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-Respondent.

BRIEF OF *AMICUS CURIAE* NEW YORK YACHT CLUB

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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 New York Yacht Club states that it has no parents, subsidiaries of affiliates.

PRELIMINARY STATEMENT

New York Yacht Club ("NYYC" or the "Club") respectfully submits this brief as *amicus curiae* to urge the Court to reverse the decision of the Appellate Division and hold that the challenge submitted by Club Náutico Española de Vela ("CNEV") on July 3, 2007 was invalid under the Deed of Gift governing the America's Cup and that CNEV is therefore ineligible to act as the Challenger of Record in the 33rd America's Cup.

The NYYC has not submitted a challenge for the upcoming 33rd America's Cup. It has no personal interest or stake in the outcome of the litigation before the Court. Its interest in the subject of this litigation stems from its long, unique involvement with the America's Cup and its desire to have the competition remain faithful to the Deed of Gift drafted by the settlors and to see that the races for the Challenger Selection Series and the America's Cup are fair and even-handed competitions for all participants.

INTEREST OF THE AMICUS

The histories of the NYYC and America's Cup are inextricably intertwined. The Club was founded in 1844 by a group of yachtsmen including George Schuyler, and held its first annual regatta in 1846. On August 22, 1851, the schooner "America," sailing under the NYYC burgee and owned by Mr. Schuyler and several other Club members, defeated a fleet of English yachts in

a race around the Isle of Wight, winning the trophy that would later become known as the America's Cup. The owners of the Cup donated it to the NYYC later that year, under the condition that it serve as a perpetual challenge trophy for international yacht racing between yacht clubs from different countries. In 1857, Mr. Schuyler along with four others—including two other founding members of the NYYC—executed and delivered to the NYYC the original Deed of Gift establishing the rules governing the America's Cup. Mr. Schuyler revised the Deed of Gift in 1882 and contributed to its third revision in 1887. The Deed of Gift was revised by court order in 1956 and again in 1985.

Between 1857 and 1983, the NYYC successfully defended the Cup 24 times. During that 126-year period, the Club served as the trustee under the Deed of Gift. In all, the Club has raced for the America's Cup 28 times, 25 as the Cup defender and trustee, and three times as a challenger (once as the "Challenger of Record"). The Club missed only the 1988, 1992, and 1995 races, when it was ineligible to participate because the Cup was held by another United States yacht club, and the 2007 races at Valencia, Spain. As a result of this long involvement, the NYYC has played a unique role in the evolution of the America's Cup. For example, in 1970, on the basis of the "mutual consent" provision in the Deed of Gift, the NYYC initiated the development of the current structure pursuant to which a challenging yacht club (referred to as the

"Challenger of Record") negotiates with the defending yacht club a protocol for the conduct of the next match on behalf of all challengers. This permits mutual consent challengers from multiple yacht clubs to compete in elimination races leading up to a one-on-one match against the Defender. The America's Cup previously had been a competition between a single challenging yacht club and a single defending yacht club.

The Club's unique role did not end in 1983 when it lost the Cup and ceased to be the trustee under the Deed of Gift. Rather, participants in the America's Cup continued to rely on the Club's experience and often turned to the NYYC for guidance in Cup matters. For example, the Protocols governing the 28th America's Cup in 1992 and the 29th America's Cup in 1995 provided that disputes arising between challengers or between the Defender and the Challenger of Record would be resolved in arbitration. The NYYC was selected to provide a neutral arbitrator to serve on that arbitration panel. Likewise, before submitting its challenge for the 32nd America's Cup in 2007, Real Federación Española de Vela ("RFEV"), the Spanish national yachting federation, approached the NYYC to seek support for its entry as a mutual consent challenger. Unlike the case now before the Court, RFEV was not seeking to become the Challenger of Record, and its mutual consent challenge ultimately was accepted by Société Nautique de Genève ("SNG"), which had

won the 31st America's Cup and, under the terms of the Deed of Gift, was then the trustee of the Cup.[1]

