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

GOLDEN GATE YACHT CLUB, Plaintiff, -v.- SOCIÈTÈ NAUTIQUE DE GENÉVE, Defendant, CLUB NAUTICO ESPAÑOL DE VELA, Intervenor-Defendant.	Index No. 602446/07 IAS Part 54 Hon. Shirley Werner Kornreich

SOCIÈTÈ NAUTIQUE DE GENÉVE'S MEMORANDUM OF LAW IN OPPOSITION TO GOLDEN GATE YACHT CLUB'S IMPROPER MOTION TO "ENFORCE" THE APRIL 7, 2009 ORDER AND JUDGMENT

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Société Nautique de Genéve ("SNG") respectfully submits this opposition to Golden Gate Yacht Club's ("GGYC") claim, improperly brought as a motion to "enforce" an unspecified portion of this Court's April 7, 2009 Judgment, that SNG's sails violate the Deed of Gift's (the "Deed") constructed-in-country ("CIC") clause.

PRELIMINARY STATEMENT

The Court of Appeals and this Court have ordered that the 33rd America's Cup start on February 8, 2010. The competing teams are now in Valencia, Spain, preparing for the race. Through its most recent motion, noticed for less than two weeks before the start of the 33rd America's Cup, GGYC seeks to disrupt the planning for the race, to obtain an unfair strategic edge over SNG and, ultimately, to create a cloud over sailing's greatest prize. As GGYC must know, this motion has no basis in law or fact. After two years of litigation, the time has come to decide the winner of the Cup on the water.

GGYC's last-minute motion, tellingly supported only by a lawyer's declaration, challenges SNG's use of "3DL sails" used by *every* America's Cup defender and challenger since 1995. Ignoring the terms and purpose of the Deed, GGYC claims that SNG's use of such sails violates the Deed's clause that a "yacht or vessel" be "constructed in the country" to which each competitor belongs. By its terms, this clause makes no mention of "sails"; it concerns the national identity only of a vessel's *hull*. In fact, throughout the history of the America's Cup, competing vessels have freely used sails and sail technology from countries other than their own. In any event, SNG's sails were constructed ***in Switzerland***.

Procedural Flaws. GGYC's CIC claim is procedurally improper and should not be considered by this Court for four reasons:

First, GGYC's motion—by asking for a ruling requiring SNG to rebuild its sails less than two weeks before the race and "offering" to delay the race for months to give SNG time

to do so—ignores the Court of Appeals' and this Court's own prior direction that the race take place starting on February 8, 2010.

Second, GGYC's claim, to the extent it seeks a pre-race ruling that SNG must rebuild its sails, is barred by laches: GGYC knew about its CIC "claim" for months, if not years, yet deliberately waited to assert this claim on the eve of the race to disrupt SNG's preparations for the race. Indeed, GGYC filed its motion only after SNG had moved its vessel and team to Valencia. By any measure, GGYC had several years to challenge SNG's use of 3DL sails, since, as GGYC knows, every America's Cup defender and challenger since 1995 has used such sails.

Third, GGYC's motion is jurisdictionally defective, because it seeks to litigate matters well beyond the scope of the May 13, 2008 Judgment reinstated by the Court of Appeals, and this Court may only address matters only within the scope of that judgment in these post-judgment proceedings. Although styled as a motion to "enforce" some unspecified portion of this Court's April 7, 2009 Judgment, GGYC never cites which portion of that judgment it seeks to enforce. GGYC's failure is not surprising, because there is nothing in that judgment, nor has there ever been anything in this parties' contentious litigation over the past two years, referencing the Deed's CIC clause. Thus, to pursue its CIC claim, GGYC must commence a new action that would provide SNG proper notice of GGYC's allegations, and a proper opportunity to contest them, including with respect to any appeal to the Court of Appeals.

Fourth, there is no reason for GGYC to demand that this Court adjudicate its last-minute motion now, as opposed to after the race. As Judge Ciparick stressed in *Mercury Bay Boating Club* v. *San Diego Yacht Club*, Index No. 21299/87 (Sup. Ct. N.Y. County July 25, 1988) (attached as Exhibit A to the January 21, 2010 Declaration of Robert J. Giuffra, Jr. ("Giuffra Decl.")), which arose out of disputes relating to the 1988 Deed of Gift match, post-race

adjudication ensures that the race will, in fact, take place, and allows the parties to resolve their disputes in a consolidated fashion with the opportunity for fact discovery. Here, as in *Mercury Bay*, neither party would be prejudiced by a post-race adjudication; the parties' history of prolonged litigation would lead only to inefficient and piecemeal pre-race rulings. And, adjudicating this dispute after the race would provide this Court with the time and opportunity to consult first with the expert members of the sailing jury before ruling on any CIC issues.

Merits of GGYC's Challenge. GGYC's nine-page motion is as weak on the merits as it is on procedure. The plain language of the Deed's CIC clause pertains only to the "yacht" or "vessel," as opposed to its "sails." That conclusion is supported by contemporaneous dictionary definitions that conceive of a yacht as an item distinct from its sails, as well as maritime statutes and regulations that confine analogous built-in-country provisions to a vessel's hull and superstructure, rather than its propulsion mechanism. Indeed, as reflected in the expert declaration of John Rousmaniere, the leading America's Cup historian, the donors of the original Deed of Gift *never* contemplated limits on foreign sails or foreign sail technology. Those donors, in fact, hoisted British sails in first winning the Cup with the schooner *America.* In fact, in adding the CIC clause to the Deed in 1882, George Schuyler, the last surviving donor, sought to ensure that the Cup remained a genuinely competitive event, while preserving the Cup's international character. He thus struck that balance by limiting the CIC requirement only to a competing vessel's *hull*, but not its sails.

