

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

**REPLY MEMORANDUM OF LAW IN SUPPORT OF GGYC'S MOTION TO
ENFORCE COMPLIANCE WITH THE ORDER AND JUDGMENT ENTERED
APRIL 7, 2009 REGARDING VENUE LOCATION FOR THE 33RD AMERICA'S CUP**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
I. SNG’S SELECTION OF RAS AL-KHAIMAH AS THE VENUE FOR THE 33 RD AMERICA’S CUP VIOLATES THE DEED OF GIFT	1
II. SNG WAS NOTIFIED OF GGYC’S OBJECTIONS TO RAS AL-KHAIMAH AND PROCEEDED TO PREPARE FOR THE AMERICA’S CUP AT AN IMPROPER VENUE AT ITS OWN RISK	5
III. GGYC’S MOTION IS NECESSITATED BY THE GRAVE AND UNNECESSARY DANGER PRESENTED BY SNG’S SELECTION OF RAS AL-KHAIMAH.....	7
A. The Affidavits Submitted by SNG Explicitly Acknowledge The Safety Risks of an America’s Cup in the Water Between Iran and Ras al-Khaimah	7
B. The Report of Brent Iivil Likewise Confirms GGYC’s Security Concerns	10
CONCLUSION.....	12

Golden Gate Yacht Club respectfully submits this reply memorandum of law in further support of its motion at the foot of a judgment to enforce compliance with the Order and Judgment entered on April 7, 2009, directing that the venue for the February 2010 America's Cup match shall be Valencia, Spain, unless the parties mutually consent otherwise.

PRELIMINARY STATEMENT

This motion presents a simple legal question – whether SNG's selection of the waters off Ras al-Khaimah in the United Arab Emirates for a February match is permitted under the Deed of Gift. To demonstrate the necessity of bringing the present motion and to make clear what is at stake in this motion, GGYC offered evidence of the serious security concerns presented by SNG's selection of such a race course. SNG (and non-party Ras al-Khaimah) have gone to great lengths to seek to diminish the seriousness of the safety risks, submitting seven factual affidavits, a score of exhibits, and an amicus submission, none of which have any bearing on the limited question of whether SNG may select a Northern Hemisphere location for an America's Cup race that is to be conducted in February. As discussed below, those efforts are unpersuasive and indeed only serve to confirm the security risks. In the end, however, this Court is not being asked to determine whether the race course SNG has designated is safe enough, but only to resolve the narrow question of whether SNG's designation is permitted under the Deed of Gift. As discussed herein, it plainly is not.

I. SNG'S SELECTION OF RAS AL-KHAIMAH AS THE VENUE FOR THE 33RD AMERICA'S CUP VIOLATES THE DEED OF GIFT.

In its opening papers, GGYC demonstrated that SNG's selection of Ras al-Khaimah as the venue for the 33rd America's Cup, which must be held in February 2010 pursuant to the Order and Judgment entered on April 7, 2009 (the "April 7 Order"), violates the express terms of

the Deed of Gift, which prohibits racing in the Northern Hemisphere between November 1 and May 1. (*See* Opening Br. at 5-7.) SNG's arguments in response are unavailing.

First, SNG argues that the April 7 Order is unambiguous and means exactly what it says, *i.e.*, that the match can be held in Valencia or "any other location selected by SNG." In fact, however, as SNG effectively concedes, the Order cannot be taken so literally. Not even SNG believes that it can select the Colorado River or Walden Pond for the America's Cup, which is what the literal words would imply, because SNG acknowledges that it cannot select a venue that is not on an ocean course or free of headlands. Given that the literal meaning cannot apply, the Order must be interpreted consistent with the Deed of Gift. Accordingly, it means that SNG may select Valencia or any other venue that is permitted by the Deed of Gift. As discussed below, the Order – for good reason – exempts only the selection of Valencia from the Deed's venue restrictions.