Furthermore, slightly over a year ago, the NYYC began discussions with Alinghi and BMW/Oracle, the sailing teams representing SNG and Golden Gate Yacht Club, respectively. The objective of these discussions was to restructure the competition for the America's Cup in a manner that would preserve the balance between the Defender and the Challenger, as envisioned by Mr. Schuyler, while recognizing the commercial realities imposed by the need for corporate sponsorship to fund the sailing teams. While undertaking this effort, the Club adopted a posture of neutrality with respect to the dispute currently before the Court, and refrained from any public expression of its views. It was the Club's hope that if agreement could be reached on the overall restructuring of the America's Cup, the underlying dispute could be settled relatively easily. Unfortunately, that goal has proven unachievable, and the NYYC recognizes that the fate of the current America's Cup now rests in the hands of the Court. In this regard, the Club believes that its position has been misrepresented in the papers submitted to this Court. (See Defendant's Appellate Brief, 35 (falsely implying that the NYYC supports SNG's position that a Challenger of Record

[1] It should be noted that the stance taken by NYYC in that dispute—that a Challenger under the Deed of Gift must be an actual yacht club—may have influenced RFEV to conclude that it would not be accepted as the Challenger of Record in its federated form. In order to avoid this issue, RFEV caused Respondent CNEV to be incorporated as a "yacht club."

need not hold an annual regatta before issuing its challenge)). As a result, the NYYC has resolved to express its opinion on the issues raised herein, in the hope that the Club's experience with such matters will be of assistance to the Court.

ARGUMENT

CNEV DID NOT MEET THE QUALIFICATIONS IN THE DEED OF GIFT AT THE TIME OF ITS CHALLENGE AND IS THEREFORE INELIGIBLE TO ACT AS CHALLENGER OF RECORD

The Deed of Gift pursuant to which the America's Cup race was established requires that the yacht club defending the Cup accept the first challenge made by 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 one which combines both." When CNEV issued its challenge on July 3, 2007, it had never held an annual regatta and was not an "organized Yacht Club" because it had only five members (each of whom was also a member of RFEV's executive board), no yachts, was formed by RFEV just days before submitting its challenge for the America's Cup, and was formed solely for the purpose of submitting that challenge.

The Appellate Division considered the phrase "having for its annual regatta" to be ambiguous and held that the settler intended it to include yacht

clubs that promised to hold an annual regatta but had not yet done so. (Appellate Division Decision, 8–11). The Appellate Division also held that a yacht club was "organized" so long as it had been "incorporated, patented, or licensed by the legislature, admiralty or other executive department" and found that CNEV was a valid Challenger. (Appellate Division Decision, 11–12). The Appellate Division's holding was in error and should be reversed.

A. The Phrase "Having for Its Annual Regatta" Is Not Ambiguous

As the New York Supreme Court and the dissenting justice in the Appellate Division panel stated, the phrase "having for its annual regatta" is not ambiguous. The plain and natural meaning of the phrase is that the challenging yacht club "has held one or more annual regattas in the past and will continue to do so in the future." (Appellate Division Decision, 25 (Nardelli J., dissenting)).

Moreover, its meaning is made clear by another provision of the Deed of Gift which mandates that, "when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided." If the requirement of a club "having for its annual regatta" were to be interpreted to include clubs that express the intention to hold an annual regatta but have not done so at the time of challenge, the yacht club defending the Cup would be unable to determine

whether the club issuing the challenge was a valid Challenger until and unless that club actually held a regatta.

The Appellate Division seemed to believe that, under its interpretation of the phrase "having for its annual regatta," a club that had not yet held a regatta at the time of its challenge would have to hold one *before* the Cup match took place. (Appellate Division Decision, 8 ("As SNG would have it, the annual regatta requirement can be satisfied where the yacht club 'intends to hold an annual regatta and does so prior to the date of its proposed match.'")). On the contrary, the logical extension of the Appellate Division's holding is that a newly formed yacht club could issue a challenge on day one of its incorporation, set the Cup match ten months later as permitted by the Deed of Gift, and vow to hold its first "annual" regatta a month or two *after* the Cup match (which would still fall within the first year of its existence). If the term "having" can be considered prospective, there is no language in the Deed of Gift that would prevent such an absurd outcome. Thus the Appellate Division's interpretation cannot be reconciled with other provisions of the Deed of Gift and would eliminate the "annual regatta" qualification as a meaningful requirement altogether.

