

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

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GOLDEN GATE YACHT CLUB :  
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 : Index No. 602446/07  
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 Plaintiff, :  
 :  
 -against- :  
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 SOCIÉTÉ NAUTIQUE DE GENÈVE :  
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 :  
 Defendant, :  
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 :  
 CLUB NÁUTICO ESPAÑOL DE VELA :  
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 :  
 Intervenor-Defendant. :  
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**MEMORANDUM OF LAW IN SUPPORT OF SOCIÉTÉ NAUTIQUE  
DE GENÈVE'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT**

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Defendant Société Nautique de Genève (“SNG”) respectfully submits this memorandum of law in support of its motion under CPLR 3211(a) and (c) for dismissal of Golden Gate Yacht Club’s (“GGYC”) claims set forth in its Verified Complaint filed on July 20, 2007 (the “Complaint”) and for summary judgment.<sup>1</sup>

### **PRELIMINARY STATEMENT**

This action relates to the historic America’s Cup yacht racing matches (the “Cup”) and the Deed of Gift (the “Deed”) that governs how challenges and the matches for the Cup are to proceed. SNG, through its racing representative, Team Alinghi SA (“Alinghi”), has won the last two America’s Cups (the 31<sup>st</sup> and the 32<sup>nd</sup>), the second on July 3, 2007. GGYC, who races through BMW Oracle, has been a challenger for the Cup and was the Challenger of Record for the 32<sup>nd</sup> Cup, but has never qualified for the final Cup match.

SNG, as other prior trustee yacht clubs before it, duly accepted a challenge for the next America’s Cup right after it won the 32<sup>nd</sup> Cup in July of this year. That challenge came from a Spanish yacht club named Club Náutico Español de Vela (“CNEV”), whose members have extensive experience in America’s Cup racing.

Undisputed documents demonstrate that CNEV is organized as a yacht club, with a board, rules, dues, etc. CNEV also is incorporated under Spanish law and fully registered with and licensed by the appropriate Valencian and Spanish authorities. CNEV is also having an annual regatta on the sea now, and has committed to hold one annually. Under the express terms

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<sup>1</sup> This motion is made under CPLR Rule 3211(a)(1) and (7) because an answer has not yet been interposed in this action. However, SNG submits with this motion “evidence that could properly be considered on a motion for summary judgment” as provided for under CPLR Rule 3211(c) and requests that the Court “treat the motion as a motion for summary judgment . . .” pursuant to CPLR Rule 3211(c). As set forth in the accompanying affirmation of David Hille, dated September 21, 2007 (the “Hille Aff.”), GGYC is aware of SNG’s intent to file a motion for summary judgment and also intends to file its own cross-motion for summary judgment on October 5, 2007. Both parties acknowledged that these motions would be made as motions for summary judgment in a joint letter from counsel to the Court dated September 18, 2007. (Hille Aff. Ex. B.) Also submitted in support of this motion is the Affidavit of Hamish Ross, sworn to September 21, 2007 (the “Ross Aff.”) and SNG’s statement under Commercial Division Rule 19-a.

of the Deed – the instrument that governs the America’s Cup and is controlling in this dispute – CNEV is entitled to challenge for the America’s Cup. Having received a valid challenge from CNEV, SNG is prohibited under the Deed from entertaining another Challenger of Record until CNEV’s challenge is completed.

As in prior Cups, SNG (as Defender) and CNEV (as the Challenger of Record) negotiated and agreed to rules relating to how they would organize and manage the 33<sup>rd</sup> America’s Cup series and, as in recent Cups, published those rules as the so-called 33<sup>rd</sup> Protocol. The Deed expressly allows this. That Protocol provides for single-hulled yachts built to published common design rules to race for the next Cup in July 2009. Four other international yacht clubs with America’s Cup experience have already signed-on to these rules, and are, like SNG and CNEV, readying to spend tens of millions of dollars and many thousands of hours preparing and competing for the next Cup.

For patently self-serving reasons, GGYC refuses to accept CNEV as a valid Challenger of Record and objects to the terms of the 33<sup>rd</sup> Protocol agreed to by SNG and CNEV. GGYC raises specious arguments, unsupported by the Deed, that CNEV is a bogus challenger because it is a new club and because it is holding its first annual regatta after its challenge. (Compl. ¶ 2.) GGYC also has made clear that, should it prevail in this lawsuit, if SNG does not accept GGYC’s demands in negotiations for a protocol, GGYC will race a two-hulled catamaran of the maximum size allowed under the Deed – virtually guaranteed to defeat a single-hulled vessel.

As set forth in detail below, the material facts in this matter are not in dispute. Rather, GGYC’s claims that SNG breached its fiduciary duty and the Deed are not supported by any terms that appear in the Deed and are in fact contradicted by the Deed’s plain language. Under the terms of the Deed, CNEV is the valid Challenger of Record and SNG is bound to honor

CNEV's challenge. (Point I.B, below.) GGYC's objections to CNEV are all premised on reading into the Deed requirements that are not there.