In any event, SNG *did* construct its sails *in Switzerland*. SNG's sailing team, Team Alinghi, designed its sails, and obtained only pieces/sections from North Sails. Then, *in Switzerland*, the Alinghi team (1) joined the pieces together, and (2) constructed those pieces into

usable sails. As a result, the Swiss government provided Alinghi with a "certificate of origin" certifying that Alinghi's vessel and the sails are of Swiss origin.

Regrettably, GGYC's baseless motion is nothing more than a transparent and futile attempt to disrupt the timing of the race—now set in stone. This Court should (1) dismiss GGYC's claim outright as procedurally infirm and/or (2) deny GGYC's motion outright on the merits, for the simple reason that the only record evidence before this Court is that SNG complied with the CIC clause when constructing its boat. In the alternative, if the Court believes there is some dispute here, that dispute—as *Mercury Bay* instructs—can and should be resolved after the race, upon a full record developed through discovery.

BACKGROUND

1. Prior Court Orders Directing that the 33rd America's Cup Commence on February 8, 2010

On April 2, 2009, the Court of Appeals mandated the 33rd America's Cup to take place in February 2010. It did so by expressly "reinstat[ing]" the May 13, 2008 Order of Justice Cahn, which required the race to be held "ten calendar months from the date of service of a copy of this order." (Giuffra Decl. Exs. B & C.) On April 7, 2009, following the Court of Appeals's mandate, Justice Cahn entered his May 13, 2008 order "as a judgment." (Giuffra Decl. Ex. D.)

Since then, GGYC has insisted that the race be held in February 2010. When, shortly after the April 7 judgment, SNG noticed the 33rd America's Cup for May 2010, GGYC moved this Court to direct SNG to "make a public announcement [that it has] scheduled the first race for the next America's Cup match for February 8, 2010." (Giuffra Decl. Ex. E, at 7.) At the hearing on that motion, GGYC's counsel represented that GGYC "will be prepared with a multi-hull for the February race, as required by [the April 7] judgment." (Giuffra Decl. Ex. F, at 11.)

Until faced with the race, GGYC demanded a February 8 race date: (1) on May 20, 2009, GGYC wrote to SNG, insisting that the race must take place in "***February 2010*** . . . [as] mandated by the Court of Appeals" (Giuffra Decl. Ex. G); (2) on July 8, 2009, GGYC again wrote to SNG that "the Deed and the Order and Judgment [of the Court of Appeals] . . . [require] a ***February race*** in Valencia" (Giuffra Decl. Ex. H); (3) on September 2, 2009, GGYC recognized that "the 33rd America's Cup [is] to be held in ***February 2010***" (Giuffra Decl. Ex. I, at 1); and (4) on October 1, 2009, GGYC once again stated that the 33rd Cup would take place in "***February, 2010***." (Giuffra Decl. Ex. J, at 1).

This Court has consistently and correctly refused to deviate from the unambiguous date set as final by the Court of Appeals. In October 2009, after GGYC filed its motion challenging SNG's selection of Ras al-Kaimah ("RAK") as the venue for the 33rd America's Cup, this Court specifically asked "for assurances from the parties that there would be no further motion, or that everything that was going to be raised be raised today so that we can insure that the race would take place." (Giuffra Decl. Ex. K, at 36.) And, when, on November 10, 2009, counsel for GGYC asked this Court via teleconference to extend the date of the race by a few weeks for additional time to prepare, this Court refused. (Giuffra Decl. ¶ 1.)

SNG's and GGYC's vessels and teams are now in Valencia preparing for a race on February 8. SNG has made arrangements with Valencia and sponsors for that race. Spectators have booked their flights and reserved their hotel rooms. Simply put, the sailing world is ready for a race on February 8. Let's get on the water.

2. The Last-Minute Timing of GGYC's Constructed-In-Country Challenge

a. GGYC, on the Eve of the February 8 Race, Files Its Challenge To SNG's Use of "3DL Sails" Constructed by SNG in Switzerland

This litigation has been going on for more than two years. GGYC had many opportunities to raise any CIC challenge to SNG's sails; there is nothing in GGYC's motion that it has not been aware of for years. The parties were before this Court on October 27, 2009, where they were asked to consolidate their objections to ensure "that the race would take place" and "would not be endangered." (Giuffra Decl. Ex. K, at 36.) GGYC raised no CIC objection. It was only on January 12, 2010—less than a month before the race—that GGYC elected to serve the instant motion on SNG.

GGYC claims it is "concerned" about SNG's use of certain sailmaking technology—specifically, the "3DL Process"—which is the "state-of-the-art process for making premiere racing sails." (Affidavit of Thomas A. Whidden ("Whidden Aff.") ¶ 5, Jan. 19, 2010.) The 3DL Process was "invented by two Swiss engineers, JP Baudet and Luc Dubois," and is subject "to a technology agreement" between North Sails and Mr. Baudet and Mr. Dubois. (*Id*. ¶ 7.) North Sails is currently "the sole worldwide supplier of 3DL sail technology, the only true 3D shaping sail technology in the world." (*Id*. ¶ 8.)

North Sails's 3DL sails are ubiquitous in premiere racing events. "Since 1995, every America's Cup Challenger and Defender has used, at least some 3DL sails manufactured at North Sails' Minden, Nevada plant, as has every America's Cup winner." [1] (*Id.* ¶ 6 (emphasis added).) 3DL sails have also "dominated the grand prix racing sail market since the mid-1990s." (*Id.* ¶ 5.)

[1] As GGYC knows, SNG used 3DL sails when previously competing for—and winning—the America's Cup in 2003 and 2007, facts of which GGYC is well aware. GGYC was, in fact, the "challenger of record" to the 32nd Protocol (Bowman Decl. Ex. T, at 3 ¶ 1.1(g)), in which GGYC and SNG agreed that the "constructed in country" requirement would be satisfied "by the lamination or another form of construction of the entire Hull." (*Id.* Ex. T, at 16 ¶ (f)(i).)

