

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

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

Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in 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 apparent intended use of “3DL” sails would violate the Deed of Gift.

PRELIMINARY STATEMENT

The Deed of Gift, the trust instrument that governs the America’s Cup and dictates the terms and conditions of the upcoming 33rd America’s Cup, clearly states the defending club must race in “any one yacht or vessel constructed in the country of the Club holding the Cup.” This construction requirement was added to the Deed of Gift after two competitions in which the challenging vessels were nominally from outside the United States (the defender’s home), but relied heavily on United States shipbuilding craftsmanship and technology. The trustee became concerned that the Cup was losing its status as an international competition and the settlor revised the Deed of Gift to require, among other things, that competing yachts be constructed in the respective countries of the competing clubs. Despite this clear provision, SNG apparently intends to compete in a vessel that was partly constructed in the United States; specifically, SNG apparently intends to use sails that were manufactured in Minden, Nevada. Through this motion, GGYC asks the Court to declare that SNG’s use of such sails would violate the Deed of Gift’s requirement – fundamental to the preservation of the Cup to promote competition “between foreign countries” -- that the defender’s vessel be constructed in the defender’s country.

SNG has refused to say whether or not it intends to use sails that were constructed outside of Switzerland, arguing that this issue is premature because SNG does not need to declare what

vessel it will race until the start of the match, and that until it declares its vessel there is no basis on which to challenge the vessel's construction. However, SNG has, through recent correspondence, indicated that it does not believe that the Deed requires that its sails be manufactured in Switzerland. GGYC is therefore compelled to bring this motion now, before the match, both to avoid being deemed to have acquiesced in SNG's intention to use U.S.-made sails or to otherwise have waived its right to challenge such use by racing SNG despite SNG's use of such sails and to ensure that this match is finally decided on the water, not in the courts.

GGYC in no way seeks through this motion to disqualify SNG's vessel. SNG may already have had sails made in Switzerland that it can use for the match. If it has not, SNG could produce sails in Switzerland within a few weeks. To the extent SNG cannot produce sails in Switzerland by February 8, when the match is scheduled to begin, GGYC would be willing to agree to delay the start of the match a short time to allow SNG to come into compliance with the Deed of Gift.

FACTUAL BACKGROUND

GGYC believes that the sails on *Alinghi 5*, which is now on location in Valencia and is apparently the vessel SNG intends to enter in the 33rd America's Cup, are custom-made "3DL" molded sails created for SNG by North Sails at a sail-making facility in Minden, Nevada. Although SNG has refused to disclose whether it intends to race with those sails, SNG has not denied that it intends to use such sails. Traditional sails are assembled from panels of flat sailcloth. 3DL molded sails, however, are created using a technology that thermo-molds sails as a unitary membrane on large scale 3-dimensional molds. (Bowman Aff. Ex. A.)¹ As a result,

¹ References in the form of "Bowman Aff. Ex. ___" refer to the Affirmation of Philip M. Bowman in Support of Golden Gate Yacht Club's Motion to Enforce Compliance with the April 7, 2009 Order and Judgment Regarding the Deed's Constructed in Country Requirement dated January 11, 2010.

North Sails delivers to its customers a unique sail that is engineered and constructed precisely to match the specifications created by the sail's designer:

“Unparalleled precision. No other sailmaking process approaches the accuracy of 3DL in replicating a designed shape. 3DL molds are scanned by lasers to verify shape within imperceptible tolerances. The laminate is then thermo-formed on the mold in a manner similar to a shrink-wrap process. *The sail you get is the precise flying shape the sail designer created.*” (*Id.*) (emphasis added).²

Only one sailmaker in the world uses 3DL technology – North Sails. North Sails creates 3DL molded sails at only two manufacturing facilities: Minden, Nevada and Sri Lanka.

(Bowman Aff. Ex. B.) In order to avoid potential post-match litigation, on December 22, 2009, GGYC informed SNG of its concern that SNG's apparent understanding of the Deed's constructed-in-country provision is contrary to the Deed's clear and unambiguous meaning. GGYC explained that the Deed “requires that the yacht, including its hull, appendages, mast and sails, be constructed in the country of the club it represents.” (Bowman Aff. Ex. C.) GGYC requested that SNG advise GGYC in the next five days whether it had a different interpretation of the Deed's requirement.

The next day, SNG issued a press release in which it characterized GGYC's concerns about SNG's sails as “simply false: Alinghi 5 complies with the Deed of Gift ‘constructed in country’ requirement, it was built in Switzerland and so are its sails.” (Bowman Aff. Ex. D.)

