

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

PRESENT: _____

PART 54**JUSTICE SHIRLEY WERNER KORNREICH** *Justice**Golden Oate*

INDEX NO.

602446607

MOTION DATE _____

MOTION SEQ. NO.

11

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 answer
of defendant.**/ FILED**NOV 19 2009**NEW YORK
COUNTY CLERK'S OFFICE*Dated: *11/17/09***JUSTICE SHIRLEY WERNER KORNREICH**
*J.S.C.*Check one: FINAL DISPOSITION NON-FINAL DISPOSITIONCheck if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X

GOLDEN GATE YACHT CLUB

Index No.:602446/2007

Plaintiff,

-against-

**DECISION and
ORDER**

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant.

F I L E D

X
NOV 19 2009

KORNREICH, SHIRLEY WERNER, J.:

NEW YORK
COUNTY CLERK'S OFFICE

I. *Background*

By decision and order dated October 30, 2009, the court directed each party to designate an independent, unaffiliated expert who had previously sat on an America's Cup Jury and those two experts to select a third neutral expert who also had sat on an America's Cup Jury. These three experts were in turn directed to appear at a hearing to testify regarding five issues delineated by the court. On November 2, 2009, David Tillett, the third independent expert, wrote to the court suggesting that the expert panel hear submissions from the parties then submit an advisory opinion to the court. The parties agreed to the procedure, and on November 6, 2009, the court "so ordered" a consent order to that effect. After a hearing held on November 7, 2009, the expert panel issued a November 8, 2009 opinion, which was submitted to the court on November 9, 2009.

On November 13, 2009, plaintiff Golden Gate Yacht Club (GGYC) submitted a Memorandum of Law in Support of Adoption of the Expert Panel's Recommendations. By letter that same date, defendant Société Nautique de Genève (SNG) urged the court to reject the expert

Panel's recommendation regarding measurement of load waterline (the court's Issue 1 in the October 30 order). SNG also argued that the court's remaining issues (Issues 2-5) were moot in light of "recent developments" and that any decision on the merits of these now moot issues would be an impermissible advisory opinion. *See Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 810-811 (2003) (finding court's jurisdiction extends only to live controversies).

II. *Discussion*

At the outset, the court finds that the expert panel was independent, well qualified and appointed in accordance with the requirements of the court's October 30, 2009 decision. The individual Panel members' qualifications were set forth fully in the parties' submissions, and the court will not repeat them here. Their opinion was unanimous. The court will separately address each of the five issues, and will set forth as much of the expert Panel's opinion as the court deems necessary to explain its decision..

ISSUE 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.

Panel Opinion:

- 20 It is the Panel's opinion that with respect to catamarans and trimarans, for the purpose of measurement of load water-line, the principle of being "fully loaded" when measured, should be employed. This would be consistent with the [America's Cup] measurement rules provision in 1988. Any moveable ballast should be distributed equally in the available ballast storage areas, and should include as much water ballast as might be used at any time during any race

- 21 The Panel recommends that the Court require SNG to arrange for the Event Measurer to write and publish measurement procedures after consulting with both competitors, in terms of the above paragraph, to include requirements of positioning of ballast and crew during measurement and any other necessary procedures.

SNG responds that it is governed by the rules of the Association des Clubs de Voile de la Région Lémanique (ACVL), which rules provide that multi-hulls must be measured with water ballast empty. The expert Panel concluded that the ACVL rules "do not apply to America's Cup boats with respect to the determination of load water line."

The court adopts the Panel's opinion on Issue 1. The context in which this issue arose is material to the court's decision. On August 6, 2009, SNG issued measurement procedures that allow ballast to be added to an America's Cup vessel after it has been measured. GGYC argued that this measurement procedure violates the Deed of Gift, which states that competing vessels may not be longer than ninety feet on the "load water-line." Apparently, adding ballast sinks the vessel deeper in the water and increases its length on load water-line, so under SNG's procedures, a vessel can weigh in at a Deed-compliant length, then attain a length that violates the Deed *after* ballast is added.