To make 3DL sails, North Sails typically creates a unitary sail from an adjustable mould, which it then finishes by traditional sail-making methods, that is, by completing the edge details and attaching the corner reinforcements, batten pockets, and hardware components. (Whidden Aff. ¶¶ 10, 11.) North Sails then typically sends the 3DL sails to the location of the client's yacht or the local North Sails office. (*Id.* ¶ 12.)

When, however, "an America's Cup Team has sufficient design, sailmaking expertise and equipment, it may elect to receive only the sail blanks, forcing [the team] to do all the finishing, edge shaping and detailing in [the team's] own facilities." (*Id.* ¶ 13.) America's Cup Teams, like Team Alinghi of SNG, therefore typically contract with North Sails for their sail program, and construct the sail as a "usable sail" at the team's own facilities. (*Id.* ¶¶ 14, 15.) To do so, they send to North Sails the design files for their 3DL sails to be processed. (*Id.* ¶ 15.) North Sails personnel "do not provide any intellectual input for the design of the syndicate's sails." (*Id.*) And, North Sails "has a system of 'Chinese Walls' to ensure that one team's design remains confidential, *i.e.*, not transmitted to other teams. The result is that teams can create substantially different 3DL sails while using the same 3DL sailmaking process." (*Id.*)

Going even further, Team Alinghi of SNG, "unlike most other clients," contracted with North Sails "to create several 3DL pieces/sections, as opposed to one unitary 3DL sail blank made from one mould that has been used in all other America's Cups in the past." (*Id.* ¶ 16.) North Sails prepared those 3DL pieces to satisfy design specifications of Alinghi designers who have worked for Alinghi for more than eight years; North Sails personnel did not "provide any intellectual input in connection with the design of the requested 3DL pieces/sections," and were not even aware "of the flying shape or other construction details of Alinghi's sails." (*Id.* ¶¶ 17, 18.)

It was at Alinghi's sail loft in Villeneuve, Switzerland, that Alinghi subsequently constructed these 3DL pieces/sections into sails by (1) joining the 3DL pieces/sections together and (2) finishing them into usable sails. (*See* Affidavit of Ian Pattison ("Pattison Aff.") ¶ 4, Jan. 21, 2010.) Specifically, the construction process in Switzerland consisted of the following:

- ***The Joining Process.*** The 3DL pieces/sections were joined by, among other things, bringing the sail sections together and overlapping them to create a "seam width" and gluing the sail pieces together. (*Id.* at 3-5.) The process allowed "the design shape of the sail [to] be altered . . . by increasing or decreasing the overlap of the seam at various points along its length." (*Id.* at 3.) In all, the joining process took "between 60 and 120 man hours," depending on the size of the sail. (*Id.* at 7.)

- ***The Finishing Process.*** The sails were then "finished" by (1) measuring the edges of the sails; (2) trimming the sails to size along the lines drawn; (3) applying corner reinforcement patches; (4) applying and stitching polyester and Cuben fibers to the corner reinforcements; (5) applying various polyester, spectra, kevlar, or carbon fiber materials in areas of the sail that will require extra strength; (6) applying/sewing polyester edge tapes around the perimeter of the sail to hold control lines to reinforce and protect the raw cut edge of the sail; (7) applying the corner rings, which allow the sail to be attached to the yacht; and (8) applying sail numbers, camber stripes, tell tails, sail battens, and tie-off points for control lines, which finally allows the sail to be ready for sailing. (*Id.* at 5-7.)

Because of this construction process in Switzerland, the Swiss government—after inspecting Alinghi's facilities in Villeneuve, the origin of the materials used to construct Alinghi's sails, as well as the labor provided in Switzerland—delivered to SNG a "Certificate of origin" certifying that Alinghi 5's sails "were entirely manufactured in Switzerland." (Affidavit of Serge Sahli ("Sahli Aff.") ¶¶ 6, 7, & Exs. A-B, Jan. 21, 2010; *see also* Affidavit of Lucien Masmejan ("Masmejan Aff.") ¶ 5.)[2] That means that, for purposes of international trade, the

[2] Similarly, Alinghi obtained a Swiss Label certificate and Admission Temporaire ("ATTA") Carnet certifying that its yacht is of Swiss origin. (Masmejan Aff. ¶¶ 6-7 & Exs. B, C.)

Swiss government certified that Alinghi's sails were "entirely obtained on the Swiss territory, or . . . sufficiently manufactured or transformed on the Swiss territory." (Sahli ¶ 3.)

b. SNG's Cross-Motion

GGYC's interpretation of the CIC clause—to the extent it seeks to brand a particular design or "technology" with a national identity that is "off limits" to foreigners—calls into question its own compliance with that clause, as does GGYC's apparent theory that the phrase "yacht or vessel" includes *all* components of a boat. Pursuant to GGYC's notice of motion, and under CPLR 2214(b), SNG must make any cross-motion on these issues today. Thus, SNG today challenge *GGYC's* compliance with the CIC clause, and seeks to discover facts that will show GGYC's violation of that provision, at least as GGYC interprets it.

SNG challenges two other aspects of GGYC's vessel (BOR-90). *First*, the Deed requires that a "yacht or vessel" must be "propelled by sails only." (Bowman Decl. Ex. G.) GGYC now admits that "[t]raditional sails are assembled from panels of flat sailcloth." (GGYC Br. at 2.) But GGYC has repeatedly touted that its vessel is propelled by a "wing" of non-foldable material. *Second*, the Deed requires that a challenging vessel, when issuing its notice of challenge, must provide "the name of the owner and a certificate of the name, rig and . . . dimensions of the challenging vessel." (Bowman Decl. Ex. G.) In its certificate challenge, GGYC described its vessel as a "[s]ingle-masted, sloop-rigged" boat. (Giuffra Decl. Ex. L.) But GGYC's vessel is not sloop-rigged because, while a sloop-rigged vessel must have a foresail and mainsail, GGYC's boat will be propelled by a rigid wing rather than a mainsail and may race at times with no foresail at all.

