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Defendant-Appellant Société Nautique de Genève (“SNG”) submits this memorandum of law in further support of its motion for a stay, pursuant to CPLR § 5519(c), of enforcement pending appeal of the March 17, 2008 Order of the Supreme Court, New York County (Herman Cahn, J.), and in opposition to Plaintiff-Appellee Golden Gate Yacht Club’s (“GGYC”) cross-motion for an order dismissing SNG’s appeal.

### **PRELIMINARY STATEMENT**

The America’s Cup is one of the most significant sporting events in the world. The organization and sponsorship of the event involves at least a year of advance planning and the expenditure of hundreds of millions of dollars. For the 32nd America’s Cup, the city of Valencia spent hundreds of millions of dollars on infrastructure improvements in its harbor, city, and seaport to accommodate the race. For the 33rd America’s Cup, the city of Valencia and various competitors planned to make similar levels of financial commitments and expenditures to support a multi-challenger event.

The erroneous order of the trial court and the confusing procedural posture of this case have put these plans on hold. The trial court entered an order establishing GGYC as Challenger of Record without first entering an order explicitly disqualifying Club Náutico Español De Vela (“CNEV”). It refused to

refer the issue of the validity of GGYC's boat certificate to an international jury of experienced sailors, which stripped SNG of its right to obtain clarification of the ambiguities of the certificate. Finally, the trial court failed to resolve the issue of when the ten-month notice period begins to run, leaving SNG without certainty on when the next America's Cup will be held.

As a result of this procedural morass, the trial court has transformed what would likely have been the most successful America's Cup challenger series in history into a Deed of Gift match race between only two competitors. It is contrary to the interests of the sport, contrary to the express terms of the Deed of Gift, and contrary to any notion of reason to have a single trial judge of the New York Supreme Court dictate the staging of the America's Cup. It is incumbent upon this Court to issue a stay of the trial court's order until the merits of the case can be properly addressed.

GGYC attempts to distract this court from these real world consequences by advancing hyper-technical claims that are at best misleading and at worst false.

*First*, GGYC suggests that SNG's appeal should be dismissed because the denial of a motion for leave to reargue is unappealable. This is a straw man argument. The order being appealed is the order attached to the Notice of Appeal, which denies SNG's motion seeking disqualification of GGYC as Challenger of

Record. While the trial court issued two orders on March 17, 2008, one denying SNG's motion for disqualification brought by the order to show cause (motion sequence 006) and the other denying SNG's motion for leave to reargue and renew (motion sequence 005), only the order denying SNG's motion to disqualify GGYC is being appealed. That order is plainly appealable.<sup>1</sup>

*Second*, GGYC's suggestion that SNG has not identified what it seeks to stay ignores SNG's clear explanation in its moving papers that it is seeking a stay of the order declaring GGYC to be the Challenger of Record for the 33<sup>rd</sup> America's Cup. This stay is necessary to ensure that SNG does not need to proceed during the prosecution of this appeal with the various steps that it would necessarily undertake were GGYC ultimately determined to be the proper Challenger of Record.

*Third*, GGYC suggests that SNG is improperly seeking an extension of the ten-month notice period prescribed by the Deed of Gift.<sup>2</sup> This is simply not

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<sup>1</sup> The fact that the trial court issued two orders on March 17, 2008, and the decision attached to both addressed both motions together, does not make the denial of the motion brought on by order to show cause somehow unappealable.

