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

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| Golden Gate Yacht Club,<br><br>Plaintiff,<br><br>v.<br><br>Societe Nautique de Geneve,<br><br>Defendant,<br><br>Club Nautico Espanol de Vela,<br><br>Intervenor-defendant. | Index No. 602446/07 |

**GOLDEN GATE YACHT CLUB'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO ENFORCE THE APRIL 7, 2009 ORDER AND JUDGMENT REGARDING THE DEED'S CONSTRUCTED IN COUNTRY REQUIREMENT**

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Golden Gate Yacht Club ("GGYC") respectfully submits this reply memorandum of law in further support of its motion for relief at the foot of a judgment to enforce compliance with the Order and Judgment entered on April 7, 2009: specifically, for an order declaring that the Deed of Gift requires that the sails of competing vessels must be constructed in the country where the competing yacht club resides and that SNG's now-admitted intended use of "3DL" sails would violate the Deed of Gift.

## PRELIMINARY STATEMENT

The Deed of Gift, by its plain and simple terms, requires that the defender's "yacht or vessel" be constructed in the country of the defender. The Deed of Gift does not say that only the hull of the defender's vessel must be constructed in the defender's country. It does not carve out an exemption for the vessel's sails – the component that propels the boat and one of the major determinants of a vessel's competitiveness. Nor does it say that yachts may be constructed in pieces abroad so long as they are "assembled" or "finished" in country. This fundamental part of the Deed of Gift has shaped the character of this great sailing competition for nearly 130 years.

GGYC went to extraordinary efforts to comply with the Deed of Gift's constructed-in-country provision, including:

- Expending significant resources to hire its own batten designer and to design, engineer and manufacture the battens at BMW/ORACLE Racing's ("BOR") facility in Anacortes, Washington, rather than using battens from New Zealand which could have been obtained at much lower cost;

- Foregoing the use of masts made by Southern Spars in New Zealand which would have been ideal;

- Foregoing the use of the best customized rods which are made at a firm in Switzerland;

- Using sail furlers manufactured in the United States rather than potentially superior non-U.S.-made products;

- Building a hydraulics system in the United States rather than purchasing it from GGYC's preferred vendor in Italy;

- Establishing a facility for finishing sails in Minden, Nevada, rather than using GGYC's operating and suitable sail loft in Valencia from the previous campaign; and

- Delaying its departure from San Diego by sixteen months in order to complete all major modifications in the United States, including adding an engine, removing the winch pedestals, adding the wing sail, adding water ballast tanks and the corresponding plumbing and hoses, and fitting of new floats, new cockpit arrangements, new foils, and new rudders. (Affidavit of Mark Turner (Bowman Reply Aff. Ex. A) ¶ 2.)

SNG, on the other hand, has once again ignored the Deed and by its own admission has had sails made in the United States.

GGYC is not seeking to delay the race; it is ready and eager to begin the match on February 8. It is not trying to disqualify SNG's yacht; that is why it is seeking to have this issue resolved now, *before the race*. GGYC is simply seeking, as it has for the past two and a half years, a contest on the water in which both teams abide by the same set of rules.

This issue must be decided now, before the race, to ensure that the match is decided on the water and not in the courts, and GGYC desires, and has the right, to win the match on the water. Moreover, deciding this issue before the match poses *no prejudice* to SNG. If SNG prevails on the motion, it has nothing to complain about. If it loses the motion, at least it has the opportunity to avoid disqualification and forfeit. It is regrettable that this issue has arisen so close to the match, but until last month there was no reason to believe that SNG would seek to race using American-made sails without GGYC's consent.

This issue is not a complex issue to resolve; it rests on three simple propositions: (1) the Deed of Gift requires that the defender's "yacht or vessel" be constructed in the defender's

country, (2) sails are part of a yacht or vessel, and (3) SNG has admitted that its sails were custom-made in pieces in Nevada. All that is required is an application of a plain and unambiguous provision of the Deed of Gift to admitted facts.

SNG's opposition brief does nothing to refute these simple points. Its primary argument – that the constructed-in-country requirement somehow does not apply to the yacht's sails – is refuted by the plain language of the Deed of Gift, by the circumstances surrounding the adoption of the provision, and by 130 years of America's Cup practice.

