To Be Argued By:
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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/ BRIEF FOR DEFENDANT-APPELLANT

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Defendant-Appellant Société Nautique de Genève ("SNG") respectfully submits this reply memorandum of law in further support of its consolidated appeal from the March 17, 2008 Order of the Supreme Court, New York County (Cahn, J.) ("March 17 Order") and as its opening memorandum of law in support of its appeal from the May 12, 2008 Order of the Supreme Court, New York County (Cahn, J.) ("May 12 Order"). The March 17, 2008 Order denied SNG's motion for an order disqualifying Plaintiff-Respondent Golden Gate Yacht Club ("GGYC") as the Challenger of Record for the 33rd America's Cup and declared GGYC's Notice for the 33rd America's Cup invalid. The May 12, 2008 Order disqualified Club Náutico Español De Vela ("CNEV") as the Challenger of Record and set dates for the next America's Cup.[1] The May 12 Order schedules the next America's Cup race in March 2009, which conflicts with the express terms of the Deed of Gift, which precludes a Northern Hemisphere race during the period of November 1st through May 1st. SNG also appeals that portion of the May 12, 2008 Order and seeks to have the 10-month notice period commence upon resolution of the uncertainty created by this litigation.

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[1] SNG filed a Notice of Appeal of the May 12 Order on May 13, 2008 and sought consolidation of its appeals from the March 17 and May 12 Orders. This Court granted SNG's application on May 13, 2008. The May 12 Order and accompanying memorandum decision are included in the Supplemental Record on Appeal, designated herein as "SR."

PRELIMINARY STATEMENT

Plaintiff-Appellee GGYC's brief on this appeal wholly ignores the substantial and sport-altering real-world consequences of the March 17 Order as supplemented by the substantially similar May 12 Order, which is also being appealed and has by order of this Court been consolidated with SNG's previous appeal. The omissions from GGYC's brief are unsurprising given GGYC's desire to eliminate all challengers for the America's Cup and have the courts declare GGYC the sole competitor against the current America's Cup holder, an achievement that GGYC has been unable to earn "on the water" in all of the prior America's Cup competitions in which GGYC has participated. Unable to win the right to sail against the Cup holder in a fair competition, GGYC has utilized this litigation to disqualify and/or exclude all potential competitors and secure itself the position of being the only challenger in the 33rd America's Cup match, thereby eliminating the drama, excitement, and fierce competition that made the most recent America's Cup the most successful America's Cup race in history. [2]

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[2] GGYC's attempt to convince the Court that it sought to negotiate a protocol that would include a challenger series is belied by its own actions. Its challenge, funded by billionaire Larry Ellison, one the richest men in the world, specifies a boat that is so large and so expensive that no other yacht clubs can afford to compete against it. Not content to outspend and thereby eliminate all competition, GGYC sought an October 2008 race date (rejected by the trial court), which would have precluded any yacht club, including SNG, from building a boat in time to compete with the catamaran goliath in which GGYC proposes to compete.

The previous two America's Cups, both of which were won by SNG on the water, were marked by broad participation among nations and intensely competitive sailing. The 31st America's Cup had nine competitors in a challenger series (during which GGYC was eliminated) and the 32nd America's Cup had eleven competitors in a challenger series (during which GGYC was again eliminated). Unless the March 17 and May 12 Orders are reversed, there will be no challenger series in the 33rd America's Cup and the two competitors—SNG and GGYC—will sail in extraordinarily expensive and extremely large boats that are unlikely to be competitive with each other. This is a disservice to both the sailing community and the audience of this immensely prestigious event.

The practical effect of the trial court's orders—however inadvertent—is to transform the storied and revered America's Cup challenge into a two-boat match race, to the detriment of the dozen other yacht clubs that had previously agreed to participate in the 33rd America's Cup. Simply stated, the trial court's rulings preclude participation in the America's Cup by all of the yacht clubs that sought to participate in the 33rd America's Cup and the billionaire sponsor of GGYC is playing the role of the spoiler to advance his own anti-competitive agenda. This Court should reverse the March 17 and May 12 Orders to prevent GGYC from precluding a traditional America's Cup regatta for at least another three years.