Indeed, SNG itself has argued to this Court that the Order does not permit a venue that does not comply with the Deed of Gift and that the Deed of Gift prohibits sailing a match in the Northern Hemisphere between November 1 and May 1. Specifically, on April 27, 2009, GGYC moved to enforce the April 7 Order and for contempt after SNG announced that the 33rd America's Cup would be held in May 2010, rather than February 2010 as required by the April 7 Order (the "April 27 Motion"). In opposing that motion, SNG made the following representations to this Court:

- "There is nothing in the Order that suggests that a race should be held in contravention of the terms of the Deed of Gift." (Bowman Reply Aff. Ex. A at 7-8 (SNG Brief in Opposition to Golden Gate Yacht Club's Motion for Contempt dated May 11, 2009).)¹

¹ References in the form of "Kearney Aff." refer to the Affirmation of James V. Kearney in Support of GGYC's Motion to Enforce Compliance with the Order and Judgment Entered April 7, 2009 Regarding Venue Location for the 33rd America's Cup, dated October 1, 2009. References in the form of "Bowman Reply Aff." refer to the Reply Affirmation of Philip M. Bowman in Further Support of GGYC's Motion to Enforce Compliance with

- “The Deed of Gift further states that no race may be held in the Northern Hemisphere between November 1 and May 1 of any year.” (*Id.* at 3.)
- “The Deed of Gift unambiguously prohibits sailing a match between November 1 and May 1 in the Northern Hemisphere: “no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere.” (*Id.* at 7.)

SNG now reverses course, claiming that the April 7 Order “unambiguously permits”

SNG to select any venue it wants, *in either hemisphere*, and that the Order “could not be clearer.” (Opposition Br. at 7 (emphasis added).) As SNG urged in May, the April 7 Order must be read in conjunction with the Deed of Gift, which expressly forbids a Northern Hemisphere location for races that are to be conducted in February.

Second, SNG argues that if a Northern Hemisphere venue were improper, Valencia would be improper, but that the April 7 Order expressly preserves SNG’s “right” to choose Valencia.² As GGYC showed in its opening brief, Valencia was designated to host the next match by both GGYC and SNG in their Notice of Settlement and Notice of Counter-Settlement, which led to the May 12, 2008 Order. (Kearney Aff. Exs. G; H.) Since neither party objected to holding the 33rd America’s Cup in Valencia, the Order carved out Valencia as an exception to the hemisphere requirement, and the fact that it was an exception was clear in context. If the Order

the Order and Judgment Entered April 7, 2009 Regarding Venue Location for the 33rd America’s Cup, dated October 19, 2009.

² In a footnote, SNG makes the unsupported assertion that “GGYC is well-aware that it is impossible at this point for Valencia, Spain to host the America’s Cup in February 2010 – less than four months from today.” (Opposition Br. at 1 n.1.) However, as shown in the Affidavit of William H. Dyer Jones, who served as Regatta Director for the 2007 America’s Cup in Valencia and administered both the Challenger Selection Series and the 32nd America’s Cup, the America’s Cup can be organized and run in Valencia “with as little as two months notice, given the existing infrastructure, assuming the parties involved are willing to contest the event there.” (Bowman Reply Aff. Ex. B, ¶ 5 (Affirmation of Wm. H. Dyer Jones).) Furthermore, the Councilor of Sports for the City of Valencia has confirmed to GGYC that Valencia is ready, willing and able to host the event. (Bowman Reply Aff. Ex. C, ¶ 2 (Supplemental Ehman Aff).)

SNG also asserts that sailing conditions in Valencia in February would be unsafe. (Meyer Aff. ¶ 9.) In fact, however, weather conditions can be bad anywhere at any time, and there are procedures in place in every America’s Cup to ensure that if race conditions are unsafe on a particular day, the race does not go forward.

was intended to remove the Deed's venue selection restriction for every Northern Hemisphere venue, it would have said so, and there would have been no reason to single out Valencia.

