

The Maritime Law Association
of Australia and New Zealand

15th Annual Meeting and Conference
7 - 11 August 1988

THE NEW ZEALAND CHALLENGE FOR THE AMERICA'S CUP

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New York, N.Y., U.S.A.

ANA Hotel, Surfers Paradise, Queensland

August 9, 1988

OUTLINE OF REMARKS

1. Fremantle to San Diego

- Documents:
1. The America's Cup Assignment and Acceptance of February 5, 1987.
 2. The Deed of Gift (October 24, 1887)

2. February 1987 to July 15, 1987

- Documents
1. The Agreement between Sail America Foundation for International Understanding and San Diego Yacht Club.
 2. The Arbitration Proceedings

3. July 15, 1987 to September 9, 1988

- Documents:
1. The Notice of Challenge of July 15, 1987
 2. Order to Show Cause of the Mercury Bay Boating Club Inc.
 3. Order to Show Cause of San Diego Yacht Club.

4. September 9, 1987 to December 28, 1987

- Documents:
1. The Order allowing New York Yacht Club to intervene.
 2. The Decision of November 25, 1987.
 3. The Order/Judgment of December 28, 1987.

5. December 28, 1987 to March 28, 1987

- Documents:
1. Order denying Intervention of City of San Diego.
 2. Demand for Compliance.

6. March 28, 1987 to July , 1988

- Documents:
1. Order Denying Royal Burnham Yacht Club Petition.
 2. Motion to Enforce Judgment.
 3. Decision of July 25, 1988.

7. Other Documents

1857 Deed of Gift (First Deed)

1882 Deed of Gift (Second Deed)

December 17, 1956 Order Amending Deed of Gift (minimum waterline length)

September 20, 1984 Order Interpreting Deed of Gift (arm of the sea)

April 5, 1985 Order Amending Deed of Gift (southern hemisphere)

AMERICA'S CUP
Assignment and Acceptance

This Assignment and Acceptance is made as of the 5th day of February, 1987, by and between the ROYAL PERTH YACHT CLUB OF WESTERN AUSTRALIA (INC.) (the "RPYC") and the SAN DIEGO YACHT CLUB (the "SDYC").

The yacht STARS AND STRIPES, as representative of the SDYC, having won the America's Cup (the "Cup") in accordance with the terms and conditions of a deed of gift dated October 24, 1887, between George L. Schuyler and the New York Yacht Club (the "NYYC"), as amended by orders of the Supreme Court of the State of New York dated December 17, 1956, September 20, 1984 and April 5, 1985, and as interpreted by resolutions adopted by the respective holders of the Cup on March 27, 1958 (the "1958 Resolution"), July 15, 1980 (the "1980 Resolutions"), March 9, 1982 (the "1982 Amendments"), May 15, 1984 (the "First 1984 Resolutions" and the "Second 1984 Resolutions") and May 22, 1984 (the "Third 1984 Resolutions"), and the Footnotes in Amplification, as amended, of the 1980 Resolutions and the 1982 Amendments, such deed of gift as so amended and interpreted being herein referred to as the "Deed of Gift", the parties hereto agree that:

1. Assignment. The RPYC hereby assigns and transfers the Cup to the SDYC on the condition that the SDYC shall hold the Cup, in trust, in accordance with the terms and conditions of the Deed of Gift.
2. Acceptance. The SDYC hereby accepts the Cup subject to the said trust and to the terms and conditions of the Deed of Gift and covenants that:
(a) it will faithfully and fully see that the conditions of the Deed of Gift are fully observed and complied with by any contestant for the Cup during the holding thereof by it; and

(b) it will assign, transfer and deliver the Cup to the foreign yacht club whose representative yacht shall have won the same in accordance with the terms and conditions of the Deed of Gift, provided that said foreign yacht club shall, by instrument in writing lawfully executed, enter with the SDYC into the like covenants as are herein entered into by it, such instrument to contain a like provision for the successive assignees to enter into the same covenants with their respective assignors, and such instrument to be executed in duplicate, with one counterpart to be retained by each club and a copy thereof to be forwarded to the NYYC.

3. Applicable Law. The parties hereto further agree that, the trust under which the Cup is held having been created under the laws of the State of New York, and having been amended as aforesaid by order of the Supreme Court of the State of New York, the terms and conditions of the Deed of Gift shall be governed by, and construed in accordance with, such laws, and any proceeding for the amendment or interpretation of such terms and conditions shall be brought before the courts of the State of New York.

IN WITNESS WHEREOF, the parties have caused this instrument to be executed by their duly authorized officers as of the date first above written.

SAN DIEGO YACHT CLUB

By: 

Commodore

ROYAL PERTH YACHT CLUB OF
WESTERN AUSTRALIA (INC.)

By: 

Commodore

DEED OF GIFT
of
THE AMERICA'S CUP

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THE AMERICA'S CUP

This Deed of Gift, made the twenty-fourth day of October, one thousand eight hundred and eighty-seven, between George L. Schuyler as sole surviving owner of the Cup won by the yacht AMERICA at Cowes, England, on the twenty-second day of August, one thousand eight hundred and fifty-one, of the first part, and the New York Yacht Club, of the second part, as amended by orders of the Supreme Court of the State of New York dated December 17, 1956, and April 5, 1985.

WITNESSETH —

That the said party of the first part, for and in consideration of the premises and of the performance of the conditions and agreements hereinafter set forth by the party of the second part, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto said party of the second part, its successors and assigns, the Cup won by the schooner yacht AMERICA, at Cowes, England, upon the twenty-second day of August, 1851. To have and to hold the same to the said party of the second part, its successors and assigns, IN TRUST, NEVERTHELESS, for the following uses and purposes:

This Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

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 for 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.

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere. Accompanying the ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and

a custom-house registry of the vessel must also be sent as soon as possible. Centre-board or sliding keel vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such centre-board or sliding keel, nor shall the centre-board or sliding keel be considered a part of the vessel for any purposes of measurement.

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.

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. All such races shall be on ocean courses, free from headlands, as follows: The first race, twenty nautical miles to windward and return; the second race an equilateral triangular race of thirty-nine nautical miles, the first side of which shall be a beat to windward; the third race (if necessary) twenty nautical miles to windward and return; and one week day shall intervene between the conclusion of one race and the starting of the next race. These ocean courses shall be practicable in all parts for vessels of twenty-two feet draught of water, and shall be selected by the Club holding the Cup; and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any time allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Should the Club holding the Cup be for any cause dissolved, the Cup shall be transferred to some Club of the same nationality, eligible to challenge under this deed of gift, in trust and subject to its provisions. In the event of the failure of such transfer within three months after such dissolution, said Cup shall revert to the preceding Club holding the same, and under the terms of this deed of gift. It is distinctly understood that the Cup is to be the property of the Club subject to the provisions of this deed, and not the property of the owner or owners of any vessel winning a match.

No vessel which has been defeated in a match for this Cup can be again selected by any Club as its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time of such defeat. And 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.

AND the said party of the second part hereby accepts the said Cup subject to the said trust, terms, and conditions, and hereby covenants and agrees to and with said party of the first part that it will faithfully and fully see that the foregoing conditions are fully observed and complied with by any contestant for the said Cup during the holding thereof by it, and that it will assign, transfer, and deliver the said Cup to the

THE ARM OF THE SEA INTERPRETATION

JUDGEMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK
DATED SEPTEMBER 20, 1984

An application having been made by petitioner The Royal Perth Yacht Club of Western Australia Incorporated for an order interpreting certain provisions of a Deed of Gift of the America's Cup dated October 24, 1887 between George L. Schuyler and The New York Yacht Club, as amended by order of the Court dated December 17, 1956 (index No. 12696/56):

NOW, upon reading and filing the order to show cause dated August 8, 1984 (Alfred M. Ascione, Jr., J.) with proof of due and timely service on the Attorney General of the State of New York, the petition of The Royal Perth Yacht Club of Western Australia Incorporated, verified the 30th day of July, 1984, and annexed exhibits, and the affidavit of Eugene M. Kinney, sworn to the 20th day of July, 1984 and exhibits thereof, all in support of the petition, and the notice of appearance and consent of the Attorney General of the State of New York, acknowledged the 13th day of August, 1984, consenting to the petition;

AND, a memorandum decision and order dated September 4, 1984 and entered September 7, 1984, having been rendered granting the petition;

NOW, upon the motion of DeForest & Duer, attorneys for petitioner The Royal Perth Yacht Club of Western Australia Incorporated, it is

ORDERED AND ADJUDGED, that the petition of The Royal Perth Yacht Club of Western Australia Incorporated is granted with the consent of the Attorney General of the State of New York, representative of the public interest in the Deed of Gift, to the extent of declaring that the Deed of Gift entitles the Chicago Yacht Club, a yacht club of a foreign (i.e. competing) country as contemplated in the Deed of Gift, to enroll and compete as a contestant for the "America's Cup".

enter,
Hon. Robert E. White J.S.C.
Justice

foreign Yacht Club whose representative yacht shall have won the same in accordance with the foregoing terms and conditions, provided the said foreign Club shall, by instrument in writing lawfully executed, enter with said party of the second part into the like covenants as are herein entered into by it, such instrument to contain a like provision for the successive assignees to enter into the same covenants with their respective assignors, and to be executed in duplicate, one to be retained by each Club, and a copy thereof to be forwarded to the said party of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal, and the said party of the second part has caused its corporate seal to be affixed to these presents and the same to be signed by its Commodore and attested by its Secretary, the day and year first above written.

George L. Schuyler (L.S.)
The New York Yacht Club
by Elbridge T. Gerry, Commodore
John H. Bird, Secretary

In the presence of
H.D. Hamilton.
(Seal of the New York Yacht Club)

AGREEMENT

This agreement is entered into by and between Sail America Foundation for International Understanding, a Nevada non-profit corporation ("Sail America"), and San Diego Yacht Club, a California mutual benefit corporation ("SDYC"), effective September 1, 1985, with respect to the following facts and circumstances.

A. Pursuant to the terms of the Deed of Gift for The America's Cup filed with the New York Yacht Club, SDYC has submitted a challenge for the America's Cup to Royal Perth Yacht Club in 1987 (the "1987 Challenge") and has paid the challenge fee of \$11,485.

B. Sail America has undertaken to raise funds and entered into agreements for purposes of carrying on the 1987 Challenge.

C. SDYC and Sail America desire to memorialize their agreement with respect to the obligations of each party and the rights of each party arising from, or related to, the 1987 Challenge, and to subsequent activities related to the America's Cup.

Therefore, the parties agree as follows:

1. MANAGEMENT OF THE 1987 CHALLENGE.

1.1. Designation of Sail America as SDYC Representative. Subject to the terms and conditions of the America's Cup Deed of Gift and of this agreement, and to the extent consistent with its corporate purposes and powers, SDYC designates Sail America as SDYC's representative for the purpose of carrying out the SDYC challenge of the America's Cup in 1987, including the representation of SDYC in all meetings, votes, decisions, proceedings and competition preceding and related to the 1987 America's Cup Match.

1.2. Duties of Sail America. To the extent of its financial resources and in compliance with its stated purposes as a tax-exempt, nonprofit corporation, Sail America shall cause the design, construction and preparation for the 1987 Challenge of one or more 12 meter yachts; arrange for all required facilities in Australia and training facilities elsewhere; select, supervise training, and manage a crew and all related personnel, and carry out and coordinate a racing campaign for the 1987 Challenge, all at the sole and exclusive expense of Sail America.

1.2.1. Performance. Timing for conduct of the campaign shall be exclusively determined by Sail America, and Sail America shall use its reasonable best efforts to carry out its duties hereunder; provided that if Sail America does not have at least one newly designed and constructed 12 meter yacht conforming to the required measurement rules not later than July 1, 1986, then SDYC may, at its option, terminate Sail America as its representative and designate such other representative as it deems appropriate, or withdraw from the challenge.

1.2.2. Expenses and Costs. All costs of the 1987 Challenge other than the challenge fee previously paid by SDYC shall be paid by Sail America. Such costs shall include reimbursement of any administrative or legal expenses incurred by SDYC related to administration of the 1987 Challenge, specifically including preparation of this agreement, and any other expenses required by the then existing Deed of Gift as amended from time to time.

1.2.3. Insurance. Sail America shall at all times maintain worker's compensation insurance issued in the state of California and protection and indemnity insurance on each and every yacht owned and/or controlled by Sail America. This coverage shall at no time exclude either the skippers or any of the crews of the 12 meters. Sail America will also carry a comprehensive general liability policy covering, but not limited to, owned and non-owned vehicles, and the above policy shall name San Diego Yacht Club as an additional insured in amounts of not less than \$5,000,000, and as additional insured on any other insurance (other than key man insurance) maintained by Sail America. The amounts of coverage and the types of insurance shall be subject to revision annually at the request of SDYC if the revision is recommended by an independent insurance broker who has no interest in any existing or future insurance for either SDYC or Sail America and who is a member or officer of neither corporation.