This appeal will determine whether the oldest and most important international sporting event can be hijacked by a billionaire "sportsman" utilizing Tonya Harding litigation tactics, replete with half truths, obfuscations, and outright misrepresentations. By this appeal, SNG seeks to ensure the "friendly competition between foreign countries" that SNG, as the holder of the America's Cup, has a fiduciary duty to secure under the Deed of Gift. And, absent a reversal, the many yacht clubs that have been excluded from the competition will lose millions of dollars and some may be forced to permanently close their doors. The City of Valencia, which is one of the few places in the Northern Hemisphere with the harbor infrastructure necessary to accommodate the America's Cup, will similarly lose substantial sums of money, including an investment of millions of dollars in infrastructure improvements.

If the trial court's order is affirmed, legal arguments rather than sailing prowess will advance a challenger to the final round. This would be an outcome antithetical to everything the America's Cup stands for and should not be countenanced. It is contrary to the interests of the sport, contrary to the express terms of the Deed of Gift, and contrary to any notion of reason for a single trial judge of the New York Supreme Court to dictate the contestants to, and the details of, the conduct of the America's Cup.

GGYC slanders SNG without foundation by describing it as some sort of villain that selected a "sham" or "convenience" yacht club in order to "fix" the rules for the next America's Cup and asserting that SNG has sought to delay the resolution of this case to secure some type of competitive advantage. Both of these scurrilous allegations are false.

Justice Cahn specifically invited SNG's motion to disqualify GGYC on the grounds that its boat certificate was inadequate. GGYC concedes that SNG was well within its legal rights when it filed a motion to renew and reargue the trial court's November 27, 2007 memorandum decision. In all events, Justice Cahn put to rest any questions about the bona fides of SNG's conduct in his May 12 decision in which he stated: "I do not deem this litigation, nor any of the motions made therein, to have been frivolous . . . ." (SR. at SR10.)

SNG accepted a valid challenge from CNEV, which qualifies as a yacht club under the Deed of Gift. SNG does not dispute that CNEV is a young yacht club, but there is nothing in the Deed of Gift that requires a yacht club to be in existence for a certain duration before it may challenge for the Cup. CNEV's evidence of organization and incorporation stands uncontested. CNEV was formed by the long established and well-respected Spanish yachting federation, Real Federation Español de Vela ("RFEV"), which participated in the 32nd America's Cup. CNEV's racing team—Desafío Español—is a well-established team that

competed with distinction in the 32nd America's Cup challenger series. These are the hallmarks of a legitimate yacht club, regardless of whether it has a website. GGYC's rhetoric about CNEV being a "paper" or "convenience" yacht club is baseless.[3]

Similarly, with respect to the protocol for the 33rd America's Cup ("Protocol"), GGYC falsely implies that SNG needed to "fix" the rules in order to defend the America's Cup, notwithstanding the demonstrated sailing prowess of SNG's racing team, which won the 31st and 32nd America's Cups "on the water." In addition, GGYC overlooks the fact that numerous well-respected yacht clubs chose to join the Protocol and engaged in a consensual process to amend the Protocol. GGYC could have joined the process but instead chose to commence litigation in order to impose its own rules. GGYC's implication is particularly ironic given that SNG won the last America's Cup under a protocol it negotiated with GGYC; by contrast, GGYC has never made it to the final America's Cup match.

As the trial court recognized in its May 12 decision, the Deed of Gift requires that the Cup holder be given at least 10 months notice of the race date, and

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[3] It is also disingenuous of GGYC to question the decision of the 33rd America's Cup arbitration panel concluding that CNEV was a valid challenger when two of the three arbitrators were specifically approved by GGYC for the 32nd America's Cup arbitration panel, an America's Cup in which GGYC was the legitimate Challenger of Record. (R. at 798.)

importantly, this 10-month period cannot properly begin to run while the identity of the proper Challenger of Record remains unclear due to pending litigation. As the trial court explained:

> [I]t would be inequitable to deprive SNG of the benefit of a full ten-month period in which to prepare its racing vessel. The ten-month period should commence when the Court's order is final, after the uncertainty created by this litigation has been resolved.