As the court found previously, 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). If the testator's language is clear and unambiguous, the inquiry ends there. *Mercury Bay Boating Club, Inc. v San Diego Yacht Club*, 76 NY2d 256, 269-270 (1990). The court finds that the language "load water-line" used in the Deed is not ambiguous and includes all loaded ballast. This was the case when the Deed

was established and remains the case now. The Panel discusses and summarizes the evidence submitted by the parties.

In 1887 when the Deed was established (and to this day), the load line mark ... was a safety measure to ensure ships were not overloaded When the ship was loaded in calm water with cargo, consumables, stores and crew, this load line mark was not permitted to be immersed The same method was used at that time to determine, when required, the length at the water-line of sailing vessels used for racing.

The Panel notes further that the concept of measuring load water-line "is not used in relation to racing sailing boats in modern times, other than in Deed of Gift America's Cup challenges," and that in 1988, in the last Deed of Challenge America's Cup race, the measurement rules included ballast. The Panel goes on to conclude that the fact that the ballast will be movable in the upcoming challenge, although of first impression in the history of the America's Cup, does not compel a different result. The court agrees. As for the ACVL rules, they do not apply because they do not provide for measurement of a vessel's length on load water-line. The absence of an ACVL rule on the topic of measuring load water-line does not support SNG's claim that the ACVL rules do not include ballast in such a measurement.

ISSUE 2: The safety of holding the race off the coast of Valencia in February, 2010

Panel Opinion:

At the hearing, both parties agreed that with the proper application of the RRS, races held in Valencia can be safely managed. The Panel concurs with this assessment.

On November 10, 2009, SNG issued the Notice of Race identifying the venue for the 33rd America's Cup race as Valencia, Spain. This issue is now moot.

ISSUE 3: When the Notice of Race (NOR) 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.

Panel Opinion:

- 36 It is the Panel's opinion that although the RRS [ISAF Racing Rules of Sailing] permit a NOR to be changed after publication provided that adequate notice is given, if a boat is prejudiced by this action the boat may request redress from the Jury under the RRS.
- 37 Sailing instructions (which give more detailed information about running the races) are required to be made available to each boat before a race begins (RRS 25). In 1988 (the last Deed of Gift challenge) Sailing instructions (together with the NOR [Notice of Race]) were issued by the Defender 16 days before the first race.
- 38 At the hearing SNG indicated that it would issue the NOR as soon as it determines the venue.

SNG has issued the Notice of Race three months before the February 10th date scheduled for the America's Cup race. This time period exceeds the examples of time periods discussed by the Panel in its opinion. The issue of timing for the initial NOR is therefore moot. As for the issue of changes to the NOR, the Panel found that the defender (here SNG) may change the NOR after it is issued as long as adequate notice is provided. The Panel bases this decision in part on the challenging boat's right under the RRS to seek redress from the America's Cup Jury for any prejudice resulting from the change. GGYC argues that the agreement between SNG and the ISAF prevents the sailing Jury from modifying the NOR, which in turn abrogates the GGYC's right to seek redress from the Jury for any prejudicial changes to the NOR. SNG argues that the issue is moot because the ISAF has confirmed that it will appoint an independent International Jury and that the process will be completed shortly. SNG also argues that issues relating to the

contents of the Notice of Race do not fall within the Deed of Gift and therefore are not properly subject to review by the New York courts.

The court is charged with construing the intent of the settlor from the language of the Deed of Gift. The Deed provides, in relevant part,

[These ocean courses] shall be selected by the Club holding the Cup; and these races shall be sailed *subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift*, but without any time allowances whatever.

(Emphasis added.) GGYC has challenged SNG's changes to its rules as contrary to the Deed. Issuance of an NOR is mandated by the RRS and not by the Deed. The contents of, and changes to the NOR are reviewable by the Jury pursuant to the RRS, but they also are reviewable by the court to determine if they conflict with the Deed. The Deed is silent on the issues of whether, and when, the defending club may change its rules. The court finds that the RRS fill this void, providing the mechanism for review by the Jury in the event the NOR or any changes to it are prejudicial to the challenging club. The same is true for issuance of sailing instructions, which must be issued by the defending club prior to the match.