<sup>2</sup> GGYC significantly distorts the holding of *Broadwall Amer. Inc. v. Bram Will-El LLC*, 32 A.D.3d 748, 821 N.Y.S.2d 190 (1st Dep't 2006) in a failed attempt to support its claim. In *Broadwall*, the plaintiff sought to enforce an option contract to purchase property from defendants, after a full panel of this Court *denied* the plaintiff's motion for a stay pending determination of the appeal. In a subsequent appeal, this Court held that, given that plaintiffs' prior application for a stay pending appeal had been *denied*, the plaintiff could not simply proceed to act as if the stay had been granted and his option period tolled during the pendency of the appeal. This Court explained: "We reject plaintiff's attempt to obtain by way of preliminary motion practice relief that this Court denied in disposing of the appeal.... It is an honored

true. SNG seeks a stay of the trial court's order to prevent GGYC from hijacking the America's Cup before this court is able to determine the merits of this appeal. The issuance of a stay will necessarily toll this ten-month notice period, but that is simply because the Deed of Gift prescribes such a result. The ten-month notice period by definition cannot run until a valid challenger of record is ascertained.

*Fourth*, as demonstrated in SNG's opening brief, and as GGYC makes no effort whatsoever to contest, SNG has a high likelihood of success on the merits on this appeal. This is a pivotal factor in deciding whether to grant a stay.

*Fifth*, absent a stay, SNG will suffer irreparable harm by being forced to prepare for a match against an improper challenger, which intends to race in an improperly designated vessel, in less than sixth months – all in violation of the Deed of Gift. No competitor, including SNG, can build a boat or otherwise prepare for the America's Cup without knowing what type of boat it is competing against. The harm inflicted upon SNG, the city of Valencia, and all other yacht clubs is enormous. A stay will ensure that the damage and harm is halted.

*Sixth*, GGYC's claim that any tolling of the ten-month notice period required under the Deed of Gift would cause it substantial prejudice is belied by

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principle that a party may not accomplish by indirection that which is directly denied to it." *Broadhall*, 32 A.D.3d at 751, 821 N.Y.S.2d at 193 (internal citations omitted). These facts are wholly inapposite to this case. The question before this Court is whether it should grant a stay pending appeal. If it does, then the ten-month notice period *is* tolled. If it does not, of course, then the period is not. Thus, *Broadwall* is a wholly unremarkable case, and nothing in *Broadwall* or any other case cited by GGYC, prevents this Court from granting this relief.

the fact that GGYC previously executed a stipulation agreeing to precisely this relief before the trial court, although that stipulation was never so ordered.

It is true that the trial court has yet to enter an order explicitly disqualifying CNEV, the original and proper Challenger of Record. Thus, the trial court's order designating GGYC as the Challenger of Record and declaring its facially defective certificate valid has placed this case in an absurd procedural posture and thrown the America's Cup into disarray. SNG, as trustee and Defender of the America's Cup, is bound to ensure that the integrity, spirit, and letter of the Deed of Gift is upheld. Without a stay, SNG simply will not be able to meet its duties and as a consequence will suffer irreparable harm. Therefore, SNG seeks, through its application for a stay, to stop the damage and uncertainty brought to the historic America's Cup, which will be a first step in restoring the integrity of the America's Cup and restoring the 33<sup>rd</sup> America's Cup as the internationally-heralded multi-challenger event contemplated by CNEV's challenge.

**ARGUMENT**

**I. THE TRIAL COURT'S ORDER IS APPEALABLE**

GGYC's motion to dismiss this appeal is wholly without merit. It is based solely on the contention that SNG is appealing a motion to reargue. (GGYC

Opp. at 5.)<sup>3</sup> This contention is demonstrably false. SNG is appealing the trial court's March 17, 2008 order denying SNG's motion, brought by order to show cause, "why an order should not be entered declaring GGYC's notice of challenge and certificate to be in non-compliance with and invalid under the Deed of Gift." (Ostrager Aff. Ex. S.) (Order to Show Cause, dated Jan. 15, 2008)<sup>4</sup>

The order to show cause directed GGYC to establish that it issued a valid challenge to be the Challenger of Record for the 33<sup>rd</sup> America's Cup. The trial court signed this order to show cause and GGYC made submissions to the court pursuant to the order. The trial court ruled on this issue. The March 17, 2008 decision consolidated for consideration and denied both motion sequence 006 (motion for an order declaring GGYC's challenge invalid) and motion sequence 005 (motion for leave to renew and reargue the decision disqualifying CNEV as the Challenger of Record). SNG appeals only the order denying motion sequence 006. That is the only order attached to its Notice of Appeal. (Ostrager Aff. Ex. A.) (SNG's Notice of Appeal, dated April 14, 2008) SNG is not, as GGYC argues,

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<sup>3</sup> Citations to "GGYC Opp." refer to GGYC's Memorandum of Law in Support of its Cross-Motion to Dismiss the Appeal and in Opposition to SNG's Motion for a Stay Pending Appeal, dated April 22, 2008.