(SR. at SR10.) In light of the continuing and unavoidable uncertainty about the identity of the true Challenger of Record, this 10-month notice period must begin no earlier than the date this Court decides this appeal. Significantly, GGYC executed a stipulation below precisely to this effect—*i.e.*, that the 10-month notice period would not begin to run until after the expiration of the time to pursue all appellate rights. (R. at 3143-3144.)

Finally, the trial court erred to the extent it set match dates in March 2009 for races to be held in the Northern Hemisphere because it ignored the Deed of Gift's unequivocal prohibition against races being held in that month (or April) in the Northern Hemisphere. And, because GGYC specifically designated a Northern Hemisphere location in its Notice of Challenge, and the court ordered Valencia, Spain as the venue unless SNG notified an alternative venue, there is no basis for ignoring the express terms of the Deed of Gift. It is particularly appropriate to follow the Deed of Gift protocols with respect to a Northern

Hemisphere match date because both SNG and GGYC are located in the Northern Hemisphere and SNG has previously stated that, consistent with its right as the Defender, it intends to hold the 33rd America's Cup in the Northern Hemisphere. As such, the earliest date permitted under the Deed of Gift is May 1, 2009, and the trial court erred to the extent that it set a date for the race expressly barred by the Deed of Gift.

In sum, it is incumbent upon this Court to reverse the trial court's March 17 and May 12 Orders, stifle GGYC's plans to eliminate multiple nations from competing in the America's Cup, and restore the prestige and honor that the America's Cup has previously enjoyed.

ARGUMENT

I. GGYC'S NON-MERITORIOUS ARGUMENT THAT SNG'S APPEAL SHOULD BE DISMISSED WAS MOOTED IN ALL EVENT BY THE MAY 12 ORDER

Any arguable uncertainty about whether the trial court has issued a final and appealable order has been completely mooted by the entry of the May 12 Order, which explicitly and conclusively resolved all issues in this case and which is the subject of this consolidated appeal. The May 12 Order disqualified CNEV, declared GGYC the Challenger of Record, and set dates for the next America's Cup. SNG filed a Notice of Appeal from the May 12 Order, which this Court consolidated with SNG's Appeal from the March 17 Order. Thus, there is no

longer any question that the March 17 and May 12 Orders are final and appealable, and GGYC's claim that there is no appealable order should be dismissed as moot.

Nonetheless, it is clear under New York law that SNG's appeal from the March 17 Order was itself proper. SNG appealed from the trial court's March 17 Order denying an order to show cause "why an order should not be entered declaring GGYC's notice of challenge and certificate to be in non-compliance with and invalid under the Deed of Gift." (R. at 1898-1899.)[4] The order ruling on this order to show cause is plainly appealable. *See County of Chemung v. Shappee,* 598 N.Y.S.2d 587, 588 (3rd Dep't 1993); *West v. Tracy,* 391 N.Y.S.2d 763, 764 (3rd Dep't 1977).[5]

II. CNEV IS THE VALID CHALLENGER OF RECORD

A. CNEV Satisfies the "Annual Regatta" Requirement of the Deed of Gift

CNEV is a yacht club having an annual regatta at the time it will sail for the America's Cup. (R. at 1535.) GGYC does not even attempt to dispute this point; GGYC concedes that CNEV held an annual regatta in November 2007,

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4 Cites to "R." refer to the Record on Appeal, filed on April 21, 2008.