In its appellate brief, CNEV argues that if the phrase "having for its annual regatta" is read in the future tense, then it can be reconciled with the

instruction that "when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided." (Intervenor-Defendant's Appellate Brief, 13–14 ("The settlor chose to use the present tense participle 'fulfilling' and not 'having fulfilled.' The use of the term 'fulfilling' leaves open when the conditions may be fulfilled instead of requiring that they have been fulfilled by the time of the challenge.")). In other words, CNEV maintains that a defender must accept a challenge from any yacht club which is *in the process of* fulfilling the conditions of the Deed of Gift, with no direction as to how far along in the "process" the Challenger must be as to any of those qualifications. This interpretation is simply incorrect. The plain and natural reading of both phrases, on their face and when evaluated in terms of their operation, is that in order to qualify as a Challenger under the Deed of Gift, a yacht club must meet the qualifications set forth therein *before* issuing its challenge.

B. The Extrinsic Evidence Does Not Support the Appellate Division's Interpretation of the Phrase "Having for Its Annual Regatta"

Even if the phrase "having for its annual regatta" were ambiguous—which it is not—the relevant extrinsic evidence does not support the interpretation given to that phrase by the Appellate Division. The *only* extrinsic evidence cited by the Appellate Division was the arbitral decision rendered by

the America's Cup Arbitration Panel ("ACAP") with respect to SNG's participation in the Challenger Selection Series for the 31st America's Cup. (Appellate Division Decision, 10–11). The ACAP decision addressed the issue of whether SNG could participate as a mutual consent challenger under the Protocol agreed to by the Defender and the Challenger of Record, *not* whether SNG would qualify as a valid Challenger of Record under the Deed of Gift. The Appellate Division brushed aside this crucial distinction, attempting to justify its conclusion by asserting that since SNG was allowed to enter the race as a mutual consent challenger without having held an annual regatta, it would be "incongruous" to prevent CNEV from being recognized as a valid Challenger of Record on those grounds. (Appellate Division Decision, 11). In so ruling, the Appellate Division glossed over the important distinction between a Challenger of Record and a mutual consent challenger and ignored relevant extrinsic information pointing to the opposite conclusion. Perhaps more significantly, by relying on the ACAP decision, the Appellate Division cited as extrinsic evidence of the intent of the drafters of the Deed of Gift an event that occurred more than 100 years after the document was drafted.

The America's Cup was originally conceived under the Deed of Gift as a match between two yacht clubs—a Challenger and a Defender—with the match conditions to be established by "mutual consent" of the two clubs. This

tradition persisted until 1970, when, pursuant to the mutual consent provision, the yacht club acting as the challenger and the NYYC (which was defending the Cup) negotiated a Protocol that permitted additional yacht clubs to submit mutual consent challenges and then to compete in a series of challenger elimination races with the winner of that series racing in a one-on-one match against the Defender. With one exception, subsequent America's Cup races have involved a multiple-challenging club elimination format agreed to by the Defender and the challenging yacht club denominated as the "Challenger of Record." It is this type of protocol that was interpreted to permit SNG to register as one of a number of mutual consent challengers participating in the Challenger Selection Series. Since the purpose of creating elimination races in the first place was to increase interest and participation in the sport of yacht racing, it is consistent that the protocol would be interpreted to encourage mutual consent challengers to participate.[2]

A very different analysis is appropriate when interpreting the qualifications specifically set forth in the Deed of Gift with respect to the yacht club which is to serve as the Challenger of Record. A Challenger of Record must negotiate with the yacht club defending the Cup all of the rules to be set

[2] Similarly, it is for this reason that the NYYC supported the inclusion of Secret Cove Yacht Club of Canada as a mutual consent challenger in the 25th America's Cup, even though Secret Cove had yet to hold their first annual regatta. That support does not, as SNG falsely implies in its brief (Defendant's Appellate Brief, 35), extend to SNG's argument that such a club would be a valid Challenger under the Deed of Gift.

forth in the mutual consent protocol, including the specifications of the boats to be used, the location and schedule of the races, the conditions under which additional mutual consent challengers may participate, and the mechanisms for the resolution of disputes. In negotiating the protocol, the yacht club serving as the Challenger of Record must adequately represent the interests of the mutual consent challengers, and it must play a leading role in organizing the event itself, including both the Challenger Selection Series and the Cup races. Unlike mutual consent challengers, the Challenger of Record cannot simply show up and race.