<sup>4</sup> Citations to "Ostrager Aff." refer to the Affirmation of Barry R. Ostrager, dated April 14, 2008 and exhibits attached thereto.

appealing the trial court's denial of SNG's motion to renew and reargue the trial court's November 27, 2007 decision.<sup>5</sup>

## **II. THE COURT SHOULD STAY THE TRIAL COURT'S MARCH 17 ORDER**

### **A. A Stay Appropriately Maintains the Status Quo**

As GGYC acknowledges, the trial court's order has created great uncertainty for the future of the America's Cup. (GGYC Opp. at 5-6.) This factor militates towards a grant of a stay to ensure that no further uncertainty or harm is brought to this historic competition. SNG's appeal seeks to resolve two areas of great uncertainty within the sailing community. First, who is the Challenger of Record for the 33<sup>rd</sup> America's Cup? Second, if the Challenger of Record is GGYC, what type of boat must SNG build to defend the Cup? This Court should stay the trial court's order until it has had the opportunity to resolve these disputes. The reputation and integrity of the America's Cup is at stake.

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<sup>5</sup> Furthermore, GGYC's suggestion that the status of CNEV is somehow unresolved is incredible on its face. While the trial court has yet to enter an order disqualifying CNEV as Challenger of Record, the trial court expressly anointed GGYC as the Challenger of Record for the 33<sup>rd</sup> America's Cup. The trial court's order anointing GGYC the Challenger of Record for the 33<sup>rd</sup> America's Cup was, by definition, a ruling that CNEV is not the Challenger of Record. By implying that there is no order disqualifying CNEV, GGYC is either saying that there are two Challengers of Record for the 33<sup>rd</sup> America's Cup or that GGYC is not the valid Challenger of Record until an order is entered disqualifying CNEV. Either way GGYC's arguments are self-contradictory. As GGYC surely knows there can be only one Challenger of Record. The trial court could not have summarily and erroneously adjudicated that GGYC is the Challenger of Record without disqualifying CNEV.

GGYC ignores the absurd procedural posture of this case and the grave real world consequences of the irregularities that have transpired below. The trial court's removal of a valid challenger rendered meaningless the preparations made by the city of Valencia, and the preparations made by more than a dozen competitors for the 33<sup>rd</sup> America's Cup, SNG, and CNEV. As particularized in detail in SNG's opening brief on appeal, these preparations followed an arbitral ruling that CNEV was the rightful Challenger of Record. The trial court's failure to refer technical sailing questions about GGYC's certificate to the appropriate international authority as mandated by the New York Court of Appeals in the *Mercury Bay* case left SNG without direction as to the type of boat it must build to defend the Cup. And, the trial court's failure to address the Deed of Gift's ten-month notice period left SNG without a date for the next America's Cup. These real world consequences of the trial court's erroneous order are the basis for SNG's motion for a stay and are the issues which are the subject of SNG's pending appeal that is scheduled to be heard during the June term of this Court.

Prior to the trial court's ruling, CNEV was the Challenger of Record for the 33<sup>rd</sup> America's Cup. SNG and CNEV were preparing for an international competition in Valencia, Spain open to yacht clubs from all nations and governed by a protocol that has been accepted by a dozen competitors. The trial court's order anointing GGYC as the Challenger of Record has forced the city of Valencia

SNG, and the other challengers—who have already spent and were planning to spend tens of millions of dollars preparing for a multi-challenger series in July 2009—to suspend these plans indefinitely.