5 Even if considered an order solely upon SNG's motion for leave to renew and reargue, a denial of a motion to reargue may be appealed where, as here, the trial court addressed the merits in making its determination to adhere to its prior decision. *Premier Capital v. Damon Realty Corp.*, 753 N.Y.S.2d 43, 44 (1st Dep't 2002) ("Although the court's order 'denied' the motion to reargue, by considering the merits of defendants' argument that their conduct was authorized by the filing of the bankruptcy petition, the court, in effect, granted reargument.").

which is a year and eight months before it would have competed in the America's Cup. (GGYC Br. at 15.)

GGYC wholly misses the mark when it argues that the use of the term "having" in the Deed of Gift refers to a present and on-going activity. (GGYC Br. at 27.)[6] The reference to "having" in the Deed of Gift relates to when a yacht club will "always be entitled to the right of sailing a match of this Cup." (R. at 98.)

Furthermore, the examples provided by GGYC of the use of the word "having" do not contradict the examples provided by SNG. GGYC simply demonstrates that the term can be used in different ways depending on the context. Here, the context and universally established historical practice of allowing newly formed yacht clubs to compete for the Cup make clear that SNG's is the only sustainable interpretation of the Deed of Gift.

The Deed of Gift should be interpreted on an inclusive rather than exclusive basis to allow the widest possible number of international competitors with differing organizational structures. GGYC's strained reading of the Deed of Gift adds an unnecessary restriction into a broadly worded Deed that was intended to foster sailing competition between foreign nations. The Deed of Gift was never intended to exclude valid challengers *whose racing team had already competed in the America's Cup*. It is impossible to imagine that George Schuyler, the settlor of

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6 Cites to "GGYC Br." refer to GGYC's brief for Plaintiff-Respondent, dated May 9, 2008.

the Deed of Gift, meant for New York state courts to be forced to consider when a challenger must have had its annual regattas or how many boats must participate before an *alleged* annual regatta becomes an *actual* annual regatta.

Finally, GGYC's assertion that SNG's "new argument" was not raised below is simply false. SNG has from the outset argued that the "annual regatta" requirement need *not* be satisfied as of the time of the challenge, and that it is sufficient for the regatta to have been held by the time of the race. (R. at 1029-1031.) The affidavit of Hamish Ross, which GGYC cites, is not at all inconsistent with SNG's position, as it merely identifies the requirements of the Challenger of Record *at the time it sails for the Cup.* (R. at 789.)

B. Under the "Four Corners" of the Deed of Gift that GGYC Agrees Applies, CNEV is Indisputably a Valid Challenger

GGYC does not and cannot dispute that CNEV is a foreign yacht club that is duly incorporated and licensed under the applicable Spanish law. The evidence in the record regarding CNEV's incorporation and licensure stands uncontroverted. (R. at 440-599). GGYC has not offered any interpretation of Spanish law under which CNEV would not be considered incorporated or licensed.

GGYC also cannot dispute that CNEV is an organized yacht club to the extent that:

- CNEV has by-laws, which provide that "Club Nautico Español de Vela is a sports club with private character, with its own legal personality and capacity to work to achieve its purposes,

incorporated to support sports activities using the sea, and especially to promote the sport of sailing . . . ." (R. at 513.)

- CNEV has officers, a board of directors, and members. (R. at 510, 513, 516.)

- CNEV has a facility on the water at Base Number 3 on the Interior Dock of the Port at Valencia. (R. at 513.)

- CNEV has detailed rules on everything from membership, to dues, to elections, to giving members of other clubs access to CNEV's club facilities. (R. at 513-524.)

Instead, GGYC argues that CNEV is not an organized yacht club by claiming—without record support—that CNEV is required to have (1) vessels, (2) members, (3) a website, and (4) a telephone number before it can challenge for the Cup. (GGYC Br. at 34.) In doing so, GGYC seeks to read additional requirements into the Deed of Gift, in plain contravention of the *Mercury Bay* Court's instruction and GGYC's own assertion that a court must "not look beyond of the four corners of the deed." *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256, 270 (1990). "[B]ecause the plain language of the Deed of Gift is unambiguous, such resort to extrinsic evidence to impute a different meaning to the terms expressed is improper." *Id.*

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.

