

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

Golden Gate Yacht Club

Plaintiff,

v.

Societe Nautique de Geneve

Defendant,

Club Nautico Espanol de Vela

Intervenor-Defendant.

Index No. 602446/07

**MEMORANDUM OF LAW IN SUPPORT OF GGYC'S MOTION TO
ENFORCE THE APRIL 7, 2009 ORDER AND JUDGMENT,
RENEW ITS SAILING RULES MOTION, AND TO PERMIT DISCLOSURE
OF SNG'S 33RD AMERICA'S CUP AGREEMENT**

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**CONFIDENTIAL MATERIAL - SUBJECT TO STIPULATION AND ORDER FOR THE PRODUCTION
AND EXCHANGE OF CONFIDENTIAL MATERIAL**

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Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in support of its motion (i) for relief at the foot of a judgment to enforce compliance with the Order and Judgment entered on April 7, 2009, (ii) to renew its motion pursuant to Civil Practice Law and Rules (“CPLR”) 2221(e), regarding applicable rules for the match decided by order and memorandum decision entered on July 29, 2009, and (iii) for an order pursuant to New York Codes, Rules and Regulations (“NYCRR”) Title 22, § 216.1 removing the confidentiality designation from the agreement between SNG and ISAF relating to the 33rd America’s Cup dated June 5, 2009 (“AC 33 Agreement”).

This Court’s July 29, 2009 decision that Societe Nautique de Geneve (“SNG”) was permitted to make changes to the rules for the 33rd America’s Cup, to be held in February 2010, stated that the following assurance was “[k]ey” to its decision -- that SNG would not issue rules that disqualified GGYC’s vessel. Golden Gate Yacht Club v. Societe Nautique de Geneve, No. 602446/07, slip op. at 4-5 (Sup. Ct. N.Y. County July 29, 2009). At oral argument prior to that decision, SNG also committed that the International Sailing Federation (“ISAF”) would be required to approve any further changes to the rules for the 33rd America’s Cup. Since that decision, SNG has breached its commitment not to issue rules that disqualify GGYC’s boat, and GGYC has learned that SNG’s representation that ISAF would be required to approve further rules changes was false. GGYC therefore brings these motions.

First, in direct contravention of its representation to this Court, SNG has issued rules that disqualify GGYC’s vessel. Indeed, not only do those rules disqualify GGYC’s vessel, but they directly contravene the Deed of Gift. In addition, SNG has issued measurement procedures that allows their vessel to circumvent the length limits set by the Deed of Gift. Following the Court’s guidance, GGYC requested that SNG, in writing, withdraw those rules and procedures; SNG

declined. Accordingly, GGYC asks the Court to order SNG to withdraw those rules and measurement procedures, and issue rules and measurement procedures that comply with the Deed of Gift and do not disqualify GGYC's boat. See Section I, infra.

Second, SNG told the Court that any further changes to the rules would require the approval of ISAF. However, GGYC has now reviewed the AC 33 Agreement. (Ex. B.) That agreement reveals that several weeks before SNG told the Court that further changes would have to be approved by ISAF, ISAF had already agreed that SNG could make future changes to the rules at its will. Thus, under SNG's agreement with ISAF, SNG can make any changes without any review or approval by ISAF. SNG's representation to the Court was simply false. Indeed, not only does the AC 33 Agreement give SNG the right to make further changes to the rules without ISAF approval, but it removes any recourse to a neutral party for improper decisions by SNG as organizing authority for the America's Cup, and gives SNG control over the appointment of the racing officials. GGYC therefore asks the Court to order that notwithstanding the AC 33 Agreement, SNG act in a neutral manner, not interfere in the selection process for racing officials, and not interfere with the role of ISAF or the racing officials in ensuring neutrality. See Section II, infra.

Third, SNG's actions demonstrate why it cannot be permitted to promulgate whatever rules it wants for the America's Cup, and that the Deed of Gift requires that the match be raced according to the defending club's existing rules. Any other interpretation skews the competitive balance struck by the Deed totally in favor on the defending club, and renders the mutual consent provisions of the Deed meaningless. Accordingly, GGYC asks the Court to order that the America's Cup be raced according to the standard ISAF rules, except for rules restricting vessel design, including RRS 49 through 54 (which the Court has held are in conflict with the Deed)

and that any changes to those rules can only be made with the consent of GGYC and with the requisite approvals of ISAF. See Section III, infra.

Fourth, the concessions that SNG extracted from ISAF in the AC 33 Agreement are a matter of public interest and not protected proprietary business information or trade secrets. Its designation as confidential should be removed. See Section IV, infra.

