



SNG's fiduciary duty to GGYC in accepting the purported challenge of Club Náutico Español de Vela ("CNEV"). GGYC, who served a Notice of Challenge upon SNG on July 11, 2007, also sought a declaratory judgment that GGYC, not CNEV, was the Challenger of Record.

3. As described in detail below, Defendants accepted an invalid challenge from a sham yacht club in order to establish terms for the next America's Cup that grossly benefit Defendants at the expense of the trust's beneficiaries, in violation of the Deed of Gift and Defendants' fiduciary duties.

4. Thereafter, in an effort to achieve credibility for the self-dealing protocol they had promulgated, Defendants sought to induce Plaintiff, an established and successful sailing team, to participate in the 33<sup>rd</sup> America's Cup. Because Plaintiff exists for the sole purpose of competing in the America's Cup, it agreed to participate. However, it did not want to be subject to Defendants' whims regarding when and where the next America's Cup would be held, and therefore agreed to participate in the match *on the condition* that Defendants undertook and promised to hold the next America's Cup race in Valencia, Spain, in 2009. In reliance on Defendants' undertaking and promise to hold the next race in Valencia in 2009, TNZ has spent millions of dollars in preparation for the 2009 event.

5. On or about November 22, 2007, Defendants announced that the next America's Cup race will not take place in Valencia in 2009. Defendants have not provided an alternative time or place. As a result of Defendants' actions, there is a serious risk that Plaintiff will not survive to challenge Defendants in a deferred race or, alternatively, will survive as a team whose resources are seriously depleted and whose competitive abilities are thereby seriously weakened, outcomes that reward Defendants for their unlawful actions.

## **THE PARTIES**

6. Plaintiff TNZ, a world class sailing team, is a corporation organized under the laws of New Zealand with its principal place of business in Auckland, New Zealand. TNZ, as representative of non-party Royal New Zealand Yacht Squadron (“RNZYS”), won the America’s Cup in 1995 and successfully defended the Cup in 2000. It also won the Louis Vuitton Cup in 2007, which entitled it to challenge the defender in the 2007 America’s Cup.

7. Defendant Société Nautique de Genève (“SNG”) is a yacht club based in Geneva, Switzerland. It is the current holder of the America’s Cup, which it won in 2003 and 2007 through its affiliate, Defendant Team Alinghi, S.A. (“Alinghi”). As the current holder of the America’s Cup, SNG is the trustee of the trust, formed under the laws of the State of New York, which holds the America’s Cup trophy for the benefit of all competitors.

8. Defendant Alinghi is a sailing team affiliated with, and the representative of, SNG and is the winner of the 2003 and 2007 America’s Cup competitions. As such, it shares in and assumes the same obligations of trust owed by SNG.

9. Defendant AC Management, S.A. (“ACM”) is a Swiss limited liability company with headquarters in Geneva, Switzerland, appointed by SNG to organize, manage, and fulfill all of SNG’s obligations under the Deed of Gift.

10. Defendant Ernesto Bertarelli, a Swiss citizen, is the founder and owner of both Alinghi and ACM.

## **JURISDICTION AND VENUE**

11. This court may exercise jurisdiction over Defendants pursuant to C.P.L.R. §§ 301 and/or 302.

12. This court may exercise jurisdiction over the subject matter of this claim pursuant to N.Y. Bus. Corp. Law § 1314(b)(5).

13. Venue lies in this Court pursuant to C.P.L.R. § 503(a).

### **FACTUAL BACKGROUND**

#### **The Deed Of Gift**

14. The America's Cup sailing competition is governed by a trust instrument executed under the laws of New York on October 24, 1887, as amended by Orders of this Court dated December 17, 1956 and April 5, 1985 (the "Deed of Gift"). The corpus of the trust is a trophy known as the America's Cup. George L. Schuyler, as the sole surviving owner of the yacht America that won the Cup in a match on August 22, 1851, designated the Cup to be held "in trust, nevertheless, for the following uses and purposes," namely that "[t]his Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

15. The Deed of Gift entitles "[a]ny organized Yacht Club of a foreign county, 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" the "right of sailing a match for this Cup."

16. The Deed of Gift states 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."

17. The Deed of Gift provides certain base-line requirements regarding the terms of the match, but provides that the defending club and the challenging club should set additional rules by 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.” The ability to set such rules, based on mutual consent, ensures that competition for the America’s Cup will be fair and that the Cup shall be preserved “for friendly competition between foreign countries.”

