

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

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GOLDEN GATE YACHT CLUB

Plaintiff,

-against-

SOCIÉTÉ NAUTIQUE DE GENÈVE

Defendant.
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: Index No. 602440/07
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**AFFIDAVIT OF
HAMISH ROSS**

**AFFIDAVIT OF HAMISH ROSS
IN OPPOSITION TO PLAINTIFF’S MOTION FOR PRELIMINARY
INJUNCTION AND EXPEDITED TRIAL AND DISCOVERY**

HAMISH ROSS, being duly sworn, deposes and says:

1. I am a citizen of New Zealand over the age of 18 and General Counsel to Team Alinghi SA (“Alinghi”). I am a member of defendant Société Nautique de Genève (“SNG”), a Swiss yacht club represented by Alinghi. I am also a Barrister of the High Court of New Zealand. I submit this Affidavit in support of defendant SNG’s Opposition to Golden Gate Yacht Club’s (“GGYC”) Motion for Preliminary Injunction and Expedited Trial and Discovery brought on by order to show cause.

2. In my capacity as General Counsel, I provide Alinghi with advice on the Deed of Gift, the America’s Cup rules and general issues of commercial law and also help develop strategies to address competitive and operational issues. I am also familiar in detail of the history of the America’s Cup. I am a member of the Royal New Zealand Yacht Squadron and

am also a founder and current Patron of the New Zealand Class Yacht Association, which promotes New Zealand's yachting history and legacy.

3. I have been involved with the America's Cup event since 1996, when I represented the New York Yacht Club Young America challenge. In 2000, I began working with the newly formed Alinghi.

4. Alinghi won the 31st America's Cup on March 2, 2003 by defeating Team New Zealand. Alinghi defended its title in the 32nd America's Cup by again defeating Team New Zealand on July 3, 2007. Alinghi is now the holder of the America's Cup and the Defender for the 33rd America's Cup.

Background on the America's Cup and The Deed of Gift

5. The America's Cup is a silver trophy that the yacht America first won in a race against British vessels around the Isle of Wight in 1851. The five owners of the America and the Cup, including George Schuyler, donated the America's Cup to the New York Yacht Club ("NYYC") in 1857. George Schuyler, as the last surviving owner, re-conveyed it in 1882 and again in 1887 in cooperation with the New York Yacht Club in order to amend its terms. The 1887 conveyance was by way of a Deed of Gift (the "Deed") dated October 24, 1887. The Deed was later modified by court orders dated December 17, 1956 and April 5, 1985. Attached hereto as Ex. A is a true and correct copy of the current version of the Deed. After the competition was resumed in 1958, following a 21 year hiatus caused by the Second World War and its aftermath, the America's Cup has been held approximately every three to four years.

6. The Deed by its terms purports to establish a trust of the Cup and has been treated by the New York courts and authorities as a New York charitable trust with the holder of the Cup as trustee (also known as the "Defender").

7. The Deed provides that the overarching purpose of the America's Cup is the promotion of friendly international sailing competition. "This Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries." (Ex. A.)

8. The Deed also provides the qualifications for the challengers for the Cup:

Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, 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, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

(Ex. A.)

9. Since the creation of a multiple challenger series in 1970, the first challenge received under the Deed in respect of any particular America's Cup is generally referred to as the "Challenger of Record." Under the Deed, to be the Challenger of Record the challenger must be (i) organized as a yacht club, (ii) foreign, (iii) incorporated in its local jurisdiction, and (iv) must have an annual regatta on the sea or an arm of the sea. As long as the challenging yacht club satisfies these requirements, the Deed provides that it is "entitled" to the right of a sailing match for the America's Cup.

10. The Deed also provides what the contents of a challenge must contain:

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed race Accompanying the ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which

dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible.

(Ex. A.)

11. The Deed further provides that once a valid challenge has been received, the Defender cannot entertain another Challenger of Record until the prior match has been decided:

And when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided.

(Ex. A) (emphasis added).

12. Once a valid challenge has been received, the Defender and the Challenger of Record may agree to the terms of the race through “mutual consent”:

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.

(Ex. A.)

13. In the event that the Challenger of Record and the Defender cannot reach agreement by “mutual consent,” the parties must revert to the terms of the Deed providing for a two-boat match race with the Challenger of Record having selected its vessel and the Defender choosing the location of the match and the race rules and sailing regulations that apply. This format has helped elevate the Cup to one of the world’s premier international sporting events. In the last 40 years, only the 27th America’s Cup held in 1988 was limited to a two-boat match because the parties could not agree to terms. This America’s Cup was the subject of a number of judicial opinions, including the Mercury Bay decision by the New York Court of Appeals, named after the New Zealand Challenger in the 27th Cup.