I. IN DIRECT CONTRAVENTION OF ITS ASSURANCES TO THIS COURT, SNG HAS PROMULGATED RULES AND MEASUREMENT PROCEDURES THAT WOULD DISQUALIFY GGYC'S VESSEL IF APPLIED

At the July 21, 2009 hearing, the Court asked SNG counsel: "Can you change the rules as to measuring?" (Ex. C at 22.) SNG counsel responded "No." (Id.) When the Court again asked this question SNG counsel confirmed: "However ISAF decides measurements are supposed to be made, that's how they should be made -- correct." (Id. at 25.) And when the Court asked whether "rules could be issued which would disqualify the challenger," SNG counsel responded: "I am telling you, it's not going to happen." (Id. at 27.) SNG counsel repeated these assurances in a letter to the court dated July 22, 2009, which the court stated were "[k]ey" to its decision. Golden Gate Yacht Club v. Societe Nautique de Geneve, No. 602446/07, slip op. at 4-5 (N.Y. Sup. Ct. July 29, 2009). Less than three weeks after providing these assurances, SNG has directly breached this commitment to the court by issuing rules and measurement procedures that expressly deviate from the ISAF measurement procedures, contravene the express provisions of the Deed, and which, if administered, compel disqualification of GGYC's competing vessel. (*See Ex. D.*)

A. SNG Ignores The “Shall Not Be Exceeded” Language In The Deed And Requires GGYC’s Vessel To Exactly Match Its Challenge Certificate Dimensions

The Deed provides that the challenge vessel dimensions set out in the challenge Certificate “shall not be exceeded.” (Ex. A at 1-2.) The New York Court of Appeals recognized that the Deed requires that “the challenger’s disclosed dimensions, [] *may not be exceeded . . .*” Mercury Bay v. Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 268 (1990) (emphasis added). Similarly, at the hearing before this Court on July 21st, this Court recognized that the Deed required that the Certificate dimensions not be exceeded. (Ex. C at 10.) GGYC’s competing vessel is designed to meet that requirement. (Ex. E ¶ 6.)

Nonetheless, SNG now asserts, less than two weeks after its assurances at the July 21st hearing, that “[GGYC’s] vessel’s measurements may not be greater than *or less than those dimensions*,” and that GGYC’s challenging vessel “will, of course, not be permitted to race if it does not *match* the challenge dimensions.” (Ex. D at 3) (emphasis supplied.) Nothing in the Deed says the challenger’s vessel dimensions cannot be “less than those dimensions” *or* that the challenge vessel dimensions must “match” the Certificate dimensions. (Ex. A.) SNG’s measurement rules are unquestionably inconsistent with the plain words of the Deed, which only require that the Certificate dimensions “shall not be exceeded.” (Id.)¹

¹ The match preceding the 1887 Deed’s inclusion of the “shall not be exceeded” language confirms its plain meaning. In that match, the challenger *Thistle*, which was under construction when it challenged, came in longer than its estimated length at the time of challenge, thus disadvantaging the defender because length on load water-line is directly correlated with speed; the longer the length, the faster the boat. See Mercury Bay, 76 N.Y.2d at 269; n.11. The settlor thereafter amended the Deed to include the “shall not be exceeded” language to provide the challenger leeway in estimating its vessel dimensions so that it could race with a shorter vessel (which would not disadvantage defenders) while ensuring that it would not race a longer, *i.e.* faster, vessel (which would disadvantage defenders). (Ex. G (Mercury Bay v. Boating Club v. San Diego Yacht Club, Index No. 21299/87, 21809/87, slip op. at 7-8, 10 (N.Y. Sup. Ct. Nov. 25, 1987) (Ciparick, J.))

As SNG knows from observing GGYC's competing vessel, its dimensions do not exceed those on GGYC's Certificate. (Ex. E ¶ 6; Ex. F ¶¶ 4-5.) What SNG is saying is that even if GGYC complies with the express terms of the Deed, under SNG's measurement rules, GGYC will "not be permitted to race." (Ex. D at 3.) This position not only violates the Deed, and SNG's assurances to the Court, it is a direct violation of the Order and Judgment. (Ex. M at 4.)²

Accordingly, SNG should be directed that GGYC's challenge vessel must "not exceed" its Certificate dimensions and that a precise match of dimensions is not required.

B. SNG Includes Rudders In The Measurement Of The "Length On Load Water-Line" In Violation Of The Deed

The SNG measurement procedures provide that "length on load water-line" shall be measured *inclusive* of any rudders. (Ex. I at 2, ¶ 1.) The meaning of the term "length on load water-line," as used in the Deed, modern usage, and under standard ISAF measurement rules, *excludes* measurement of the rudder. (Ex. A at 1; Ex. V ¶¶ 2-7; Ex. J ¶ C.6.3(c).) GGYC's competing vessel is designed to meet that requirement but would be disqualified under SNG's proposed rule. (Ex. E ¶ 6.)

