

Court of Appeals

STATE OF NEW YORK



In the Matter of
GOLDEN GATE YACHT CLUB,

Plaintiff-Appellant,

—against—

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant-Respondent,

—and—

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

**NOTICE OF MOTION FOR LEAVE
TO FILE *AMICI CURIAE* BRIEF**

**COPY OF ORIGINAL
WITH PROOF OF SERVICE**

ELIZABETH M. ROTENBERG-SCHWARTZ
SHEPPARD, MULLIN, RICHTER
& HAMPTON LLP

30 Rockefeller Plaza, Suite 2400
New York, New York 10112
Telephone: (212) 332-3827
Facsimile: (212) 332-3888

Attorneys for Amici Curiae

December 31, 2008

COURT OF APPEALS
STATE OF NEW YORK

GOLDEN GATE YACHT CLUB,
 Plaintiff-Appellant,

 -against-

SOCIÉTÉ NAUTIQUE DE GENÈVE,
 Defendant-Respondent,

 -and

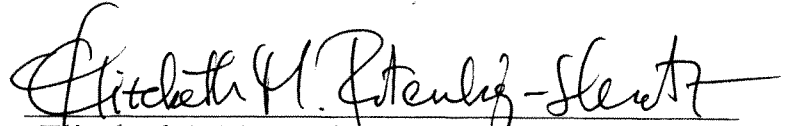
CLUB NÁUTICO ESPAÑOL DE VELA,
 Intervenor-Defendant.

X New York County Clerk's
: Index No. 602446/07
:
:
:
:
:
NOTICE OF MOTION
:
FOR LEAVE TO FILE
:
AMICI CURIAE BRIEF
:
:
:
:
:
:
X

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth M. Rotenberg-Schwartz, Esq., dated December 30, 2008, the exhibit thereto, and upon all the proceedings heretofore had herein, the undersigned will move this Court at a term thereof to be held at the Court of Appeals Hall in Albany, New York, on January 12, 2009, at the opening of this Court on that day, or as soon as counsel may be heard, for an order granting movants The San Diego Yacht Club Sailing Foundation and San Diego Yacht Club to file an *amici curiae* brief in the

above-entitled action which currently is before this Court on appeal, and for such other and further relief as this Court may deem just and proper.

Dated: New York, New York
December 30, 2008



Elizabeth M. Rotenberg-Schwartz
Sheppard, Mullin, Richter & Hampton LLP
30 Rockefeller Plaza, Suite 2400
New York, NY 10112
Telephone: 212-332-3800
Facsimile: 212-332-3888

Counsel for Movants The San Diego Yacht
Club Sailing Foundation and San Diego
Yacht Club

TO: Maureen E. Mahoney, Esq.
J. Scott Ballenger, Esq.
Derek D. Smith, Esq.
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004

James V. Kearney, Esq.
Aaron Siri, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022

Attorneys for Plaintiff-Appellant Golden Gate Yacht Club

Barry R. Ostrager, Esq.
Jonathan K. Youngwood, Esq.
George S. Wang, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3954

Attorneys for Defendant-Respondent Société Nautique Genève

David W. Rivkin, Esq.
Jeremy Feigelson, Esq.
Catherine M. Doll, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

Attorneys for Intervenor-Defendant Club Náutico Español de Vela

Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
Office of the New York State Attorney General
New York, NY 10271

the *amici curiae* brief attached as Exhibit A, in the above-entitled action now before the Court on appeal.¹

2. This Court's decision will determine whether the America's Cup yacht race will maintain its position as yachting's most prestigious Challenge race, or whether it will become a farce. In a Challenge race, two boats compete against each other, as in a boxing match. This is different from a "classic" fleet race, in which several boats sail against another at the same time. In a Challenge race, tactics play a crucial role because the focus is on one single opponent in the water at the same time. To the winning boat, and thus to the winning Yacht Club, goes the America's Cup - - the most coveted trophy in the sport of sailing.

3. In the America's Cup, the Challenger and Defender sail the same course, eyeing the other and jockeying to join the windward position and snatch wind from the rival. Thus, fair and fierce competition between true competitors is at the heart of the America's Cup.

