

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK****AFRICAN DIASPORA MARITIME
CORPORATION,****Plaintiff-Appellant,****-against-****GOLDEN GATE YACHT CLUB,****Defendant-Respondent.**

Index No. 653419/2011

Hon. Barbara R. Kapnick


NOTICE OF APPEAL

PLEASE TAKE NOTICE, that Plaintiff-Appellant African Diaspora Maritime Corporation ("Plaintiff"), hereby appeals to the Appellate Division of the New York Supreme Court in and for the First Judicial Department, from the Decision/Order of the Honorable Barbara R. Kapnick, Supreme Court of the State of New York, County of New York, dated January 18, 2013 and filed in the Office of the Clerk of New York County on January 18, 2013 for the above captioned action, granting the Defendant-Respondent Golden Gate Yacht Club's Motion to Dismiss Plaintiff's Amended Complaint. A copy of the January 18, 2013 Decision/Order with its Notice of Entry, dated January 22, 2013, is annexed hereto.

Dated: New York, New York.
January 23, 2013

MCDERMOTT WILL & EMERY LLP

By: _____


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

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AFRICAN DIASPORA MARITIME	:	
CORPORATION,	:	Index No. 653419/2011
	:	
Plaintiff,	:	
	:	
-against-	:	
	:	NOTICE OF ENTRY
GOLDEN GATE YACHT CLUB,	:	
	:	
Defendant.	:	
-----X		

PLEASE TAKE NOTICE, attached hereto is a true and correct copy of an Order and Memorandum Decision issued by the Honorable Barbara Kapnick on January 18, 2013 and duly entered by the office of the New York County Clerk on January 18, 2013 in the above captioned proceeding.

Dated: New York, New York
January 22, 2013

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

PRESENT: BARBARA R. KAPNICK

PART 39

Justice

Index Number : 653419/2011
AFRICAN DIASPORA MARITIME
VS.
GOLDEN GATE YACHT CLUB
SEQUENCE NUMBER : 002
DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 1/18/13


_____, J.S.C.
BARBARA R. KAPNICK

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

-----X
AFRICAN DIASPORA MARITIME CORPORATION,

Plaintiff,

-against-

GOLDEN GATE YACHT CLUB,

Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 653419/11

Motion Seq. No. 002

This action involves the America's Cup race - the premier sailing competition in the world - and plaintiff African Diaspora Maritime Corporation's ("ADM") rejected application to compete to be a Defender of the Cup in the 34th America's Cup ("AC 34") to take place in San Francisco in 2013. The current trustee of the Cup is defendant Golden Gate Yacht Club ("GGYC").

Background

Plaintiff ADM is a not-for-profit corporation founded by Charles M. Kithcart in 1994, and incorporated under the laws of North Carolina in 2011 for the purposes of competing in local, national, and international competitive sailing events and maritime activities - including but not limited to the America's Cup - and training and mentoring young African-Americans regarding competitive race sailing and maritime history. (Amended Complaint, ¶¶ 6, 30.)

Defendant GGYC, represented by Team Oracle Racing, won the 33rd America's Cup race ("AC33") in Valencia, Spain on February 14, 2010. (*Id.*, ¶¶ 10, 22.) On April 20, 2010, GGYC accepted the America's Cup trophy from the former trustee of the Cup, Société Nautique de Genève ("SNG"). This transfer occurred pursuant to a signed "Assignment and Acceptance" entered into by GGYC and under which GGYC agreed to accept the Cup and hold it in trust in accordance with the terms and conditions as stated in the Deed of Gift, described below. (*Id.*, ¶ 11.)

