

To be Argued by:

DAVID BOIES

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New York Supreme Court

Appellate Division—First Department

GOLDEN GATE YACHT CLUB,

Plaintiff-Respondent,

– against –

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Appellant,

– and –

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

BRIEF FOR PLAINTIFF-RESPONDENT

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Plaintiff-Respondent Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in opposition to the appeal of Defendant-Appellant Société Nautique de Genève (“SNG”) from the October 30, 2009 Order of the Supreme Court, New York County (Shirley W. Kornreich) (“October 30 Order”) and from the November 2, 2009 Memorandum Decision and Order of the Supreme Court, New York County (Shirley W. Kornreich) (“November 2 Order”).

The October 30 Order granted GGYC’s motion for an order declaring SNG’s selection of Ras al-Khaimah as the venue for the 33rd America’s Cup invalid under the Deed of Gift. The November 2 Order ruled, among other things, that a vessel’s rudder must be excluded under the Deed of Gift’s measurement of the vessel’s “length on load water-line.”

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the trial court err as a matter of law when it held that SNG’s selection of a Northern Hemisphere venue for an America’s Cup match in February violated the Deed of Gift, which unambiguously states that “no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere”?
2. Did the trial court err as a matter of law in concluding that measurement of “load water-line” in the Deed of Gift excludes measurement

of a vessel's rudder, consistent with the meaning of the term at the time the Deed of Gift was executed and the fact that the rudder has never been included in the measurement of the "length on load water-line" in the history of the America's Cup?

NATURE OF THE CASE

These appeals concern the interpretation of two provisions of a trust agreement – the Deed of Gift – that governs the America's Cup sailing competition, and of an order enforcing that Deed of Gift.

First, the appeal of the trial court's decision regarding the venue of the match is plainly moot, and should be dismissed. Even if it were not moot, the trial court's decision should be affirmed because it correctly held that the Order enforcing the Deed of Gift had to be interpreted, as far as possible, consistent with the Deed of Gift, and that the term "any other location" in the Order could not be interpreted to include a Northern Hemisphere venue for a February match, something strictly prohibited by the Deed of Gift.

Second, the trial court correctly interpreted the term "load water-line," consistent with its common usage at the time the Deed of Gift was executed, to exclude the vessel's rudder.

The Venue

On October 1, 2009, GGYC moved for an order that SNG be directed to hold the 33rd America's Cup in February, 2010 in Valencia, Spain. In response, SNG argued that it had the right to hold the America's Cup in Ras al-Khaimah. The trial court held that SNG could not hold the America's Cup in Ras al-Khaimah because Ras al-Khaimah is in the Northern Hemisphere and the Deed of Gift prohibits racing in the Northern Hemisphere in February. SNG filed the instant appeal. After filing its appeal, SNG publicly announced that it would hold the 33rd America's Cup in February, 2010 in Valencia, Spain, as GGYC had requested. As a result, SNG's appeal is moot and must be dismissed.

If the appeal were not moot, the trial court's decision should be affirmed. As SNG concedes: "By its express terms, the Deed of Gift prohibits matches in the Northern Hemisphere from November to May." (Appellant's Br. at 3.) Ras al-Khaimah, one of the United Arab Emirates, is in the Northern Hemisphere and is therefore expressly prohibited by the Deed of Gift for a match in February.

SNG argues that despite that unambiguous prohibition, a May 12, 2008 order of the trial court, reinstated on April 7, 2009 by the Court of Appeals (the "April 7 Order"), which was designed to create a remedy for

SNG's breach of another express term of the Deed of Gift, somehow gave SNG the right to select a Northern Hemisphere venue for a February match.

The Order provides:

Ordered 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*; and it is further

Ordered that GGYC and SNG may engage in a mutual consent process and 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 challenge match races in accordance with the Deed of Gift.” (R. at 238) (emphasis added).

SNG argues that the words “any other location” should be read in a vacuum, without reference to the Deed of Gift, and give SNG the right to hold the America's Cup literally anywhere on earth. That argument is absurd, as the trial court correctly recognized. Indeed, SNG itself implicitly recognizes the absurdity of that argument (because it would mean that the Order gave SNG the right to hold the race on a lake or a river – something even SNG does not believe). Thus, SNG's real argument is not that the words of the Order should be taken literally, but that they mean something else entirely, specifically: any location permitted by the Deed of Gift irrespective of its hemisphere restrictions. Of course, had the Court intended to grant SNG that right, it could have done so. It did not.

On May 14, 2009, the trial court directed the parties to race on February 8, 2010 pursuant to the April 7 Order. Over the following weeks, GGYC repeatedly and consistently stated to SNG its position that the April 7 Order did not permit SNG to select a Northern Hemisphere venue for the match.

Despite knowing the express prohibition in the Deed of Gift against a Northern Hemisphere race in February, and despite knowing that GGYC intended to enforce the Deed of Gift in that respect, SNG waited until three days before its right to select a venue expired, and then announced that it had selected a race course off the coast of Ras al-Khaimah, United Arab Emirates, in the Northern Hemisphere. GGYC again unequivocally stated its position that such a venue was prohibited under the Deed of Gift. SNG responded that its selection of Ras al-Khaimah was “irrevocable” and that it would continue to prepare to race in Ras al-Khaimah despite GGYC’s position.

In a good faith effort to avoid potentially unnecessary litigation, GGYC then sought to determine whether it could consent to race in Ras al-Khaimah. After a thorough and prudent investigation, GGYC determined that, for the safety of its team and their families, as well as for the good of

the sport, it could not. GGYC therefore brought the instant motion to enforce the April 7 Order.

The trial court correctly held that the words “any other location” could not be read in a vacuum, but must be interpreted against the background restrictions of the Deed of Gift, which require that the race courses be “ocean courses, free of headlands” that are “practicable in all parts for vessels of twenty-two feet draught of water” and, if between November 1st and May 1st, that they be in the Southern Hemisphere. The trial court correctly concluded those unambiguous terms prohibit a February match in Ras al-Khaimah.

The Rudder

The Deed of Gift requires that competing yachts (“if of one mast”) must measure no more than ninety feet on the “load water-line.” The measurement of the “load water-line” was and is a specialized concept in yacht racing, and to interpret its meaning, the trial court correctly referred to the term’s common usage at the time the Deed of Gift was written. GGYC offered uncontroverted evidence that at the time the Deed was written, the length at load water-line was measured exclusive of any part of the rudder. This interpretation was consistent with the way the term has been interpreted for over one hundred years. SNG offered no counter-evidence, and on

appeal argues in conclusory fashion that because the rudder is part of the vessel, it must be included in the measurement of length on load water-line.