¹ The facts herein and in the brief attached as Exhibit A are recited upon information and belief, the source of which is information provided by the Proposed *Amici*, and by a partner in my firm, Dana J. Dunwoody, who is located in San Diego, California.

4. For that reason, the Deed of Gift For the America's Cup ("Deed of Gift") set out rules and eligibility restrictions to ensure fair and arms-length competition. Without strict enforcement of such rules and restrictions in the Deed of Gift, a Challenge (or match) race like America's Cup is vulnerable to manipulations. It is vulnerable to a situation as we have here, where the Cup's defending champion has rolled over -- or perhaps rolled out the red carpet -- to install a sham "Yacht Club" as Challenger of Record. Such a cozy situation brings dishonor to the sport, and most certainly circumvents the Deed of Gift's eligibility restrictions.

5. Proposed *amicus* San Diego Yacht Club is an organized Yacht Club established in 1886, which currently has approximately 2,000 members. In its 122 years of sports history, San Diego Yacht Club has won numerous world-class sailing victories. It is a former Trustee of the America's Cup, and was Defender of the America's Cup races held in San Diego in 1992 and 1995. As a former Trustee of the Cup, San Diego Yacht Club has a present and abiding interest in the outcome of this matter.

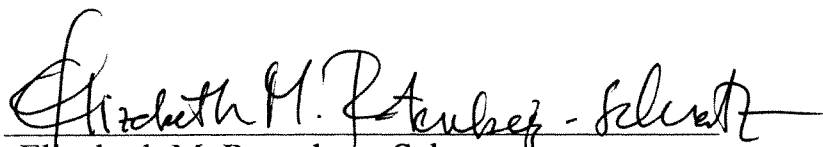
6. Proposed *amicus* The San Diego Yacht Club Foundation was organized in the late 1990's to promote national and international amateur sailing, as well as maritime education and competition. The Foundation supports outreach

programs, training activities, provision of sailing equipment and participation in all nautical activities for sailors from all walks of life - - not just to members of the San Diego Yacht Club.

7. The proposed *Amici* do not seek simply to repeat arguments made by the other parties. Rather, the Proposed *Amici* wish to stress a single point: One of the Deed of Gift's eligibility restrictions requires the Challenger of Record be an "organized Yacht Club." It was clearly the settlor's intent that the potential Challenger of Record be a bona fide Yacht Club: meaning "organized." This is clear from the history against which the Deed of Gift was created. The purported Challenger of Record, Intervenor-Defendant CNEV, does not meet that requirement.

WHEREFORE, your deponent believes that the *amici curiae* brief to be submitted (attached as Exhibit A) will be of special assistance to the Court in deciding the appeal in this action, and respectfully requests that the instant motion be granted in all respects.

Dated: New York, New York
December 30, 2008



Elizabeth M. Rotenberg-Schwartz
Sheppard, Mullin, Richter & Hampton LLP
30 Rockefeller Plaza, Suite 2400
New York, New York 10112
Telephone: 212-332-3800
Facsimile: 212-332-3888

Counsel for Movants The San Diego Yacht
Club Sailing Foundation and San Diego
Yacht Club

TO: Maureen E. Mahoney, Esq.
J. Scott Ballenger, Esq.
Derek D. Smith, Esq.
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004

James V. Kearney, Esq.
Aaron Siri, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022

Attorneys for Plaintiff-Appellant Golden Gate Yacht Club

Barry R. Ostrager, Esq.
Jonathan K. Youngwood, Esq.
George S. Wang, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3954

Attorneys for Defendant-Respondent Société Nautique Genève

David W. Rivkin, Esq.
Jeremy Feigelson, Esq.
Catherine M. Doll, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

Attorneys for Intervenor-Defendant Club Náutico Español de Vela

Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
Office of the New York State Attorney General
New York, NY 10271

EXHIBIT A

Court of Appeals

STATE OF NEW YORK

In the Matter of
GOLDEN GATE YACHT CLUB,
Plaintiff-Appellant,
—against—

SOCIÉTÉ NAUTIQUE DE GENÈVE,
Defendant-Respondent,
—and—

CLUB NÁUTICO ESPAÑOL DE VELA,
Intervenor-Defendant.

