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

PRESENT: Cahn Justice

PART 49

Index Number : 602446/2007

GOLDEN GATE YACHT CLUB

VS

SOCIETE NAUTIQUE DE GENEVE

Sequence Number : 004

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE....

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/27/07

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS Part 49

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GOLDEN GATE YACHT CLUB,

Plaintiff,

- against - Index No. 602446/07

SOCIÉTÉ NAUTIQUE DE GENÈVE,

Defendant,

CLUB NÁUTICO ESPAÑOL DE VELA,

Intervenor-Defendant.

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HERMAN CAHN, J.:

Motion sequence numbers 001, 002, 003 and 004 are consolidated for disposition.[1]

In motion sequence number 001, plaintiff Golden Gate Yacht Club (GGYC) moves for expedited discovery and an expedited trial. Plaintiff also seeks a preliminary injunction enjoining defendant Société Nautique de Genève (SNG) to provide GGYC with the SNG sailing rules governing, and identify SNG's selection of the location of, the match between GGYC and SNG noticed in GGYC's challenge.

In motion sequence number 002, non-parties Reale Yacht Club Canottieri Savoia (RYCCS) and Mascalzone Latino (collectively, Amici) move for leave to file an amici curiae brief regarding SNG's motion for summary judgment and GGYC's cross motion for summary judgment.

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[1] At oral argument, Golden Gate Yacht Club argued that its preliminary injunction motion was moot, and counsel presented arguments only as to the motion for leave to file an amici curiae brief and the summary judgment motions.

In motion sequence number 003, SNG moves for summary judgment dismissing all claims alleged by GGYC in this action, CPLR 3211 (a) (1) and (a) (7). GGYC cross-moves for summary judgment, CPLR 3211 (c) and 3212.

In motion sequence number 004, intervenor-defendant Club Náutico Español de Vela (CNEV) moves for an order dismissing GGYC's claims. In its initial moving papers, CNEV stated that it would not be submitting its own memorandum of law but, instead, relying upon and adopting SNG's memoranda of law in support of SNG's own motion for summary judgment. Nevertheless, CNEV submitted its own reply memorandum of law.

Background

The America's Cup is a trophy awarded to the winner of a world-renowned yacht race that has been held 32 times since the first America's Cup race held in 1851. Although many yacht clubs are able to, and usually do, join in the race, the document governing the race permits the defending winner (Defending Club) and the challenging club (Challenger of Record) to agree upon the terms of the forthcoming race. Defendant SNG, the winner of the last America's Cup, accepted a challenge from intervenor-defendant CNEV for the 33rd America's Cup race, and thereby purported to make CNEV the Challenger of Record. Thus, CNEV and SNG would be able to set the terms and conditions that will govern the next America's Cup race.

Dissatisfied with the agreed-upon terms for the 33rd race, GGYC commenced this action contending that CNEV, a newly-formed yacht club that is not qualified to be designated as the Challenger of Record in the forthcoming America's Cup competition and that, therefore, the acceptance of CNEV's challenge should be vacated.

The leading New York decision, indeed one of the few reported New York State

decisions involving the America's Cup, is the Court of Appeals decision, *Mercury Bay Boating Club v San Diego Yacht Club* (76 NY2d 256 [1990]) (*Mercury Bay*).[2] As discussed therein, the silver trophy cup, denominated the America's Cup (Cup), is the corpus of a charitable trust created in the mid-1800's under the laws of New York (*Mercury Bay*, 76 NY2d at 260). The yacht *America* was the winner of a yacht race held in 1851 around the Isle of Wight. In 1857, the six Cup owners donated the silver trophy to the New York Yacht Club. The club returned the Cup to George Schuyler, as the then sole-surviving Cup owner, because of questions about the terms of the trust. Schuyler again donated it to the New York Yacht Club, to hold the Cup in trust pursuant to the terms of the present Deed of Gift (Deed), dated October 24, 1887 (*Mercury Bay*, 76 NY2d at 261). The Deed was amended by two Orders of this Court, dated December 17, 1956, and April 5, 1985.