COUNTER STATEMENT OF FACTS

A. The America's Cup And The Deed Of Gift

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 the New York Supreme Court dated December 17, 1956 and April 5, 1985 (the "Deed of Gift" or "Deed"). The corpus of the trust is a trophy known as the America's Cup, which the settlor, George L. Schuyler, designated 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." (R. at 345). The winner of the Cup holds it as trustee for the benefit of all potential challengers.

Under the Deed of Gift, any "organized Yacht Club" "having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup." (R. at 345). When a defender receives a challenge from a yacht club that meets the Deed's requirements, it must accept that challenge. (R. at 346).

The Deed of Gift further provides:

“[B]ut no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere.” (R. at 345).

The Deed of Gift further provides: “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.” (R at 346).

If the challenging club and the defending club cannot mutually agree on the terms of the match (including the venue), the Deed of Gift prescribes match rules, which provide, among other things, for a one-on-one, best of three match at a venue selected by the defender, on the date named by the challenger in its Notice of Challenge. (R. at 345-46).

B. SNG Accepts Challenge Of Sham Yacht Club, And GGYC Commences Suit.

In 2007, SNG won the 32nd America’s Cup in Valencia, Spain. Rather than accepting the challenge of an existing yacht club, SNG sought to arrange for a challenge from Club Náutico Español de Vela (“CNEV”), a “paper” yacht club that had been quickly formed for the purpose of issuing a

“challenge” that SNG would “accept”. At the time CNEV issued its challenge, because it existed only on paper, it had never held an annual regatta, which is one of the few qualifications required by the Deed of Gift.

GGYC commenced this action in the Supreme Court of New York County alleging that SNG breached the terms of the Deed and its fiduciary duties as trustee of the America’s Cup by, among other things, accepting the challenge of an invalid challenger. *Golden Gate Yacht Club v. Societe Nautique de Geneve*, 12 N.Y.3d 248, 254 (2009). On November 27, 2007, the trial court issued a memorandum decision sustaining GGYC’s claim that CNEV’s challenge was invalid because it had not held an annual regatta at the time of its challenge, which is a requirement under the Deed. The trial court declared that GGYC, not CNEV, was the Challenger of Record. (R. at 270). On March 17, 2008, the trial court entered another order following an order to show cause, declaring GGYC’s challenge and certificate to be valid. (R. at 163). The trial court directed the parties to settle an order.

C. The Trial Court’s May 12 Order Provides That The Venue Shall Be Valencia Unless SNG Provides GGYC Six Months Notice Of A Deed-Compliant Venue.

In settling the order on the November 27, 2007 and March 17, 2008 decisions, the parties sought to address when and where the 33rd America’s Cup would be held. (R. at 159-225). The procedure under the Deed by

which the challenger names the dates upon ten months' notice and the defender, in the absence of mutual consent, names a venue, had been interrupted by SNG's breach of the Deed and this resulting action. GGYC and SNG both designated Valencia, the site of the 32nd America's Cup, as the venue for the 33rd America's Cup in their Notice of Settlement and Counter-Notice of Settlement. (R. at 1201; 1209).

On May 12, 2008, the trial court issued a final order, which, among other things, sought to craft a remedy for SNG's breach of the Deed (the "May 12 Order"). Under the May 12 Order, the next America's Cup would be held ten months from service of a copy of the Order. Regarding venue, the May 12 Order stated:

Ordered 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*; and it is further

Ordered that GGYC and SNG may engage in a mutual consent process and 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 challenge match races in accordance with the Deed of Gift." (R. at 238) (emphasis added).

Thus, the May 12 Order directed that the next America's Cup shall be held in Valencia, unless SNG provided GGYC with six months' notice of another venue. As the trial court later ruled, the words "any other location"

must be read in conjunction with the Deed of Gift to mean any other location that complies with the Deed of Gift, including its hemisphere restrictions. (R. at 36-37).

D. The Court Of Appeals Affirms SNG's Breach Of The Deed And Reinstates The May 12 Order.

SNG appealed from the March 17 and May 12 Orders. SNG did not, however, appeal the May 12 Order insofar as it directed that the venue for the next America's Cup shall be Valencia, unless SNG provides GGYC six months notice of an alternate venue. On July 29, 2008, the Appellate Division reversed and reinstated CNEV as the Challenger of Record in a decision reported at 55 A.D.3d 26 (1st Dep't 2008).

On April 7, 2009, the Court of Appeals reversed the First Department's decision. *Golden Gate Yacht Club*, 12 N.Y.3d at 252. The Court of Appeals reinstated the May 12 Order of the Supreme Court. *Id.* This Order was entered as the order and judgment of the Court of Appeals on April 7, 2009 (the "April 7 Order"). Counsel for GGYC served a copy of the April 7 Order the same day. Thus, the dates for the next America's Cup race under the April 7 Order are February 8, 10, and 12, 2010. (R. at 231).

E. GGYC Consistently Warns That SNG Could Select Only Valencia Or A Southern Hemisphere Venue.

Following the entry of the April 7 Order, GGYC consistently made clear to SNG its position that, under the Order, SNG could select only Valencia or a Southern Hemisphere venue for the next America's Cup. GGYC sent SNG letters to that effect several times between May and August 2009. Indeed, GGYC specifically put SNG on notice that it would take steps to enforce the terms of the April 7 Order if SNG announced a Northern Hemisphere venue other than Valencia.

On May 20, 2009, GGYC wrote to SNG:

“In accordance with the Deed, the April 7, 2009 Order and Judgment and confirmed by the Court last week, *the regatta will be at Valencia, Spain, or any other location of SNG's choice that is Deed-compliant, provided SNG notifies us of the location of the ocean courses on or before August 8, 2009.* Notwithstanding your ‘Newsletter Alinghi-SNG’ distributed yesterday and widely publicized by the media, *‘Deed-compliant’ means, among other things, that the location (if other than Valencia) must be in the Southern Hemisphere.* We are, however, willing to negotiate with you alternative Northern Hemisphere locations for the February 2010 Match if SNG so desires.” (R. at 1178) (emphasis added).

On May 23, 2009 GGYC wrote to SNG:

“It is clear to us that you may select Valencia for the February 2010 match, *or an otherwise Deed-compliant venue – which you have acknowledged time and again means only a venue in the Southern Hemisphere.*” (R. at 1181) (emphasis added).

On June 19, 2009, GGYC wrote to SNG:

“However, please know that *we will not stand idly by if your Club flaunts the Deed of Gift and/or the Court’s Judgment and Orders by, for example, naming a Northern Hemisphere venue other than Valencia* without our express agreement – which, nonetheless, we remain willing to negotiate.” (R. at 1184) (emphasis added).

