

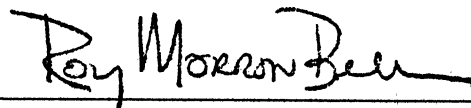
PLEASE TAKE NOTICE THAT, upon the affidavit of Roy Morrow Bell, attorney for William I. Koch, and upon the *amicus* brief filed herewith, Mr. Koch will move the Court on January 12, 2008 at 9:30 am at the Courthouse located at 20 Eagle Street, Albany, NY 12207, or as soon thereafter as counsel may be heard, for an order pursuant to Court of Appeal of the state of New York Rule of Practice 500.23 for permission to appear as *amicus curiae*.

Mr. Koch seeks *amicus curiae* relief because he can identify arguments that might otherwise escape the Court's consideration and because the proposed *amicus curiae* brief will be of assistance to the Court. *Amicus Curiae* relief is particularly appropriate in this case as the America's Cup is an international event that sparks wide-spread public interest. *Colmes v. Fisher*, 271 N.Y.S. 379 (1934) (In cases involving questions of important public interest, leave is generally granted to file brief as *amicus curiae*). As a former America's Cup challenger, winner, and an inductee in the America's Cup Hall of Fame, Mr. Koch believes that he can provide the Court with a perspective of the issues that is not provided by the parties to this action.

Respectfully submitted,

Dated: January 1, 2009

TROUTMAN SANDERS LLP



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ROY MORROW BELL, an attorney duly admitted to practice before the Courts of the State of New York, affirms the following to be true under penalty of perjury:

1. I am an attorney with the law firm of Troutman Sanders, attorneys for William I Koch. I am fully familiar with the facts and circumstances described in my affirmation based upon my personal knowledge and a review of the files in the possession of my firm. I also represented William I Koch and *America*³ during their two America's Cup campaigns. I respectfully submit this affirmation in support of William I. Koch's motion for *amicus curiae* relief pursuant to Court of Appeals of the State of New York Rule of Practice 500.23. Mr. Koch's proposed *amicus* brief is submitted herewith.

2. Mr. Koch, who holds a PhD from MIT, sponsored a team that raced in, and ultimately won, the 1992 America's Cup on a yacht named *America*³. Mr. Koch not only financed the team, but also sailed as the team leader and the helmsman in the afterguard of *America*³. In 1993, Mr. Koch was inducted in the America's Cup Hall of Fame.

3. In 1995 Mr. Koch financed another team to compete for the Cup on the yacht named *Mighty Mary*. This crew consisted entirely of women, except for one male tactician, later added.

4. Mr. Koch has sponsored and participated in publishing a book on the history of the America's Cup by Robert Fisher. He is also sponsoring a further series of books on other aspects of the America's Cup, such as: the art of the America's Cup; the technology of the America's Cup, etc. Mr. Koch authored a series of articles during the America's Cup conducted in New Zealand in 2000. He also has given over 250 speeches on various aspects of the competition. Furthermore, he is the largest collector of America's Cup memorabilia in the world, which includes a two-scale model of every single boat that has competed in the finals for the America's Cup.

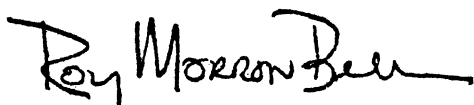
5. As a former winner, Defender and America's Cup Hall of Fame inductee, Mr. Koch has an interest in preserving the fine international reputation of the America's Cup and ensuring that the America's Cup maintains a high standard of competition. Moreover, his experience in financing a team and managing a crew to compete in the America's Cup has given him insight into "what it takes to win" and to organize a successful, profitable event. Mr. Koch has an extensive understanding of how to attract and manage the staff of 50 to 250 people needed to compete in the America's Cup. He understands the challenges and necessity of attracting sponsors and racing syndicates, which base their participation on public interest.

6. Mr. Koch's *amicus* brief is limited to issues affecting the America's Cup in general and from a different perspective than that of the parties. For this reason, Mr. Koch's brief identifies issues that might otherwise escape the Court's attention.

7. Mr. Koch believes that the arguments set forth in this *amicus* brief will be of assistance to the Court.

WHEREFORE, it is respectfully requested that William I. Koch's Motion for Leave to File a Brief as Amicus Curiae in the above reference matter, be granted.

Dated: January 1, 2008
San Diego, California



Roy Morrow Bell

TABLE OF CONTENTS

PRELIMINARY STATEMENT1

THE AMICUS CURIAE4

FACTS5

ARGUMENT6

CONCLUSION10

PRELIMINARY STATEMENT

The America's Cup is the oldest and most prestigious sailing regatta in the world and the oldest active trophy in international sport. It predates the modern Olympics by 45 years. The America's Cup, which is a silver cup trophy, was first won in 1851 by the yacht *America* in a race around the Isle of Wight. After winning the Cup, the six owners of the *America* donated the Cup to the New York Yacht Club in 1857, creating a charitable trust under the laws of New York that provided that the Cup would be a perpetual challenge cup for the friendly competition between foreign countries. From the beginning, the Deed of Gift required that a Challenger of Record be an organized yacht club. Since 1857 there have been 32 America's Cup matches and in every single race, the Challenger of Record was an organized yacht club. Most of these yacht clubs had royal patronage.