The Cup was donated on the condition that the Cup: "shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

The Deed governs how such "friendly competition" challenges are made for the Cup, who may be a qualified Challenger of Record, and the manner in which matches for the Cup are to proceed.

Mercury Bay involved the successful defense by the San Diego Yacht Club of the America's Cup race held in 1988, using a catamaran vessel against a slower monohull vessel used by the challenger, the Mercury Bay Boating Club. The Mercury Bay club argued that, although the catamaran vessel technically fell within the Deed's express limitations, its use

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[2] The others are *Courageous Syndicate, Inc. v People-to-People Sports Committee, Inc.*, reported at 124 AD2d 776 (2d Dept 1986) and 112 AD2d 916 (2d Dept 1985).

violated the Deed's "spirit," as exemplified by both its terms and various items of extrinsic evidence. The Court deemed that the gravamen of Mercury Bay's complaint was the alleged inherent unfairness of a race between a multihull yacht and a monohull yacht, regardless of the donors' intent, basing the measure of fairness upon contemporary sporting practices and sportsmanship standards (*id.* at 265).

The Court of Appeals rejected Mercury Bay's argument and held that the Deed's unambiguous language, permitting the defender to defend the Cup in "any one yacht or vessel" within the specified range of load water-line length, did not require the defender to race a vessel of the same type or evenly-matched to that of the challenger, and it did not preclude the defender's use of a catamaran (*Mercury Bay*, 76 NY2d at 269). The Court expressly declined to consider whether the San Diego club's conduct was "unsportsmanlike" and "unfair," finding that the Deed appropriately left such issues to yachting experts (*id.* at 271). Rather, the Court limited itself to strictly applying the terms of the Deed. This court is bound to follow that ruling and apply the provisions of the Deed to this dispute.

As is relevant here, the Deed specifies the eligibility requirements that entitle a yachting club to be designated as Challenger of Record:

> Any 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, 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 [Challenger of Record] belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

(Emphasis added).

The Challenger of Record is to provide 10-months' written notice, naming the days of the proposed races, as well as providing technical information about the challenging vessel. Significantly, the Challenger of Record and the Defending Club:

> may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived.

When the Defending Club and the Challenger of Record agree upon the match terms, pursuant to this "mutual consent" process, they then issue a publication (a protocol) setting forth such terms. The Deed also provides that if the parties cannot mutually agree upon the match terms, then three races are to be sailed and the winner of two of such races is then entitled to the Cup. The Deed sets forth the terms of such races, and provides 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.

SNG, through Team Alinghi, one of its teams, is the Cup's current Defending Club and trustee, having won the 31st Cup on March 2, 2003 and having successfully defended its title in the 32nd Cup held on July 3, 2007. GGYC was the Challenger of Record for the 32nd America's Cup, and SNG and GGYC publicly released the SNG-GGYC protocol for the 32nd Cup two days after SNG won the 31st America's Cup in March 2003.

Initially, the Spanish sailing federation – Real Federación Española de Vela (RFEV) – sought to become the Challenger of Record for the 33rd America's Cup. Although RFEV participated in the 32nd America's Cup, opposition to RFEV becoming Challenger of Record for the 33rd America's Cup match arose, on the ground that it was a federation of yacht clubs, not a

yacht club itself. RFEV's lawyers apparently considered the possibility of a dispute to RFEV's right to challenge for the Cup, and advised RFEV to incorporate a club to formalize the challenge for the 33rd America's Cup.

Thereupon, RFEV incorporated CNEV in order to avoid further controversy about RFEV's capacity to become the Challenger of Record under the Deed. According to Manuel José Chirivella Bonet, chairman of CNEV and vice-chairman of RFEV, CNEV is a private Spanish sports club with unlimited duration, that was organized on June 19, 2007 and registered with the Registry of Sports Organizations of the Valencian Community (Registro de Entidades Deportivas de la Comunitat Valenciana) on June 28, 2007 (*see also* Monasterio Aff). Bonet states that CNEV's purpose is to promote sailing practices through the organization of national as well as international regattas within the national territory and to organize at least one regatta per year on the open sea, as reflected in Chapter 1 of its articles of incorporation.