It is perplexing that in interpreting the Deed of Gift the Appellate Division failed to focus on the distinction between a Challenger of Record and a mutual consent challenger, and instead relied exclusively on an arbitral decision that was rendered close to a century after the provision at issue was written, that was binding only on the parties before it, and that did not address the issue before the court—especially when more relevant extrinsic evidence was available. In his dissent, Justice Nardelli recognized that the intent of the donor—the most relevant type of extrinsic evidence when interpreting the words of a trust—was clearly to allow only established, experienced yacht clubs to qualify as Challengers. (Appellate Division Decision, 25–26 (Nardelli J., dissenting)). The America's Cup races of 1876 and 1881 were widely regarded

as failures due to the inexperience of the Challenger in those years. The 1882 amendment that introduced the current "annual regatta" requirement into the Deed of Gift was made for the specific purpose of ensuring that unseasoned yacht clubs would not continue to tarnish the reputation of the America's Cup as a truly competitive event. Although newly formed yacht clubs have occasionally been permitted to register as mutual consent challengers before holding their first annual regatta,[3] every pre-1970 Challenger and post-1970 Challenger of Record in the history of the America's Cup has held an annual regatta *prior* to issuing the challenge to which the Deed of Gift refers.

At the time he amended the Deed of Gift in 1882, Mr. Schuyler was well aware that the NYYC and other legitimate "Yacht Clubs" held annual regattas. The NYYC had held more than a dozen annual regattas by this time, and the Royal Yacht Squadron, from which the Cup had originally been won, had held more than two dozen. Moreover, for a race to constitute an "annual" regatta, it must be repeated once each year. A club's first regatta, therefore, is not an "annual" regatta because it does not follow a regatta from the prior year. For example, the NYYC held its first regatta in 1845, but it was the regatta of the

[3] Indeed, as the Appellate Division acknowledged, entities that are not even yacht clubs have been permitted to register as mutual consent challengers. (Appellate Division Decision, 5 (noting that CNEV's parent, RFEV, was permitted to participate in the 32nd Cup despite being "not a yacht club but a federation of sports clubs and individuals who promote the sport of sailing")). Yet the Appellate Division did not find it "incongruous" that such an entity would be allowed to participate as a mutual consent challenger, despite its obvious ineligibility as a Challenger of Record under the Deed of Gift.

following year—1846—that the NYYC designated as its "First Annual Regatta." Mr. Schuyler's intent in amending the Deed of Gift is clear from his experience at the time: legitimate yacht clubs hold annual regattas on the sea or an arm of the sea, and a yacht club that has not held such a regatta—much less one that has never held a regatta *of any kind*—is simply not qualified to be a Challenger for the Cup.

C. The Appellate Division Failed to Give Effect to the Phrase "Organized Yacht Club"

The Deed of Gift requires a Challenger to be an "organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department." GGYC argued below that CNEV is not an "organized Yacht Club" within the ordinary meaning of the term, but the New York Supreme Court did not reach the issue since it found that CNEV could not be the Challenger of Record since it had not held an annual regatta.

Rather than remand to the Supreme Court, the Appellate Division, citing a 1926 case of that court, decided that the term "organized" meant simply that an entity "has taken all steps necessary to endow itself with the capacity to transact the legitimate business for which it was created." (Appellate Division Decision, 11 (internal quotation marks and brackets omitted)). Based on this single reference, and without analyzing the relationship of that term to the rest of the words in the sentence in the Deed of Gift, the Appellate Division held that since CNEV had a valid certificate of incorporation, it qualified as an "organized Yacht Club" within the meaning of the Deed of Gift. The interpretation adopted by the Appellate Division renders the term "organized" completely superfluous.

Under the Deed of Gift, a Challenger must be both "an organized Yacht Club" *and* "incorporated, patented, or licensed by the legislature, admiralty or other executive department." The term "organized" is linguistically separate from the terms "incorporated, patented, or licensed" and indicates an additional qualification. Indeed, the original 1857 Deed of Gift required *only* that the Challenger be an "organized Yacht Club." The phrase "incorporated, patented, or licensed by the legislature, admiralty or other executive department" was added in the 1882 amendment to the Deed of Gift and imposed an *additional* requirement—that an "organized Yacht Club" must *also* be "incorporated, patented or licensed" in order to qualify as a Challenger for the Cup.