Given that CNEV is the valid Challenger of Record under the express terms of the Deed, GGYC also cannot object to the 33<sup>rd</sup> Protocol mutually agreed to by SNG and CNEV. (Points I.B.4 and II, below.) The Deed provides that the Defender and the Challenger of Record "may, by mutual consent, make any arrangement satisfactory to both" as to all conditions of the match. The Deed nowhere specifies the type of bargain that the Defender and the Challenger of Record must strike, nor the content of the rules so agreed. SNG and CNEV negotiated a Protocol that they both found satisfactory as evidenced by the fact that they signed it and GGYC can either participate under that Protocol or sit this Cup out – the choice is theirs. What GGYC has no right to do is impose their will on the Cup competition. It is also undisputed and noteworthy that four other major yacht clubs – against whom GGYC has no complaint and including competitors that outperformed GGYC in the last America's Cup – have signed on to the 33<sup>rd</sup> Protocol. In addition, an America's Cup Arbitration Panel (2 of 3 members of which were arbitrators nominated and/or accepted by GGYC under a prior America's Cup protocol) has reviewed GGYC's claims and ruled CNEV's challenge valid under the Deed.

Finally, and importantly, the Court of Appeals has ruled specifically on the America's Cup Deed. Mercury Bay Boating Club Inc. v. San Diego Yacht Club, 76 N.Y.2d 256, 265, 557 N.Y.S.2d 851, 856 (1990). Mercury Bay highlights the importance of the Deed's express terms and holds that courts should not add to the Deed words that are not in it. Id. at 857. This action is only about the validity of CNEV's challenge under the Deed. If GGYC does not supplant CNEV, its objections to the 33<sup>rd</sup> Protocol and breach of fiduciary duty claims are purely academic and of no legal moment. In addition, Mercury Bay held that "issues of fairness and

sportsmanship be resolved by members of the yachting community rather than by the courts.” Mercury Bay, 76 N.Y.2d at 265, 557 N.Y.S.2d at 856 (emphasis added). Thus, GGYC’s complaints about the terms of the 33<sup>rd</sup> Protocol have no place before this Court.

Essentially, GGYC wants a do-over. It wants to serve as Challenger of Record again and have the terms of the 32<sup>nd</sup> Protocol apply again. Unfortunately for GGYC, it did not earn the right to control the 33<sup>rd</sup> Cup by winning on the water. Now the 33<sup>rd</sup> Americas Cup must move forward – with or without GGYC.

### **BACKGROUND AND RELEVANT FACTS**

#### **The America’s Cup And The Deed Of Gift**

The America’s Cup is a silver trophy cup that the yacht America first won in a race open to all nations against a champion fleet of British vessels. (Ross Aff. ¶ 5.) The current version of the Deed is attached as Exhibit A to the Ross Aff. The Cup is considered the corpus of a trust and has been treated as a New York charitable trust with the holder of the Cup (also known as the “Defender”) as trustee. (The history of the Cup is further described in the Mercury Bay decision. See Mercury Bay, 76 N.Y. at 260-62, 557 N.Y.S.2d at 853-54.)

The Deed provides that the overarching purpose of the America’s Cup is the promotion of a “friendly” international sailing competition. (Ross Aff. Ex. A.) The Deed also provides the qualifications for the challengers for the Cup (the first of whom under the Deed is the “Challenger of Record,” which is what CNEV is and what GGYC seeks to become):

Any 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, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

(Id.) (emphasis added). Thus, to be the Challenger of Record the challenger must be: (i) organized as a yacht club; (ii) foreign; (iii) legally recognized in its local jurisdiction; and (iv) having an annual regatta on the sea or an arm of the sea. As long as a challenger satisfies these requirements, the Deed provides that it is “entitled” to the right of a sailing match for the America’s Cup. The Deed says nothing about how long a yacht club must be in existence or how it should be organized before it challenges, nor when the club must hold its first annual regatta.

The Deed also provides what the contents of a challenge must contain – including the proposed race and a precise description of the challenger’s vessel. (Id. & Ross Aff. ¶ 13.) Once a valid challenge has been received, the Defender cannot entertain another Challenger of Record until the pending match has been decided:

And 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.

(Ross Aff. Ex. A.) (emphasis added).

Significantly, after a challenge has been made the Defender and the Challenger of Record may then agree to the terms of the race through “mutual consent”:

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

(Id.) (emphasis added). The Deed is silent about the bargain the parties must strike or how much one should give in to another as to the terms of the race. It is, however, through this “mutual consent” mechanism that every America’s Cup since 1970, save one, has involved challengers from different countries of the world participating in a challengers’ elimination series with the

winner of that series racing the Defender for the America's Cup. (Ross Aff. ¶ 14.) This format has helped elevate the Cup to one of the world's premier international sporting events.

In the event that the Challenger of Record and the Defender cannot reach agreement by "mutual consent," the parties must revert to the terms of the Deed providing for a two-boat match race with the Challenger of Record having selected its vessel and the Defender choosing the location of the match and the race rules and sailing regulations that apply. In the last 40 years only the 27<sup>th</sup> America's Cup held in 1988 was limited to a two-boat match because the parties could not agree to terms. This infamous 1988 America's Cup was the subject of a number of judicial opinions, including the Mercury Bay decision by the Court of Appeals, (referred to as the Mercury Bay case after the New Zealand Challenger of Record) and featured prominently a catamaran. (Id. ¶ 14.)