On its face, the term yacht or vessel (as used in the Deed of Gift) includes the sails. A sailboat cannot sail without sails. Because the Deed of Gift is unambiguous on this point, the Court should not consider extrinsic evidence. In any event, the extrinsic evidence confirms the plain meaning. The very evidence cited by SNG shows that the use of foreign-made sails was at the center of the controversy that led to the amendments to the Deed of Gift and that ***prior to*** the addition of the constructed-in-country provision, use of foreign-made sails was the norm in the America's Cup but that ***after*** the Deed was amended, foreign-made sails were not used at all except in isolated cases where the defender "turned a blind eye" or there was a "relaxation of the rules" by mutual consent.

SNG then argues that its sails were in fact constructed in Switzerland – arguing that constructed really means "assembled" and that because SNG's sails were shipped to Switzerland in pieces and then "joined" and "finished" in Switzerland, they were constructed in Switzerland. Under that argument, SNG could have its entire vessel built in the United States, shipped in pieces to Switzerland, and then put together there. That is plainly not what the Deed of Gift requires.

## ARGUMENT

### I. SNG'S VESSEL DOES NOT COMPLY WITH THE DEED'S CONSTRUCTED-IN-COUNTRY PROVISION.

#### A. The Constructed-in-Country Clause Applies to a Yacht's Sails.

##### 1. The Plain Meaning of the Term "Yacht or Vessel" In The Deed of Gift Includes the Sails.

GGYC demonstrated in its opening brief that the plain meaning of the words "yacht or vessel" as used in the Deed of Gift includes the yacht or vessel's sails. Indeed, SNG itself argued that a yacht comprises "a series of elements that are needed to sail the boat". (Bowman Aff. Ex. I; Ex. H at 7.)[1] Obviously a sailboat cannot sail without sails. SNG's attempts to avoid this plain and unambiguous meaning of the language of the Deed of Gift fail.

*First*, SNG argues that the First Department somehow implicitly held that a yacht or vessel does not encompass every aspect of a boat when it held that the rudder is not included in the measurement of a boat's length on load waterline. (SNG Opp. at 20.) The First Department did nothing of the sort. As GGYC argued to this Court and the First Department, the issue was not whether a vessel's rudder is part of the vessel – it plainly is – but whether the rudder is included in the measurement of the length on load waterline. (*See* GGYC's Memorandum of Law in Support of its Motion to Enforce The April 7, 2009 Order and Judgment, dated September 2, 2009 at 5-7 and GGYC's Reply Memorandum dated September 29, 2009 at 8-11.) The First Department thus said nothing – implicitly or otherwise – about what comprises a yacht

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[1] References in the form of "Bowman Aff. Ex. __" refer to the Affirmation of Philip M. Bowman in Support of GGYC's Motion to Enforce Compliance with the April 7, 2009 Judgment and Order Regarding the Deed's Constructed in Country Requirement, dated January 12, 2010. References in the form of "Giuffra Aff. Ex. __" refer to the Affirmation of Robert J. Giuffra, Jr. in Support of SNG's Memorandum Of Law in Opposition To GGYC's Motion To "Enforce" The April 7, 2009 Order and Judgment and Cross-Motion to Enforce The April 7, 2009 Order and Judgment, dated January 21, 2010. References in the form of "Bowman Reply Aff. Ex. __" refer to the Reply Affirmation of Philip M. Bowman in Further Support of GGYC's Motion to Enforce Compliance with the April 7, 2009 Judgment and Order Regarding the Deed's Constructed in Country Requirement and in Opposition to SNG's Cross-Motion to Enforce The April 7, 2009 Order and Judgment, dated January 27, 2010.

or vessel.

*Second*, SNG quotes dictionary definitions showing that not all yachts and vessels have sails. (SNG Opp. Br. at 20-21.) Of course not all yachts and vessels have sails. The point is that the sails are part of a *sailboat*. SNG's argument that the words "propelled by sails only" in the Deed of Gift show that the term "yacht or vessel" excludes the sails is frivolous. A car is propelled by an engine. That does not mean the engine is not part of the car.