Without a stay, SNG will have to race in a Deed of Gift match at an uncertain time without having the ability to prepare a sufficient defense. SNG will also be potentially stripped of its right under the Deed of Gift to select the location of the match, as the city of Valencia has committed to host a Formula One race on the October 2008 dates proposed by GGYC. (R. at 1506-1511.) (Letter from Barry R. Ostrager to Hon. Herman J. Cahn, dated Dec. 12, 2007)<sup>6</sup> It is plain to see that without a stay the status quo will be irrevocably changed. A stay is needed to ensure that SNG is not placed in the irreconcilable position of preparing for a race against GGYC, only to discover that it must then prepare for an entirely different type of race against CNEV for which an entirely different vessel would be appropriate. SNG also seeks a stay to ensure that no further uncertainty or harm is brought to the historic America's Cup competition.

**B. SNG and Other Competitors Would Be Irreparably Harmed if a Stay is Not Granted**

Without a stay, SNG, the city of Valencia, and other potential competitors for the America's cup will suffer irreparable harm. GGYC cannot dispute any of the following facts:

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<sup>6</sup> Cites to "R." refer to the Record on Appeal, filed on April 21, 2008.

- The organization and sponsorship of the America's Cup involves at least a year of advance planning and the expenditure of hundreds of millions of dollars. For example, the City of Valencia made hundreds of millions of dollars of infrastructure improvements throughout its harbor, city and seaport to accommodate 32<sup>nd</sup> America's Cup. SNG, as the trustee of the America's Cup, is responsible for these preparations. (Ostrager Aff. Ex. D.) (Ross Affidavit, dated Sept. 21, 2007)
- SNG, the City of Valencia, and other yacht clubs were actively preparing for the 33<sup>rd</sup> America's Cup when GGYC instituted this litigation and disrupted these plans. (Ostrager Aff. Ex. D.)
- The trial court's order has transformed what would have likely been the most successful America's Cup challenger series in history into a Deed of Gift match race, a significantly different event than the traditional challenger series.
- If SNG is forced to prepare for a race against GGYC and ultimately prevails on its appeal, any preparation efforts for a race other than the multi-challenger race contemplated by the CNEV challenge will be a waste of time and money.
- If SNG is forced to prepare for a race against GGYC, it will have to build a boat that can compete against the boat described in GGYC's ambiguous and facially defective certificate.
- GGYC's status as the Challenger of Record will not be indisputably established until the parties' appellate rights have been exhausted.

Given these undisputable facts, SNG clearly will be irreparably harmed absent a stay pending appeal. Furthermore, forcing SNG to prepare and race GGYC in a two-boat match for the America's Cup before this Court can properly ascertain whether GGYC does in fact have the right to force such a race is contrary to the Deed of Gift and the controlling law of the Court of Appeals in *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256, 557 N.Y.S.2d 851 (1990).

**1. The Deed of Gift Mandates that SNG be Given Ten Months Notice from when the Challenger of Record is Ascertained**

The Deed of Gift provides that a challenging club must give ten months notice to the Defender of the race dates for the America's Cup. (Ostrager Aff. Ex. C.) (Deed of Gift) By definition, the ten-month notice period cannot begin to run until the Defender is made aware of the identity of Challenger of Record.<sup>7</sup> The Challenger of Record for the 33<sup>rd</sup> America's Cup is uncertain at best. The trial court's order anointing GGYC as the Challenger of Record was not issued

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<sup>7</sup> GGYC does not dispute this fact. Instead, GGYC attempts to distort the facts by claiming that SNG is seeking a two year-notice period. The argument disingenuously suggests that the ten month period began to run in July 2007, the date on which GGYC belatedly issued an improper notice of challenge. GGYC's submissions to the trial court, however, insisted upon a tolling of the ten-month notice period to accommodate the litigation. (R. at 1420.) (GGYC's Notice of Settlement, dated Dec. 3, 2007).

