

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

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GOLDEN GATE YACHT CLUB, :
:
Plaintiff, : Index No. 602446/07
:
v. : IAS Part 54
:
SOCIÉTÉ NAUTIQUE DE GENÈVE, : Hon. Shirley Werner Kornreich
:
Defendant, :
:
v. :
:
CLUB NÁUTICO ESPAÑOL DE VELA, :
:
Intervenor-Defendant. :
:
-----X

**SOCIÉTÉ NAUTIQUE DE GENÈVE'S MEMORANDUM
OF LAW IN OPPOSITION TO GGYC'S MOTION TO ENFORCE
COMPLIANCE WITH THE APRIL 7, 2009 ORDER AND JUDGMENT
REGARDING THE VENUE LOCATION FOR THE 33RD AMERICA'S CUP**

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Defendant Société Nautique de Genève (“SNG”) submits this memorandum of law, the affirmation of Jonathan K. Youngwood, dated October 13, 2009, and the exhibits annexed thereto (“Youngwood Aff.”); the affidavits of Fred Meyer (“Meyer Aff.”) and Reinhard Flick (“Flick Aff.”); and the declarations of Jack Devine (“Devine Decl.”), Vice Admiral Kevin Cosgriff USN (Ret.) (“Cosgriff Decl.”), and Noah Feldman (“Feldman Decl.”) in support of its Opposition to Golden Gate Yacht Club’s (“GGYC”) Motion to Enforce Compliance with the April 7, 2009 Order and Judgment, Regarding the Venue Location for the 33rd America’s Cup.

PRELIMINARY STATEMENT

In yet another chapter of its “unsportsmanlike conduct”, GGYC is now asking the Court to reject Ras Al Khaimah (“RAK”) as the site for the 33rd America’s Cup just months before the scheduled start of the race.¹ This motion ignores the clear and unambiguous language of the Court’s April 7, 2009 Order, which granted SNG the unfettered right to choose the venue for the next America’s Cup. This is not a mutual consent match and GGYC does not have to consent to the venue selected by SNG.

The timing of GGYC’s latest motion, its seventh application to this Court for relief, illustrates its underlying intent to delay these proceedings and endanger the February 2010 match. GGYC had ample opportunity to timely raise any objections it had to SNG’s selection of a Northern Hemisphere location. GGYC could have filed its motion:

- After the decision of the Court of Appeals on April 7, 2009, which issued a judgment ordering that the race take place in “Valencia, Spain *or any other location selected by SNG*”.

¹ GGYC is well-aware that it is impossible at this point for Valencia, Spain to host the America’s Cup in February 2010 – less than four months from today. Valencia has not agreed to host the event in February 2010 and there is not sufficient time for a hosting agreement to be negotiated.

- On May 14, 2009, when SNG represented to the Court that it would “absolutely” choose a Northern Hemisphere location for the race.
- When SNG announced the selection of RAK on August 5, 2009.
- In early September 2009, after BMW ORACLE Racing representatives visited RAK, met with senior government officials, reviewed the course for the match and gave it a “positive” risk assessment.

Youngwood Aff., Exs. A – D.

GGYC did none of the above. Instead, GGYC chose to wait until October to file its motion, one day after SNG announced that its boat had arrived in RAK. The motion is based on a misapplication of the Court of Appeals’ Order and wholly unfounded concerns about RAK’s safety and preparedness to host the America’s Cup. GGYC’s latest tactic can be swiftly dismissed.

First, the Order is clear – SNG can select any venue it chooses. The Court’s Order does not limit SNG’s choice to a Southern Hemisphere location. In fact, the Order specified a Northern Hemisphere location – Valencia, Spain – in the winter months. The Order similarly does not require SNG to negotiate or seek approval from GGYC when the match is not being sailed under the mutual consent provisions of the Deed of Gift. The Order unambiguously states “the location of the match shall be in Valencia, Spain or **any other location selected by SNG.**” Youngwood Aff., Ex. A, at 5 (emphasis added). Thomas F. Ehman, Jr., Head of External Affairs for GGYC’s racing representative BMW ORACLE Racing, has agreed that “the Judge has said the **Defender may choose any venue in the world in either hemisphere, irrespective of the dates.**” Youngwood Aff., Ex. F at 28:11-13 (July 16, 2008 BMW Oracle Press Conference) (emphasis added). And even the Skipper and CEO of BMW ORACLE Racing, Russell Coutts, agreed the Court “**gave the Defender the flexibility to choose, in fact, any venue in the world, north or southern hemisphere . . .**” *Id.* at 23:17-21 (emphasis added).