*Third*, SNG references maritime regulations governing whether a vessel is deemed "United States built" and therefore "allowed to engage in U.S. coastwise trade." (*Id.* at 21.) Current maritime regulations plainly cannot show what the settlor intended in 1882. *See In re Escher's Will*, 75 A.D.2d 531, 533 (1st Dep't 1980) ("The 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."). Maritime regulations from 1882 are irrelevant as well. What was required by United States maritime trade regulations simply has no bearing on what the settlor of the Deed of Gift intended.

**2. The History of the Deed of Gift and Its Interpretation for 130 Years Confirms that the Constructed-in-Country Provision Applies to the Sails.**

As set forth above, under the plain language of the Deed of Gift, the entire yacht or vessel, which includes its sails, must be constructed in country. SNG argues that despite this plain language, the history of the Deed of Gift somehow shows that the requirement was really only meant to apply to the hull of the vessel. SNG relies, for this argument, on the unsworn "Report and Declaration" of John Rousmaniere. That "Report and Declaration" is not evidence and cannot be relied on by the Court. *See* C.P.L.R. 2214 (allowing supporting affidavits, not "reports" or declarations on a motion). Furthermore, its core thesis – that the Deed of Gift

requires that the competitors "should have similar access to state-of-the-art equipment" (Rousmaniere Decl. ¶ 11) – is directly refuted by the Court of Appeals decision in *Mercury Bay Boating Club Inc. v. San Diego Yacht Club,* 76 N.Y.2d 256 (1990). In any event, the historical evidence cited by Mr. Rousmaniere confirms that the Deed's constructed-in-country provision applies to sails. (*See* Affidavit of William I. Koch ("Koch Aff.") (Bowman Reply Aff. Ex. B).)

*First*, Mr. Rousmaniere asserts that the Deed of Gift was rewritten in 1882 in response to the performance of the prior two challengers, *Countess of Dufferin* and *Atalanta*. (Rousmaniere Decl. ¶ 34.) He asserts that the complaints about these two challengers were about the model (which he says, without support, means the "hull shape") and that the Deed of Gift's constructed-in-country language therefore must have been addressing only hulls, not sails or other parts of the vessel. However, in its opening brief, GGYC quotes several sources that SNG simply ignores showing that the complaints about the *Countess of Dufferin* and *Atalanta* were specifically about their sails, including in particular that they had been made in America (GGYC Br. at 6-8; Koch Aff. ¶¶ 5-6):

- "Her sails were so poorly cut that they had to be ***taken off and recut by the renowned American sailmaker, Wilson***. Later, four feet were added to her main boom to give her ***more mainsail***." (Bowman Aff. Ex. K at 41.)

- "***All her sails, also, with a few exceptions, had been made in New York***, and so, as a daily paper remarked, whichever way the contest terminated, it would be a victory for the American ***model***." (Bowman Aff. Ex. L at 21.)

- "There is in reality nothing about her [the *Countess of Dufferin*] which would lead anyone looking at her at a little distance to pronounce her a foreign yacht. . . . ***[F]rom the cut of her jib to the hoist of her mainpeak***, the *Countess of Dufferin*, so far as appearances go, is a thorough Yankee vessel; she has a Yankee model, a Yankee rig, and is furnished with a patent Yankee steering apparatus, bearing the imprint of a dealer in that sort of wares located in Cannon street, in this City." (Bowman Aff. Ex. M.)

- "[The first Deed] held until after the *Atalanta-Mischief, Madeleine-Countess of Dufferin* races, when a new deed was made. ***The reason for the change*** was that

the two Canadian boats were towed through canals, and the dates of the races delayed time and again. ***Not only this, American riggers fitted this pair out. John Sawyer practically made over the sails,*** and so 'fresh water' were those in control of the *Countess of Dufferin* that the late Joe Ellsworth sailed her in one race, and he had a south side of Long Island oysterman crew to help him out.") (Bowman Aff. Ex. N.)

- "Had this yacht [*Countess of Dufferin*] sailed these races within a reasonable time after her arrival, in all the maiden bloom of her Canadian builders' art and skill, she would have been beaten hull down today, without a shadow of doubt. But with a keenness worthy of the shrewdest Yankee, her owner had not been here many days before he saw that his yacht was a monstrosity, compared with the club yachts of the squadron he had come to contend with. He at once called to his aid all the combined yachting skill which New York city possessed, and completely transformed his yacht: ***booms[2] were lengthened out, clouds of canvas were fitted*** . . . a full crew of the choicest Yankee tars were selected . . . the best sailing master in New York was engaged . . ."). (Bowman Aff. Ex. O at 49.)

