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thus the beneficiaries of the trust. Defendant's fiduciary duties include the obligation to act "in good faith and in the spirit of friendly competition by reasonably attempting to reach an accord on the terms of matches to be held" and "to compete on equal terms with the trust beneficiaries". See *Mercury Bay Boating Club, Inc. v. San Diego Yacht Club*, 76 N.Y.2d 256 (1990).

4. Pursuant to the terms of the Deed of Gift, SNG became the trustee when it won the 31st America's Cup in 2003. SNG then used its position as trustee to select a venue for the next America's Cup on the basis of benefits granted to SNG and its affiliates even though other venues offered greater benefits to the beneficiaries. SNG also directed that funds that should have been distributed to the trust beneficiaries be used to provide benefits to SNG's affiliates.

5. SNG won the Cup again in July 2007, thus retaining its position as trustee. Prior to winning the 32<sup>nd</sup> America's Cup, SNG orchestrated a scheme in which SNG agreed to "accept" the challenge of a sham yacht club so that it could "negotiate" a set of one-sided rules that would virtually guarantee SNG's victory in the next America's Cup. After those rules were announced, GGYC sought relief from this Court, alleging that SNG's actions violated the terms of the Deed of Gift.<sup>1</sup> On April 2, 2009, the Court of Appeals ruled that the sham yacht club's challenge was indeed invalid and that GGYC is the Challenger of Record. The Court of Appeals concluded, "It falls now to SNG and GGYC to work together to maintain this noble sailing tradition as 'a perpetual Challenge Cup for friendly competition between foreign countries.'" *Golden Gate Yacht Club v. Société Nautique de Genève*, 12 N.Y.3d 248, 258 (2009) (citing the Deed of Gift).

6. However, SNG was still determined not to compete on equal terms with the trust beneficiaries, but rather to race under rules that will ensure an SNG win. In direct violation of its

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<sup>1</sup> GGYC also initially alleged that SNG's actions violated its fiduciary duties as trustee, but GGYC did not pursue that claim and it was later dismissed on the grounds that it had been abandoned.

fiduciary duties, SNG refused to act in good faith to reach an agreement on the terms for the next match. Instead, SNG told GGYC: “If you thought the Protocol was bad, wait until you see the Deed of Gift rules.” In fact, SNG sought, again, to orchestrate an SNG win by declaring the right to promulgate whatever rules it wants to for the 33<sup>rd</sup> America’s Cup, promulgating one-sided rules and rules that disqualify GGYC, and seizing control over the appointment of the umpires and sailing jury members who would officiate the match. As Brad Butterworth, the skipper of SNG’s team, Alinghi, said in an open letter on October 23, 2009: “For those who seek a level playing field, go and race in any of the numerous competitions that exist in the world.”

7. Among other things, SNG entered into a secret agreement with the International Sailing Federation (“ISAF”) that (i) requires ISAF to authorize in advance any changes SNG might want to make to the racing rules and regulations governing the 33<sup>rd</sup> America’s Cup (giving SNG the unchecked power to promulgate whatever rules it wants); (ii) secures for SNG a veto over the appointment of all racing officials; and (iii) eliminates any redress to a neutral authority for improper rules changes or decisions by SNG.

8. SNG also issued measurement rules that violate the Deed of Gift and that were designed to disqualify GGYC, the only challenger in the February 2010 match.

9. Finally, SNG designated a race course for the 33<sup>rd</sup> America’s Cup in the waters off the coast of Ras Al Khaimah in the United Arab Emirates. Not only does this violate the Deed of Gift’s prohibition against Northern Hemisphere races between November and May, but it subjects GGYC to unnecessary and disproportionate danger. In selecting this race course, SNG put its own business interests and the interests of its partners and affiliates above the interests of the trust beneficiaries. Upon information and belief, SNG selected Ras Al Khaimah

because it knew the venue would be objectionable to GGYC – an American team – hoping GGYC would forfeit.

10. These egregious breaches of SNG’s duties call for SNG to be replaced as trustee and for a new trustee to be appointed who will ensure that the purpose of the trust is fulfilled and the 33<sup>rd</sup> America’s Cup is raced “on equal terms.” See *Mercury Bay*, 76 N.Y.2d at 270.