After its formation, CNEV challenged SNG for the 33rd America's Cup, by delivering a Notice of Challenge, dated June 29, 2007, contending that it was a valid challenger pursuant to the Deed, in that it was an organized, foreign yacht club having an annual regatta. On July 3, 2007, SNG accepted CNEV's challenge.

On July 5, 2007, SNG and CNEV publicly released the "The Protocol Governing the 33rd America's Cup" (Protocol). The Protocol contains an arbitration provision. As of the date of the submission of the motion papers, four clubs had signed onto the Protocol, including: the Royal Cape Yacht Club of South Africa; the Royal Thames Yacht Club of England; the Royal New Zealand Yacht Squadron of New Zealand; and the Deutscher Challenger Yacht Club e. V. of Germany. GGYC has not signed on to the Protocol.

GGYC contends that CNEV is not a valid Challenger of Record because it is not an "organized" yacht club and it has not yet held an annual regatta. According to GGYC, RFEV controls CNEV, an entity that has no vessels. Moreover, apart from the five RFEV directors that executed CNEV's incorporation and registration papers on June 19, 2007, CNEV has not identified any of its members, it has no telephone number – other than the telephone number of the base facility of the racing team (Desafio Español) – and does not have a website. SNG disputes these assertions only insofar as GGYC concludes that such circumstances thereby cause CNEV to be a "phantom club."

Initially, SNG contended that CNEV has held two regattas; an "Optimist" race, held in Santander, Spain, on July 14, 2007, and the Vuelta España a Vela race, from September 3 to September 22, 2007, which it co-sponsored. The Optimist race was for children, and CNEV later stated that it did not consider such race as complying with the annual regatta requirement of the Deed. The Vuelta España a Vela race was held subsequent to the date of CNEV's and GGYC's respective challenges. CNEV has not taken the position that either of these qualifies as an annual regatta pursuant to the Deed. According to CNEV's chairman, Bonet, CNEV is scheduled to hold its annual regatta, the "Club Náutico Español de Vela Primera Regatta, Trofeo Desafío Español," on open water off Valencia, Spain in November 2007.

On July 11, 2007, GGYC issued its own Notice of Challenge for the 33rd America's Cup. GGYC contends that it is the valid Challenger of Record in that it: is incorporated in the United States, in the State of California; maintains a membership of more than 200 members; operates as a yacht club; and has objectives consistent with the furtherance of yachting activities. Moreover, it holds an annual regatta – the Sea Weed Soup Perpetual Trophy – that, among other

GGYC regattas, is, and has been, held annually on an arm of the sea, namely, the San Francisco Bay. Thus, according to GGYC, it is an "organized Yacht Club" fulfilling all the conditions that the Deed requires.

Because of this controversy, on July 20, 2007, SNG initiated proceedings under the arbitration provisions of the Protocol, seeking a ruling from the panel set up under the Protocol (Panel) as to the validity of CNEV's challenge.[3] The Panel asked GGYC to participate in the proceedings, stating that it would accept GGYC's submissions, even if GGYC elected not to submit to the Panel's jurisdiction. GGYC refused to do so, contending that only signatories, to what it characterizes as the "illegal" Protocol, have the right to participate in the arbitration. On September 10, 2007, the Panel issued its decision determining that CNEV was a valid Challenger of Record.

On the same day that SNG initiated the arbitration, GGYC commenced this action, alleging that SNG has accepted a challenge that is invalid under the Deed from CNEV, a brand-new yacht club. It claims that the challenge was not valid because CNEV is not an organized yacht club, and has never had an annual regatta – two requirements under the Deed – prior to its creation for the specific purpose of collaborating with SNG.

