

PRELIMINARY STATEMENT

This motion respectfully requests, pursuant to CPLR 2221, that the Court revisit two aspects of its November 27, 2007 Decision granting in part GGYC's motion, denying in part SNG's motion, and denying CNEV's motion (the "Decision").

First, in adjudicating the validity of GGYC's challenge, the Court failed to consider and/or overlooked certain inconsistencies and flaws in GGYC's challenge. The Court therefore erred in suggesting that the GGYC challenge is valid. GGYC's motion papers did not raise or attempt to establish the validity of its Notice of Challenge and GGYC's Certificate. Thus, neither SNG nor CNEV had any reason to address the issue, and the Court likewise could not have considered these questions in any detail. GGYC's motion papers were limited to the statement that GGYC is a Yacht Club that meets the qualifications to be a challenger. However, the Deed of Gift mandates not just that the Yacht Club meet certain specified qualifications, but also expressly requires that the notice of challenge and accompanying certificate meet certain enumerated requirements. The only question properly raised by GGYC's motion papers—and thus the only issue properly before the Court—was the validity of CNEV's challenge. SNG respectfully requests leave to reargue and renew the competing motions for summary judgment to the extent this Court's Decision addresses questions relating to the validity of GGYC's (rather than CNEV's) challenge.

GGYC's challenge is deficient on its face. The Certificate submitted by GGYC with its Notice of Challenge expressly states that the challenging vessel shall be a "keel yacht," which is necessarily, as described below, a mono-hulled vessel. However, GGYC's Notice of Challenge is internally inconsistent because it proceeds to set forth specifications more akin to a multi-hulled vessel, and, subsequent to the issuance of its challenge, GGYC has given

indications that it may be intending to race a multi-hulled vessel. GGYC's Certificate fails to provide specifications as required by the Deed of Gift and fails to provide SNG as defender with adequate details about the boat it intends to race in its challenge. Such inconsistency and deficiencies render GGYC's challenge invalid.

Second, one of the facts upon which the Court based its decision to declare CNEV's challenge invalid—that CNEV had yet to hold an annual regatta—is no longer true. CNEV held its first annual regatta on November 24 and November 25, 2007, after the motions for summary judgment were fully briefed and argued before this Court and just two days prior to this Court's Decision. There is no requirement in the Deed of Gift that a regatta be held at any particular time before the America's Cup race, and the Court was unaware that CNEV had actually held its regatta prior to the date the Court issued its decision and, respectfully, we submit that the Court should consider that fact now.

ARGUMENT

A motion to reargue may be granted upon a showing that the court "overlooked or misapprehended" facts or law or for some reasons mistakenly arrived at its earlier decision. N.Y. CPLR 2221 (McKinney 2007); *Mansueto v. Worster*, 766 N.Y.S.2d 691, 692 (2d Dep't 2003); *Ebasco Constructors, Inc. v. A.M.S. Const. Co., Inc.* 599 N.Y.S.2d 866, 867 (2d Dep't 1993). A motion to renew is appropriate under CPLR 2221 where there are "new facts to support the motion, as well as a justifiable excuse for not initially placing such facts before the court." *Taft v. Lesko*, 182 A.D.2d 1008, 1009 (3d Dep't 1992) (citation omitted); *Luna v. Port Auth.*, 21 A.D.3d 324, 326 (1st Dep't 2005) (granting motion to renew). Those standards are satisfied here.

I. THE COURT ERRED IN DECLARING GGYC'S CHALLENGE VALID WITHOUT CONSIDERING WHETHER GGYC'S NOTICE OF CHALLENGE AND CERTIFICATE COMPLIED WITH THE REQUIREMENTS OF THE DEED OF GIFT

In order for a yacht club to be deemed the Challenger of Record for the America's Cup, it must, *inter alia*, tender a proper notice of challenge and certificate that satisfies each of the requirements in the Deed of Gift. Passing the issue of whether it was appropriate for the Court to disqualify CNEV and substitute GGYC as the Challenger of Record, SNG respectfully submits that the Court failed to consider facts concerning the propriety of GGYC's Notice of Challenge (Meyer Aff., Ex. B) and Certificate (Meyer Aff., Ex. C) in declaring GGYC's challenge to be valid.