(R. at 98.) Nowhere to be found in the Deed of Gift is any requirement that a challenging yacht club must have a minimum number of vessels. Regardless, CNEV has a facility on the water at Base Number 3 on the Interior Dock of the Port at Valencia. (R. at 510.) Nor does the Deed of Gift require a yacht club to have a minimum number of members. But in any event, CNEV has members, as well as a board of directors and officers. (R. at 510.) And the Deed of Gift—which dates back to 1887—certainly does not require a yacht club to have a phone number or website.

GGYC also makes the incredible argument that RFEV's sponsorship of CNEV somehow invalidates CNEV as an organized yacht club. (GGYC Br. at 34.) RFEV is a well-respected and internationally recognized sailing federation. The technical concern raised in the 32nd America's Cup was that it is not a yacht club, but rather a federation of yacht clubs. (R. at 80.) RFEV helped create, organize and incorporate CNEV in order to meet the technical requirement of the Deed of Gift that a Challenger of Record be a yacht club. (R. at 567-568.) There is nothing in the Deed of Gift which prohibits or even mentions whether a yacht club can be supported by another organization. Furthermore, it is widely accepted that today's America's Cup competition requires independent racing teams to represent yacht clubs, as BMW Oracle Racing does for GGYC and Alinghi does

for SNG, in order to provide the enormous sums of money and resources necessary to compete. (R. at 567-568.) In fact, CNEV's representative for the 33rd America's Cup, Desafío Español, competed in the 32nd America's Cup as RFEV's representative. (R. at 567-568, 1036.)

III. GGYC'S CERTIFICATE IS INVALID AND GGYC SHOULD BE DISQUALIFIED AS THE CHALLENGER OF RECORD

A. GGYC'S Certificate Is Fatally Ambiguous and Therefore Invalid

The Deed of Gift requires that the challenge specify the "length on load water-line; beam at load water-line and extreme beam; and draught of water" of the challenging vessel. (R. at 98.) GGYC, however, in an apparent effort to mislead SNG and gain a competitive advantage, chose to include additional information in its certificate that effectively voided the information required under the Deed of Gift. Because GGYC has not submitted a certificate that has complied with the Deed of Gift, it must be disqualified as the Challenger of Record. GGYC also has not provided a Custom House registry for its vessel, which is required under the Deed of Gift to be provided "as soon as possible." (R. at 98-99.)

GGYC chose to describe its challenging vessel as a 90 foot by 90 foot "keel yacht." (R. at 103.) GGYC does not seriously dispute that the inclusion of this information rendered GGYC's certificate wholly inconsistent and contradictory. For example:

- GGYC does not now dispute that it intends to sail a multi-hull. (R. at 675.)

- GGYC does not dispute that keel yachts are a completely different class of vessels from multi-hulls. (R. at 3127-3128.)

- GGYC does not dispute that the dimensions in the certificate indicate that there is no keel between the underside of the hull and the bottom of the centerboard. (R. at 2853-2854.)

- GGYC does not dispute that its specification of only a single "beam at waterline" rather than a beam measurement for each hull indicates a mono-hull. (R. at 2869.)[7]

Instead, GGYC contends that the certificate could say anything at all so long as it recited the four dimensions specified in the Deed of Gift. (GGYC Br. at 37.) Under this strained logic, GGYC could have stated that it was going to race a tug boat and then arrive at the race with an orders of magnitude faster catamaran. This Court cannot affirm an interpretation of the Deed of Gift as countenancing misleading certificates. Indeed, the requirement to specify the dimensions of the challenging vessel would have to be denuded of all meaning if GGYC is allowed to issue a contradictory certificate.[8]

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[7] SNG's previous submissions on this issue, which GGYC cite as an apparent inconsistency in Appellant's position, actually serve to highlight the irreconcilable deficiencies in GGYC's certificate. (R. at 789.)