Third, SNG makes much of statements made by representatives of GGYC in response to questions at a press conference in Munich, Germany in July 2008 concerning the meaning of the May 12, 2008 Order. Those statements, which were made shortly after the Order was issued and which SNG has taken out of context, are not controlling. Far more revealing are SNG's recent statements to the Court. Referring to an April 23, 2009 meeting between SNG and GGYC, Lucien Masmajan, an attorney for SNG and Secretary of its America's Cup Committee, testified in support of SNG's opposition to GGYC's April 27 Motion: "SNG explained that it believed it was constrained from hosting the 33rd America's Cup in the Northern Hemisphere between November 1st and May 1st under the express terms of the Deed of Gift. *The Deed of Gift does not permit races for the Cup to be sailed in that hemisphere during those months.*" (Bowman Reply Aff. Ex. D, ¶ 8 (Affidavit of Lucien Masmajan dated May 11, 2009 (emphasis added)).) SNG similarly stated in a letter from Fred Meyer and Alec Tournier to GGYC, "At this meeting SNG asked GGYC to discuss the dates for the race. SNG explained its view that it had to comply with the express terms of the Deed of Gift." (Bowman Reply Aff. Ex. E (May 5 Letter from Fred Meyer and Alec Tournier to Marcus Young).)

Moreover, since the May 14, 2009 Hearing, GGYC has repeatedly made its position known to SNG that the Order did not permit SNG to designate a Northern Hemisphere venue other than Valencia, as discussed in further detail below.

II. SNG WAS NOTIFIED OF GGYC'S OBJECTIONS TO RAS AL-KHAIMAH AND PROCEEDED TO PREPARE FOR THE AMERICA'S CUP AT AN IMPROPER VENUE AT ITS OWN RISK.

SNG argues that GGYC was untimely in filing the instant motion, suggesting that GGYC could have brought a motion to challenge SNG's undisclosed venue after the Court of Appeals decision on April 7, 2009 or after SNG told the Court that it intended to select a Northern Hemisphere venue on May 14, 2009. Any such motion would have been premature, however, because until August 5, 2009 it was possible that SNG would select Valencia, which was specifically sanctioned by the Court's Order and to which GGYC had no objection.

Moreover, GGYC has consistently made clear to SNG its position that a Northern Hemisphere venue other than Valencia was not permitted under the April 7 Order, both before *and* after SNG announced Ras al-Khaimah. On May 20, 2009, GGYC wrote to SNG:

"In accordance with the Deed, the April 7, 2009 Order and judgment and confirmed by the Court last week, the regatta will be at Valencia, Spain, or any other location of SNG's choice that is Deed-compliant, provided SNG notifies us of the location of the ocean courses on or before August 8, 2009. Notwithstanding your "Newsletter Alinghi-SNG" distributed yesterday and widely publicized by the media, "Deed-compliant" means, among other things, that the location (if other than Valencia) must be in the Southern Hemisphere." (Kearney Aff. Ex. A at 2.)

Similarly, GGYC wrote to SNG on May 23, 2009: "It is clear to us that you may select Valencia for the February 2010 match, or an otherwise Deed-compliant venue – which you have acknowledged time and again means only a venue in the Southern Hemisphere." (Kearney Aff. Ex. B at 1.) Days before SNG announced Ras al-Khaimah as the venue, GGYC warned: "The purpose of this letter is to put you on notice, yet again, that *if you unilaterally select a Northern Hemisphere venue other than Valencia, we intend to defend our rights* under the Deed and the Order and Judgment of the Court of Appeals." (Kearney Aff. Ex. D at 1 (emphasis in original).)

When SNG finally announced its intention to hold the match in Ras al-Khaimah, GGYC notified SNG of its objection the next day. GGYC wrote: “We once again advise you that it is our firm view that the selection of a Northern Hemisphere venue, other than Valencia, without our mutual consent contravenes the Deed and the Order and Judgment of the Court of Appeals . . . this defect in venue selection would permit court challenges by any number of parties and further uncertainty respecting future America’s Cup events.” (Bowman Reply Aff. Ex. F (Aug. 6, 2009 letter from Marcus Young to Fred Meyer.) Any preparation SNG made for an America’s Cup at an improper venue was made at SNG’s own risk.