3. The Unprecedented Nature of GGYC's Challenge to SNG's Use of 3DL Sailmaking "Technology"

a. History of Exchange of Sailmaking Technology

GGYC's challenge of SNG's use of 3DL sail "technology" is baseless. Since as far back as 1851—when the schooner *America* won the first "America's Cup"—"[s]ailmaking technology was freely exchanged across borders." (Declaration of John Rousmaniere ("Rousmaniere Decl.") ¶ 14, Jan. 20, 2010.) It is an "undisputed fact" that the *America* herself—and the donors of the Deed of Gift who sailed her—"set foreign sails in the race on August 22, 1851." (*Id.* ¶ 24.) Specifically, "[w]hen *America* raced in England, it was under a very different rig. There, Commodore [John Cox] Stevens purchased sails from a Cowes [*i.e.*, British] sailmaker and set them in the race around the Isle of Wight."[3] (*Id.* ¶ 25.) One of these sails—a "flying jib"—was "little known by New York yachtsmen but in common use in England." (*Id.* ¶ 26.)

In the eyes of the donors of the Cup, the use of British sails was fully consistent with the international character of *America*'s challenge. That is because, as the terms of *America*'s challenge make clear, she represented the American "'model'"—a "nineteenth century yachting term meaning 'hull shape' or 'hull type.'" (*Id.* ¶ 18.) Specifically, when submitting a challenge to the Commodore of the Royal Yacht Squadron, Commodore John Cox Stevens, on behalf of the New York Yacht Club, proposed to "'test the relative merits of the different models of the schooners of the old and new world.'" (*Id.*)

America was thus the first competitor in the America's Cup to use foreign sailmaking technology and foreign sails. She was far from the last:

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[3] Commodore Stevens, one of the donors, "was an extremely knowledgeable sailor and a commanding captain, so it is incredible that the decision to buy, rig, and set this unfamiliar gear came from anywhere but the top." (*Id.* ¶ 30.)

> From the yacht *America* onwards, during the lives of the donors [of the Deed of Gift]—Commodore John Cox Stevens, George Schuyler, and the other owners of *America* who were also signatories to the Deed of Gift—sailmaking technology was repeatedly and publicly exchanged internationally with only rare protests. No complaint came from the trustee of the Cup, whether George L. Schuyler or, after his death in 1890, the New York Yacht Club until 1962. In several cases, the borrowers or importers of sail technology were officers of the trustee yacht club, including Commodore Stevens himself and Commodore J.P. Morgan. (*Id.* ¶ 14.)

In addition to *America* herself, that 100-year-plus tradition in the America's Cup consisted of the following:

- **1871**: British challenger *Livonia*'s sails were made of American cotton, not the flax typical of English sails.

- **1876**: Canadian challenger *Countess of Dufferin* had her sails recut by New York sail lofts.

- **1881**: Canadian challenger *Atalanta* likewise had her sails recut by New York sail lofts.

- **1887**: British challenger *Thistle*'s mainsail was made of American cotton duck.

- **1893**: British challenger *Valkyrie II*'s sails were made of American cotton duck.

- **1895**: British challenger *Valkyrie III*'s sails were made of American cotton duck.

- **1895**: New York Yacht Club yacht *Defender* set at least one sail made of ramie fiber, which is made of a Japanese plant. To make that ramie sail, *Defender*'s owners (including New York Yacht Club former Commodore E.D. Morgan and former Rear Commodore C. Oliver Iselin) acquired all the ramie they could find in England, had it spun into yarn in Ireland, and brought the yarn to the U.S. to be woven into sail cloth.

- **1901**: British challenger *Shamrock II*'s sails were made of American Sea Island cotton.

- **1903**: All three U.S. defense candidates, including the winner *Reliance*, purchased sails from the new American subsidiary of the English sailmaker Lapthorne & Ratsey, at City Island, staffed by English and American sailmakers.

- **1920, 1930, 1934, 1937:** U.S. defenders and British challengers used sails designed or built by employees of the English and U.S. branches of an English-owned firm now called Ratsey & Lapthorn. All yachts had access to the same sailmaking technology, including Egyptian and Sudanese Sekel cotton cloth. Most of these sails were designed by English sailmakers but built in each yacht's country. Additionally, in 1934, a NYYC member loaned one of his U.S. defense candidate's U.S.-made jib to British challenger *Endeavor*.

- **1958:** British challenger *Scepter* flew a spinnaker in races that was designed and built in France at the Herbulot sail loft. (The same boat was denied permission by the NYYC to use U.S. sailcloth.)

- **1962:** The Australian challenger *Gretel* used U.S.-made Hood sails in the races, winning one race with an all-Hood inventory. (Rousmaniere Decl. ¶ 15.)

This consistent historical pattern shows that, sails, unlike hulls, "were not regarded as subject to nationality restrictions—not by sailors, not by sailmakers, and not by the donors and the trustee New York Yacht Club." (*Id.* ¶ 16.) It was therefore "understood from the beginning [of the America's Cup] . . . that the cup was a test of hulls representative of the countries whose national ensigns they flew." (*Id.* ¶ 19.)

b. History and Purpose Behind the 1882 Deed of Gift and Its Constructed-in-Country Provision.

It is against this historical background—*i.e.*, (1) the experience of the *America* in 1851; (2) a distinct identification of "hulls" as national in character; and (3) a consistent pattern of early exchanges of sails, sailmaking materials and technology—that George Schuyler (the last surviving donor of the original Deed of Gift) drafted the 1882 version of the Deed of Gift, which first contained the "constructed in country" provision.

Always important to Schuyler, along with the other donors, was "their experience at Cowes," England, when they first won the Cup in 1851. (*Id.* ¶ 23.) That experience impressed upon Schuyler and the other donors the importance of preserving the America's Cup as "a competitive and international race." (*Id.* ¶ 21 (emphasis removed).)

