To Be Argued By:
ROBERT J. GIUFFRA, JR.

New York County Clerk's Index No. 602446/07

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

GOLDEN GATE YACHT CLUB,

Plaintiff-Respondent,

—against—

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Appellant,

—and—

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

ROBERT J. GIUFFRA, JR.
BASIL P. ZIRINIS III
SHARON L. NELLES
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000

BARRY R. OSTRAGER
JONATHAN K. YOUNGWOOD
GEORGE S. WANG
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Attorneys for Defendant-Appellant

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

In its opposition brief, Respondent Golden Gate Yacht Club ("GGYC") confirms its impermissible strategy to strip Appellant Société Nautique de Genève ("SNG"), the Defender of the America's Cup, of its fundamental right to select the venue for the 33rd Cup in February 2010. Under the Deed of Gift (the "Deed") for the America's Cup, the defender indisputably is supposed to select the venue, while the challenger sets the timing of the Cup match. (R. 345-47).

The parties agree that this appeal turns on whether this Court should give full effect to a May 13, 2008 Order of Justice Cahn (the "May 13 Order"), specifically "reinstated" by the Court of Appeals on April 7, 2009 (together, the "April 7 Order"). By its unambiguous terms, the April 7 Order expressly directs: "[T]he location of the match shall be in Valencia, Spain ***or any other location selected by SNG***, provided SNG notify GGYC in writing not less than six months in advance of the date set for the first challenge match race. . . ." (R. 238) (emphasis added).

In urging that the April 7 Order permits SNG to select only GGYC's preferred Northern Hemisphere venue – Valencia – for a February 2010 Cup match, GGYC studiously ignores the express terms of this Order, and circumstances surrounding the judicial compromise reflected therein. Both SNG and GGYC, Northern Hemisphere yacht clubs, wanted a Northern Hemisphere

venue for the Cup. GGYC was pressing for an early date for the match; SNG sought a later date.

In entering the May 13 Order, Justice Cahn resolved the parties' dispute over the timing of the match races – literally splitting the difference between their respective positions. Because the May 13 Order's compromise over timing would have sent the race to the Southern Hemisphere under the Deed, Justice Cahn made clear that the race could nonetheless take place in Valencia or "any other location selected by SNG." Indeed, shortly after Justice Cahn entered that Order, Russell Coutts, the CEO of BMW ORACLE Racing, GGYC's racing representative, tellingly confirmed: "[W]e believe that the order . . . *does allow the race to take [place] in the Northern Hemisphere*, outside of the Deed of Gift restraints, if that's what you call it. *The order was very clear*." (R. 1413) (emphasis added). Thus, in "reinstat[ing]" the May 13 Order, the Court of Appeals permitted a February race in Valencia – a Northern Hemisphere location – "and any other location," without any limitation by hemisphere, selected by SNG.

In its decision below, dated October 30, 2009 (the "October 30 Order"), the trial court (now Justice Kornreich), at the behest of GGYC, erroneously revisited Justice Cahn's compromise, impermissibly reinterpreting its plain meaning, even though the May 13 Order was expressly "reinstated" by the Court of Appeals. If Justice Kornreich's interpretation is left to stand, SNG faces

the prospect of having to defend the Cup in a Northern Hemisphere venue not of SNG's choosing, during the winter, when the Deed specifies that Cup races may be held only in a Southern Hemisphere location. Thus, while repeatedly citing the language of the Deed in support of its strategy to strip SNG of its fundamental right to select the Cup venue, GGYC seeks to benefit from Justice Cahn's compromise on the timing of the Cup matches, while denying SNG's right, as reflected in the April 7 Order, to select its preferred Northern Hemisphere venue for a winter race.

This appeal is far from moot. Under settled law, an appeal is not moot where, as here, the appeal seeks to vindicate the appellant's legal rights. At this time, in reliance on the April 7 Order, SNG's America's Cup vessel and large sailing, technical and support team remain in SNG's chosen venue, Ras Al Khaimah ("RAK") in the United Arab Emirates, preparing for the upcoming America's Cup. RAK, an important United States ally, has spent more than $120 million to build facilities for the 33rd Cup.

As of November 10, in order to comply with the April 7 Order's direction that the Cup be contested in February 2010, SNG had no choice but to issue a notice of race for Valencia, Spain, the only permissible Northern Hemisphere venue under Justice Kornreich's erroneous October 30 Order. GGYC cites SNG's November 10 issuance of a Notice of Race for a race in Valencia, but

disregards that SNG did so only after this Court denied SNG's motion for a stay pending appeal on November 4. That ruling left SNG with no choice, unless and until the Order is reversed, but to proceed with a race in Valencia. If this Court, as it should, vindicates SNG's legal right under the April 7 Order, and reverses the October 30 Order, then SNG *will* contest the Cup in RAK – a more temperate venue for a sailing race in February than Valencia.

In its 44-page Opposition, GGYC does not contest the facts making clear that GGYC did – to SNG's detriment – unreasonably delay challenging SNG's choice of venue for the 33rd America's Cup for two months, that is, until October 1, 2009, the date when GGYC finally filed its motion to upset SNG's selection of RAK. (R. 1163). Indeed, it is undisputed that GGYC filed its motion (i) one month *after* GGYC's sailing, technical and support staffs had spent several weeks in RAK in September; (ii) one week *after* certifying to the U.S. Coast Guard under penalty of seizure and forfeiture of its America's Cup vessel that the vessel would be shipped to RAK; and (iii) the very day *after* SNG had successfully spent 30 days transporting its Cup vessel to RAK. While these tactics rightly compelled the trial court to call GGYC's conduct "unsportsmanlike" (R. 37), this Court should also apply the doctrine of laches to bar GGYC's patently improper strategy of lulling SNG into a false sense of security and then filing a late legal challenge to SNG's chosen venue of RAK.

