

Chambers of the Hon. Shirley Werner Kornreich
Supreme Court of the State of New York
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New York, New York 10007

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FROM: Hon. Shirley Werner Kornreich

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DATE: October 29, 2009

RE: Golden Gate v. SNG
Index No. 602446/2007

MESSAGE: See attached.

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

PRESENT: Kornreich

PART 54

Index Number : 602446/2007

GOLDEN GATE YACHT CLUB

VS.

SOCIETE NAUTIQUE DE GENEVE

SEQUENCE NUMBER : 011

ENFORCE/EXEC JUDGMENT OR ORDER

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

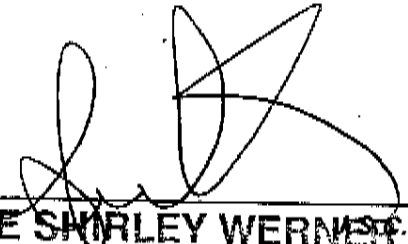
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is* decided in accordance with the *unopposed* decision/order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/30/09



JUSTICE SHIRLEY WERNER KORNRE

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

-----X
GOLDEN GATE YACHT CLUB

Plaintiff,

-against-

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant.
-----X

Index No.:602446/2007

**DECISION and
ORDER**

KORNREICH, SHIRLEY WERNER, J.:

In this next round of motion practice involving The America's Cup race, plaintiff Golden Gate Yacht Club (GGYC) moves for the following relief: (1) to renew its motion for an order "directing that SNG cannot change any of the rules and sailing regulations for the next America's Cup match" (denied by the court in its July 29, 2009 Decision and Order); (2) to enforce the April 7, 2007 Order and Judgment regarding venue for the race (Cahn, J., Retired); and (3) for an Order removing the confidentiality designation of the June 5, 2009 agreement between the International Sailing Federation (ISF) and defendant Société Nautique de Genève (SNG). The court assumes the parties' familiarity with the facts. New evidence or material developments will be summarized as needed.

I. *Discussion*

A. *Motion to Renew*

CPLR 2221(e) provides that,

(e) A motion for leave to renew:

1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Originally, GGYC asked the court to hold SNG in contempt “for its failure to provide its rights” GGYC also asked for an Order “directing that SNG cannot change any of the rules and sailing regulations for the next America’s Cup match without ... mutual consent” At that time, the parties focused on SNG’s use of movable ballast and power winches to trim the sails. The court denied the motion and found that SNG’s use of movable ballast and power winches did not violate either the Deed of Gift or the ISAF rules. Golden Gift is not now asking to renew its motion as to this issue. It has rebuilt its yacht to be competitive with SNG’s, and there will be no further discussion about the use of movable ballast or power winches as a design feature.

The “new facts” raised by GGYC are SNG’s rules of measurement, issued August 6, 2009 and subsequently clarified by correspondence and filings. SNG has acknowledged that under its rules the measurement of the “length on load water-line” would include the rudder and would exclude movable ballast that could be added later. GGYC argues that these rules violate the Deed of Gift, which precludes the defender from changing its rules after the Notice of Challenge has been issued. Additionally, GGYC argues, at the time the Deed of Gift was created, the custom and practice was to exclude rudders from the “length on load water-line” measurement. Further, the addition of ballast after measurement, it argues, would sink the vessel

deeper into the water and increase its “length on load water-line” beyond the 90 feet maximum set by the Deed of Gift.

Rules Changes

GGYC seeks to renew its challenge to the Court’s prior ruling that nothing in the Deed of Gift precludes the defending organization from changing its rules after the Notice of Challenge has been issued. The Court based its prior decision on the evidence that was presented, particularly the Affidavit of Fred Meyer, who is the Vice-Commodore of SNG. Meyer explained the “heirarchichal rule structure” governing sailing regattas around the world. Of particular interest to the court and key to the court’s ruling, was Meyer’s explanation that SNG had been using movable ballast and power winches since at least 1995, and that it is “common practice for other major yacht races throughout the world to modify ISAF RRS 2009-2012 [ISAF rules] and in particular RRS 51 [prohibiting movable ballast] and 52 [requiring manual power].” The court understood Meyer’s sworn statements to establish that SNG’s rules, at the time the Notice of Challenge was issued by GGYC, permitted SNG to use movable ballast and power winches.