The Cup, a large silver trophy first won by the schooner yacht "America," in a race against British sailing vessels around the Isle of Wight in England in 1851, "became the corpus of a charitable trust created under the laws of New York...." *Golden Gate Yacht Club v Société Nautique de Genève*, 12 NY3d 248, 252 (2009). In 1887, the owner of the Cup created a deed of gift (the "Deed of Gift"), pursuant to which the Cup "shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

Under the Deed of Gift, an established yacht club of a country other than the home country of the club holding the Cup may seek to challenge the club that holds the Cup. Such clubs are known as "Challengers." Additionally, under the Protocol described below,

anyone seeking to put together a racing team from the home country of the Cup holder can apply to GGYC to represent GGYC in AC34. Such teams are known as "Defender Candidates," since they would be applying to defend GGYC's possession of the Cup. (Amended Complaint, ¶ 26.) The team that ultimately represents GGYC in AC34 will be known as the "Defender." Under the Protocol, if there is more than one team seeking to be the Defender of the Cup, the contestants will participate in preliminary races as a means to decide who will be the Defender. (*Id.*)

On or about February 15, 2010, the day after GGYC won AC33, GGYC announced it had accepted a challenge to sail a new match from Club Nautico di Roma ("CNR") as "Challenger of Record" in the AC34 races.¹ Under the Deed of Gift, CNR as Challenger of Record, was empowered to negotiate with GGYC, if GGYC so desired, a "protocol" to govern AC34. Specifically, the Deed of Gift provides that

[t]he 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 [otherwise provided by the Deed of Gift] may be waived.

(Amended Complaint, ¶ 23.)

¹ CNR has since withdrawn from the impending America's Cup and the current Challenger of Record is the Royal Swedish Yacht Club, represented by Artemis Racing.

GGYC and CNR reached agreement and, on September 13, 2010, published the Protocol Governing the 34th America's Cup (the "Protocol"). The Protocol establishes, *inter alia*, who from the United States can challenge its representative from AC33 - Team Oracle Racing - to be the "Defender of the Cup" and serve as the representative of GGYC. (*Id.*, ¶¶ 20, 24.)

Article 3 of the Protocol defines GGYC's duties when dealing with both Defender Candidates and candidates to be Challengers, and states in pertinent part that GGYC, in its capacity as trustee, shall "act in the best interests of all Competitors collectively" and "not unreasonably favor the interests of any Competitor over another." Under the Protocol's definitions, a "Competitor" includes both a "Defender Candidate" and a "Challenger." (*Id.*, ¶ 27.)

Articles 8 and 26 of the Protocol establish a procedure to apply to become a Defender Candidate and, if accepted, to challenge Team Oracle Racing in an America's Cup Defender Series to determine who will represent GGYC in AC34. In particular, Article 8 sets forth the procedure for a racing team to follow in order to be considered by GGYC to become a Defender Candidate and the standards GGYC must apply in such consideration, all subject to GGYC's duties in holding the Cup "as trustee for the benefit of all potential

challengers". Specifically, Article 8 of the Protocol provides as follows:

8 ACCEPTANCE OF DEFENDER CANDIDATES

8.1 GGYC will accept applications to be a Defender Candidate from 1 November 2010 until 31 March 2011. Thereafter, applications may be accepted at the discretion of GGYC upon payment of a late fee to be determined by GGYC.

8.2 Defender Candidates shall comply with the Protocol and shall submit the documents and fees as set out in Article 9.

8.3 GGYC will review Defender Candidate applications and will accept those it is satisfied have the necessary resources (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series. (emphasis added).

(Amended Complaint, ¶ 28).

Article 9 of the Protocol requires Defender Candidates to submit an application, an example of which was appended to the Protocol as Schedule Two, and submit a bank draft in the sum of \$25,000 made payable to "America's Cup Properties, Inc." (Amended Complaint, ¶ 29.) Further, Article 5 of the Protocol establishes a "Competitor Forum," which the "Regatta Director shall establish and maintain...for consultation and communication with Competitors." The Competitor Forum was the vehicle that GGYC used to communicate information necessary for potential Competitors to

include in their applications as well as any other information concerning their participation in AC34. (*Id.*, ¶ 32.)

While GGYC was negotiating the Protocol, it was also negotiating with the City of San Francisco with the aim of selecting San Francisco as the host city for AC34. On or about December 31, 2010, GGYC did officially select San Francisco to host AC34. (*Id.*, ¶ 25.)