GGYC's summary judgment motion papers did not raise or attempt to establish the validity of its Notice of Challenge and GGYC's Certificate. Thus, neither SNG nor CNEV had reason to brief the issue or argue it before the Court.

GGYC's only discussion of the propriety of GGYC's challenge in any of its briefing was its statement in its opening summary judgment brief that: "It is undisputed that GGYC, the Challenger of Record for the 32nd America's Cup is a 'Club fulfilling all the conditions required by this instrument.'" Memorandum of Law in Support of Golden Gate Yacht Club's Cross-Motion for Summary Judgment and In Opposition to Société Nautique de Genève's and Club Náutico Español de Vela's Motions to Dismiss and for Summary Judgment, dated October 5, 2007, at 16. It is correct there is no dispute that GGYC is a Yacht Club that qualifies as an "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." Meyer Aff., Ex. E, at 1. But that fact does not end the analysis.

The Deed of Gift requires more than a finding that a Yacht Club meets the qualifications to be a challenger. It also expressly requires the tendering of a certificate meeting the requirements of the Deed of Gift along with the putative Challenging Club's notice of challenge. Meyer Aff., Ex. E, at 1-2. Thus, even assuming *arguendo* that CNEV's challenge is invalid, GGYC's challenge would be valid if and only if GGYC was a qualified Club *and* it tendered a proper certificate per the terms of the Deed of Gift.

Because the validity of GGYC's challenge certificate—a question wholly separate from whether GGYC would be a qualified challenger if it tendered a proper challenge—was not properly before the Court, the Court should not have reached the question of whether GGYC's Challenge was valid.¹ Notwithstanding this absence of evidence, the Court nonetheless appears to have concluded that GGYC is the Challenger of Record. Decision, at 18. SNG respectfully requests leave to reargue and renew the motions for summary judgment with respect to the propriety of reaching the question of the validity of GGYC's Notice of Challenge and Certificate. Even assuming that CNEV's challenge is invalid, because GGYC has not made a proper challenge compliant with the Deed of Gift, the proper Challenger of Record under the Deed of Gift would be the yacht club that tendered the next challenge in chronologic order (Royal Cape Yacht Club, South Africa; Royal Thames Yacht Club, Great Britain; Royal New Zealand Yacht Squadron, New Zealand, etc.) valid under the Deed of Gift and who still intends to maintain its challenge. Meyer Aff., ¶ 21.

¹ The only cause of action sustained by the Court was for breach of terms of the Deed of Gift. In that count, GGYC requested a declaration that "CNEV's notice of challenge and challenge, which was accepted by SNG, was invalid and failed to conform to the terms of the Deed of Gift." (Complaint ¶48). Thus, based on the sole count on which GGYC prevailed, it was entitled to no more than a declaration that CNEV's challenge was invalid.

In light of the Court's Decision (and while the time to take an appeal has not yet started to run) SNG commenced to study the GGYC's Notice of Challenge. SNG had not previously had reason to analyze in any detail the technicalities of GGYC's Notice of Challenge or accompanying Certificate because (i) SNG had already accepted in good faith CNEV's challenge, (ii) the Deed of Gift states clearly that no challenge can be made as long as a previous challenge has not been resolved, and (iii) SNG had thus apprised GGYC, in response to its purported challenge, that SNG had already received a valid challenge from CNEV and that the Deed of Gift barred consideration of another challenge until the pending challenge of CNEV had been decided. Meyer Aff., ¶¶ 5-6.

As a result of this review, SNG has identified several material issues of fact regarding the validity of GGYC's Challenge that preclude summary judgment.

First, the Deed of Gift requires the challenge to include "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." Meyer Aff. Ex. E, at 1-2. As required by the Deed of Gift, GGYC's Certificate states certain dimensions of its intended challenging vessel including that it will be a "keel yacht" with a length on load water-line of 90 feet and a beam at load water-line of 90 feet. Meyer Aff., Ex. C. A keel yacht is a mono-hull vessel—*i.e.*, a boat with only one hull, with centreboard or a fin keel or permanent keel(s) designed to provide stability when under sail. However, the vessel specifications of a length of 90 feet and a beam of 90 feet are unusual for a keel yacht, and would be more ordinarily consistent with the dimensions of a multi-hulled vessel. Thus, GGYC's Certificate contains an inherent and irreconcilable internal inconsistency, rendering its Certificate and accompanying