Although the Appellate Division below found the requirement that a Challenger of Record hold an annual ocean regatta to be somewhat trivial, history indicates that it was an important requirement for the donors. In fact, status and grandeur of the Challenger of Record was so important to the donors that in 1882, after two challenges had come from yacht clubs situated on the Great Lakes, which resulted in racing vessels deemed to be "crude in finish" and "degrading to the standing of the competition"; the sole surviving donor, George Schuyler revised

the deed to require that, in addition to being an “organized yacht club” the challenger must have “its annual regatta on an ocean water-course.”

The requirement that a Challenger of Record be an organized yacht club, also provides other benefits. It guarantees that a Challenger will have the experience necessary to negotiate a fair and competitive Protocol for the America’s Cup; that the Challenger is a sailing enthusiast motivated by the challenge of competing in a world renowned sailing event, rather than the financial incentives of holding an international sporting event. It ensures that the America’s Cup will remain a true sport, with the most prestigious teams racing for organized yacht clubs that have real members who can rally behind their team. The requirement secures a level of competition that drives innovation and captivates public attention.

Now, more than a hundred and fifty years after the America’s Cup began, the current Defender and trustee of the Cup, Societe Nautique De Geneve (SNG), has disregarded the terms of the Deed of Gift and seeks to trample tradition and tarnish the prestigious reputation of the America’s Cup by permitting a sham yacht club, Club Nautico Espanol De Vela (CNEV), to serve as Challenger of Record for the 33rd America’s Cup. The objective of SNG and its team founder, Ernesto Bertarelli, is to use CNEV to make money and circumvent the self-dealing charitable laws of New York. CNEV is not a yacht club. It has no vessels, no

members, no physical facilities (other than the base facility of its racing team) and has never held an annual regatta. Prior to September of this year, CNEV had no website, no telephone number or contact information. In fact, it was incorporated just days before it submitted a challenge to SNG.

In truth, CNEV is nothing more than a federation of sports clubs and individuals who promote the sport of sailing. The sole purpose of its creation was to ensure that the 33rd America's Cup would be held in Valencia, Spain. Because CNEV is not a *bona fide* yacht club, it cared little (or knew little) about negotiating a fair and sportsman-like race for the America's Cup. Instead, its prime focus was to ensure that the race would be held in Valencia, and in exchange for that guarantee, CNEV allowed SNG to create a one-sided Protocol that left SNG with total control of the competition.

The result of this exchange is a plan for the 33rd America's Cup that not only violates the express language of the Deed of Gift, which requires the Challenger of Record to be an organized yacht club holding its annual regatta on an ocean water-course, but one that also fails to comply with the spirit and intention of the Deed of Gift. Should the lower court's decision stand, any organization, whether a yacht club or not, could be a Challenger of Record. The outcome would be a rapid demise to the grandeur and prestige of the America's Cup. The America's Cup would no longer be a competitive event that drives

innovation and captures the public's attention. The event, as it exists today and as it was envisioned by the donors of the Cup, would die.

THE AMICUS CURIAE

Mr. Koch has been actively involved in the America's Cup for nearly two decades. He financed and sailed on the 1992 winner of the America's Cup, the *America*³ and was inducted in the America's Cup Hall of Fame in 1993. In 1995 he financed another team to compete for the Cup on the yacht named *Mighty Mary*.

Mr. Koch has sponsored and participated in publishing a book on the history of the America's Cup by Robert Fisher. He is also sponsoring a further series of books on other aspects of the America's Cup, such as: the art of the America's Cup and the technology of the America's Cup. Mr. Koch authored a series of articles during the America's Cup conducted in New Zealand in 2000. He has given over 250 speeches on various aspects of the competition. Furthermore, he is the largest collector of America's Cup memorabilia in the world, which includes a two-scale model of every single boat that has competed in the finals for the America's Cup.

As a former winner, Defender and America's Cup Hall of Fame inductee, Mr. Koch has an interest in preserving the fine international reputation of the America's Cup and ensuring that the America's Cup maintains a high standard of competition. Moreover, his experience in financing a team and managing a crew to compete in the America's Cup has given him insight into "what it takes to win"

and to organize a successful, profitable event. Mr. Koch has an extensive understanding of how to attract and manage the staff of 50 to 250 people needed to compete in the America's Cup. He sponsored and edited an America's Cup book entitled "To the Power of Three". He understands the challenges and necessity of attracting sponsors and racing syndicates, which base their participation on public interest.

In light of this experience, Mr. Koch can provide the Court with an independent perspective on how the America's Cup will be changed should the lower court's decision stand and "sham" yacht clubs be permitted to serve as Challengers of Record. As a prominent member of the sailing community, an avid supporter of the Sea Scout program of the Boy Scouts of America, and biannual host of the William I Koch International Sea Scout Cup, Mr. Koch hopes to provide this Court with a view not expressed by the parties, but a perspective of the sailing community in general.