#### GGYC Was The Challenger Of Record For The 32<sup>nd</sup> America's Cup

SNG is a Swiss yacht club and the home club of Alinghi. Alinghi won the 31<sup>st</sup> America's Cup in March 2003. (Id. ¶ 4.) Immediately (i.e., the same day) following the finish of the 31<sup>st</sup> Cup match, GGYC tendered and SNG accepted GGYC's formal challenge and GGYC became the Challenger of Record for the 32<sup>nd</sup> America's Cup (a designation GGYC now wants for a second straight Cup). (Id. ¶ 15 & Ex. B.) GGYC's challenge was publicly announced at a press conference held approximately two days later. At the same press conference, the Protocol governing the terms of the 32<sup>nd</sup> America's Cup, signed by SNG and GGYC at the same time as GGYC's challenge was publicly released. (Id. ¶ 15.)

#### CNEV Becomes The Challenger Of Record For The 33<sup>rd</sup> America's Cup

On July 3, 2007, Alinghi defended its title and won the 32<sup>nd</sup> Cup. (Id. ¶ 16.) Thus, SNG is once again the Defender, now for the 33<sup>rd</sup> America's Cup. The success and popularity of the

32<sup>nd</sup> America's Cup has been widely recognized. Prior to filing this action, GGYC credited that success to "SNG's stewardship, [under which] the 32<sup>nd</sup> America's Cup delivered some of the most hotly-contested racing in recent Cup history and brought Cup sailing to more people worldwide than ever before." (Id. at Ex. C.) Indeed, for the first time in Cup history, surplus money raised during the event is going to be distributed to all competitors (i.e., the beneficiaries under the trust), which will help defray some of the beneficiaries' costs of competing. (Ross Aff. ¶ 18.) According to preliminary calculations, approximately €30,000,000 will be distributed to the challengers, including over €9,000,000 to Team New Zealand as runner-up and over €3,000,000 to GGYC as a semi-finalist in the Challengers' series. (Ross Aff. ¶ 18 & Ex. D.)

CNEV challenged for the 33<sup>rd</sup> Cup following the identical procedure used with GGYC in 2003 (for the 32<sup>nd</sup> Cup). On July 3, 2007, immediately after the 32<sup>nd</sup> Cup ended with SNG/Alinghi's victory, CNEV tendered and SNG accepted CNEV's formal challenge for the 33<sup>rd</sup> Cup. (Id. Ex. E.) As described below, CNEV was organized, incorporated and licensed under Spanish law when it made its challenge.

SNG was very pleased to accept a challenge from a Spanish club to increase international diversity in the sport, as a Spanish club had never been the Challenger of Record. As it did with GGYC, SNG also entered into a protocol with CNEV for the 33<sup>rd</sup> Cup (the "33<sup>rd</sup> Protocol") which was released publicly two days after CNEV challenged on July 5, 2007. (Ross Aff. ¶ 22.) The 33<sup>rd</sup> Protocol was the result of significant negotiations between SNG, CNEV and their respective representatives over a more than two-week period in June 2007. (Id.)

GGYC suggests in its Complaint that the timing of CNEV's challenge and the issuance of a protocol "just two days after SNG won the 32<sup>nd</sup> America's Cup" was somehow sinister or collusive. (See, e.g., Compl. ¶¶ 9, 21.) This, however, is the exact same procedure by which

GGYC challenged for the 32<sup>nd</sup> Cup and by which GGYC and SNG entered into the 32<sup>nd</sup> Protocol.

### Preparations For The 33<sup>rd</sup> America's Cup

There is no dispute that costly preparations are already underway for the 33<sup>rd</sup> Cup. Although the 32<sup>nd</sup> America's Cup ended only two months ago, four teams have signed on to join SNG and CNEV to race under the 33<sup>rd</sup> Protocol:

- Royal Cape Yacht Club of South Africa, a 32<sup>nd</sup> Cup challenger;
- Royal Thames Yacht Club of England, which will compete through Team Origin, a 32<sup>nd</sup> Cup challenger;
- Royal New Zealand Yacht Squadron, a former Cup holder and runner-up in the 32<sup>nd</sup> Cup;
- Deutscher Challenger Yacht Club e.V. of Germany, a 32<sup>nd</sup> Cup challenger.

These are accomplished and experienced sailing teams that are already preparing to and will spend tens of millions of dollars on boat design, testing and training, in pursuit of the America's Cup. (Ross Aff. ¶ 31.)

Moreover, notwithstanding GGYC's accusation that CNEV is a "fabricated challenger" and is just doing the bidding of SNG (Compl. at ¶ 2), CNEV has announced that its sponsor, the Spanish multinational, Iberdrola, has committed a substantial amount to CNEV's America's Cup campaign. (Ross Aff. at ¶ 24.) Real challengers would only invest tens of millions of dollars and thousands of hours if they believed that the 33<sup>rd</sup> Cup was going to be run fairly and competitively, just like the 32<sup>nd</sup> Cup run so successfully by SNG. In addition, during July 2007, the City of Valencia and other Spanish government agencies announced an agreement to host the 33<sup>rd</sup> America's Cup in Valencia. (Id. ¶ 32.) The Spanish agreed to commit a total cash sum of €160,000,000, infrastructure worth €50,000,000, and considerable value in kind in support of the 33<sup>rd</sup> Cup. (Id.)