SNG has consistently made clear its intent to select a Northern Hemisphere location for the match. SNG chose RAK based on its desire, as the trustee of the America's Cup, to promote, as the Deed instructs, "friendly competition between foreign countries." Bringing the America's Cup to RAK will promote interest in sailing in a part of the world that has not previously been exposed to America's Cup competition. Meyer Aff. ¶¶ 4-6. SNG's knowledge of the sailing conditions in RAK, based on its training in Dubai for the 32nd America's Cup, played a role in its selection of RAK as the venue. *Id.* ¶ 7. RAK has ideal sailing conditions for a February match, as opposed to the potentially dangerous and less certain conditions for multi-hull racing that can exist in Spain in the winter months. *Id.* ¶¶ 8-9.

Second, RAK is undoubtedly a safe venue for the America's Cup. Devine Decl. ¶¶ 4-5. The United Arab Emirates is a country that increasingly caters to American businesses and tourists. The United States enjoys friendly relations with the U.A.E. and there has never been an attack on American interests in that country. Feldman Decl. ¶¶ 2-6. Indeed, GGYC cannot dispute the following facts:

- More than 10 million tourists travel safely to the U.A.E. every year, with a substantial number of those visiting RAK. Approximately 180,000 American citizens reside in the U.A.E.
- The U.A.E. ports host more U.S. Navy ships than any port outside the United States.
- The United States has enjoyed friendly relations with the U.A.E. since it was founded in 1971. In November 2008, the U.S. and the U.A.E. declared themselves "allies" in the fight against terrorism and extremism. The two countries agreed to the terms of a nuclear cooperation treaty in early 2009.
- There have been no recent terrorist attacks in the U.A.E. In contrast, Spain is home to the worst terrorist attack in recent European history.
- The crime rate in RAK is close to zero.

- The U.A.E. has been host to numerous high profile international events without incident. Athletes Tiger Woods, Venus Williams, Roger Federer and David Beckham have all safely competed or trained in the U.A.E. Entertainers Justin Timberlake, George Michael and Phil Collins have safely performed in the U.A.E. Formula One Racing is holding the Abu Dhabi Grand Prix in November 2009.
- Russell Coutts, BMW ORACLE Racing's skipper and CEO, has sailed in numerous regattas in the U.A.E. His own boat Class association (RC 44) holds a major regatta every year in Dubai and will again hold a regatta in November, in which BMW ORACLE Racing will compete. BMW ORACLE Racing has not expressed safety concerns regarding its participation in this event.
- BMW, a sponsor of BMW Oracle Racing, maintains a showroom in RAK, as well as other showrooms in the U.A.E.
- Oracle, a sponsor of BMW ORACLE Racing, maintains its Middle East Headquarters in Dubai, 59 miles from the selected venue RAK.
- Latham & Watkins, counsel to GGYC maintains an office in the U.A.E.

Youngwood Aff., Exs. E, D (Massaad Aff.) at ¶¶ 9, 11, 13-16, 20; Feldman Decl. ¶¶ 2-6, 8-10, 12; Devine Decl. ¶¶ 5, 10.²

As set forth in greater detail in the contemporaneously-filed amicus brief by RAK and accompanying affirmation of Dr. Khater Massaad, which is attached to the Youngwood Affirmation at Exhibit D, RAK has put in place substantial security measures to protect the participants and spectators of the America's Cup, comparable to what one would reasonably expect at any major modern sporting event. The U.A.E. government will provide extensive on-shore and off-shore security to both teams.