The New York Yacht Club ("NYYC") rules extant at the time the 1887 Deed was executed provided that length on load water-line was measured "exclusive of any portion of the rudder or rudder-stock." (Ex. K at 2.) The NYYC, whose members first won the Cup aboard the

² SNG has sought to justify its refusal to abide by the Deed and the Order and Judgment by asserting that the Court's ruling of May 14, 2009, regarding the Custom House Registry ("CHR"), changed the requirements of the Deed. (Ex. H, at 24 ("If the CHR does not conform to the challenge dimensions, it is the Court's belief, and my direction, that Golden Gate will be disqualified . . .").) However, the current issue was not raised by the parties or considered by the Court on that motion. Further, there is no tension between the Court's CHR ruling and the "shall not be exceeded" language of the Deed. GGYC's CHR and Certificate will "conform," and its

America, was the epicenter of the America's Cup for over one hundred years. George L. Schuyler, settlor of the 1887 Deed and a founder of the NYYC, was still intimately involved with the NYYC when, in 1887, the NYYC America's Cup Committee consulted with him to amend the Deed. See Mercury Bay, 76 N.Y.2d at 282. The defined term "length at load water-line" in the 1887 NYYC rules therefore provides the best corroboration of its meaning in the Deed.³ The 1887 NYYC rule is consistent with the long-standing practice in the yachting community, which measures length on the load water-line exclusive of any portion of the rudder, (Ex. V ¶¶ 2, 3, 7), and was the practice historically adhered to by America's Cup participants, including immediately prior to and after the adoption of the 1887 Deed. (Ex. K, Ex. R, Ex. S; see also Ex. V ¶ 6.) Indeed, the very first multihull designed and patented in the United States, the *Amaryllis*, patented in 1877, defined its load water-line in reference to its hull excluding the rudder, as evidenced by the *Amaryllis II*, a precise replica of the original *Amaryllis* made in 1933, whose published load water-line measurement has consistently been calculated exclusive of the rudder. (Ex. V ¶ 5.)

The current ISAF measurement rules, which SNG represented to the Court would apply to the match (Ex. C, at 25), similarly define measurement of the water-line to exclude rudders. (Ex. J, ¶ C.6.3(c) ("The line(s) formed by the intersection of the *outside of the hull(s)* and . . . the water surface when the boat is floating in measurement trim.") (emphasis supplied).)

vessel's dimensions will not exceed those provided in its Certificate.

³ See, e.g., In re Gross, 426 N.Y.S.2d 1008, 1009-1010 (1st Dep't 1980) ("The 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. The meaning, however, must be determined by reference to the circumstances existent at the time that the words were

As SNG knows from observing GGYC's competing vessel, its length on load water-line exceeds ninety feet when the rudder is included in that measurement. (Ex. E ¶ 5.) It is impossible to move the rudders forward without a complete redesign and rebuild of the vessel. Further, doing so would severely compromise the performance and maneuvering of the vessel, which could create safety issues on the race course. (Id.)

SNG's inclusion of the rudders in its measuring rules serves no purpose other than to assure disqualification of GGYC. Not surprisingly, the rudders on SNG's vessel are below the water-line and hence its inclusion in the measurement does not lengthen its vessel's measurement of length on load water-line. (Id.) Put another way, including or not including the rudders in measurement has no impact on the measurement of SNG's current vessel, but disqualifies GGYC's vessel. This provides a vivid illustration of SNG's abuse of its power as the fiduciary trustee under the Deed and self-proclaimed organizing authority under the ISAF rules: mandating a rule to disqualify its sole competitor.

Accordingly, SNG should be directed, in accordance with the Deed and the standard ISAF measurement rules, to only include the hull (*i.e.*, to exclude rudders) when measuring length on load water-line.

C. The SNG Definition Of Measurement Of The Length On "Load Water-Line" Is Inconsistent With The Plain Language Of The Deed

used It is the intention which exists at the time of execution which controls") (internal citations omitted).

As noted above, the Deed provides that the length of the competing vessels shall be measured on the “load water-line.” (Ex. A ¶ 3.)⁴ The only logical reading of this phrase is that the water-line lengths of competing vessels shall be measured with the maximum weight, or “load,” the competing vessels intend and shall be allowed to have while racing. Any other construction of the term “load water-line” would render the length limitations in the fifth paragraph meaningless and unenforceable. If the load of the vessel during measurement could be exceeded during racing, then a competitor could simply add load (ballast) after measurement to increase its water-line length above the ninety foot limitation imposed by the Deed.

