

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

**GOLDEN GATE YACHT CLUB'S MEMORANDUM OF LAW
IN OPPOSITION TO SOCIÉTÉ NAUTIQUE DE GENEVÈ'S CROSS-MOTION
TO ENFORCE THE APRIL 7, 2009 ORDER AND JUDGMENT REGARDING THE
DEED OF GIFT'S CONSTRUCTED IN COUNTRY, "PROPELLED BY SAILS ONLY"
AND NOTICE OF CHALLENGE REQUIREMENTS**

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Golden Gate Yacht Club (“GGYC”) respectfully submits this memorandum of law in opposition to Société Nautique de Genève’s (“SNG”) cross-motion for an order disqualifying GGYC for violating the Deed’s constructed-in-country requirements and further disqualifying GGYC unless GGYC (i) races with foldable sails and (ii) races with its foresail aloft at all times.

PRELIMINARY STATEMENT

In a transparent attempt to distract the Court from its own blatant violation of the Deed of Gift’s constructed-in-country requirement and harass Golden Gate Yacht Club (“GGYC”) with the threat of “immediate” discovery, SNG, under the guise of “fulfill[ing] its duty as holder of the America’s Cup,” has brought a baseless cross-motion against GGYC seeking – once again – to disqualify GGYC’s challenge vessel.

The cross-motion is frivolous and should be denied in its entirety. *First*, despite SNG’s best efforts to confuse the issue, the Deed of Gift does not require that the vessel be *designed* in the country where the yacht club is located or that it be *designed by* nationals from that country: it requires that the vessel be *constructed* in that country, a standard that GGYC’s vessel meets but that SNG’s vessel does not. SNG’s motion based on the *design* of GGYC’s yacht must therefore be dismissed.

Second, contrary to SNG’s unsupported speculation, the hydraulics system aboard GGYC’s vessel fully complies with the Deed’s constructed-in-country requirement. It was constructed *in the United States* in partnership with Cariboni USA, a subsidiary of an Italian firm that designed the system. Unless the Court rules that boats need not be entirely constructed in country (and it should not), or the parties mutually consent otherwise, GGYC intends to race with a vessel that was entirely constructed in country.

Third, in an effort to disqualify GGYC’s “wing” sail, SNG argues – again without any support in the Deed of Gift or otherwise – that GGYC’s sail must be foldable. The Deed contains no such requirement, and “hard” or “wing” sails are part of America’s Cup tradition. Indeed, SNG fails to tell the Court that the *Stars and Stripes*, the catamaran that won the America’s Cup in 1988 and that the Court of Appeals in *Mercury Bay* explicitly endorsed as a valid competitor under the Deed of Gift was propelled by a wing sail. As the Court of Appeals observed, “Nothing in the deed limits the design of the defending club’s vessel other than the length on water-line limits applicable to all competing vessels . . .” *Mercury Bay Boating Club v. San Diego Yacht Club*, 76 N.Y.2d 256, 261 (1990). *Mercury Bay* also definitively rejected the notion that America’s Cup yacht design is limited based on what was known at the time the Deed of Gift was executed. Moreover, as detailed below (*infra* p. 8), SNG’s skipper, Brad Butterworth, admitted in an interview that GGYC’s wing is a sail and that SNG itself considered developing a wing sail: “I really think that if [GGYC] can build a wing-sail, and they can make it work on their boat, and can win the America’s Cup with it, good on them.”

Fourth, GGYC’s vessel is sloop-rigged, as stated in its Challenge Certificate; that is, it is single-masted and fore and aft rigged. There is no requirement that a sloop-rigged vessel sail with a mainsail and a foresail at all times. GGYC’s vessel thus complies with its Challenge Certificate.

ARGUMENT

I. GGYC’S VESSEL COMPLIES WITH THE DEED’S CONSTRUCTED-IN-COUNTRY REQUIREMENT.

A. SNG’s “Designed-in-Country” Argument is Meritless.

In its cross-motion, SNG seeks, among other things, to disqualify GGYC’s entire vessel because, according to witnesses who were not part of GGYC’s design team and who did not

participate in the design process, GGYC's vessel was the "offspring" of a French design, "created" by French designers, and "outsourced" to France. This motion is utterly baseless.