That objective was frustrated when the New York Yacht Club raced against two embarrassingly uncompetitive Canadian challengers—the *Countess of Dufferin* in 1876 and the *Atalanta* in 1881. The performance of these two challengers "had been so poor as to be embarrassing not only to Canadians but to the New York Yacht Club," and the NYYC therefore

"feared for its reputation and the America's Cup future." (*Id.* ¶ 35.) Making matters worse, the 1881 challenger *Atalanta* was regarded by the NYYC as "'of a model and type'"—"'model'" here meaning "'hull shape'"—"'essentially the same as the vessels she expected to meet, so reducing the contest initiated for the purpose of fostering and improving the models of seagoing vessels to a mere race between boats of neighboring clubs.'" (*Id.* ¶ 39.)

As a direct result of the experience with the Canadian challengers, the members of the New York Yacht Club "approved a resolution instructing the club to return the cup to Schuyler so he could improve the Deed in accordance with the donor's intentions." (*Id.* ¶ 38.) The Second Deed was therefore aimed principally at "preventing the stubborn [Canadian] Captain Cuthbert from returning." (*Id.* ¶ 40.) It did so by enacting four new provisions, three of which excluded Cuthbert's boat by (1) imposing a requirement that the challenging club have a regatta on an arm of the sea (as opposed to the Great Lakes, from where the *Atalanta* hailed); (2) requiring the challenging yacht to sail on her own bottom to the contest (the *Atalanta* was towed through the Erie Canal and Hudson); and (3) forbidding a defeated boat from challenging for the Cup within two years or until another challenger intervened. (*Id*.) And, the Deed included a constructed-in-country requirement addressing the concern about the copycat nature of the *Atalanta*'s hull. (*Id.* ¶ 41.)

In sum, the CIC clause, precipitated directly by two Canadian challengers and drafted in light of the donor's experience and observation with the free international exchanges of sails and sailmaking technology, embodied two fundamental ideas: (1) "[t]he two sides, challenger and defender, should not lose their national identities"; and (2) "[t]he America's Cup cannot survive without good, close racing." (*Id.* ¶ 10.)

ARGUMENT

I. GGYC'S IMPROPER MOTION SHOULD BE DISMISSED OR STAYED UNTIL AFTER THE RACE.

A. GGYC's Motion Is Procedurally Infirm.

1. GGYC Cannot Undo By Motion Practice the February 8 Race Date Directed by the Court of Appeals and this Court.

The race is set, by the order of the Court of Appeals, for February 8, 2010. This Court is bound by that mandate, as this Court has previously recognized. (Giuffra Decl. Ex. F, at 15 ("I don't believe I have much authority beyond what the Court of Appeals has directed unless you both come to terms with regard to date.").) Thus, this Court has reaffirmed that the race *will* take place on February 8, and has rejected previous GGYC efforts to delay the race. And, on November 10, 2009, this Court rejected an outright plea by GGYC to delay the race by a few weeks. (Giuffra Decl. ¶ 1.)

Once again, GGYC seeks to undo by motion practice what the Court of Appeals has fixed by mandate. GGYC noticed this motion for January 28, 2010—not by Order to Show Cause. That means that, were this Court to resolve GGYC's CIC challenge in GGYC's favor on January 28—without giving SNG an opportunity to present its witnesses at a hearing or to develop any necessary discovery, or without consulting with experienced members of the sailing jury—SNG would have a total of *10 days* to (i) rebuild its sails in Switzerland, (ii) transport them to Valencia, and (iii) assemble them on *Alinghi 5* in time to race on February 8. Even that 10-day period is artificial, because SNG would appeal any adverse ruling to the First Department (and possibly beyond). In short, the race will go forward on the 8th with SNG's present sails, because that is the only way the race can go forward on the 8th.

GGYC knows that the race cannot be held on February 8 if it secures a ruling in its favor. That is why GGYC, to "allow SNG to come into compliance" with GGYC's self-serving interpretation of the CIC requirement, is prepared to agree "to delay the start of the match." (GGYC Br. at 2.) The premise for this "proposal" is baseless because SNG's boat *is* in compliance with the CIC requirement, and SNG hereby expressly rejects any offer to delay the race. The teams are already in Valencia. The sponsors are already on board. The spectators are coming. The race must start on February 8.

2. GGYC Unreasonably Delayed in Bringing Its Constructed-in-Country Motion to the Extent It Seeks a Ruling Prior to the Race.

GGYC's motion, to the extent it seeks a ruling prior to the race, is barred by laches, "the essential elements" of which are "unreasonable and inexcusable delay by the plaintiff in undertaking to enforce his rights, which results in prejudice to the opposing party." *Dante* v. *310 Assocs.*, 121 A.D.2d 332, 333 (1st Dep't 1986).

There is no question that GGYC unreasonably delayed bringing its CIC challenge. GGYC knew *for years* that North Sails is the "only sailmaker in the world [that] uses 3DL technology," and that North Sails "creates 3DL molded sails at only two manufacturing facilities: Minden, Nevada and Sri Lanka." (GGYC Br. at 3.) Indeed, North Sails's public website states that 3DL technology "remains unchallenged as the dominant racing sail technology worldwide," (Bowman Decl. Ex. A) and that North Sails "have been on every America's Cup defender and challenger since 1980." (Bowman Decl. Ex. B.)

Over the past two years, GGYC has been before this Court on numerous occasions, including this past October. Not once did GGYC raise before this Court any concern about SNG's "intended" use of 3DL sails, *despite* this Court's specific request for "assurances from the parties that there would be no further motion, or that everything that was going to be

raised [at the October 27, 2009 hearing] be raised [at that hearing] so that we can insure that the race would take place." (Giuffra Decl. Ex. K, at 36.) Rather, it was only on December 22, 2009—approximately a month and a half before the race—that GGYC notified SNG of its sudden "concern" over SNG's "inten[tion] to use sails constructed at Minden, Nevada in the USA." (Bowman Decl. Ex. C.) GGYC offers no reason for its inexcusable delay. There is none: GGYC saved its objection to the 11th hour in a transparent attempt to delay the race and end-run the Court of Appeals' and this Court's orders.