On December 27, 2009, however, SNG stated:

“Societe Nautique de Geneve [sic] defending yacht will be constructed in Switzerland in compliance with the provision in the Deed of Gift. The Deed only requires the ‘yacht or vessel’ to be constructed in the respective country and does not expressly impose

² To create 3DL sails that are the size required for America's Cup vessels, multiple sections created from different custom designed molds may be sewn or glued together. Whether the process of joining these custom engineered sections of cloth together occurs in Minden, Nevada or elsewhere does not change the fact that North Sails delivers to its customer a custom-designed and custom-engineered product with specifications unique to the customer's vessel. That product is manufactured in the United States and in this case cannot be used for any purpose other than to build SNG/Alinghi's sails, and propel SNG/Alinghi's vessel, for which the sail was designed. There is nothing generic about the 3DL products that North Sails creates at its Minden facility.

obligations in respect of any of the separate components onboard the yacht or vessel.” (Bowman Aff. Ex. E.)

On December 31, 2009, SNG reiterated this position in a letter to GGYC. SNG stated:

“As expressed in our previous letter, SNG [sic] defending yacht will be constructed in Switzerland in compliance with the provision in the Deed of Gift and SNG disagrees with your interpretation of this provision of the deed of gift. SNG observes the Deed only requires the ‘yacht or vessel’ to be constructed in the respective country and does not expressly impose obligations in respect of any of the separate components onboard the yacht or vessel.” (Bowman Aff. Ex. F.)

ARGUMENT

I. THE DEED OF GIFT REQUIRES THAT THE ENTIRE VESSEL, NOT JUST THE HULL, BE CONSTRUCTED IN THE COUNTRY WHERE THE COMPETING YACHT CLUB RESIDES.

A. The Clear Language Of The Deed Requires That The Entire Vessel Be Manufactured Domestically.

The Deed of Gift states:

“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.*” (Bowman Aff. Ex. G (emphasis added).)

It is well-settled under New York law that “the trust instrument is to be construed as written and the settlor’s intention determined solely from the unambiguous language of the instrument itself.” *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 267 (1990). The language of the Deed of Gift is unambiguous. It requires that the defender’s “yacht or vessel” be constructed in the country of the defending club. The sails plainly are part of the vessel (indeed are a critical part of the vessel). As SNG has repeatedly argued, the Deed’s reference to “yachts” and “vessels” is to all the parts of the vessel needed to sail the vessel. For

example, in arguing that a vessel's length on load water-line should include measurement of a vessel's rudder, SNG argued:

“The Deed of Gift and the Challenger Certificate refer to the dimensions of ‘competing yachts or vessels’ and not only to the dimensions of the hulls of such yachts and vessels. In English language, the plain concept of yacht or vessel includes a direction system, which is normally a rudder. Hence, by essence and definition, a yacht or vessel comprises rudders as opposed to a hull, which designates a limited and specific part of the boat. Not including rudders as part of a vessel or a yacht is the same as if wheels were deemed not to be part of a car.” (Bowman Aff. Ex. H at 7.)

A fortiori, the “plain concept of a yacht or vessel” includes what propels the boat; here, the sail. Similarly, SNG submitted an affidavit of Tom Schnackenberg, who testified that “[a] yacht or vessel is made of a series of elements that are needed to sail the boat.” (Bowman Aff. Ex. I.) A sail is, of course, “needed to sail the boat.”

SNG's interpretation would allow all of the component parts of a vessel or yacht, including the hull, mast, sails, spars, and rudder, to be constructed outside of the country. That is not what the settlor intended, as it would render the language in the Deed meaningless. This is not to suggest that every nut and bolt must be manufactured domestically in order to comply. There is, of course, an enormous difference between manufacturing interchangeable, off-the-shelf parts, which can be used for any number of purposes, and manufacturing a one-of-a-kind, custom-designed and custom-constructed sail that fits exact design and engineering specifications of the defender's vessel, and only that vessel.

B. The History Behind The Constructed-In-Country Provision Makes Clear That The Settlor Intended The Requirement To Bar The Foreign Manufacturing Of Competing Vessels.

Under New York law, the “[t]he judicial interpretative function is to find the meaning of the testator as expressed in the language used, considered in the light of the attendant circumstances, and effectuate it.” *In re Escher's Will*, 75 A.D.2d 531, 533 (1st Dep't 1980)

(quoting *Matter of Nicol*, 24 A.D.2d 191, 197 (1st Dep't 1965); see also *In Re Balsam's Trust*, 58 Misc.2d. 672, 686 (N.Y. Sup. Ct. 1968) ("The [trust] instrument must be deemed to speak as of the time of its date, and to be interpreted by conditions existing at that date") (internal citations omitted).

A fundamental characteristic of the America's Cup is that it is a sailing competition between foreign nations. George L. Schuyler donated the Cup on the condition that it "shall be preserved as a perpetual Challenge Cup for friendly competition *between foreign countries*." (Bowman Aff. Ex. G (emphasis added).) Only a foreign yacht club may challenge the club holding the Cup. (*Id.*)

The original Deed of Gift, executed in 1857, contained no language regarding the country of construction. This permitted challengers to effectively set up shop in the defender's harbor while their vessel's were rebuilt using the best technology that the host city had to offer. The end result was a race between two boats using much of the same technology from the same country, rather than having two boats that were representative of the technology of their respective countries, as envisioned by the settlor.