**BRIEF OF AMICI CURIAE
THE SAN DIEGO YACHT CLUB SAILING FOUNDATION
AND THE SAN DIEGO YACHT CLUB**

ELIZABETH M. ROTENBERG-SCHWARTZ
SHEPPARD, MULLIN, RICHTER
& HAMPTON LLP
30 Rockefeller Plaza, Suite 2400
New York, New York 10112
Telephone: (212) 332-3827
Facsimile: (212) 332-3888
Attorneys for Amici Curiae

December 31, 2008

CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 500.1 of the Rules of Practice for the Court of Appeals of the State of New York, *amicus curiae* San Diego Yacht Club states that it has no parents, subsidiaries or affiliates.

TABLE OF CONTENTS

Page

| | |
|--------------------------------|----|
| I. PROPOSED AMICI CURIAE | 1 |
| II. FACTS | 2 |
| III. ARGUMENT | 5 |
| IV. CONCLUSION..... | 10 |

I.
PROPOSED AMICI CURIAE

Proposed *Amicus* the San Diego Yacht Club is a former Trustee of the America's Cup, and was the defender of the America's Cup races held in San Diego in 1992 and 1995. The San Diego Yacht Club endorses and supports the position of the Golden Gate Yacht Club in this appeal. Founded in 1886 (one year before Mr. Schuyler revised the Deed of Gift for the final time in 1887), the San Diego Yacht Club has evolved from a small gathering of boating enthusiasts to a world renowned yachting community recognized for its successes in ocean racing, bay sailing, cruiser navigation (also known as predicted log racing), angling and its support of sailing programs and races at all levels -- from Star boats to the Lipton Cup, from Sabot Nationals to the Olympics, and of course the America's Cup.

Proposed *Amicus* The San Diego Yacht Club Sailing Foundation ("Foundation") is in every respect a product of the generosity and long-standing enthusiasm for yachting competition and maritime education of the dedicated sailors and members of the San Diego Yacht Club. The Foundation was organized in the late 1990's following the 1995 America's Cup event. The Foundation was funded initially with money remaining in AC'95, the America's Cup organizing enterprise. Organized to promote national and international amateur sailing as well

as maritime education and competition, the Foundation supports outreach programs, training activities, provision of sailing equipment and participation in all nautical activities for amateur sailors from all walks of life, not limited to members of the San Diego Yacht Club. It is a cornerstone of the Foundation's raison d'être that sailing competitions be conducted in observance of the traditional rules governing sailing competition.

II. **FACTS**

The San Diego Yacht Club and the Foundation do not intend to recite the facts outlined by the Golden Gate Yacht Club or other parties. Rather, certain additional facts are set forth here.

- The history of the America's Cup dates to 1851, and is named for the schooner *America* built by a group of New York yachtsmen (including George L. Schuyler) who wanted to challenge British naval superiority. At that time, as the song goes, "Britannia," with its 250-year naval and yachting tradition, "ruled the waves."

- The British heard that the Yankees were building a schooner, and they were curious. The Earl of Wilton, Commodore of the Royal Yacht

Squadron, invited the owners of the *America* to moor their yacht at Cowes on the Isle of Wight, where Queen Victoria was staying at her summer home and also where the Royal Yacht Squadron (once described as the "most exclusive club in the universe") was housed. Lord Wilton also extended an invitation in his letter dated February 22, 1851 that the New York contingent sailing the *America* should "become visitors at the club-house at Cowes."

- The *America* left Hoboken, New Jersey on June 21, 1851.

Although the owners of *America* sailed to England with the hope of racing against the best yachts the British could offer, they did not have an invitation to race. Rather, they had only an invitation to be the guests of the Royal Yacht Squadron. Ultimately through a combination of curiosity and, it appears, wagering, the British invited the *America* to sail against 14 English cutters and schooners in what was called "The R.Y.S. £100 Cup."