18. If the challenging club and the defending club cannot mutually agree on the terms of the match, the Deed of Gift establishes certain default rules that will govern the terms of the match.

Alinghi Accepts The Purported “Challenge” Of Sham Challenger CNEV

19. Before Alinghi had even won the 32<sup>nd</sup> America’s Cup, Defendants agreed with Real Federación Española de Vela (“RFEV”), the national governing body for the sport of sailing in Spain (not a yacht club at all), that RFEV would issue a “challenge” to Alinghi if Alinghi won the America’s Cup. However, “opposition to RFEV becoming Challenger of Record for the 33<sup>rd</sup> America’s Cup match arose, on the ground that it was a federation of yacht clubs, not a yacht club itself.” *Golden Gate Yacht Club v. Societe Nautique De Geneve*, No. 602446/07, 2007 WL 4624020 at \*3 (N.Y. Sup. Nov. 27, 2007). Acting on the advice of its lawyers and at the request of Defendants, RFEV quickly formed CNEV.

20. CNEV has no yachts. It has no members other than the directors of RFEV who executed its incorporation and registration papers days before CNEV issued its challenge. CNEV had no telephone number and no website. As of the date of CNEV’s challenge, CNEV had never held an annual regatta, which is one of the few qualifications required by the Deed of Gift. CNEV attempted to hold two “regattas,” one of which involved children sailing during a training session and the other of which CNEV co-sponsored with another yacht club. Neither of

these “regattas” satisfies the Deed of Gift’s requirement because, among other reasons, they both post-date CNEV’s purported challenge.

21. On July 2, 2007, the day before the final race in the 32<sup>nd</sup> America’s Cup series, pursuant to its agreement with Defendants, CNEV announced that, if SNG successfully defended the Cup, CNEV would challenge SNG for the 33<sup>rd</sup> America’s Cup. On July 3, 2007, Alinghi, representing SNG, defended the America’s Cup by defeating TNZ in the final race. CNEV immediately issued its purported challenge, which SNG accepted.

Alinghi And Sham Challenger CNEV Form Self-Dealing Protocol

22. Historically, the challenging club and the defending club issue a “protocol” that announces the rules for the next America’s Cup to which the two clubs have mutually consented. Additional challengers are invited to join the protocol by submitting a Notice of Entry. Instead of following that procedure, Defendants issued a protocol that grants to themselves the right to set the terms of the next America’s Cup unilaterally.

23. On July 5, 2007 SNG and CNEV publicly released the “Protocol Governing the Thirty Third America’s Cup” (the “Protocol”).

24. The Protocol provides that SNG may appoint ACM, a commercial organization owned and controlled by Ernesto Bertarelli (who also owns Alinghi), as the Event Authority. The Protocol awards ACM “the ultimate responsibility for the management, organization, and financing of the Event.” Thus, Defendants secured for themselves the rights to set the terms of the Cup.

25. For example, ACM has the power, in its sole discretion, to appoint the members of the Race Committee, the Measurement Committee, Umpires, and “such other persons as are reasonably necessary in discharging the duties outlined” in the Protocol. ACM has the power to

fine competitors for “non-compliance” of rules, to deduct fines from any moneys due to competitors, and to take legal action necessary to recover outstanding fines. ACM may “impose any rule and restriction on the Competitors that are necessary to the fulfillment of its duties under the Deed of Gift and this Protocol.” ACM even has the power to cherry-pick who those competitors will be, inasmuch as ACM “may accept or reject any entry received” based on four enumerated yet expansive grounds, including failure to abide by the Deed of Gift or the terms of the Protocol.

26. Unlike the 32<sup>nd</sup> America’s Cup Protocol, which was negotiated between SNG and GGYC, the 33<sup>rd</sup> America’s Cup Protocol eliminates the rights of challenging competitors. The 32<sup>nd</sup> Protocol established the Challenger Commission, which consisted of a representative from each challenging team and enjoyed certain voting rights. The 33<sup>rd</sup> Protocol replaces the Challenger Commission with a “Competitors’ Commission,” which has no voting powers. The 32<sup>nd</sup> Protocol provided that the Challenger of Record represented the interests of all challengers, whereas the 33<sup>rd</sup> Protocol here absolves CNEV of such duty, stating that “the Challenger of Record shall not owe any additional duties to the Challenging Competitors.”