The prejudice resulting to SNG from any ruling in GGYC's favor before the race is clear: SNG constructed its boat to prepare for a February 8 race, transported it to Valencia, and now is preparing to race in Valencia. Every month of delay costs millions of dollars to SNG and its team.

3. This Court Lacks Jurisdiction to Adjudicate GGYC's Post-Judgment "Enforcement" Motion.

GGYC styles its motion as one to "enforce" this Court's April 7 judgment. (GGYC Br. at 1.) But nowhere does GGYC say *what part* of that judgment it is purportedly enforcing. Its silence is deafening: This Court has never previously resolved—let alone considered—GGYC's CIC claim, and the April 7 judgment orders nothing related to it.

GGYC's motion therefore violates a fundamental rule of New York practice: That a court, once it renders a final judgment, lacks jurisdiction to adjudicate matters beyond its scope. *See Little Prince Prods., Ltd.* v. *Scoullar*, 258 A.D.2d 331, 332 (1st Dep't 1999) (court lacks "jurisdiction to entertain applications for additional relief after entry of final judgment."); *Korn* v. *Gulotta*, 186 A.D.2d 195, 198 (2d Dep't 1992) ("[S]ince Korn's current application raises issues wholly separate and distinct from those originally raised . . . Korn's application cannot be construed as one to enforce the prior declaratory judgment."). Rather, if a party seeks

such additional relief, that party must "commence a new action." *Little Prince Prods.*, 258 A.D.2d at 332.[4] GGYC itself recognized this rule when, in May 2009, it argued that "[t]he only specific power that a New York court retains in an action after entry of a final judgment and exhaustion of all appeals is to enforce the judgment." (Giuffra Decl. Ex. M, at 6.)

That rule makes sense. GGYC has never before litigated its CIC challenge against SNG. If GGYC were allowed to bring such a claim as an "enforcement" motion, it would deprive SNG of the right to receive proper notice of GGYC's allegations and the right to test the validity of those allegations—as it would any other claim—such as by filing a motion to dismiss, a motion for summary judgment, and obtaining discovery as contemplated by the CPLR.

B. At the Very Least, this Court Should Follow *Mercury Bay* and Stay Resolution of GGYC's Motion Until After the Race.

In circumstances such as these, there is only one precedent on point—*Mercury Bay*—and that precedent strongly counsels against this Court's resolving the merits of GGYC's motion before the race. In that case, Justice Ciparick directed the litigating America's Cup contenders to "proceed with the races and to reserve their protests, if any, until after completion of the America's Cup races." *Mercury Bay Boating Club, Inc.* v. *San Diego Yacht Club*, Index No. 21299/08, at 9 (Sup. Ct. July 25, 1988) (Giuffra Decl. Ex. A, at 9). Justice Ciparick delayed resolving any dispute over whether the parties' vessels complied with the Deed, because:

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[4] *See also Korn*, 186 A.D.2d at 198 ("The appellant's present application . . . cannot be construed as one to enforce the prior declaratory judgment. Accordingly, Korn's failure to properly acquire jurisdiction over the respondents by serving a summons and complaint requires dismissal of the demand for declaratory relief"); *Erie County* v. *Axelrod*, 80 A.D.2d 701, 702 (3d Dep't 1981) (holding that where judgment had been satisfied and motion for enforcement involved new circumstances "[petitioners] should proceed by a new plenary action against the [defendant] and not by motion in an action which has been terminated by a judgment which has been paid.").

- it was "somewhat premature" to resolve the challenger's pre-race dispute because the Deed "specifically [gave] the defender the right to name its boat at the last possible moment, at the starting line on the first day of the race" (*id.* at 6-7);

- it would have been "manifestly improper for the court to dictate conditions for the upcoming race, in the context of a contempt proceeding where the only issue that [could] properly be determined [was] the extremely narrow issue of whether the clear and unequivocal mandate of the court ha[d] been violated" (*id.* at 7);

- for the court to render a definitive pre-race determination "would countenance continued bickering, and encourage further litigation which would inevitably delay commencement of the races," especially given the parties' "well-chronicled inability to negotiate their differences in the best interests of the America's Cup" and the likelihood that "a number of additional pre-race disputes involving matters of naval architecture, rules or terms of the race" would arise (*id.* at 7, 9); and

- the parties would "not suffer substantial prejudice by being required to seek . . . rulings at the conclusion of the races, since both boats are already built and launched." (*Id.* at 8.)

Mercury Bay is directly on point and should be followed here for several reasons:

First, as in *Mercury Bay*, resolution of GGYC's motion is premature for the simple reason that SNG has not yet formally announced its boat. The Deed gives the Cup Defender the right to announce its boat on the day of the race. That is what SNG intends to do.

Second, it would be "manifestly improper" for this Court to adjudicate GGYC's dispute—one not previously considered by this Court—in the post-judgment enforcement context. This Court would have limited ability to consult first with the ISAF sailing jury, which should have the chance to bring its expertise to bear on this issue in the first instance and to advise the court on important issues of fairness and sporting considerations; SNG does not have proper notice of GGYC's claims; and, should GGYC proceed with its CIC claim, SNG would be entitled to show that GGYC's position is refuted by the history of the America's Cup and the purpose behind the CIC requirement. Further, SNG also would be entitled to discover facts about GGYC's boat concerning GGYC's compliance with the CIC clause.

Third, resolution of GGYC's motion now would, in fact, "encourage further litigation" and invite further "piecemeal" resolutions. GGYC has taken the position that it was required to file this motion now to "avoid being deemed to have acquiesced" in purported Deed violations and to avoid "waiv[ing] its right to [such] challenge[s]" by proceeding to race. (GGYC Br. at 2.) SNG has done the same. At this point, both sides have *not* waived any claims about the other's vessel, and this Court can decide any remaining challenges *after* the race.