As the foregoing makes clear, the extrinsic evidence confirms the plain language of the Deed of Gift and shows that sails were at the center of the controversy that led to the 1882 amendments to the Deed of Gift. (*See also* Koch Aff. ¶¶ 7-10.)

*Second*, citing Mr. Rousmaniere, SNG asserts that the "consistent historical pattern shows that, sails, unlike hulls, 'were not regarded as subject to nationality restrictions'". (SNG Opp. Br. at 12.)[3] In fact, the evidence offered by SNG shows exactly the opposite. It shows that ***prior to*** 1881, immediately before the addition of the constructed-in-country requirement, sails were commonly not constructed in country. (Koch Aff. ¶ 9.) Then, from 1882 until 1958, SNG cites a single example from 1934 where the New York Yacht Club ("NYYC") lent a domestic sail to a challenger as a "courtesy". (Rousmaniere Decl. Ex. D.) (*See also* Koch Aff. ¶ 9.)

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[2] A boom is a spar extending from a mast to hold the bottom of a sail outstretched.

[3] According to Mr. Rousmaniere, it would appear that the America's Cup was intended to be, and has been, a competition over hull design. In the opinion of John Marshall, the former president and CEO of North Sails and design project manager for the 1987 and 1988 America's Cups, there are two elements to the performance of a competitive sailing vessel: hydrodynamic performance (having to do with the action of the water on the vessel's hull) and aerodynamic performance (having to do with the action of the wing on the vessel's sails). Both elements are at the heart of the America's Cup and they always have been. Affidavit of John Marshall (Bowman Reply Aff. Ex. C) ¶¶ 7-9.

SNG's other examples are of the use of foreign raw materials, such as cotton yarn, something that GGYC has never argued is prohibited by the Deed of Gift. (*Id.*) [4]

The circumstances as described by Mr. Rousmaniere surrounding the use of foreign-made sails in 1958 and 1962 only serve to confirm that it was widely understood that the Deed of Gift prohibited the use of foreign-made sails. Even crediting Mr. Rousmaniere's account, the British challenger used a "French spinnaker" in 1958 because the defender New York Yacht Club "turned a blind eye." (Rousmaniere Decl. ¶ 42.) [5] Similarly, Mr. Rousmaniere's account makes clear that the Australian challenger was only able to use American-made sails in 1962 because of a "relaxation of the rules". (Rousmaniere Decl. Ex. R.) Far from showing that it was understood that sails were not subject to the constructed-in-country provision, these examples show precisely the opposite. Thus all of the historical evidence cited by SNG directly refutes its position and confirms GGYC's.[6]

Finally, Mr. Rousmaniere asserts that one of the fundamental ideas underlying the 1882 Deed of Gift is that "the America's Cup cannot survive without good, close racing" and that as a result, the "teams should have similar access to state-of-the art equipment." (Rousmaniere Decl. ¶¶ 10-11.) This assertion finds no support in the language of the Deed of Gift or anywhere else

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[4] Mr. Rousmaniere describes the efforts that NYYC Commodore J.P. Morgan undertook in order to establish a Ratsey & Lapthorn sail loft in City Island, New York. When asked if the loft would make sails for the defender *Reliance*, Lapthorn responded, "It is what we came here for." Rousmaniere Decl. ¶ 15. If anything, this suggests, prior to setting up shop in New York, Ratsey & Lapthorn was not able to make sails for the American defenders, and that J.P. Morgan went to great lengths to change that.

[5] Mr. Rousmaniere cites no documentary evidence for the proposition that the spinnaker raced by the British challenger in 1958 was actually constructed in France. In fact, according to a contemporary source, that spinnaker was built in the Ratsey & Lapthorn sail loft in Gosport, England. Koch Aff. ¶ 9.

