

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

Golden Gate Yacht Club

Plaintiff,

v.

Societe Nautique de Geneve

Defendant

Club Nautico Espanol de Vela,

Intervenor-Defendant

Index No. 602446/07

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE
ORDER & JUDGMENT AND FOR CONTEMPT**

July 14, 2009

Attorneys for Plaintiff

Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in support of its motion, pursuant to Judiciary Law § 756 and for relief at the foot of a judgment, to direct Societe Nautique de Geneve (“SNG”) that it cannot change the sailing rules for the America’s Cup (“Cup”) match without the mutual consent of GGYC, to direct SNG to disclose to GGYC a secret agreement, dated on or about June 5, 2009, with the International Sailing Federation (“ISAF”), pertaining to the implementation of those rules, and to direct SNG to cease its efforts to delay the formation of an ISAF sailing jury for the match.

Both SNG (and its racing team Alinghi) and GGYC (and its racing team BMW ORACLE Racing) are completing construction of their respective vessels for the next Cup match. SNG knows the rules for the match. GGYC does not. That is because SNG has not to date affirmed to GGYC its rules and has said that it may change the rules in the future without GGYC consent. This violates the express terms of the Deed and the mandate in the order and judgment of this Court dated April 7, 2009 (“Order and Judgment”), entered pursuant to the Remittitur of the Court of Appeals, that GGYC be treated as “the Challenger of Record pursuant to the Deed of Gift.” (Ex. A at 2; B at 4; C.)¹

**THE DEED PRESCRIBES THE RULES FOR THE MATCH
AND HOW THEY MAY BE MODIFIED**

The Deed deals with the rules for the match in two paragraphs which, of course, must be read together. First, it provides that the Cup match “shall be sailed subject to [the defender’s] *rules and sailing regulations* so far as the same do not conflict with the provisions of this deed of gift.” (Ex. A at ¶ 9) (emphasis supplied.) Second, the Deed explicitly provides that the

¹ All citations in the form “Ex. ___” refer to exhibits to the affirmation of James V. Kearney, dated July 14, 2009 (“Kearney Affirmation”).

defender's "rules and sailing regulations" for the match may only be modified through mutual consent of the defender and challenger. It states:

The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the . . . *rules and sailing regulations*

(Id. at ¶ 8). Any unilateral modification to the rules by SNG, as the defender, is therefore prohibited as it "conflict[s] with the provisions of this deed of gift" which require mutual consent of both the defender and challenger to change the "rules and sailing regulations." Id.²

The plain meaning of these two provisions, read together giving force and effect to each, is that the rules applicable to the match cannot be changed by the defender after issuance of a Notice of Challenge without the challenger's consent. It follows therefore that the defender's club rules in place at the time the Notice of Challenge is issued are the rules that apply to the match. A contrary interpretation of the plain meaning of the text would render the mutual consent clause without force or effect in violation of New York law of trust construction, because it would permit the defender without mutual consent of the challenger to change its rules any time after the Notice of Challenge. See, e.g., In re Asserson, 707 N.Y.S. 2d 821, 823 (N.Y. Sur. 2000) ("[I]n construing the instrument the court should attempt to give meaning and effect to *all words used therein* unless to do so would be in contravention of the settlor's intent.") (emphasis added.)

² The tradition and history of the America's Cup, contemporaneous with the execution of the current version of the Deed in 1887, demonstrates that the defender's "rules and sailing regulations" were immediately accessible to the challenger and that any modifications to these rules required mutual consent. In the 1885 and 1886 America's Cup matches, preceding execution of 1887 Deed, the then defender, the New York Yacht Club ("NYYC"), provided a copy of its "rules and sailing regulations" along with its letter accepting the challenges from the *Genesta* and *Galatea*, respectively, for these matches. (Ex. I at 3) ("For your guidance a copy of the Club Book has been forwarded to you.") By this letter the NYYC sought the challenger's mutual consent to effect certain changes to these rules; of course, this would have been unnecessary if the NYYC could unilaterally modify the rules. Id.

Furthermore, to interpret the Deed to mean that the match is “subject to such rules and sailing regulations as may now or hereafter be promulgated by [SNG],” as SNG stated in their letter to GGYC of April 23, 2009, would produce absurd results. (Ex. J at 3 ¶ 6.) The defender would be empowered to unilaterally change the rules for the match at any time, even after the challenger has completed construction of its vessel, to the competitive disadvantage of the challenger or even to disqualify the challenger’s vessel for failure to comply with the defender’s new rules. See, e.g., In re Estate of Swords, 157 N.Y.S. 2d 688, 690 (N.Y. Sur. Ct. 1956) (“The language of the will cannot be interpreted as requiring such an absurd result.”)