For example, in 1876, the challenger, the Canadian *Countess of Dufferin*, sailed into New York Harbor, where she was met with "ridicule" at her appearance and handling. (Bowman Aff. Ex. J. at 78.) "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.) One source went so far as to say:

“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.)³

This practice was repeated in the 1881 match, when the Canadian *Atalanta* arrived in New York by canal, where she underwent major revisions. “*Atalanta* was scarcely back at her moorings before he [its owner] announced his intention of laying her up in New York for the winter, and carrying out various alterations and improvements, with a view to challenging again next year The prospect of having the Canadian yacht as a semi-permanent resident in New York . . . did not at all commend itself, and the Committee determined to make it impossible.” (Bowman Aff. Ex. O at 54.)

After these incidents, the New York Yacht Club (“NYYC”) in 1882 returned the Cup to George Schuyler and asked him to make alterations that would take into account the problems that had appeared during the first four challenges. (*Id.* at 54-55; Bowman Aff. Ex. J at 90-92; Bowman Aff. Ex. P at 128-129.) The result was the constructed-in-country provisions as well as an additional requirement, later repealed, that the challenger must sail to the venue on its own bottom (rather than being boarded upon another ship). The revised Deed also prohibited a defeated challenger from issuing a subsequent challenge with the same vessel within two years

³ See also Bowman Aff. Ex. N (“[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.”); Ex. O at 49 (“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 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 . . .”).

of its defeat. It is clear from the history leading to this amendment that the settlor's intent was to protect the international character of the competition by ensuring that competing boats were genuinely products of their home country.

C. The Deed of Gift Has Consistently Been Interpreted To Require That Sails Be Manufactured Domestically.

As noted above, the Deed of Gift must be construed according to its plain meaning in light of the circumstances at the time it was executed. See above pp. 5-6. Subsequent interpretations and conduct cannot change the settlor's expressed, unambiguous intent. In any event, the consistent interpretation of the Deed of Gift since 1882 confirms that the Deed does not permit competitors to use foreign-made sails. For example, in 1982, the New York Yacht Club issued an "Interpretive Resolution" setting forth its interpretation of the Deed of Gift's constructed-in-country provision. (Bowman Aff. Ex. Q at 4.)⁴ The New York Yacht Club had previously concluded that "constructed" under the Deed of Gift meant "designed and built". The 1982 Interpretive Resolution said:

"A yacht shall be deemed to be 'designed' in a country if the designers of the yacht's hull, rig *and sails* shall be nationals of that country; and

A yacht shall be deemed to be 'built' in a country in a country [sic] if the hull of the yacht, including all framing and all planking, plating or other form of surfacing of the hull, shall be fabricated and assembled, *and if the yacht's sails shall be manufactured, in that country*; provided that the foregoing provisions of this clause (b) shall not prevent the modification of the hull of any challenger, or candidate, in the country in which an America's Cup Match is to take place so long as the modification or manufacture (i) is effected when the challenger or candidate is in such country and (ii) meets the requirements of clause (a) above " (*Id.* (emphasis added).)

Although the interpretations of the "constructed in country" provision have varied slightly over time, GGYC is aware of *no* interpretation of the Deed of Gift that did not require, at

⁴ A trustee cannot unilaterally change the terms of a trust instrument, and an "interpretive resolution" has no binding effect. We refer to it simply as evidence that the Deed was consistently interpreted to require that sails be manufactured domestically.

a minimum, that the sails be manufactured in the country of the competitor. Indeed, when, in recent America's Cup matches, competitors (including SNG) wanted to use foreign-made sails, the parties entered into explicit agreements to allow the use of such sails despite the Deed's prohibition. (See Bowman Aff. Ex. R at Art. 13(g); Ex. S at Art. 11.8; Ex. T at Art. 7(f).) If the Deed of Gift allowed the use of foreign-made sails, as SNG apparently believes, there would have been no reason to enter into such agreements. No such agreement has been made for the 33rd America's Cup.

Thus the consistent interpretation of the constructed in country requirement since 1882 confirms that all competitors, including SNG, have always recognized that the Deed did not permit the use of foreign-made sails.

CONCLUSION

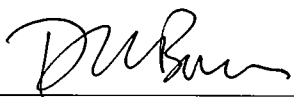
For the reasons stated above, GGYC respectfully submits that the Court should grant its motion at the foot of a judgment and enter an order declaring that the Deed of Gift requires that the sails of competing vessels must be constructed in the country where the competing yacht club resides and that SNG's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

Dated: New York, New York

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Respectfully submitted,

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