[6] In its opening brief, GGYC showed that when challengers and defenders sought to relax the Deed's constructed-in-country requirement, they did so through a mutual consent process that resulted in an explicit agreement to do so. GGYC Br. at 8-9. That is exactly what happened in the 30th America's Cup. As stated in the affidavit of William Dyer Jones, who has forty years of experience in the America's Cup and who represented the Challenger of Record, NYYC, during the negotiations of the protocol governing the 30th America's Cup, it was understood that without the mutual agreement of the defender and the challenger of record, non-American competitors would not have been permitted to race with 3DL sails from North Sail's plant in Minden, Nevada. Affidavit of William Dyer Jones (Bowman Reply Aff. Ex. R) ¶¶ 4-5.

for that matter. Indeed, it directly contradicts the central holding of *Mercury Bay*. Mercury Bay's argument was that "San Diego's defense of the Cup by sailing an inherently faster multihull catamaran against a larger, but slower monohull yacht was unsportsmanlike, antithetical to the concept of 'friendly competition between foreign countries' and a 'gross mismatch' in violation of the of America's Cup Deed of Gift and San Diego's obligations as trustee." *Mercury Bay*, 76 N.Y.2d at 259-60. The Court of Appeals rejected that argument, holding that there is nothing in the Deed of Gift requiring that competing vessels be evenly matched. *Id.* at 267-270.

**B. SNG's Sails Were Made in the United States.**

In its opposition, SNG admits that the separate sections of its sails were manufactured in the United States, but argues that the sails were nevertheless constructed in Switzerland because these pieces were joined together and "finished" in Switzerland. (SNG Opp. Br. at 24.) By this argument, SNG could construct its entire vessel in the United States in pieces, ship the pieces to Switzerland to be put together and then claim its boat was constructed in Switzerland.

Although SNG tries to cloud this issue by emphasizing the labor involved in the joining and finishing process, it cannot escape the fact that its sails were manufactured in Minden, Nevada. As explained in the affidavit of John Marshall, the former President and CEO of North Sails and a participant in nine America's Cup campaigns, a sail is fundamentally a three-dimensionally curved, aerodynamic surface and the construction of a sail is the process of creating that three-dimensionally curved, aerodynamic surface. (Affidavit of John Marshall ("Marshall Aff.") (Bowman Reply Aff. Ex. C) ¶¶ 10-11.)

Conventional sails are made by assembling flat sheets of sailcloth, using various techniques to simulate or approximate a continuously smooth surface. (Marshall Aff. ¶ 12.) In

North Sails' 3DL process, the surface curvature is created using a mold. (Marshall Aff. ¶ 13.) The process involves layering films and yarns onto the mold, installing batten pockets to the sail designer's requirements and then heating the layers of films and yarns to form a laminate. (Affidavit of Craig Phillips ("Phillips Aff.") (Bowman Reply Aff. Ex. D) ¶¶ 8-16.) The product that comes off the mold in Minden, Nevada is a fully three-dimensionally curved surface exactly specified by the sail designer. (Marshall Aff. ¶ 14.) If the dimensions are small enough, an entire sail can be constructed from one mold. If the dimensions are larger than the mold, it may be impractical to use a single mold. Then multiple molds will be used and the individual pieces are designed to be removed from each mold and then glued or otherwise joined together. (*Id.*)

Before a sail undergoes the finishing process, it is sometimes referred to as a "blank." A 3DL "blank," however, is a fully formed three-dimensional surface. (*Id.* ¶ 17.) Notably, North Sails refers to their sail lofts around the world where the 3DL sails are assembled into a completed sail as "finishing facilities." (Phillips Aff. ¶ 17.) Only the Minden, Nevada and Sri Lanka 3DL plants where the molding process described above takes place are called are called "construction" or "manufacturing" facilities. (*Id.*)

A further indication of the degree to which a sail is completed before it is joined and finished is the cost to finish a sail compared to the cost of a "blank." The cost of GGYC's 3DL "blanks" from North Sails average approximately $200,000 for a headsail and $400,000 for a mainsail. The finishing cost, using a labor rate of $40 per hour and allowing for materials, is between $3500 and $7000, depending on the sail. (*Id.* ¶ 20.) By that measure, the finishing process accounts for ***less than 2%*** of the cost of the sail. Notably, when GGYC bought its sails from North Sails, it received only a 9% discount for having the sails delivered in unjoined,

unfinished pieces as opposed to a fully joined, finished sail. (Bowman Reply Aff. Ex. E.)[7] Furthermore, when North Sails invoiced BMW/ORACLE Racing ("BOR"), it described the product that it delivered as a "multihull headsail" and deducted a 9% "mold only" discount. (Bowman Reply Aff. Ex. F.)