SNG’s measurement procedures require that competing vessels be measured *without* movable ballast on board and allow movable ballast to be added after measurement. In the right conditions, adding water-line length effectively makes the boat faster. See Mercury Bay, 76 N.Y.2d at 282-283. SNG has created a rule which allows it to measure-in without exceeding the length limit prescribed by the Deed, but actually race at a longer (and thus faster) length than allowed by the Deed. This plainly violates the Deed and renders the Deed’s length on load water-line limits meaningless.

It is absurd that the SNG measurement procedures require all crew and all equipment to be on board at the time of measurement yet allow additional ballast to be added afterwards. The weight of equipment, crew, and ballast sinks the vessel lower in the water, and therefore almost always makes the vessel longer at the water-line. This demonstrates the inconsistency of SNG’s measurement procedures. Clearly, SNG has drafted these procedures to gain a competitive advantage of racing at a greater length on the load water-line that the Deed allows. The GGYC

⁴ The fifth paragraph of the Deed provides that “the competing yacht or vessels, if of one mast, shall be not less than forty four feet on the water-line nor more than ninety feet on the *load water-*

vessel was not designed to take advantage of SNG's self-serving measurement method that ignores the plain language of the Deed.

Accordingly, SNG must be directed to measure length on "load water-line" of the competing vessels in the maximum weight, or "load," the competing vessels intend and shall be allowed to have while racing.

II. SNG'S AGREEMENT WITH ISAF REVEALS THAT SNG'S REPRESENTATION TO THE COURT THAT FURTHER RULES CHANGES WOULD REQUIRE ISAF'S APPROVAL WAS FALSE; AND THE AGREEMENT CONTRAVENES THE DEED

At the July 21, 2009 hearing, SNG represented "that if there are any further changes to the rules, they have to be approved by ISAF." (Ex. C at 32.) We now know this assurance was simply untrue. On June 5, 2009, over six weeks prior to that hearing, SNG signed the AC 33 Agreement with two ISAF officials. In that Agreement, ISAF ceded to SNG the authority to make any change to the ISAF Racing Rules of Sailing ("RRS") that SNG wanted, without any further approval from ISAF. (Ex. B ¶ 5(a).)⁵

Not only does the agreement give SNG the right to make rule changes without any review by ISAF, but it is inconsistent with the Deed. The court in Mercury Bay held that the Deed "contemplates that such issues of fairness and sportsmanship be resolved by members of the yachting community rather than by the courts." 76 N.Y.2d at 265. SNG has violated that Deed requirement by eliminating the normal recourse to the sailing jury that competitors have under standard ISAF rules for redress and adjudication, which operate to prevent any unfair rule-

line." (Ex. A. ¶ 5.)

⁵ Almost as important as the racing rules themselves, the official ISAF interpretations of those

changes by the organizing authority.

According to Bryan Willis, a Chief Umpire and Chairman of the Sailing Jury for several America's Cup competitions,⁶ a competitor can seek redress from the ISAF Sailing Jury for actions by an organizing authority which are improper and have caused prejudice. (Ex. W ¶¶ 1, 2, 6.) This includes claims of prejudice arising from the organizing authority's change, modification or abrogation of an ISAF racing rule. (*Id.* ¶ 6.) Such juries have broad power to craft appropriate relief, which could include changing or amending the rules for the match. (*Id.* ¶ 8.)⁷ To limit that power would be inconsistent with the very purpose of an independent dispute resolution body, without which the concept of fair competition would be entirely absent. (*Id.* ¶ 10.)

Yet, SNG has sought to accomplish exactly that by virtue of the AC 33 Agreement, which provides: "*Umpires, the Measurers, the Jury and all officials* appointed for the 33rd America's Cup *shall be bound by the Notice of Race and . . . relevant documentation issued by SNG*" and that these "*officials shall in no circumstances be entitled to modify the Notice of Race, the applicable sailing instructions or other relevant documentation.*" (Ex. B ¶ 7.) (emphasis supplied.) In this way, SNG has disempowered the jury by requiring it to be bound by any rule created by the organizing authority (SNG), without possibility of modification, even if that rule were found to be improper or prejudicial.

rules can also unilaterally be changed by SNG under paragraph 5(a) of the AC 33 Agreement. *Id.*

⁶ Mr. Willis is also a thirty-year member of the ISAF Racing Rules Committee, a twenty-year member of the ISAF Judges Sub-Committee, and author of several books on ISAF rules. (Ex. W ¶ 2.)