14. If the Challenger of Record and the Defender cannot reach agreement by “mutual consent,” the Deed provides for a two-boat match race held under conditions specified in the Deed. The Challenger of Record has selected its vessel with the dimensions specified in its notice of challenge and the dates for the match. The Defender, having received notice of the Challenger vessel dimensions, is free to select its vessel constrained only by the minimum and maximum waterline length dimensions specified in the Deed of Gift, chooses the location of the match subject to the constraints specified in the Deed of Gift, and provides the racing rules and sailing regulations that apply to the match. According to the Deed:

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses These ocean courses . . . shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations

(Ex. A.)

15. Since the creation of a multi-challenger selection series first held in 1970, only the 27th Cup held in 1988 was limited to a two-boat match without a challenger selection series because the parties could not agree to terms by mutual consent. In the 27th America’s Cup, the Challenger of Record sailed a monohull while the Defender raced a catamaran. The catamaran won the Cup by a wide margin. The 27th America’s Cup is widely regarded as an infamous episode in the history of the America’s Cup for the tactics employed and resort to the court to resolve a sporting dispute. GGYC’s proceedings in this court are the first to be filed in a court regarding the conduct of the America’s Cup since the 27th America’s Cup.

GGYC, Challenger of Record for the 32nd America’s Cup

16. Alinghi won the 31st America’s Cup in March 2003 by defeating Team New Zealand. The same day that Alinghi won, GGYC tendered and SNG accepted GGYC’s formal

challenge and GGYC became the Challenger of Record for the 32nd America's Cup. Attached hereto as Ex. B is a true and correct copy of GGYC's challenge for the 32nd America's Cup. It was publicly announced at a press conference held approximately two days later that GGYC was the Challenger of Record for the 32nd Cup. At the same press conference, the Protocol governing the 32nd America's Cup, signed by SNG at the same time that GGYC's challenge was accepted by SNG, was publicly released and explained in general terms. GGYC and BMW Oracle, the team that races for GGYC, were represented at the press conference by Thomas Ehman who spoke at length. As is typical for America's Cup protocols, the Protocol Governing the 32nd America's Cup was amended 11 times between its initial issuance and the conclusion of the 32nd America's Cup.

17. On July 3, 2007, Alinghi defeated Emirates Team New Zealand, which represented The Royal New Zealand Yacht Squadron ("RNZYS") to win the 32nd Cup and defend its title. GGYC made it to the semi-finals in the Challenger elimination series, but did not qualify to race in the America's Cup.

18. The success and popularity of the 32nd America's Cup has been widely recognized. Prior to filing this lawsuit GGYC credited the success to "SNG's stewardship, [under which] the 32nd America's Cup delivered some of the most hotly-contested racing in recent Cup history and brought Cup sailing to more people worldwide than ever before." Attached hereto as Ex. C is a true and correct copy of GGYC press release, "San Francisco's Golden Gate Yacht Club Challenges for 33rd America's Cup," dated July 11, 2007.

19. Indeed, for the first time in Cup history, surplus money raised during the overall America's Cup event is going to be distributed to all competitors, which will help defray some of the beneficiaries' costs of competing.

CNEV, Challenger of Record for the 33rd America's Cup

20. The procedures followed for CNEV's challenge in the 33rd America's Cup were almost identical to those followed when GGYC challenged for the 32nd.

21. On July 3, 2007, immediately after the 32nd Cup ended with SNG/Alinghi's victory, CNEV tendered and SNG accepted CNEV's formal challenge. Attached hereto as Ex. D is a true and correct copy of CNEV's challenge for the 33rd Cup.

22. SNG was very pleased to accept a challenge from a Spanish club to increase international diversity in the sport, as a Spanish club had never been the Challenger of Record, because the Spanish competitor had done well in the 32nd America's Cup on its first attempt, effectively placing fourth after winning two of seven semi-final races against Emirates Team New Zealand, and particularly because SNG wished to encourage the City and Region of Valencia to again agree to host the next America's Cup in Valencia Spain, which had been highly beneficial to all competitors and to the City and Region of Valencia and to Spain.