On July 8, 2009, GGYC wrote to SNG:

“Let us again reiterate, the Deed and the Judgment and Order are clear that *you may not select a Northern Hemisphere venue, other than Valencia, without our mutual consent.*” (Emphasis added).

Finally, on July 28, 2009, GGYC wrote to SNG:

“The purpose of this letter is to put you on notice, yet again, that *if you unilaterally select a Northern Hemisphere venue other than Valencia, we intend to defend our rights under the Deed and the Order and Judgment of the Court of Appeals.* This position has been consistently reiterated to you through correspondence (as recently as July 8, 2009) and public statements.” (R. at 1186) (emphasis added).

At no point between the entry of the April 7 Order and SNG’s announcement of Ras al-Khaimah (a venue in the Northern Hemisphere) did GGYC tell SNG – or anyone – that the April 7 Order permitted SNG to select a Northern Hemisphere venue other than Valencia.

F. SNG Waits Until The Last Moment Under The April 7 Order To Announce A Northern Hemisphere Venue Other Than Valencia For A Race To Be Conducted In February.

Under the April 7 Order, SNG had the option to select a venue other than Valencia, provided that SNG notify GGYC in writing six months prior

to the first scheduled race of that location. As such, SNG had until August 8, 2009 to notify GGYC of an alternative venue.

In order to maximize its benefit under the April 7 Order, and minimize the notice provided to GGYC, SNG waited until the last possible moment to disclose its selected venue, and rejected numerous offers by GGYC to reach an agreement on a mutually acceptable venue. (R. at 1177; 1181; 1184; 1186).

On August 5, 2009, three days before the expiration of its right to select a venue other than Valencia, SNG informed GGYC that the venue for the next America's Cup would be Ras al-Khaimah, an emirate in the United Arab Emirates. Ras al-Khaimah, located on the Strait of Hormuz in the Persian Gulf, is in the Northern Hemisphere.

GGYC immediately notified SNG of its objection to SNG's selection of Ras al-Khaimah. On August 6, 2009, the day after SNG provided notice to GGYC, GGYC wrote:

“We once again advise you that it is our firm view that the selection of a Northern Hemisphere venue, other than Valencia, without our mutual consent contravenes the Deed and the Order and Judgment of the Court of Appeals . . . We therefore call upon you to suspend your venue announcement and either enter into discussions with us as to a mutually acceptable venue, or choose Valencia or a Southern Hemisphere venue which is Deed-compliant.” (R. at 1452-53).

In response, SNG stated that it had *irrevocably* selected Ras al-Khaimah and that it would not suspend either its announcement or the contractual arrangements it entered into with Ras al-Khaimah.

G. GGYC Investigates In Good Faith Whether It Can Consent To Ras Al-Khaimah.

In the weeks following SNG's announcement and GGYC's immediate objection to the venue, GGYC sought in good faith to determine whether it could consent to SNG's non-compliant selection of Ras al-Khaimah.

GGYC's racing team, BMW ORACLE Racing ("BOR") sent a reconnaissance team to Ras al-Khaimah to assess the security risks associated with racing in the waters between Ras al-Khaimah and Iran. Among other things, BOR learned that (i) there was rampant smuggling of banned or sanctioned goods into the United Arab Emirates from Iran; (ii) there is a substantial contention between Iran and the United Arab Emirates over Iran's occupation of three islands near Ras al-Khaimah; (iii) police recently covered up a plot by Iran to blow up an area in Dubai; (iv) hotels in the United Arab Emirates were "soft targets" because very few had security guards or closed circuit cameras; (v) that one of the 9/11 terrorists was from Ras al-Khaimah; and (vi) that Iran would likely try to seize any boat and personnel that came close to Iran's waters, an obvious concern given that the

race area designated by SNG abuts contiguous Iranian waters. (R. at 1474; 1462).¹

After careful and prudent consideration, GGYC, which will be sailing a vessel named “USA” that flies an American flag on a 200-foot mast, determined that it would be unsafe to race on the course selected by SNG. Accordingly, on October 1, GGYC brought a motion to challenge SNG’s venue selection.

H. The Trial Court Invalidates SNG’s Selection Of Ras Al-Khaimah.

On October 27, 2009, the trial court, after hearing oral argument on GGYC’s venue motion, ruled in favor of GGYC from the bench:

“I believe that the order of Justice Cahn, as affirmed by the Court of Appeals, permits the race to take place in Valencia, Spain, and this was by virtue of previous preparation that took place in Valencia, Spain, there had been mutual agreement prior to the order that it would take place in Valencia, Spain, and I believe that may well be the reason Valencia, Spain was mentioned.

Whether it is or not, Valencia, Spain was permitted, and it is a Northern Hemisphere venue, it was permitted for the race.

¹ SNG argued before the trial court that Brent Ivil, who accompanied the BOR reconnaissance team to Ras al-Khaimah in order to persuade BOR to retain him as a security analyst, told a Ras al-Khaimah official that his report to BOR would be positive. (R. at 1302) Mr. Ivil was not authorized by BOR to make that representation, and in any event, his report to BOR was not positive. Furthermore, Mr. Ivil’s communication was sent to Dr. Massaad, the CEO of Ras al-Khaimah Investment Authority, not SNG. BOR was not aware of that communication until it was served on counsel in this action. (R. at 1474).

Other than that, the judge specifically said – and, again, this order was affirmed by the Court of Appeals ‘—or any other location selected by SNG.’

It is the belief of this Court that that phrase must be read in conjunction with the Deed of Trust, and the Deed of Trust specifically requires that the race, if it takes place between November 1 and May 1, must take place in the Southern Hemisphere.

Therefore, since RAK is in the Northern Hemisphere, it cannot under the Deed of Trust take place in RAK.” (R. at 36-37).

I. SNG Confirms That The Next America’s Cup Will Be Held In Valencia, Spain In February 2010.

On November 10, 2009, six days after filing this appeal, SNG issued a press release stating that the 33rd America’s Cup will be held in February 2010 in Valencia, Spain. In this release, SNG “confirmed that it will conduct a Deed of Gift Match with GGYC in February 2010 in Valencia, which is the date and venue repeatedly requested by GGYC and previously ordered by the Court.” On the same date, SNG issued a Notice of Race, declaring Valencia to be the venue of the 33rd America’s Cup.

J. SNG Issues Measurement Rules That Include The Rudder In The Measurement Of The “Length On Load Water-Line” In Violation Of The Deed Of Gift.