1.2.4. Contingency Fund. No later than 90 days prior to the 1987 Challenge Elimination Series, Sail America shall set aside, in trust, a contingency fund in the amount of \$75,000. The fund shall be held as a bond, letter of credit, deposit or other security, the form, substance and issuer of which shall be subject to the approval of SDYC; such approval shall not be unreasonably withheld. The trust principal shall be expended by Sail America only to reimburse SDYC for costs related to the 1987 Challenge which SDYC is required to pay after the 1987 Challenge and notice of which is given by SDYC to Sail America within 1 year of the date the Sail America yacht last competes in the 1987 America's Cup competition. To the extent not required for such expenditures the unexpended trust principal may be withdrawn from trust by Sail America 13 months after the date of the last competition.

1.3. DUTIES OF SDYC.

1.3.1. Obligation of Challenger. SDYC has submitted the challenge fee and designated Sail America as its representative. SDYC shall take possession of the America's Cup in the event of successful challenge, as provided under the Deed of Gift. All expenses of performance of the obligations of SDYC, other than the payment of the initial challenge fee, shall be paid directly by Sail America, or reimbursed to SDYC, by Sail America promptly upon demand from SDYC. To the extent required by the America's Cup Deed of Gift and related rules, and to the extent personnel of Sail America who are members of SDYC cannot legally carry out such duties, SDYC shall provide any required official representatives in Australia. SDYC shall otherwise comply with the obligations of a challenging club under the Deed of Gift and related rules.

1.3.2. Use of SDYC Facilities. For purposes of facilitating the 1987 Challenge SDYC shall make available its facilities, at the expense of Sail America, on a reasonable basis not inconsistent with other operations of SDYC as determined by SDYC.

2. MANAGEMENT OF AMERICA'S CUP DEFENSES.

2.1. San Diego America's Cup Committee. If the America's Cup is won in 1987 by SDYC and Sail America, a committee shall be formed to oversee and review the future defenses of the America's Cup while SDYC possesses the Cup and Sail America is manager as described below. The committee shall be called the "San Diego America's Cup Committee" (the "Committee").

2.1.1. Membership. Unless otherwise agreed by the parties, the committee shall be composed of seven to eleven (7 to 11) members, with a majority of the membership being members of SDYC. No person employed by either SDYC or Sail America shall be able to serve as a member of the Committee. The first nominations of committee members shall be made by Sail America within 60 days of the winning of the Cup; in the absence of such nominations by Sail America, SDYC may designate the initial membership of the committee. Thereafter, Sail America shall nominate the members of the Committee on or before the expiration of a regular term or within ninety (90) days of a vacancy which is required to be filled. The members nominated shall be subject to the approval of SDYC's Board of Directors. If a nominee is not approved, Sail America shall nominate another until all open committee positions have been filled with approved persons. Any member may be removed from membership without cause upon the concurrence of Sail America and SDYC. Either Sail America or SDYC may unilaterally remove any member for cause, which cause shall be defined as gross

misconduct, expulsion from membership in SDYC, a criminal conviction or bankruptcy. Members shall serve 2-year terms, with one-half of the members being appointed on alternate years; provided the initial appointments shall include 1-year terms for a majority of the members. All terms shall be renewable.

2.1.2. Duties. The Committee shall:

2.1.2.1. Adopt standards for the selection of the yachts which will defend the America's Cup from among the organizations which wish to furnish yachts to represent SDYC, which organizations may include Sail America;

2.1.2.2. Select the defending yacht pursuant to the America's Cup Deed of Gift and the standards adopted under 2.1.2.1.;

2.1.2.3. Recommend to Sail America standards for allocating funds to potential defender syndicates other than any proposed to be sponsored specifically by Sail America;

2.1.2.4. Establish standards of taste and aesthetics for any possible involvement of SDYC in marketing activities in support of America's Cup activities, subject to SDYC's election not to participate in all or any such marketing activities;

2.1.2.5. Review and monitor the management and conduct of the defense of the America's Cup on behalf of SDYC;

2.1.2.6. Determine the timing and site of America's Cup defenses;

2.1.2.7. Upon the request of SDYC made within sixty (60) days of a successful defense, determine within ninety (90) days of such defense whether Sail America shall be terminated or continued as Manager of the America's Cup defenses; provided that such a decision shall be based solely on Sail America's compliance with the spirit and letter of this agreement.

2.2. Appointment of Sail America as Manager. On the condition that SDYC and Sail America win the America's Cup in 1987, Sail America is hereby designated as the Manager of the defense of the America's Cup. As Manager Sail America shall act as the representative of SDYC in planning and implementing all practical steps required to fulfill SDYC's obligations as the defender of the America's Cup. Sail America shall act as Manager of future defenses in accordance with the America's Cup

Deed of Gift and related rules, as well as the policies and standards adopted from time to time by the Committee.

2.3. SDYC's Duties as Defender.

2.3.1. SDYC shall take custody of the America's Cup pursuant to the America's Cup Deed of Gift. SDYC shall make the America's Cup available for display on a reasonable basis to affiliated yacht clubs and sponsors which support the 1987 Challenge, subject to terms and conditions for costs of transport, security, insurance and maintenance as SDYC deems appropriate.

2.3.2. To the extent required by the Deed of Gift and related rules, and to the extent personnel of Sail America who are members of SDYC cannot carry out such duties, SDYC shall make persons available where required to act as its official representatives. SDYC shall otherwise comply with the obligations of a defending club under the Deed of Gift and related rules.

3. LICENSING AND PROMOTIONAL ACTIVITIES.

3.1. Sail America Rights. Subject to the other provisions of this contract, SDYC hereby grants exclusively to Sail America the right to advertise, promote and represent Sail America as the exclusive representative of SDYC for the 1987 America's Cup challenge and as the Manager of future defenses by SDYC of the America's Cup. SDYC understands Sail America has entered, and will enter in the future, into contracts relating to its activities hereunder pursuant to which Sail America will receive various licensing fees, royalties, and corporate sponsorships, as well as various forms of charitable contributions. SDYC disclaims all interest, if any, it has in such fees, royalties, corporate sponsorships, and contributions. For the term of this agreement, SDYC assigns to Sail America such rights as it may have or acquire to trademarks or copyrights of the name "America's Cup", the image and likeness of the America's Cup, and the broadcast of all America's Cup related activities. The rights of SDYC to any revenues derived therefrom, including, without limitation, those derived from all forms of television, video, motion picture and radio treatments of America's Cup-related activities, are hereby assigned to Sail America.

3.2. Sail America Dedication of Revenues. Sail America shall dedicate at least 15% of the proceeds of its America's Cup-related marketing efforts, to the extent that the proceeds exceed America's Cup-related costs (including, without limitation, reasonable reserves for future America's Cup purposes), to the furtherance of national and international amateur competitive sailing activities in the San Diego area,

insofar as such expenditures are consistent with Sail America's tax-exempt charitable purposes.

3.3. Promotional References to SDYC. The role of SDYC as the challenging or defending yacht club, as the case may be, shall be prominently displayed in all promotional materials and activities unless SDYC expressly directs that the identification not be used.

3.4. Promotional Activities With Affiliated Yacht Clubs. SDYC acknowledges that Sail America intends to seek additional sponsorship by other yacht clubs for the 1987 Challenge on a basis contemplating that the America's Cup will be displayed at such yacht clubs and that certain other benefits relating to information will be made available to such yacht clubs. Consent is hereby given to such activities provided that (i) all expenses related to any access to the America's Cup are paid by Sail America or a affiliated yacht club, (ii) all arrangements are made by and subject to the direct approval and supervision of SDYC subsequent to a successful challenge, and (iii) that any visitation by members of affiliated yacht clubs to SDYC and utilization of SDYC facilities shall be subject to reasonable terms and conditions including provisions for insurance indemnity.

4. CONTRACT TERM.

4.1. Termination by SDYC. SDYC may terminate this agreement by giving reasonable notice to Sail America upon the occurrence of any one of the following:

4.1.1. Sail America loses its tax-exempt status through some action of the IRS;

4.1.2. Sail America changes its structure to something other than that of a nonprofit corporation;

4.1.3. The America's Cup Deed of Gift is amended or judicially interpreted in such a way as to negate the mode of operation contemplated by this agreement;

4.1.4. By notice given within ninety days (90) days of a successful defense, if SDYC decides to give up its role as defender under the Deed of Gift;

4.1.5. A decision by the Committee, pursuant Section 2.1.2.6., that Sail America shall be terminated as Manager for future defenses;

4.1.6. A violation by Sail America of Section 6:

4.1.7. The passage of 12 years after the effective date hereof.

4.2. Termination by Sail America. Sail America may terminate this agreement by giving notice to SDYC within ninety (90) days after any successful defense of the America's Cup.

4.3. Post-Termination Revenues. The assignment of SDYC property rights under Section 3.1. shall end upon the termination of this contract pursuant to this section 4. Any revenues received at any time by Sail America as a result of the use of SDYC rights before the termination shall be the sole property of Sail America; provided that, revenues received by Sail America at any time, which revenues derive from the use of SDYC property rights after the termination, including revenues related to America's Cup defenses occurring after the termination, shall be the sole property of SDYC even if the revenues arise from contracts entered into before the termination, and Sail America shall forward such revenues to SDYC within 30 days of their receipt.

5. COVENANT NOT TO COMPLETE.

Sail America shall not represent, independently or jointly, any other yacht club in a challenge for the America's Cup in 1987, other than yacht clubs affiliated with the SDYC challenge as referred to above, without the prior written consent of SDYC.

6. INDEMNITIES.

6.1. Indemnification of SDYC. Sail America shall fully and completely indemnify and hold SDYC harmless from any and all loss, cost, liability or damage (including attorneys fees) which may arise out of or be related to activities conducted or contracts executed by Sail America pursuant to this agreement whether they relate to the present challenge or to future defenses.

6.2. Indemnification of Sail America. SDYC shall indemnify and hold Sail America harmless from any and all loss, cost, liability or damage (including attorneys fees), other than those contributorily caused by Sail America's acts in breach of its duties hereunder, which arise from SDYC's performance of its duties as challenger for or defender of the America's Cup.

7. GENERAL PROVISIONS.

7.1. Successors and Assigns. This agreement shall be binding on all successors and assigns of the parties.

7.2. Default. Should any default exist under the terms of this Agreement, the party in default shall have thirty (30) days notice by the other party of such default to cure such default, and in the event of cure within such period, this agreement shall not be deemed terminated.

7.3. Notice. Any notice required to be given hereunder shall be in writing and deemed given five (5) days after deposit in the U.S. Mail, postage prepaid, return receipt requested, addressed to the respective party and their address opposite their signature on the signature page hereto.

7.4. Attorneys' Fees. Should any action be brought to enforce any of the provisions of this agreement, including arbitration, the prevailing party shall be entitled to reasonable attorney's fees in addition to any other damages to which such party may be entitled.

7.5. Integration. This agreement is the entire agreement of the parties hereto and supersedes any and all written or oral communication prior to the date hereof and may be modified only in writing executed by both parties.

7.6. Arbitration. Any disputes concerning this agreement or its performance shall be submitted to arbitration in accordance with the provisions of the California Code of Civil Procedure.

7.7. Conflicts of Interest. Certain individuals are presently officers and directors of both SDYC and Sail America, and this may continue in the future. The terms of this agreement have been agreed on with this fact in mind and in the good faith belief that, notwithstanding these conflicts of interest, the agreement is just and reasonable to both parties. The officers executing this agreement below certify that their respective Boards of Directors duly voted to approve this agreement with the abstention of persons holding offices, or being directors, in both corporations.

San Diego Yacht Club

By: Richard C. Knöth
Richard C. Knöth,
Comodore

By: Michael O. Bryan
Michael O. Bryan
Vice Comodore

Sail America Foundation for
International Understanding

By: Malin Burnham
Malin Burnham, President

AMERICAN ARBITRATION ASSOCIATION

SAN DIEGO YACHT CLUB

-- AND --

SAIL AMERICA FOUNDATION FOR
INTERNATIONAL UNDERSTANDING

ARBITRATION BRIEF OF THE SAN DIEGO
YACHT CLUB IN SUPPORT OF THE EXISTING
SAN DIEGO AMERICA'S CUP COMMITTEE
APPOINTED BY THE BOARD OF DIRECTORS OF
THE SAN DIEGO YACHT CLUB
ON APRIL 18, 1987

Arbitrator:
Honorable Charles W. Froehlich, Jr.

PATRICK CARROLL SHEA
A Professional Corporation
JOHN Y. LIU
LILLICK McHOSE & CHARLES
101 West Broadway, Suite 1800
San Diego, California 93202
Telephone: (619) 234-5000

Or, are we to today behind or at best equal in those areas? If we are to relinquish our present lead what will it take in money, time, testing, etc. to regain the initiative?]

Sail America owns a valuable inventory of state of the art heavy air America's Cup gear. We own the two fastest heavy air 12's in the world, several tough, reliable masts, at least 50 good heavy air sails. Our two boats alone give us a million dollar investment and thus create instant parity for the Germans, Japanese and other newcomers. Other teams like the Kiwis and Italians already own good light air boats. Would they go from behind to ahead in costly trail horse boats if we race in San Diego?"

It is repugnant to any sense of fair or friendly sportsmanlike competition, as well as to the Agreement and Deed of Gift, for the Syndicate as player, manager, and referee to have the opportunity to manipulate the rules, trials, defender selection, and site of the next America's Cup races in order to favor its own yachts and its own skipper. Yet this appears to be precisely the Syndicate's intention, however it may protest at this arbitration.

