

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

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

**SOCIÉTÉ NAUTIQUE DE GENÈVE'S MEMORANDUM  
OF LAW IN ANTICIPATION OF THE NOVEMBER 6 HEARING**

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Defendant Société Nautique de Genève (“SNG”) submits this memorandum of law in anticipation of the November 6 hearing, at which SNG will seek clarification that SNG may select a Southern Hemisphere location for the 33<sup>rd</sup> America’s Cup.

### **PRELIMINARY STATEMENT**

SNG's overarching objective is, as it has always been, to have the 33<sup>rd</sup> America’s Cup decided on the water rather than in the Courts of the State of New York. Towards that end, SNG remains committed to proceeding with the 33<sup>rd</sup> America’s Cup in February 2010. We seek to conduct this event at a world-class venue that will be best for participants and spectator and enhance the quality of the world's premier sailing event.

Under the Deed of Gift, and longstanding practice, SNG, as defender, has the right to select the venue. Following this Court’s October 30, 2009 Order, holding that SNG could not select a Northern Hemisphere venue, other than Valencia, for a race in February 2010, SNG has identified a potential Southern Hemisphere venue located on the East Coast of, Australia.

GGYC cannot credibly quarrel with this location under any construction of the Deed of Gift or this Court’s Orders. Nevertheless, having succeeded in invalidating SNG’s selected venue, GGYC now asks this Court to entirely strip SNG of its right under the Deed of Gift to select the venue. GGYC wants this Court to order SNG to hold the 33<sup>rd</sup> America’s Cup either (i) in Valencia, **GGYC’s** preferred venue which SNG did not consent to for a winter race, or, perhaps, (ii) in a Southern Hemisphere venue **only upon GGYC’s consent**. However, nothing in this case could be clearer than that the Deed of Gift does not contemplate GGYC having a role in the venue selection process

The Defender’s right to select the venue is a pivotal right, one of the Defender’s most critical advantages along with its right to race under its rules. GGYC has expressly

conceded this fact. As stated by GGYC's counsel to the Court: "To counterbalance this [advantage of the challenger to select the dates for the match], *the Deed gives the defender great advantage, including the right to select the location . . .* and the right to use its sailing rules and regulations . . ." Ostrager Aff., Ex. A (March 26, 2008 letter from James Kearney to Justice Cahn) (emphasis added); *see also*, Ostrager Aff., Ex. B (December 10, 2007 letter from James Kearney to Justice Cahn) ("The Deed of Gift explicitly provides that . . . SNG is entitled to select the location.").

This Court should not allow GGYC to use legal gamesmanship to usurp the rights afforded to SNG under the Deed of Gift thereby unraveling the competitive balance struck by the Deed of Gift. GGYC will suffer no prejudice whatsoever if the Court grants the relief SNG seeks. GGYC's boat was in San Diego harbor three weeks ago when GGYC made its belated and tactical challenge to SNG's chosen Northern Hemisphere venue *and* GGYC's boat presently remains in San Diego harbor. By contrast, SNG's boat, together with a hundred SNG personnel, is in RAK.

GGYC delayed its venue motion in bad faith and without any good cause and is estopped from attempting to deny SNG any discretion to choose the venue of the race. GGYC's conduct precludes the absurd outcome GGYC seeks, which is that the match take place in a non-Deed compliant venue that SNG did not choose and where the sailing conditions are, as contemplated by the Deed of Gift, suboptimal in the winter. The doctrines of unclean hands, laches and estoppel should preclude GGYC from manipulating the 6-month notice provision in the May 12, 2008 Order to prohibit SNG from designating an alternative Southern Hemisphere venue, compliant with the Deed of Gift and New York law, for the February 2010 race.

## BACKGROUND

### A. The May 12, 2008 Order

On November 27, 2007, Justice Cahn issued a memorandum decision dismissing GGYC's claim of breach of fiduciary duties, but sustaining GGYC's claim that CNEV's challenge was invalid because it had not held an annual regatta at the time of the challenge and declaring GGYC as the Challenger of Record. On March 17, 2008, the trial court entered another decision, declaring GGYC's challenge and certificate to be valid. In settling the order on these decisions, the parties directly addressed the issue of a proper race date via letters to Justice Cahn, who held a hearing on April 2, 2008 about the appropriate application of the 10-month notice period. The trial court was asked to specifically address the hemisphere restrictions in the Deed of Gift.