As the foregoing demonstrates, it simply cannot be said that 3DL sails – even if they are delivered in pieces that need to be joined and finished – are not made in Nevada.

Moreover, the purported Swiss government certification, tellingly issued on the same day that SNG served its opposition brief, that SNG's sails were entirely "manufactured in Switzerland" is meaningless. (*See* Sahli Aff. and exhibits thereto.) It is based, on its face, on SNG's own self-serving statements, and even crediting SNG's own description of the process, it is impossible to conclude that SNG's sails were *entirely* manufactured in Switzerland. In any event, the standards used by the Swiss government to determine what can be marketed as having been made in Switzerland are totally irrelevant here. The question is what the settlor intended, not what the Swiss government is willing to certify as having been made in Switzerland.

In any event, even under SNG's own misleading description of the manufacture of its sails, it is clear that at least a significant part of the manufacture was done in the United States. The Deed of Gift does not require that the defender's vessel be *partly* or even *mostly* constructed in the defender's country. It requires that it be *constructed* in the defender's country.

## II. GGYC'S MOTION IS TIMELY, PROPER AND SHOULD BE DECIDED BEFORE THE MATCH.

### A. GGYC's Motion is Timely and Proper.

Because SNG has no argument on the merits, it seeks to characterize GGYC's motion as somehow procedurally infirm. *First*, SNG complains that the only way it can race on February 8

[7] The contract between BOR and North Sails states that BOR shall specify "whether *the sail* is to be delivered finished or unfinished (mold only)." Bowman Reply Aff. Ex. E (emphasis added).

is if it uses its current sails. That may or may not be the case – SNG may well already have Swiss-made sails in Valencia – but that would be no reason to permit SNG to race in a non-compliant vessel. SNG knows what the Deed of Gift says, and yet chose to ignore the Deed, preparing for a match with a vessel that does not comply.

*Second*, SNG argues that GGYC unreasonably delayed in bringing this motion. In support of that argument, SNG asserts that GGYC has known "for years" that 3DL sails are not made in Switzerland and yet never raised the issue before this Court. (SNG Opp. Br. at 15.) In fact, however, although GGYC observed SNG's *Alinghi 5* using 3DL sails as early as July 2009, at that time there was no reason to believe that SNG intended to race with those sails. (Affidavit of Russell Coutts ("Coutts Aff.") (Bowman Reply Aff. Ex. G) ¶ 6.) It is common to practice with one set of sails and race with another. Indeed, GGYC's "wing" sail was unveiled for the first time in November, after practicing for over a year with different sails.

Indeed, GGYC believed that SNG itself was developing a wing sail. (*Id.* ¶ 5.) Among other things, SNG had recruited wing sail experts to its team, including Duncan MacLane, a renowned designer and key member of the 1988 defense of the America's Cup which used a wing sail (*id.*) and GGYC noted that SNG was testing only a small inventory of sails in August off the coast of Genoa (*Id.* ¶ 8.)

Furthermore, GGYC also considered the possibility that SNG was conducting sea trials with 3DL sails while it manufactured Deed-complaint sails made with 3Di technology, which SNG made in Switzerland during the 32nd America's Cup. (*Id.* ¶¶ 4-6.) Thus SNG's use of 3DL sails in practice starting in July was not a basis to believe that SNG would not race with a Deed-complaint vessel.

It was not until after a meeting between SNG and GGYC representatives on December

15, 2009 in Sydney that GGYC became concerned that SNG apparently believed it could use its Minden-manufactured sails without obtaining GGYC's consent based on statements made by SNG representatives at that meeting. (*Id.* ¶ 9.) GGYC immediately sought clarification from SNG on December 22. GGYC delayed the filing of the instant motion in order to enable the parties to meet, at SNG's request, to try to resolve this and other issues. (*Id.* ¶¶ 10-12.) Accordingly, there is no basis for SNG's assertion that GGYC delayed in bringing this motion.