⁷ RRS 62.1 provides redress where "a boat's score in a race or series has . . . been made significantly worse by . . . an improper action or omission of the . . . organizing authority." (Ex. N ¶¶ 2, 62.1.) RRS 64 gives an ISAF sailing jury broad authority to redress an organizing authority's "improper action." (*Id.* ¶ 64.2.)

Secondly, ISAF Regulation 18.12.8 (which can only be modified by the ISAF Council), requires ISAF to select the Jurors and Umpires for an America's Cup Match. (Ex. R ¶ 18.12.8.) In direct contravention of that rule, SNG has given itself control over the appointment of sailing jury members. (Ex. B ¶ 8(a).) SNG's imposed selection criteria for the jury members reduces the candidates for these positions to a handful of individuals. (*Id.*) SNG has then given itself power to sidetrack any ISAF nomination from this handful of eligible candidates, by compelling ISAF to either give in to SNG's veto or undergo the rigors of arbitration in Switzerland. (See *id.* at ¶ 12.) As for all other race officials, including measurement officials, SNG has the power to "at its own discretion, select and appoint any other race officials [and] . . . ISAF shall not intervene in the appointment of these other race officials." (*Id.* at ¶ 8(b).)

Next, SNG provides itself with unique access to the race officials. The AC 33 Agreement, in paragraph 7, provides that SNG "may -- at its sole discretion -- request confidential opinions of officials" while in paragraph 8, precludes GGYC from having any such communications with the officials. (*Id.* at ¶¶ 7, 8(a).)

Fundamentally, ISAF rules require that an organizing authority "must be impartial and conduct the racing of all matches in good faith and in the best interests of all the competitors and the regatta as a whole." (Ex. Q.) ISAF rules are thus structured with the assumption that the organizing authority shall act as a neutral third-party in conducting the event. If SNG chooses to wear the two hats of competitor and organizing authority, it must, in its duties as an organizing authority, abide by ISAF rules which require it to be "impartial" and "conduct the racing . . . in good faith and in the best interests of all the competitors." (*Id.*) This is necessary to achieve what the court in Mercury Bay held was contemplated by the Deed: that "issues of fairness and sportsmanship be resolved by members of the yachting community." 76 N.Y.2d at 265. SNG

has taken away the ability of the ISAF jury to determine such issues of fairness and sportsmanship by disempowering the jury as described above, and by unilaterally controlling all of the rules and interpretations. (Ex. W ¶¶ 9, 11.)

SNG cannot justify its violation of the rules and its fiduciary duty by pointing to prior America's Cup agreements with ISAF. All such prior agreements, including for the 32nd America's Cup, have been the result of a consent process between the defender and the challenger in which an agreed "Protocol" (conditions governing the match) was already in place when the ISAF agreement was signed. (Ex. F ¶¶ 7-9.) SNG's AC 33 Agreement, in contrast, is not the result of a mutual consent process, and has none of the protections afforded to the challenger in the past.

Accordingly, SNG should be directed that, notwithstanding the AC 33 Agreement:

(1) the sailing jury, upon a request for redress, (i) shall be permitted to review any SNG rule to determine whether it constitutes an improper action under RRS 62 or violates any ISAF rule or recognized principles of sportsmanship and fair play under RRS 2, and (ii) shall be empowered to order any and all remedies, pursuant to the ISAF rules, including modification or deletion of any SNG rule;

(2) SNG shall not participate in any way with ISAF's selection of jury members and umpires for the match;

(3) SNG shall direct in writing that the sailing jury and all race officials for the America's Cup match act with utmost neutrality and not to favor one competitor over the other in performing their official functions; and

(4) in the fulfillment of any duty as the organizing authority, SNG must be impartial and conduct the racing of all matches in good faith and in the best interests of all the competitors and the regatta as a whole.

III. SNG SHOULD NOT BE PERMITTED TO INTERFERE FURTHER WITH ISAF'S APPROVAL PROCESS FOR RULES CHANGES OR MODIFY THE STANDARD ISAF RULES UNILATERALLY

GGYC argued in its July 14, 2009 brief that the Deed requires that the trustee's rules and sailing regulations govern the match and that these may not be changed unilaterally by the defender. The Court's July 29th decision suggested two concerns with this. First, the Court recognized that the problem of empowering one competitor to create new rules that could disqualify the other, stating that "[k]ey to this proceeding" was SNG's counsel's representations that the new measurement rules would not disqualify GGYC's vessel. Golden Gate Yacht Club, No. 602446/07, slip op. at 4-5. And, at the same time, the Court expressed concern about relying on the mutual consent process, observing that the "race can still be held regardless that the parties have failed to agree" on terms of the race. (*Id.* at n.1.)