With respect to the 33<sup>rd</sup> Protocol, GGYC is well aware that modern America's Cup protocols are "living" documents that are clarified and modified between the time they are first issued and the actual races. (Id. at ¶ 34.) As mentioned above, the 32<sup>nd</sup> Protocol between SNG and GGYC was amended eleven times.<sup>2</sup> Similarly, SNG and CNEV have held meetings and conversations with the other competitors that have already signed on to the 33<sup>rd</sup> Protocol to discuss ways to improve that Protocol. These discussions have already led to draft amendments and clarifications to the 33<sup>rd</sup> Protocol. GGYC would be welcome to participate in this process if it signs up for the 33<sup>rd</sup> America's Cup. (Id. ¶ 33.)

#### GGYC Disputes CNEV's Challenge And Files Its Complaint

On July 11, 2007, GGYC delivered a letter to SNG in which GGYC attacked the CNEV challenge. (Id. Ex. Q.) With its letter, GGYC also submitted its own purported challenge demanding that it be considered the Challenger of Record. (Id.) On the certificate provided with its challenge, the dimensions of the vessel GGYC would race specify a length and a beam of 90 feet. These dimensions (a square) can only be a multi-hulled vessel, likely a catamaran.

On July 20, GGYC filed its Complaint. (Hille Aff. Ex. A.) In the Complaint, GGYC alleges that SNG breached the Deed and its fiduciary duties by accepting the challenge from CNEV because CNEV is a brand new yacht club that had not yet held its annual regatta, and by entering into the 33<sup>rd</sup> Protocol which GGYC apparently does not like. GGYC seeks declarations that CNEV's challenge and the 33<sup>rd</sup> Protocol are void and that GGYC's challenge is valid; that

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<sup>2</sup> GGYC suggests in its Complaint that the 33<sup>rd</sup> Protocol should be measured against the 32<sup>nd</sup> Protocol, to which GGYC was a signatory. (Compl. ¶ 30.) This comparison misrepresents the nature of America's Cup protocols. These protocols are each individually negotiated agreements between the Defender and Challenger of Record for each Cup per the mutual consent terms of the Deed, and each protocol reflects a variety of rules and approaches. Thus, there is no standard or model America's Cup protocol, nor any universally accepted set of terms. (Ross Aff. ¶¶ 33-34.)

SNG be enjoined from promulgating rules under the 33<sup>rd</sup> Protocol; and that SNG be ordered to reject CNEV's challenge and accept GGYC's.

#### The Arbitration Proceedings And Decision

Also on July 20, before being aware of the Complaint, SNG initiated proceedings seeking a ruling from the Arbitration Panel formed under the express terms of the 33<sup>rd</sup> Protocol as to the validity of CNEV's challenge. SNG commenced the proceedings because arbitration is the dispute resolution mechanism agreed to by the competitors in the 33<sup>rd</sup> America's Cup – a process used in prior Cups, including in the 32<sup>nd</sup> Cup, in which GGYC was Challenger of Record. (Ross Aff. ¶ 37.) The Panel asked GGYC to participate in the proceedings and stated that it would accept submissions from GGYC even if GGYC elected not to submit to the Panel's jurisdiction:

GGYC is invited, by not later than Friday, July 27, 2007 at 5:00 p.m., to inform ACAP 33, SNG and CNEV whether they are willing to take part to these proceedings and, if so, (i) as a party, submitting to the jurisdiction of ACAP 33, or (ii) by presenting their case, without prejudice to the existence and/or jurisdiction of ACAP 33 including the basis and reasons therefore.

(Ross Aff. Ex. U.) Even though two of the three arbitrators on the Panel also served as arbitrators under the 32<sup>nd</sup> Protocol, as nominated and/or accepted by GGYC as the then Challenger of Record, GGYC rejected the invitation and has scorned the current Panel as a “kangaroo court.” (Ross Aff. ¶¶ 38-39.)

In fact, the Arbitration Panel is comprised of three prestigious arbitrators, Professor Henry Peter, Luis Maria Cazorla Prieto, and Graham McKenzie. (Biographical information for each of the arbitrators is provided in the Ross Aff. at Exhs. R-T.) Professor Peter served on America's Cup panels for both the 31<sup>st</sup> and 32<sup>nd</sup> Cups, while Mr. McKenzie served for the 32<sup>nd</sup> Cup. Mr. Carzorla Prieto is, among other things, Counsel to the Spanish Parliament. (Id.)

On September 7, 2007, the Arbitration Panel issued its decision. The Panel stated that it had considered the submissions to the Panel by the competitors as well as GGYC's submissions to this Court up to the date of the decision (all of which GGYC had posted on the Internet). (Id. at Ex. V, Arb. Dec. ¶ 42.) Following a detailed analysis of the issues and the parties' submissions, the Panel ruled that CNEV's challenge was valid under the Deed. (Id. Ex. V, Arb. Dec. ¶¶ 134-39.)

## ARGUMENT

### I. CNEV'S CHALLENGE IS VALID

#### A. Undisputed Facts Establish That SNG Complied With The Deed

As set forth above, this motion is made under CPLR Rule 3211(a), but SNG submits in support of the motion "evidence that could properly be considered on a motion for summary judgment" as provided for under CPLR Rule 3211(c) and requests that the Court "treat the motion as a motion for summary judgment . . ." under CPLR Rule 3211(c). (Counsel for both parties have submitted to the Court a joint letter reflecting that both parties would be submitting motions for summary judgment. (Hille Aff. Ex. B.))