Notice of Challenge deficient and invalid.² The Deed of Gift requires the challenger to provide an accurate certificate describing the Challenging Vessel so that the defender will have adequate opportunity to prepare its defense. The self-contradictory nature of GGYC's Certificate makes such preparation all but impossible.³

SNG understands and expects, based on the express language in GGYC's Certificate, that the challenging vessel of GGYC shall be a keel yacht (not a multi-hulled vessel), with a length on load water-line of 90 feet and a beam at load water-line of 90 feet. Meyer Aff. ¶¶ 8-17. The Certificate expressly describes the challenging vessel as a "keel yacht." Meyer Aff., Ex. C. The Oxford English Dictionary defines a "keel-boat" as "a yacht having a keel instead of a centre-board." Meyer Aff., Ex. F, at 1528. In contrast, multi-hull boats, encompassing catamarans and trimarans, are not referred to as keel yachts; they do not have keels and instead achieve stability through the broad stance of the multiple hulls. This distinction between "keel yacht" and "multi-hull" is confirmed by numerous sources, including the 2007 International Sailing Federation ("ISAF") Regulations rules that clearly distinguish the

² In prior Court filings, SNG has assumed that GGYC's boat will be a catamaran, *see, e.g.* Hamish Ross Aff. ¶36, based on the dimensions given in the GGYC Certificate. However, upon further review of GGYC's Certificate, it is clear that GGYC has specified that its challenging vessel shall be a keel yacht, not a catamaran, of those dimensions, even though such dimensions appear to be unusual (but not at all impossible) for a keel yacht.

³ A review of the statements of the Donor George Schuyler, the last of the surviving original donors, confirms the importance of a specific and clear description of the yacht to be raced. Meyer Aff., Ex. K ("I believe the challenged party has a right to know what the yacht challenging is like, so it can meet her with a yacht of her own type if it is so desired.")

following class designs: (i) keel boat, (ii) multi-hull, (iii) centreboard, and (iv) windsurfing. Meyer Aff., Ex. G, at §§15.2.1., 18.2.1.b.⁴

To the extent that the Court intends to adjudicate the validity of the GGYC Challenge, it should require that GGYC's challenging vessel comply with the description stated in the GGYC Certificate—specifically, that it be a keel yacht (not a multi-hulled vessel) with a length on load water-line of 90 feet and a beam at load water-line of 90 feet.⁵ In the event that GGYC deviates from its current Notice of Challenge by changing from a mono-hulled vessel to a multi-hulled vessel, its Notice of Challenge should be declared invalid and/or forfeited, as such alteration is clearly material.⁶

Second, GGYC's Notice of Challenge fails to give 10 months notice to the Defender as required by the Deed of Gift. As GGYC acknowledged in its December 10 letter to the Court, the ten months' notice of the match date required by the Deed of Gift must be

⁴ Reinforcing such distinction, the ISAF requires different competencies and experiences for specialists on keel yacht, as opposed to multi-hull vessels. Meyer Aff., Ex. G, § 15.2.1; *see also* Meyer Aff., Ex. H. The ISAF regulations further require different on-board equipment for keel yachts as opposed to multi-hulls. Meyer Aff., Ex. G, § 16.1.6. The ISAF International Measurer's Manual likewise contrasts keel-boat against multi-hulls, and establishes different measurement rules for both class designs. Meyer Aff., Ex. I.

⁵ Even assuming GGYC intended to specify a multi-hull vessel, its failure to include detail about whether it intended a catamaran or trimaran, and dimensions for each of the hulls (and, in the event of a trimaran, specifying further whether the overall beam includes only hulls that are in the water or all hulls), as well as full details of the rig such as mast height, renders its certificate non-compliant with the Deed of Gift.

⁶ As the Donor George Schuyler, the last of the surviving original donors, explained, only minor subsequent changes in a certificate can be allowed; substantial or major changes invalidate the challenge: "The importance of accuracy in giving the dimensions of a yacht challenging for the Cup is so great that any decision reached in any one case cannot be used as a precedent in any other that might arise. A great error in any of the 'dimensions', whether through mistake or design, would vitiate the agreement – a small one should be governed by the circumstances attending it, and always on the liberal side". Meyer Aff., Ex. J, at 23.