The Court of Appeals explained in Mercury Bay Boating Club v. San Diego Yacht Club that “*the trustee of the America's Cup is obligated to act in good faith and in the spirit of friendly competition by reasonably attempting to reach an accord on the terms of the matches to be held. Where that is not possible, however, the specific terms of the deed govern and the trustee must use its best efforts to compete for the Cup within the specified terms.*” 76 N.Y.2d 256, 271 (1990) (emphasis supplied.) It follows that SNG’s reservation of a unilateral right to modify the rules, not only guts the mutual consent requirement, it also violates SNG’s fiduciary duty to “in good faith . . . reasonably attempt[] to reach an accord on the terms of the matches” and “[w]here that is not possible . . . [to] use its best efforts to compete for the Cup within the specified terms.” Id. The Court of Appeals acknowledged that upon receipt of the Notice of Challenge the defender had the option to “accept the challenge, forfeit the Cup, or negotiate agreeable terms with the challenger.” Mercury Bay, 76 N.Y.2d at 263. The defender did not have the option to accept the challenge and then dictate the terms to the challenger.

**SNG ASSERTS THE RIGHT TO CHANGE THE SAILING RULES
WITHOUT THE CONSENT OF GGYC**

At the time of GGYC's challenge on July 11, 2007, SNG's "rules and sailing regulations" were those of the International Sailing Federation ("ISAF"), including the ISAF Racing Rules of Sailing ("RRS") that then and now govern major sailing events.³ (Ex. D at 1; E ¶ 4; F ¶¶ 3-4; G.) These rules apply "so far as the same do not conflict with the provisions" of the Deed. (Ex. A ¶ 9.) Thus, SNG cannot take refuge in the argument that the RRS themselves permit the organizing authority of a regatta, under certain circumstances, to change certain RRS unilaterally and to change others with the consent of ISAF. Such a rule would not be applicable to the match because it would "conflict with the provisions of this deed of gift" that requires mutual consent to change the "rules and sailing regulations." (Ex. A ¶¶ 8, 9.)⁴

GGYC relied on these rules in its preparation for the next Cup match, including

³ The Swiss national sailing authority, Swiss Sailing, requires that yacht clubs within Swiss territory, such as SNG, abide by ISAF rules and regulations. (Exs. H at Art. 4, 5(A), 7; F ¶ 3.) As SNG's advised its members on July 13, 2004:

The Racing Rules of Sailing (RRS) govern practically all of the regattas organized in the world. They are amended every 4 years. *The rules that we use today* will expire at the end of this year, after 4 years of good and loyal service. *As of January 1, 2005, they will be replaced by the new edition of the 2005-2008 RRS.*

(Ex. O.) A copy of the ISAF Regulations and ISAF RRS extant at the time of GGYC's challenge are attached as Exhibits U and V, respectively, to the Kearney Affirmation.

⁴ Historical practice contemporaneous with the execution of the Deed in 1887, and continuing to this day, is for established yacht clubs to issue a yearly club book specifying their club rules ("Club Book"), which in modern times includes specifying any modifications to the RRS. (Ex. E ¶ 5.) For example, New York Yacht Club, defender of the Cup from 1857 to 1983, has issued an annual Club Book since the 1840's and in its most recent Club Book of 2009 it modified RRS 75 and RRS 78 for the 2009 racing season. (Ex. L at 438.) Similarly, the Royal Perth Yacht Club, defender of the Cup from 1983 to 1987, Club Book of 2008/9 modified RRS 44.1, 55 and 63.7 for the 2008/2009 racing season. (Ex. P at 2, Rules 1.2, 1.6, 1.7.) SNG's Club Book for 2007 does not specify any such modifications, including leaving unchanged the rules prohibiting non-manual power and movable ballast. (Ex. T.) Moreover, SNG's notice of race for its 2006 and its 2007 annual regattas, respectively held before and after GGYC issued its challenge, specify that the RRS for 2005-2008 shall govern these events without modifying the rules prohibiting non-manual power and movable ballast. (Exs. Q ¶ 2; R ¶ 2.)

the -- soon to be completed -- design and construction of its competing vessel. (Ex. E ¶¶ 3, 7.) For example, in designing and constructing its vessel GGYC relied on RRS Rule 52 which prohibits use of non-manual power to lower and raise sails. (Ex. V ¶ 52.) Were SNG to unilaterally eliminate this rule, SNG could put an onboard engine to drive the sails in its vessel, while GGYC is compelled to design its vessel without such an engine. Similarly, were SNG to eliminate RRS Rule 51, prohibiting movable ballast,⁵ its vessel could have movable ballast while GGYC was compelled to design its vessel without it. (Ex. V ¶ 51.) Engines that drive sails and movable ballast provide huge competitive advantages. (Ex. E ¶ 7.)