C. Syndicate Control of the Cup Committee Would Violate the Deed of Gift.

The America's Cup competition is one of the oldest continuing sporting events in the world. America's Cup races have been held regularly for over a hundred years, pursuant to the century-old Deed of Gift. The letter and spirit of the Deed of Gift supersede any more recent rule, regulation, or agreement concerning the America's Cup competition, including the Agreement at issue here. Indeed, the Agreement repeatedly

recognizes that the parties' own agreements are effective subject to the Deed of Gift, in Paragraph 1.1 (as respects the 1987 Challenge), in Paragraph 2.2 (as respects future defenses), and elsewhere in the Agreement.

To the extent that the Agreement is inconsistent with the Deed of Gift, it cannot stand. To the extent that a party attempts to contravene the Deed of Gift, it must be restrained.

The Syndicate's attempt to control the Cup Committee is completely inconsistent with the letter and spirit of the Deed of Gift. For a century, the Deed of Gift has explicitly provided that (1) the site of the Cup races shall be decided by the defending yacht club, (2) that the America's Cup is "distinctly understood" to be the property of the winning yacht club and not of any person or syndicate owning the winning yacht, and (3) that the America's Cup competition is to forever remain a competition between the world's yacht clubs, not commercial syndicates. The Club never intended to change these precepts by its 1985 contract. Even had the Club so intended, they could not have lawfully done so.

Under the Agreement, the Cup Committee oversees the actions of the Syndicate in managing the Cup's defense, commercially exploiting the races and the America's Cup itself, or choosing a venue for the races. Should the Syndicate succeed in controlling the Cup Committee, thus depriving the Club of its bargained-for voting control, the Syndicate will possess effectively unfettered powers to decide the site of

sure Cup races and to control and exploit the America's Cup itself, and this century-old sporting institution will be forever changed from an amateur competition between yacht clubs to a televised marketing extravaganza, nominally a sporting contest, between private syndicates operated for profit. For the Syndicate to suggest that such results would not violate the Deed of Gift is to value form over reality.

The Club submits that such a fundamental subversion of the America's Cup competition is utterly in violation of the terms of the Deed of Gift, and must not be countenanced.

VI

NOR HAS THE SYNDICATE ANY CLAIM
FOR DETRIMENTAL RELIANCE

In the absence of any support from the the Agreement, California law, or the Deed of Gift, the Syndicate may finally claim that informal conversations between Malin Burnham and other representatives of the Syndicate, on the one hand, and Commodore Frye and other members of the Club Board, on the other, somehow constituted "binding representations" that certain nominees for the Cup Committee would be approved, upon which Mr. Burnham relied. The Syndicate may present self-serving testimony by Mr. Burnham and other trustees of the Syndicate that at various times, over lunch or at informal meetings, they discussed various possible nominees with Commodore Frye or other members of the Club Board, and that

MERCURY BAY BOATING CLUB
INC.

ESTABLISHED 1948

15th July 1987

The Board of Directors
San Diego Yacht Club
1011 Anchorage Lane
San Diego
California 92106
UNITED STATES OF AMERICA

Gentlemen,

NOTICE OF CHALLENGE FOR THE AMERICA'S CUP

It is with much pleasure that the Mercury Bay Boating Club Incorporated hereby formally challenges San Diego Yacht Club to a match for the America's Cup to be sailed over three ocean courses in the manner set forth in the America's Cup Deed of Gift.

In accordance with the requirements of the Deed of Gift that ten months notice be given we name 1st June 1988 as the date of the first race, and 3rd and 7th June 1988 as the dates for the second and third races respectively.

This Notice of Challenge is given in accordance with the America's Cup Deed of Gift dated 24 October 1887 between George L. Schuyler and the New York Yacht Club as amended by Orders of the Supreme Court of the State of New York dated 17 December 1956 and 5 April 1985.

We advise that the owner of the challenging vessel is Mr H.M.G. Fay, a member of this Club.

Accompanying this Notice in accordance with the Deed of Gift is the Certificate as to the name, rig and specified dimensions of the challenging vessel. The 'Custom House' registry of the challenging vessel will be sent as soon as possible.

We appreciate that you may seek alternative courses, additional races and perhaps to establish particular rules and sailing regulations applicable to the forthcoming match. In such case we would be pleased to discuss these matters with you at the first opportunity.

-2-

The Board of Directors
San Diego Yacht Club

15 July 1987

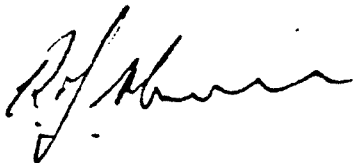
Should we not hear from you within one month we shall consider such matters as settled and would request that you send as soon as possible a copy of your Club's rules and sailing regulations.

This Club, its Flag Officers and membership are respectful of the traditions and history of the America's Cup and look forward enthusiastically to this match.

Yours sincerely,



COMMODORE
MERCURY BAY BOATING CLUB INC.



MEMBER, GENERAL COMMITTEE
MERCURY BAY BOATING CLUB INC.

Enclosure: Certificate of Mr H. M. G. Fay as to name, rig
and specified dimensions of the challenging vessel.

MERCURY BAY BOATING CLUB
INC.

ESTABLISHED 1948

Board of Directors
San Diego Yacht Club
1011 Anchorage Lane
San Diego
California 92106
UNITED STATES OF AMERICA

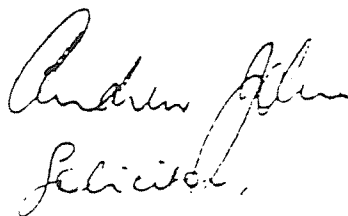
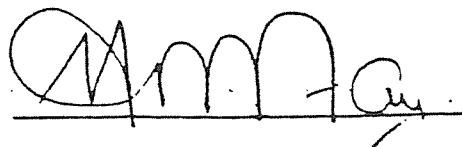

15 July 1987

CERTIFICATE
OF NAME, RIG AND SPECIFIED DIMENSIONS
OF CHALLENGING VESSEL

I, HUMPHREY MICHAEL GERARD FAY, certify the details set out below as to the name, rig and specified dimensions of the keel yacht to represent Mercury Bay Boating Club Incorporated in a match for the America's Cup to be sailed in accordance with the Notice of Challenge herewith:

1. Name - "New Zealand" ;
2. Rig - single masted, sloop rigged ;
3. Dimensions -
 - (a) Length on load waterline - 90 feet
 - (b) Beam at load waterline - 14 feet
 - (c) Extreme beam - 26 feet
 - (d) Draught of water - 21 feet

Signed by
HUMPHREY MICHAEL GERARD FAY
in the presence of:-

IAS
At a ~~Term~~, Part 15, of
the Supreme Court of the
State of New York, held in
and for the County of New
York, at the Courthouse,
located at 60 Centre
Street, New York, New York
on the 31st day of August,
1987.

A. BEAUCHAMP CIPARICK

Present: Hon. _____, Justice

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

THE MERCURY BAY BOATING CLUB INC. :
Plaintiff, :
-against- :
SAN DIEGO YACHT CLUB and :
ROYAL PERTH YACHT CLUB OF :
WESTERN AUSTRALIA (INC.), :
Defendants. :

ORDER TO SHOW CAUSE
WITH TEMPORARY
RESTRAINING ORDER
Index No. 21299/87

-----X

Upon reading and filing the annexed Complaint for Preliminary Injunction, Declaratory Relief and Rescission, verified the 28th day of August, 1987, and the exhibits thereto, the Affidavits of George N. Tompkins, Jr. sworn to August 28, 1987, and Raymond John Morcom, sworn to August 28, 1987 and Humphrey Michael Gerald Fay, sworn to August 28, 1987, and exhibits thereto and it being alleged that defendant SAN DIEGO YACHT CLUB (hereinafter "SDYC") is acting

in breach of and in violation of the rights of plaintiff THE MERCURY BAY BOATING CLUB INC. (hereinafter "MBBC") arising out of the Deed of Gift for the AMERICA'S CUP, causing immediate and irreparable injury to plaintiff MBBC, and other good and sufficient cause being alleged, it is:

At IAS Part 15 (Som 3rd)
ORDERED that defendant SDYC show cause before this Court, at the County Courthouse, 60 Centre Street, on the 9th day of September, 1987, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard why:

(1) a preliminary injunction should not be issued pursuant to CPLR 6301, pending the determination of this action, enjoining and restraining defendant SDYC, its agents, servants and employees, and all persons acting under, in consort with or for SDYC, including Sail America Foundation for International Understanding, SDYC's announced manager for the AMERICA'S CUP defense, from soliciting, entertaining or considering any other challenges for the AMERICA'S CUP until the event specified in the MBBC Notice of Challenge dated July 15, 1987 has been decided and from dictating, specifying, planning or deciding upon the conditions and procedures for any event until the pending MBBC Notice of Challenge event has been decided, on the ground that these acts are in violation of the plaintiff MBBC's rights arising under the Deed of Gift for the AMERICA'S CUP, tend to render

any judgment ineffectual and, if continued during the pendency of this action, would produce irreparable injury to plaintiff MBBC; and why

(2) an Order should not be entered declaring that the MBBC Notice of Challenge is valid and enforceable and recognizing and enforcing the right of MBBC to sail a match for the AMERICA'S CUP in accordance therewith and further declaring that if SDYC nevertheless refuses to defend the AMERICA'S CUP in response to and in accordance with the MBBC Notice of Challenge, SDYC is in breach of the trust, terms and conditions of the Deed of Gift and has forfeited its right to continue as Trustee under the Deed of Gift and holder of the AMERICA'S CUP and further declaring that MBBC, as the issuer of an uncontested challenge for the AMERICA'S CUP fulfilling all the conditions required by the Deed of Gift, is the rightful Trustee, holder and defender of the AMERICA'S CUP by default and forfeiture of SDYC.

(3) ALTERNATIVELY, why an Order should not be entered rescinding the SDYC Assignment and Acceptance and directing the return of the AMERICA'S CUP to the Royal Perth Yacht Club of Western Australia (Inc.), as assignor under the SDYC Assignment and Acceptance if SDYC does not defend the AMERICA'S CUP in response to and in accordance with the MBBC Notice of Challenge.

U.S.C.

Pending the hearing ~~and determination~~ of this action, it appearing that immediate and irreparable injury, loss or damage will result unless defendant SDYC is restrained before a hearing can be had, defendant SDYC, its agents, servants and employees, and all persons acting under, in consort with or for SDYC, including Sail America Foundation for International Understanding, SDYC's announced manager for the AMERICA'S CUP defense, hereby are enjoined and restrained from soliciting, entertaining or considering any challenge until the event specified in the MBBC Notice of Challenge has been decided and from dictating, specifying, planning or deciding upon the conditions and procedures for any other event until the pending MBBC Notice of Challenge event has been decided.

§ Plaintiff's undertaking is fixed in the sum of

10,000. (One Hundred Thousand Dollars)

~~No previous application has been made for the relief requested or for any other provisional remedy pursuant to CPLR 6001.~~

~~The above-entitled action is brought for preliminary injunction, declaratory relief, and alternatively for rescission.~~

Sufficient reason appearing therefore, let a copy of this Order and the Summons and Complaint and all other papers upon which it is granted be served:

(1) by personal delivery upon SDYC at its offices in San Diego on or before the 1st day of September, 1987; and

(2) by ~~DHL or comparable international courier~~ ^{personal} service on defendant RPYC at its offices in Perth or Fremantle, Western Australia on or before the 4th day of September, 1987; and

(3) by personal delivery upon the office of the Attorney General of the State of New York, as the representative of the public interest in the Deed of Gift of the AMERICA'S CUP, which is a charitable trust created under the laws of the State of New York, on or before the 4th day of September, 1987.

**ALL COUNSEL FOR PARTIES
OR PRO SE LITIGANTS MUST
APPEAR ON RETURN DATE**

Enter,



J.S.C.

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

-----X
THE MERCURY BAY BOATING CLUB INC. :

Plaintiff, :

- against - :

SAN DIEGO YACHT CLUB and ROYAL PERTH
YACHT CLUB OF WESTERN AUSTRALIA
(INC.), :

Defendants. :

: AFFIDAVIT IN
SUPPORT OF ORDER
: TO SHOW CAUSE
WITH TEMPORARY
: RESTRAINING ORDER

: Index No. 21299/87

-----X
STATE OF NEW YORK :
: ss:
COUNTY OF NEW YORK :

GEORGE N. TOMPKINS, JR., being first duly sworn,
deposes and says:

1. I am an attorney and counselor at law and a member of the firm of Condon & Forsyth, attorneys for plaintiff THE MERCURY BOATING CLUB INC. (hereinafter "MMBC"). I submit this Affidavit in support of the attached Order to Show Cause with Temporary Restraining Order.

2. As fully set forth in the Deed of Gift for the AMERICA'S CUP, attached as Exhibit "A" to the Complaint, MBBC clearly is entitled to sail a match for the AMERICA'S CUP in accordance with the MBBC Notice of

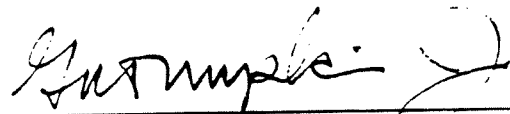
Challenge, dated July 15, 1987, which is attached as Exhibit "G" to the Complaint. That the MBBC Notice of Challenge meets each and every requirement of the Deed of Gift is evident from the Affidavits of Messrs. Raymond John Morcom and Humphrey Gerald Michael Fay, sworn to August 28, 1987, which are attached hereto as Exhibits "A" and "B", respectively.

