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January 2, 2009

## BY U.S. MAIL

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Re: *Golden Gate Yacht Club v. Société Nautique De Genève, et al*  
NY Court of Appeals (NY County Index No. 602446/07)

Dear Counsel:

Enclosed please find the Notice of Motion to file an *Amici Curiae* Brief and supporting papers in the above-referenced action.

Very truly yours,



Patrick D. Bonner, Jr.

Encls.

COURT OF APPEALS STATE OF NEW YORK

-----X  
GOLDEN GATE YACHT CLUB,

Plaintiff-Appellant,

- against -

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Respondent,

- and -

CLUB NAUTICO ESPANOL DE VELA,

Intervenor-Defendant.  
-----X

: New York County  
: Index No. 602446/07

: **NOTICE OF MOTION**  
: **FOR LEAVE TO FILE**  
: **AMICI CURIAE BRIEF**

**PLEASE TAKE NOTICE**, that upon the annexed Affirmation of

Patrick D. Bonner, Jr., Esq., dated January 2, 2009, the exhibit thereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a term thereof to be held at Court of Appeals Hall in Albany, New York, on January 12, 2009, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an order granting movants Team French Spirit and Team Shosholoza leave to file an *amici curiae* brief in the above-titled action which currently is before this Court on appeal, and for such other and further relief as this Court may ~~deem~~ **deem** just and proper.

Dated: New York, New York  
January 2, 2009

Respectfully Submitted,

MENZ BONNER & KOMAR-LLP

By:

  
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COURT OF APPEALS STATE OF NEW YORK

-----X  
GOLDEN GATE YACHT CLUB, : New York County  
 : Index No. 602446/07  
 :  
Plaintiff-Appellant, :  
 :  
 :  
- against - : **AFFIRMATION IN**  
 : **SUPPORT OF MOTION**  
 : **TO FILE *AMICI CURIAE* BRIEF**  
SOCIÉTÉ NAUTIQUE DE GENÈVE, :  
 :  
Defendant-Respondent, :  
 :  
 :  
- and - :  
 :  
 :  
CLUB NAUTICO ESPANOL DE VELA, :  
 :  
Intervenor-Defendant. :  
 :  
 :  
-----X

PATRICK D. BONNER, JR., an attorney admitted to practice before the Courts of the State of New York, affirms the following under penalty of perjury:

1. I am a member of the law firm of Menz Bonner & Komar LLP, counsel for movants Team French Spirit and Team Shosholoza (collectively, the “Proposed *Amici*”). I submit this affirmation in support of the instant motion for the Proposed *Amici* for leave to file the accompanying *amici curiae* brief in the above-entitled action now before this Court on appeal.

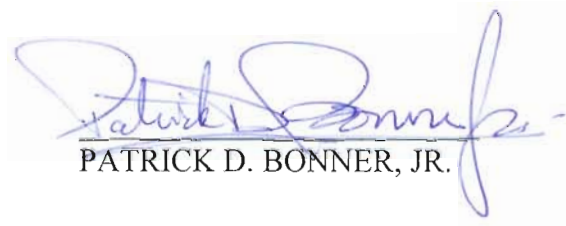
2. As stated in their prior briefing, Proposed *Amici* Team French Spirit and Team Shosholoza have submitted Notices of Entry for the 33<sup>rd</sup> America’s Cup to Respondent Société Nautique de Genève. These entries have been accepted, and Proposed *Amici* actively intend to and will compete in the 33rd America’s Cup, so long as it is held as a multi-challenger regatta.

3. The Proposed *Amici* seek leave to submit an amicus brief to correct the

factual misstatements made by the New York Yacht Club (“NYYC”) in its proposed amicus brief and to respond to the NYYC’s arguments made therein and can offer an important perspective to the Court on the interpretation of the Deed of Gift advanced by the NYYC in its amicus brief.

WHEREFORE, your deponent respectfully submits that the accompanying proposed *amici curiae* brief would be of assistance to the Court in deciding the appeal in this action, and respectfully requests that the instant motion be granted in all respects.

Dated: New York, New York  
January 2, 2008



PATRICK D. BONNER, JR.

*New York County Clerk's Index No. 602446/07*

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New York State  
COURT OF APPEALS

GOLDEN GATE YACHT CLUB,

*Plaintiff-Appellant,*

*against*

SOCIETE NAUTIQUE DE GENEVE,

*Defendant-Respondent,*

*and*

CLUB NÁUTICO ESPAÑOL DE VELA,

*Intervenor-Defendant.*

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BRIEF OF *AMICI CURIAE* TEAM FRENCH SPIRIT AND TEAM  
SHOSHOLOZA IN SUPPORT OF RESPONDENT

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*Attorneys for Amici Curiae Team French Spirit and  
Team Shosholoza*

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*Printed on Recycled Paper*

### **Interest of Amici Curiae**

As stated in their prior briefing, Team French Spirit and Team Shosholoza (collectively, “Amici”) have submitted Notices of Entry for the 33<sup>rd</sup> America’s Cup to Respondent Société Nautique de Genève (“SNG”). These entries have been accepted, and Amici actively intend to and will compete in the 33rd America’s Cup, so long as it is held as a multi-challenger regatta. Amici is familiar with the historic practices of the New York Yacht Club (“NYYC”), which was the subject of contemporaneous criticism, and seek leave to submit an amicus brief to correct the factual misstatements made by the NYYC in its proposed amicus brief and to respond to the NYYC’s arguments made therein.