After the Court of Appeals decision of April 2, 2009 and the resulting Order and Judgment of April 7, 2009, SNG claimed it would unilaterally change the sailing rules. By letter to GGYC dated April 23, 2009, SNG for the first time claimed the right to change the rules for the match at anytime without mutual consent. (Ex. J at 3 ¶ 6) (“The races shall be sailed subject to such rules and sailing regulations as may now or hereafter be promulgated by the Societe Nautique de Geneve . . .”) SNG went even further, asserting that it “may adopt regulations clarifying and implementing the provisions of the Deed of Gift related to measurement of the challenging vessel and its compliance with the notice of challenge.” (Ex. J at 3 ¶ 8.)

But SNG did not stop there. David Kellett, ISAF Executive Committee member and Treasurer, acknowledged that on June 5, 2009, SNG (or its racing team Alinghi) paid ISAF €150,000 pursuant to a secret agreement making certain arrangements concerning ISAF’s role in, and the “rules and sailing regulations” for, the next Cup match.⁶ (Ex. E ¶ 8.) At SNG’s request,

⁵ “Ballast” is defined as: “Weight installed to influence the stability, flotation or total weight of the boat.” (Ex. G ¶ C.2.5.)

⁶ The first agreement with ISAF and an America’s Cup competitor related to the America’s Cup was executed for the 28th America’s Cup. (Ex. S ¶ 3.) In every Cup event since (and including) the 28th

ISAF has delayed formation of the sailing jury from July 1, 2009, as originally scheduled by ISAF.⁷ (Ex. K.)

Neither ISAF nor SNG/Alinghi will disclose the secret agreement to GGYC. (Ex. S ¶ 5.) Especially in light of ISAF's central role in selecting the match officials and sailing jury, such collusive secrecy is unacceptable and violates SNG's fiduciary duty to GGYC as the challenger or record and trust beneficiary.⁸ See Mercury Bay, 76 N.Y.2d at 271 ("the trustee must use its best efforts to compete for the Cup within the specified terms"). The world understands that, especially in trust administration circumstances like this, transparency is a hallmark of fairness and secrecy is usually a sign of deception.

THE PREJUDICE TO GGYC

The prejudice to GGYC is manifest. SNG has proclaimed the intent and authority to construct its competing vessel with engines to drive sails and movable ballast, each now banned by the ISAF rules, and then announce a change in those rules that permits them. (See supra at 4-5.) No doubt, SNG will announce these regulations after GGYC has completed construction of its vessel in reliance on the ISAF rule that prohibits engines and movable ballast.

America's Cup the defender and challenger of record have mutually consented to the terms of the agreement executed with ISAF related to certain aspects of the respective Cup event. Id.

⁷ Mr. Kellett stated in a June 6, 2009 email to Richard Slater, representative of GGYC's racing team, that ISAF "tried to have the Jury appointed by 1st July but they [SNG] are reluctant to do that." (Ex. K.) ISAF still has not appointed the jury.

⁸ ISAF Regulation 18.12.8 provides that "ISAF shall exercise the right to appoint the International Jury or the International Umpires for the . . . America's Cup Match . . ." (Ex. U ¶ 18.12.8.) The "rules and sailing regulations" for the next Cup match thus require ISAF, not SNG, to appoint the jury; and this rule may only be modified by mutual consent of SNG and GGYC, not via SNG's secret agreement with ISAF.

Second, unilateral modification of the rules by SNG is a clear-cut deprivation of GGYC's rights under the Deed's mutual consent requirement and the Order and Judgment's mandate to treat GGYC as the challenger. (See supra at 1-3.)