The Deed of Gift provides the minimum and maximum size of the vessels permitted to race in a match for the America’s Cup by reference to a nautical term called the “load water-line.” According to the Deed,

“The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet *on the load water-line*; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet *on the load water-line*. (R. at 345) (emphasis added).

On August 6, 2009, SNG issued measurement procedures for the next America’s Cup, which, among other things, purported to provide a definition of “length on load water-line” that includes, for the first time in the history of the America’s Cup, the vessel’s rudder. Upon GGYC’s request for clarification, SNG further stated: “Any part of the yacht which is not a center-board or sliding keel would be considered as part of the yacht for purposes of measuring the length on load waterline.” (R. at 1519).

At the time that it issued its measurement procedures, SNG knew that the length on load water-line of GGYC’s vessel exceeds ninety feet when the rudder is included in that measurement. (R. at 624; 619). SNG nevertheless purported to redefine the term “load water-line” in its measurement procedures, despite its repeated representation to the trial court that it would not issue measurement procedures that would disqualify GGYC’s vessel. (R. at 1508; 478; 891-92).

K. The Trial Court Rules That SNG's Inclusion Of The Rudder In The Measurement Of The "Length On Load Water-Line" Violates The Deed of Gift.

On September 2, 2009, GGYC moved, among other things, for an order declaring that SNG's measurement procedures with regard to the inclusion of rudder in the length on load water-line violate the Deed of Gift. The Deed states that, in the event that the defender and challenger cannot reach mutual consent on match terms, a default match will be raced "and these races shall be sailed subject to [the defending club's] rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any time allowances whatever." (R. at 346). The trial court held oral argument on October 27.

By order dated October 30, 2009, the trial court agreed that SNG's inclusion of the rudder in measuring the length on load water-line violates the Deed of Gift:

"The Court finds, based on the evidence presented and the arguments of counsel at the October 27, 2009 hearing, that the rudder is not included in measurement of the length on "load water-line" under the Deed of Gift. The deed provided, in pertinent part, that "competing yachts or vessels, if of one mast, shall not be . . . more than ninety feet on the load water-line." Under New York law, "[t]he judicial interpretive function is to find the meaning of the testator as expressed in the language used, considered in the light of the attendant circumstances, and effectuate it. *In re Gross*, 75 A.D.2d 531 (1st Dep't 1980), quoting *Matter of Nicol*, 24 A.D.2d 191, 197 (1st Dep't 1965).

“GGYC has submitted substantial evidence, including affidavits from a number of yacht racing experts, that the ‘length on load water-line’ historically excluded measurement of the vessel’s rudder. New York Yacht Club rules in existence of the time the deed was executed provided that measurement would be ‘exclusive of any portion of the rudder or rudder-stock.’ In addition, the rudder was not included in the measurement procedures for length on load water-line in the 1988 America’s Cup, which measurement procedures SNG claims it relied on for its August 6, 2009 measurement procedures. SNG has not submitted any persuasive contrary evidence. SNG may not include rudders in the measurement of the ‘length on load water-line’. In light of this ruling, the Court does not need to reach the broader issue of whether SNG can change its rules to include rudders in the measurement.” (R. at 156-157)

STANDARD OF REVIEW

Generally, the trial court’s interpretation of the April 7 Order and the Deed of Gift is reviewed *de novo* by this Court. With respect to the rudder issue, however, where the language in the contract is ambiguous, determination of the parties’ intent becomes a mixed question of law and fact. *Descovito Glaze of Schenectady, Inc. v. Mechanical Const. Corp.*, 159 A.D.2d 760, 764 (3d Dep’t 1990) (citing *Kenyon v. Knights Templar & Masonic Mut. Aid. Assn.*, 122 N.Y. 247, 254 (1890)); *Construction Management Corp. v. Brown & Root, Inc.*, 41 Misc.2d 864, 870 (Sup. Ct. 1964), *aff’d*, 25 A.D.2d 843 (1st Dep’t 1966). This Court reviews *de novo* the trial court’s implicit conclusion of law that the Deed of Gift is ambiguous. *See, e.g., Duane Reade, Inc. v. Cardtronics, LP*, 863 N.Y.S.2d

14, 17 (1st Dep't 2008). However, the court's findings with respect to the meaning of the ambiguous language should be subject to the clearly erroneous standard of review. *See Hatalmud v. Spellings*, 505 F.3d 139, 145 (2d Cir. 2007); *cf. Ashland Management Inc. v. Janien*, 190 A.D.2d, 591, 591 (1st Dep't 1993) (trial court's factual determinations following a bench trial should not be disturbed on appeal unless they could not have been reached under any fair interpretation of the evidence).

ARGUMENT

I. SNG'S APPEAL OF THE VENUE ISSUE IS MOOT.

On November 10, 2009, SNG issued a press release stating that the 33rd America's Cup will be held in February 2010 in Valencia, Spain. Specifically, SNG "confirmed that it *will conduct* a Deed of Gift Match with GGYC in February 2010 *in Valencia*, which is the date and venue repeatedly requested by GGYC and previously ordered by the Court."² On the same date, SNG issued a Notice of Race, declaring Valencia to be the venue of the 33rd Cup.³

² <http://www.alinghi.com/en/news/news/index.php?idIndex=200&idContent=20867> (last visited Nov. 12, 2009) (emphasis added).

³ Notice of Race, http://www.alinghi.com/multimedia/docs/2009/11/091110_33rd_Americas_Cup_Notice_of_Race.pdf (last visited Nov. 12, 2009).

Because SNG no longer intends to hold the America's Cup in Ras al-Khaimah, and has instead agreed that the Cup will be held in Valencia as requested by GGYC, there is no controversy regarding the venue for the 33rd America's Cup and the appeal is therefore moot. "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal." *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713 (1980) (citing *Matter of State Ind. Comm.*, 224 N.Y. 13, 16 (1918), *California v. San Pablo & Tulare R.R.*, 149 U.S. 308, 314-15 (1893)). Thus, "an appeal will be considered moot unless the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment." *Id.*

Here, there is no longer any dispute between the parties over the venue of the 33rd America's Cup. Accordingly, SNG's appeal of the trial court's venue decision is moot and should be dismissed. If the appeal were not moot, the trial court's decision should be affirmed for the reasons set forth in Parts II and III below.

II. THE TRIAL COURT CORRECTLY HELD THAT SNG'S SELECTION OF RAS AL-KHAIMAH IS INVALID.

A. The April 7 Order Must Be Read In Conjunction With The Deed Of Gift.

The trial court correctly held that SNG's selection of Ras al-Khaimah, a venue in the Northern Hemisphere, for a race to be conducted in February 2010, violates the Deed of Gift. The Deed of Gift unambiguously states:

"The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere." (R. at 345) (emphasis added).