GGYC sought race dates in either July 2008 (the date specified on its original Notice of Challenge) or October 2008 (10 months from entry of the Court's November 27, 2007 memorandum decision). Ostrager Aff., Ex. A.

SNG argued that since the race was to be held in the Northern Hemisphere, and the Deed prohibits a race in the Northern Hemisphere between November and May, the 10-month notice period necessarily must be extended so as not to deprive SNG, as the Defender, the right to select the venue of its choosing. Ostrager Aff., Ex. C (March 26, 2008 letter from Barry Ostrager to Justice Cahn).

On May 12, 2008, Justice Cahn issued a final order, settling its prior decisions and directing that the next America's Cup be held ten months from the date of that order. Ostrager Aff., Ex. D (Decision and Order dated May 12, 2008). In addition, the Court ruled that "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.” Ostrager Aff., Ex. D. Accordingly, the Court’s ruling meant that even if the 10-month period ended between November and May, SNG would not be deprived of its right to select a Northern Hemisphere venue for the 33rd America’s Cup.

**B. GGYC Acknowledges SNG’s Right Under the May 12, 2008 Order to Select Any Venue**

Indeed, shortly after entry of this Order, Russell Coutts, CEO of BMW ORACLE Racing, speaking specifically about the May 12, 2008 Order, 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.*

Ostrager Aff., Ex. E, at 23:17-24 (July 16, 2008 BMW Oracle Press Conference Transcript)

(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. Thomas F. Ehman, Jr., Head of External Affairs for BMW ORACLE Racing, confirmed this view:

*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.*

*Id.* at 28:11-19.

Based on the plain language of the Order, and also the transcribed statements of GGYC's principal client representatives in this court proceeding, SNG understood that it had the right to designate any venue of its choice and repeatedly and unequivocally made clear such understanding, including in an April 23 letter to GGYC, Ostrager Aff., Ex. F (April 23, 2009 letter from SNG's Fred Meyer to GGYC's Marcus Young), as well during SNG's first appearance before Your Honor on May 14, 2009.

**C. SNG Did Not Consent To Valencia For A Winter Deed of Gift Match Between Multihulls**

SNG did not consent to Valencia for a Deed of Gift match in February and has previously stated that Valencia is not an ideal venue for a February race. While SNG did propose Valencia as the venue for a *summer* multi-challenger regatta in much smaller *monohull* vessels, SNG never proposed Valencia as the venue for a *winter* Deed of Gift match between *multihull* vessels.

GGYC and SNG both intend to compete in gigantic vessels that, while state of the art in many respects, are of sizes and will race at speeds that have never before been tried in such a competition. As evidenced by the recent calamity GGYC suffered with its racing vessel just two days ago, these gigantic multihulls can break even in ideal conditions and would be very dangerous to race in less than ideal conditions. Ostrager Aff., Ex. G (*Trimaran dismasts during testing*, Associated Press, Nov. 3, 2009).

**D. GGYC, Without Any Good Cause, Delays For Months Before Bringing Any Challenge To The Venue Selected By SNG**

SNG made a timely designation of a Northern Hemisphere venue of its choice on August 5. Prior to choosing the venue for the race this Court noted in its July 29 decision that SNG would be selecting a Northern Hemisphere location consistent with representations that

were made in open Court two months earlier: “Counsel [for SNG] . . . stated that SNG would announce the Northern Hemisphere location for the February 2010 America’s Cup on August 6.” July 29, 2009 Order at 5. Nevertheless, GGYC sat on its hands for the next two months. Indeed, after the venue announcement, GGYC continued to affirmatively cause SNG to believe that it would appear for the race in RAK in February 2010.

In a letter to SNG dated August 6, GGYC suggested that the race would proceed as planned but raised the potential for challenge *after* the February 2010 match: “Furthermore, no matter which of us wins the match in February, this defect in venue selection would permit court challenges by any number of parties and further uncertainty respecting future America’s Cup events.” Ostrager Aff., Ex. H (August 6, 2009 letter from Marcus Young, GGYC Commodore, to Fred Meyer, SNG Vice-Commodore).