The question of who *designed* the GGYC's vessel and where it was *designed* is irrelevant. The Deed of Gift says nothing about where or by whom competing vessels must be designed. Indeed, as the Court of Appeals explained in *Mercury Bay*, "*other than a waterline length limitation, the deed does not contain any design restraints*" and "[t]he only design constraints imposed by the deed are [contained in its 5th and 6th paragraphs]". *Mercury Bay*, 150 A.D.2d at 90, 92 (emphasis added). There is no support for the argument, and GGYC has never argued, that the constructed-in-country clause "embodies a design requirement . . . that a yacht or vessel be designed, as well as built, in the home country of a competing yacht club." (Cross Motion Br. at 4.)¹

Even if the design of GGYC's vessel were relevant (and it is not), SNG's assertion that GGYC's vessel was "created by French designers at a French design firm" is not accurate. The design of GGYC's vessel was the product of a collaborative effort involving several dozen designers and consultants from around the world who worked together for over two years both in and outside the United States.² (Affirmation of Michael Drummond ("Drummond Aff.")(Bowman Reply Aff. Ex. I) ¶ 4.)³

¹ SNG asserts that "GGYC cites [sic] trustee 'interpretive resolutions' analyzing the Deed providing that 'constructed in' a country means 'designed' in that country." Cross-Motion Br. at 2. GGYC cited those interpretive resolutions simply to show that – contrary to SNG's assertions – participants in the America's Cup have understood since 1882 that the constructed-in-country provision applies to a vessel's sails. (See GGYC Opening Br. at 8.) Interpretations by the trustee cannot amend or contradict the plain language of the Deed, and in any event, "[a]ll past trustee interpretive resolutions issued prior to 2 March 2003 were repealed by SNG in 2003 and are of no further effect." Bowman Reply Aff. Ex. J.

² Indeed, the press release cited by SNG goes on to quote a French designer stating: "To be able *to integrate* our expertise in high performance multihull design *with the experienced BMW ORACLE Racing design team*, as well as with *the construction team in the United States*, is exciting and inspiring for VPLP." Giuffra Aff. Ex. AA (emphasis supplied).

³ References in the form of "Bowman Aff. Ex. ___" refer to the Affirmation of Philip M. Bowman in Support of GGYC's Motion to Enforce Compliance with the April 7, 2009 Judgment and Order Regarding the Deed's Constructed in Country Requirement, dated January 12, 2010. References in the form of "Giuffra Aff. Ex. ___" refer

SNG's "designed-in-country" argument thus has no basis in law or fact and its motion should be denied.

B. There Is No Basis For SNG's Claim Against GGYC's Hydraulic System and Engine.

The hydraulics system aboard GGYC's vessel complies with the Deed's constructed-in-country requirements. SNG's challenge to this system is based on pure conjecture.

BOR purchased a custom-made hydraulics system from Cariboni, a leading supplier of hydraulics systems located in Italy. Due to the limitations imposed by the Deed of Gift, however, BOR reached an agreement with Cariboni where, following trials, the custom Cariboni system was redesigned and then built by a different vendor in the United States. (Affidavit of Mark Turner ("Turner Aff.") ¶ 2(e) (Bowman Reply Aff. Ex. A); Affidavit of Russell Coutts ("Coutts Aff.") (Bowman Reply Aff. Ex. G) ¶ 7.) SNG speculates that the hydraulics system was "made outside the U.S." because in June 2008, SNG's Secretary General, Alec Tournier took photographs at Cariboni's facility outside Milan showing "boxes filled with material to be sent to BMW Oracle Racing in Anacortes, USA." (Affidavit of Alec Tournier ¶¶ 3-4.) Given that Cariboni constructed BOR's initial trial hydraulics system, it is hardly surprising that it was sending parts to BOR's shipyard in June 2008, nearly a year and a half before GGYC's vessel departed for Valencia.

SNG's allegation about the engine that powers the hydraulics is also pure speculation. Unless the Court orders that competing vessels do not need to be entirely constructed in country

to the Affirmation of Robert J. Giuffra, Jr. in Support of SNG's Memorandum Of Law in Opposition To GGYC's Motion To "Enforce" The April 7, 2009 Order and Judgment and Cross-Motion to Enforce The April 7, 2009 Order and Judgment, dated January 21, 2010. References in the form of "Bowman Reply Aff. Ex. ___" refer to the Reply Affirmation of Philip M. Bowman in Further Support of GGYC's Motion to Enforce Compliance with the April 7, 2009 Judgment and Order Regarding the Deed's Constructed in Country Requirement and in Opposition to SNG's Cross-Motion to Enforce The April 7, 2009 Order and Judgment, dated January 27, 2010.

or the parties agree otherwise, GGYC intends to race in a vessel entirely constructed in the United States, including any engine.⁴

II. GGYC'S WING SAIL COMPLIES WITH THE "PROPELLED BY SAILS ONLY" REQUIREMENT.

In its cross motion, SNG also seeks to disqualify GGYC's vessel because its mainsail is not "made of foldable fabric". (Cross-Motion Br. at 11.) This argument is refuted by the plain meaning of the Deed of Gift and by *Mercury Bay*.