3. The Order to Show Cause with Temporary Restraining Order should be granted because defendant SAN DIEGO YACHT CLUB ("SDYC"), the present Trustee under the Deed of Gift and holder the AMERICA'S CUP, has refused to sail the match for the AMERICA'S CUP to which MBBC clearly is entitled under the terms of the Deed of Gift and MBBC Notice of Challenge, and actively is soliciting and considering challenges for a different AMERICA'S CUP event to be held in 1990-1991. In so doing, SDYC is acting in breach of its fiduciary position as Trustee under the Deed of Gift and holder the AMERICA'S CUP and in clear violation of MBBC's rights under the Deed of Gift. Unless the Order to Show Cause with Temporary Restraining Order is granted MBBC will immediately and irreparably be deprived of its clear right to sail a match for the AMERICA'S CUP in accordance with the Deed of Gift and the MBBC Notice of Challenge and SDYC will be permitted to control the conditions governing the selection of a challenger in a

manner that is contrary to the express terms and purpose of the Deed of Gift and the intent of the donor of the AMERICA'S CUP.

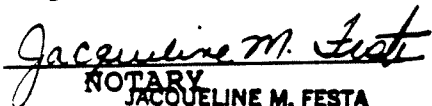
4. There is no adequate remedy at law and no previous application for the same or similar relief has been requested or for any other provisional remedy.

WHEREFORE, deponent respectfully requests that the Order to Show Cause annexed hereto and containing Temporary Restraining Order be granted as prayed for therein.



GEORGE N. TOMPKINS, JR.

Sworn to before me
this 28th day of
August, 1987.



NOTARY
JACQUELINE M. FESTA
Notary Public, State of New York
No. 4792342
Qualified in Westchester County
Commission Expires Aug. 31, 1989

At the IAS, Part 15,
Room 325 of the Supreme
Court of the State of New
York, County of New York,
held at the Courthouse, 60
Centre Street, New York,
New York, on the 4th day
of September, 1987.

PRESENT: Hon. C. Beauchamp Ciparick
Justice

-----X
: In the Matter of the Application of :
: SAN DIEGO YACHT CLUB, : Index No. 21809/87
: :
: Petitioner, : ORDER TO
: : SHOW CAUSE
: for an order pursuant to EPTL :
: Section 8-1.1(c)(1) or otherwise, :
: interpreting the Deed of Gift :
: of the America's Cup, or in the :
: alternative amending the terms of :
: said Deed of Gift. :
-----X

Upon reading and filing the annexed affirmation of James E. Brandt, dated September 3, 1987, the exhibits annexed thereto, and upon the verified petition herein.

LET the Attorney General of the State of New York show cause at IAS Part 15, Room 325 of this Court, to be held at the Courthouse, 60 Centre Street, New York, New York, on the 9th day of September, 1987 at 9:30 o'clock a.m., or as soon thereafter as counsel can be heard, why an Order should not be entered herein:

1. declaring that San Diego Yacht Club is not required to accept The Mercury Bay Boating Club, Inc.'s challenge to the exclusion of all other challengers; and
2. that San Diego Yacht Club, as trustee of the America's Cup under the Deed of Gift, is authorized and empowered to follow the reasonable and fair practices adopted by it and prior trustees of the Cup in conducting and administering the America's Cup competition; or alternatively

3. interpreting, reforming, amending or ratifying a de facto amendment to the Deed of Gift to allow the trustee of the America's Cup to (a) designate a reasonable period of time after its victory in a match for the cup in which any qualified yacht club may submit a challenge for the next match; (b) make arrangements for a series of elimination races to select the challenger in the event more than one challenge is received; (c) designate a particular class or design rule of yachts in which the challenging club or clubs and the defending club shall compete, with not less than two years' notice if the immediately preceding competition was conducted in a different class or under a different design rule; and (d) provide that the competition be held no more often than once in three years; and

4. Such other and further relief as the Court may deem just and proper.

Sufficient reason appearing therefore, let service of a copy of this Order, together with the papers on which it is granted, upon the Attorney General of the State of New York at its Charities Bureau, 120 Broadway, Room 329, New York, New York 10271 by

5:00 o'clock p.m. on the 4th day of September, 1987, be

deemed good and sufficient service. and by certified mail or courier on all known attorneys of parties to the related action of Me...

Proof of service must be submitted to IAS Part __, Room __, Bal... of this Court not later than on the return date.

Boatman
v. Sarg
Yacht Club
and Ed
Perth Yacht
Club of West
Australia
no attorney
known, the
known as
of party

E N T E R

All Counsel For Parties
OR Pro Se Litigants
MUST APPEAR ON RETURN
DATE

S/
J.S.C.
New York County

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

In the Matter of the Affirmation of
SAN DIEGO YACHT CLUB,

Petitioner,

for an order pursuant to EPTL
Section 8-1.1(c)(1) or otherwise,
interpreting the Deed of Gift
of the America's Cup, or in the
alternative amending the terms of
said Deed of Gift.

Index No.

AFFIRMATION IN
SUPPORT OF ORDER
TO SHOW CAUSE

JAMES E. BRANDT hereby affirms, under penalty of
perjury, that:

1. I am a member of the bar of this Court and an
attorney at the law firm of Latham & Watkins, attorneys for
petitioner herein, San Diego Yacht Club. I submit this
affirmation in support of San Diego Yacht Club's attached
order to show cause.

2. San Diego Yacht Club (the "Trustee"), as most
recent victor of the America's Cup competition, is the
present holder and trustee of the America's Cup. The
America's Cup had originally been won by the the yacht
"America" in a race around the Isle of Wight in England on
August 22, 1851, and the trophy was ultimately (after
several terminated transfers) gifted by George Schuyler to
the New York Yacht Club pursuant to deed of gift, dated
October 24, 1887 (the "Deed"). (A copy of the Deed is

Exhibit A to the Petition.) Under the Deed, subsequent victors in the America's Cup competitions become successor trustees. As successor trustee under the Deed, the Trustee has the responsibility to carry out the purpose of the donor of the America's Cup.

3. On July 17, 1987, the Mercury Bay Boating Club, Inc. ("MBBC") issued a purported challenge for the America's Cup. In derogation of the accepted and appropriate practice, the challenge purports to require a one-on-one match race and a boat size wildly out of line with that standard in modern competition. The Trustee has continued with its plans to conduct a truly international competition, in which MBBC is welcome to participate, in accordance with the accepted and appropriate interpretation of the Deed and the historical practice.

4. On September 1, 1987, MBBC, attempting to win in the courts what it apparently does not believe it can win in a genuine competition, instituted an action against the Trustee in this Court, entitled The Mercury Bay Boating Club Inc. v. San Diego Yacht Club and Royal Perth Yacht Club of Western Australia, Index No. 21299/87. MBBC simultaneously served the Trustee with a temporary restraining order and an order to show cause setting a hearing on September 9, 1987 to consider MBBC's requests for preliminary injunctive relief. MBBC's order to show cause requests preliminary

relief alternatively (i) sustaining MBBC's challenge; (ii) appointing MBBC victor by default and so successor Trustee; or (iii) returning the America's Cup to the Royal Perth Yacht Club of Western Australia (Inc.), the predecessor trustee. At base, MBBC's motion asks this Court to interpret the Deed so as to determine whether its challenge must be honored.

5. The Trustee does not believe that MBBC can prevail on its motion. It believes that, as set out in its accompanying verified petition (the "Petition"), the proper interpretation of the Deed would invalidate MBBC's challenge in favor of the traditional and truly international America's Cup competition with which the public has become so familiar. (A copy of the Petition, exhibits and supporting affidavits is attached as Exhibit A.) In addition, for reasons that will be explained in more detail in its papers opposing MBBC's request for preliminary relief, the Trustee believes that MBBC's action does not provide this Court the appropriate jurisdictional basis for interpreting the Deed. Among other things, suffice it here to say that, in derogation of the statutory requirements, MBBC did not even name the New York State Attorney General, a necessary party, in its action. E.P.T.L. § 8-1.4(e)(1). Finally, and perhaps most to the point, the Trustee is concerned that even the expected denial of MBBC's request

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for relief will not provide the certainty required to allay the significant concerns of the interested parties generated by MBBC's action, since the Court's determination will necessarily be preliminary.


6. Nonetheless, the Trustee does agree with MBBC that a prompt resolution of the Deed's proper interpretation is absolutely critical. As the accompanying affidavits in support of the Petition explain, the uncertainty created by MBBC's challenge and lawsuit (and its determined international publicity campaign) is, among other things, (i) threatening imminent and permanent damage to the ability of proper challengers to raise the funds necessary to mount their valid challenges; (ii) jeopardizing the funds that have already been and continue to be spent in preparing challenges; and (iii) impeding the Trustee's ability to plan, implement and market the next America's Cup competition. (See, e.g., September 9, 1987, article in The New York Times, attached as Exhibit B.) The Trustee believes that the special proceeding it is now instituting is jurisdictionally proper and provides the Court a basis promptly to determine the proper interpretation of the Deed, and thus to establish the rights of all of the interested parties, including the intended beneficiaries of the trust, the international sailing community.

7. By this order to show cause, the Trustee is requesting that this matter be determined in accordance with MBBC's proposed time schedule, but in the appropriate format and with the appropriate parties. MBBC, which has requested that the Court issue closely related extraordinary injunctive relief on the same time-frame, can hardly claim prejudice. Similarly, scheduling this matter to coincide with the hearing granted to MBBC can only benefit the Court since it will avoid the unnecessary burden of duplicative proceedings. The Trustee simply believes that the special proceeding it has instituted provides the Court the proper procedural basis to accord the complete relief appropriate here.

8. No prior request for this relief or any other provisional remedy has been made.

WHEREFORE, affirmant respectfully requests that the Order to Show Cause annexed hereto be granted.

Dated: September 4, 1987


James E. Brandt, Esq.

SUPREME COURT : NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 15

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-----x
THE MERCURY BAY BOATING CLUB, INC.,

Plaintiff,

Index No.

-against-

21299/87

SAN DIEGO YACHT CLUB and ROYAL
PERTH YACHT CLUB OF WESTERN
AUSTRALIA (Inc.),

Defendants.

-----x
In the Matter of the Application of
SAN DIEGO YACHT CLUB,

Petitioner,

for an order pursuant to EPTL
Section 8-1.1(c)(1) or otherwise,
interpreting the Deed of Gift of
the America's Cup, or in the
alternative amending the terms of
said Deed of Gift.

-----x
CARMEN BEAUCHAMP CIPARICK, J.:

The New York Yacht Club seeks leave to intervene as of right (CPLR 1012[a][2]) or in the exercise of discretion (CPLR 1013) in the proceeding commenced by the San Diego Yacht Club for an order interpreting or amending the Deed of Gift of the America's Cup (Case #2).

While intervention as of right does not appear to be warranted, the court is inclined to exercise its discretion to permit intervention by New York Yacht Club as the original trustee to the America's Cup from its beginning in 1857 and holder of the cup until 1983. The court notes that the Attorney General, as the statutory representative of the interests of the

cc -

beneficiaries of the charitable trust, does not oppose the relief sought by San Diego Yacht Club and that the proposed changes have been the source of much controversy in the yachting community.

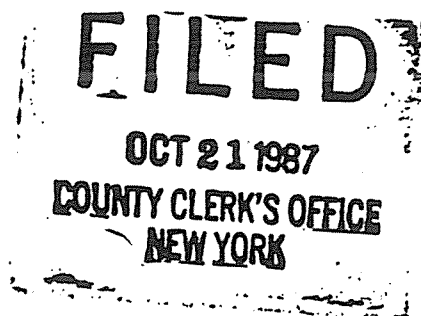
Therefore, to ensure full litigation of this controversy and in the interests of justice, the New York Yacht Club should be permitted to intervene to advance its views in opposition to the proposed interpretation or amendment of the deed.

Accordingly, the motion for leave to intervene is granted. The answer in the form annexed shall be deemed served upon service of a copy of this order with notice of entry thereof. The intervenor shall serve this order upon the remaining parties within three days.

This constitutes the order of the Court.

DATED: October 13, 1987


J. S. C.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
THE MERCURY BAY BOATING CLUB INC.,

Plaintiff,

- against -

SAN DIEGO YACHT CLUB and ROYAL PERTH YACHT
CLUB OF WESTERN AUSTRALIA (INC.),

Defendants.
-----X

In the Matter of the Application of
SAN DIEGO YACHT CLUB,

Petitioner,

for an order pursuant to EPTL Section
8-1.1(c)(1) or otherwise, interpreting
the Deed of Gift of the America's Cup, or
in the alternative amending the terms of
said Deed of Gift.
-----X

Index No.

21299/87

Case 1

Index No.