² GGYC misleadingly cites to U.S. State Department advisories regarding travel to RAK. Those advisories, however, are directed to U.A.E. as a whole, including Abu Dhabi and Dubai, where Oracle, BMW, and Latham & Watkins do business. *See* Kearney Aff., Ex. I. GGYC does not contend that Dubai is unsafe. RAK is less than one hour away from Dubai and poses no different risk than Dubai. Youngwood Aff., Ex. D at ¶ 8.

RAK has also made substantial infrastructure improvements and is prepared to host the event. Youngwood Aff., Ex. D at ¶¶ 27-36; Meyer Aff. ¶ 6. The preparations – including state of the art facilities for the race participants, establishing base facilities and accommodations for the media, the sponsors and the public – are near completion. SNG’s crew has established a base in RAK and will begin training shortly. Youngwood Aff., Ex. D at ¶ 35.

Third, RAK is otherwise qualified under the Deed of Gift to host the event. SNG has designated an ocean course free from headlands. And the Persian Gulf, where the match will take place, is part of the Indian Ocean. In short, there is absolutely no reason to disturb SNG’s unilateral right to select the venue for the 33rd America’s Cup.

BACKGROUND

On April 7, 2009, the Court of Appeals affirmed the ruling of the Supreme Court, ordering that the race take place “ten calendar months” from service of a copy of the Order in “Valencia, Spain or any other location selected by SNG, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races.” Youngwood Aff., Ex. A at 5 (April 7, 2009 Order).

On May 14, 2009, this Court held a hearing regarding GGYC’s “application for contempt in terms of when the ... America[’s] Cup Race, is to be run.” Youngwood Aff. Ex. B at 3:7-10 (May 14, 2009 Transcript). At this hearing, SNG represented unequivocally that it “will have a match race in the northern hemisphere, either Valencia or another location that we’re entitled to pick.” *Id.* at 26:5-8; 19:6-8 (“SNG is absolutely committed to a northern hemisphere race. There will be *a northern hemisphere race.*”) (emphasis added); 25:12-15 (“And I’m representing to the court that we are going to have a match *in the northern*

hemisphere. It may be Valencia, or it may be *another location in the northern hemisphere.*”) (emphasis added). The Court then issued its ruling “directing SNG to hold the race as per the order of the Court of Appeals and Justice Cahn in February as the order required.” *Id.* at 26:25-27:2. On the same day, this Court signed an Order adopting the transcript of this hearing as the Order and Judgment of the Court. Youngwood Aff. Ex. G (Orders dated May 14, 2009).

On August 5, 2009, SNG announced the selection of RAK as the site for the 33rd America’s Cup. Youngwood Aff. Ex. C (Letter from SNG to GGYC, dated August 5, 2009).³

In early September 2009, BMW ORACLE Racing representatives visited RAK, met with senior government officials and reviewed the course for the match. Youngwood Aff., Ex. D at ¶¶ 23, 33. BMW ORACLE Racing sent its equipment and an advance team to RAK after its security advisor visited the venue and gave it a “positive” risk assessment and informed RAK officials that he was “more than impressed” with RAK’s arrangements. *Id.*

On September 18, 2009, GGYC’s racing representative BMW ORACLE Racing submitted a request for priority handling for its Certificate of Documentation to the United States Coast Guard. Youngwood Aff., Ex. H (Request for Priority Handling). Through this request, GGYC certified to the United States Coast Guard that GGYC’s challenging vessel was to depart the United States on September 25, 2009 for the “Persian Gulf, United Arab Emirates.” This representation was made with the understanding that “a false statement when applying for vessel documentation may subject the vessel to seizure by and forfeiture to the United States government.” *Id.*

³ GGYC describes SNG’s negotiations with RAK as “secret”, but as GGYC is not a mutual consent challenger, SNG had no duty or obligation to include GGYC in the negotiations with potential hosts.

Thirteen days after certifying to the United States Coast Guard that it would ship its boat to the U.A.E., three weeks after traveling to the U.A.E. to examine the venue, and two months after SNG's timely announcement of the venue, GGYC elected to file the current motion with the Court seeking to have the venue declared invalid.

ARGUMENT

I. **RAK IS A PROPER VENUE FOR THE AMERICA'S CUP**

To resolve GGYC's motion, the Court need only resolve the narrow question of whether the prior Order in this case allows SNG to select a Northern Hemisphere location. It does. That fact alone gave SNG the right to select RAK as the venue for the 33rd America's Cup. None of GGYC's other contentions alter this simple conclusion.