However, SNG's manipulation of the ISAF rules and issuance of its own brand of non-standard measurement procedures, (*supra* pp. 3-8), have now conclusively demonstrated that a construction of the Deed that permits the defender to select the rules destroys the competitive balance of the challenge cup struck by the Deed.⁸ The default match paragraph of the Deed expressly provides that the location for the race "shall be selected" by the defender. (Ex. A ¶ 8.)

⁸ As of the July 29th decision, the AC 33 Agreement had not been disclosed to GGYC. Accordingly, GGYC makes this motion to renew, as it is now evident that SNG's representation to the Court that further rule changes would require ISAF approval was false, as evidenced by the unprecedented AC 33 Agreement, and that SNG's manipulation of the ISAF jury contravenes the

It also permits the defender to “name its representative vessel” at the time of the race. Id. It does not, however, give such temporal latitude with regard to the defender’s “rules and sailing regulations.” Rather, it says that “these races shall be sailed subject to its rules and sailing regulations as far as the same do not conflict with the provisions of this deed of gift . . .” (Id.) This provision does not say that the defender “shall select” what rules it wants to apply; it does not say that the defender can “name” or disclose its racing rules at the time of the race, as it can disclose its racing vessel.

Consistent with custom at the time, the Deed presumes that the defender yacht club would have a body of rules for its regattas.⁹ This is the only reading of the Deed that avoids absurd results.¹⁰ As George L. Schuyler, the Deed settlor, stated regarding the defender NYYC’s rules changes for the 1870 match after the notice of challenge had been received:

It seems to me that the [position of the defender, NYYC] renders the America’s trophy useless as ‘a Challenge Cup’ and that for all sporting purposes it might as well be laid aside as family plate. I cannot conceive of any yachtsman giving six months’ notice that he will cross the ocean for the sole purpose of entering into an almost hopeless contest for this Cup.

See Mercury Bay, 76 N.Y.2d at 282. The NYYC had announced that it would defend the Cup with a fleet instead of one vessel after the challenger for the Cup had already crossed the Atlantic. Id.

Deed.

⁹ The history contemporaneous with the Deed demonstrates that the defender had a body of rules and it provided its rules and sailing regulations promptly after receiving a challenge. The NYYC letter accepting the challenges of the *Genesate* (1885 Cup match) and *Galatea* (1886 Cup match) provided a copy of the NYYC club rules and, in that very letter, requests mutual consent for certain modifications to those rules. (Ex. R.) The same is true of the first challenge received after execution of the 1887 Deed, on behalf of the vessel *Valkyrie*, in which the NYYC again provided its club rules and, in that very letter, requests mutual consent for certain modifications. (Ex. S at 3.) If the NYYC could have simply modified these rules unilaterally there would have been no reason for it to attempt to mutually consent to their modification.

¹⁰ To avoid duplication, GGYC incorporated herein by reference, but does not repeat, its brief of July 14, 2009.

Similarly, to interpret the Deed to permit SNG to create new club rules just for the America's Cup event which disqualify the challenger would render the America's Cup "useless as a 'Challenge Cup'." *Id.* Having observed GGYC's competing vessel, SNG simply announced rules and measurement procedures that would disqualify her. (See *supra* pp. 3-8.) Under such a flawed construction of the Deed, a defender would never be precluded from changing the rules at any point. Indeed, if things are not going well after the first race under previously announced rules, a defender could simply make up new ones for the next race. Even a seemingly innocuous rule change can throw off the entire competitive balance in an event like the America's Cup, which involves cutting-edge competition and razor-thin-margins. (See Ex. E ¶¶ 3, 5; see also *supra* n.1.)

As vividly demonstrated by SNG's own rule making and in particular its AC 33 Agreement, as detailed above, the only reasonable interpretation of the plain language of the Deed, consistent with its contemporaneous custom and practice, is that the defending club's regular racing rules at the time of the challenge apply to the match unless the competitors mutually consent otherwise. It simply makes no sense that the donor intended that the competitors first engage in mutual consent discussions over the "rules and sailing regulations" for the match under the mutual consent clause, but that the defender is empowered by the Deed's default paragraph to simply impose whatever rules it wants, whenever it wants, once the mutual consent process is over. Rather, the mutual consent process contemplated by the Deed presupposes that there is a definitive set of rules (the defender's club rules) which would be binding on both the defender and the challenger, unless they mutually agreed otherwise. (See Ex. A ¶ 8.) The default paragraph and mutual consent clause cannot be read separately, but must be interpreted harmoniously to construct the plain meaning of the Deed.