*Third*, SNG argues that this Court lacks jurisdiction to adjudicate this motion to enforce the judgment of the Court of Appeals. The Court of Appeals ordered that GGYC was the Challenger of Record, entitling GGYC to all the benefits of the challenger under the Deed of Gift. (April 7, 2009 Order and Judgment at 5.) SNG argued in its cross motion, "Under this Court's April 7, 2009 Order and Judgment declaring GGYC the Challenger of Record, GGYC must comply with the terms of the Deed applicable to the Challenger. The Court has the power to enforce this obligation by granting 'appropriate relief' at 'the foot of the judgment.' (Cross-Motion Br. at 9 (citing *Ripley v. Int'l Rys. of Cent. America*, 8 N.Y.2d 430, 447 (1960).) For the same reason, this Court may enforce SNG's obligation to race under the terms of the Deed.[8]

*Fourth*, SNG argues that this Court should stay the resolution of this motion until after the race. There is no basis for such a stay. A stay would deprive GGYC of its right to challenge for the America's Cup under the terms of the Deed of Gift. GGYC should not be required to race against SNG in a match in which SNG has totally disregarded the constructed-in-country

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[8] The cases cited by SNG are inapposite. GGYC is not seeking "additional relief" like the injunction sought by the defendant in *Little Prince Products, Ltd. v. Scoullar*, 258 A.D.2d 331, 332 (1st Dep't 1999) following a final judgment. Likewise, the Second Department in *Korn v. Gulotta*, 186 A.D.2d 195, 198 (1992) found that a motion challenging a county's 1990 budget could not possibly be "enforcing" a declaratory judgment stating that the county's 1988 budget was illegal. Similarly, the Third Department in *Erie County v. Axelrod*, 80 A.D.2d 701, 702 (3d Dep't 1981) held that a plaintiff could not "enforce" a judgment declaring one regulation invalid by seeking to declare a subsequently enacted regulation invalid. That is clearly not the situation before this Court. The Court of Appeals held that SNG had to face GGYC in the 33rd America's Cup under the terms of the Deed of Gift. SNG complains as if GGYC's motion pertained to the 34th, rather than the 33rd America's Cup.

requirements while GGYC has studiously adhered to those requirements.

GGYC and its sponsors want to win the Cup in the water, not in court. The prejudice to GGYC is thus extreme. There is, on the other hand, *no* prejudice to SNG to having this issue resolved before the match. If SNG prevails on this motion, it will have suffered no harm. If SNG loses the motion, it will at least have the opportunity to correct its vessel and compete for the Cup.[9] On the other hand, if the motion is stayed until after the race and SNG loses the motion, it will not be able to correct its boat and will forfeit the Cup. It appears that SNG's strategy is to prevent a ruling until after the race hoping that no court will be willing to overturn the result on the water. The Court should not permit this.

SNG's other reasons to delay resolution of this matter are similarly unconvincing. SNG argues that there is no time for the sailing jury to advise the Court on "issues of fairness and sporting considerations" (SNG Opp. Br. at 18), but this is an issue of the interpretation of the Deed of Gift for the Court. SNG argues that it is entitled to discovery of GGYC's compliance with the constructed-in-country requirement, but such discovery is entirely irrelevant to this motion, which is about *SNG's* failure to comply with the Deed.

The circumstances here are very different from those that led the court in *Mercury Bay* to delay its consideration until after the match. In *Mercury Bay*, deciding the issue before the match risked cancelling the America's Cup, since a ruling in favor of Mercury Bay would have required San Diego to build a new boat. Here, a ruling before the match will, at most, require SNG to use a different set of sails, and will ensure that the match is decided on the water, not in the courts.

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[9] SNG may already have Deed-compliant sails. During the 32nd America's Cup, SNG constructed sails using 3Di technology in Switzerland. Affidavit of Michael Drummond (Bowman Reply Aff. Ex. I) ¶ 5. If it does not, as demonstrated in the affidavit of Jean Baptiste Le Vaillant, a manager of the sailmaking company Incidences, sails can be constructed in Switzerland for SNG's multihull in approximately four weeks. Affidavit of Jean Baptiste Le Vaillant (Bowman Reply Aff. Ex. H) ¶ 6.

## CONCLUSION

For the reasons stated above, GGYC respectfully requests that the Court grant its motion at the foot of a judgment and enter an order declaring that the Deed of Gift requires that the sails of competing vessels must be constructed in the country where the competing yacht club resides and that SNG's admitted intended use of "3DL" sails would violate the Deed of Gift.

Dated: New York, New York

January 27, 2010

Respectfully submitted,

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