until March 17, 2008. A brief stay pending the disposition of this appeal will not prejudice GGYC in any manner.<sup>8</sup>

Without a stay, SNG will be forced to prepare for a match with GGYC under a cloud of uncertainty, in violation of the ten-month notice requirement in the Deed of Gift. The Deed of Gift and common sense mandate that SNG have sufficient time to prepare for a race of this magnitude. GGYC's opposition brief does not dispute this fact. A stay necessarily stops the clock and is required to maintain the status quo.<sup>9</sup>

## **2. SNG Cannot Build a Boat Until the Dispute about GGYC's Boat Certificate is Resolved**

The trial court's order did not resolve the irreconcilable ambiguity in GGYC's Certificate. As fully described in SNG's moving papers, GGYC's certificate names a keel yacht, but provides dimensions of a multi-hull vessel, which cannot be a keel yacht. Boats raced in the America's Cup are finely tailored

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<sup>8</sup> GGYC argues by grossly distorting the meaning and facts of the *Mercury Bay* case that a race between GGYC and SNG before this Court renders a decision will not render this litigation moot. (GGYC Opp. at 7.) This is completely irrelevant. The issue on a motion to stay is whether the moving party will suffer irreparable harm. The fact that this court could technically declare that GGYC did not have a right to race does not ameliorate the tremendous harm SNG would have suffered preparing for a race on short notice, nor the damage done to the prestige of the America's Cup, nor the uncertainty that would result in a post-hoc decision stripping GGYC of the title of Challenger of Record after it has challenged.

<sup>9</sup> If the ten-month notice period runs from March 17, 2008 – the date of the only order entered in this case – or the decision of this court, the earliest date upon which the race may take place is May 1, 2009. The Deed of Gift states that races in the Northern Hemisphere may only be held between May 1<sup>st</sup> and November 1<sup>st</sup>. (Ostrager Aff. Ex. C.) GGYC's Notice of Challenge is for a Northern Hemisphere race and SNG, a yacht club located in the Northern Hemisphere, intends to choose a venue in the Northern Hemisphere.

based on the challenger's boat and the racing conditions. It has been nine months since GGYC first issued its Challenge and SNG still does not have any idea how many hulls the challenging vessel will have. How can any defender prepare a defense in this situation? A stay is necessary to ensure that SNG is not forced to do the impossible – prepare a defense against an unknown vessel.

GGYC characterizes the harm SNG faces as self-inflicted, but ignores the fact that SNG's harm flows directly from the trial court's order declaring GGYC the Challenger of Record and directing SNG to race against GGYC, and not CNEV. It is absurd to credit GGYC's argument that both SNG and GGYC are operating under the same uncertainty and SNG can build or not build a boat at its own peril.

Without a stay, SNG will be forced to spend millions of dollars and thousands of man-hours building a boat for an invalid match against a boat that should not be allowed to compete.<sup>10</sup> GGYC, by contrast, knows the type of vessel it intends to race against SNG. Consequently, GGYC wants to race immediately. SNG does not know the vessel GGYC intends to use and will suffer irreparable harm if forced to prepare for a race with no present knowledge of the date the trial

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<sup>10</sup> GGYC's opposition brief asserts without support that SNG itself will not incur economic harm in preparing for a race, and that it is Alinghi, "a distinct entity not a party to this litigation" that would spend the money to prepare for a race. This is incorrect for at least two reasons. First, Alinghi is the racing team through which SNG competes. A loss to Alinghi is a loss to SNG. Second, as discussed *infra*, SNG, as trustee, must fulfill its obligations under the Deed of Gift, which requires it to prepare an infrastructure for the race.

court may order the race to take place. To force SNG to do so, would not only cause irreparable harm to both the America's Cup and SNG, but would also grant GGYC an astonishing and unwarranted competitive advantage in violation of the Deed of Gift.