### **THE PARTIES**

11. Plaintiff GGYC is an organized yacht club incorporated under the laws of the State of California. GGYC has issued a Notice of Challenge to sail a match for the America’s Cup in accordance with the terms and conditions of the Deed of Gift, dated October 24, 1887, as amended by Orders of this Court dated December 17, 1956 and April 5, 1985 (“Deed of Gift”). By order of the Supreme Court, affirmed by the Court of Appeals, GGYC is the Challenger of Record. GGYC will challenge SNG in a default match described under Paragraph 8 of the Deed of Gift. GGYC has standing as a beneficiary of the trust instrument, the Deed of Gift, a charitable trust, to bring this action to enforce the trust.

12. Defendant SNG is a yacht club organized under the laws of Switzerland. SNG currently holds the America’s Cup, in trust, in accordance with the terms and conditions of the Deed of Gift.

### **JURISDICTION AND VENUE**

13. This court may exercise jurisdiction over Defendant pursuant to C.P.L.R. §§ 301 and/or 302.

14. This court may exercise jurisdiction over the subject matter of this claim pursuant to N.Y. Bus. Corp. Law § 1314(b)(5).

## **FACTUAL BACKGROUND**

### **SNG's Fiduciary Duties**

15. The America's Cup sailing competition is governed by a trust instrument executed under the laws of New York on October 24, 1887, as amended by Orders of this Court dated December 17, 1956 and April 5, 1985 (the "Deed of Gift"). The corpus of the trust is a trophy known as the America's Cup. George L. Schuyler, as the sole surviving owner of the yacht America that won the Cup in a match on August 22, 1851, designated the Cup to be held "in trust, nevertheless, for the following uses and purposes," namely that "[t]his Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

16. The winner of the Cup holds it as trustee for the benefit of all potential challengers. As trustee, the defender is required to act in good faith and in the spirit of friendly competition and to compete on equal terms with the trust's beneficiaries.

### **SNG Abuses Its Position as Trustee to Take Benefits for Itself That Belonged to the Trust's Beneficiaries**

17. In preparation for the 32<sup>nd</sup> America's Cup, GGYC, as Challenger of Record, and SNG, as Defender, negotiated the terms of a protocol under the Deed of Gift's mutual consent provision. In exchange for other benefits conferred through mutual consent, SNG agreed to share a portion of the net surplus revenue with GGYC and the other competitors. Realizing that any proceeds it received directly from the city of Valencia in exchange for SNG's agreement to select that city as the venue for the 32<sup>nd</sup> America's Cup would be subject to that bargained-for agreement, SNG proceeded to enter into a series of side deals with Valencia. The benefits of those side deals flowed not to the beneficiaries (as SNG agreed) but directly to SNG's principals,

partners, and affiliates. Thus, SNG funneled funds to itself and its affiliates that should have been divided among the trust's beneficiaries.

18. Further, SNG chose Valencia over other venues that may have provided greater benefits to the beneficiaries because of additional benefits provided to SNG's affiliates. Among other things, days before SNG announced that the 32<sup>nd</sup> America's Cup would be held in Valencia, Spain, the central Spanish government enacted a statutory change to permit stem cell research. That enactment directly benefited a well-known private fertility clinic in Valencia, the Instituto Valenciano de Infertilidad ("IVI"), which has enjoyed a longstanding business relationship with Serono SA, a Swiss pharmaceutical company owned by the family of Ernesto Bertarelli, who controls the SNG team – Team Alinghi. Serono and IVI share reciprocal interests: Serono produces the majority of drugs that IVI uses in its fertility and research treatments, and the results of IVI's research provide Serono with an opportunity to market its drugs. In September 2006, three years after SNG selected Valencia for the 32<sup>nd</sup> America's Cup, the Bertarelli family sold Serono to Merck for 8.6 billion dollars.

19. SNG's decision to choose Valencia was also based upon the fact that Ernesto Bertarelli and his family held real estate in and around Valencia that they knew would increase in value if Valencia hosted the Cup.

**SNG Accepts the Purported "Challenge" of Sham Challenger CNEV**

20. Under the Deed of Gift, any organized Yacht Club "having for its annual regatta on 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 for this Cup." When the defender receives a challenge from a qualifying yacht club, it must accept that challenge.

21. The Deed of Gift further provides: “The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the 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.” The ability to set such rules, based on mutual consent, ensures that competition for the America’s Cup will be fair and that the Cup shall be preserved “for friendly competition between foreign countries.”

22. If the challenging club and the defending club cannot mutually agree on the terms of the match, the Deed of Gift prescribes match rules (the “Default Match Rules”): “In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup . . . and these races shall be sailed subject to [the defending club’s] rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any times allowances whatever.”