21809/87

Case 2

CARMEN BEAUCHAMP CIPARICK, J.:

This controversy arises out of the refusal of the San Diego Yacht Club to entertain the July 15, 1987 challenge of the Mercury Bay Boating Club of New Zealand (and Michael Fay) to sail a match in June 1988 for the America's Cup, using yachts measuring ninety feet on the load-water line, or J-class yachts. "J-boats" are large ocean-going yachts that were used in the America's Cup competition prior to World War II and are approximately two times the size of the twelve-metre yachts used in the races since 1958. San Diego Yacht Club is the current holder of the America's Cup (since 1987 when it took the cup from the Royal Perth Yacht Club) and the trustee under the Deed of Gift of the Cup. Cases #1 and #2 have been consolidated for

disposition.

In case #1, Mercury Bay Boating Club seeks declaratory relief against San Diego Yacht Club relating to the validity of its challenge as well as an injunction precluding consideration or solicitation of other challenges until Mercury Bay's challenge, which is concededly the first one received by San Diego, is decided. In support of its request for injunctive relief Mercury Bay Boating Club relies upon the express language of the deed which mandates: ". . . when a challenge from a club fulfilling all the conditions required in this instrument has been received, no other challenge can be considered until the pending event is decided."

Following receipt of Mercury Bay's challenge, San Diego Yacht Club commenced action #2 for interpretation or amendment of the America's Cup Deed of Gift and certain declaratory relief. The relevant instrument is the 1887 Deed of Gift (incorporating two prior amendments and one order of interpretation) of the America's Cup by the donor George L. Schuyler to the New York Yacht Club. The cup was donated "upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries." The deed provides that "[a]ny organized Yacht Club of a foreign country . . . having for its annual regatta an ocean water course on the sea, or an arm of the sea . . . shall always be entitled to the right of sailing a match for this cup."

San Diego Yacht Club ("SDYC") specifically objects to the

dimensions or size of the boat provided for in the New Zealand challenge (a ninety footer, the largest boats provided for in the deed, rather than the smallest, twelve metre yachts) and to the proposed time of the race ten months following receipt of the notice of challenge. Under the deed the challenger may determine the dimensions of the boat, within a limited size range as well as the time of the race, subject to the minimum ten month notice period. The defender sets the venue and the courses for the race, subject to a mutual consent provision. The mutual consent clause states 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 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 provision may be waived." In the following paragraph the deed dictates certain terms for the match which govern absent mutual agreement.

The problem here is that the challenger wants to race for the cup in a yacht measuring ninety feet on the load-water line which is at the upper size limit under the deed. The deed reads: "[t]he competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load-water line" In 1956 the deed was amended for the first time to eliminate the requirements that the boats sail to the place of the race "on its own bottom." More relevant to this dispute, the deed was also amended to reduce the minimum load-water line from sixty-five feet to forty-four feet to permit the

use of the twelve-metre boats used in recent years. The post-World War II amendment was sought to revive the cup since the New York Yacht Club had not been challenged for a race in almost twenty years. The smaller boats were thought to be cheaper to build than the large yachts.

The only other amendment to the deed was ordered in 1985 to provide for races in the Southern hemisphere between certain dates so that the Royal Perth Yacht Club, which won the cup in 1983, could host the event in Australia. Thereafter, in 1987, the San Diego Yacht Club defeated the Australians for the cup.

In 1985, the "arm-of-the-sea provision", which relates to which clubs are qualified to challenge for the cup, was interpreted by the court to include Lake Michigan to allow the Chicago Yacht Club to participate in the elimination series for the right to challenge Royal Perth for the cup. With the exception of the 1956 and 1985 amendments, the 1887 deed (the third deed) remains unchanged.

PROPER PARTIES

The court agrees that the Attorney General is a necessary party to this litigation (EPTL 8-1.1). Any defect regarding the absence of the Attorney General as a party to case #1 is cured by the prior consolidation of cases #1 and #2. The court notes that the Attorney General has always been on notice by service of all papers in action #1 and has been a party to action #2 since its commencement. In view of the foregoing, San Diego Yacht Club's argument that this proceeding is procedurally or jurisdictionally

defective due to the absence of the Attorney General in case #1 is without merit.

STANDING

San Diego Yacht Club contends that Mercury Bay Boating Club, as a mere beneficiary of a charitable trust, lacks standing to bring case #1 or to participate in case #2. Consolidation of the two proceedings renders the standing issue largely academic since the issues (with the exception of Mercury Bay's request for injunctive relief) have been submitted to the court in case #2 by the San Diego Yacht Club as a trustee and can be decided in the context of the trustee's request for interpretation or amendment of the deed. Therefore, standing by Mercury Bay to allow the club to maintain a separate action is not crucial. It appears that Mercury Bay has standing in any event. Although a person having a special interest is sometimes permitted to maintain a suit to enforce a charitable trust, the mere possibility that one may be a beneficiary does not confer standing to maintain a suit to enforce the trust (18 N.Y. Jur. 2d Charities² Sec. 40). Generally, it is for the Attorney General to act as the representative of the beneficiaries of charitable trusts (EPTL 8-1.1[f]). However, Mercury Bay Boating Club is more than just a possible beneficiary under the deed, having issued a formal challenge for the cup. As a general rule, the remedy of a beneficiary is to petition the Attorney General to champion the cause. However, in this case, the Attorney General supports the position of the San Diego Yacht Club in all respects requiring Mercury Bay to participate or not have its position represented.

VALIDITY OF THE CHALLENGE

Turning to the substantive issues, San Diego Yacht Club contends that Mercury Bay's challenge is invalid because the challenger's boat has not yet been completed. In short, SDYC claims that unless the parties mutually agree otherwise, the boat must be in existence at the time the challenge is issued. Nowhere in the deed is such a requirement expressly set forth. The deed states that: "[t]he Challenging Club shall give ten months' notice, in writing, naming the days of the proposed races Accompanying the ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig, and the following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and a custom-house registry of the vessel must be sent as soon as possible"

The Mercury Bay/Michael Fay notice of challenge and accompanying certificate contain all the information required under the deed. San Diego Yacht Club argues, however, that the deed of gift uses the term "vessel" and therefore the challenge is invalid since the boat is not completed and in existence. SDYC points to the legal definition of the word "vessel" and to general principles of Maritime Law which provide that something is a vessel once it is built, measurable and perhaps even launched. SDYC also points out that the custom-house registry (or equivalent) which is required to be sent "as soon as possible" by the deed cannot be obtained until a vessel is

completed and measured. San Diego claims that the "as soon as possible" language was added to the 1887 deed because pleasure craft do not uniformly require such registration and a challenger with an existing boat may have to obtain the requisite registry and send it to the defender later. However, another interpretation of the phrase might indicate that the trust instrument anticipated that the challenging craft might not be completed and therefore the registry was to follow at a later date. The court further notes that the trust instrument, contrary to SDYC's argument, does not address the term vessel in the present tense at the time of the challenge. A reading of the instrument indicates a more feasible use of the term vessel, by applying it to the boat at race time.

The history of the cup, in particular the events of 1887, shed light on the contention that the boat must be in existence at the time of the challenge. In October, 1887, the America's Cup deed was redrafted following the 1887 race between "Volunteer", representing the New York Yacht Club and the challenger "Thistle" sent by the Royal Clyde Yacht Club of Scotland.

The Thistle challenge was made when the yacht was not yet built. The specified dimensions based upon information provided by Thistle's designer stated that the boat would measure eighty-five feet on the load-water line. When the Thistle was completed and measured at the site of the race, it was longer on the water line than specified in the notice of challenge (86.46 feet rather than 85 feet) and longer than the defender, Volunteer. The

discrepancy of 1.46 feet was significant since a longer boat is potentially more powerful and faster. Therefore, the question of whether the Thistle should be allowed to race was ultimately referred to the surviving donor of the cup, George L. Schuyler. Mr. Schuyler found that the discrepancy was not so great as to disqualify the challenger especially since the error was thought to be the fault of the ship's designer. Thistle was permitted to race, subject to a time allowance penalty based upon the extra length. Volunteer won, but only with the benefit of the time correction used to equalize the boats.

Shortly after completion of the 1887 defense the New York Yacht Club received a sort of "challenge" from Charles Sweet, a member of both the New York Yacht Club and the Royal Clyde Yacht Club. Mr. Sweet sent a letter offering to resign from the New York Yacht Club and informing the Club of his future intent to challenge for the cup. Sweet told the club that ". . . the formal challenge with the documents and particulars required by the deed of gift will be forwarded as soon as possible . . ."

After receiving Sweet's letter, the New York Yacht Club as trustee made preparations to draft a new (third) deed, the 1887 deed at issue herein. The same day (October 27, 1887) that the new deed was accepted by the New York Yacht Club, the Sweet "challenge" was rejected.

A classic book on the history of the cup until 1901, The Lawson History of the America's Cup: A Record of Fifty Years (W. Thompson & T. Lawson, 2d ed. 1986) indicates that the Sweet

challenge was rejected because it involved a boat not yet built and not in accordance with the new deed of gift. With due deference, the court notes that the copies of the New York Yacht Club minutes for the meeting held on October 27, 1887 do not support the above and instead indicate that the ostensible "challenge" was rejected because Sweet merely made known his intention to make a future challenge. The club determined not to consider the matter further until a formal challenge was submitted.

The new deed of 1887, whereby the cup was reconveyed to the New York Yacht Club, set out the relevant requirements for making a challenge. For instance, as noted above, the deed provides that the challenger sets the dates of the match but shall give a minimum of ten months' notice. Again, "accompanying the ten months' notice of challenge there must be sent the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line; beam at load water-line and extreme beam; and draught of water; which dimensions shall not be exceeded; and a custom-house registry of the vessel must also be sent as soon as possible."

The above requirements are fixed under the deed and are not subject to the mutual consent clause. After a valid challenge has been made, the parties are free to make arrangements by mutual agreement, for example as to dates and courses of the race. Other than the size range for competing boats, the deed makes no design constraints other than that center boards and sliding keels shall always be permitted and are not considered

part of the boat for measurement purposes. The 1887 deed provides that time allowances would be abandoned and that all races are to be held over ocean courses free from headlands and practicable for vessels of twenty-two feet draught.

The dimensions of the challenging vessel were to be sent along with the notice of challenge so that the defender would know what kind of boat it would face. If either boat were inaccurate on its dimensions, there would be a default, rather than a correction by time allowance.

Again, nowhere in the deed is there listed a requirement that the challenging boat must be in existence to render a challenge valid. Even after the Thistle incident, the donor did not expressly require the boat to be in existence. Instead, the time correction penalty was eliminated to indicate that if the dimensions exceeded those sent with the notice of challenge, the challenger would forfeit the right to sail a match for the cup.

Clearly, if the donor had intended to respond to the Thistle incident by requiring the challenging boat to be in existence at the time of the challenge the deed could have been amended to so provide. Instead, the grantor provided for the challenger to build at its peril.

Furthermore, the court rejects San Diego's contention that prior challenges accepted when the yachts were not yet built were plausible only under the mutual consent provision. The mutual consent clause refers to the arrangements for a match and not to the validity of the notice of challenge. Based upon a

comprehensive review of the relevant provisions of the deed as well as past practice, the court concludes that the challenge by Mercury Bay Boating Club is valid and that it conforms to the terms of the deed. Both past practice and the trust instrument support a finding that the challenging boat need not be completed at the time of the challenge.

REQUESTED CY PRES RELIEF

As an additional ground for relief if faced with a valid challenge, San Diego Yacht Club contends that adherence to the literal terms of the deed by allowing the Mercury Bay challenge to proceed would destroy the cup. Relying on the statutory cy pres doctrine (EPTL 8-1.1[c]) San Diego as trustee of the cup requests that the court interpret or amend the deed in part to conform with certain post-World War II customs and practices utilized by the New York Yacht Club and the Royal Perth Yacht Club.

San Diego wants the America's Cup to be sailed in twelve-metres in 1990 or 1991 (rather than using ninety footers in 1988).

As already noted, the use of twelve-metre yachts for the America's Cup began in 1958 after the deed was amended to reduce the length on the load water-line to make it possible (by mutual consent) to sail the match in twelve-metres. The amendment was sought to revive interest in the cup since the New York Yacht Club had not received a challenge in nineteen years. The lack of interest in the cup was believed to be related in part to the expense of building the large J-class yachts at the time compared

with the cost of sailing in twelve-metres. As a result, the deed was amended to reduce the length on the load water-line from sixty-five to forty-four feet which made it possible under the deed size limitations and the mutual consent clause to use twelve-metre yachts.

In any event, if single masted yachts are to be used, as in this case, the deed mandates that the boats "shall not be less than forty-four feet nor more than ninety feet on the load water-line." If the parties cannot mutually agree on the terms and conditions for the match the race is governed by the terms of the deed. For example, with three races to be sailed on ocean courses which would accommodate yachts of twenty-two feet of draught, under the rules and regulations of the club holding the cup if those rules do not conflict with the provisions of the deed. No time allowances are permitted.

The New York Yacht Club, the holder of the America's Cup for most of its history, prevented the type of unwelcome challenge that now faces the San Diego Yacht Club by following the practice of issuing an announcement during the course of a match that if it was successful in defending the cup, it would hold the next race at a certain time (generally three to four years later) and at a certain place (generally Newport, R.I.). The club would also announce that the match would be sailed in twelve-metres and that all challenges received by a given date would be treated as received simultaneously. By following that practice, the New York Yacht Club and later the Royal Perth Yacht Club managed to

prevent preemption of the field by one challenger. At one time, after interest in the cup grew, the New York Yacht Club had a problem with several potential challengers attempting to issue the first challenge as the successful defender crossed the finish line. The solution worked out was to treat valid challenges as received simultaneously and beginning in the 1970's to hold a multinational elimination series every three to four years, with the winner getting the right to challenge the holder for the America's Cup. The competitors all complied with these arrangements which were authorized by the deed under the mutual consent clause.