- The historic race occurred on August 22, 1851. *America* was the sole winner. To quote Michael Levitt, communications director of the New York Yacht Club, and author of 11 books, three of which are about the America's Cup, including *America's Cup 1851- 1992*: "According to the Illustrated London News, at 6:00 pm, *America* neared the 223 -foot royal yacht, Victoria & Albert. Queen Victoria supposedly asked, "Who is first?" When told it was *America* , she

asked, "Who is second?" "There is no second," was the reply. This line -- apocryphal or not -- became a standard for the race."

- It is not an overstatement that *America's* defeat of a fleet of English ships marked both a turning point in the sport of yacht racing and also in the esteem with which Britain held the fledgling United States of America. To again quote Michael Levitt: "As Winfield M. Thompson wrote in *The Lawson History of the America's Cup*, the friendly feeling Queen Victoria showed toward Americans in this critical period of this country's development was "of more benefit to this nation than the world knew." *America's* victory became the stuff of legend -- abroad and at home. The *London Merchant* wrote that this win foretold a change in the world's order. ". . . The empire of the seas must before long be ceded to America; its persevering enterprise, its great commerce, are certain to secure this prize; nor will England be in a condition to dispute it with her. America, as mistress of the ocean, must overstride the civilized world."

It was against this background that George L. Schuyler made the Deed of Gift in 1857. His intention in creating the America's Cup was that the race would have only one winner, and no "second." His intention was to create an international sailing competition between yacht clubs that would reflect the tradition and honor that had become forever intertwined with the silver cup that

America had wrested from a fleet of British ships before the eyes of the world and the hopes of her Queen. Mr. Schuyler manifested this intention in the Deed of Gift through the requirements that Challengers be organized Yacht Clubs. Nothing less. As further evidence of this point, when challenges from two Canadian yacht clubs that Mr. Schuyler deemed unfit to uphold this tradition were lodged, he amended the Deed of Gift to also require Challengers to have an annual regatta.

To ensure that his intention was carried out in perpetuity, Mr. Schuyler stipulated that the America's Cup "shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

Thus, in the Deed of Gift, Mr. Schuyler imposed rules and eligibility restrictions to ensure that only an "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 both..." could be eligible to be Challenger.

III. **ARGUMENT**

It is safe to say that Mr. Schuyler never imagined that the America's Cup, which was to be the essence of a Challenge competition, would be a contest

between a Yacht Club and its vassal rather than between rivaling Yacht Clubs' vessels. Indeed, the key element of the Deed of Gift provision being referenced is the Club -- not the vessel's owners, captain or crew. This is a hard concept for individualists today to appreciate. The requirement that the Challenge come from an "organized" club means that it cannot come from an individual, or a paper entity created for the sole purpose of the challenge; it means that the Club is more important than the individuals who created it; it means that to be organized, a Yacht Club must have members, a facility, vessels and a tradition.

For the Challenging club to be an organized Yacht Club it must, like Mr. Schuyler's New York Yacht Club and Proposed Amicus San Diego Yacht Club, have a tradition, vessels and a physical facility. One can imagine Mr. Schuyler's enthusiasm would be dampened if instead of being invited by Lord Wilton to stay at the Royal Yacht Squadron's "club-house at Cowes" -- a somewhat modest description of a sixteenth century castle -- he and the New York contingent had arrived at Intervenor-Defendant CNEV's non-existent facility and were issued a hammock for open air sleeping. Indeed one can readily imagine that the New York Yacht Club would not have accepted the invitation to sail the *America* to England if the rival group was not a Yacht Club at all but was merely a "paper" entity having no vessels, members, facilities or traditions. Where is the honor in that paper contest?

Apart from requiring an annual regatta, the Deed of Gift does not define what constitutes an "organized Yacht Club," which makes possible the mischief in Defendant-Respondent SNG's and CNEV's positions -- attempting to install a "Yacht Club" in name only as the Challenger of Record. It is, however, clear that the Deed of Gift plainly requires that the Challenger of Record must be an "organized Yacht Club" *and* that it must be "incorporated, patented or licensed by the legislature, admiralty, or other executive department..." As the motion court properly recognized, "here the donors [of the Deed of Gift] contemplated additional indicia of a yachting club." (R. at 45.) The "additional indicia of a yachting club" means that an entity cannot be an organized Yacht Club simply because it was "incorporated, patented or licensed [as such] by the legislature, admiralty, or other executive department..." It must also have a presence as a Yacht Club, a club worthy of carrying the tradition that started with the *America* defeating a squadron of England's best yachts in 1851, and with Mr. Schuyler's original Deed of Gift in 1857.