Finally, this Court should reverse the trial court's November 2, 2009 order (the "November 2 Order") holding that the rudders on GGYC's massive 113-foot trimaran – the longest boat in Cup history – should not be included in the load water-line measurement of the trimaran. In keeping with its strategy of selectively reading provisions in the Deed, GGYC claims that "rudders" should not be included in measuring its trimaran's length on load water-line. In doing so, GGYC ignores that the Deed expressly limits "yachts or vessels" to not more than ninety feet on the load water-line and only excludes the "center board" and the "sliding keel" from such measurement. (R. 345-46). The Deed does not, as GGYC claimed below, limit this measurement only to the vessel's hull, and the drafters of the Deed plainly could have done so.

Moreover, the trial court committed error by considering extrinsic evidence about the measurement of other America's Cup vessels bearing no resemblance to GGYC's massive 113-foot trimaran. Because the Deed is unambiguous on its face, there was no cause to consider extrinsic evidence here. And, in any event, the extrinsic evidence cited by GGYC, such as rules governing the measurement of the load water-line of a vessel's *hull*, rather than the entire vessel, actually makes clear that the rudder should be included in the measurement of the length of the *vessel*.

GGYC should not get the benefit of its preferred Northern Hemisphere venue for a winter race in an illegal 113-foot trimaran. This Court should reverse the trial court's October 30 and November 2 Orders.

ARGUMENT

I. BECAUSE SNG SEEKS TO VINDICATE ITS CHOICE OF VENUE UNDER THE APRIL 7 ORDER, THIS APPEAL IS *NOT* MOOT.

A. Under Settled Law, An Appeal Is Not Moot Where, As Here, the Appeal Seeks To Vindicate the Appellant's Legal Rights.

It is black-letter law that an appeal "presents a live controversy where the rights of the parties will be directly affected by the determination and where the judgment has immediate consequence for them." *Johnson v. Pataki*, 91 N.Y.2d 214, 222 (1997) (quotation marks omitted); *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714 (1980) (appeal not moot if "the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment.").

Plainly, SNG has a right at stake that will be directly and immediately affected by this appeal: Under the April 7 Order, SNG has the right to choose the venue for the 33rd America's Cup, including RAK. (*See* R. 238 ("ORDERED that the location of the match shall be in Valencia, Spain or any other location *selected by SNG* . . . .") (emphasis added)). Put simply, if the lower court's ruling stands, SNG has lost its right to choose RAK as the venue for the 33rd America's Cup.

That loss would be particularly consequential here because RAK offers "perfect weather and great sailing conditions in February," making RAK a more suitable winter venue than Valencia for the world's most famous sailing races. (R. 1262-63 ¶¶ 8, 9).

B. If this Court Vindicates SNG's Legal Rights, SNG *Will* Conduct the 33rd America's Cup in RAK.

GGYC does not dispute that SNG's choice of venue is a valuable right that will be directly affected by this Court's ruling. Instead, GGYC claims that there is no longer any live controversy here because, in light of SNG's November 10, 2009 press release and issuance of a Notice of Race ("NOR"), "SNG no longer intends to hold the America's Cup in [RAK], and has instead agreed that the Cup will be held in Valencia as requested by GGYC." (GGYC Br. 22).

GGYC is wrong. If this Court vindicates SNG's right to choose RAK as a venue for the 33rd America's Cup, SNG will race in RAK in February 2010. Of course, it is SNG – not GGYC – that can properly speak to SNG's "inten[tion]." And SNG's intention has always been perfectly clear: SNG informed GGYC on August 5, 2009 that it had selected RAK as the Cup venue (R. 1257); SNG then shipped its Cup vessel to RAK (R. 1564); SNG defended its right to choose RAK as a venue in the trial court when GGYC belatedly moved to challenge that designation in October 2009 (R. 1481-94); SNG obtained expedited briefing from

this Court to seek reversal of the lower court's erroneous order that RAK was not a permissible venue; and SNG continues to pursue its expedited appeal.

SNG did not render this expedited appeal moot simply by issuing its November 10, 2009 press release and NOR. Rather, SNG took those actions to comply with court orders, not stayed by this Court, directing that the 33rd Cup occur *in February 2010*, and to ensure that, regardless of the outcome of this appeal, the America's Cup competition leaves the courtroom and returns to the water. Indeed, in a November 10, 2009 letter to Justice Kornreich, SNG explained:

> In issuing its NOR for races in Valencia in February 2010, SNG complies with (a) this Court's Order, "reinstated" by the Court of Appeals' April 2, 2009 decision, that the parties race in February 2010, and authorizing Valencia as a permissible venue for the 33rd Cup, and (b) Your Honor's direction that "SNG [] hold the race as per the order of the Court of Appeals and Justice Cahn *in February*."

(Letter from Barry R. Ostrager to The Honorable Shirley W. Kornreich, Nov. 10 2009, at 2) (emphasis and alteration in original).