The complaint contains two causes of action. The first is for breach of fiduciary duty, alleging that, as trustee, SNG was and is under a duty to enforce the terms of the trust instrument, i.e., the Deed. Allegedly, SNG breached its duty of care, loyalty, good faith and honesty. The

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[3] Article 22 of the Protocol provides for two dispute resolution bodies: a "Sailing Jury" that is to interpret provisions or resolve disputes of a sporting or technical nature arising under the competition regulations, and an "Arbitration Panel" which is to interpret all other provisions of the Protocol or resolve other disputes.

complaint also contains allegations that SNG engaged in self-dealing, by accepting CNEV's challenge and by entering into the Protocol without engaging in the consensual process required by the Deed's mutual consent clause.

The second cause of action is for breach of the Deed. Plaintiff alleges that CNEV's Notice of Challenge and challenge, which SNG accepted, was invalid in that it failed to conform to the terms of the Deed, and the resulting Protocol was not the product of the required mutual consent process.

GGYC seeks: (1) a declaration that CNEV's purported challenge and the Protocol are void; (2) a declaration that GGYC's challenge is valid; (3) judgment in favor of GGYC and against SNG (i) enjoining SNG from promulgating rules and regulations pursuant to the Protocol, and (ii) directing SNG to reject CNEV's challenge; and (4) judgment in favor of GGYC and against SNG enjoining SNG to (i) accept GGYC's notice of challenge and (ii) to implement the terms of the Deed by participating with GGYC in the establishment of a protocol through a consensual process and, failing that, to proceed with the match under the rules expressly set forth in the Deed.

SNG argues that CNEV is a legitimate Challenger of Record, that it has accepted CNEV's legitimate challenge, and is thus prohibited from entertaining another Challenger of Record until the completion of CNEV's challenge. It argues that CNEV is organized as a yacht club with board rules, dues and other indicia of a legitimate legal entity. Moreover, it is incorporated under Spanish law and fully registered with, and licensed by, the appropriate Valencian and Spanish authorities. Moreover, CNEV is committed to holding an annual regatta on the sea.

According to Amici, RYCCS, a yacht club that was established in 1893, with 860 members, and represented by Mascalzone Latino, would like to participate in the next America's Cup, but it cannot make adequate commercial and technical preparations until the controversy at issue here is resolved.

Amici argue that the Protocol contravenes the core terms of the Deed, which provides that the Cup "shall be a perpetual Challenge Cup." Amici contend that the Protocol eliminates challenger rights and grants SNG unchecked authority. Specifically, Amici argue that: (1) SNG, through America's Cup Management (ACM), the "Event Authority," that SNG controls, possesses unilateral power to disqualify a challenging team for disputing any provision of the Protocol and possesses powers and rights, through its control of ACM, that significantly exceed those of any defender in any other protocol in the history of the America's Cup; (2) the Protocol effectively eliminates any challenger representation; (3) SNG, as the Defending Club, through ACM, is given the power to establish unilaterally the rules for all events; and (4) SNG has the unprecedented option to participate wholly or partly at its discretion in the "Trials" and "Challenger Selection" other than the final trial between the two challengers to select a challenger for the match.

SNG argues that the Amici memorandum is irrelevant to the issues in this action because, as recognized by both GGYC and SNG, the subject of the summary judgment motions at issue is the validity of CNEV's challenge, and not the terms of the Protocol. As such, SNG contends, Amici's memorandum is merely a list of items that it would like to see changed in the Protocol.

Discussion

As a preliminary matter, the motion by Amici for leave to file an amici curiae brief

regarding SNG's motion for summary judgment and GGYC's cross motion for summary judgment is granted. Amici represents a yacht club that has participated in the 31st and 32nd America's Cup races. The only opposition to its motion is based on the assertion that participation by Amici in any formal hearing as to the validity of CNEV's challenge could render the proceedings cumbersome, something that the court need not presently consider.