Four days later at an August 10 evidentiary hearing on the custom-house registry issue, GGYC raised no complaint at all about the venue. As this Court will recall, GGYC’s counsel saw fit to levy new challenges during that hearing about SNG’s measurement rules announced on August 6, *after* the venue announcement. GGYC raised an issue about the rudder. It raised an issue about measurement of ballast. But it said nothing about the venue. Ostrager Aff., Ex. I (August 10, 2009 hearing transcript).

On September 2, GGYC instituted its sixth litigation initiative, a motion complaining about 5 different issues. None related to the venue. Ostrager Aff., Ex. J (GGYC’s Motion to Enforce the April 7, 2009 Order and Judgment, Renew Its Sailing Rules Motion, and to Permit Disclosure of SNG’s 33<sup>rd</sup> America’s Cup Agreement, dated September 2, 2009).

GGYC then sent a launch team to the venue and to all outward appearances began actively making on-the-ground preparations for the race. GGYC’s security advisor gave a

positive recommendation on security issues, and sent a nice note to RAK. Ostrager Aff., Ex. K (email from BMW Oracle Security Advisor Brent Ivil to Dr. Khater Massaad, dated September 12, 2009). GGYC's team continued to actively prepare in RAK up until just before its belated October venue motion, when one morning GGYC's launch team were instructed (by GGYC) to vacate the country in less than 24 hours.

Through these actions, GGYC caused SNG (and RAK) to believe that GGYC would race in RAK in February 2010. And such belief was confirmed by GGYC's representations in mid-September to the U.S. Coast Guard that it would be shipping its vessel to RAK in September. Ostrager Aff., Ex. L (Request for Priority Handling filed by BMW Oracle Racing with the U.S. Coast Guard, dated September 18, 2009).

GGYC waited until October, two full months after the venue announcement, to present a regular notice motion challenging the venue. Despite the last-minute nature of its application, GGYC sought no expedited relief. Although it had filed three of its last four motions by order to show cause, GGYC strategically elected to file this application upon a leisurely briefing schedule.

## **ARGUMENT**

### **I. SNG IS ENTITLED TO SELECT A DEED-COMPLIANT VENUE, AND GGYC IS ESTOPPED FROM ENFORCEMENT OF THE 6-MONTH NOTICE PROVISION**

Having sat on its hands in an act of transparent gamesmanship, this Court should not reward GGYC's inequitable conduct by limiting SNG's Southern Hemisphere options which, under the circumstances that presently obtain, would be unfair and inequitable. The Southern Hemisphere location (East Coast of Australia) SNG is proposing is completely unobjectionable and will enhance the quality of the world's premier sailing event. GGYC's efforts to usurp rights afforded to the Defender would, if accepted, undermine the balance of powers set forth in

the Deed of Gift. As GGYC has acknowledged, to counterbalance the advantages given to GGYC as challenger, *“the Deed gives the defender great advantage, including the right to select the location . . . and the right to use its sailing rules and regulations . . . .”* Ostrager Aff., Ex. A (emphasis added).

While Valencia is GGYC’s choice of venue for the 33<sup>rd</sup> America’s Cup, GGYC does not get to pick the venue. SNG does. And, with RAK invalidated, SNG intends to choose a Southern Hemisphere location.

GGYC has no right under the Deed of Gift to participate in the process of selecting a Southern Hemisphere venue. GGYC seeks to invent such a right through its argument that the 6-month notice provision of the May 12, 2008 Order estops SNG from designating a Deed-compliant venue for the February 2010 race. However, it is GGYC who is estopped under the doctrine of unclean hands, laches and estoppel from calling upon this Court to enforce the 6-month notice period (a requirement that is *not* in the Deed of Gift). GGYC’s inequitable conduct includes its failure to raise its venue objections with this Court in an expeditious fashion and its conduct causing SNG to believe that GGYC would appear in RAK for the February 2010 race. This inequitable conduct by GGYC led this Court to characterize GGYC’s behavior as “double dealing,” “tactical,” and “unsportsmanlike.” Ostrager Aff., Ex. M (Transcript of Hearing dated October 27, 2009). Failing to allow SNG the right to designate a Southern Hemisphere location for the match produces the absurd result that SNG is conscripted to a venue that is not Deed compliant and that it did not choose, and rewards GGYC for its gamesmanship and bad faith.