To ensure there will be America's Cup races in February 2010, SNG had to announce Valencia as the venue, because Valencia was the "only venue to which GGYC ha[d] not objected for a match in February 2010." *Id.* If SNG had not announced Valencia as the Cup venue, and this Court affirmed the trial court below, SNG would have faced the charge that its failure to select Valencia violated multiple court orders directing that the 33rd Cup be contested in February 2010. In

other words, SNG was faced with a Hobson's Choice: either select Valencia (the only indisputably permissible Northern Hemisphere location under Justice Kornreich's October 30 Order) or run the risk of being held in contempt of court.

SNG's intention to race in RAK in February 2010 is matched by RAK's willingness and ability to host the 33rd Cup. RAK has already committed more than $120 million to develop the infrastructure to host the race, "with the vast majority of such developments already completed." (R. 1303 ¶ 27). And, there is nothing in the record indicating that GGYC cannot transport its boat to RAK in time to race in February 2009.[1]

In short, if this Court holds that SNG properly designated RAK as the venue, the 33rd Cup will take place there, in an ideal warm-weather climate off the shores of an important U.S. ally. If this Court affirms the trial court, the race will

[1] Below, GGYC suggested that its decision not to race in RAK was motivated by purported "safety" concerns. But GGYC concedes on appeal that it "did not" ask the trial court "to use its safety concerns as a basis for a decision," and the trial court in fact "chose not to do so." (GGYC Br. 31). In any event, RAK is a safe venue for the 33rd America's Cup. There has never been a successful terrorist attack on U.S. interests in the UAE. (R. 1242-43). The UAE is home to more than 1,000 North American and European companies, including Oracle itself, whose Middle East headquarters are in Dubai. (R. 1298). Boats carrying the U.S. flag pass through the waters off RAK on a daily basis, without incident. (R. 1302-03). As set forth in RAK's amicus brief to this Court, the UAE's Ministry of Interior developed detailed plans for ensuring the safety of all visitors to the America's Cup in RAK. (Amicus Curiae Brief of RAK, at 11, Nov. 4, 2009).

take place in Valencia. This appeal thus presents a quintessentially "live controversy." *Johnson v. Pataki*, 91 N.Y.2d at 222.

II. THE TRIAL COURT *DID* IMPERMISSIBLY OVERRIDE THE PLAIN TERMS OF THE MAY 13 ORDER, EXPRESSLY "REINSTATED" BY THE COURT OF APPEALS, PERMITTING THE 33RD CUP TO TAKE PLACE IN "ANY OTHER LOCATION SELECTED BY SNG."

In its opposition, GGYC urges that the "any other location" language in the April 7 Order actually means any other location *in the Southern Hemisphere*, and that Justice Cahn (and the Court of Appeals) had no authority to permit a Northern Hemisphere race in winter. To make this argument, GGYC simply ignores SNG's right as defender to choose race venue, the express terms of this Order, and circumstances surrounding the judicial compromise reflected therein.

A. GGYC Cannot Escape the Plain Terms of the April 7 Order.

The Court of Appeals' April 7 Order "reinstated" Justice Cahn's May 13 Order, thus setting a match in February 2010 "in Valencia, Spain or any other location selected by SNG." (R. 267-73). The critical phrase – "any other location" – is *not* modified by any express or implied limitation. GGYC immediately recognized the plain meaning of the Order. GGYC's skipper, BMW Oracle CEO Russell Coutts, announced at a July 16, 2008 press conference that the Order "gave the defender the flexibility to choose, in fact, any venue in the world, north or southern hemisphere, the way the order's worded." (R. 1409). Thomas F.

Ehman, Jr., Head of External Affairs for BMW ORACLE Racing, likewise confirmed that "[i]n this case the Judge has said the *defender may choose any venue in the world in either hemisphere, irrespective of the date.*" (R. 1414) (emphasis added).

"[W]here the plain terms of a court order unambiguously apply, as they do here, they are entitled to their effect." *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2204 (2009). The trial court is thus required to "adopt, and give effect to, the plain meaning of the" Order. *United States v. Spallone*, 399 F.3d 415, 421 (2d Cir. 2005). Justice Kornreich did just the opposite, impermissibly reinterpreting the April 7 order "in conjunction with the Deed of Trust" at the October 27, 2009 hearing. (R. 37). The fact that the April 7 Order originated with Justice Cahn did not permit Justice Kornreich to rewrite this Order, which was expressly "reinstated" by the Court of Appeals.

When a trial judge decides a question of law in a case, that determination becomes "binding not only on the parties, but on all other judges of coordinate jurisdiction," under the law of the case doctrine. *State of New York Higher Educ. Serv. Corp. v. Starr*, 158 A.D.2d 771, 772 (3d Dep't 1990). This rule "avoid[s] the retrial of issues already determined in the same case," a "kind of intra-action *res judicata*." *Brown v. State*, 250 A.D.2d 314, 320 (3d Dep't 1998). Justice Kornreich was required to apply the plain language of the April 7 Order.

GGYC, however, contends that "any other location" "cannot be read literally" to permit a Northern Hemisphere race because such a reading would leave "no principled way to distinguish which of the Deed's restrictions should remain in place." (GGYC Br. 24). GGYC goes so far as to suggest the April 7 Order "read literally" permits SNG "to select literally any location, including Lake Geneva, the Colorado River, or Walden Pond." (GGYC Br. 23-24). This argument is specious. Going into this dispute, as described below, the *only* contested issue decided in the May 13 Order was the date of the race. Both Northern Hemisphere clubs wanted a Northern Hemisphere race, on the ocean, not on a lake, a river, or pond. Justice Cahn therefore resolved the date dispute and permitted a Northern Hemisphere venue.