CNEV's Challenge

To qualify as the Challenger of Record under the Deed, the would-be challenger must be 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 . . . ." GGYC's contention – that CNEV does not meet these requirements, in that it neither is an organized Yacht Club nor has an annual regatta on the sea or arm of the sea – is persuasive as to the latter requirement and, thus, dispositive.

To qualify under these requirements, the club must be incorporated. It is inconsequential that RFEV may have incorporated CNEV to formalize the challenge because of the likelihood that RFEV's own challenge would be disputed. That, by itself, does not disqualify CNEV from qualifying as Challenger of Record.

However, being incorporated is not, by itself, sufficient; it must have additional attributes that make it an "organized Yacht Club." Although the term "organized" often refers to the nature of an entity's legal existence or formation, here the donors contemplated additional indicia of a yachting club. This is evident from the corporate seal of the New York Yacht Club itself, the Cup's original donee, which states that the club was organized in 1844 *and* incorporated in 1865

(Ehman Aff, Exh EE). SNG's dictionary reference (A Dictionary of Law 739 [William C. Anderson ed. 1889] [attached to SNG's Reply Br]) does not prove otherwise. It states that "[o]rganizing an incorporation refers to the choice and qualification of offices necessary for the transaction of business," thereby implying that organizing a yacht club is not synonymous with incorporating a yacht club. Thus, SNG's argument – that incorporating, adopting by-laws and assigning roles and responsibilities for its officers and directors (SNG Reply Br at 7) is sufficient to constitute an organized yacht club under the Deed – is unconvincing.

Nevertheless, CNEV arguably complies with the requirement that the club be a legally recognized entity of its jurisdiction with certain additional attributes. CNEV is a private Spanish sports club with unlimited duration, registered with the Registry of Sports Organizations of the Valencian Community. According to Bonet, chairman of CNEV and vice-chairman of RFEV, CNEV's purpose is to promote sailing practices through the organization of national as well as international regattas within the national territory and to organize at least one regatta per year in the open sea, as reflected in Chapter 1 of CNEV's articles of incorporation. The club is negotiating a collaboration agreement with the Center of Sailing Training in Santander – where the Spanish Sailing Olympic Team is trained – with the Optimist race as its first event and denoting the promotion of sailing among young people as among of its priorities. Bonet also states that CNEV expects to be listed in due course on the website of the Valencian Community Sailing Federation.

Whether these attributes are sufficient – in the absence of vessels, members, and a telephone number, *etc.* – to constitute a "Yacht Club" under the Deed would require an analysis of custom and practice in the sport, as well as a hearing. Such is not necessary, however.

Although the meaning of the term "organized" in the context of a sporting club is unclear as to the club's required attributes, the Deed expressly requires one specific attribute, namely, that the club have an annual regatta. CNEV's failure to comply with this requirement nullifies its purported role as Challenger of Record of the 33rd America's Cup.

GGYC argues that the phrase "having for its annual regatta" means that the club has held a regatta in the past, and will continue to do so in the future. According to SNG and CNEV, the intention to hold a regatta in the future and to continue such regatta annually, constitutes "having" an annual regatta.

In interpreting a trust, courts look to the intent of the settlor as expressed in the trust instrument (*Matter of Preiskel*, 275 AD2d 171 [1st Dept 2000], citing *Mercury Bay*, 76 NY2d at 267, *appeal dismissed* 96 NY2d 812 [2001]). To ascertain that intent, the court construes the phrase at issue – "having for its annual regatta on the sea or arm of the sea" – by affording it its plain and natural meaning (*Mercury Bay*, 76 NY2d at 261). That phrase is plainly understood to mean that it is an on-going activity; the activity has taken place and is continuing. It implies that the organization has had one or more regattas in the past, and will continue to have them in the future. SNG's and CNEV's interpretation strains the language of the Deed beyond its reasonable and ordinary meaning (*AIU Ins. Co. v Robert Plan Corp.*,__AD3d __, 841 NYS2d 878 [1st Dept 2007]; *Innophos, Inc. v Rhodia, S.A.*, 38 AD3d 368 [1st Dept 2007]).