### **Argument**

As presently constituted, the 33rd America’s Cup is the most popular event ever, with at least seventeen participants including Team French Spirit and Team Shosholoza. It is the most anticipated, most important America’s Cup in history—or, more precisely, it will be unless the Golden Gate Yacht Club (“GGYC”) is successful in using this litigation to derail the multi-challenger event and force a one-on-one competition in which only GGYC is allowed to compete.

The NYYC is a particularly peculiar entity to claim unfairness in the rules of the 33<sup>rd</sup> America’s Cup protocol because the NYYC has never shown any desire to enter and compete in the 33<sup>rd</sup> America’s Cup. The NYYC has never

organized a race as inclusively as, or as well as, SNG has organized the 33rd America's Cup. In the NYYC era, the Cup was contested infrequently in contrast to the present era and did not attract the fantastic world attention the 33rd America's Cup has already attracted following on the heels of the 32nd Cup which was the most successful in history

The NYYC has not been trustee since 1983, and has not been Challenger of Record since 2000. And it has not been part of the America's Cup competition at all since 2002. The America's Cup has since moved on and is now far more democratic with more disclosure than when NYYC last participated with any significant role. Consequently, the NYYC has no real knowledge of or involvement worthy of this Court's consideration, and it is apparent it is serving essentially as a puppet to parrot GGYC's arguments.

The NYYC's recent proposed amicus brief is replete with factual misstatements and distortions about the history of the Cup and about the NYYC's prior conduct as trustee and challenger of record. The NYYC's tenure as trustee drew widespread criticism from America's Cup competitors. The NYYC suggests that the protocols it entered into as Trustee were the product of open negotiations with the Challenger of Record. This is simply false. The NYYC's consistent and uniform practice was to call for entries by multiple challengers and to unilaterally select whichever challenger it preferred and to do so without explanation.

While NYYC was trustee, there were no open negotiations involving all challengers over the terms of the Protocol. Indeed, there was no negotiation with anyone. The challengers simply had to accept the terms dictated by NYYC.

By way of recent example regarding NYYC's conduct as challenger of record, the last time NYYC was challenger of record, other challengers asked the NYYC to consult them in making changes to the Protocol and to agree not to unilaterally agree to any Protocol changes without their consent. The NYYC refused. Acting against the concerns voiced by other challengers, the NYYC made changes to the 30<sup>th</sup> America's Cup protocol without notice to or discussion with other challengers. The NYYC did not consult other challengers in negotiating a protocol as challenger of record in the 30<sup>th</sup> America's Cup, nor did GGYC consult other challengers in negotiating the 32<sup>nd</sup> America's Cup protocol as challenger of record. Both clubs did so in secrecy, and without any consultation with others. The fact that NYYC and GGYC insisted on the unilateral right as challenger of record to reach agreements with the trustee altogether eviscerates the legitimacy of their current complaints about CNEV's more limited right to do so under the current protocol.

In contrast to the dictatorial conduct of the NYYC during its long ago involvement in the Cup, the current 33<sup>rd</sup> America's Cup protocol has been

amended several times by reason of comments made by the numerous other competitors. (*E.g.*, R. at 1235-37.)

In regard to its legal arguments, NYYC entirely regurgitates GGYC's previously articulated arguments including, for example, that Real Federation Español de Vela ("RFEV") was merely a "mutual consent" challenger in the 32<sup>nd</sup> America's Cup. Notably, such term is to be found nowhere in the Deed of Gift. It is rather an invention of GGYC's adopted by the NYYC. Tellingly, this purported distinction between a challenger of record and a so-called "mutual consent" challenger collapses of its own weight in the NYYC's brief.

As the NYYC is forced to admit, even though RFEV's participation in the 32<sup>nd</sup> America's Cup was merely as what the NYYC terms a "mutual consent" challenger, the NYYC felt the need to object to, and did in fact voice objection, to RFEV's inability, in the NYYC's view, to comply with the Deed of Gift requirements to challenge. That fact alone undermines the NYYC's (and GGYC's) argument that a mutual consent challenger need not comply with the requirements set forth in the Deed of Gift. Were that true, RFEV's entry as a "mutual consent" challenger should have been entirely unobjectionable to NYYC. But instead, the NYYC felt obliged to object. The NYYC's prior actual conduct is compelling evidence that there is no legal difference between the newly minted concept of a "mutual consent" challenger and challengers of record. Both need to


comply with the Deed of Gift. And the fact that numerous newly formed yacht clubs that had not previously held an annual regatta on the open waters have in the past been accepted as challengers for the America's Cup (R. at 639-648, 795, 799-801, 1000-01) is relevant and compelling precedent of the proper interpretation of the Deed of Gift.

**Conclusion**

For the reasons set forth above and previously, Amici respectfully request that this Court affirm the Appellate Division's Order.

Dated: New York, New York  
January 2, 2009

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