SNG’s suggestion that GGYC should have brought this motion following the May 14, 2009 Hearing is particularly absurd, given the relief that SNG requested – but did not receive – from this Court. In opposing GGYC’s April 27 Motion, SNG argued: “At a minimum, were this Court to order the race to begin on February 8, 2010, it should confirm that racing in Valencia *or elsewhere in the Northern Hemisphere as SNG may designate* in accordance with the Order will not be a breach of fiduciary duty under the Deed of Gift.” (Bowman Reply Aff. Ex. A at 3 (emphasis added).) At the May 14, 2009 Hearing, this court ordered the race to begin in February 2010 but *did not* provide SNG the confirmation that it sought. If anyone was under an obligation to seek further clarification from this Court, it was SNG. Instead, SNG proceeded to make arrangements for its selection of Ras al-Khaimah, and then waited until August to notify GGYC. SNG must face the consequences of that action. It cannot claim benefit from its own delay.

III. GGYC'S MOTION IS NECESSITATED BY THE GRAVE AND UNNECESSARY DANGER PRESENT BY SNG'S SELECTION OF RAS AL-KHAIMAH.

To grant GGYC's motion, the Court need not agree with GGYC that SNG has subjected GGYC to unnecessary danger by selecting Ras al-Khaimah and certainly need not pass judgment on any action by Ras al-Khaimah or its officials. Nevertheless, GGYC has offered evidence of the serious safety concerns presented by SNG's selection of Ras al-Khaimah to demonstrate the necessity of bringing the present motion to enforce the terms of the Deed of Gift.³

A. The Affidavits Submitted by SNG Explicitly Acknowledge the Safety Risks Of an America's Cup in the Water between Iran and Ras al-Khaimah.

In its effort to prove that GGYC's security concerns are unfounded, SNG presents the affidavits of Kevin Cosgriff, Jack Devine, and Noah Feldman. Not surprisingly, these affiants confirm that holding the America's Cup in the waters between Iranian territory and Ras al-Khaimah presents the risk of hostile acts taken by decentralized non-state actors.

Vice Admiral Cosgriff acknowledges that "Al Qaeda and associated groups have demonstrated a capacity to conduct maritime attacks," and characterizes the "risk of a speedboat attack" as "plausible." (Cosgriff Aff. ¶¶ 7, 11.) As Graeme Gibbon Brooks, whose supplemental affidavit is submitted herewith, testified, this risk is salient to a match in Ras al-Khaimah because, given the closed-in geography of the race area, the relative speed of fast powerboats, and their difficulty to detect on radar (due to their small size), a rapid response time by security forces is essential. (Bowman Reply Aff. G, ¶ 4 (Supplemental Affirmation of

³ In its amicus brief, Ras al-Khaimah asserts that GGYC's purported request to "reject" Ras al-Khaimah "as a safe and secure venue offends basic ideas of comity." (Ras al-Khaimah Amicus Br. at 14.) That assertion is meritless. GGYC's motion is entirely directed to the conduct of SNG, not Ras al-Khaimah. It in no way seeks to require Ras al-Khaimah to do anything or to rule that Ras al-Khaimah has done anything wrong. Ras al-Khaimah's assertion that GGYC has asked this Court to "make a judgment about matters that are central to the functioning of a sovereign entity and that directly relate to the entity's international reputation and stature" is thus completely misplaced. (*Id.* at 15.) Principles of international comity do not – and cannot – preclude a finding that SNG has breached the terms of the Deed of Gift.