SNG asserts that the trial court erred as a matter of law because the April 7 Order states that "the location of the match shall be in Valencia, Spain or any other location selected by SNG". (R. at 238). SNG's argument is that the words "any other location" are to be construed in a vacuum without regard to the restrictions in the Deed of Gift. Under SNG's interpretation, SNG was empowered under the April 7 Order to select literally any location, including Lake Geneva, the Colorado River, or Walden Pond, venues that are plainly prohibited under the Deed Gift. There is no reason to believe that the Court of Appeals would or could have given the breaching party such expanded rights.

SNG must concede that the words of the Order cannot be read literally, and instead, tries to read words into the Order that are not there, and wants the Order to be interpreted to say “any location” in either hemisphere without regard to the Deed of Gift’s hemisphere restrictions. There is no basis for such a rewriting of the Order.

SNG argues that the Order’s endorsement of Valencia indicates that it intended to abrogate the Deed’s hemisphere restriction. To the contrary, the April 7 Order singled out Valencia as the venue for the next America’s Cup because that is the venue designated by both GGYC and SNG in their notice of settlement and counter-notice of settlement respectively. (R. at 1201; 1209). As the trial court correctly observed, the April 7 Order made an exception for Valencia: “[T]his was by virtue of previous preparation that took place in Valencia, Spain, there had been mutual agreement prior to the order that it would take place in Valencia, Spain.” (R. at 36-37). Indeed, if “any other location” meant any location in either hemisphere, as SNG’s urges, there would have been no reason at all for the trial court to single out Valencia.

Furthermore, SNG has no principled way to distinguish which of the Deed’s restrictions should remain in place in light of its reading of the April 7 Order and which restrictions have been rendered meaningless. For

example, SNG argued before the trial court that Ras al-Khaimah was a valid venue because it is an ocean course free of headlands. SNG cannot explain why Ras al-Khaimah must be Deed-compliant in these respects but not with regard to the Deed's hemisphere restrictions.⁴

B. Informal Statements By GGYC Personnel Are Not Controlling.

SNG points to statements made by GGYC representatives at a single press conference in July 2008 to support SNG's contention that the October 30 Order is inconsistent with parties' understanding of the April 7 Order. (Appellant's Br. at 24). At that press conference, GGYC representatives discussed the possibility that SNG may select a venue in either hemisphere. (R at 1409; 1413). Those statements, made while the May 12 Order was on appeal, are of no import. What is important is that after the May 12 Order was reinstated by the Court of Appeals in the April 7 Order, GGYC

⁴ Furthermore, SNG does not argue that the settlor's intent with regard to venue was ambiguous. In fact, it is unambiguous, which precludes the application of equitable deviation. See *In re JPMorgan Chase Bank, N.A.*, 19 Misc.3d 337, 340 (N.Y. Sur. 2008) ("The doctrine of equitable deviation has been applied by our courts to permit deviation from the terms of a will or trust where there have been unforeseen circumstances and adherence to the instrument threatens to defeat or substantially impair the purpose of the trust. Application of the doctrine must accomplish the testator's [or settlor's] intent which is the paramount consideration. Thus, reformation or deviation will not apply where the testator's or settlor's intention is unambiguous."); see also *In re Dickinson*, 273 A.D.2d 89, 90 (1st Dep't 2000) ("When the purpose of a testator is reasonably clear by reading his words in their natural and common sense, the courts have not the right to annul or pervert that purpose upon the ground that a consequence of it might not have been thought of or intended by him.").

consistently made clear its position to SNG that SNG could not select a Northern Hemisphere venue other than Valencia for the 33rd America's Cup. SNG itself conceded in May of 2009 that "there is nothing in the Order that suggests that a race should be held in contravention of the terms of the Deed of Gift," (R. at 367-368); that SNG "believed it was constrained from hosting the 33rd America's Cup in the Northern Hemisphere between November 1st and May 1st under the express terms of the Deed of Gift."; and that "[t]he *Deed of Gift does not permit races for the Cup to be sailed in that hemisphere during those months.*" (R. at 1444) (emphasis added).

C. SNG Sought But Did Not Receive A Ruling That It May Select A Northern Hemisphere Venue Other Than Valencia.

In the months leading up to SNG's announcement of Ras al-Khaimah, SNG sought but did not receive a ruling from the trial court that it could, without breaching its duties under the Deed, designate a Northern Hemisphere venue other than Valencia. In opposing GGYC's April 27 motion to require SNG to hold the next America's Cup in February pursuant to the April 7 Order, SNG argued: "At a minimum, were this Court to order the race to begin on February 8, 2010, it should confirm that racing in Valencia *or elsewhere in the Northern Hemisphere as SNG may designate* in accordance with the Order will not be a breach of fiduciary duty under the

Deed of Gift.” (R. at 363). At the May 14, 2009 Hearing, the trial court ordered the race to begin in February 2010 but *did not* provide SNG the confirmation that it sought. SNG did not seek further clarification from the trial court.

The fact that SNG stated that it would designate a Northern Hemisphere venue of course proves nothing. As the trial court correctly held, “*That was not the Court’s ruling, just your position.*” (R. at 21) (emphasis added).

Thus the trial court never ratified SNG’s reading, and SNG never received the ruling it sought.

D. SNG’s Reading Of The April 7 Order Would Grant SNG Relief That It Did Not Request And Would Remove The Order From The Issues It Was Meant To Decide.

SNG’s appeal must fail for the additional reason that the relief SNG now seeks goes well beyond what the order was designed to accomplish. Regardless of the plain language of the April 7 Order, a court decree must “be construed with reference to the issues it was meant to decide.” *Mayor & Aldermen of City of Vicksburg v. Henson*, 231 U.S. 259, 269 (1913); *see also City Bank Farmers Trust Co. v. Macfadden*, 13 A.D. 395, 403 (1st Dep’t 1961) (citing *City of Vicksburg*, 231 U.S. at 272-273), *aff’d* 12 N.Y.2d 1035 (1963). A court order “will not be construed as going beyond the motion in

pursuance of which the order is made, for a court is presumed not to intend to grant relief which was not demanded.” *Harrigan v. Mason & Winograd, Inc.*, 121 R.I. 209, 213, 397 A.2d 514, 516 (1979) (citations omitted); *see also Prouty v. Clayton County*, 264 N.W.2d 761, 762 (Iowa 1978). In other words, a court should consider “what the decree was really designed to accomplish.” *City of Vicksburg*, 231 U.S. at 273. Finally, to ensure that an order is construed with reference to the issues it was meant to decide and does not grant relief beyond that which was requested, the reviewing court should consider not just the language of the order, but also the pleadings and the record in the matter. *Id.* at 269. If the language of the order provides broader relief than that requested, the Court is empowered to limit the effect of the order. *Id.*

Here, the April 7 Order cannot grant SNG the right to set the race in any location it chooses regardless of the Deed of Gift restrictions because SNG simply did not request such relief. A review of the record indicates that rather than asking that it be permitted to hold the Cup anywhere it chose without reference to the venue restrictions in the Deed of Gift, SNG asked only that the notice requirement be extended so that it could, in compliance with the Deed of Gift restrictions, choose a Northern Hemisphere location if it so desired. (R. at 174).