This Court may grant a motion for summary judgment when there are no genuine issues of material fact that require a trial. See CPLR 3212(b) (McKinney's 2006); Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986); J.E. v. Beth Israel Hosp., 295 A.D.2d 281, 282, 744 N.Y.S.2d 166, 169 (1st Dep't 2002). SNG has provided undisputed documentary evidence demonstrating its compliance with the Deed. See Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 967, 525 N.Y.S.2d 793, 794 (1988); Alvarez, 68 N.Y.2d at 324, 508 N.Y.S.2d at 925. The burden now shifts to GGYC to produce admissible evidence to establish the existence of material facts that must be resolved at trial. Gilbert Frank Corp., 70 N.Y.2d at 967, 525 N.Y.S.2d at 794. In so doing, however, GGYC may not offer "mere conclusion,

expression of hope or unsubstantiated allegations or assertions . . . .” Zuckerman v. City of N.Y., 49 N.Y.2d 557, 562, 427 N.Y.S. 2d 595, 598 (1980). Rather, GGYC must offer facts that as a matter of law establish their claims. This GGYC cannot do.

B. This Court May Not Look Past The Terms Of The Deed

CNEV’s challenge satisfies the plain language of the Deed. Under New York law, a trust instrument is to be construed as written. See Mercury Bay, 76 N.Y.2d at 267, 557 N.Y.S.2d at 857. Specifically, in Mercury Bay, noting that the donors had used specific and detailed terms in some places but not others, the Court of Appeals stressed that it would not look beyond the “four corners” of the Deed to ascertain the donor’s intent, nor would it add words not present in the Deed. Mercury Bay, 76 N.Y.2d at 269-70, 557 N.Y.S.2d at 858-59. Indeed, in Mercury Bay the term that the Court of Appeals refused to read into the Deed was one prohibiting a Defender from racing a specific kind of boat – a double-hulled catamaran – against a Challenger of Record’s hapless monohull, which the Defender knew the Challenger of Record had to race based on its challenge. Mercury Bay, 76 N.Y.2d at 267, 557 N.Y.S.2d at 857. (GGYC’s threat to race a catamaran here is obviously pulled directly from the Mercury Bay playbook.) The Court ruled that “[n]othing in the Deed limits the design of the defending club’s vessel other than the length of water-line limits applicable to all competing vessels” and refused to read in any terms beyond that requirement. Mercury Bay, 76 N.Y.2d at 261, 557 N.Y.S.2d at 854.

If the Court of Appeals refused to read into the Deed a prohibition on the Defender racing a boat that was virtually unbeatable, surely Mercury Bay does not allow GGYC to read into the Deed a requirement that the Challenger of Record (CNEV) must be an “old” club with certain specific characteristics or have had its annual regatta at some point prior to challenging. Only by ignoring Mercury Bay and reading words into the Deed that are not there can GGYC’s Complaint be upheld and summary judgment avoided.

1. CNEV Is A Properly Organized And Incorporated Foreign Yacht Club

CNEV meets the terms of the Deed. Under the Deed, a Challenger of Record can be any (i) organized yacht club, that is (ii) foreign, (iii) legally recognized in its local jurisdiction, and (iv) having an annual regatta on the sea or an arm of the sea. (Ross Aff. Ex. A.) As set forth in the accompanying affidavit, sworn to on September 7, 2007, of Miquel Terrasa Monasterio (the “Terrasa Aff.”),<sup>3</sup> a Spanish lawyer with expertise in advising sports organizations, and as is readily apparent from CNEV’s organization and incorporation documents (attached to the Terrasa Aff. as Ex. 2), CNEV met all of the requirements of the Deed to serve as Challenger of Record. (The documents attached as Exhibit 2 to the Terrasa Aff. were provided by CNEV to SNG when CNEV made its formal challenge.) (Ross Aff. ¶ 23.)

First, CNEV was established and organized under Spanish law upon the signing of its constitution on June 19, 2007. (Terrasa Aff. ¶ 6.) CNEV’s by-laws provide that “Club Nautico Español de Vela is a sports club with private character, with its own legal personality and capacity to work to achieve its purposes, incorporated to support sports activities using the sea, and especially to promote the sport of sailing . . . .” (Id. Ex. 2 at Art. 1.) CNEV has officers, a board of directors and a facility on the water at Base Number 3 on the Interior Dock of the Port at Valencia. (Id. Ex. 2 at Art. 6) It also has detailed rules on everything from membership, to dues, to elections, to giving members of other clubs access to CNEV’s club facilities. (Id. Ex. 2.) CNEV is organized as a yacht club. (Id. ¶¶ 6-7.)

Second, CNEV is foreign for purposes of the Deed in that it is Spanish, not Swiss. This is undisputed.

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<sup>3</sup> The Terrasa Aff. was previously submitted in opposition to GGYC’s motion for preliminary injunction and is submitted again here as Exhibit C to the Hille Aff.

Third, CNEV was properly incorporated under Spanish law and registered with the relevant Valencian authorities prior to July 3, 2007 when it challenged. (Terrasa Aff. ¶ 4 & Ex. 2.)