It is a fundamental principle of equity that a party seeking equitable relief “must come to the court with clean hands.” *Haskins v. Thomajan*, 99 A.D.2d 463, 464 (2d Dep’t 1984). “Where a litigant has himself been guilty of inequitable conduct with reference to the subject

matter of the transaction in suit, a court of equity will refuse him affirmative aid.” *Yemini v. Goldberg*, No. 12402-05, 2007 WL 1574422, at \*4 (N.Y. Sup. May 29, 2007); accord *Tepfer v. Berger*, 119 A.D.2d 668, 669 (2d Dep’t 1986); *Pecorella v. Greater Buffalo Press*, 107 A.D.2d 1064, 1065 (4th Dep’t 1985) (“Any willful conduct which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean”) (internal quotation marks omitted).

Similarly, the doctrine of equitable estoppel prevents “the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party’s words or conduct, has been misled into acting upon the belief that such enforcement would not be sought.” *Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175, 184 (1982). A party is estopped from obtaining equitable relief where another party has “rightfully relied” on his word or deed “and so relying, changes his position to his injury.” *Kopelowitz & Co., Inc. v. Mann*, 23 Misc. 3d 1112(A), at \*11, 886 N.Y.S.2d 67 (Sup. Ct. N.Y. County 2009) (quoting *Metropolitan Life Ins. Co. v. Childs Co.*, 230 N.Y. 285, 292-292 (1921) ); accord *E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 368-369 (1988); *Triple Cities Constr. Co. v. Md. Cas. Co.*, 4 N.Y.2d 443, 448 (1958). As the Court of Appeals explained:

The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party’s actions, has been misled into a detrimental change of position.

*Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 326 (2006).

And, under the doctrine of laches, a court of equity will deny relief to a party if, as a result of that party's unreasonable and inexcusable delay in requesting it, the relief would work inequity. *Macon v. Arnie Realty Co.*, 207 A.D.2d 268, 271 (1st Dep't 1994) (“[L]aches requires a showing of unreasonable and inexcusable delay by plaintiff resulting in prejudice to the defendant.”); *Barabash v. Barabas*, 31 N.Y.2d 76, 81 (1971); *see also Macon*, 207 A.D.2d at 271 (“The essential element of this equitable defense is delay prejudicial to the opposing party.”).

Here, in light of the fact that GGYC (i) previously argued, successfully, that the Order trumped the Deed of Gift, (ii) publicly acquiesced in SNG's plain language interpretation of its rights under the Order, and (iii) delayed since May in raising the venue issue with the Court, GGYC has unclean hands barring it from complaining about the lack of six months notice of the Southern Hemisphere venue. GGYC is similarly estopped under the doctrine of estoppel and laches because of the injustice upon SNG, which will suffer significant prejudice if its right to select the venue under the Deed of Gift is vitiated, as that is one of the key advantages granted to the Defender under the Deed of Gift. SNG justifiably relied upon GGYC's words and action (and inaction) in selecting and actively organizing and preparing for a Northern Hemisphere venue, including shipping its challenge vessel by helicopter and cargo ship from Switzerland to RAK.

While this Court has invalidated RAK as the venue, SNG's right to select the venue should be maintained and SNG should be able to select a Southern Hemisphere venue of its choice. To prepare for this eventuality and to make sure the Cup is not delayed, SNG began to consider and investigate Southern Hemisphere venues immediately after last Tuesday's hearing. As noted above, SNG is proceeding with all expedition to evaluate and finalize a venue on the

East Coast of Australia on the Pacific Ocean, and expects to be in a position to make a definitive announcement shortly.

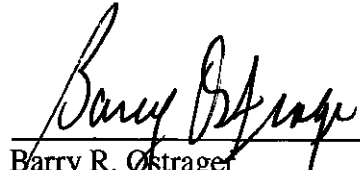
**CONCLUSION**

For the foregoing reasons, Defendant SNG respectfully requests that the Court recognize SNG's right to select a venue compliant with the Deed of Gift for a February 2010 match.

Dated: New York, New York  
November 5, 2009

Respectfully submitted,  
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