23. After acceptance of CNEV's challenge, SNG and CNEV entered into a protocol for the 33rd Cup (the "33rd Protocol") which set out the terms of the 33rd America's Cup that had been mutually agreed upon after a period of discussion and negotiation, and which was released publicly on July 5.

24. When CNEV delivered its formal challenge, it provided SNG with copies of its incorporation documents. Attached hereto as Ex. E are true and correct copies of CNEV's incorporation and formation documents that were provided to SNG.

25. SNG recognizes that CNEV is closely connected to the Real Federación de Española de Vela ("RFEV") (i.e., the Spanish Yachting Federation). The RFEV has sailed in the prior America's Cup challenger series through its team Desafío Español, just like Alinghi

represents SNG and BMW Oracle represents GGYC. Desafío Español is the same team that will represent CNEV in the 33rd Cup as set forth in CNEV's challenge. (Ex. D.) I am also aware from media reports that CNEV has already arranged substantial sponsorship from the Spanish conglomerate Iberdrola.

Preparations for the 33rd America's Cup

26. Although the 32nd America's Cup only ended two months ago, preparations are well underway for the 33rd Cup. The 33rd Cup is to be raced in monohull vessels and will include a series of qualifying regattas and a challenger series.

27. Since the 33rd Protocol was issued four teams have signed on to race for the 33rd America's Cup.

28. The Royal Cape Yacht Club of South Africa entered the competition on July 18 and will compete again through Team Shosholoza, which competed in the 32nd Cup. Attached hereto as Exhs. F and G are true and correct copies of The Royal Cape Yacht Club's Notice of Entry and the letter of acceptance issued by AC Management SA, dated July 26, 2007.

29. The Royal Thames Yacht Club of England entered the competition on July 20, 2007 and will compete through TeamOrigin which competed in the 32nd Cup. Attached hereto as Exhs. H and I are true and correct copies of The Royal Thames Yacht Club's Notice of Entry and the letter of acceptance issued by AC Management SA, dated July 20, 2007 and July 26, 2007, respectively.

30. RNZYS of New Zealand entered the competition on July 25, 2007 and will compete through Team New Zealand; RNZYS is a former Cup holder and was the runner-up in the 32nd Cup. Attached hereto as Exhs. J and K are true and correct copies of RNZYS' Notice of

Entry and the letter of acceptance issued by AC Management SA, dated July 25, 2007 and July 26, 2007, respectively.

31. The Deutscher Challenger Yacht Club e.V. of Germany entered the competition on August 10, 2007 and will compete through United Internet Team Germany, which is also a prior America's Cup competitor. Attached hereto as Exhs. L and M are true and correct copies of The Deutscher Challenger Yacht Club's Notice of Entry and the letter of acceptance issued by AC Management SA, dated August 9, 2007 and August 30, 2007, respectively.

32. The challengers and their representatives are accomplished and experienced sailing teams that are prepared to and will spend tens of millions of dollars on boat design, testing and training, in preparation for the 33rd America's Cup.

33. On July 25, 2007 the City of Valencia and other Spanish agencies announced an agreement to host the 33rd America's Cup in Valencia. I have been informed that the Spanish have agreed to commit a total cash sum of €160,000,000, infrastructure worth €50,000,000, and considerable value in kind in support of the event, which is to be held in May to July 2009 and which will include a series of qualifying regattas and a challenger series to ensure wide participation and robust competition.

GGYC's Claims, Challenge and This Action

34. On July 11, 2007, GGYC delivered a letter to SNG in which GGYC attacked the CNEV challenge as invalid because CNEV is a "new" club, because it has not yet held an annual regatta and because it does not appear to GGYC to have performed any of the duties of a Challenger of Record. Attached hereto as Ex. N is a true and correct copy of GGYC's Letter to SNG, dated July 11, 2007.

35. With its July 11, 2007 letter, GGYC also submitted its own purported challenge for the 33rd Cup demanding that it be considered the Challenger of Record. (Ex. N.) On the certificate provided with GGYC's bid, the dimensions of the vessel GGYC proposes to race include a length on load water-line of 90 feet and a beam at load water-line of 90 feet. (Ex. N.) These dimensions can only be for a multi-hulled vessel.

36. The New York courts have discussed the America's Cup in the Mercury Bay litigation proceedings, including in In re Royal Burnham Yacht Club, No. 01569/88, slip op. at 2-3 (N.Y. Sup. Ct. Apr. 6, 1988), a true and correct copy of which is attached hereto as Ex. O.