GGYC also contends that "any other location" cannot include locations in the Northern Hemisphere, because under this reading, "there would have been no reason at all for the trial court to single out Valencia." (GGYC Br. 24). GGYC has it backward. Under the "principle of statutory construction known as 'reverse ejusdem generis,'" a phrase of the form "A, B or any other C" indicates that A is a subset of C. *Nat'l Football League v. Vigilant Ins. Co.*, 36 A.D.3d 207, 212 (1st Dep't 2006) (citation omitted). Thus, here, "Valencia, Spain," is one of a

subset of places in the category "any other location selected by SNG" – a category that therefore must include Northern Hemisphere venues.[2]

B. The Record Makes Clear that the April 7 Order Reflected a Judicial Compromise Between the Parties' Positions.

This Court need not look beyond the plain language of the Orders, but the record is clear that the May 13 Order, "reinstated" by the Court of Appeals' April 7 Order, was meant to accomplish precisely the result dictated by that language.

Under the Deed of Gift, "no race shall be sailed in the days intervening between November 1st and May 1st if the races are to [be] conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere." (R. 345). Further, a challenger chooses the date of a challenge (and therefore, in practice, the hemisphere), but "shall give ten months' notice, in writing," of that date. (R. 345).

GGYC's July 11, 2007 Notice of Challenge ("NOC") explicitly selected a *July 2008 race* after "recognizing the period permitted by the Deed of

---

[2] Moreover, while the maxim *expresio unius est exclusio alterius* permits a court to construe narrowly an enumeration in a contract or statute, adding a proviso such as "including but not limited to" circumvents that doctrine. 28 N.Y. Practice, Contract Law § 10:13. Here, the "or any other location selected by SNG" clause operates as such a proviso.

Gift for a match in the Northern Hemisphere." (R. 376). Thus, the NOC complied with the Deed's hemisphere and notice provisions, but the parties disagreed over other aspects of the NOC's validity. These other issues were not finally resolved until two separate decisions were rendered, one on November 27, 2007 and one on March 17, 2008. *See Golden Gate Yacht Club v. Societe Nautique De Geneve*, 18 Misc. 3d 1111(A), 2007 WL 4624020, at *10 (N.Y. Sup. Ct. Nov. 27, 2007) (declaring challenge valid); (R. 163).

The July 2008 date for the 33rd America's Cup was upset by this protracted litigation. GGYC's challenge, a challenge by a Northern Hemisphere club against a Northern Hemisphere defender, noticed a Northern Hemisphere race by selecting a July date. At an April 2008 hearing before Justice Cahn, GGYC continued to press for a Northern Hemisphere race, but argued that the race should be held in October 2008 (a time when a Northern Hemisphere race was permissible), ten months from Justice Cahn's November 2007 order declaring GGYC's Notice of Challenge valid. (R. 211-12, 216).

SNG agreed with GGYC's proposed Northern Hemisphere location and indeed insisted that the race "is going to be held in the northern hemisphere." (R. 216). Thus, both parties had submitted proposed orders permitting Northern Hemisphere venues – asking the trial court to set the location for the 33rd America's Cup "in Valencia, Spain *or any other location selected by SNG*." (R.

1201, 1209 (emphasis added)).[3] But SNG also argued that it was entitled to at least ten months' notice from Justice Cahn's March 17, 2008 Order. (R. 209-10). Because ten months from the March Order was January 2009 – a time at which "no race shall be sailed . . . if the races are to [be] conducted in the Northern Hemisphere" – SNG argued that the race should take place in May 2009. (R. 209-10).

Justice Cahn fashioned a compromise to resolve the parties' timing conflict after months of litigation, during which the facts on the ground had changed. Simply put, Justice Cahn split the difference. GGYC came looking for an equitable remedy, and GGYC got one that fit the facts as they stood: GGYC was pressing for an early match in the Northern Hemisphere; SNG was seeking a later date in the Northern Hemisphere. Justice Cahn ordered that the race take place somewhere in between but recognized that this date was at odds at the parties' agreement on venue. So Justice Cahn made explicitly clear in the May 7 Order that he was not intending to upset SNG's venue choice by adopting the

[3] GGYC's assertion that both parties "designated Valencia . . . as the venue for the 33rd America's Cup" in their Notice and Counter-Notice of Settlement (GGYC Br. 10, 32) is incorrect. (*See* R. 1201, 1209).

Valencia or "any other location" language in his Order.[4] (R. 238). The only disputed issue to be and that was resolved was timing.

The Court of Appeals' April 7, 2009 Order "reinstated" the May 13 Order's middle ground, setting a match for ten months later – now February 2010 – in Valencia or "any other location selected by SNG." (R. 272, 276-87). The Court of Appeals' explicit reinstatement of the May 13 Order made no changes to the compromise that order effected, simply setting the date of the 33rd Cup ten months from when SNG received notice of the validity of GGYC's challenge, while preserving SNG's right to select a Northern Hemisphere location.[5] SNG chooses RAK.

C. Justice Cahn's Order, as "Reinstated" by the Court of Appeals, Properly Permitted a Northern Hemisphere Race.

GGYC apparently contends that Justice Cahn lacked the authority to permit a Northern Hemisphere race in the winter. (GGYC Br. 25 n.4). But GGYC made precisely the opposite argument to this Court in a May 22, 2008 brief

---

[4] In so doing, Justice Cahn was well aware that his order permitted a Northern Hemisphere race in the winter; the parties made clear at the April 2 hearing that Valencia is in the Northern Hemisphere. (R. 217).