Here, rather than issuing a statement of intent before it won or even shortly after, the San Diego Yacht Club was apparently delayed by disagreements with its contractual agent for the defense of the cup, Sail America Foundation, on how the defense should be handled. In the interim, before San Diego sent out such a statement, Mercury Bay issued the disputed challenge.

In the face of the Mercury Bay challenge, San Diego asks the court to retroactively interpret or amend the deed to allow it to ignore the Mercury Bay challenge to give the defender the right to designate, among other things, the size of the boat, the dates of the races and to organize an elimination series between challengers. In effect, San Diego seeks to have fundamental changes written (or interpreted) into the deed to take away rights given to the challenger under the deed, rather than relying on the mutual consent provisions as has been done in the past. In addition, San Diego wants to limit future challenges to

a maximum of once every three years, instead of the ten month minimum notice period provided for under the deed.

The San Diego Yacht Club relies on cy pres principles (EPTL 8-1.1[c]) and argues that literal adherence to the terms of the deed would virtually destroy the international sporting event that the America's Cup has become by allowing the club submitting the first valid challenge to designate the size of the yachts to be raced and the dates of the races and by barring the defender from considering other challenges until the first valid challenge is decided. San Diego contends that following the terms of the deed would render it impossible or impracticable to carry out the donor's purpose of promoting friendly yachting competition among foreign nations. The City of San Diego and the yacht club also contend that organizing a proper defense is like hosting the Olympic games and requires three to four years "lead time" so that the ten month minimum provided for under the deed is wholly insufficient.

Specifically, San Diego seeks interpretation or amendment of the deed as follows, to provide that the holder or trustee of the cup may:

1. Within a reasonable time after winning or successfully defending the cup, designate the particular class or design rule of yachts in which competitors shall race in the next match, with not less than two years notice if the preceding match was held in a different class or design rule;

2. Within a reasonable time after winning or successfully

defending the cup, set the venue, dates, times and number of races for the next match and provide that the next match is to be held within a reasonable time after the last match and in any event, not less than three years apart;

3. Prescribe a reasonable time within which any qualified club may submit a challenge; and

4. Make arrangements for a series of elimination races to select a challenger.

San Diego asserts that "literal adherence to the outmoded terms of the deed would in the face of changed circumstances thrust the cup into a bygone age when only those of vast wealth could compete." The new circumstances not foreseen by the donor which allegedly justify such fundamental changes in the deed are the status of the America's Cup as a premiere international sailing competition and the worldwide following that it has attained in recent years.

The basic problems that San Diego has with sailing ninety footers on ten months' notice are that: 1) it would be too expensive; 2) the City and the yacht club need more time to organize the event; and 3) that the requirement that the first challenge be determined before others are considered would exclude other competitors.

The merits of the arguments raised by San Diego are vigorously disputed. Supporters of both San Diego and Mercury Bay have made their respective positions well known to the court. It is not at all clear that a challenge involving ninety footers would be more expensive than racing in twelve-metre yachts. In

fact, racing ninety footers may turn out to be more economical given the shorter interval proposed between competitions. In preparing for recent twelve-metre matches held three to four years apart, the competitors often spent millions of dollars building several boats to practice and test technological innovations. If the larger boats be raced at more frequent intervals some yachtsmen believe that the cost will be less than that involved in holding a twelve-metre campaign. In addition, it appears that ninety footers may be ideal and twelve-metre boats ill-suited for a competition to be held in San Diego with its light winds.

The potential exclusivity problem raised by a one-on-one challenge does not appear to be a realistic concern at this juncture. Although San Diego has declined to negotiate with the challenger, Mercury Bay expresses its willingness to participate in a multi-national elimination series, in 1988 using ninety footers, for the right to challenge for the cup and to negotiate other terms.

In any case, it is clear that the donor structured the America's Cup competition as a "challenge cup." The challenger is given the right to designate the size or dimensions of its boat within the limits of the deed and to set the dates and times for the races. The holder/defender has the right to set the courses for the race and to have its clubs' rules and sailing regulations govern. It should be stressed that much if not all of the above can be altered under the mutual consent provision.

In fact, the multi-national elimination format that San Diego basically wants written into the deed was worked out by the participants under the more flexible mutual consent provision, as was the three to four year gap between races. It is not at all clear that maintaining a minimum three to four year period between races is in the best interests of the sport or more importantly, within the donor's intent. No prejudice will result if the minimum ten months' notice period is not lengthened through negotiation. The same time limitations apply to all the participants. Finally, San Diego has failed to support its contentions that the Mercury Bay challenge will hurt the level of competition for the cup.

Clearly, New York courts have cy pres power over charitable trusts under EPTL 8-1.1(c). The statute provides that whenever it appears to the court having jurisdiction over a charitable trust that circumstances have so changed since the execution of the instrument making the charitable disposition as to render impossible or impracticable literal compliance with the terms of the deed, the court may make an order directing that the disposition be administered or applied in such a manner as in the court's judgment will most effectively accomplish the instrument's general purposes, free from any specific restriction, limitations or direction contained in the instrument.

Cy pres relief as applied to a general charitable trust is applicable on the basis of changed circumstances only when it has become impracticable or impossible beneficially to literally

comply with the terms of the instrument or to apply the property in the exact way that the donor directed. Only then is the court permitted to reform the deed to give effect to the will of the donor (Matter of Wilson's Estate, 87 A.D. 2d 98, aff'd 59 N.Y. 2d 461). In other words, the court may not resort to cy pres relief until it first determines that the donor's specific charitable purpose is no longer capable of being carried out under the precise terms of the trust (see, e.g., Matter of Wilson's Estate, id; Matter of Scott, 8 N.Y. 2d 419).

Applying the relevant standard the court finds that the San Diego Yacht Club has failed to make the required showing to justify making truly radical and fundamental changes in the deed. The deed of gift of the America's Cup is a relatively simple and flexible document that has served well for 100 years to foster the intent of the donor to create a challenge cup to promote friendly competition among foreign nations. Many of the customs that San Diego seeks to have formalized into the deed through interpretation or amendment were adopted under the mutual consent provision and are not precluded now or in the future. It appears that the strength and validity of the America's Cup is derived in large part from the flexibility provided by the mutual consent clause. The deed as written has and can continue to accommodate changes in circumstances. Clearly, fundamental revision is not required to effectuate the intent of the donor. Failing mutual agreement, the race can be sailed under the terms of the deed.

There being no compelling justification to formally alter

the terms of the deed to change the America's Cup into an event virtually dominated by the defender, ex pres relief is unwarranted. Therefore, in the face of a properly tendered challenge, San Diego Yacht Club, having accepted the cup pursuant to the terms of the deed, may either accept the challenge, forfeit the cup, or negotiate agreeable terms with the challenger. For the court to decide otherwise would be to allow the holder of the America's Cup to virtually unilaterally dictate conditions for future competitions. That result is unjustified in view of the workable deed and would clearly violate the donor's intent.

Accordingly, the relief requested by the parties is granted solely to the extent of declaring that Mercury Bay Boating Club has tendered a valid challenge and that San Diego Yacht Club must treat it as such in accordance with the terms of the deed. The ten month notice period previously tolled pending determination of this litigation shall continue running from the date of service of a copy of the order to be settled herein with notice of entry. In view of the foregoing, the court need not consider Mercury Bay Boating Club's request for injunctive relief, which is denied as moot.

Settle order.



J. S. C.

Dated: *November 25, 1987*

At IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse located at 60 Centre Street, New York, New York on the 21st day of December, 1987.

Present: HON. CARMEN BEAUCHAMP CIPARICK, Justice.

201

~~SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15.~~

-----X
THE MERCURY BAY BOATING CLUB INC., :
Plaintiff, :
-against- :
SAN DIEGO YACHT CLUB and ROYAL PERTH :
YACHT CLUB OF WESTERN AUSTRALIA :
(INC.), :
Defendants. :
-----X

ORDER / *uocys*

Index No. 21299/87
Case 1

SPECIAL TERM PART I
PAPERS SUBMITTED
DEC 22 1987
NUMBERS

In the Matter of the Application of :
SAN DIEGO YACHT CLUB, :
Petitioner, :
for an order pursuant to EPTL :
Section 8-1.1(c)(1) or otherwise, :
interpreting the Deed of Gift :
of the America's Cup, or in the :
alternative amending the terms of :
said Deed of Gift. :
-----X

Index No. 21809/87
Case 2

Plaintiff in Case 1, THE MERCURY BAY BOATING CLUB INC., having moved by Order to Show Cause dated August 31, 1987 for a preliminary injunction and declaratory relief and

Petitioner in Case 2, SAN DIEGO YACHT CLUB, having moved by Order to Show Cause dated September 4, 1987 for an order interpreting or alternatively amending the Deed of Gift of the America's Cup pursuant to EPTL Section 8-1.1(c)(1).

NOW, upon reading and filing the Order to Show Cause dated August 31, 1987 and exhibits attached thereto, the affidavit of George N. Tompkins, Jr., sworn to August 28, 1987 and the affidavits of Raymond John Morcom, sworn to August 28, 1987 and Humphrey Michale Gerard Fay, sworn to August 28, 1987 attached thereto, the Verified Complaint of August 28, 1987 and exhibits attached thereto, ~~the Memorandum of Law of the Mercury Bay Boating Club, Inc. filed September 9, 1987 and exhibits submitted therewith,~~ the affidavit of Humphrey Michael Gerard Fay, sworn to September 9, 1987 and exhibits attached thereto the Reply Memorandum of Law of The Mercury Bay Boating Club Inc. filed September 18, 1987 and exhibits attached thereto, the reply affidavit of Humphrey Michael Gerard Fay, sworn to September 16, 1987 and exhibits attached thereto, ~~the Memorandum of Law of the Royal Perth Yacht Club of Western Australia dated September 18, 1987,~~ the affidavit of Ian Field Cameron, sworn to September 15, 1987, the affidavit of Stanley Edward Reid, sworn to September 15, 1987, the affidavits of Douglas R. Jensen, sworn to September 18, 1987, with proof of due service thereof upon the defendants in Case 1 or their attorneys, the attorneys for the Petitioner in Case 2 and on the office of the Attorney General of the State of New York,

all in support of the motion in Case 1 and in opposition to the motion in Case 2, the Order of the Court dated September 4, 1987, the affidavit of James M. H. [redacted] dated September 4, 1987, the Petition verified September 7, 1987 and exhibits attached thereto, ~~the Memorandum of Law of San Diego Yacht Club dated September 8, 1987 and exhibits attached thereto, the affidavit of Edward L. Johnson, sworn to September 8, 1987, the affidavits of Bruce Nelson Davidson, sworn to September 4, 1987 and September 7, 1987, the Memorandum of Law of San Diego Yacht Club dated September 8, 1987, the affidavit of Robert G. Stone, sworn to September 8, 1987, the affidavit of John K. Marshall, sworn to September 8, 1987, the affidavit of Assistant Attorney General David G. Samuels, sworn to September 8, 1987, the Memorandum of the City of San Diego dated September 17, 1987, the Supplemental Memorandum of San Diego Yacht Club dated September 17, 1987, the Memorandum of Law of San Diego Yacht Club dated September 22, 1987, the affidavit of Assistant Attorney General Robert R. Molic, sworn to September 25, 1987, the letter to the Court of October 5, 1987 from the attorneys for San Diego Yacht Club, with proof of due service thereof upon the parties in Case 1 or their attorneys and from the office of the Attorney General of the State of New York, in opposition to the motion in Case 1 and in support of the motion in Case 2 and the Motion of New York Yacht Club to intervene in Case 2 and supporting papers~~ the affidavit of John Anthony Clare, sworn to September 18, 1987, the supplemental affidavit

Mr Robert G. Stone, Jr., sworn to September 29, 1987, ~~the Reply~~
~~was filed on September 29, 1987, and the Court on September 29,~~
~~1987, the Court on October 6, 1987, from the~~
~~with the New York Yacht Club with professional fees,~~
~~thereon, the parties in Case 1 and Case 2 on their~~
~~respects on the office of the Attorney General of the~~
~~State of New York, all in opposition to the motion in Case 2,~~
and after hearing on September 9, 1987 George N. Tompkins, Jr.,
Esq. and John M. Boyle, Esq., of counsel for the plaintiff in
Case 1 in support of the motion in Case 1 and in opposition to
the motion in Case 2, and Jack Zepp, Esq. and Kenneth M.
Poovey, Esq., of counsel for defendant San Diego Yacht Club in
Case 1 and the petitioner in Case 2, David G. Samuels, Esq., of
counsel for the Attorney General of the State of New York, and
Howard B. Comet, Esq., of counsel for the City of San Diego, in
opposition to the motion in Case 1 and in support of the motion
in Case 2, and the Court having consolidated Case 1 and Case 2
for disposition, and due deliberation having been had, and the
Court having ^{responded} ~~filed~~ a written decision on November 25, 1987,