The America's Cup Arbitration Panel

37. On July 20, 2007, prior to (and prior to being aware of) GGYC's proceedings in this Court, SNG initiated proceedings under the arbitration provisions in the 33rd Protocol seeking a ruling from the America's Cup Arbitration Panel as to the validity of CNEV's challenge. SNG commenced the proceedings because arbitration is the dispute resolution and Protocol interpretive mechanism agreed to by the competitors in the 33rd America's Cup under the terms of the 33rd Protocol (as in all recent America's Cups since the Mercury Bay debacle, including the 32nd in which GGYC was Challenger of Record).

38. The America's Cup Arbitration Panel asked GGYC to participate in the proceedings and stated that it would accept submissions from GGYC even if GGYC elected not to submit to the jurisdiction of the Panel:

GGYC is invited, by not later than Friday, July 27, 2007 at 5:00 p.m., to inform ACAP 33, SNG and CNEV whether they are willing to take part to these proceedings and, if so, (i) as a party, submitting to the jurisdiction of ACAP 33, or (ii) by presenting their case, without prejudice to the existence and/or jurisdiction of ACAP 33 including the basis and reasons therefore.

Attached hereto as Ex. P is a true and correct copy of the America's Cup Arbitration Panel's Direction No. 1 dated July 23, 2007. GGYC declined that invitation.

39. Two of the three members of the Panel also served as arbitrators under the 32nd Protocol called the America's Cup Jury (in which GGYC was the Challenger of Record).

The Participation of "New" Clubs in Previous America's Cups

40. The history of the Cup has numerous examples where "new" clubs and even clubs incorporated well after the fact, or never "incorporated, patented, or licensed by the legislature, admiralty, or other executive department," as required by the Deed, have been permitted to compete as challengers.

41. The Sun City Yacht Club from Western Australia was incorporated in December 23, 1974 and challenged on December 24, 1974 for the 1977 America's Cup. Attached hereto as Exhs. Q and R are a copy of the Sun City Yacht Club Certificate of Incorporation from the Registrar of Western Australia and correspondence with the New York Yacht Club referencing Sun City Yacht Club's challenge for the 1977 America's Cup (obtained from the New York Yacht Club archives), respectively. It was established for the purpose of challenging for the America's Cup and its challenge was accepted by the then Defender, the New York Yacht Club.

42. The Secret Cove Yacht Club was incorporated only three months prior to challenging for the 1983 Cup and was openly established for the purpose of challenging for the Cup as a national Canadian representative. Attached hereto as Ex. S is a copy of correspondence from Secret Cove Yacht Club to the New York Yacht Club, dated March 30, 1981. Also attached as Ex. S is correspondence from the New York Yacht Club accepting Secret Cove's challenge, dated August 31, 1981. (These documents were obtained from the New York Yacht Club archives.)

43. The Mercury Bay Boating Club was incorporated less than nine months before it issued its challenge in 1987 and it was widely publicized during the Mercury Bay litigation to have operated out of a car on a beach. Attached hereto as Ex. T is a copy of Certificate of Incorporation for Mercury Bay Boating Club Inc., dated September 30, 1986, and obtained from the Registrar of Companies New Zealand.

44. The Southern Cross Yacht Club was incorporated in April 1993 six months after its challenge was accepted by the San Diego Yacht Club. Attached hereto as Ex. U is a true and correct copy of a print out from the Australian Securities & Investments Commission, accompanied by a statutory declaration by Peter James Strickland, an Australian attorney. Mr. Strickland also testifies about incorporation of the Australian Yacht Club which also specifically incorporated for the purpose of challenging for the 1995 America's Cup.

45. RNZYS first challenged for the 1987 Cup and its challenge was accepted by the then trustee Royal Perth Yacht Club of Western Australia Incorporated. RNZYS challenged twice more, for the 1992 America's Cup and the 1995 America's Cup, and its challenges were accepted by the then trustee San Diego Yacht Club, despite not ever being incorporated. Attached hereto as Ex. V is a copy of the Certificate of Incorporation for RNZYS, dated February 28, 2003, and obtained from the Registrar of Companies New Zealand. RNZYS won the America's Cup in 1995 and was the Defender/trustee in 2000 and in 2003. It was not "incorporated, patented, or licensed by the legislature, admiralty, or other executive department," as required by the Deed, until after it had lost the America's Cup to SNG and ceased to be the trustee.