The Deed of Gift states, "Any organized Yacht Club of a foreign country . . . shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel *propelled by sails only* and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup." (Bowman Aff. Ex. G (emphasis added).)

SNG seeks to support its custom-made, narrow definition of a sail by piecing together bits of dictionary definitions. For example, SNG quotes an 1860 dictionary that defines a sail as "An expanded sheet by means of which a vessel is propelled by the wind". (Cross-Motion Br. at 11.) That definition in no way suggests that a sail must be foldable or made of fabric, so SNG looks to the definition of the word "sheet", from which it quotes selectively: "a piece of linen or cloth *for a bed*". (*Id.* (emphasis added).) This creates the absurd definition of a sail as "An expanded sheet [i.e., a piece of linen or cloth for a bed] by means of which a vessel is propelled by the wind". George Schuyler plainly did not intend that only vessels with bed sheets for sails could compete in the America's Cup. The *full* definition of sheet is "A piece of linen or cotton cloth for a bed: -- *any thing expanded*: -- a piece of paper." (Giuffra Aff. Ex. MM (emphasis

⁴ Moreover, GGYC believes that SNG's vessel is equipped with an Austrian-built engine. See Affirmation of Frank Albina (Bowman Reply Aff. Ex. K) ¶¶ 3-6.

added).⁵ Thus a sail was defined as any expanded thing by means of which a vessel is propelled by the wind. Under that definition, GGYC's wing sail, which uses the same principles as a soft sail and is covered with fabric, is plainly a sail.⁶ This is consistent with the way sails are defined by modern sailmakers and sailors. As explained by John Marshall, the former President and CEO of North Sails and successful sailmaker who has participated in nine America's Cup campaigns, including as the design project manager for the *Stars & Stripes* defense in 1988, a sail is defined by its function, not by its form or the materials from which it is constructed. It is the thing or system that captures the energy of the wind to propel a vessel. (Affidavit of John Marshall ("Marshall Aff.") (Bowman Reply Aff. Ex. C) ¶¶ 10-11, 23.) GGYC's wing sail utilizes the same aerodynamic concepts as a soft sail with a rotating mast. It is covered mostly with cloth made from polyester and Mylar. (Drummond Aff. ¶¶ 6-7.)

SNG's position that "hard" sails are prohibited in the America's Cup is also refuted by past practice and the Court of Appeals decision in *Mercury Bay*. San Diego defended the Cup in the 1988 "Deed of Gift" match with a catamaran, *Stars and Stripes*, that was propelled by a rigid sail (also described as a "wing" or "hard" sail). (Marshall Aff. ¶ 5.) While the issue of the sail was not directly before the Court (*Mercury Bay* never challenged it), the Court of Appeals in *Mercury Bay* held that San Diego's vessel did not violate the Deed of Gift and that San Diego was the rightful champion of the 1988 Match. In so doing, the Court of Appeals rejected the argument that the Deed of Gift limited designs to what could have been conceived by the donors.

⁵ SNG quotes from an 1883 dictionary defining sail as "a texture spread to the wind" and defining texture as "that which is woven; a fabric formed by weaving; a web. 3. The disposition or connection of threads, filaments or other slender bodies interwoven; as, the texture of cloth or of a spider's web." SNG Cross-Motion Br. at 11. SNG's 3DL sails are neither woven, nor formed by weaving, nor interwoven. See Affidavit of Craig Phillips (Bowman Reply Aff. Ex. D) ¶¶ 4-16 (describing the process of manufacturing a 3DL sail).

⁶ As far back as 1985, ISAF has announced measurement and sail area calculations for wing sails. See Bowman Reply Aff. Ex. L (1985 ISAF Guide to Sail Area Calculation and Measurement, stating "The intention is to establish a reliable and simple method of measuring the whole driving area of the sail plan, including the spars, foils, and flaps (or wing sails).").