Although SNG and CNEV contend that CNEV complies with the annual regatta requirement, they do not contend that CNEV had held an actual regatta at the time of its Notice of Challenge, dated June 29, 2007, or by GGYC's subsequent challenge on July 11, 2007. According to Bonet, CNEV is planning to hold its first annual regatta called the "Club Náutico

Español de Vela Primera Regatta, Trofeo Desafío Españo" on open water off Valencia, Spain in November 2007.

To effectuate the interpretation advocated by SNG and CNEV, the Deed could have stated: "having, or intending to have, for its annual regatta." It would be entirely natural for the donors to have included such language into the Deed if that were their intent to do so.

However, the phrase "having historically held an annual regatta," a phrase suggested by CNEV to effectuate GGYC's interpretation (CNEV Reply Br at 5), would imply that a yacht club could qualify if it had held an annual regatta, but need not be continuing to do so. That, too, is not the meaning of the Deed provision at issue. The court must not construe a contractual provision in such a way that would distort its apparent meaning (*Matter of Matco-Norca, Inc.*, 22 AD3d 495 [2d Dept 2005]). Furthermore, CNEV impliedly acknowledged that it does not come within the ordinary meaning of the Deed provision, in that it states that "CNEV is committed to 'having' an annual regatta this year and in the future" (CNEV Reply Br at 6).

Because the Deed provision at issue is unambiguous, the court need not look beyond the Deed's four corners in ascertaining the donors' intent. Thus, it may not consider extrinsic evidence on the meaning of this provision (*R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29 [2002], *rearg denied* 98 NY2d 693 [2002]; *Mercury Bay*, 76 NY2d at 270). The court notes, however, that GGYC's interpretation effectuates the apparent expectations of the donors as set forth in the Deed. The Deed contemplates that the Defending Club and the Challenger of Record will, by mutual consent, make all arrangements as to the dates, courses, number of trials, rules and sailing regulations, and all other conditions of the match. An established yacht club that has already held an annual regatta is more likely to better understand the ramifications of the race

and, thus, be better able to negotiate the terms of a match – terms that the other participants must adhere to – than a newly-formed club that has not yet held a regatta. Hence, the court's finding comports with a practical interpretation of the expression of the parties thereby realizing their reasonable expectations (*Sutton v East Riv. Sav. Bank*, 55 NY2d 550 [1982]; *American Bldg. Maintenance Co. of N.Y. v Solow Mgt. Corp.*, 7 AD3d 331 [1st Dept], *lv denied* 4 NY3d 702 [2004]).

Furthermore, although the arbitration Panel concluded that CNEV was a valid Challenger of Record, that determination is not binding on this court, since there is nothing in the Deed that mandates that disputes be resolved by arbitration. GGYC is not a party to the Protocol; it was not bound to participate in the arbitration and refused to participate. Unless a party has entered into an agreement to arbitrate, and the agreement expressly covers the subject matter of the particular dispute, that party will not be compelled to forego its right to seek judicial relief (*Bowmer v Bowmer*, 50 NY2d 288 [1980]; *Matter of Eastern Mins. Intl. Cane Tenn.*, 274 AD2d 262 [1st Dept 2000], *lv denied* 96 NY2d 702 [2001]). SNG concedes that GGYC is not bound by the arbitration decision, or that the arbitration supplants this court's authority to resolve the issues at hand.

GGYC's decision to decline the "invitation" to participate in the arbitration is understandable in that the Protocol for the 33rd race, drafted by SNG and CNEV, gave these two clubs the right to dismiss and replace the members of the Panel at their discretion at any time.

GGYC's Challenge

Consequently, GGYC argues that SNG is required to accept its July 11, 2007 Notice of Challenge, citing the following provision of the Deed:

> 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.