23. In 2003, SNG won the 31<sup>st</sup> America’s Cup by defeating Team New Zealand and became the trustee.

24. SNG initially accepted a challenge for the 32<sup>nd</sup> America’s Cup from Real Federación Española de Vela (“RFEV”), the national governing body for the sport of sailing in Spain (not a yacht club at all) in direct violation of the Deed of Gift, despite protests from the New York Yacht Club and other beneficiaries.

25. On July 3, 2007, SNG, through its representative, Team Alinghi, S.A. (“Alinghi”) won the 32<sup>nd</sup> America’s Cup and thus continued to be the trustee. Because SNG wanted to dictate terms for the next America’s Cup that would favor SNG over other competitors, it sought to avoid negotiating mutually acceptable terms with a legitimate competitor. Therefore, before SNG had even won the 32<sup>nd</sup> America’s Cup, SNG again sought to arrange for a challenge from

RFEV. Knowing that RFEV was not a yacht club and thus not an appropriate challenger, RFEV quickly formed Club Náutico Español de Vela (“CNEV”) for the purpose of issuing a “challenge”.

26. At the time CNEV issued its challenge, it had no yachts, no legitimate members, no telephone number and no website. It had never held an annual regatta, which is one of the few qualifications required by the Deed of Gift. (CNEV attempted to hold two “regattas,” after the fact, one of which involved children sailing during a training session.)

#### **SNG and Sham Challenger CNEV Form Self-Dealing Protocol**

27. SNG drafted and issued a protocol for the 33<sup>rd</sup> America’s Cup that gave SNG unprecedented control over the terms of the race, thus breaching its fiduciary duty to act “in good faith and in the spirit of friendly competition by reasonably attempting to reach an accord on the terms of matches to be held.” *Mercury Bay*, 76 N.Y.2d at 271.

28. For example, the protocol that SNG issued gave SNG, through its agent AC Management, S.A. (“ACM”), the unilateral right to (i) accept or reject any entry for the race, (ii) fine competitors, (iii) appoint the Race Committee, Measurement Committee, and Umpires, (iv) issue new ACC Rules that will determine the class of yacht allowed to participate in the match; (v) determine the Challenger elimination series racing schedule 16 months before the first race while withholding the Notice of Race, Sailing Instructions and Racing Rules of that Challenger elimination series until “approximately 60 days” before the first race. Under that protocol, SNG even reserved the ability to compete in the challenger elimination matches without ever facing elimination, but where SNG’s results would ultimately affect the other competitor’s standings. Notably absent from the 33<sup>rd</sup> America’s Cup protocol was the “Fair Competition” clause from

the 32<sup>nd</sup> America's Cup protocol that required the competitors, officials, event organizers and arbitrators to adhere to recognized principles of sportsmanship and fair play.

**The Court of Appeals Rules that CNEV's Challenge Is Invalid and that GGYC is the Challenger of Record**

29. GGYC filed suit against SNG on July 20, 2007 in the Supreme Court of the State of New York. GGYC alleged that SNG breached the terms of the Deed of Gift and its fiduciary duties in accepting CNEV's invalid challenge and issuing a one-sided protocol in violation of the Deed's mutual consent clause.

30. On November 27, 2007, Justice Cahn held that CNEV's challenge was invalid, and that GGYC is Challenger of Record pursuant to the Deed. *Golden Gate Yacht Club v. Société Nautique de Genève*, No. 602446/07, 2007 WL 4624020 at \*10 (N.Y. Sup. Nov. 27, 2007).

31. During the weeks prior to that ruling, SNG rejected a proposal by a majority of the challenging yacht clubs that had filed challenges for the America's Cup, including GGYC, that would have allowed the America's Cup to proceed as a multi-challenger race in Valencia in 2009, and which would have been in the best interests of the beneficiaries, SNG, and the America's Cup. However, SNG, determined to race only under terms the terms of its one-sided protocol, rejected this proposal. After Justice Cahn's ruling, GGYC presented to SNG settlement terms substantially the same as those presented prior to the ruling. Again, SNG refused to consider a settlement, which would have been in the best interests of the beneficiaries.

32. Following Justice Cahn's ruling, SNG refused to recognize GGYC as the Challenger of Record.

33. The Court of Appeals affirmed. *Golden Gate Yacht Club v. Société Nautique de Genève*, 12 N.Y.3d 248, 257 (2009).