E. Principles Of International Comity Have Nothing To Do With GGYC's Motion.

In the brief Ras al-Khaimah seeks to file with this Court as *Amicus Curiae* (the “Amicus Brief”), as well as in its brief below, Ras al-Khaimah cites to principles of international comity for its proposition that SNG should be entitled to choose Ras al-Khaimah as a venue for the 33rd America’s Cup. Contrary to Ras al-Khaimah’s assertion, however, international comity has nothing to do with the question presented to the Court, which asks only whether under the terms of the Deed of Gift and the April 7 Order, SNG is free to choose a Northern Hemisphere location other than Valencia as the venue for the 33rd America’s Cup. This Court, like the court below, is not being asked to rule on issues regarding the acts of a foreign sovereign; rather, it is being asked to review decisions of New York courts which interpreted a legal document drafted under and subject to the laws of New York. This Court is in no way being asked to infringe in any way on the sovereignty of Ras al-Khaimah.

Under principles of international comity, “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (quoting *Underhill v. Hernandez*, 168

U.S. 250, 252 (1897)). The rule is “that when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.”

Id. The doctrine comes into play “where the dispute is intrinsically involved with some foreign function of a foreign entity.” *Int’l Tin Council v.*

Amalgamet Inc., 138 Misc.2d 383, 386 (N.Y Sup. Ct. 1988).

It is quite clear that neither this Court, nor those below, have been asked to rule upon the validity of the acts of another country. Indeed, in its initial venue motion, GGYC stated it was raising safety concerns about Ras al-Khaimah not as a basis upon which the court should rule, but as a means to demonstrate its reasons for bringing the motion in the first instance.

Further, Ras al-Khaimah is neither a party to this action nor do its actions form the basis of GGYC’s claims. *See Banco Nacional*, 376 U.S. at 406 (principles of comity apply where defendant was acting under a dictate of a foreign government); *Freund v. Republic of France*, 592 F.Supp.2d 540, 579 (S.D.N.Y. 2008) (principles of comity apply where action of defendant foreign government forms basis of claim); *Frazier v. Foreign Bondholders Protective Council, Inc.*, 283 A.D. 44, 47 (1st Dep’t 1953) (allowing non-sovereign defendant to raise comity defense because “an indispensable

ingredient of the plaintiffs' cause of action will be an adjudication that the sovereign . . . breached its valid contract with them"). No order issued by this Court would mandate Ras al-Khaimah's actions or prohibit it from taking any action with respect to its system of security. Accordingly, international comity is not implicated because the Court is not sitting in judgment on the validity of Ras al-Khaimah's actions. Finally, comity is not implicated on this appeal because the actions of Ras al-Khaimah were not even considered below and are not presently before this Court. As admitted by Ras al-Khaimah in its Amicus Brief, "[t]he court below made clear that its venue ruling was wholly unrelated to the security of RAK." (Ras al-Khaimah Brief at 6.) As such, even if GGYC had asked the trial court to use its safety concerns as a basis for a decision, which it did not, the trial court chose not to do so, thereby mooting any potential comity issues that might have otherwise been implicated.

III. SNG CANNOT PROVE THE ELEMENTS OF LACHES OR UNCLEAN HANDS

SNG asserts that the trial court "declined to expressly address" the issue of whether GGYC should be permitted to deny SNG of its venue rights. (Appellant's Br. at 1-2). This is because SNG did not brief the

defenses of laches or unclean hands before the trial court. In any event, SNG cannot satisfy the elements of either defense.

A. GGYC Did Not Sit On Its Rights.

To avail itself of the defense of laches, SNG must prove three elements, none of which it can prove. *First*, SNG must prove that GGYC unreasonably and inexcusably delayed bringing the instant motion. *See Waldman v. 853 St. Nicholas Realty Corp.*, 64 A.D.3d 585, 588 (2d Dep't 2009) ("In order for laches to apply, there must be an unreasonable and inexcusable delay"); *Weiss v. Mayflower Doughnut Corp.*, 1 N.Y.2d 310, 319 (1956).

As an initial matter, GGYC could not have brought this motion before it learned of SNG's selection of a Northern Hemisphere venue in violation of the Deed. That happened on August 5, 2009. (R. at 1257). Any challenge before that date would have been premature. SNG's suggestion that GGYC was on notice of its alleged intent to select a Northern Hemisphere venue is belied by the record. (R. at 1177; 1181; 1184; 1186). It is also misleading because it was not until August 5 that GGYC learned that SNG did not select Valencia, which is, of course, in the Northern Hemisphere, but expressly permitted under the April 7, 2009 Order because it had been agreed to by both parties.

After GGYC immediately notified SNG of its objection to Ras al-Khaimah on August 6, 2009, GGYC engaged in a good faith effort to determine whether it could consent to SNG's invalid venue. Among other things, GGYC sent a reconnaissance and logistical team to Ras al-Khaimah (R. at 1474) and devoted significant resources to assessing the threats associated with holding the America's Cup in the waters between Ras al-Khaimah and Iran. (R. at 1218; 1455). GGYC ultimately determined that in light of those security concerns, it could not consent to Ras al-Khaimah and instead sought an order from the trial court invalidating Ras al-Khaimah on October 1, 2009. SNG has cited no authority, and GGYC is aware of none, that supports the proposition that taking eight weeks to determine whether exercising one's rights is prudent and necessary constitutes an unreasonable and inexcusable delay under the doctrine of laches.

Second, SNG must prove that GGYC's delay caused prejudice to SNG. *See In re Barabash's Estate*, 31 N.Y.2d 76, 81 (1972) ("The essential element of this equitable defense is delay prejudicial to the opposing party"). SNG, however, cannot demonstrate that GGYC's delay caused SNG to change its position to its detriment. *See Weiss*, 1 N.Y.2d at 319 (denying defense of laches where "[t]he sequence of events in this action shows that the delay in instituting it was not unreasonable and that plaintiff's conduct

did not cause the defendant Mayflower to change its position to its detriment”).