[5] GGYC asserts that the April 7 Order did not grant SNG the right to select "any location it chooses . . . because SNG simply did not request such relief." (GGYC Brief at 28). As set forth above, the May 13 Order "reinstated" by the April 7 Order was a compromise that gave neither party exactly what it asked for. A court of equity "may grant any type of relief within its jurisdiction appropriate to the proof, whether or not demanded, imposing such terms as may be just." *State v. Barone*, 74 N.Y. 2d 332, 336 (1989).

defending the provision of the May 13 Order permitting a winter race in the Northern Hemisphere, in Valencia. GGYC argued that "[i]f, in equity, the court can modify one provision of the trust instrument to effect equitable relief . . . it logically follows that it can modify another to effectuate the perceived equitable relief." (GGYC Br. of May 22, 2008 (First Dep't), at 14). GGYC recognized the courts' authority to permit a winter race in Valencia; "it logically follows" that the courts could permit winter races elsewhere in the Northern Hemisphere. (*Id.*).

Indeed, "[i]n the exercise of its equitable jurisdiction, the court may effect whatever remedy is necessary to do justice to the parties and the subject matter." 55 N.Y. JUR. EQUITY § 84 (2009); *Evans v. Catalino*, 103 Misc. 2d 261, 267 (N.Y. Sup. Ct. 1979), *judgment modified on other grounds*, 88 A.D.2d 780 (4th Dep't 1982) (by commencing an action seeking equitable relief, party "submitted itself to the equitable jurisdiction of this court" pursuant to which "the court may effect whatever remedy necessary to do justice to the parties and the subject matter"). "The power of equity is as broad as equity and justice require . . . There is no other limitation. The fact that there is no precedent for the precise relief sought is of no consequence." *London v. Joslovitz*, 279 A.D. 280, 281-82 (3d Dept. 1952).[6]

[6] Because the power of equity is so broad, GGYC's suggestion (GGYC Br. 25 n.4) that the doctrine of equitable deviation precluded Justice Cahn from fashioning his compromise is simply beside the point. *See Phillips v. W.*

III. GGYC *DID* UNREASONABLY DELAY – TO SNG'S DETRIMENT – IN FILING ITS MOTION TO REVERSE THE APRIL 7 ORDER.

The decisive factors in any laches analysis are the reasonableness of the plaintiff's delay and the resulting prejudice suffered by the defendant. *See Schulz v. State of New York*, 81 N.Y.2d 336, 347-48 (1993). Here, GGYC claims that laches does not bar its eleventh hour attempt to move the venue of the 33rd America's Cup because, despite its delay in asserting a venue claim while actively litigating other issues, GGYC sent letters to SNG expressing its disagreement with Northern Hemisphere venues, and because GGYC's delay was somehow reasonable. These arguments fail. *First*, GGYC did *not*, in fact, provide any notice of its intent to assert a claim challenging SNG's ability to select a Northern Hemisphere venue, other than Valencia, for a winter race. *Second*, GGYC's delay of eight weeks – about one-third of the time between the venue announcement and the scheduled February 2010 Cup match – was not only unreasonable but highly prejudicial to SNG.

GGYC selectively cites five letters as evidence of notice to SNG "that GGYC would assert" a claim. (GGYC Br. 34). The first four, dated May 20, 2009 through July 28, 2009 – before SNG even announced the RAK venue – stated

---

Rockaway Land Co., 226 N.Y. 507, 515 (1912) ("It is a familiar principle that a court of equity having obtained jurisdiction of the parties and the subject-matter of the action will adapt its relief to the exigencies of the case.").

GGYC's view that the match must be in Valencia or the Southern Hemisphere. In each of those letters, however, GGYC specifically indicated its willingness "to negotiate with you alternative Northern Hemisphere locations." (R. 1178, 1182, 1184, 1186). In the fifth letter, dated August 6, 2009, one day after SNG's RAK announcement, GGYC did reiterate its view of the hemisphere restriction, but stated that it was still "prepared to discuss other options." (R. 1452). Indeed, the August 6 letter implied that absent a negotiated change in venue, GGYC intended to race against SNG in RAK in February, stating: "no matter which of us wins the match in February, this defect in venue selection would permit court challenges by any number of parties and further uncertainty respecting future America's Cup events." (R. 1453). And, as GGYC itself acknowledges, after the venue announcement, it considered "consent[ing]" to the RAK venue rather than standing on its supposed rights. (GGYC Brief at 33). Thus, none of the letters could have given notice of GGYC's purported intent – which did not even exist when they were written – to assert a claim.

In any event, GGYC's conduct negated any supposed "notice" in its letters. GGYC sent its sailing, technical and support staffs to RAK for several weeks in early September, and BMW Oracle Racing representatives met with senior government officials in RAK. (R. 1302). GGYC also sent its equipment and advance teams to RAK, certifying to the U.S. Coast Guard under penalty of

seizure and forfeiture of its America's Cup vessel that the vessel would be shipped to the Persian Gulf and announcing that this shipment would take place in mid-November. (R. 1306, 1431, 1569, 1613).