On or about July 7, 2010, ADM claims that it contacted GGYC to congratulate it on its victory in AC33 and to seek advice on how to apply to be a Defender Candidate in AC34. GGYC purportedly directed ADM to contact Tom Ehman ("Ehman"), the Chairman of the America's Cup Committee. (*Id.*, ¶ 33.) ADM asserts that, at that time, Ehman was aware that GGYC had already formed the Competitor Forum and that Anthony Romano ("Romano") was its liaison. Rather than immediately putting ADM in touch with Romano, however, between July 8, 2010 and March 26, 2011, while ADM contacted GGYC (through Ehman) on a near-monthly basis seeking information on how to join AC34 and asking to speak with someone about ADM's intent to participate, GGYC allegedly exhibited a pattern of intentional avoidance, providing it with virtually no information until it was nearly too late for ADM to enter AC34. (*Id.*, ¶¶ 34-35.)

ADM alleges that on or about March 26, 2011, just five days before the entry deadline for AC34, GGYC finally forwarded ADM to Romano. Between March 26 and March 31, 2011, Romano forwarded information critical to ADM's application to join AC34, which purportedly had been provided to the Competitor Forum months prior. (*Id.*, ¶ 38.)

In spite of the foregoing delays, on or about March 31, 2011, ADM claims that it timely submitted a fully compliant application ("Application") under the Protocol to sail a match to become the rightful Defender of the America's Cup. In addition, it wired the \$25,000 application fee to the designated account. (*Id.*, ¶¶ 39, 43-44.)

ADM's team was to include, among others, three Olympians, an All-American, several additional talented, experienced and award-winning sailors, and Dave Pedrick ("Pedrick"), an America's Cup award-winning yacht designer. (*Id.*, ¶ 40.)

Additionally, ADM contends GGYC was well aware that ADM had detailed plans underway to create a "media frenzy" around its team for both publicity and fundraising purposes. For example, conditioned upon GGYC accepting ADM as a Defender Candidate, ADM, together with the Secretary of Commerce and the Head of the

Department of Tourism for North Carolina, developed a plan to build a "boat park" in Raleigh. Also conditioned on GGYC accepting ADM, several wealthy African-Americans had committed to help ADM fund its efforts to win AC34. (*Id.*, ¶¶ 41-42.)

ADM alleges that from about April 1 to April 15, 2011, GGYC falsely and repeatedly claimed that its Application was deficient because it was not signed and did not include a document evidencing payment of the \$25,000 fee. However, ADM asserts that it later disproved these claims. (*Id.*, ¶¶ 46-47.)

Then, GGYC contacted Pedrick, who ADM had listed on its Application as the Design Director for ADM's yacht. Pedrick purportedly confirmed to GGYC that he would in fact be ADM's yacht designer if ADM were selected by GGYC. However, ADM alleges that because Pedrick had not signed a contract with ADM to this effect, GGYC told ADM its team was not constituted as claimed in the Application and that Pedrick had "denied" being a member of the ADM team. Notwithstanding GGYC's position, ADM argues that emails from Pedrick to ADM, as well as an April 5, 2011 email from Pedrick to GGYC, establish that Pedrick did, in fact, intend to design a yacht for ADM in its effort to win AC34. (*Id.*, ¶ 47.)

Finally, by letter dated April 15, 2011, GGYC advised ADM that its Application had been rejected. GGYC's stated reason for the rejection was that it was "not satisfied that ADM has, or will have the necessary resources (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series," (*Id.*, ¶ 48), quoting Article 8.3 of the Protocol almost verbatim.

ADM insists GGYC had no basis for its claimed lack of "satisfaction" because even though ADM's Application indicated that it would "provide further details of our challenge as GGYC may request to review and consider this application," GGYC never attempted to verify the precise status of its proposed team, never attempted to obtain any information about whether ADM might be able to raise the necessary funds, and never attempted to ascertain whether ADM's proposed team had the necessary "experience" to have a "reasonable chance" of beating Team Oracle Racing. (*Id.*, ¶ 49.)

Moreover, ADM argues that GGYC knew well that potential Competitors are most often without funds prior to being accepted as Competitors, because it is the status of Competitor that gives a Competitor the ability to begin raising funds. (*Id.*, ¶ 50.)

Plaintiff claims that GGYC provided material or financial help to other struggling Competitors by buying or giving them a yacht and/or a design package for use in AC34. In so doing, plaintiff claims GGYC was using its powers as trustee of the America's Cup to help some Competitors and not others, and thus failing to treat all equally. (*Id.*, ¶ 53.)