On August 6, 2009, GGYC notified SNG of its objections to Ras al-Khaimah and demanded that SNG suspend its venue announcement. (R. at 1452). One week earlier, GGYC had stated unequivocally that it “intend[s] to defend [its] rights under the Deed and the Order and Judgment of the Court of Appeals” if SNG selected a Northern Hemisphere venue other than Valencia. (R. at 1186). In response, SNG told GGYC that its selection of Ras al-Khaimah was irrevocable and it refused to suspend its contractual arrangements with authorities in Ras al-Khaimah. SNG thus cannot claim that GGYC’s delay caused SNG to change its position to its detriment.

Third, SNG must prove that it lacked knowledge or notice that GGYC would assert its rights under the April 7 Order. *Cohen v. Krantz*, 227 A.D.2d 581, 582 (2d Dep’t 1996) (identifying “lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief” as a “necessary [element] for the proper invocation” of the defense of laches); *see also* N.Y. Jurisprudence 2d § 364 (updated 2009) (same). Again, GGYC’s consistent message to SNG, culminating in the August 6, 2009 letter, put SNG squarely on notice of GGYC’s intention to

assert its rights under the April 7 Order and defeats this necessary element of laches.⁵

B. The Doctrine of Unclean Hands Does Not Apply.

The doctrine of unclean hands does not bar GGYC from seeking to invalidate SNG's selection of a Northern Hemisphere venue other than Valencia for a race to be conducted in February. Unclean hands "is never used unless the plaintiff is guilty of immoral, unconscionable conduct and even then only when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct." *Nat'l Distillers & Chem. Corp. v. Seyopp Corp.*, 17 N.Y.2d 12, 15-16 (1966); *see also Frymer v. Bell*, 99 A.D.2d 91, 96 (1st Dep't 1984). SNG has offered no evidence that GGYC engaged in immoral and unconscionable conduct, and the trial court did not conclude that GGYC engaged in immoral and unconscionable behavior or even that its conduct was unsportsmanlike. Rather, the court recognized, as the Court of Appeals did in *Mercury Bay*, that issues of sportsmanship are best reserved to other forums. (R. at 38). In *Mercury Bay*, the Court of Appeals expressly

⁵ In *In re Barabash's Estate*, 31 NY.2d 76 (1972), cited by SNG in its brief at page 26, the Court of Appeals denied a trustee's defense of laches against a beneficiary of the trust: "The defense of laches fails on another ground. Thus, a leading treatise on the law of trust states: 'A fiduciary is not entitled to rely upon the laches of his beneficiary as a defense, unless he repudiates the relation to the knowledge of the beneficiary.'" (quoting 5 Scott, *Trusts* [3d ed], § 409, p. 3226).

declined to consider whether the conduct of the parties was “unsportsmanlike,” finding that the Deed left such issues to the yachting community. *Mercury Bay*, 76 N.Y.2d at 269; *see also Golden Gate Yacht Club v. Societe Nautique de Geneve*, No. 602446/07, 200 WL 4624020 at *2 (N.Y. Sup. Nov. 27, 2007). Here, SNG asks this Court to do exactly what the Court of Appeals declined to do – pass judgment on a competitor’s allegedly “unsportsmanlike” conduct. What is more, SNG asserts that this conduct should serve as the basis for insulating SNG from the consequence of its own breach of the Deed and the April 7 Order.

SNG must also show that it relied upon GGYC’s conduct in order to bar GGYC’s motion under the doctrine of unclean hands. *See Fine Cut Diamonds Corp. v. Shetrit*, No. 1283/06, 2009 WL 264122 at *5 (N.Y. Sup. Feb. 3, 2009); *Nat’l Distillers*, 17 N.Y.2d at 15-16; *Kopsidas v. Krokos*, 294 A.D.2d 406, 407 (2d Dep’t 2002). SNG cannot show such reliance, for the reasons discussed above.

IV. THE TRIAL COURT CORRECTLY HELD THAT THE DEED’S MEASUREMENT OF THE LENGTH ON “LOAD WATER-LINE” EXCLUDES A VESSEL’S RUDDER.

SNG argues that the trial court erred by consulting extrinsic evidence to determine whether, under the Deed of Gift, the measurement of a vessel’s length on “load water-line” excludes the rudder. SNG argues that the trial

court should not have looked outside the four corners of the Deed to resolve this question, even though the Deed does not define “load water-line” and even though there is no dispute that “load water-line” is a term of art with specialized meaning in the sport of sailing.

SNG argues that the term “vessels” is unambiguous, and that the trial court should not have looked to extrinsic evidence to determine whether or not the rudder is part of the vessel. Whether the rudder is part of the vessel, however, is not the issue. The issue is whether the rudder is included in the measurement of a vessel’s length on load water-line. Because the term “load water-line” has a specialized meaning in sailing, the trial court did not err in looking to extrinsic evidence, which overwhelmingly demonstrated that the rudder is not included in the length on load water-line, as that term is used in the Deed, in past America’s Cups, and under the rules of the International Sailing Federation (“ISAF”).

A. The Trial Court Properly Considered Evidence Of The Usage Of The Term Length On “Load Water-line” At The Time The Deed Was Executed.

The trial court properly considered evidence of the standard usage and practice at the time the Deed was written to determine the settlor’s intent regarding measurement of the length on load water-line. Under New York

law, “[t]he judicial interpretative function is to find the meaning of the testator as expressed in the language used, considered in the light of the attendant circumstances, and effectuate it.” *In re Escher’s Will*, 75 A.D.2d 531, 533 (1st Dep’t 1980) (quoting *Matter of Nicol*, 24 A.D. 2d 191, 197 (1st Dep’t 1965)); see also *In re Balsam’s Trust*, 58 Misc.2d 672, 686 (N.Y. Sup. Ct. 1968) (“The [trust] instrument must be deemed to speak as of the time of its date, and to be interpreted by conditions existing at that date”) (internal citations omitted).

