trial occurs in October -- and expedited discovery concludes in September -- GGYC and other challengers will not be able to make the preparations described above, threatening the very existence of the America's Cup contest.

#### **VI. GGYC is Entitled to a Preliminary Injunction as Interim Relief**

Pending adjudication on the merits and at an expedited trial or on summary judgment, GGYC is entitled to interim relief to maintain the status quo and to ensure an effective remedy. In the most recent America's Cup controversy to come before this Court, the challenging club, Mercury Bay, sought preliminary relief. *See Mercury Bay*, 76 N.Y. 2d at 263. (The Court issued "a preliminary injunction, declaring that Mercury Bay's notice of challenge was valid, and holding that [defender] San Diego's options were to 'accept the challenge, forfeit the cup, or negotiate agreeable terms with the challenger.'").

In the instant action, GGYC seeks the same type of preliminary relief granted in *Mercury Bay*. *Id.* Indeed, the need for preliminary relief is even greater here. In *Mercury Bay*, Mercury Bay was the only purported challenger for a head-to-head match with the defender under the Default Match Rules. By contrast, in the instant action, SNG claims that CNEV is the Challenger of Record for a challenger selection series governed by its Protocol. Preliminary relief is even more important where there is pressure on other challengers to prepare for SNG's illegal race -- a race which may never occur.

There is ample precedent beyond *Mercury Bay* for such relief. Pursuant to CPLR 6301:

A preliminary injunction may be granted in any action where it appears that the defendant

threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

Where a party has shown a clear and continuing violation of its rights, courts calibrate their test for preliminary relief to emphasize the plaintiff's likelihood of success on the merits and the importance of granting the plaintiff effective relief. Although GGYC seeks only limited preliminary relief, it is entirely consistent with New York jurisprudence to grant as preliminary relief in such cases the very relief that the party would receive after prevailing at trial. *See, e.g., Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601 (3d Dep't 1999) (preliminary relief granted, despite certain questions of fact, to a plaintiff who showed a strong likelihood of success on the merits in a suit for medical insurance coverage); *Mindel v. Educational Testing Service*, 147 Misc. 2d 968, 972 (Sup. Ct. N.Y. County 1990) (preliminary relief granted to student seeking a makeup SAT test in time for college early decision application deadlines); *County of Nassau v. Spectator Mgmt Group*, 175 Misc. 2d 790, 793-94 (Sup. Ct. Nassau County) (preliminary relief deemed appropriate to enjoin use of Nassau Coliseum for purpose in "clear violation" of relevant lease).

Here, GGYC has shown a continuing violation of its rights as the challenger of record for the 33<sup>rd</sup> America's Cup and there is a high likelihood that GGYC will succeed on the merits; SNG has acted in breach of its fiduciary duties as trustee of the America's Cup.

Under the Deed of Gift, the trustee undertakes to "fully see that the foregoing conditions [of the Deed] are fully observed and complied with by any contestant for the said Cup during the holding thereof by it." (Ex. B, p.3). Generally, "a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust to the exclusion of the interests of all other parties. Further,

general language in a trust instrument granting broad discretionary powers does not authorize a trustee to engage in self-dealing in violation of its fiduciary duty nor does such language substitute a less strict standard of good faith in place of the trustee's duty of undivided loyalty.” 106 NY Jur *Trusts* § 247 (2007).

SNG’s conduct constitutes illegal self-dealing on the part of SNG. The “[c]ommon law in New York contains an absolute prohibition against self-dealing.” 106 NY Jur *Trusts* § 364 (2006) (citing Restatement (Second) of Trusts § 170(1) and stating that “a trustee must not engage in any transactions concerning the trust which might be regarded as self-dealing. This rule applies regardless of the fairness of the transaction or the motive of the trustee”); *See also Berardi v. W.T. Lane*, 333 N.Y.S.2d 226, 229 (2d Dep’t 1972) (holding that trustees committed self-dealing). SNG constructed a challenge from a shell entity, compelling it to abdicate virtually all authority to SNG. Because CNEV lacks independence under the Protocol, SNG has effectively selected itself -- rather than GGYC -- as challenger to its own title, in utter contravention of the Deed of Gift that it is obligated to enforce.