GGYC asserted in an earlier motion in this action that CNEV “does not possess the club license required to operate as a yachting club in Valencia” and that CNEV therefore cannot hold or organize yachting competitions.<sup>4</sup> The lack of a club license, however, would in no way affect CNEV’s standing as an organized yacht club under Spanish law. (Terrasa Aff. ¶ 8.) Moreover, the Deed requires only incorporation “or” licensing. There is no dispute that CNEV was incorporated when it challenged. Thus, GGYC’s point was irrelevant. In any event, GGYC simply was mistaken – CNEV does indeed possess a club license. The license was issued, and was effective as of June 20. (Id. Ex. 3.) Accordingly, CNEV was organized, incorporated and licensed in June 2007 and at the time of its challenge under the Deed.

2. It Is Irrelevant Under The Deed If CNEV Is A “New” Club

GGYC complains that CNEV is “brand new” and that it was established to challenge for the America’s Cup. (Compl. ¶ 2.) This claim also fails under the express terms of the Deed.

No one disputes that CNEV is a “new” yacht club formed for the purpose of challenging for the 33<sup>rd</sup> Cup. There is nothing in the Deed, however, to suggest that a club needs to be in existence for any particular amount of time or organized in a particular way before it may submit a challenge. To the contrary, the Deed provides that “Any organized Yacht Club” may challenge indicating an intent toward inclusion, not exclusion. Under New York law, a trust instrument is to be construed as written, and the settlor’s intent is determined from the unambiguous language

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<sup>4</sup> See GGYC’s Memorandum of Law in Support of Its Motion for Preliminary Injunction and Expedited Trial and Discovery, dated August 22, 2007 at p. 9 and GGYC’s accompanying Spanish law affidavit submitted by an associate from the Paris office of Latham & Watkins, GGYC’s counsel here.

of the instrument. See Mercury Bay, 76 N.Y.2d at 269-70, 557 N.Y.S.2d at 858 (declining to look beyond the “four corners” of the Deed to ascertain the donor’s intent). There are no words in the Deed suggesting that a club has to be “old,” or anything else, to challenge as long as it meets the express terms of the Deed. GGYC would read into the Deed requirements that simply do not exist.<sup>5</sup> Cf. Wilhelmina Artist Mgmt., LLC v. Knowles, 801 N.Y.S.2d 782 (table), 2005 WL 1617178, at \*6 (Sup. Ct. 2005) (Cahn, J.) (holding that “[w]hen the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the document” and “[c]lear language does not become ambiguous just because the parties argue differing interpretations.”).

In addition, the history of the Cup has numerous examples where “new” clubs, clubs formed only to challenge for the Cup, and even clubs incorporated well after the fact, did in fact compete as challengers. For example:

- Sun City Yacht Club was incorporated one day before confirming its challenge for the 1977 America’s Cup. (Ross Aff. ¶ 42.)
- Secret Cove Yacht Club was incorporated only three months prior to challenging for the 1983 Cup and was openly established for the purpose of challenging for the Cup. (Id. ¶ 43.)
- Mercury Bay Yacht Club was incorporated less than nine months before it issued its challenge in 1987 and it is widely known to have operated out of a car on a beach. (Id. ¶ 44.)
- Southern Cross Yacht Club was incorporated in April 1993 six months after challenging the San Diego Yacht Club. (Id. ¶ 45.)
- Royal New Zealand Yacht Squadron challenged, and had its challenges accepted, for the 1987, 1992, and 1995 Cups, despite not being incorporated. (Id. ¶ 46.)
- A challenge from the Cortez Sailing Association was accepted by the Royal New Zealand Yacht Squadron although Cortez does not appear to

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<sup>5</sup> Thus, in any event, SNG was well within its discretion as trustee in accepting CNEV’s challenge. New York courts will not disturb or second guess the reasonable and good faith exercise of discretion by a trustee. Oddo v. Blum, 83 A.D.2d 868, 868, 442 N.Y.S.2d 23, 24 (1st Dep’t 1981).

have been incorporated until 2002, more than two years after it competed. (Id. ¶ 47.)

- Nippon Yacht Club, which challenged for the 29<sup>th</sup> and 30<sup>th</sup> Cups, appears to have been created solely to compete in the America’s Cup. (Id. ¶ 48.)
- Deutscher Challenger Yacht Club e.V. was specifically created to challenge for the Cup and challenged for the 32<sup>nd</sup> Cup just a few months after being established, with no objection from GGYC. (Id. ¶ 49.)

These precedents, though not necessary for the Court to grant summary judgment in SNG’s favor, show that the spirit of the Deed and Cup competition among Defenders and challengers, while lost on GGYC, is one of inclusion – consistent with the Deed’s directive for “friendly” international competition.

### 3. CNEV’s Annual Regatta

The final requirement under the Deed is an annual regatta. GGYC’s assertion is that CNEV’s challenge fails because it had not yet held an annual regatta before challenging.<sup>6</sup> (Compl. ¶¶ 19-20.)

Again, there is nothing in the Deed that requires a Challenger of Record to have had annual regattas before making its challenge. Indeed, the Deed uses the word “having” which, fairly read, includes past, present or future regattas.

Moreover, CNEV is “having” a regatta this month called the Vuelta a España a Vela. (Ross Aff Ex. EE.) In addition, CNEV has committed to hold an annual regatta going forward called the “Club Nautico Español de Vela Annual Regatta.” Manuel Chirivella, the Chairman of CNEV, has “formally undertake[n] on behalf of CNEV to maintain the [Club Nautico Español de Vela annual regatta] annually for all the time that the XXXIII America’s Cup will last.” (Ross Aff. Ex. EE.)