Fourth, staying GGYC's motion is particularly sensible where, as here, an intervening event—the 33rd America's Cup itself—may "resolve and render academic" the issues to be decided by the Court. *Am. Transit Ins. Co.* v. *Assoc. Intern. Ins. Co.*, 210 A.D.2d 133, 133 (1st Dep't 1994) (citation omitted). Obviously, if GGYC wins on the water, its CIC claim will be moot.

Fifth, GGYC will not be prejudiced if its motion is adjudicated after the race. GGYC claims that it is "compelled to bring this motion now" in order "to avoid being deemed to have acquiesced in SNG's intention to use U.S.-made sails or to otherwise have waived its right to challenge such use by racing SNG." (GGYC Br. at 2.) But if those concerns were valid, GGYC, *before* filing its motion, would have asked SNG to stipulate that GGYC would not be deemed to have waived its CIC claim by racing. GGYC did not, no doubt because it knows SNG's position, which SNG reaffirms here: SNG agrees that GGYC would not be deemed to have waived or otherwise abandoned its CIC claim if it were to interpose it after the race.[5] By racing in their respective vessels, both SNG and GGYC are running the risk that after the race

[5] In doing so, SNG does not—and, in fact cannot—waive any jurisdictional objection to GGYC's procedurally defective "enforcement" motion.

the loser could argue that the winner's vessel violated the Deed. That is what happened in *Mercury Bay*, and that is what should happen here, particularly in light of the Court of Appeals' direction that the race start on February 8. By following *Mercury Bay*, this Court would finally put an end to a "land bound battle among clever lawyers in the courthouse" (Ex. A, at 8), and allow the race to be determined where it should be: on the water.

II. SNG COMPLIED WITH THE DEED'S CONSTRUCTED-IN-COUNTRY CLAUSE.

A. The Constructed-in-Country Clause Does Not Apply To a Yacht's Sails.

1. The Plain Language of the Constructed-in-Country Clause Does Not Include a Yacht's "Sails."

GGYC argues that the phrase "yacht or vessel," as used in the CIC provision, "plainly" includes a vessel's "sails." (GGYC Br. at 4.) But GGYC cites no textual support—none—for its definition of a "yacht or vessel." Instead, GGYC relies on an interpretation previously advanced by *SNG* when arguing, with respect to the Deed's waterline-measurement requirement, that the term "yacht or vessel" includes a yacht's rudders. But GGYC neglects to mention that the First Department ruled *against* SNG on the waterline-measurement issue, thereby implicitly holding that the phrase "yacht or vessel" does *not* encompass every aspect of a boat. *See Golden Gate Yacht Club* v. *Société Nautique de Genéve*, --- N.Y.S.2d ---, 2009 WL 4797736, at *2 (1st Dep't Dec. 15, 2009).

Dictionary definitions in existence during or shortly after the 1882 Deed was drafted confirm that a "yacht or vessel" has an identity independent of its sails. The 1882 edition of Webster's Dictionary, for instance, defines a "yacht" as "[a] light and elegantly furnished vessel, used either for private pleasure, or as a vessel of state to convey princes. &c. from one place to another; a sea-going vessel used only for pleasure trips, racing, and the like." (Giuffra

Decl. Ex. N.) And, a "vessel," in turn, is defined as "[a]ny structure made to float upon the water, for purposes of commerce or war, *whether impelled by wind, steam or oars*." (*Id.* (emphasis added).) If a "yacht or vessel" necessarily included the sails, there would have been no need to specify that it should be "propelled by sails." *Cf. Suffolk County Water Auth.* v. *Village of Greenport*, 21 A.D.3d 947, 948 (2d Dep't 2005) ("[A]n interpretation which renders language in the contract superfluous is unsupportable."). That is why, for instance, it makes perfect sense to say that one is "rigging" a yacht or vessel, *i.e.*, "equipping a vessel with the necessary shrouds, stays, braces, etc." Oxford English Dictionary (2d ed.); *see also id.* (defining "rig" as "[t]he arrangement of masts, sails, etc., on a vessel").

Even worse, GGYC makes *no* attempt to define the term "constructed," much less explain how "constructed" should be read with the phrase "yacht or vessel." When read together, there is clearly a point at which a "yacht or vessel"—like a car on an assembly line—comes into being, or can be said to be "constructed." The 1859 edition of the Dictionary of English Language, for instance, defines the verb "construct" as [t]o put together, as the parts of a thing, for a *new product*; to form with contrivance; to fabricate; to build; as '[t]o construct a machine'; '[t]o construct a ship.'" (Giuffra Decl. Ex. O (emphasis added).) When it comes to a yacht, that "new product" is formed when the vessel's hull and superstructure come into being. That is, in fact, how maritime statutes and regulations define analogous constructed-in-country concepts in the context of determining when a vessel is "United States built," and therefore allowed to engage in U.S. coastwise trade. *See* 46 U.S.C. § 12112(a)(2)(A) (allowing for "coastwise endorsement" to issue "for a vessel" that, among other requirements, "was built in the United States"); 46 C.F.R. § 67.97 ("To be considered built in the United States a vessel must meet both of the following criteria: (a) All major components of its *hull and superstructure* are

fabricated in the United States; and (b) The vessel is assembled entirely in the United States.") (emphasis added).[6]

2. George Schuyler, the Donor of the 1882 Deed, Never Intended the Constructed-in-Country Requirement to Apply to a Yacht's "Sails."

The plain meaning of the phrase "yacht or vessel," especially as modified in conjunction with the term "constructed," excludes a yacht's sails from the CIC requirement. Moreover, the extrinsic evidence confirms SNG's interpretation of this requirement.

In its nine-page brief—unsupported by *any* expert declaration—GGYC claims that the CIC requirement was designed "to protect the international character of the competition by ensuring that competing boats were genuinely products of their home country." (GGYC Br. at 8.) GGYC simply begs the question rather than answers it—namely, *which* elements of "competing boats" were considered national in character?