NOW, on motion of Condon & Forsyth, attorneys for
plaintiff The Mercury Bay Boating Club Inc. in Case 1, it is

ORDERED that the motion of plaintiff The Mercury Bay
Boating Club Inc. for declaratory relief in Case 1 be ~~and the~~
~~same hereby~~ is granted and, it is further

ORDERED that the motion of petitioner San Diego Yacht
Club in Case 2 ~~be and the same hereby~~ is denied and, it is
further

~~ADJUDICATED~~
ORDERED that the Petition in Case 2 ~~is~~ and the same

~~is~~ is dismissed and, it is further

~~ADJUDICATED~~ ~~ADJUDICATED~~

ORDERED that the Notice of Challenge of The Mercury Bay Boating Club Inc. dated July 15, 1987 is a valid Notice of Challenge which entitles The Mercury Bay Boating Club Inc. to sail a match for the America's Cup and San Diego Yacht Club must treat the Notice of Challenge as such in accordance with the terms of the Deed of Gift of The America's Cup of October 24, 1887 as amended by orders of the Supreme Court of the State of New York dated December 17, 1956 and April 5, 1985 and, it is further

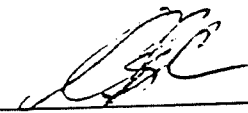
AND ADJUDICATED

ORDERED that San Diego Yacht Club, having accepted the America's Cup pursuant to the terms of the Deed of Gift of October 24, 1887, as amended as aforesaid, must sail a match for the America's Cup in accordance with the terms of the Deed of Gift and the valid Notice of Challenge of July 15, 1987 of The Mercury Bay Boating Club Inc., forfeit the America's Cup to the challenger, The Mercury Bay Boating Club Inc., or negotiate agreeable terms with the challenger, and it is further

ORDERED that ~~in view of the grant of the motion for~~ ~~declaratory relief in Case 1 and the denial of the motion and~~ ~~the dismissal of the Petition in Case 2,~~ the motion of plaintiff, The Mercury Bay Boating Club Inc., for a preliminary injunction in Case 1 pending determination of the action ~~and~~ ~~not be considered~~ and is hereby denied as moot and, it is further

ORDERED that the ten (10) month notice period in the valid Notice of Challenge of The Mercury Bay Boating Club Inc. of July 15, 1987, previously tolled by the Court on September 9, 1987 pending determination of the motions and actions in Case 1 and Case 2, shall resume and continue to run from the date of service of a copy of this order ^{AND JUDGMENT} with notice of entry upon the attorneys for the parties and on the office of the Attorney General of the State of New York.

ENTER


CARMEN BEAUCHAMP CIPARICK, J.S.C.

Norman Goodman
Clerk

FILED
DEC 28 1987
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT : NEW YORK COUNTY
IAS PART 15

MB1

-----X
THE MERCURY BAY BOATING CLUB INC.,

Plaintiff,

- against -

SAN DIEGO YACHT CLUB and ROYAL PERTH
YACHT CLUB OF WESTERN AUSTRALIA (INC)
Defendant.

Index No.
21299/87

-----X
In the Matter of the Application of
SAN DIEGO YACHT CLUB,

Petitioner,

for an order pursuant to EPTL Section
8-1.1(c)(1) or otherwise, interpreting
the Deed of Gift of the America's Cup,
or in the alternative amending the
terms of said Deed of Gift.

-----X
CARMEN BEAUCHEAMP CIPARICK, J.:

The City of San Diego moves pursuant to CPLR 1013 for leave
to intervene after final disposition of the above entitled action
by this court in a memorandum decision dated November 25, 1987.
The motion is addressed to the discretion of the Court.

This litigation relates to the interpretation of the terms
of the deed of gift of the America's Cup and the validity of the
challenge by the Mercury Bay Boating Club to sail a match for the
cup using boats measuring ninety feet on the water line. In its
prior decision, this Court upheld the validity of the challenge
and declined to interpret or amend the deed of gift in the manner

sought by the San Diego Yacht Club. Although the City of San Diego has been on notice of these proceedings since their commencement and participated in hearings and submitted memoranda prepared by independently retained local counsel, the City only now seeks leave to intervene after the issues raised in the case have been finally determined. Until this time, the City apparently believed that its interests were adequately represented by the San Diego Yacht Club (and the New York State Attorney General) whose positions the City had wholly adopted and endorsed. The change in circumstances appears to arise out of the public announcements of the San Diego Yacht Club and the Mercury Bay Boating Club stating that they do not intend to appeal the court's determination. As a result, the City of San Diego seeks leave to intervene for the purpose of bringing an appeal.

Mercury Bay Boating Club and the New York Yacht Club oppose intervention of the grounds that the City is not a beneficiary of the charitable trust and therefore lacks standing to participate in this litigation as a party and that despite contrary contentions by the City, its interests are adequately represented by the San Diego Yacht Club and the New York Attorney General.

The City of San Diego asserts that its interests are not being adequately represented and contends that it should be allowed to intervene based upon an alleged real and tangible interest in the outcome of the litigation as a potential site for the upcoming event. The City states that Mercury Bay and the

San Diego Yacht Club seem to think that they can dictate that the races be held in San Diego and force the City to host the competition and to provide the necessary support services and facilities.

The motion by the City of San Diego for leave to intervene is denied in the exercise of discretion. First the court notes that the City had adequate opportunity to seek intervention prior to final judgment and failed to do so. Generally, intervention after final judgment has been rendered is sparingly granted (Auerbach v. Bennett, 64 AD2d 98 mod, 47 NY2d 619). In this case, the circumstances do not justify the exercise of discretion by the court to grant intervention when the parties directly impacted (the defender-trustee and a challenger-beneficiary) appear to be willing to abide by the prior determination of the court.

Furthermore, the court finds that the City of San Diego lacks standing to participate in this litigation as a party. Although a potential litigant need not be a beneficiary of a charitable trust to have standing, a real and substantial interest in the subject matter of the trust is essential. (Matter of Petroleum Research Fund, 3 AD2d 1) The City of San Diego lacks the requisite real and substantial interest in this controversy. Rather than being real and substantial, the only interest of the City of San Diego or any other City in this controversy is peripheral as a possible site for future competition. The City has no discernable interest in the

determination of the legal issues raised in this litigation relate to the interpretation of the deed of gift and the validity of the Mercury Bay challenge. The City's interest relates only to the provision in the trust instrument giving the defender of the cup the power to set the venue and courses for the races, subject to the mutual consent provision. This court's prior determination in no way alters that clause or the options available to the defender under the provision. San Diego will only be impacted when and if the San Diego Yacht Club as defender, exercises its power to set the venue for the upcoming event in its home City of San Diego. At this time it is not clear where the next America's Cup competition will be held. While the San Diego Yacht Club initially intended to defend the cup in San Diego, in view of the nature of the Mercury Bay challenge, the San Diego Yacht Club has at this time declined to commit itself to any particular site for the races. The San Diego Yacht Club has indicated that it has been considering Hawaii as another possible site for the event.

Even if the City of San Diego had standing, the court concludes that intervention by it would still be unwarranted at this stage in the litigation and in view of the apparent willingness of the parties to abide by the court's decision. Furthermore, to allow intervention based upon speculation that the City of San Diego will ultimately be chosen to host the competition would invite future intervention by any of the cities that may be considered by the defender to host the event. While

the deed gives the defender the right to select the venue of the races, it does not follow that if San Diego is actually chosen the City will be forced to host the competition and to provide support services and facilities. Nothing in this court's decision limits the City of San Diego in enforcing its regulations and police powers as it would with similar boating or other sporting events. If the City of San Diego is selected as the site for the America's Cup competition and the City objects to that choice, it may pursue any available remedies in the California Courts.

Accordingly, the motion is denied. This constitutes the order of the court.

Dated: December 30 1987


J. S. C.

FILED
JAN 07 1988
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X

THE MERCURY BAY BOATING CLUB INC., : Index No. 21299/87

Plaintiff, :

-against- :

SAN DIEGO YACHT CLUB and ROYAL PERTH :
YACHT CLUB OF WESTERN AUSTRALIA :
(INC.), :

Defendants. :

-----X

In the Matter of the Application of :
SAN DIEGO YACHT CLUB, :

Petitioner, :

for an Order pursuant to EPTL :
Section 8-1.1(c)(1) or otherwise, :
interpreting the Deed of Gift :
of the America's Cup, or in the :
alternative amending the terms of :
said Deed of Gift. :

DEMAND FOR
COMPLIANCE WITH
ORDER/JUDGMENT

-----X

TO: SAN DIEGO YACHT CLUB, the Trustee, Holder and Defender
of the America's Cup and defendant in the above entitled
action:

You are hereby notified that annexed hereto and
herewith served upon you is a duly certified copy of the
original Order/Judgment entered in the above entitled action
in the office of the Clerk of the County of New York, City of
New York in said county on the 28th day of December, 1987,
and you are hereby further notified and required forthwith to
comply with said original Order/Judgment and to defend the
America's Cup, in accordance with the Deed of Gift of the

America's Cup of October 24, 1887 as amended by orders of the Supreme Court of the State of New York dated December 17, 1956 and April 5, 1985 and the valid Notice of Challenge of July 15, 1987 of The Mercury Bay Boating Club Inc., with a single masted keel yacht (monohull) not more than ninety (90) feet on the load waterline in the ocean waters of San Diego in a series of three (3) races the first of which will commence on September 19, 1988, as you are directed and required to do in and by the original Order/Judgment, first above mentioned; and you are hereby further notified and required forthwith to comply with, carry out, and obey the provisions and directions of said original Order/Judgment; and that in default of your so doing a motion will be made to the Supreme Court to punish you for civil contempt of court, to compel your obedience to the requirements of said original Order/Judgment and to order the forfeiture of the America's Cup to The Mercury Bay Boating Club Inc. for your failure and refusal to defend the America's Cup in accordance with the provisions of the aforesaid original Order/Judgment.

Dated: March 28, 1988
New York, New York

Yours, etc.,

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CONDON & FORSYTH
Attorneys for Plaintiff
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(212) 757-6870

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New York, New York 10153

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

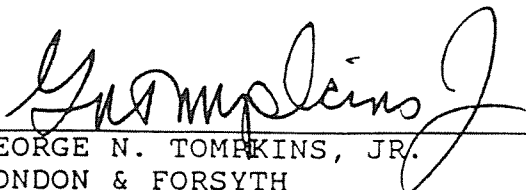
-----X
THE MERCURY BAY BOATING CLUB INC., :
 :
 Plaintiff, : Index No. 21299/87
 :
 -against- :
 :
 SAN DIEGO YACHT CLUB and ROYAL PERTH :
 YACHT CLUB OF WESTERN AUSTRALIA :
 (INC.), :
 :
 Defendants. :
-----X

In the Matter of the Application of :
 SAN DIEGO YACHT CLUB, :
 :
 Petitioner, :
 :
 for an Order pursuant to EPTL :
 Section 8-1.1(c)(1) or otherwise, :
 interpreting the Deed of Gift :
 of the America's Cup, or in the : ASSIGNED TO
 alternative amending the terms of : JUSTICE C.
 said Deed of Gift. : BEAUCHAMP CIPARICK
 :
 :
-----X

CERTIFICATION

I HEREBY CERTIFY that the attached is a true and
correct copy of the Order/Judgment entered in the above-
entitled action on December 28, 1987.

Dated: March 22, 1988
New York, New York



GEORGE N. TOMPKINS, JR.
CONDON & FORSYTH
Attorneys for THE MERCURY BAY
BOATING CLUB INC.
1251 Avenue of the Americas
New York, New York 10020
(212) 757-6870

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
In the Matter of the Application of the
ROYAL BURNHAM YACHT CLUB,

Petitioner,

for an Order pursuant to Sections 7-2.6 and
8 of the EPTL or otherwise removing the
San Diego Yacht Club as the Trustee under
the Deed of Gift, unless it consents to a
Challenge Round in advance of the next
America's Cup match.
-----X

Index No.

01569/88

Seq. #001 &

002

003

CARMEN BEAUCHAMP CIPARICK, J.:

This is the third in a series of special proceedings in which interested yacht clubs have sought the intervention of the court in conducting the America's Cup yachting competition.

In the first and second proceedings, the court determined that Mercury Bay Boating Club tendered a valid challenge to race for the cup in yachts measuring ninety feet on the waterline (now called "K-boats") and that the defender/trustee, San Diego Yacht Club, had not made out a case to justify wholesale amendment of the one-hundred year old deed of gift governing the America's Cup. Thereafter, the court denied a post-judgment motion by the City of San Diego (as the likely site for the races) to intervene for the purpose of appealing the court's prior determination.

In this latest proceeding, the only issue directly raised is whether San Diego Yacht Club as defender of the cup, in order to be consistent with its fiduciary obligations, must agree to a multi-national elimination series to be held between the first valid challenger (Mercury Bay Boating Club) and any other interested foreign challengers, including petitioner, the Royal

Burnham Yacht Club of Great Britain, for the right to sail a match for the cup against San Diego Yacht Club.