As the dissent noted, “The cup donors – the record clearly shows – never conceived of a catamaran as a vessel that might be entered by either a challenger or defender in America's Cup competition.” *Mercury Bay*, 76 N.Y. 2d at 275 (Hancock, J., dissenting).

As observed in the concurring opinion of Justice Rubin of the Appellate Division in *Mercury Bay*, it does not advance the interests of the sport of sailing to “cling stubbornly to a concept which reflects 19th-century technology”. Justice Rubin specifically noted that the introduction of rigid sails into the America’s Cup is consistent with “innovation”, which is “a hallmark of America’s Cup racing”:

“The 1988 contest between *Stars and Stripes* and *New Zealand* represents merely another step in the inevitable evolution of racing yacht design and illustrates the decided inexpedience of limiting the contest to any particular hull configuration. It does not advance the interests of the sport to cling stubbornly to a concept which reflects 19th-century technology (albeit in a highly refined form) when modern theory offers an inherently superior approach. Innovation is a hallmark of America’s Cup racing and, in the recent past, flexible masts, trim tabs, grooved hulls, finned keels and *rigid airfoil sails* have all been introduced (not, it must be added, without attendant controversy). Other innovations will doubtless follow, to the benefit of sailing enthusiasts the world over. San Diego Yacht Club should not be deprived of its victory simply because the design of its vessel was more innovative and more successful in achieving its purpose than that of the challenger Mercury Bay Boating Club.” *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 150 A.D.2d 82 (1st Dep’t 1989) (Rubin, J., concurring) (emphasis added).⁷

Justice Rubin also observed, with respect to the phrase “yachts or vessel propelled by sails only”, that “[t]he deed gives the contestants the widest latitude in the design of the yachts in which they choose to compete. The reference to a ‘yacht *or vessel* propelled by sails only’ (emphasis added) constitutes the broadest possible language.” *Id.* at 105. “The America’s Cup is a ‘perpetual challenge cup’, and therefore the deed is necessarily broadly drafted and should be

⁷ Indeed, as Alinghi’s skipper Brad Butterworth observed in September 2007, “We are keen to return the America’s Cup to the romantic era of J-Class size yachts, albeit updated with the very latest technology. This will create a superb spectacle and event for sailing fans worldwide.” Bowman Reply Aff. Ex. M.

broadly construed to accommodate changes which will occur over the course of centuries in both the customs and technology of yacht racing.” *Id.* at 109.

SNG points to past versions of the America’s Cup Class Rule, which by agreement of the competitors restricted sails that could be used in various regattas including a recent America’s Cup to sails made out of foldable fabric. (SNG Cross-Motion Br. at 12.) The fact that rigid sails were excluded *by agreement* does not suggest that the Deed prohibited such use.⁸ To the contrary, it suggests that in the absence of such an agreement, the use of hard sails would have been permitted.

SNG knows perfectly well that GGYC’s wing is a sail.⁹ SNG’s skipper, Brad Butterworth, admitted that GGYC’s wing is a sail and that SNG itself considered developing a wing sail: “I really think that if [GGYC] can build a wing-sail, and they can make it work on their boat, and can win the America’s Cup with it, good on them.” Butterworth further stated that SNG had “obviously” considered using a wing sail, but that time was now too short to design and construct one.¹⁰ Further, Duncan MacLane, affiant for SNG and a consultant to their design team, recently boasted that he brought the hard sail “technique to the Stars & Stripes 1988 catamarans, where it was hugely successful [against Mercury Bay]. *It’s now of course standard practice . . .*” (Bowman Reply Aff. Ex. N (emphasis added).)

⁸ Of course, the fact that Version 5 of the America’s Cup Class Rule, dated December 15, 2003, specifically addressed whether “thickened sails, eg.[sic] foamed sails or rigid sails” would be prohibited under the Class Rule confirms that “rigid sails” are indeed a type of sail. Giuffra Aff. Ex. QQ.

⁹ SNG asserts that “it is a matter of common sense that a sail and an airplane wing are not the same.” (SNG Cross-Motion Br. at 12.) That is true, but GGYC’s sail is not an airplane wing, it is just called a wing.

¹⁰ Recorded November 9, 2009 Sailing World Interview with Brad Butterworth, http://www2.worldpub.net/images/sw/4-091109_ButterworthAudio.mp3 (last accessed January 27, 2010).