The answer, as explained by John Rousmaniere—the leading America's Cup historian—is clear: hulls, not sails. (Rousmaniere Decl. ¶ 9 ("For more than a century of America's Cup competition, nationality concerned only yacht clubs and yacht hulls.").) That is because, during the time of the original Deed and thereafter, there *was* no international character to sails. Sails and sailmaking technology were exchanged between countries all the time. Even the *America* herself sported two British sails.

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[6] Indeed, for over 100 years, the Coast Guard has "uniformly held that the use of foreign propulsion equipment in an otherwise American-built vessel will not cause that vessel to be deemed foreign built." Memorandum from the U.S. Coast Guard Merchant Vessel Documentation Division (Sept. 26, 1968). (Giuffra Decl. Ex. P.) That tradition dates back to 1882—the year the Second Deed issued—when the Treasury Department interpreted a predecessor statute containing a similar "built within the United States" clause to impose "no prohibition against registry on account of the foreign origin of the vessel's engine." (Giuffra Decl. Ex. Q.)

The wealth of historical evidence supporting that proposition is only confirmed by an 1881 document, "Notes and Draft for a New Version of the Deed," that provides the most definitive account of the purpose behind the CIC requirement. This document, as Mr. Rousmaniere explains, nowhere alludes to any concern over a vessel's *sails*; the concern is limited to a yacht's "model" and "type," which were synonymous with "'hull shape'":

> Since the complaints about *Atalanta* concerned how identical her "model," or hull shape, was to U.S. yachts, "constructed" can only have meant "designed and built." Nothing was said or even implied in the "Second Deed" about sails, scantlings, or other construction standards. (Rousmaniere Decl. ¶ 41.)

GGYC provides no evidence to refute these points. Instead, it promotes a supposedly "consistent interpretation" of the 1882 Deed based on a resolution that was passed *100 years* later, and that was, in any event, repealed, and that GGYC claims has "no binding effect."[7] (GGYC Br. at 8; Rousmaniere Decl. ¶ 47.) All that is "consistent" about GGYC's position is its lack of support.

It is Mr. Rousmaniere, and the wealth of historical evidence that he cites—including over a dozen instances of defenders and challengers using foreign sail cloth or sail technology—that provides *the* definitive account of the origins and purpose behind the CIC requirement. That account confirms that the CIC clause covers only a vessels' hull, not its sails.

Thus, this Court would *further*—not hinder—the purpose behind the CIC requirement by holding that the CIC requirement does not restrict America's Cup competitors

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[7] Making matters worse, GGYC cites an incorrect version of the "1982" resolution. The resolution was actually passed in 1980 and amended in 1982. The correct version, contained in a 1983 NYYC yearbook, states that challenging vessels are not prevented from using sails "manufacture[d] . . . in the country in which an America's Cup match is to take place . . . . " (Giuffra Decl. Ex. R.)

from using the 3DL sailmaking process, *the* "state-of-the-art process for making racing sails." (Whidden Aff. ¶ 5.) Indeed, a "fundamental idea" underlying the 1882 Deed of Gift is that "The America's Cup cannot survive without good, close racing." (Rousmaniere Decl. ¶ 10b.) In "a sport as technology-driven as yacht racing, this means that the teams should have similar access to state-of-the-art equipment." (*Id.* ¶ 11.) This Court would advance the sport—and the donor's intent—by rejecting GGYC's gross misreading of the Deed.

B. In Any Event, SNG's Sails *Were* Constructed in Switzerland.

1. The Word "Constructed" Refers to Physical Assembly.

GGYC cites no basis for its suggestion that the term "constructed," the touchstone of the CIC requirement, refers to the use of "technology." The term plainly does not; it refers only to physical *assembly*. The 1882 edition of the American Dictionary of the English Language defines the verb "construct," in relevant part, as "[t]o put together in their proper place and order the constituent parts of; to build; to form; as to construct an edifice." (Giuffra Decl. Ex. N; *see also id.* Ex. O.) In no sense does the verb "construct" refer to or even connote the use of intellectual-property rights. That conclusion is fully supported by the donor's intention to limit the CIC requirement to a yacht's hull. At the very least, the donor never intended to impose any restriction on sailmaking *technology*, which was freely exchanged for over 100 years since the *America* first won the Cup in 1851.

2. SNG Assembled Its Sails *in Switzerland*.

In any event, SNG *did* construct its sails *in Switzerland*. Alinghi, "[u]nlike most other clients," contracted with North Sails to receive several unfinished pieces of 3DL sails (*i.e.*, a "sail blank") rather than a unitary sail, and then processed those pieces of 3DL sails in accordance with Team Alinghi's design specifications. (Whidden Aff. ¶¶ 15, 16.) It was only

once in Switzerland that the Alinghi team (1) joined the sails and (2) finished the sails through complex and time-intensive sailmaking methods. For that reason, the Swiss government provided a certificate of origin "for the yacht Alinghi 5 and for its sails" stating that they were Swiss-made. (Sahli Aff. ¶ 7 & Ex. A.) Indeed, the Director of the Legalization Department of the Swiss Chamber of Commerce and Industry has confirmed "that the Alinghi 5 sails were entirely manufactured in Switzerland." (Sahli Aff. ¶ 6.)

Thus, even if GGYC's CIC claim were legally viable (and it is not), it is factually wrong: SNG's sails *were* constructed in Switzerland; no usable or recognizable sails existed prior to the shipment of pieces of 3DL sail blanks to Switzerland.

CONCLUSION

For the foregoing reasons, SNG respectfully requests that this Court dismiss GGYC's procedurally improper "enforcement" motion and/or deny GGYC's motion on the merits. At the very least, this Court should follow the *Mercury Bay* precedent and not decide this motion until after the 33rd America's Cup.

Respectfully,

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