Moreover, GGYC appeared before Justice Kornreich on August 10, 2009, five days after SNG notified her of the RAK venue, but made *no* venue-related complaint – none whatsoever. (R. 497-595). GGYC's lawyer did not even object when Justice Kornreich asked "[b]oth sides" to confirm that "the place of the race has been . . . issued." (R. 498). And, during its eight-week period of delay, GGYC filed a new motion attacking the measurement procedures and rules applicable to the February match in RAK, but did not dispute the more fundamental issue of the match's location. (R. 838-61, 1145-62). GGYC's affirmative preparation for a RAK race, not vague letters, gave real notice of its intent to race in RAK – notice that SNG relied on to its detriment.[7]

Nor can GGYC argue that its delay was reasonable. GGYC asserts that no authority holds that "taking eight weeks . . . constitutes an unreasonable

---

[7] In any event, the purported notice provided by GGYC's letters is irrelevant. The First Department has continually affirmed, as recently as this year, that two elements drive the laches analysis: undue delay and prejudice to the opposing party. *See, e.g.*, *Moreschi v. DiPasquale*, 58 A.D.3d 545 (1st Dep't 2009) ("[t]he affirmative defense of laches requires a showing of undue delay by a party in asserting its rights, as well as prejudice to the opposing party as a consequence of the delay"). The First Department is not required to alter this analysis to conform to sister departments. *See Mountain View Coach Line, Inc. v. Storms*, 102 A.D.2d 663, 665 (2d Dep't 1984) (sister departments are "free to reach a contrary result").

and inexcusable delay." (GGYC Brief at 33). The length of delay in and of itself is, of course, not dispositive. Rather, the court must "examine and explore the nature and subject matter of the particular controversy, its context and the reliance and prejudicial impact on defendants and others materially affected." *Schulz*, 81 N.Y.2d at 347-48. In light of such factors, "even a comparatively short period during which a plaintiff has failed to assert [its] rights may" constitute an unreasonable and prejudicial delay. *Black v. Black*, 22 A.D.2d 673 (1st Dep't 1964); *see Bailey v. Chernoff*, 45 A.D.3d 1113, 1115 (3d Dep't 2007) (laches barred claim where plaintiffs waited five months to challenge the construction of boathouse because during those months defendant spent $125,000 on the construction).

Here, there can be no question that GGYC's delay was unreasonable and substantially prejudiced SNG. GGYC's delay spanned about one-third of the entire period between the venue announcement and the 33rd America's Cup. During that delay, in reliance on the court's April 7 Order, SNG spent 30 days transferring its vessel to RAK, and spent this period organizing the race in RAK. (R. 1635). In fact, SNG's boat remains in RAK today. (Transcript of Nov. 6, 2009 Hearing, at 13). GGYC's delay was unreasonable, inexcusable, and resulted in prejudice to SNG – not to mention the prejudice to RAK, which spent more than $120 million preparing for the 33rd America's Cup. On these undisputed facts,

laches applies and bars GGYC's venue claim. *Macon v. Arnlie Realty Co.*, 207 A.D.2d 268, 271 (1st Dep't 1994) ("unreasonable and inexcusable delay by plaintiff resulting in prejudice to the defendant" forecloses relief sought).

IV. THE TRIAL COURT *DID* IGNORE THE PLAIN TERMS OF THE DEED OF GIFT IN RULING THAT THE RUDDERS OF GGYC'S TRIMARAN MUST BE EXCLUDED FROM THE LENGTH ON LOAD WATER-LINE MEASUREMENT.

In improperly excluding rudders from the measurement of the length on load water-line, the trial court ignored the plain terms of the Deed of Gift. If left to stand, this ruling would nullify the Deed's express limits on maximum load water-line (a measure taken from the forward-most point to the aftmost point of the yacht that cuts through the water, in load condition). Further still, the trial court plainly erred in considering irrelevant extrinsic evidence about the measurement of America's Cup vessels bearing no resemblance to GGYC's unprecedented, 113-foot trimaran.

A. The Language of the Deed on the Measurement of GGYC's Trimaran, Including Its Rudders, Must Control.

To regulate the size of yachts or vessels for the America's Cup, and to afford the defender fair warning of the boats it will face in a challenge, the Deed provides specific and detailed requirements regarding (a) how boats are to be measured, and (b) the maximum possible load water-line, or boat length. (R. 345). A challenger and defender that have agreed to a mutual consent challenge may

apply International Sailing Federation ("ISAF") measurement rules, rules of their own selection, or rules applied by the New York Yacht Club in 1887. (*Id.*) But where, as here, the contenders did not reach agreement, the Deed controls and must be followed.

GGYC does not dispute that the Deed calls for the measurement of *entire* "yachts or vessels;" it does not carve out appendages or rudders. (R. 345). This unambiguous provision makes clear that "yachts or vessels" that exceed ninety feet on the load water-line cannot compete for the America's Cup. (R. 345).[8] GGYC likewise does not dispute that a rudder is as much a part of a yacht as tires are part of a car. (*See* GGYC Br. 37). Thus, GGYC cannot deny that, on its face, the length on load water-line of the "yacht or vessel" referred to in the Deed means a measurement of the entire part of the "yacht or vessel" that sits at the waterline, including any rudders or other appendages that sit at the waterline.