SNG also fails to meet the standard of loyalty set forth in *Mercury Bay*. The donors did not intend for the trustee to violate the specific terms of the Deed of Gift in order to obtain significant advantages over the challenger. Far from taking necessary action to “compete on equal terms with the trust beneficiaries,” 76 N.Y.2d at 270, SNG has engaged in a transparent usurpation of the challengers’ rights: first, to a consensual process to define the competition and, failing that, a strict adherence to the Default Match Conditions as expressly stated in the Deed of Gift. (*See supra* §§ II; IV. B). As detailed above, SNG knew that CNEV’s challenge and execution of the resulting Protocol violated the literal terms of the Deed of Gift. (*See supra* § IV. A; IV. B). As evidenced by SNG’s usurpation of power to control the America’s Cup

competition by means of the Protocol, SNG failed to engage in arms-length negotiations, as contemplated by the Deed.

SNG's refusal to accept GGYC's valid challenge, its acceptance of CNEV's facially defective challenge and its execution of the resulting Protocol also constitute a breach of its duty of care. "Trustees must exercise reasonable care, diligence, and prudence in the administration of the trust estate." 106 N.Y. Jur 2d Trusts § 367 (2007); See *Delbene v. Estes*, 15 Misc. 3d 481, 485 (Sup. Ct. Westchester County 2007) (noting that trustees owe a duty of care to fiduciaries).

SNG's conduct also violates its obligation to act in good faith and with honesty. A "trustee's duty of undivided loyalty to the trust beneficiaries can be reduced by means of language in a trust instrument" but the "trustee must always exercise good faith." 106 NY Jur *Trusts* § 363 (2007). Effectively, SNG has created an elaborate masquerade, in which CNEV plays the "Challenger of Record" and SNG plays the "Defender." For that reason, the America's Cup will only masquerade as a "competition" and GGYC's rights will be violated. SNG's conduct flatly contradicts the terms of the Deed of Gift.

Finally, GGYC will suffer irreparable injury and the balancing of the equities favors issuance of the limited preliminary injunction requested here. By continuing to reject GGYC's challenge and implementing the SNG/CNEV Protocol, SNG continually erodes GGYC's rights under the Deed of Gift. First, GGYC and its racing representative, BMW ORACLE Racing, are compelled to make preparations for the July 2008 match under the Default Match Conditions without either the location for the July 2008 match or SNG's "rules and sailing regulations" for the match, both required by the terms of the Deed of Gift to be provided by SNG. It is necessary to know the location and sailing rules of the match to prepare the challenge vessel appropriately and to practice and train for competition. (Ehman Aff. ¶ 16). Moreover, it is necessary that SNG

identify the location and sailing rules in sufficient time for GGYC to resolve with SNG any dispute as to whether they meet the requirements of the Deed of Gift.

For these reasons, GGYC seeks as interim preliminary relief only that SNG be required to disclose the location and rules for the July 2008 race.

The balancing of the equities strongly favors issuance of this limited relief. As noted, GGYC cannot adequately prepare without the location and rules for the July 2008 race. SNG already has them. Disclosure will cost SNG nothing.

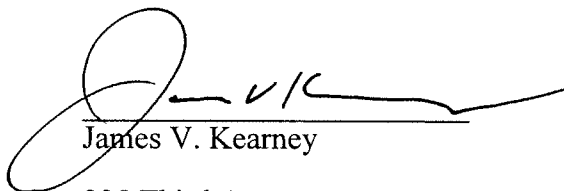
CONCLUSION

For the foregoing reasons, GGYC respectfully requests that its motion for preliminary injunction and expedited trial and discovery be granted.

August 22, 2007  
New York, New York

Respectfully submitted,

LATHAM & WATKINS LLP

A handwritten signature in black ink, appearing to read 'J.V. Kearney', is written over a horizontal line. The signature is stylized with a large initial 'J' and a long horizontal stroke.

James V. Kearney

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