Moreover, the term "organized" plainly suggests more than a paper existence. In fact, the New York Supreme Court recognized that "the donors contemplated additional indicia of a yachting club" when they used the term "organized" in the Deed of Gift. An interpretation which better comports with the intent of the settlors and with the history of the America's Cup is that "organized" in this context means "securely established." (*Accord* Brief of *Amici Curiae* Reale Yacht Club Canottieri Savoia and Mascalzone Latino, 21 (giving the example of "*organized* or *established* religion") (emphasis in original)). When Mr. Schuyler and the other settlors chose the NYYC as the first Defender of the Cup and used the term "organized" to describe the type of

Yacht Club that could be a proper Challenger, the NYYC had been active for 13 years, had held a dozen annual regattas, had hundreds of members and had a fleet of 25 yachts. The Royal Yacht Squadron had been active for 38 years, had held 27 annual regattas and had more than a dozen yachts. These were the "organized Yacht Clubs" that the settlers had in mind when they deeded the America's Cup. In the history of the Cup, not one of the previous Challengers of Record has been, like CNEV, a mere shell of a "Yacht Club"—that is, a yacht club without a true membership, elected directors, an annual regatta or even a single yacht—when it issued its challenge.

D. The Terms of the Protocol Developed for the 33rd America's Cup Demonstrate the Wisdom of Requiring a Challenger to be an Organized and Experienced Yacht Club

The initial protocol developed for the 33rd America's Cup (the "Protocol") demonstrates the wisdom of the Deed of Gift's requirement that the Challenger of Record be an organized yacht club which has held its own annual regatta. Whether that Protocol reflects a prior arrangement between SNG and CNEV, or whether CNEV simply lacked the knowledge, experience and wherewithal to negotiate fair and even-handed terms, the result is the same: the Protocol gives an unfair advantage to SNG over any challengers. Specifically, the Protocol gives SNG the power to reject challenging yacht clubs at its sole discretion and disqualify those who dispute the Protocol or SNG's authority

thereunder; it permits SNG to arbitrarily appoint and supervise the Event Authority (which will conduct the Challenger Selection Series as well as the Cup Races) and all of the Regatta Officials; and it virtually eliminates the obligation held by the Challenger of Record to represent the interests of all challengers. Perhaps most alarmingly, the Protocol allows SNG to unilaterally determine the essential rules of the event, announce them to the other participants only 60 days beforehand, and change them at any time without consultation with the other participants.

In attempting to justify the radically new protocol that it has imposed on all challengers, SNG twists the words of Mr. Schuyler to manufacture support for its untenable position. SNG quotes, from his obituary in the New York Times, Mr. Schuyler's statement that "if he ever became convinced there was any unfair or unsportsmanlike conditions in the deed he would be willing to have them changed," and repeats the sentiment that "no matter what complications may occur in future in relation to the deed the New York Yacht Club will remember the words of Mr. Schuyler in support of the document he executed." (Defendant's Appellate Brief, 30–31). SNG then implies that Mr. Schuyler would have wanted the Court to apply a "liberal interpretation of the Deed of Gift as an inclusive rather than exclusive document."

The Club does indeed remember Mr. Schuyler's support for the original Deed of Gift, and for the amendments that he later determined were necessary to ensure that the America's Cup would remain a "spirited contest for the Championship." The requirements that a Challenger be an organized yacht club having an annual regatta on the sea or an arm of the sea were chief among the criteria that Mr. Schuyler established in pursuit of that goal. Yet these are the very measures that SNG seeks to undermine. The terms of the protocol are the antithesis of everything that Mr. Schuyler envisioned and against which he intended to guard by requiring that any yacht club challenging for the America's Cup be an "organized Yacht Club" having an "annual regatta."

CONCLUSION

For the reasons set forth herein, the NYYC respectfully urges the Court to reverse the decision of the Appellate Division and hold that the challenge proffered by CNEV on July 3, 2007 was invalid under the Deed of Gift and that CNEV is therefore ineligible to act as the Challenger of Record in the 33rd America's Cup.

Dated: New York, New York
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