A. **The April 7, 2009 Order Unambiguously Permits, as GGYC's Representatives Have Agreed, SNG to Select RAK as the Venue for the 33rd America's Cup**

The April 7, 2009 Order provides:

[T]hat the location of the match shall be in Valencia, Spain or *any other location selected by SNG*, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race of the location it has selected for the challenge match races.

Youngwood Aff. Ex. A at 5 (emphasis added).⁴

The Order could not be clearer – SNG can select any location for the America's Cup. There is nothing ambiguous, confusing or unclear. The Order makes no reference to the Deed of Gift's hemisphere restrictions.

⁴ GGYC's Notice of Settlement, which was adopted by the Court in its May 12, 2008 order, included the language permitting the race to take place in "*any other location selected by SNG*." Kearney Aff., Ex. G (emphasis added).

By identifying Valencia, a Northern Hemisphere location, as a possible venue for the match, regardless of the date, the Order allowed GGYC to insist on a February race in the Northern Hemisphere notwithstanding what the Deed of Gift says. The Order likewise preserved SNG's right to choose either Valencia or any other location of its choice. Were a Northern Hemisphere venue improper, Valencia would similarly be improper. Thus, by its express terms, the Order allows SNG to name RAK as the venue for the next America's Cup.

SNG has repeatedly made clear that it intended to announce a Northern Hemisphere location for the America's Cup, while reserving its right to name the specific venue in due course. Youngwood Aff., Ex. B at 19:6-8; 25:12-15; 26:5-8. Up until recently, GGYC understood that the Order permitted SNG to choose a Northern Hemisphere location.⁵ Russell Coutts, CEO of BMW ORACLE Racing, speaking specifically about the Order at issue, stated:

But the court's also allowed, you know, gave the defender the flexibility to choose, in fact, *any venue in the world, north or southern hemisphere*, the way the order's worded. So it's interesting. It's part of the America's Cup game and for us it's an interesting challenge because we have to prepare for all eventualities, as I said.

Youngwood Aff., Ex. F at 23:17-24 (emphasis added). Mr. Coutts further confirmed this understanding that the Order permitted the race to take place in February in the Northern Hemisphere: "[W]e believe that the order ... does allow the race to take place in the Northern Hemisphere, outside of the Deed of Gift restraints, if that's what you call it. The order was very clear." *Id.* at 27:17-21.

⁵ Contrary to GGYC's assertions, the CEO of SNG's racing team Alinghi, Ernesto Bertarelli did not say that "the 33rd America's Cup would be Valencia irrespective of how the Court of Appeals were to rule". GGYC Br. at 4. He said that "[I]f Alinghi wins the court case, the Cup will remain here in Valencia". Kearney Aff. Ex. F.

Thomas F. Ehman, Jr., Head of External Affairs for BMW ORACLE Racing, similarly expressed his understanding that the Order permitted SNG to choose a Northern Hemisphere venue in the winter:

In this case the Judge has said the *defender may choose any venue in the world in either hemisphere, irrespective of the date*. But it will be in March. So he has the power, our lawyers tell us, to make such a decision, which we believe he has made. And we, as Russell said, we think the appellate court will probably uphold Justice Cahn's decision, and we hope sooner rather than later.

Youngwood Aff., Ex. F at 28:11-19 (emphasis added). GGYC's own counsel, according to Mr. Ehman, has told them that SNG could select RAK. *Id.*

The only conclusion the Court can reach from these statements is that GGYC's current objection to the venue is solely for the purpose of derailing the 33rd America's Cup.