The New York Yacht Club (“NYYC”) rules extant at the time the 1887 Deed was settled provided that length on load water-line was measured “exclusive of any portion of the rudder or rudder-stock.” (R. at 711) The NYYC, whose members first won the Cup aboard the *America*, was the epicenter of the America’s Cup for over one hundred years. George L. Schuyler, settlor of the Deed and a founder of the NYYC, was still intimately involved with the NYYC when, in 1887, the NYYC’s America’s Cup Committee consulted with him to amend the Deed. See *Mercury Bay*, 76 N.Y.2d at 282. Thus, the NYYC’s definition of “length on load water-

line” in the 1887 NYYC rules provides the best corroboration of its meaning in the Deed.⁶

SNG cites *Mercury Bay* for the proposition that the Deed’s provisions are unambiguous and that it was therefore improper for the trial court to look beyond the four corners of the Deed. *See Mercury Bay*, 76 N.Y.2d at 270 (“Because the deed provisions *on these issues* are unambiguous, the court may not look beyond the four corners of the deed in ascertaining the donors’ intent.”) (emphasis added). However, the issue referred to by the Court of Appeals was whether the Deed’s measurement requirements “require the defenders to race a vessel of the same type or ‘evenly matched’ to that of the challengers” and whether those provisions “preclude the defender’s use of a catamaran.” *Id.* The Court of Appeals determined that the Deed’s provisions were unambiguous with regard to what kinds of boats could be raced. *Mercury Bay* said nothing about whether the term “load water-line” must be construed without reference to outside sources.

⁶ SNG argues that because the Deed explicitly states that “center-board or sliding keel” shall not be “considered a part of the vessel for any purposes of measurement,” all other parts of a vessel must be included in the length on load water-line. That is wrong. As GGYC explained to the trial court, center-boards and sliding keels (unlike rudders) were used by American yachtsmen but not British yachtsmen, and the purpose of listing these components was to ensure that vessels employing them would not be excluded from competition if the Cup were won by a club of a different nationality. (R. 1071). Its purpose was not to define the universe of included or excluded items when measuring the length on load water-line.

SNG also notes that, generally speaking, the longer the length of the boat's *hull* in the water, the faster the boat, implying that the trial court's Order will give GGYC an unfair advantage on the water. There is no basis for such an inference. SNG has offered no evidence (nor could it) showing that placement of the rudder (a steering device) behind the vessel increases the vessel's speed.

B. The Overwhelming Extrinsic Evidence Confirms That The Term Length On "Load Water-line" Excludes A Vessel's Rudder.

As the trial court observed, the overwhelming extrinsic evidence confirms that the term "load water-line" as used in the Deed excludes a vessel's rudder. The trial court's determination on this issue is subject only to a clearly erroneous standard of review. *See, e.g., Desco Vitro*, 159 A.D.2d at 760; *Ashland Mgmt.*, 190 A.D.2d at 591; *Hatalmud*, 505 F.3d at 145.

Not only did the NYYC rules at the time the Deed was executed clearly exclude rudders for the measurement of the load water-line, as discussed above, but Halsey Herreshoff, a preeminent designer, sailor, and measurer with extensive yachting and America's Cup experience, testified that he is not aware of *any* America's Cup competition that included the rudder in the length on load water-line measurement. (R. at 826).

Significantly, the rudder was not included in the measurement procedures for length on load water-line in the 1988 America's Cup, which measurement procedures SNG claims it relied upon for its August 6, 2009 measurement procedures. The 1988 America's Cup measurement procedures for length on the load water-line were detailed in a section entitled "Measurement (Hulls)," meaning that the load water-line measurement was a measurement of the hull, not the yacht as a whole. (R. at 1078-79). Kenneth McAlpine, who was an official measurer for the 1988 America's Cup, testified that the measurement procedures for that event would have excluded from the length on load water-line any rudder extending beyond the water-line of the hull. (R. at 1099).

Moreover, the standard ISAF measurement rules (which SNG represented to the trial court on July 21, 2009 would apply to the match) define length on the load water-line as excluding the rudder. (R. at 686). Those rules define the "*waterline length*" as "the longitudinal distance between the aftermost point and the foremost point of the *waterline*"; and "*waterline*" is defined as "the line(s) formed by the intersection of the outside of the *hull(s)* and . . . the water surface." (R. at 691-92) (emphasis added). And the term "*hull*," defined as a boat's "shell", explicitly excludes

“*hull appendage*,” defined as anything attached to the “shell” (R. at 693), specifically listing “*rudder*” as a type of “*hull appendage*” (R. at 693).

SNG does not dispute the weight of this evidence. Rather, SNG contends that custom and practice is irrelevant because boats like GGYC and SNG’s multihulls have never raced in the America’s Cup before. That may well be, but the Court’s role is to determine the settlor’s expressed intent, not what the settlor might have intended in unforeseen circumstances. *In re Dickinson*, 273 A.D.2d at 90.

C. Even Assuming The Deed Is Unambiguous The Court Did Not Err By Consulting Outside Sources To Determine The Meaning Of Length On Load Water-Line.

Even assuming that the Deed’s measurement provisions are unambiguous, the trial court did not err because it correctly applied the generally accepted technical meaning of length on “load water-line.” If the disputed language is not ambiguous, then the plain meaning or generally accepted technical meaning of the language must be applied. *HNC Realty Co. v. Bay View Towers Apartments, Inc.*, 64 A.D.2d 417, 425 (2d Dep’t 1978). SNG argues that the trial court was not permitted to consider outside evidence to determine the plain meaning or generally accepted technical meaning of “load water-line”. SNG is wrong. The court is only barred from

referencing outside evidence to determine the parties' intent; nothing prohibits a court from utilizing outside sources to determine the regular meaning of an otherwise undefined term. *See, e.g., N. Vill. Liquors, Inc. v. Vascof Realty Corp.*, 66 A.D.2d 685, 685 (1st Dep't 1978) (utilizing outside sources to define a disputed term); *Board of Educ. of Liverpool Cent. School Dist. v. Utica Mut. Ins. Co.*, No. 2004-4164, 2007 WL 273551 at *2 (N.Y. Sup. Jan. 31, 2007) (indicating courts often resort to dictionary definitions to supply meaning to a disputed term and citing *Rosner v. Metro. Prop. and Lia. Ins. Co.*, 96 N.Y.2d 475 (2001)).

Here, at the time the Deed of Gift was executed, the term "load water-line" had a specialized meaning in the sport of sailing. So long as the court was only searching for the objective meaning of the term, and not the parties' intent as to the meaning of the term, its resort to the NYYC regulations, for example, was permissible and the definition provided therein must be applied.

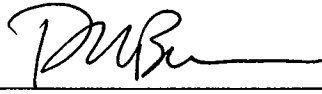
CONCLUSION

For the foregoing reasons, Plaintiff-Respondent GGYC respectfully requests that this Court affirm the trial court's orders invalidating Ras al-Khaimah as the venue for the 33rd America's Cup and excluding the rudder from the measurement of the length on load water-line.

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Respectfully submitted,

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