This would normally end the inquiry, but GGYC has alleged that SNG and the ISAF have agreed to bypass this administrative review process. The court, however, need not determine whether this agreement violates the Deed, or whether the court is empowered to review the propriety of the agreement under the RRS. The ISAF, in an *amicus* submission, has confirmed that it will appoint an independent and objective Panel of jurors, free from interference by SNG. SNG also claimed that its letter to the ISAF dated September 16, 2009, amended parts of its agreement with ISAF and shows that it does not intend to restrict ISAF from exercising its power

of appointment of an independent Jury, or to modify the International Jury's powers (by blocking its review of changes to the NOR). The Panel issued the following recommendation, which the court adopts:

The Panel recommends that the parties be directed to attempt to reach a binding agreement to reflect the submissions referred to above. Should they fail to agree in such time as the Court determines, the matter be referred to the Panel which would confer with the Parties and advise the Court on how the matters contained in the submissions be resolved.

ISSUE 4: When the Panel of jurors is customarily appointed in an America's Cup challenge.

Panel Opinion:

- 41 There is no rule that governs when a jury should be appointed. In most major sailing events, the appointment of the jury usually occurs after the Notice of Race has been published. In the case of the America's Cup the appointment of a jury is often prompted by the development of a potential dispute.
- 42 At the hearing, both parties agreed that the ISAF may appoint a jury at any time, without either party requesting the appointment, and were happy for ISAF to appoint the jury now.

This issue is now moot since the ISAF has indicated it will appoint a Jury shortly.

ISSUE 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.

Panel Opinion:

- 47 SNG, as Trustee of the America's Cup has an obligation to ensure there is no conflict between the provisions of ISAF RRS and ISAF regulations and the Deed of Gift. In the Panel's opinion, SNG has properly reserved for itself the exclusive authority to resolve any such conflict including the right to modify the relevant documentation. SNG, as the Organising Authority, is the party responsible for

preparing and issuing the documentation for the Event.

48. The Panel is of the opinion that clause 7 of the Agreement relates to 'conflict of rules' and would not prevent the Jury from granting redress by way of modifying the relevant documentation in appropriate cases.

The Panel identified the rules by which the International Jury would be bound as the ISAF Racing Rules and Regulations. The Panel further recommended that the parties be directed to attempt to reach a binding agreement reflecting the parties' submissions to the Panel and establishing that SNG "has no intention of altering the normal rules of the RRS in respect of a jury including right and powers concerning redress...." (See also the discussion *ante re*: Issue 3.) Accordingly, it is

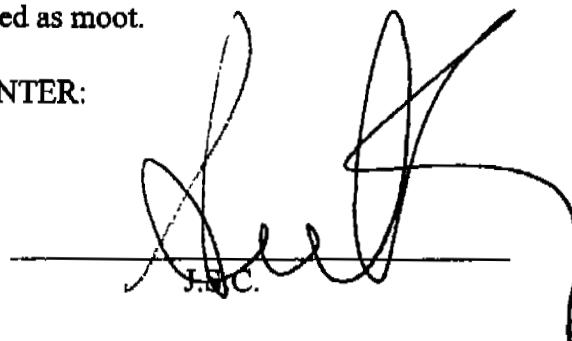
ORDERED that GGYC's motion to renew and for other relief is granted in part to the extent of striking SNG's measurement rule excluding movable ballast; and it is further

ORDERED, in accordance with the Panel's Opinion and this Decision and Order, that the parties shall attempt to reach a binding agreement regarding SNG's declared intent not to hinder ISAF's appointment of an independent and objective International Jury. The parties shall report to the court in writing by December 4, 2009, on their success or failure to reach an agreement, and any further dispute on this issue will be referred back to the Expert Panel for recommendations; and it is further

ORDERED that in all other respects the motion to renew is denied; and it is further

ORDERED that GGYC's motion to enforce the April 7, 2007 Order and Judgment regarding venue for the race (Cahn, J., Retired) is denied as moot.

ENTER:



J.H.C.

Date: November 17, 2009
New York, N.Y.

FILED
NOV 19 2009
NEW YORK
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