“uninterrupted by this lawsuit.” Letter from James V. Kearney to Hon. Herman J. Cahn, dated December 10, 2007. GGYC’s proposed first race date of July 4, 2008 is less than ten months from today. Even GGYC appears to acknowledge that July 2008 is impracticable and has since proposed a race date of October 2008. Letter from James V. Kearney to Hon. Herman J. Cahn, dated December 13, 2007. But that date is also less than 10 months from today and will certainly be far less than 10 months from the date final resolution of this case is at hand.

Third, GGYC’s Notice of Challenge proposes race dates that violate the Deed of Gift’s explicit requirement that “one week day shall intervene between the conclusion of one race and the starting of the next race.” Meyer Aff. Ex. E, at 2. GGYC’s Notice of Challenge names the following race dates: “4 July 2008 as the date of the first race, 6 July 2008 and 8 July 2008 as the dates for the second and, if necessary, third races.” Meyer Aff., Ex. B, at 2. There is no “week day” between the first race date of July 4, 2008, which is a Friday, and the second proposed race date of July 6, 2008, which is a Sunday. Thus, GGYC’s Notice of Challenge is facially deficient in this respect as well.

Because the validity of GGYC’s challenge was never properly before this Court, and there are, at a minimum, issues of facts as to its validity, SNG respectfully requests that the Court reconsider its Decision to the extent it purported to adjudicate issues as whether GGYC’s Notice of Challenge and Certificate were valid.

* * *

For the foregoing reasons, even assuming *arguendo* that CNEV’s challenge is invalid, because GGYC’s challenge is invalid and/or forfeited for failure to comply with the Deed of Gift, the proper Challenger of Record is the yacht club that tendered the earliest challenge (Royal Cape Yacht Club, South Africa; Royal Thames Yacht Club, Great Britain;

Royal New Zealand Yacht Squadron, New Zealand, etc.) valid under the Deed of Gift and that still intends to maintain its challenge. Meyer Aff., ¶ 21.

II. THE COURT'S OPINION SHOULD BE REVISITED BASED ON EVENTS THAT HAVE TAKEN PLACE SINCE THE ISSUANCE OF THE COURT'S OPINION

In its November 27 Decision, the Court concluded that CNEV's challenge was invalid because it did not have an annual regatta as required in the Deed of Gift. Decision, at 13. That holding was, we submit, based on a misreading of the Deed of Gift⁷ as well as on a now incorrect understanding of the underlying facts. By the time of the July 2009 match date in CNEV's notice of challenge, CNEV will have held at least two annual regattas, in 2007 and in 2008. The record before the Court when it rendered the Decision did not include evidence of CNEV's annual regatta held subsequent to completion of briefing and oral argument on the instant Motions. That event (the Trófeo Desafío Español), however, was held on November 24 and 25 in Valencia, Spain. Affidavit of Manuel José Chrivella Bonet, sworn to on December 27, 2007, ¶ 2. Thus, CNEV has already held at least one annual regatta. CNEV has also committed to hold an annual regatta again in 2008. *Id.* ¶ 3. GGYC has offered no evidence to suggest that a

⁷ The Deed of Gift states: "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 on 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 for 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." Meyer Aff. Ex. E (emphasis added). Respectfully, SNG submits that the Court mistakenly limited its interpretation of this provision to the phrase "having for its annual regatta on the sea or arm of the sea" rather than consideration of the entire provision of the Deed of Gift, including the phrase "shall always be entitled to the right of sailing a match for this Cup." When the two phrases are read together, it is indisputable that the Deed of Gift requires a challenger to have had an annual regatta ***by the time of the match***, not by the time of the challenge. The Deed of Gift does not require that the annual regatta must be held at the time of the challenge.

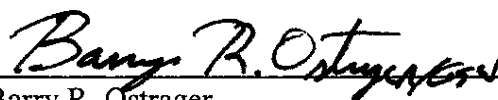
second annual regatta will not, in fact, be held by CNEV. Thus, even under GGYC's strained reading of the Deed of Gift as requiring two annual regattas to have been held by the Challenger of Record, CNEV would still qualify under the Deed of Gift as a proper Challenger of Record.

CONCLUSION

For the foregoing reasons, SNG respectfully requests that the Court grant leave to reargue and renew SNG's Motion to Dismiss and for Summary Judgment and GGYC's Cross-Motion for Summary Judgment.

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