**THE COURT HAS THE LEGAL AUTHORITY
TO REMEDY THE CONTEMPT**

This Court has the authority to order remedial relief to compel compliance with its mandates. See, e.g., Jud. Law § 753(A)(3) (2009) (authorizing “fine and imprisonment . . . for any . . . disobedience to a lawful mandate of the court”); Jud. Law § 773 (2009) (authorizing fines “sufficient to indemnify the aggrieved party”); McCain v. Dinkins, 84 N.Y.2d 216, 228-30 (1994) (affirming “remedial” relief as “within the discretionary, equitable powers of the courts,” noting that even ordering city officials to spend a night in an emergency unit as punishment for civil contempt is “within a court’s power to induce compliance or remedy noncompliance with a court’s mandate for particularly egregious conduct or willful inaction”); Dep’t of Env’t Prot. v. Dep’t of Env’t Conservation, 70 N.Y.2d 233, 239 (1987) (“penalty [may be] imposed . . . to coerce compliance with the court’s mandate”); Baralan Int’l v. Avant Indus., 242 A.D.2d 226, 227 (1st Dep’t 1997) (“Courts have inherent authority to impose remedial fines for failure to obey their orders . . .”); 21 NY Jur Contempt § 4 (2008) (“[a]s to civil contempt, the court may, if necessary, look beyond the specific statutory provisions and resort to its inherent common-law power”).

Here, the criteria for holding SNG in contempt are easily satisfied. See McCain v. Dinkins, 84 N.Y.2d 216, 226 (1994). The Judgment and Order is in effect. (Ex. B.) Its mandate that SNG afford GGYC the rights of being the Challenger of Record is unequivocal. (See Id; supra at 1.) It is indisputable that SNG received notice of the Judgment and Order on April 7,

2009. (Ex. M.) SNG's defiance of this mandate and its prejudice to GGYC are also indisputable. (See supra at 4-7.)

In this instance, however, the mere finding of contempt and imposition of a statutory fine is insufficient to protect the Court's judicial process and ensure GGYC's rights. In instances such as this, the court is empowered to go beyond the remedies of contempt and provide relief "at the foot of the judgment" to enforce its provisions. See, e.g., (Ex. N) (Mercury Bay Boating Club v. San Diego Yacht Club, Index No. 21299/87, at 1, (N.Y. Sup. Ct. April 7, 1989) ("Plaintiff . . . having moved for relief at the foot of the judgment . . ." the court ruled that the America's Cup defender forfeit the Cup to the challenger.) (Ciparick, J.) rev'd 545 N.Y.S.2d 693 (1st Dep't 1989) (while finding that forfeiture of the Cup is available when the party's conduct merits the ultimate remedy, it was not warranted under the facts therein) aff'd 76 N.Y.2d 256 (1990) see also Berlitz Publications v. Berlitz, 37 N.Y.2d 878, 880 (1975) (an application at the foot of the judgment "seeks enforcement of the judgment as it stands").⁹

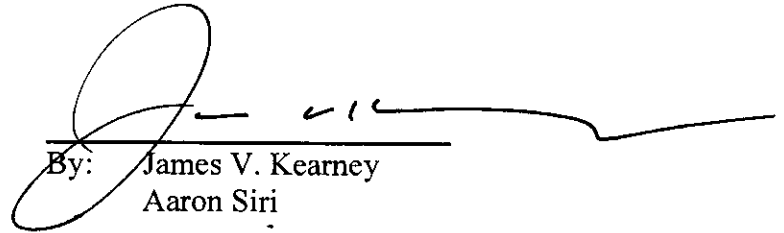
RELIEF REQUESTED

Pursuant to the Court's inherent power to enforce its judgments, GGYC requests the Court (i) direct that SNG cannot change any of the rules and sailing regulations for the next America's Cup match without GGYC's mutual consent, (ii) direct SNG to provide GGYC, within one day of service of a copy of this Court's order directing the same upon the attorneys

⁹ "Whatever the appellate court has ordered in the remittitur must be done . . . it is the duty of the trial court to enforce obedience to the order and not to hear further excuses for disobedience." 4 NY Jur Appellate Review § 791 (2008). Indeed, this is so important to proper functioning of the court system that failure to enforce the remittitur can be remedied by way of direct petition to the Court of Appeals. See, e.g., 1-11 New York Appellate Practice § 11.12 (2009) ("If a lower court takes action assertively inconsistent with the Court's remittitur, the party asserting the inconsistency may take an appeal as of right to the Court of Appeals.").

for SNG, a copy of the agreements between ISAF, or any of its affiliates, and SNG, or any of its affiliates and/or its racing team, having effect after the Order and Judgment, and related to the next America's Cup event, (iii) direct SNG to cease and desist from efforts to prevent formation of an ISAF jury or otherwise thwart ISAF's implementation of the rules applicable to the next America's Cup event, (iv) award GGYC its attorneys' fees, and (v) hold SNG in contempt for its failure to provide GGYC its rights as the next America's Cup challenger of record as detailed in the Order and Judgment.

Dated: New York, New York
July 14, 2009



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