Graeme Gibbon Brooks).) In fact, the race course area designated by SNG abuts the waters over which Iran claims jurisdiction. (*See id.* (Exhibit A to Brooks Supp. Aff.)) Mr. Brooks confirms that there is no open source evidence to suggest that the United Arab Emirates navy has the recent operational experience for such a fast response. Further, according to Mr. Brooks, the risk of longer-range stand-off attacks (such as firing a weapon into the race course area from outside the race course area), or air-borne attacks from light aircraft, is also tangible, and there is no open source evidence that the United Arab Emirates navy has the operational ability to address such risks. (*Id.*)

Vice Admiral Cosgriff also acknowledges “the risk by a rogue element within Iran (most likely originating within the Iranian Revolutionary Guard and its ‘Navy’) exists.” (Cosgriff Aff. ¶ 12.) Mr. Devine admits that “Iran is currently faced with continuing civil unrest and discord, even amongst the ruling religious leadership,” (Devine Decl. ¶ 12.) and he further admits that Iran will detain vessels and crew for “domestic political gain.” (*Id.* ¶ 8.) He acknowledges that Iranian “rogue operations” do occur. (*Id.*)

Vice Admiral Cosgriff suggests that the United Arab Emirates may request that security for the America’s Cup be augmented by Coalition forces and the U.S. Fifth Fleet. (Cosgriff Aff. ¶ 14.) The suggestion that Coalition forces and the U.S. Fifth Fleet may be available to protect the America’s Cup races and Vice Admiral Cosgriff’s recognition of the need for such heavy military protection highlights the security risk that exists in the region. Vice Admiral Cosgriff assumes that Coalition or American forces would be willing to divert their resources from protecting the sealanes in the Strait of Hormuz and protecting against piracy in the Indian Ocean. Vice Admiral Cosgriff neglects to mention that foreign militaries do not have legal jurisdiction within the United Arab Emirate Territorial Waters and would therefore require special

diplomatic arrangements to allow them to have legal jurisdiction, which would be a significant precedent for the United Arab Emirates. (Bowman Reply Aff. Ex. G, ¶ 5.) This situation stands in stark contrast to the risk profile presented by Valencia, Spain, which successfully hosted the 32nd America's Cup without the need for protection from foreign militaries.

Further, SNG's affiant Jack Devine concedes the close ties between Iran and the United Arab Emirates, noting that Iranian nationals account for approximately 10% of the United Arab Emirates' population "with nearly 400,000 Iranians running approximately 10,000 small business firms in the country." (Devine Decl. ¶ 11.) This fact enhances, rather than mitigates, the threat of danger. Indeed, the Wall Street Journal reported last week that the United Arab Emirates is "tightening oversight of government workers and foreign residents because of concerns about the threat of infiltration by Iranian agents." (Bowman Reply Aff. Ex. H.)⁴

SNG also misleadingly cites statistics and facts about parts of the United Arab Emirates other than Ras al-Khaimah. The question, however, is not the safety of Dubai or Abu Dhabi, but whether it is safe for an American vessel to participate in a yacht race off the coast of Ras al-Khaimah. For example, the Affirmation of Dr. Khater Massaad describes a variety of "international events" that have taken place or are scheduled to take place in the United Arab Emirates as evidence that Ras al-Khaimah is safe. In fact, other than the "RAK Half Marathon", these events all took place (or will take place) in Abu Dhabi or Dubai, *not* Ras al-Khaimah. (Massaad Aff. ¶¶ 13-19.) In the end, SNG can point to no evidence of a track record of safely

⁴ Affiant Noah Feldman is a constitutional law scholar and a professor at Harvard Law School whose relevant experience consists of academic work in the field of constitutional development in the Middle East. He has no expertise in security issues, and has no particular knowledge of the security risks in Ras al-Khaimah or Spain. Accordingly, with all due respect to Professor Feldman, his "judgment" that "terrorist attacks against America's Cup personnel or facilities are no more probable in Ras al-Khaimah, United Arab Emirates, than in Valencia, Spain" is simply not relevant here. (Feldman Decl. ¶ 13.)