Because its trimaran exceeds the dimensions required by the Deed, (R. 845, 847), GGYC must claim that the Deed does not mean what it plainly says. GGYC urges that the Deed did not *really* mean to measure the entire length of a boat; it *really* meant for competitors to measure only "hulls." (GGYC Br. 37). But, the Deed could not be clearer in speaking in terms of restrictions on the length of "yachts or vessels," as opposed to "hulls." (R. 345). This limitation on the

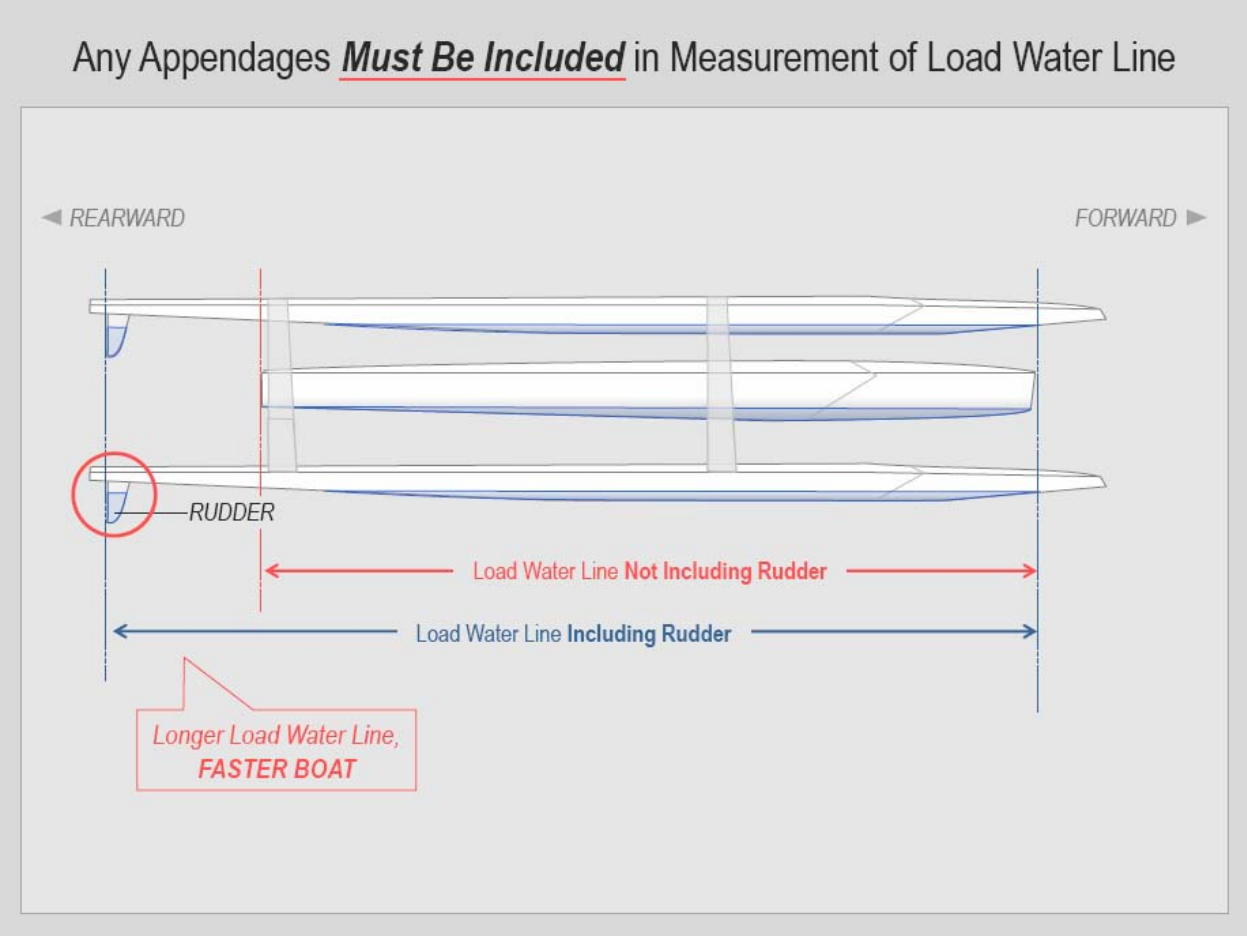
[8] This limitation applies to single-masted yachts.

length of the vessel is important because a vessel's length is an important factor in determining its speed. (R. 848).[9] GGYC does not and cannot dispute that extending the waterline by positioning the rudders behind the hull waterline plane will improve the performance and speed of their yacht. If it did not, GGYC would not have re-designed its vessel to re-position the rudder in a manner that extended the load water-line inclusive of the rudder.

As the below demonstrative illustrates, excluding the rudder from the measurement would allow a competitor to race in a vessel that exceeds 90 feet in length:[10]

[9] Indeed, George L. Schuyler, the donor of the Deed of Gift, repeatedly emphasized the importance of accurate measurements. (R. 927).

[10] This demonstrative was accepted into evidence below. (R. 114).



Moreover, the fact that the Deed expressly states that "nor shall the centre-board or sliding keel be considered a part of the vessel for any purposes of measurement" confirms that the rudder must be included in measuring the length of the vessel. (R. 346). *First*, this clause reiterates in its reference to "vessel" that the measurements at issue in the Deed of Gift are of the "vessel," not merely the "hull." *Second*, as explained in SNG's opening brief, this clause makes clear that the drafters of the Deed of Gift knew how to exclude components of a vessel from measurement when they wanted to. The Deed excludes centre-boards and sliding keels. It does not exclude rudders.

GGYC's only response is to say that "the purpose of listing these components was to ensure that vessels employing them would not be excluded from competition." (GGYC Br. 39 n.6). But GGYC's construction cannot be reconciled with the language of the Deed itself. In fact, the Deed expressly allows centre-board and sliding keels in its declaration that: "Centre-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such centre-board or sliding keel . . . ." (R. 346). GGYC's reading of the separate clause in the Deed, "nor shall the centre-board or sliding keel be considered a part of the vessel for any purposes of measurement," as saying the same thing would impermissibly render this clause superfluous.