46. A challenge from the Cortez Sailing Association led by Dennis Conner was accepted by the Royal New Zealand Yacht Squadron although Cortez does not appear to have

been incorporated until 2002, more than two years after it competed in the 2000 America's Cup. Attached hereto as Ex. W is a copy of the Cortez Sailing Association's Articles of Incorporation, dated August 12, 2002, and obtained from the California Secretary of State.

47. I am advised by counsel in Japan that the Nippon Yacht Club which challenged for the 29th America's Cup in 1995 and whose challenge was accepted by San Diego Yacht Club, and for the 30th America's Cup in 2000 and whose challenge was accepted by RNYS was specifically created solely to challenge for the America's Cup and has since been inactive. Also, it does not appear to have ever been "incorporated, patented, or licensed" as required by the Deed.

48. I am informed that the newly formed Deutscher Challenger Yacht Club e. V. was specially created on August 30, 2004, when it was registered with the Registrar of Associations of the Local Courts of Munich, for the single purpose of representing all of Germany for the 32nd America's Cup in 2005. Its challenge, which was accepted on April 29, 2005, was never questioned or protested by GGYC or any other competitor during the 32nd America's Cup.

CNEV's Annual Regatta

49. CNEV could not have held an annual regatta prior to this year because it did not exist as an entity before this year. CNEV has undertaken to hold an annual regatta at least until the 33rd America's Cup is completed. CNEV's submission to the America's Cup Arbitration Panel, which includes a Notice of Regatta for the Vuelta España a Vela, is attached to the Affidavit of Thomas Ehman, sworn to on August 22, 2007, at Ex. I.

50. This very issue arose when SNG first challenged for the 31st America's Cup. Because SNG is located on Lake Geneva it had never regularly held a regatta on the sea or on an arm of the sea before challenging. The question of whether SNG satisfied the "annual regatta"

requirement under the Deed was submitted to the America's Cup Arbitration Panel appointed under the Protocol for the 31st Cup. In its December 17, 2000 decision, the Panel ruled as follows:

Neither the Deed of Gift nor the Protocol have any provision requiring the annual regatta to have been held prior to the lodging of a challenge, nor that the annual regatta must have been held more than once. The only requirement is that the challenging club must be a yacht club "having for its annual regatta an ocean water course on the sea" If it has such a regatta, it is eligible.

Attached hereto as Ex. X is a true and correct copy of the 31st America's Cup Arbitration Panel Decision, dated December 17, 2000. GGYC was a competitor in the 32nd America's Cup and abided by the ruling of the Panel despite a considerable incentive not to do so in that Alinghi eliminated BMW Oracle in the challenger finals.

51. In addition, NYYC agreed to let the Secret Cove Yacht Club of Canada race in the 1983 Cup, even though Secret Cove had never before had an annual regatta on condition that it would have them annually going forward. (Ex. S.)

The Preliminary Injunctive Relief Sought by GGYC

52. GGYC seeks an order directing SNG to provide race rules and sailing regulations and a location for GGYC's proposed two-boat race. These decisions are neither simple nor unimportant. If forced to race a catamaran as GGYC proposes, SNG will have to invest substantial time and effort in identifying a course where the Defender might be competitive and to conclude an appropriate agreement with a host city or region. The possible locations of courses depend on the date of the races, because the Deed specifies the hemisphere (Northern or Southern) the course must be located, depending on the date of the races. The date of the races remains uncertain due to GGYC's proceedings so that no decision can be made until after the date of races becomes fixed. Similarly, SNG does not have standard "rules and sailing

regulations" that apply to all races and regattas. Rather, for each race SNG, like other yacht clubs, has to analyze, assess and decide which International Sailing Federation rules will apply to the particular race and in what ways. There is no "off the shelf" set of rules as GGYC's submission suggests. Thus, providing the relief GGYC seeks will require significant time, effort and analysis that take away from SNG's efforts to prepare for the 33rd Cup. The rules and regulations for the America's Cup matches held in 2000, 2003, and 2007 were not finalized until days before the first race of the match.

53. In addition, the preliminary injunction sought by GGYC could cause SNG significant monetary damage. I have been advised that ACM, the Swiss limited liability company appointed by SNG to help SNG organize and manage the America's Cup, has an agreement with the Spanish authorities under the Host City Agreement with respect to which there is a milestone and a corresponding payment of €21,000,000 approaching in September 2007. The further cloud that a preliminary injunction would create over the preparations for the 33rd Cup could jeopardize ACM's ability to receive that payment.

Dated: September 5, 2007
Geneva, Switzerland



Hamish Ross

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

Sworn to before me this ____ day of September, 2007.

Notary Public