One of the required traditions -- beat to death in the briefs but handled properly by the Golden Gate Yacht Club -- is that to be an organized Yacht Club, it must have an annual regatta. For Mr. Schuyler that was a screening test. If a Yacht Club holds an annual regatta on "an ocean water course on the sea, or an arm of the sea, or one which combines both" then it has one of the bona-fides

Mr. Schuyler considered a prerequisite to being considered an organized Yacht Club. If it does not, or has not prior to the purported Challenge held an annual regatta then it is not an organized Yacht Club, period.

SNG and CNEV assert in their briefs that although CNEV has never held an annual regatta, its intention to hold one in the future is sufficient under the Deed of Gift to qualify CNEV as an "organized Yacht Club" capable of issuing a valid Challenge for the America's Cup -- the oldest sporting competition, even older than the modern Olympic games which began in 1896. Can one imagine the International Olympic Committee accepting for a qualifying round a group of individuals who intended to compete for a country that did not yet exist, but which they "intended to" form prior to the start of the games? Can one imagine Wimbledon dispensing with international rankings and qualifications, and allowing a spot on the tournament to someone whose "intention" was to play in her first match, and to achieve the requisite ranking, "at some point" prior to the commencement of tournament qualifiers? Or a boxer who had a well-intentioned plan to fight a match but wanted to "test his mettle" for the first time in the World Boxing Heavyweight Championship?

For that matter, can one imagine joining a Yacht Club that has no members, no facilities, no vessels, no history of even amateur competition or the sponsorship of same, but which merely exists on paper? That entity is CNEV.

The Deed of Gift's eligibility restriction that the Challenging Club be a bona fide and "organized Yacht Club" was no doubt in furtherance of Mr. Schuyler's stipulation that the America's Cup race be "preserved as a perpetual Challenge Cup for friendly competition between foreign countries." As noted, the essence of a Challenge Cup is arms-length competition. Under the Deed of Gift, the Cup's Defender has no choice but to meet the Challenge, and every other would-be Challenger is on hold pending agreement between the Defender and Challenger on the protocols. The Defender must meet whatever requirements the Challenger conceives, so long as they are in accord with the Deed of Gift. Given those restrictions, a Defender who is in collusion, rather than competition, with a Challenger can flip the rules on their head, creating in essence a Defender's Cup rather than a Challenger's Cup. Collusion on the protocols is to the disadvantage of serious competition, and is in violation of the historical background against which the America's Cup Deed of Gift was created.

To be "organized" means that the challenging Yacht Club must have a substantial enough history as a Club to at least have held annual regattas that meet

the requirements of the Deed of Gift; and it must (in the words of the motion court) have other "indicia of yachting club" such as members, vessels and a facility. The Yacht Club is paramount, and its individual members are secondary so far as the Deed of Gift is concerned.

IV. CONCLUSION

The complete and utter disregard of some of the longest-standing and most hallowed rules of sailing prescribed for the most important and prestigious of all international sailing competitions, the America's Cup, by the current Defender SNG, has moved the San Diego Yacht Club and the Foundation to seek leave to file this *amicus* brief in support of Golden Gate Yacht Club's appeal. In the interests of national and international sailing and its dedicated participants throughout the world, the appeal of Golden Gate Yacht Club must be granted and the decision of the Appellate Division must be reversed.

The America's Cup is a Challenge event. It is the very essence of a Challenge event that the Defender be subject to the risk of receiving a Challenge from an equally dedicated, well financed and technically adept Challenger, and not a lap dog of the Defender ready to roll over and concede to the Defender's long list of requirements that will essentially insure the success of the Defender. The

situation at hand is comparable to a heavyweight boxing title holder accepting a challenge from only a light weight contender, and insisting that the gloves of the *heavyweight* contain horseshoes to assure his punch will KO the untested opponent.