Further, while there are certain ISAF RRS provisions the organizing authority normally may modify under RRS 86.1 without ISAF approval (but always subject to notice and fairness requirements so as not to prejudice a competitor), *all other* RRS rules may only be modified by obtaining ISAF approval pursuant to RRS Rule 86.2 and ISAF Regulation 31.1.3. (Ex. N ¶ 86.2; Ex. P ¶ 31.1.3.)¹¹ As detailed above, (*supra* p. 9-12), in the AC 33 Agreement, SNG has eviscerated the ISAF authority to follow these standard ISAF rules.

Accordingly, SNG should conduct the match in accordance with the standard ISAF rules, except for rules restricting vessel design, including RRS 49 through 54 (which the Court has held are in conflict with the Deed), and any changes to those rules can only be made with the consent of GGYC and with the requisite approval of ISAF.¹²

IV. PUBLIC DISCLOSURE OF THE AC 33 AGREEMENT IS COMPELLED BY NEW YORK LAW, THE CONFIDENTIALITY STIPULATION, AND THE OBLIGATIONS OF A NEW YORK CHARITABLE TRUSTEE

The AC 33 Agreement must be declassified, since its content is a matter of public interest and not confidential material as defined in the Stipulation and Order for the Production and Exchange of Confidential Information dated July 30, 2009 (“Confidentiality Stipulation”) or material that can be protected from disclosure to the public pursuant to 22 NYCRR § 216.1

¹¹ These rules require that modifications to the RRS (beyond those permitted under RRS 86.1) must be approved by the ISAF Executive Committee, in consultation with the Chairman of the Racing Rules Committee. And, such rules changes can only be made upon a finding by the ISAF Executive Committee that “such changes be of *clear necessity or pressing importance*.” (Ex. P ¶ 31.1.3.)

¹² In its Motion of July 14, 2009, GGYC asserted that the ISAF rules extant at the time of the challenge apply to the upcoming match, which at that time were the Racing Rules of Sailing for 2005-2008. Motion, at 4-5. ISAF has promulgated its current rules, the Racing Rules of Sailing for 2009-2012. (Ex. N.) For the purposes of this motion, GGYC will not contest the application of the current 2009 ISAF rules, as opposed to the rules that were in place at the time of the challenge.

(2009). See Danco Labs. Ltd. v. Chem. Works of Gideon Richter, 711 N.Y.S.2d 419, 424 (1st Dep't 2000).

First, the Confidentiality Stipulation defines “confidential information” as “trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party’s business or the business of any of that party’s customers or clients.” (Ex. T ¶ 3) see also Bristol, Litynski, Wojcik, P.C. v. Town of Queensbury, 562 N.Y.S.2d 976, 977-78 (3d Dep't 1990) (confidentiality “orders . . . should be limited to trade or business secrets”).¹³ The AC 33 Agreement does not contain any such information.

Indeed, such rules are presumptively public; RRS 86.2 provides that rules changes to the RRS (beyond those permitted in RRS 86.1 -- which are also made public in the Notice of Race) must be made public “in the notice of race, and sailing rules and on the events official notice board,” and Regulation 31.1.3 further requires sending immediate notice of these modifications to all one-hundred twenty-six Member National Authorities. (Exs. N ¶ 86.2; Ex. P ¶ 31.1.3.)

Second, a document regarding the rules and sailing regulation for an America’s Cup match, which in its last rendition was televised to over a billion people, is precisely the type of document New York law mandates cannot be sealed; sealing this document would be equivalent to sealing the rules of play governing National Football League games. See 22 NYCRR § 216.1

¹³ Harm to reputation is *not* a cognizable harm for purposes of sealing a document. See, e.g., Griffin v. Scudder, Stevens & Clark, N.Y.L.J., June 28, 1991, at 22, col. 3 (Sup. Ct., New York County, Baer, J.) (“Some things will clearly not suffice to justify a sealing order,” including “the desire of a corporation to protect its reputation, statute or image.”); Liapakis v. Sullivan, 736 N.Y.S.2d 675, 676 (1st Dep't 2002) (prejudice to reputations “caused by plaintiff’s allegations of