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<sup>6</sup> SNG notes that GGYC’s Complaint (see, e.g., ¶ 20) and in particular GGYC’s earlier submissions in this action rely heavily on press clippings and media reports. Not only are such materials not evidence on this motion, but the Court of Appeals has recognized that press interest in the America’s Cup is irrelevant to the Court’s analysis. Mercury Bay, 76 N.Y.2d at 270 n.2, 557 N.Y.S.2d at 859 n.2.

Significantly, this issue also has arisen and has been decided within the America's Cup community. The issue arose when SNG first challenged for the 31<sup>st</sup> America's Cup in 2000. Because SNG is located on Lake Geneva its annual regatta was not on the sea or an arm of the sea as required by the Deed, and SNG held its first said regatta between the time that its challenge was tendered and accepted. The issue was submitted to an America's Cup Arbitration Panel appointed under the Protocol for the 31<sup>st</sup> Cup. In a December 2000 decision, the Panel confirmed SNG's validity:

Neither the Deed of Gift nor the Protocol have any provision requiring the annual regatta to have been held prior to the lodging of a challenge, nor that the annual regatta must have been held more than once. The only requirement is that the challenging club must be a yacht club "having for its annual regatta an ocean water course on the sea . . . ." If it has such a regatta, it is eligible.

(Ross Aff. Ex. FF.) Notably, GGYC was a competitor in that America's Cup, and did not dispute SNG's eligibility despite a considerable incentive to do so when SNG's representative (Alinghi) eliminated GGYC's representative in the challenger series finals in 2003. GGYC abided by that arbitral ruling and should not be allowed the convenience of ignoring that precedent now.<sup>7</sup>

In addition, in the 1983 America's Cup, the New York Yacht Club agreed to let the Secret Cove Yacht Club of Canada race even though it had never before had an annual regatta on the condition that it would have regattas going forward. (Ross Aff. Ex. Y.) That is exactly the undertaking that CNEV has given here. (Id. Ex. EE.) CNEV's compliance with the literal terms

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<sup>7</sup> GGYC's willful ignorance of prior Cup precedent and arbitral decisions rendered under protocols to which it was a party call into serious question whether, under any circumstances, GGYC comes to the Court with clean hands sufficient to support the declaratory and injunctive relief that it seeks. See, e.g., Tepfer v. Berger, 119 A.D.2d 668, 669, 501 N.Y.S.2d 106, 107 (2d Dep't 1986) ("When equitable relief is sought, moral considerations of fundamental importance require the litigant come into court with 'clean hands.'"); Quinones v. Quinones, 139 N.Y.S.2d 607, 611 (Sup. Ct. 1955) ("A Court of Equity does not lend its aid to parties who themselves resort to unjust, untrue and unfair conduct.").

of the Deed establishes that CNEV is a proper Challenger of Record, that SNG duly accepted that challenge per the Deed, and that SNG is entitled to summary judgment.

4. The 33<sup>rd</sup> Protocol Was Reached By Mutual Consent

GGYC asserts that the 33<sup>rd</sup> Protocol and the terms of competition for the 33<sup>rd</sup> America's Cup are so unfair and one-sided that CNEV failed to carry out its duties under the Deed as Challenger of Record and SNG violated its fiduciary duties under the Deed. (Compl. ¶ 25.) GGYC's complaints ring hollow in light of the fact that four teams (in addition to CNEV) have signed on to the 33<sup>rd</sup> Protocol in less than two months. These teams, like SNG and CNEV, are all serious returning America's Cup competitors and their actions are a far more reliable indicator of the competitiveness and fairness of the 33<sup>rd</sup> Cup than GGYC's words.

As important, GGYC's argument again ignores the terms of the Deed. The Deed provides that the Defender and the Challenger of Record "may, by mutual consent, make any arrangement satisfactory to both as to . . . any and all conditions of the match." (Ross Aff. Ex A.) Thus, provided there is mutual consent, the Defender and the Challenger of Record can make "any" arrangements they want. Here, SNG and CNEV manifested their mutual consent by agreeing to and executing the 33<sup>rd</sup> Protocol. That ends the discussion (including under Mercury Bay). The Deed says nothing about how hard a bargain the Defender may drive, or how little the Challenger should give up before consenting. All the Deed requires is the action of "mutual consent" which happened here.

Moreover, CNEV did not just accept SNG's terms and do SNG's bidding. Far from it. The 33<sup>rd</sup> Protocol was negotiated with representatives of CNEV over a period of about two weeks. SNG and CNEV representatives had face-to-face sessions and additional communications and email correspondence. (Ross Aff. ¶ 22 & Ex. F.) SNG and CNEV exchanged at least four separate versions of the protocol reflecting comments and requests by

CNEV. (Id.) Thus, although no particular negotiation process is required under the Deed, SNG in no way “unilaterally determin[e]” the terms of the Protocol as GGYC alleges in its Complaint (Compl. ¶ 24.)

It is completely irrelevant and without any legal significance that GGYC does not like or agree with certain provisions of the 33<sup>rd</sup> Protocol. SNG and CNEV entered into the Protocol by “mutual consent” and GGYC has no greater right to complain about the terms than does any other non-party to a contract. GGYC has a simple choice – it can join the 33<sup>rd</sup> Cup and play by the rules or it can sit this match out.