[8] If the Court reverses the decision of the trial court and properly holds that a boat certificate must be free from ambiguity, the Defender will certainly not be able to "cherry pick" the Challenger of Record, as GGYC suggests. A Defender would have no reason to reject a challenge if the Challenger simply provided only that which is required under the Deed of Gift.

GGYC's straw man argument that SNG wants something more than what it is entitled to under the Deed of Gift—"full disclosure" of its vessel—is incorrect. (GGYC Br. at 39-40.) SNG simply asks that a Challenger be required to provide the required information free from ambiguity and contradiction—nothing more, nothing less. By providing additional and confusing statements and thus rendering the certificate self-contradictory and ambiguous, GGYC has improperly attempted to tip the competitive balance in its favor. If the Challenger is permitted to issue a contradictory certificate of challenge, the shift in competitive balance against the Defender would be dramatic. As stated by George Schuyler, "the challenged party has a right to know what the yacht challenging is like, so it can meet her with a yacht of her own type if it is so desired." (R. at 1852.)

B. The Court Erred in Summarily Declaring GGYC's Certificate Valid Without Referring the Issue to an International Jury

GGYC quibbles over the definition of "keel yacht" versus "keelboat" and whether a multi-hull vessel can have a keel. (GGYC Br. at 43-44.) Its argument relating to technical sailing issues only serves to underscore the need to have issues relating to the sufficiency of boat certificates resolved by those in the sailing community that have the requisite knowledge. This was the rule of law set forth in *Mercury Bay*:

> [T]he Deed of Gift governing the conduct of the America's Cup competitions contemplates that such issues of fairness and sportsmanship be resolved by members of the yachting community rather than by the courts. The deed provides that where the defending and the challenging yacht clubs have not agreed upon the terms of the match, it is to be conducted as specified in the deed and pursuant to the rules and regulations of the defending club, so long as they do not conflict with the deed. As the deed broadly defines the vessels eligible to compete in the match, it is these rules and regulations which the donors intended to govern disputes relating to racing protocol such as the fairness of the vessels to be used in a particular match.

Mercury Bay, 76 N.Y.2d at 265-266. GGYC has itself contended that the International Sailing Federation's ("ISAF") rules "*must* apply to the Default Match under the Deed." (R. at 678.) (emphasis added) GGYC also does not dispute that ISAF's Racing Rules provide that that an "international jury" of experienced sailors appointed by the organizing authority in accordance with ISAF Racing Rules "*shall decide questions of* eligibility, measurement or *boat certificates*." (R. at 3090.) (emphasis added) Instead, GGYC resorts to obfuscation, arguing that the applicable sailing rules cannot wrest jurisdiction from the Court. (GGYC Br. at 44-45.) To be clear, SNG is not seeking to divest this Court of jurisdiction, but rather to follow the Court of Appeals' mandate to refer to sailing experts such technical questions as the sufficiency of boat certificates, which have the potential to greatly alter the competitive balance to the disadvantage of the Defender. Accordingly, the trial court erred when it declared GGYC's certificate valid.

IV. IF THE COURT WERE TO DECLARE GGYC THE CHALLENGER OF RECORD, THE EARLIEST POSSIBLE DATE FOR A DEED OF GIFT MATCH RACE IS 10 MONTHS AFTER THIS COURT'S RULING IN THIS APPEAL

If this Court concludes that GGYC is the valid Challenger of Record for the 33rd America's Cup, the earliest possible date for a Deed of Gift match race between SNG and GGYC can take place is May 1, 2009. SNG is entitled to 10-months notice of the match, beginning from the final resolution of this appeal, and the date must be no earlier than May 1st, the earliest date from today on which a race in the Northern Hemisphere is permissible under the Deed of Gift. The May 12 Order must be reversed because it orders a Northern Hemisphere race in March 2009. (SR. at SR15.)