GGYC's interpretation thus contravenes well established rules of contract interpretation. *Lawyers' Fund for Client Protection v. Bank Leumi Trust Co.*, 94 N.Y.2d 398, 404 (2000) (rejecting an interpretation that "would render the second paragraph superfluous, a view unsupportable under standard principles of contract interpretation"); *Suffolk County Water Auth. v. Vill. of Greenport*, 21 A.D.3d 947, 948 (2d Dep't 2005) ("an interpretation which renders language in the contract superfluous is unsupportable").

Instead, this latter clause speaks clearly and directly to the question of which components of the vessel should be considered for measurement purposes.

Centre-boards and sliding keels, and only centre-boards and sliding keels, are excluded. GGYC's tortured interpretation of the Deed does violence to the maxim of *expressio unius est exclusio alterius—i.e.*, the express exclusion of centre-boards and sliding keels from measurement means that there are no other unacknowledged exclusions from measurement under the Deed. *See In re New York City Asbestos Litigation*, 41 A.D.3d 299, 302 (1st Dep't 2007).[11]

B. The Trial Court Plainly Erred in Considering Irrelevant, Extrinsic Evidence About the Measurement of Other America's Cup Vessels Bearing No Resemblance to GGYC's Trimaran.

Because the Deed of Gift is unambiguous on its face, resort to extrinsic evidence is unnecessary here. In any event, the extrinsic evidence cited by GGYC actually confirms the plain language interpretation of the Deed as requiring the rudder to be counted in the measurement of the length of the vessel.

GGYC cites 1887 New York Yacht Club ("NYYC") measurement rules, which provide that: "Length is the length on the L.W.L., ***exclusive of any portion of the rudder or rudder-stock*** . . . ." (R. 711) (emphasis added). These

[11] Contrary to GGYC's unfounded claim, SNG did not issue measurement rules with the intention to disqualify GGYC. SNG published the measurement procedures on August 6, 2009. (R. 682-83). GGYC did not first declare its challenge vessel until four days ***later*** at a hearing on August 10. (R. 568-69). In any event, GGYC's counsel acknowleged at that August 10 hearing that GGYC could modify its vessel to account for whatever the Court's ruling was on whether the rudder issue. (*See* R. 500).

NYYC rules show that yacht clubs knew very well how to exclude the rudder from the measurement if that was the goal. The 1887 NYYC measurement rules carve the rudder out of the load water-line measurement. The 1887 Deed of Gift does not. Had the drafters of the Deed intended to exclude the rudder from the measurement of the yacht for some reason, they could easily have added the clause "exclusive of any portion of the rudder," as the NYYC did.

GGYC relies upon two other pieces of extrinsic evidence, supposedly "standard ISAF measurement rules"[12] and the 1988 America's Cup measurement procedures. (GGYC Br. 41). Both these sets of rules are irrelevant because they explicitly deal with the measurement of the load water-line of the ***hull***, rather than of the vessel. (R. 686, 1078-79). Whether a rudder is or is not counted in measuring the load water-line of a hull is not at issue here. It is undisputed that the Deed's load water-line limitation applies to the "vessel," not the "hull."

Perhaps most telling of all, GGYC cannot cite any example of any vessel, whether defending or challenging, in any prior America's Cup that has exceeded 90 feet in length, including its rudder. Of the hundred or so vessels that have previously participated in the 140-year history of the America's Cup, no prior

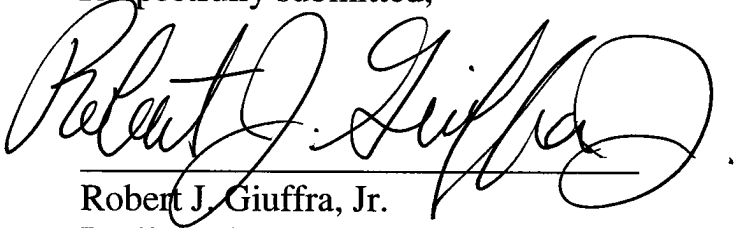
[12] GGYC suggests in its brief that the ISAF Equipment Rules of Sailing (R. 686) are part of SNG's rules. (GGYC Br. 41). GGYC cites no evidence in the record to support such a proposition and there is, in fact, no evidence in record supporting GGYC's claim that the ISAF Equipment Rules of Sailing are part of SNG's rules and regulations.

competitor has ever raced in a boat that exceeds 90 feet in length inclusive of rudder. (R. 75, 98-99). GGYC's vessel would be the first. Thus, to the extent that historic evidence is relevant, such evidence confirms that the rudder must be counted in measuring load water-line.

CONCLUSION

For the foregoing reasons, Appellant-Defendant SNG respectfully requests that this Court reverse the trial court's orders granting (1) Appellee-Plaintiff GGYC's motion to disqualify RAK as the venue for the 33rd America's Cup and (2) GGYC's motion to exclude the rudder from the load water-line measurement.

Respectfully submitted,



Robert J. Giuffra, Jr.
Basil P. Zirinis III
Sharon L. Nelles
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
Tel: (212) 558-4000
Fax: (212) 558-3588

Attorneys for Defendant-Appellant Société Nautique de Genève

Barry R. Ostrager
Jonathan K. Youngwood
George S. Wang
Laura D. Murphy
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
Tel: (212) 455-2000
Fax: (212) 455-2502

November 13, 2009

PRINTING SPECIFICATION STATEMENT

This computer generated brief was prepared using a proportionately spaced typeface.

Name of typeface: Times New Roman

Point size: 14-point type

Line spacing: Double-spaced

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, and any authorized addendum is 6,972 words.