ADM filed its original Summons and Complaint on or about December 12, 2011. GGYC then moved to dismiss the Complaint on January 17, 2012. By Stipulation dated April 19, 2012, the parties agreed to allow plaintiff to file and serve an Amended Complaint by April 20, 2012, which was done, and the first motion to dismiss was deemed moot by the Court. The Amended Complaint, dated April 20, 2012, asserts causes of action for: (i) breach of contract (Count One); (ii) breach of trust (Count Two); and (iii) breach of fiduciary duty by self-dealing (Count Three).

The first cause of action, sounding in breach of contract, alleges that GGYC agreed in the Protocol to review all compliant applications of sailing teams seeking to be a Defender Candidate, and to accept those that it was satisfied had the necessary resources and experience to have a reasonable chance of winning the America's Cup Defender Series. ADM argues that GGYC breached its duty to undertake a good faith review of ADM's application.

The second cause of action, sounding in breach of trust, alleges that in considering ADM's application, GGYC owed ADM a fiduciary duty as trustee of the Cup to consider only relevant factors with due care, after necessary inquiry and investigation, and in light of the realities of the financing of a challenge, just as it did with other Competitors. ADM alleges that GGYC breached those duties.

The third cause of action, denoted, "breach of fiduciary duty by self-dealing," alleges that GGYC engaged in self-dealing by negotiating to purchase long-term property rights in waterfront property on San Francisco Bay that could be assigned to third parties free of the trust imposed by the Deed, and also by requiring that all competitors purchase AC 45 yachts to the benefit of Team Oracle Racing and its member, Larry Ellison.

ADM seeks \$1 million in compensatory damages and numerous forms of equitable relief, including, but not limited to: an order directing GGYC to accept its Application, hold an America's Cup Defender Series, and reschedule and postpone any currently scheduled America's Cup events to allow for ADM to design, build and test a racing vessel; the removal of GGYC as trustee of the Cup and the appointment of an independent trustee; and that GGYC

provide ADM with at least two AC 45 yachts and provide equal vessels to all Competitors and potential Competitors.

GGYC now moves to dismiss the Amended Complaint on the grounds that (1) there is a defense founded upon documentary evidence (CPLR 3211 [a] [1]); (2) the Complaint fails to state a cause of action (CPLR 3211 [a] [7]); and (3) plaintiff lacks standing (CPLR 3211 [a] [3]) to assert the breach of trust and breach of fiduciary duty causes of action.

Discussion

It is well settled that

[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 NY2d 83, 87-88 (1994) (internal citations and quotation marks omitted). Allegations consisting of bare legal

conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 NY3d 358, 373 (2009) (citing *Caniglia v. Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-34 [1st Dep't 1994]).

Breach of Contract

Plaintiff alleges in its first cause of action that "the Protocol together with the submitted Application and required fee constituted a binding and enforceable contract between ADM and GGYC."² (Amended Complaint, ¶ 108.) Plaintiff also alleges that GGYC's duties under Article 8.3 of the Protocol - that is, to review Defender Candidate Applications and to "accept those it is satisfied have the necessary resources (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series" - is subject to a reasonableness standard, and at the very least requires good faith on the part of GGYC in determining whether it was satisfied. (*Id.*, ¶ 104.) Specifically, plaintiff maintains that GGYC breached the parties' contract by failing to act in good faith, because it lacked a reasonable basis for its claimed lack of "satisfaction" and was wrong not to request additional information from ADM.

² Plaintiff asserts that defendant does not dispute that ADM prepared its Application in the precise form provided by Schedule Two of the Protocol and submitted the fee with its Application.

Defendant, on the other hand, argues that the Protocol was merely a binding agreement with the Challenger of Record setting forth the terms of the next Challenge, as contemplated in the Deed of Gift. At best, defendant insists that the terms of the Protocol governing the procedure for submitting Defender Candidate applications might be considered a solicitation of bids from Defender applicants, which, pursuant to New York law, is simply a request for an offer and not an offer itself. See *S.S.I. Invs. v. Korea Tungsten Min. Co.*, 80 AD2d 155, 158 (1st Dep't 1981), *aff'd* 55 NY2d 934 (1982).