27. Unlike the 32<sup>nd</sup> America’s Cup Protocol, which adopted pre-existing America’s Cup Class (“ACC”) Rules, the Protocol allows ACM, in its sole discretion, to issue new ACC Rules that will determine the class of yacht allowed to participate in the match. ACM may also amend those rules, provided that CNEV and Alinghi give their token approval. The Protocol requires only that ACM provide challengers 18 months to prepare, design, finance, and build a vessel for the match. Alinghi, as an affiliate of ACM, will have access to rules before they are issued and will thus have longer than its competitors to prepare.

28. ACM may also determine the event's racing schedule 16 months before the first race and may withhold the Notice of Race and Sailing Instructions until "approximately 60 days before the first race of the Event." ACM may withhold the Racing Rules until "approximately 60 days before a race of the Event in which they are applicable." Again, this allows Alinghi to have access to information before its competitors.

29. Furthermore, the Trials and Challenger Selection format announced by ACM "may provide for the Defender an 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." Thus, SNG has reserved its right to compete against a variety of challengers without facing elimination.

30. SNG has delegated the following additional duties to ACM in its sole discretion: to determine time limits for registering; to issue Competition Regulations, including limitations for training and testing; to take and distribute the minutes of the Competitors' Commission to all competitors represented; to determine whether there will be qualifying regattas and how they shall be scored; to decide whether competitors may build one, two, or more new boats; to determine and change venue; to determine the race and course areas and limit their use outside the racing periods; and to amend unilaterally the restrictions regarding crew members and designers.

31. The Protocol established an Arbitration Panel to resolve disputes relating to the Protocol. However, the Panel has demonstrated that it is not independent. In an effort to preempt the New York Supreme Court's consideration of the issue whether CNEV's challenge and the Protocol are valid under the Deed of Gift, SNG and CNEV submitted unopposed papers requesting that the Arbitration Panel deem CNEV's challenge valid and that the Protocol

complies with the Deed of Gift. The Arbitration Panel “arbitrated” the issue even though GGYC refused to participate. The “opposition” cited by the Arbitration Panel consisted of a letter by GGYC’s lawyers stating that GGYC *would not* participate in the “arbitration” and a review of “the contents of all the material placed on GGYC’s website up to the date of this Decision, including the documents filed with the Supreme Court for the State of New York.”

Unsurprisingly, the Arbitration Panel issued a lengthy decision in favor of exonerating SNG and upholding the validity of the CNEV challenge, on grounds that are wholly unsupportable, as demonstrated by the decision of the New York Supreme Court.

#### Alinghi Courts TNZ To Enter The America’s Cup

32. After SNG announced that it accepted CNEV’s purported challenge, there was considerable criticism in the yachting community regarding the propriety of CNEV’s status as the Challenger of Record. Following the issuance of the Protocol, yachting commentators and potential challengers criticized the terms of the Protocol, noting that SNG had unfairly usurped its status as defending club in issuing a protocol that gave SNG near exclusive control over the terms of the match.

33. As a result of the yachting community’s reaction to Defendants’ acts, only a few teams signed onto the Protocol by submitting a Notice of Entry. These teams were weak in terms of sponsorship, popularity, and successful racing history. None of the teams that joined the Protocol had ever won the America’s Cup.

34. TNZ, on the other hand, is a well-respected and successful racing team. As alleged above, TNZ successfully challenged Young America in the 29<sup>th</sup> America’s Cup and then successfully defended the Cup by defeating Luna Rossa in the 30<sup>th</sup> America’s Cup. TNZ won

the Challenger Selection Series in 2007 (called the Louis Vuitton Cup), earning the right to challenge Alinghi in the final match of the 32<sup>nd</sup> America's Cup.

35. In an effort to overcome the lack of credibility surrounding CNEV's status as Challenger of Record and the propriety of the invalid Protocol, SNG sought the entry of TNZ in late July 2007. The entry of TNZ would lend considerable credibility to both the Event and the Protocol. Without the entry of high profile teams and in particular TNZ, Defendants would not be able to secure the sponsorship and backing necessary to make the 33<sup>rd</sup> America's Cup a financial success. Furthermore, without TNZ and similar teams, the America's Cup, historically the premiere event in world class yachting, would become little more than side show recital starring SNG.