To this point, the Court of Appeals in Mercury Bay expressly rejected the idea that the courts should substitute their judgment for that of the competitors, and rejected the idea that a Cup challenger could frame a breach of duty claim by presenting to the courts issues of competitiveness and fairness of America’s Cup rules :

The question of whether particular conduct is “sporting” or “fair” in the context of a particular sporting event, however, is wholly distinct from the question of whether it is legal. Questions of sportsmanship and fairness with respect to sporting contests depend largely upon the rules of the particular sport and the expertise of those knowledgeable in that sport; they are not questions suitable for judicial resolution.

Mercury Bay, 76 N.Y.2d at 265, 557 N.Y.S.2d at 856 (emphasis added). Thus, all of GGYC’s stated concerns about the terms of the 33<sup>rd</sup> Protocol or how the 33<sup>rd</sup> Protocol somehow constitutes a breach of duty by SNG are matters not properly before this Court. Cf. Mason v. Am. Theater Wing, Inc., 627 N.Y.S.2d 539, 541 (Sup. Ct. 1995) (Cahn, J.) (court would not substitute its judgment for that of Tony award governing body regarding decision on eligibility of plaintiff’s play for an award).

Indeed, if GGYC's attempt to elevate its complaints over the rules to the level of a breach of duty is credited, every time an America's Cup competitor has an issue about a measurement, a course selection, a penalty, a disqualification, etc., it would come to the courts. Not only is that not the purpose of the New York courts, but it would grind America's Cup competitions to a halt. That was exactly the point made by the Court of Appeals in Mercury Bay. See also Mercury Bay, 76 N.Y.2d at 272, 557 N.Y.S.2d at 860 (Wachtler, C.J., concurring) (allowing fairness interpretations to be decided in court "would encourage repetition of the most distasteful innovation of all in this case – resolution of the competition in court."). This is why since the Mercury Bay decision, America's Cup competitors – including GGYC in the 31<sup>st</sup> and 32<sup>nd</sup> Cups – have agreed to arbitrate their differences, and have done so successfully and professionally and why until now the courts have been free of applications from disgruntled competitors. (Ross Aff. ¶ 14.)

Finally, as GGYC well knows from first hand experience, America's Cup Protocols are "living" documents that are usually discussed with competitors and often evolve over time as progress is made toward the race. Indeed, the 32<sup>nd</sup> Protocol to which GGYC was a party as Challenger of Record was amended eleven times after it was first issued. (Id. ¶ 15.) As described above, SNG, CNEV, and the other competitors in the 33<sup>rd</sup> Cup have already met to discuss modifications to the Protocol. SNG respectfully submits that GGYC's efforts would be better spent in that process than this one.

## II. GGYC CANNOT ESTABLISH A BREACH OF FIDUCIARY DUTY

"A breach of trust is a violation by the trustee of any duty which as trustee he owes to the beneficiary." Restatement (Second) of Trusts § 201 (1959). Thus, to state a claim for breach of fiduciary duty, GGYC must demonstrate: (i) the existence of a fiduciary relationship between the parties; and (ii) a breach of that duty. As detailed above, GGYC cannot make these proofs

because the Court of Appeals has made it clear that the Defender's duty in the America's Cup is to follow the Deed. See Mercury Bay, 76 N.Y.2d at 267-68, 557 N.Y.S.2d at 857. Here, SNG did just that by accepting a valid challenge and by negotiating a protocol with CNEV as contemplated by the Deed.

Moreover, the Cup is unlike a typical trust because, by the terms of the Deed and as recognized by the Court of Appeals, it creates an adversarial relationship between the trustee and the challengers. Id. As noted above, in Mercury Bay the Court of Appeals found no breach of the Deed and no breach of fiduciary duty where the Defender, knowing that the Challenger of Record had no choice but to race a single-hulled boat, showed up with a catamaran – virtually guaranteeing victory and making a mockery of the entire competition. The conduct alleged here against SNG – accepting a challenge from a newly formed yacht club having its annual regatta after its challenge and entering into a Protocol that at least four other experienced America's Cup teams have also signed – is trivial compared to the Defender's actions that were upheld in Mercury Bay.

Given the express terms of the Deed and CNEV's literal compliance with those terms, SNG acted reasonably and properly in accepting CNEV's valid challenge. Under those circumstances, GGYC cannot show a breach of duty. Oddo v. Blum, 83 A.D.2d 868, 868, 442 N.Y.S.2d 23, 24 (1st Dep't 1981) (noting that a court will not interfere with a trustee's decision, unless it is shown to be an abuse of the discretion given by the donor). Moreover, GGYC's complaints about the terms of the 33<sup>rd</sup> Protocol simply have no place before this Court, as an alleged breach of fiduciary duty or otherwise. As noted above, the Court of Appeals in Mercury Bay expressly held that questions of sportsmanship and fairness with respect to sporting contests

“are not questions suitable for judicial resolution.” Mercury Bay, 76 N.Y.2d at 265, 557  
N.Y.S.2d at 856.

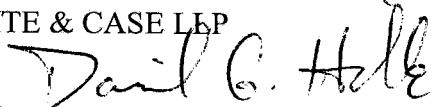
**CONCLUSION**

For the foregoing reasons, SNG respectfully requests that this Court grant its motion for summary judgment and issue an order that all of GGYC’s claims in the Complaint be dismissed, and that this Court order such additional relief as it deems just and proper.

Dated: New York, New York  
September 21, 2007

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