FACTS

As the facts related to this dispute are set forth, at length, in the parties' briefs, *Amici Curiae* will not repeat them here.

ARGUMENT

Mr. Koch supports the argument asserted by Plaintiff/Appellant Golden Gate Yacht Club that the intent of the donors, as expressed in the Deed of Gift, was that only a *bona fide* yacht club could qualify as Challenger of Record. Not only is this requirement expressly set forth in the Deed of Gift, but the requirement is necessary to maintain the splendor and glory of the America's Cup.

As a practical matter, a requirement that a challenger be a organized yacht club that has held an annual ocean regatta, ensures that the challenging entity will be independent from the Defender and will have the experience needed to negotiate a Protocol for the America's Cup that will result in a competitive showing of true sportsmanship. This competition fuels innovation and fortifies the prestige of the America's Cup.

If the decision of the Appellate Division stands, and CNEV is permitted to serve as Challenger of Record for the 33rd America's Cup, the prestige and reputation of the Cup will be soiled. The lower court's decision opens the door for a Defender to invent sham challengers (as SNG did here) so that the Defender may continue to control the Cup. The result of this is that the Defender could violate the self-dealing provisions pertaining to charitable trusts of the state of New York and divert monies to itself.

The revenue generated by the America's Cup will create huge incentives for non-yacht clubs to lodge challenges simply to secure the event in their home city (as is the case here where CNEV was created solely to ensure that the 33rd America's Cup is held in Valencia). In its *amicus curiae* brief the City of Valencia states that the 32nd America's Cup had an economic impact of 6 billion Euros and created more than 60,000 jobs. The financial temptation to host the Cup creates a perverse incentive that would certainly pervert the motive of a sham challenger. Absent independence from the Defender and the experience of a organized yacht club, the challenger would be unable to negotiate a fair Protocol that maintains the high level of competition upheld by the America's Cup Defenders and Challengers of Record since 1851.

Moreover, if a challenger is not a *bona fide* yacht club – if it lacks members, a physical location and an annual regatta – sailing enthusiasts cannot join the challenging club, and rally behind their team for the America's Cup. The nature of the event would change. In the end, public interest in the America's Cup would greatly diminish, and along with it would go sponsors and syndicates, which are necessary to the survival of the Cup.

A successful and competitive America's Cup requires the merging of management, technology, fundraising and teamwork. The America's Cup is as much about technology as it is sportsmanship. The boats that compete in the event

have always been on the cutting edge of technology. The race introduces to the world the innovations in sailing hydrodynamics and aerodynamics. Technology is paramount. It is this innovation that captures the public's attention and drives the competition. Although the typical America's Cup match lasts 2 1/2 to 3 hours, a sixty second win is consider a "big win"; even a five second difference in speed is enough to win the event. This tight margin fuels innovation in technology and can only be maintained if the competition is held on a level playing field.

Maintaining cutting edge technology also requires experience. The experience to negotiate a competitive course, to design a state-of-the-art boat, to understand the foundations of competitive sailing and to manage a staff of 50 to 100 people that includes marketers, fundraisers, public relations personnel, maintenance crew, sail makers, yacht designers, meteorologists, engineers, computer experts, retail staff, rules experts, housing staff, coaches, tender operators, sailors and more. By requiring a challenger to be an organized yacht club that holds an annual ocean regatta, the Deed ensures that all challengers will have a threshold level of experience to produce an America's Cup even worthy of its history.

All of this requires funding. There is a direct correlation between money spent and boat speed. Most racing syndicates must rely on sponsorship to fund their quest for the Cup. Sponsors, who look for a return on their money, are

motivated by public support and attention. The public will not be enticed to watch a one-sided race that favors only the Defender and a “no-name” challenger will not have the fan-base to draw a large crowd. Absent public interest to draw in sponsors, competitors will be unable to raise the money necessary to fund the technological innovation and talent needed to win the America’s Cup. And a sponsor will be less likely to back a challenger facing an unfair Protocol that guarantees a victorious Defender. Without a cutting-edge, fair and competitive event, public interest in the America’s Cup will further dwindle, funding and innovation will cease and the world’s oldest and prestigious international trophy sport will die.

Accordingly, the Appellate Division decision not only conflicts with the intent of the donors and the plain language of the Deed of Gift, the practical result of its decision would forever change the America’s Cup from a competitive and prestigious match between the most prominent members of the sailing community, to an unfair and degrading race unjustly dominated by SNG.

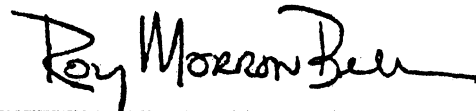
CONCLUSION

For the foregoing reasons, Mr. Koch respectfully requests that this Court reverse the decision of the Appellate Division and find that CNEV is not a qualified Challenger of Record under the Deed of Gift.

Respectfully submitted,

Dated: January 1, 2009

TROUTMAN SANDERS LLP

A handwritten signature in black ink that reads "Roy Morrow Bell". The signature is written in a cursive style with a long horizontal flourish at the end.

Roy Morrow Bell, Esq.
*Attorneys for Amicus Curiae,
William I. Koch*