Further, even if ADM's Application and fee constitute a binding contract, defendant argues that dismissal of the breach of contract claim would still be appropriate because plaintiff does not allege any breach under the Protocol. Moreover, while plaintiff alleges that GGYC's "satisfaction" must be reasonable, defendant asserts that the plain language of the Protocol grants GGYC unfettered discretion to reject applications that it deems unsatisfactory.

Defendant also asserts that ADM cannot rely on the Protocol's "fairness" requirements, because the provisions cited by plaintiff in the Amended Complaint as establishing a duty of "fairness" apply

only to Competitors, not Defender Applicants like ADM. In any event, defendant emphasizes that it did consider ADM's application and gave ADM a more than fair opportunity to demonstrate that it had, or could have, the necessary resources to mount a competitive team, but it failed to do so. Since the Amended Complaint fails to allege that GGYC actually was "satisfied" that ADM possessed the necessary resources and experience, defendant argues that this cause of action should be dismissed.

Defendant also points out that it is trying (as it is obligated to do) to successfully defend the America's Cup. Its chosen representative, Team Oracle Racing, is a proven America's Cup winner. Plaintiff, by contrast, has never competed in the America's Cup, nor has it indicated that it has ever competed in any regatta or that the purported members of its "syndicate" have ever even been on a boat together. Against this backdrop, GGYC contends that it is hard to see how its conduct in declining to accept plaintiff's Application could be deemed unreasonable, even if there was a binding contract, which, of course, defendant disputes.

Finally, defendant argues that plaintiff fails to allege any damages resulting from the alleged breach. Even if plaintiff were to prevail on its breach of contract claim, defendant maintains

that plaintiff would not necessarily be selected as a Defender Candidate, let alone win the right to represent GGYC in the America's Cup.

In opposition to defendant's argument that the language of the Protocol constitutes only a request for an offer and not an offer itself, plaintiff insists that the rules of a contest constitute a contract offer and that a participant's entry into the contest constitutes an acceptance of that offer. See *Robertson v. US*, 343 US 711, 713 (1952); *Sargent v. New York Daily News, L.P.*, 42 AD3d 491, 493 (2d Dep't 2007); *Diop v. Daily News, L.P.*, 11 Misc.3d 1083(A) (Sup Ct, Bronx Co 2006); *Greenwood v. Daily News, L.P.*, 8 Misc3d 1002(A) (Sup. Ct., Nassau Co., June 7, 2005).

ADM also argues that the Protocol states that GGYC had to accept applicants whom GGYC was "satisfied" had a "reasonable chance of winning" and that a "satisfaction" clause does not grant unfettered discretion. ADM relies upon *Mattei v. Hopper*, 51 Cal 2d 119 (Cal 1958), in which the written agreement between plaintiff, the purchaser of real property, and the defendant-seller, required the real estate broker to obtain leases satisfactory to the purchaser prior to the time he was committed to pay the balance of the purchase price and to take title to the defendant's property.

The Court in *Mattei* held that

[w]hile contracts making the duty of performance of one of the parties conditional upon his satisfaction would seem to give him wide latitude in avoiding any obligation and thus present serious consideration problems, such "satisfaction" clauses have been given effect. They have been divided into two primary categories and have been accorded different treatment on that basis. First, in those contracts where the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility, dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously, and the standard of a reasonable person is used in determining whether satisfaction has been received (internal citations omitted).

Mattei, 51 Cal 2d at 122-123.