(2009) (“a court shall *not* enter an order in any action or proceeding sealing the court records . . . *except upon a written finding of good cause* . . . In determining whether good cause has been shown, *the court shall consider the interests of the public* as well as of the parties.”) (emphasis supplied); Mancheski v. Gabelli Group Capital Partners, 835 N.Y.S.2d 595, 598 (2d Dep’t 2007) (“good cause” exists only where the party wishing to seal has demonstrated that “public access to the document at issue will likely result in harm to a compelling interest.”); L.K. Station Group v. Quantek Media, 872 N.Y.S.2d 691, 2008 NY Slip Op 51827U, at *2 (N.Y. Sup. Ct. 2008) (“[T]he presumption of the benefit of public access to court proceedings takes precedence, and sealing of court papers is permitted only to serve compelling objectives, *such as when the need for secrecy outweighs the public’s right to access, i.e. in the case of trade secrets and the like.*”) (emphasis supplied); Danco Labs. Ltd., 711 N.Y.S.2d at 424 (“New York’s presumption of public access is broad . . . [and t]he public interest in openness is particularly important on matters of public concern, even if the issues arise in the context of a private dispute.”).

The public interest in the AC 33 Agreement is amply demonstrated by the many media inquiries seeking a copy of the AC 33 Agreement, including Stuart Streuli (Senior Editor of *Sailing World* magazine), Craig Leweck (Publisher and Editor of *Scuttlebutt* North America), Bernie Wilson (sports writer for the Associated Press), Eric Sharp (outdoor writer for the *Detroit Free Press*), Cory Friedman (legal commentator and columnist for *Scuttlebutt* North America), Stuart Alexander (yachting writer for *The Independent* (UK)), Bob Fisher (columnist for *Yachts & Yachting Magazine* (UK) and *The Guardian* (UK)) and Richard Gladwell (editor of the American and New Zealand editions of the *Sail-World* newsletter and website). (Ex. F ¶ 11.)

unethical and criminal conduct” did not outweigh “the clear public interest in such allegations”).

The Senior Editor of Sailing Anarchy, the world's most popular sailing news and information website, receiving, on average, between 800,000 and 900,000 unique visitors per month, states in his affidavit that:

Without question, one of the most sought-after pieces of information by the worldwide sailing community is the content of the agreement entered into by Societe Nautique de Geneve ("SNG") and the International Sailing Federation ("ISAF"). If the information in that agreement were made public, it would be "top of the front page" news on our website, and would likely be the same in every other sailing publication in the world that covers the America's Cup.

(Ex. U ¶ 6.) Accordingly, the AC 33 Agreement is a clearly a matter of public interest and its confidential designation under the Court's standard form confidentiality stipulation should be removed.

CONCLUSION

Accordingly, GGYC requests that SNG be directed that:

I. (i) GGYC's challenge vessel need only "not exceed" its Certificate dimensions and a precise match of dimensions is not required; (ii) SNG shall only include the hull(s) (*i.e.*, exclude rudders) of GGYC's challenge vessel when measuring length on load water-line; and (iii) SNG shall measure length on "load water-line" of the competing vessels with the maximum weight the competing vessels intend to have while racing.

II. notwithstanding the AC 33 Agreement, (i) the sailing jury, upon a request for redress, shall be permitted to review any SNG rule to determine whether it constitutes an improper action under RRS 62 or violates recognized principles of sportsmanship and fair play under RRS 2 and be empowered to order any and all remedies, pursuant to the ISAF rules, including modification or deletion of any SNG rule; (ii) SNG shall not participate in any way

with ISAF's selection of jury members and umpires for the match; (iii) SNG shall direct in writing that the sailing jury and all race officials for the America's Cup match act with utmost neutrality and not to favor one competitor over the other in performing their official functions; and (iv) in the fulfillment of any duty as the organizing authority, SNG must be impartial and conduct the racing of all matches in good faith and in the best interests of all the competitors and the regatta as a whole.

III. notwithstanding the AC 33 Agreement, SNG should conduct the match in accordance with the standard ISAF rules (which are the 2009-2012 ISAF Racing Rules of Sailing; 2009-2012 ISAF Regulations (including ISAF Anti-doping rules); 2009-2012 ISAF Equipment Rules of Sailing; and the 2009-2012 Swiss Sailing Prescriptions), except for rules restricting vessel design, including RRS 49 through 54 (which the court has held are in conflict with the Deed), and any changes to those rules can only be made with the consent of GGYC and with the requisite approval of ISAF.

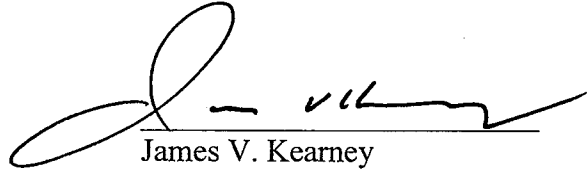
IV. the AC 33 Agreement's confidential designation under the Court's standard form confidentiality stipulation should be removed.

Dated: New York, New York
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