GGYC argues that it is undisputed that it, the Challenger of Record for the 32nd America's Cup, fulfills all the conditions required by the Deed. Moreover, only when the Defending Club receives a challenge from a qualifying club is it prohibited from considering a subsequent challenge. Thus, that CNEV may someday comply with the conditions of the Deed has no bearing on GGYC's valid challenge that it issued after the date of CNEV's invalid challenge, but prior to such time as CNEV may fulfill the conditions of the Deed.

Neither SNG nor CNEV argues that GGYC fails to qualify as an organized foreign yacht club.

SNG argues, instead, that GGYC is not entitled to the equitable relief sought – an injunction and a declaration that it should be designated as Challenger of Record – because of the doctrine of unclean hands. This defense is not applicable, however, unless the plaintiff is guilty of immoral, unconscionable conduct, and then only when the wrongful conduct relied upon directly relates to the subject matter, and the party relying on it was injured by the conduct (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12 [1966]; *390 W. End Assoc. v Baron*, 274 AD2d 330 [1st Dept 2000]). The acts allegedly constituting unclean hands do not meet these requirements.

SNG first argues that GGYC's representative, Russell Coutts, sent a letter dated September 21, 2007, to Brad Butterworth of Team Alinghi, stating that the essence of this action is not the validity of CNEV's challenge but, rather, the alleged unfair Protocol, which is "why the lawsuit was filed in the first place." This does not constitute immoral and unconscionable

conduct that might otherwise constitute unclean hands. Moreover, the statement that the real issue is the Protocol is not inconsistent with the claim that CNEV is not a proper challenger. As discussed above, GGYC argues, persuasively, that one of the purposes to be accomplished through the designation of a legitimate Challenger of Record (i.e., one that complies with the Deed requirements) is that the defender and the Challenger of Record are more likely to seriously negotiate the terms of the Protocol. This is not meant to imply that SNG and CNEV did not seriously negotiate the Protocol, only that a challenge to the legitimacy of the Challenger of Record is not inconsistent with a challenge to the Protocol.

As a second example of unclean hands, SNG argues that GGYC's has ignored precedent – i.e., a prior competition in which GGYC accepted the Deutscher Challenger Yacht Club, a then newly-formed club organized to challenge for the 32nd Cup – when GGYC was the Challenger of Record. This, too, does not constitute unclean hands. Moreover, the Deutscher Challenger Yacht Club was not the Challenger of Record, so there would be less reason to challenge its entry in the race in that it did not engage in the mutual consent process of negotiating the protocol.

As a third example, SNG argues that GGYC is attempting to ignore the Panel's arbitration decision regarding CNEV's challenge. However, the court has found that GGYC was correct in ignoring the arbitration. The assertion that this somehow constitutes unclean hands is inexplicable.

Furthermore, SNG failed to allege that the claimed wrongful behavior, described above, has caused it prejudice, thereby further nullifying this defense (*see Wertheimer v Cirker's Hayes Stor. Warehouse*, 300 AD2d 117 [1st Dept 2002]).

Breach of Fiduciary Duty

Finally, the court grants SNG's motion to the extent of dismissing the breach of fiduciary duty cause of action. SNG argues that GGYC cannot demonstrate that a fiduciary relationship existed between the parties and that the duty was breached, two requirements to prevail on this theory of liability. SNG reasons that, as determined in *Mercury Bay*, the duty of the Defending Club in the America's Cup is to follow the Deed, which SNG did by accepting a valid challenge and negotiating a protocol with CNEV. GGYC offers no opposition to this defense, and it is deemed abandoned (*see Rivera v Anilesh*, 32 AD3d 202 [1st Dept 2006], *affd* 8 NY3d 627 [2007]).

Conclusion

The court concludes that CNEV's challenge is invalid, and that GGYC is Challenger of Record pursuant to the Deed. GGYC's breach of fiduciary duty claim against SNG is dismissed.

Settle Order.

Dated: November 27, 2007

ENTER:

J.S.C.