The second line of authorities dealing with "satisfaction" clauses are those involving "fancy, taste, or judgment. Where the question [of satisfaction] is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract." (*Id* at 123.) ADM further relies on *J.D. Cousins & Sons, Inc. v. Hartford Steam Boiler Inspection and Ins. Co.*, 341 F3d 149 (2d Cir 2003), in which the Court held that "if the standard is objective, a decision to reject...performance must be reasonable, while if the subjective standard applies, it need only be shown to be honest and in good faith." *J.D. Cousins*, 341 F3d at 153. Since, based on the plain terms of Article 8.3 of the Protocol, GGYC's satisfaction

with plaintiff's Application was clearly a subjective determination, the standard that applies here is one of good faith, not reasonableness. Plaintiff also argues that GGYC's failure to request additional information from ADM was further indication of its lack of good faith. However, GGYC was under no obligation to request further information about plaintiff's financial capabilities or sailing credentials in order to make its determination of satisfaction. The Application states that a Defender Applicant agrees to provide further details "as GGYC may request to review and consider this¹ application." (emphasis added). It is clear from the plain meaning of this language that it was within GGYC's discretion whether further inquiries were necessary. As such, the Court finds nothing in the record to support plaintiff's contention that GGYC acted in bad faith in reviewing plaintiff's Application.

Finally, with regard to the issue of damages, plaintiff contends that it does not have to plead that had its application been accepted, it would have beaten Team Oracle Racing or won the America's Cup. Plaintiff argues that GGYC's depriving it of the opportunity to compete is harm in and of itself.

In order to plead breach of contract, plaintiff must allege "the existence of a contract, the plaintiff's performance under the

contract, the defendant's breach of that contract, and resulting damages." *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 (2d Dep't 2010). "[R]egardless of whether [the contract] is bilateral or unilateral, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms" (internal quotation marks and citations omitted). *Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 103-104 (1st Dept 2009), *lv den* 15 NY3d 703 (2010).

Here, there is nothing in the language of the Protocol which indicates an intent that GGYC be bound upon the receipt of a Defender Candidate application and the accompanying fee to do more than review said application. Indeed, the acceptance of a Defender Candidate application is dependent upon both GGYC being "satisfied" with the resources and experience of the applicant, and upon GGYC deciding to hold a Defender Series in the first instance. Thus, Article 8.3 of the Protocol does not constitute an offer that creates a power of acceptance, or that would impose contractual duties on GGYC to accept a Defender Candidate applicant upon the submission of a compliant application and the required fee. See *S.S.I. Invs. v. Korea Tungsten Min. Co.*, *supra*.

Accordingly, the Court finds that plaintiff has failed to state a cause of action for breach of contract and, therefore, this claim must be dismissed.

Breach of Trust

Plaintiff alleges in this cause of action that

[i]n deciding whether to accept ADM's Application, GGYC had a fiduciary duty as trustee of the America's Cup to only consider relevant factors and ignore any irrelevant factors, and to consider the relevant factors with due care and after necessary inquiry and investigation, and to consider such factors in light of the realities of the financing of an America's Cup challenge as it did so with other Competitors. GGYC failed to do so and as a result, its denial of ADM's Application was a breach of its duties as trustee of the America's Cup.

(Amended Complaint, ¶ 113.) Plaintiff further alleges that it has been damaged by being unable to participate in AC34 or any events leading up thereto, and its preparations to compete have been substantially impaired and delayed. (*Id.*, ¶ 114.)

Defendant argues, in the first instance, that plaintiff lacks standing to bring a breach of trust cause of action. Defendant cites *In re Royal Burnham Yacht Club*, 1998 WL 1564609 (Sup Ct, NY Co, April 6, 1988), which also involved the America's Cup, and in which the Court articulated the general rule that mere beneficiaries of charitable trusts lack standing to sue to interpret or enforce the trust and must instead rely on the New

York Attorney General to do so.³ The Court did, however, recognize an exception to this general rule when a party has a "special interest in funds held in trust for a charitable purpose," (see *Alco Gravure, Inc. v. Knapp Found.*, 64 NY2d 458, 465 [1985]), but defendant argues that exception does not apply here.

Next, defendant argues that plaintiff's claim for breach of trust should be dismissed pursuant to CPLR 3211(a)(1) and (a)(7) because the trust, as set forth in the Deed of Gift, does not require GGYC to hold a Defender Series at all, let alone dictate the "relevant" and "irrelevant" factors under which one is to be held.

Plaintiff argues in opposition that it has standing to bring its breach of trust claim because no New York court has held that the America's Cup trust is a charitable trust, citing to a footnote in the *Mercury Bay Boating Club* case, 76 NY2d at 271 n.4.