36. Defendants were particularly interested in securing TNZ's entry because of the history of rivalry and fierce competition between TNZ and Alinghi in recent years. Alinghi acquired the America's Cup by defeating TNZ in 2003, disrupting what could have been TNZ's third straight America's Cup victory. Alinghi then successfully defended itself against TNZ's challenge in the 32<sup>nd</sup> America's Cup, winning the final race by one second. Alinghi understood that this rivalry enhanced the interest in the America's Cup. Furthermore, Defendants understood that if TNZ entered the race, other challenging teams would follow TNZ's lead.

37. In addition, pursuant to ACM's agreement with the city of Valencia, Valencia would provide certain contract money only if Defendants could secure the entry of at least nine teams. TNZ's entry to the 33<sup>rd</sup> America's Cup was thus critical to Defendants.

### The Parties Negotiate And Reach An Agreement

38. Ernesto Bertarelli, founder and owner of Alinghi and ACM, personally negotiated with Grant Dalton, Managing Director of TNZ, regarding TNZ's potential entry into the 33<sup>rd</sup> America's Cup race.

39. During the negotiations, TNZ expressed concern regarding the Protocol's unilateral reservation of ACM's right to choose when the next America's Cup race would take place. This issue was critical to TNZ because TNZ needed to be able to prepare for the event. TNZ needed to know when the event would take place because it needed to know when to hire staff, sign leases and sponsorship agreements, settle the amounts of sponsorship payments, and begin construction of boats. It needed to know where the event would take place because, among other things, it needed to lease space and hire staff at the location. Indeed, TNZ refused to sign onto the Protocol unless the parties agreed in advance upon the location and date of the 33<sup>rd</sup> America's Cup. Defendants, eager for TNZ to enter the race, agreed, among other things, that the 33<sup>rd</sup> America's Cup would take place in Valencia, Spain, in 2009.

40. Specifically, on July 25, 2007, James Farmer, a director of TNZ, sent a letter via email to Hamish Ross, General Counsel for Alinghi. A true and correct copy of that email and letter is attached as Exhibit A. Farmer wrote:

“Following our discussion and those between Grant Dalton and Ernesto Bertarelli, I can say that an entry can be sent to you tonight (New Zealand time) if the following is agreed:

1. The Event will be in 2009 in Valencia and there will be a very early announcement to that effect.”

41. The letter addresses six other conditions demanded by TNZ, regarding the announcement and substance of Regulations and Class Rules, the sailing of new boats, selection of bases at the Event, and deferment of the entry fee.

42. Farmer wrote, “It would be appreciated if you would email me back as soon as possible your agreement to the terms contained in this letter. On receipt of your email I will immediately email back the entry signed by the Squadron [RNZYS].”

43. At 11:21 p.m. on July 25, 2007, Hamish Ross responded to Farmer’s letter as follows: “Thank you for your email and the attached latter, *I confirm that I am instructed by Ernesto to accept the terms set out in your letter (paragraphs 1-7), as well as the understandings reached between Grant and Ernesto.*” (emphasis added). Ross continued, “Meanwhile, we intend announcing the entry at the press conference this afternoon.” Exhibit A.

44. In response to Ross’s email, TNZ emailed a Notice of Entry signed by RNZYS and TNZ. A true and correct copy of that email and Notice of Entry is attached as Exhibit B.

45. In reliance upon the parties’ agreement that the 33<sup>rd</sup> America’s Cup race would be held in Valencia, Spain in 2009, TNZ settled its budget for a 2009 event. TNZ negotiated amounts to be provided by its major sponsors based on that budget. TNZ also entered into employment contracts with a number of parties, all of whose employment would be necessary to ensure TNZ’s successful challenge for the Cup. Those key personnel included yachtsmen, designers, and senior management. TNZ has devoted significant resources in preparation for a 2009 race in Valencia.

Defendants Announce That They Will Not Hold The 33<sup>rd</sup> America’s Cup In Valencia In 2009

46. On November 22, 2007, before the ruling of the court described below, Defendants (through ACM) announced that the 33<sup>rd</sup> America’s Cup *would not* be held in Valencia in 2009 but did not indicate where or when it would be held, although making it clear Event will be deferred until at least 2011. In doing so, Defendants have chosen to put their own

personal and commercial interests ahead of the interests of the Event, the standing of the America's Cup, and the interests of other competitors, including Plaintiff.

47. Defendants postponed the Cup despite the fact that GGYC offered a settlement proposal to SNG that would have preserved the plans for the 2009 America's Cup race in Valencia. Other challengers, including TNZ, supported this proposal. SNG rejected the proposal.