A. The 10-Month Notice Period Required By the Deed of Gift Properly Commences After Resolution of All Uncertainty Concerning the Proper Challenger of Record

As the trial court recognized in its May 12 Order, so long as the identity of the Challenger of Record and the nature of the challenging vessel is in dispute, the 10-month notice period set forth in the Deed of Gift cannot begin to run:

> [I]t would be inequitable to deprive SNG of the benefit of a full ten-month period in which to prepare its racing vessel. The ten-month period should commence when the Court's order is final, *after the uncertainty created by this litigation has been resolved.*

(SR at SR10.) (emphasis added) Indisputably, there was uncertainty following the trial court's November 27, 2007 memorandum decision, which was not reduced to an order until May 12. The trial court explained in its May 12 Order that the basic rule of law that a "binding decision [does not exist until] an order has been made by the Court. Only such an order triggers finality, for example the right to appeal." (SR at SR11.) Under the trial court's own reasoning, in light of the continuing and unavoidable uncertainty about the identity of the Challenger of Record, the 10-month notice period required by the Deed of Gift should remain tolled pending this Court's resolution of this appeal.

Tolling the 10-month notice period through the pendency of this appeal would, in fact, be entirely consistent with a stipulation GGYC previously executed stating that the 10-month notice period would not begin to run until after the expiration of the time to pursue all appellate rights:

> The Notice Period is tolled, so that the time to the Races is extended until:
>
> 1. ten months after the latest of the following events: (a) service of a notice of entry of the trial court's final order or judgment on the merits; (b) service of a notice of entry of any Appellate Division, First Department's final order or judgment on the merits, if any; (c) service of a notice of entry of any New York State Court of Appeals' final order or judgment on the merits, if any or (d) the expiration of the time to pursue all appellate rights, if any, or

2. a date mutually agreed upon by GGYC and SNG.

(R. at 3143-3144.)[9]

B. Under the Deed of Gift, the 33rd America's Cup Must Be Held Between May and November in the Northern Hemisphere

While properly recognizing that the 10-month notice period could not start until the May 12 Order, the trial court order altogether ignored the fact that the Deed of Gift expressly prohibits matches in the Northern Hemisphere from being sailed in March 2009, as the May 12 Order appears to dictate. The Deed of Gift unequivocally instructs that "*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." (R. at 98.) (emphasis added)

Here, any Deed of Gift match race between GGYC and SNG must be held in the Northern Hemisphere for numerous reasons. *First*, GGYC specifically designated a race in the Northern Hemisphere. Its Notice of Challenge states:

> To comply with the requirements of the Deed of Gift that ten months' notice be given, *and recognizing the period permitted by the Deed of Gift for a match in the Northern Hemisphere*, we name [dates]."

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[9] SNG does not dispute that this stipulation was never fully executed and filed with the trial court because of ongoing negotiations over whether there should be 10 or 12 months notice subsequent to a final order. But GGYC's execution of the stipulation diminishes any prejudice or inequity GGYC claims it will suffer.

(R. at 102.) *Second*, SNG is located in Geneva, Switzerland and GGYC is located in the State of California, both within the Northern Hemisphere. *Third,* as the trial court recognized, SNG is expressly entitled under the Deed of Gift to select the location of the race and has previously advised of its intention to hold the 33rd America's Cup in the Northern Hemisphere. (R. at 99, 1444.) *Fourth*, the trial court expressly contemplated a Northern Hemisphere race as its May 12 Order designates Valencia, Spain as the default location for the race. (SR. at SR16.)

GGYC having elected a Northern Hemisphere race in its challenge, and the trial court having set Spain as the default location for the match, no race between GGYC and SNG can be held in March 2009. The earliest date permitted under the Deed of Gift for the 33rd America's Cup is May 1, 2009, and the trial court erred to the extent that it set a date for the race that is expressly barred by the Deed of Gift.

CONCLUSION

For the foregoing reasons and the reasons set forth in SNG's appellate brief, Appellant-Defendant SNG respectfully requests that this Court reverse the trial court's March 17 and May 12 Orders.

Dated: New York, New York
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Respectfully submitted,

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