Based on the evidence presented at that time, the only disputed material issue before the court was whether SNG’s use of power winches and movable ballast violated the Deed of Gift, and not the broader issue of whether the deed permits SNG to change its rules after the Notice of Challenge. The court, now, will clarify its prior ruling to resolve only the narrow issue concerning whether SNG’s waiver of ISAF rules 49 through 54 violated the Deed of Gift. The portion of the ruling addressing the broader issue of when a defender can change its rules, is *dicta*.

GGYC argues, as it did before, that allowing the defender to change its rules invites the latter to engage in unfair tactics. This argument does not warrant renewal of the prior motion on this issue. In any event, the ISAF rules recognize that changes will likely occur, and certain sailing rules depend on the particular venue. Further, SNG has represented to the Court that it “does not have and has never had any intention of using the measurement procedures to disqualify” the challenger. The court will take SNG at its word and anticipates that it will not issue rules or sailing instructions that would be inconsistent with the overriding purpose of the Deed of Gift – to set the ground rules for a “friendly competition between foreign countries.”

Inclusion of the Rudder in Measurement

The Court finds, based on the evidence presented and the arguments of counsel at the October 27, 2009 hearing, that the rudder is not included in measurement of the length on “load water-line” under the Deed of Gift. The deed provides, in pertinent part, that “competing yachts or vessels, if of one mast, shall not be ... more than ninety feet on the load water-line.” Under New York law, “[t]he 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.” *In re Gross*, 75 AD2d 531 (1st Dept 1980), quoting *Matter of Nicol*, 24 AD2d 191, 197 (1st Dept 1965).

GGYC has submitted substantial evidence, including affidavits from a number of yacht racing experts, that the term “length on load water-line” historically excluded measurement of the vessel’s rudder. New York Yacht Club rules in existence at the time the deed was executed provided that measurement would be “exclusive of any portion of the rudder or rudder-stock.” In addition, the rudder was not included in the measurement procedures for length on load water-

line in the 1988 America's Cup, which measurement procedures SNG claims it relied on for its August 6, 2009 measurement procedures. SNG has not submitted any persuasive contrary evidence. SNG may not include rudders in measurement of the "length on load water-line." In light of this ruling, the Court does not need to reach the broader issue of whether SNG can change its rules to include rudders in the measurement.

Remaining Issues

The Court requires additional expert guidance in order to decide the following issues:

- (1) How "load water-line" is measured in an America's Cup race, including but not limited to whether SNG can exclude movable ballast from the measurement and whether the same procedures are used when dealing with a catamaran and/or trimaran;
- (2) The safety of holding the race off the coast of Valencia in February, 2010;
- (3) When the Notice of Race and other rules of the race are customarily issued in an America's Cup challenge, including whether they are changed after the Notice of Challenge;
- (4) When the panel of jurors is customarily appointed in an America's Cup challenge; and
- (5) Whether the contract between ISAF and SNG provides for an independent and objective panel of jurors, and by which rules such a panel of jurors is bound in an America's Cup challenge.

The Court will hold a hearing at 10:00 A.M. on Wednesday, November 4, 2009, at which time the parties shall each produce an independent expert who is not affiliated with either party and who has sat on an America's Cup jury in the past. The parties' appointed experts shall confer prior to the hearing and choose a third, independent expert who is not affiliated with either party

and who has also sat on an America's cup jury in the past. All three experts shall appear at the hearing and be prepared to testify regarding the above issues.

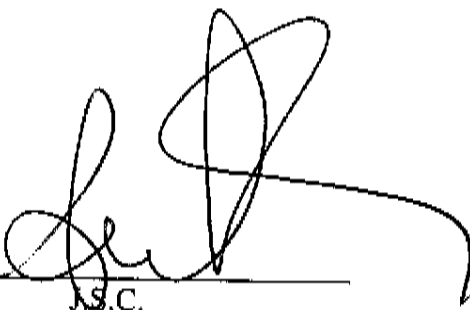
All other issues raised in the motion and opposing papers were resolved by the Court on the record at the hearing on October 27, 2009.

Finally, all issues in regard to venue which have been raised in multiple letters to the court on October 29 and 30, 2009, shall be heard on the date of the hearing. Accordingly, it is

ORDERED that GGYC's motion to renew and for other relief is continued until after a further hearing; and it is further

ORDERED that the parties shall appear at 10:00 A.M. in Part 54 of the New York Supreme Court, Commercial Division, 60 Centre Street, Room 418, New York, New York. for a hearing pursuant to the court's directions in this Decision and Order.

ENTER:



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right. The signature is written over a horizontal line.

J.S.C.

Date: October 30, 2009
New York, N. Y.