48. The effect of Defendants' breach has been and continues to be substantial. Costs for deferring the event from 2009 to 2011 will exceed tens of millions of dollars. In taking steps to mitigate such damage, including placing key employees on retainers in place of their former full time contracts, TNZ has suffered both the loss of goodwill and intellectual property. Given this harm, a strong possibility exists that TNZ will not survive a lengthy delay, an outcome that would reward SNG for its wrongful acts by eliminating one of SNG's most serious rivals.

#### Justice Cahn Holds That CNEV's Challenge Is Invalid

49. On November 27, 2007, Justice Cahn held that "CNEV's challenge is invalid, and that GGYC is Challenger of Record pursuant to the Deed." *Golden Gate Yacht Club v. Societe Nautique De Geneve*, No. 602446/07, 2007 WL 4624020 at \*10 (N.Y. Sup. Nov. 27, 2007). Justice Cahn held that CNEV's failure to have an annual regatta "nullifies its purported role as Challenger of Record of the 33<sup>rd</sup> America's Cup." *Id.* at \*7.

50. Under that ruling, the Protocol purportedly negotiated between SNG and CNEV is necessarily invalid, null and void, and unenforceable.

#### **COUNT ONE – BREACH OF FIDUCIARY DUTY**

51. TNZ incorporates by reference paragraphs 1 through 50 above, as if set forth herein.

52. Defendants have violated the fiduciary duties of care, loyalty, good faith and honesty that they owe as holders and trustees of the America's Cup. Defendants owe these duties to all potential competitors, as beneficiaries under the Deed of Gift.

53. As trustee, Defendants were, and continue to be, under a duty to enforce the terms of the trust instrument, the Deed of Gift, and not to act in a manner contrary to the interests of the beneficiaries of the trust, including Plaintiff.

54. As demonstrated by the above allegations, Defendants failed, and continue to fail, to exercise the care required by the Deed of Gift. Defendants have breached their duties of care, loyalty, good faith, and honesty 1) by accepting CNEV's invalid challenge; 2) by entering into the Protocol without engaging in the consensual process contemplated by mutual consent clause of the Deed of Gift; 3) by structuring the Protocol to advantage themselves at the expense of the trust's beneficiaries; and 4) by unnecessarily postponing the 33<sup>rd</sup> America's Cup. These acts violate the terms of the Deed of Gift.

55. As demonstrated by the above allegations, Defendants are engaging in self-dealing 1) by accepting CNEV's invalid challenge; 2) by entering into the Protocol without engaging in the consensual process contemplated by mutual consent clause of the Deed of Gift; 3) by structuring the Protocol to advantage themselves at the expense of the trust's beneficiaries; and 4) by unnecessarily postponing the 33<sup>rd</sup> America's Cup. These acts violate the terms of the Deed of Gift and demonstrate that SNG is unfit to continue as trustee of the trust established by that Deed.

### **COUNT TWO – BREACH OF CONTRACT**

56. TNZ incorporates by reference paragraphs 1 through 55 above, as if set forth herein.

57. TNZ and Defendants entered into a valid contract supported by valuable consideration on July 25, 2007.

58. In that contract, Defendants agreed, among other things, that the 33<sup>rd</sup> America's Cup would be held in Valencia, Spain in 2009. TNZ agreed, based on that condition, among others, that it would submit a Notice of Entry to sign onto the Protocol for the 33<sup>rd</sup> America's Cup.

59. On November 22, 2007, Defendants announced that they would not hold the 33<sup>rd</sup> America's Cup in Valencia, Spain in 2009.

60. This act constitutes a breach of contract.

61. Defendants have caused and continue to cause damage to TNZ through this breach in an amount to be determined at trial.

#### **RELIEF REQUESTED**

62. Based on the foregoing, TNZ requests that the Court

- a. Award TNZ actual and consequential damages in an amount to be established at trial, as a result of the allegations set forth herein as established at trial;
- b. Award TNZ interest of any award of actual damages at the rates prescribed by actual law;
- c. Award TNZ an amount sufficient to reimburse it for all expenses, including costs and attorneys fees, that have been reasonably incurred;

- d. Declare that SNG be removed as trustee of the trust established by the Deed of Gift; and
- e. Grant TNZ such other relief as justice may require.

Dated: New York, New York

March 6, 2008

Respectfully submitted,

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