If there ever were an example of what an organized Yacht Club is, it is the San Diego Yacht Club -- former Trustee of the America's Cup. It is simply ludicrous and an affront to common sense and the Deed of Gift to consider an entity such as the current purported Challenger of Record to be an "organized Yacht Club" when it has no facilities, no yachts, no members, no regattas and only "plans" to hold a regatta at some future time and in the vain hope that the serious yachting world looks the other way.

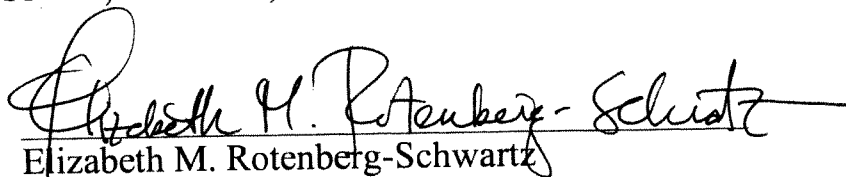
While SNG and CNEV point with sarcasm to the fact that some Challengers of Record did not have facilities comparable to clubs such as the San Diego Yacht Club, the fact of the matter is that every single Challenging Club in the history of the America's Cup has at least had members, and vessels, and has held annual regattas prior to the time it Challenged for the America's Cup. The current Challenger of Record did not even have an old car on a beach or any other facilities, or members, or boats or regattas at the time of its purported Challenge.

For the benefit of the America's Cup and all of international sailing,
Golden Gate Yacht Club has not looked away and neither can the San Diego Yacht
Club or the Foundation.

Dated: December 30, 2008

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



Elizabeth M. Rotenberg-Schwartz

30 Rockefeller Plaza, Suite 2400

New York, New York 10112

Telephone: (212) 332-3827

Facsimile: (212) 332-3888

Attorneys for *Amici Curiae*

THE SAN DIEGO YACHT CLUB SAILING
FOUNDATION AND THE SAN DIEGO
YACHT CLUB

W02-WEST:8DJD1401215975.1

229 West 36th Street, New York, N.Y. 10018• Tel: (212) 619-4949• Fax No. (212) 608-3141

23800

STATE OF NEW YORK,)

SS:

AFFIDAVIT OF SERVICE

COUNTY OF NEW YORK)

Daniel Vinci being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on the 31, day of December 2008 deponent served 2 copy(s) of the within

NOTICE OF MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

upon the attorneys at the addresses below, and by the following method:

BY FEDERAL EXPRESS NEXT BUSINESS DAY DELIVERY

Maureen E. Mahoney, Esq.
J. Scott Ballenger, Esq.
Derek D. Smith, Esq.
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004
(202) 637-2200

David W. Rivkin, Esq.
Jeremy Feigelson, Esq.
Catherine M. Doll, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000
Attorneys for Intervenor-Defendant
Club Náutico Español de Vela

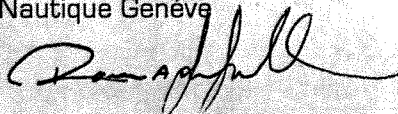
James V. Kearney, Esq.
Aaron Siri, Esq.
Latham & Watkins LLP
885 Third Avenue
New York, NY 10022
(212) 906-1200

Carolyn T. Ellis, Esq.
Assistant Attorney General
Section Chief
Charities Bureau
Office of the New York State Attorney General
120 Broadway
New York, NY 10271
(212) 416-8000

Attorneys for Plaintiff-Appellant
Golden Gate Yacht Club

Barry R. Ostrager, Esq.
Jonathan K. Youngwood, Esq.
George S. Wang, Esq.
Simpson Thacher & Bartlett LLP
425 Lexington Avenue
New York, NY 10017-3954
(212) 455-2000

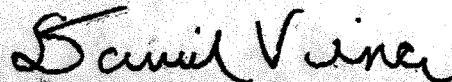
Attorneys for Defendant-Respondent
Soci te Nautique Gen ve



Sworn to me this

December 31, 2008

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01H06118731
Qualified in Kings County
Commission Expires November 15, 2012



Case Name: Golden Gate v. Societe

Docket/Case No.