B. GGYC's Alleged Safety Concerns Are Unfounded and Cannot Be Permitted to Form the Basis of Denying a Properly Chosen Venue

SNG has properly exercised its fiduciary duty by expanding interest in the America's Cup into new regions such as the Middle East, a place with a long and rich maritime history, and in the U.A.E. in particular, with excellent sailing conditions and a long standing commitment to developing the sport of sailing. Meyer Aff. ¶¶ 4-9; Youngwood Aff., Ex. D at ¶ 20. By bringing the America's Cup to the Middle East, SNG has been consistent with the Deed's desire that the Cup be a "friendly competition between foreign countries." Indeed, SNG's selection of RAK has resulted in RAK making substantial infrastructure improvements to host the America's Cup, which will attract future sailing events. Youngwood Aff., Ex. D at ¶¶ 27-36. RAK has committed more than \$120 million to develop the infrastructure and improve the Al Hamra village and marina. *Id.* at ¶ 27. Far from being "totally unprepared", as claimed by GGYC, all major facilities now exist or are near completion and are available for BMW ORACLE Racing. Team Alinghi is now fully operational in RAK. *Id.* at ¶¶ 27-36. By February

2010, RAK will be fully prepared to be the first Middle Eastern location to host the world's oldest sailing event.

GGYC's misleading statements and fear mongering aside, RAK is a safe venue for the America's Cup. Devine Decl. ¶¶ 4-5; Feldman Decl. ¶¶ 4-5, 12; Cosgriff Decl. ¶¶ 7, 16. The U.A.E. is not currently on either the U.S. Department of State's Travel Alert or Travel Warning lists. Devine ¶ 5. Rather, the U.A.E. falls under the U.S. Department of State's generic advisory for all Middle East countries, which is similar for many Asian, African and some European countries. *Id.* Noah Feldman, a Senior Adjunct Fellow for Middle East Studies at the Council on Foreign Relations, opined that an attack against America's Cup personnel or facilities is no more probable in RAK than in Valencia, Spain. Feldman Decl. ¶¶ 8-12; *see also* Devine Decl. ¶ 4.

The U.A.E.'s Ministry of Interior, with cooperation from the Navy, Coast Guards and federal and local police will ensure the safety and well being of all visitors to RAK by, among other things, dispatching additional troops, police and coast guards. Youngwood Aff., Ex. D at ¶¶ 21-22. The Coast Guard intends to monitor the territorial waters of Iran and there will be America's Cup Management security in place to oversee the outer boundaries of the race course. *Id.* Vice Admiral Kevin J. Cosgriff, former Commander of the U.S. Fifth Fleet and also the Combined Maritime Forces, submitted a declaration detailing the capability of the U.A.E. to secure a race course against any security risks that might be faced by competitors in the event. *See* Cosgriff Decl. ¶¶ 7-10; 14-16.

GGYC's concerns regarding RAK's proximity to Abu Massa are also unfounded. The race course will take place in U.A.E. waters and contiguous waters many miles away from Abu Massa or any Iranian territory. These same waters serve as a major waterway for

commercial shipping boats as well as military boats, and highly conspicuous U.S. flagged carriers pass through these waters on a daily basis. Cosgriff Decl. ¶¶ 9-10. There has never been a single incident involving Iran and these boats. Youngwood Aff., Ex. D at ¶ 24.

RAK's extensive preparations, relating to both security and infrastructure, ensure that RAK is a proper and appropriate venue for the 33rd America's Cup. GGYC's speculative claims and innuendo should not form the basis of denying SNG's undisputed right under both the Deed of Gift and the Court of Appeals Order to select the venue for the next America's Cup.

C. RAK is Qualified Under the Deed of Gift to Host the America's Cup

RAK is qualified under the Deed of Gift to host the event. The Persian Gulf, where the match will take place, is part of the Indian Ocean. Flick Aff. ¶¶ 7-8. The course will be free from headlands within the coordinates designated in SNG's August 5 letter to GGYC. Flick Aff. ¶¶ 12-15 & Ex. A.

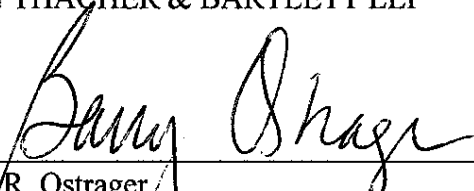
CONCLUSION

For the foregoing reasons, Defendant SNG respectfully requests that the Court deny GGYC's Motion and instruct the parties to race in RAK beginning on February 8, 2010.

Dated: New York, New York
October 13, 2009

Respectfully submitted,
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