**3. SNG, as Trustee, Must Make Preparations for the America's Cup**

GGYC does not dispute that preparations for the America's Cup are enormously burdensome and costly. Instead, GGYC simply states that SNG does not have to make preparations. (GGYC Opp. at 9.) That is simply not true. SNG as Trustee of the America's Cup has the duty to ensure that the integrity and spirit of the America's Cup is upheld. (Ostrager Aff. Ex. T at ¶ 23.) Accordingly, SNG, as Trustee, will have to proceed to fulfill its duty to organize and host the America's Cup, which is attended and viewed by millions of people worldwide. SNG simply asks that it not be forced to make such preparations with all the uncertainty that presently obtains.

**C. GGYC Will Suffer No Prejudice**

GGYC was willing to and did sign a stipulation to toll the notice period throughout the pendency of this litigation. (R. 3141-3145.) (Letter from James V. Kearney to David G. Hille and David W. Rivkin, dated Sept. 25, 2007, attaching a stipulation executed on behalf of GGYC by its attorney James Kearney) Although this stipulation was never fully executed and filed with the

trial court because of ongoing negotiations over whether there should be ten or twelve months notice subsequent to the final order, no one ever disputed that the notice period would be at least ten months or that such period would be tolled during the pendency of this litigation. (R. at 3179-3182.) (E-mail from David G. Hille to James V. Kearney and David W. Rivkin attaching SNG's comments to stipulation, dated Oct. 9, 2007) This fact alone establishes that there would be no prejudice to GGYC from a stay. Clearly, GGYC would not have agreed to a toll (or, as it concedes, been willing to agree to a tolling agreement but not actually enter into one) if a toll would cause GGYC tremendous prejudice.

**D. This Appeal is Not Taken for the Purpose of Delay**

SNG is prosecuting this appeal to ensure the tradition and integrity of the America's Cup is upheld and that all parties abide by the requirements of the Deed of Gift. GGYC's refusal to follow the Deed of Gift's requirement that the Defender be given ten month's notice, that the challenging club properly and accurately describe their challenging vessel and that the challenging club otherwise uphold the terms of the Deed of Gift, is precisely why a stay pending appeal is necessary.

SNG is not seeking delay; it is seeking what it is rightfully entitled under the Deed of Gift—a valid challenge, which gives ten months notice and an accurate description of the vessel to be used. GGYC has failed to provide these

basic requirements. Instead, GGYC seeks to force a race in violation of the Deed of Gift, before this court is able to make a determination as to whether GGYC is in fact entitled to such a race. This is what necessitated the instant motion for a stay.

GGYC argues that SNG's March 26, 2008 letter demonstrates that SNG is seeking delay in prosecuting this appeal. Once again, GGYC resorts to obfuscation and misinterpretation of the record. The letter states that "SNG has stated that it is willing to forego its appellate rights both as respects to CNEV's disqualification and GGYC's defective Notice of Challenge so long as GGYC agrees to race in good faith in 2009 consistent with the Deed of Gift's requirements." (Petrocelli Aff. Ex. F.)<sup>11</sup> Accordingly, in the interests of maintaining the integrity of the America's Cup, which is already badly damaged as a result of GGYC's relentless pursuit to usurp the Cup through litigation rather than through sailing, SNG offered to accept GGYC's challenge if and only if GGYC agreed to abide fully by the terms of the Deed of Gift. This was a *settlement offer* that was rejected by GGYC.

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<sup>11</sup> Citations to "Petrocelli Aff." refer to the Affirmation of Gina M. Petrocelli, dated April 22, 2008, and the exhibits attached thereto.

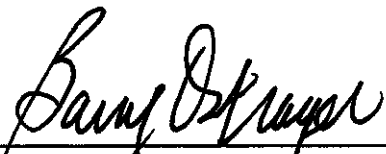
**CONCLUSION**

For the foregoing reasons, Defendant-Appellant SNG respectfully requests that the Court grant a stay of enforcement of the trial court's order pending appeal, deny GGYC's motion to dismiss this appeal, and order such further relief that the Court deems just and proper.

Dated: New York, New York  
April 25, 2008

Respectfully submitted,

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