Further, plaintiff argues that even if this Court finds the America's Cup Trust to be a charitable trust, the "special interest" exception recognized in *Alco Gravure, supra*, in which the

³ The Court of Appeals has previously acknowledged that the America's Cup was created pursuant to a charitable trust. *Golden Gate Yacht Club v. Société Nautique de Genève*, 12 NY3d 248, 251 (2009); *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 76 NY2d 256, 260 (1990).

Court of Appeals held that "special interest" confers standing where "a particular group of people has a special interest in funds held for a charitable purpose, as when they are entitled to a preference in the distribution of such funds and the class of potential beneficiaries is sharply defined and limited in number," applies. *Alco Gravure*, 74 NY2d at 465. Plaintiff contends that, like in *Alco Gravure*, merely being a Competitor entitles such parties to a share of the Net Surplus Revenue.

Finally, plaintiff argues that it has stated a claim for breach of trust because under the Deed of Gift and the Protocol, GGYC had a duty to fulfill its obligations as trustee in good faith, honestly, and with undivided loyalty, and GGYC failed to do so.

As noted, the Court of Appeals concluded in *Mercury Bay* and *Golden Gate Yacht Club* that the America's Cup was created pursuant to a charitable trust and, thus, this Court finds unavailing plaintiff's arguments to the contrary. Moreover, plaintiff's arguments regarding the special interest exception are inapposite because plaintiff is not a beneficiary of the trust. It is simply an applicant applying to be accepted as a "Defender Candidate," and not a confirmed "Defender Candidate" or "Competitor," as those terms are defined in the Protocol. Accordingly, the Court finds

that plaintiff lacks standing to assert its breach of trust cause of action and it is, therefore, dismissed.

Breach of Fiduciary Duty

Finally, plaintiff alleges in its third cause of action that

GGYC is engaged in self-dealing by negotiating terms directly beneficial to it and other third parties, free from trust, in violation of the terms of the Deed of Gift, the Assignment and Acceptance, the April 20, 2010 Undertaking, and its fiduciary duties of a trustee. GGYC similarly violated the terms of [same] by requiring that all competitors purchase AC 45 yachts to the benefit of Oracle Racing, and its member, Larry Ellison.

(Amended Complaint, ¶ 117.)

Moreover, plaintiff alleges that it has standing to bring its breach of fiduciary duty claim as a "beneficiary of the trust because it is a potential defender ... and has sought to compete to become the Defender," (Amended Complaint, ¶ 116), and because, had GGYC exercised its discretion in good faith, ADM would be a Competitor required to buy an AC 45 yacht and entitled to a share of the Net Surplus Revenue.

Defendant argues that plaintiff lacks standing for the reasons discussed, *supra*, because it has not and cannot allege any conceivable injury resulting from the alleged breach of fiduciary

duty.⁴ Further, even if plaintiff has standing to bring its breach of fiduciary duty claim, this claim would still fail because the Amended Complaint fails to allege a breach of that duty. See *Mercury Bay Boating Club, supra*.

For the same reasons stated above, the Court finds that plaintiff lacks standing to assert a breach of fiduciary duty claim. The fiduciary duty that GGYC owes as trustee of the America's Cup under the Deed is to use its

best efforts to defend its right to hold the Cup and thus to defeat the beneficiaries in the contemplated competition. It is thus inappropriate and inconsistent with the competitive trust purpose to impose upon the trustee of a sporting trust such as this one the strict standard of behavior which governs the conduct of trustees who are obligated not to compete with the trust beneficiaries.

Mercury Bay Boating Club Inc., 76 NY2d at 271.


GGYC also owes a duty to construe the Deed in accordance with its plain meaning, and to adhere to the provisions in the Deed (*Id.*) Nothing in the Deed extends beneficiary status to mere applicants to become a Defender Candidate, such as ADM. Therefore, this cause of action must also be dismissed.

⁴ The parties agree that the negotiations relating to certain long-term development rights on the San Francisco waterfront have been abandoned, so there is no basis to that claim.

Accordingly, the motion is granted in its entirety and the Amended Complaint is dismissed with prejudice and without costs or disbursements.

This constitutes the decision and order of this Court.

Date: January 18, 2013



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.