Royal Burnham Yacht Club ("Royal Burnham") petitions the court to declare that San Diego Yacht Club ("San Diego") is in violation of its fiduciary obligations as trustee by failing to negotiate in good faith with Mercury Bay Boating Club ("Mercury Bay") regarding a multi-national regatta. Royal Burnham seeks to enjoin an America's Cup that does not include an elimination series and/or does not allow interested challengers adequate time to prepare for the race. Finally, petitioner wants San Diego removed as trustee unless it agrees to allow a multi-national elimination regatta.

San Diego cross-moves pursuant to CPLR 3211(a)(7) to dismiss the petition for failure to state a cause of action and on the ground that Royal Burnham lacks standing to institute this suit.

STANDING

Before turning to the merits of this case, the court finds that Royal Burnham has standing to commence this proceeding on the unique set of facts alleged by petitioner and largely unrefuted by San Diego. Specifically, after the Mercury Bay challenge, Royal Burnham issued a challenge to compete for the cup and later tendered a \$25,000 deposit with San Diego which was recently returned. Prior to and following this court's prior determination as to the validity of the Mercury Bay challenge, San Diego assured Royal Burnham that it would be competing in the next America's Cup and that it should carry on with necessary

preparations. Based on those assurances and San Diego's frequent declarations (in court and to the media) that a one-on-one match race without a challenger elimination series would diminish the quality of competition and destroy the America's Cup, Royal Burnham committed or spent approximately \$6,000,000 to prepare for the races.

Generally, a mere beneficiary of a charitable trust does not have standing to commence suit to interpret or enforce the trust (18 N.Y. Jur. 2d Charities, Sec. 40) and must instead rely on the New York State Attorney General to champion its cause (Estates, Powers and Trusts Law Sec. 8-1.1[f]). In this case, the court finds that Royal Burnham has demonstrated sufficient special interest in the subject of the trust to confer standing to maintain this proceeding.

THE MULTI-NATION CHALLENGE SERIES

The starting point for determining whether a multi-national elimination regatta may be forced upon San Diego is the America's Cup deed of gift and Mercury Bay's valid challenge. Mercury Bay's challenge called for a race in ten months' time using boats measuring ninety feet on the waterline. Therefore, with court ordered tolls computed in, the races are scheduled to begin in September, 1988, unless the competitors can agree to an alternate schedule. From the start, Mercury Bay has expressed its willingness to consent to a challenge series but has been reluctant to agree to postpone the races and has refused to agree to race in smaller boats. At this point, Mercury Bay has publicly (and in communications with San Diego and the court)

expressed its willingness to postpone the races to 1989 to give other interested competitors time to prepare for the race. San Diego has intermittently indicated a willingness to allow a challenger series but only on terms that would require Mercury Bay to scrap its already launched yacht and to race in a smaller boat. More often, San Diego and its defense manager, Sail America, have stated that they just want to get the big boat challenge over with so that they can concentrate on an extravaganza using twelve-metre boats off of San Diego in 1991. In short, the two competitors have been unable to arrive at acceptable terms relating to such factors as an elimination round, which would clearly be permissible under the deed's flexible mutual consent provision. Instead, the parties are proceeding under the terms of the deed which govern absent mutual agreement.


Under the terms of the deed, unless the parties can agree to another format, the parties must sail a one-on-one match race for the cup. Significantly, nowhere in the deed is the possibility of a challenger elimination series mentioned and in fact, throughout much of its history, the America's Cup has been held as a match race. The multi-national regatta format was introduced relatively late in the event's history, in the 1950's.

Examination of the deed and reference to America's Cup traditions make it clear that the multi-national elimination format is permissible under the mutual consent clause but that absent mutual agreement a multi-nation series cannot be forced

upon the competitors. Since the parties have not as yet been able to agree to mutually acceptable terms and because a compelling case has not been presented to justify present amendment of the deed, the competitors must proceed with a match race. Nothing in this decision or the court's prior decisions shall preclude the competitors, up until race time, from agreeing to hold a multi-national regatta and such a course of action is encouraged by the court in the interests of sportsmanship and for the good of the America's Cup. The litigants are encouraged to compete for the cup on the water rather than in the courtroom.

Accordingly, the application is denied and the petition is dismissed.

This constitutes the judgment of the court.



J. S. C.

Dated:

April 6, 1988

Norman Goodman
Clerk

FILED
APR 18 1988
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
THE MERCURY BAY BOATING CLUB INC., :

Plaintiff, :

: Index No. 21299/87

-against- :

SAN DIEGO YACHT CLUB and ROYAL PERTH :
YACHT CLUB OF WESTERN AUSTRALIA :
(INC.), :

: NOTICE OF MOTION

Defendants. :
-----X

In the Matter of the Application of :
SAN DIEGO YACHT CLUB, :

Petitioner, :

for an Order pursuant to EPTL :
Section 8-1.1(c)(1) or otherwise, :
interpreting the Deed of Gift :
of the America's Cup, or in the :
alternative amending the terms of :
said Deed of Gift. :

: ASSIGNED TO
JUSTICE C.
: BEAUCHAMP CIPARICK
: ORAL ARGUMENT REQUESTED

-----X
PURSUANT TO CPLR 5104 and Judiciary Law § 753, San
Diego Yacht Club must heed this

WARNING

**YOUR FAILURE TO APPEAR IN
COURT MAY RESULT IN YOUR
IMMEDIATE ARREST AND IMPRISONMENT
FOR CONTEMPT OF COURT**

PLEASE TAKE NOTICE that upon the attached Affidavit
of George N. Tompkins, Jr. sworn to on May 3, 1988, the
accompanying Memorandum of Law and upon all the prior papers and

proceedings herein, a Motion will be made by plaintiff The Mercury Bay Boating Club Inc. in Room 325 at the Courthouse located at 60 Centre Street, New York, New York, on the 18th day of May, 1988 at 9:30 a.m. in the forenoon of that day or as soon thereafter as counsel may be heard, for an Order:

1. of Enforcement pursuant to CPLR 5104 and Judiciary Law § 753 punishing defendant San Diego Yacht Club, by fine or imprisonment or both, for civil contempt of Court for San Diego Yacht Club's failure to comply with and obey the provisions and requirements of the Order/Judgment duly entered in the above entitled action on the 28th day of December, 1987;

2. compelling compliance by defendant San Diego Yacht Club with the Order/Judgment of this Court entered on December 28, 1987;

3. and for such other and further relief as the Court may deem just and proper.

The above-entitled action is for declaratory and other relief.

PLEASE TAKE FURTHER NOTICE that answering Affidavits and other papers, if any, must be served at least seven (7) days

before the return date of this motion.

Dated: New York, New York
May 4, 1988

Yours, etc.

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New York, New York 10005

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New York, New York 10153

Richard Sharfman
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& SIVIGLIA, P.C.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X
THE MERCURY BAY BOATING CLUB, INC.,

Plaintiff,

Index No.
21299/87

- against -

SAN DIEGO YACHT CLUB and ROYAL PERTH YACHT CLUB OF WESTERN AUSTRALIA (INC.),

Defendants.

-----X
In the Matter of the Application of
SAN DIEGO YACHT CLUB,

Petitioner,

for an Order pursuant to EPTL Section 8-1.1(c)(1) or otherwise, interpreting the Deed of Gift of the America's Cup, or in the alternative amending the terms of said Deed of Gift. -----X

CARMEN BEAUCHAMP CIPARICK, J.:

Mercury Bay Boating Club ("Mercury Bay") moves pursuant to Judiciary Law Sec. 753 and CPLR 5104 to enforce the order of this court entered on December 28, 1987 and to hold San Diego Yacht Club ("San Diego") in civil contempt for violating the terms of the court's order. Mercury Bay contends that San Diego will be in contempt if the club arrives at the starting line to defend the America's Cup in a multihulled vessel or other boat not "like or similar" to the challenging yacht "New Zealand." "New Zealand" is described as a "ninety foot sloop rigged keel (monohulled) yacht."

Royal Burnham Yacht Club ("Royal Burnham") seeks to intervene pursuant to CPLR 1013 to enforce an alleged agreement to allow Royal Burnham to participate in a challenger elimination

series, with the winner gaining the right to race against San Diego for the America's Cup. "Blue Arrow", Royal Burnham's yacht, is described by its owner as a sixty-five foot sliding keel monohull yacht.

The relief sought by Royal Burnham must be denied. Although it appears that the parties had a general agreement in principle to allow Royal Burnham to sail-off against Mercury Bay, an examination of the record before the court makes it clear that essential terms of the race were never agreed to and therefore an enforceable contract was never made. It also appears that there was never a simultaneous meeting of the minds between San Diego, Mercury Bay and Royal Burnham regarding the terms of the challenger sail-off.

Mercury Bay, in seeking to hold San Diego in civil contempt, contends the order of this court requires San Diego Yacht Club to defend in a boat "like or similar" to Mercury Bay's yacht and that San Diego's expressed intent to defend in the multihulled craft "Stars and Stripes" constitutes contempt of this court.

The parties agree that "in order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed" (Matter of McCormick v. Axelrod, 59 N.Y. 2d 574, 583). The order of the court forming the basis for this contempt motion upheld Mercury Bay's challenge for the right to race for the America's Cup in a boat measuring ninety feet on

the lead water-line and gave San Diego the option to treat the challenge as valid under the terms of the deed of gift, to negotiate terms agreeable to both competitors under the mutual consent clause or to forfeit the cup. Neither the decision of the court dated November 25, 1987 nor the order entered on December 28, 1987 addressed the question of the type of boat the defender must race. In fact, the issues of the viability of multihull yachts in the America's Cup or whether the defender must meet Mercury Bay's challenge with a boat "like or similar" to the challenger's boat as expressed in the Notice of Challenge, were not raised in prior proceedings or determined by this court.

Mercury Bay apparently contends that by virtue of the court's decision upholding the Mercury Bay challenge pursuant to the terms of the deed of gift, that the terms of the deed may also form the basis for a contempt holding. Mercury Bay contends that under the deed, San Diego is compelled to defend with a boat like or similar to the ninety foot keel yacht specified in Mercury Bay's Notice of Challenge. In other words, Mercury Bay argues that the challenger, by selecting its boat and by notifying the defender of its basic dimensions as required by the deed of gift, dictates the size and type of yacht to be used by the defender and presumably any other competitors. Whether or not Mercury Bay is ultimately found to be correct, the issue was not previously addressed by the court and is not so clear as to properly form the basis for a contempt determination. No "like or similar" requirement is unequivocally mandated by reference to the terms of the America's Cup deed of gift, nor does the deed

specifically exclude multihulled boats.

Mercury Bay points out that the deed calls for a sailing "match" and that according to the last surviving donor, George L. Schuyler, "'a match' means one party contending with another party upon equal terms as regards the task or feat to be accomplished" (Letter of George L. Schuyler dated April, 1871). Mercury Bay reasons that the essence of the deed requires a fair and equal race and that in order to be fair and equal, the challenging and defending vessels must be of the same type. Mercury Bay further points to the general rule of sailing that due to fundamental differences in design and performance, multihulls are inherently faster than monohulls.

The America's Cup deed of gift says very little about the characteristics of qualifying yachts. The deed dictates the permissible size range of competing boats, which "... if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line, if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line."

Conclusive effect and a resulting contempt finding cannot be based upon the language of the deed requiring the challenger to state the dimensions of its boat in the Notice of Challenge. Nor can a finding of contempt be properly made based upon mere inference drawn from the "essence" of the deed that the America's Cup competition must be fair and equal. Instead of being so clear as to constitute an unequivocal mandate, the conclusions

FROM LONDON & FORSYTH

drawn by Mercury Bay require in depth analysis of the deed and its history. The significance of the dimensions required in the Notice of Challenge cannot be said to be so obvious when the issue has become the subject of a hotly disputed battle among naval architects. The court finds that the provisions of the deed lack the requisite clarity, as to whether the challenger's choice of boat in effect dictates that of the defender and as to whether multihulls are inherently barred from sailing in the America's Cup, to properly form the basis for a finding of contempt.

The foregoing conclusion as it relates to the viability of a multihull defense is not altered by Mercury Bay's contention that in addition to never before being used in the America's Cup, multihulls have traditionally been systematically excluded from participating in races with monohulls. Mercury Bay explains that there was no need for the deed to specifically exclude multihulls because mixed races would never have been contemplated by the donor. Mercury Bay's basic argument that a mixed race is too absurd to even consider is fundamentally shaken by San Diego, which points to a number of instances from Schuyler's time in the nineteenth century up to the present, where monohulls and multihulls have raced together on the same course without necessarily being handicapped or divided into separate classes. In at least some instances, the only design limitation appears to be length.

Mercury Bay's argument that a race between a monohull and a multihull would be so unfair as to be unthinkable fails to

persuade the court that a finding of contempt is appropriate. That argument is undermined by the present popularity of mixed races in Europe. Whether or not the general rule regarding the inherent speed capabilities of monohulls versus multihulls is applicable in this case is debatable. Although Mercury Bay's experts indicate that the multihull will win every time, San Diego's experts point to instances where monohulls have beaten multihulls. Some of the experts also assert that both "New Zealand" and "Stars and Stripes" are of such radical designs that the result of a race between them cannot be predicted.

In view of the foregoing, the court determines that a finding of civil contempt is utterly unwarranted in this case. Neither this court's order, nor the terms of the deed of gift incorporated therein, so unequivocally state that multihulled boats are prohibited or that a defender must be the challenger in a "like or similar" yacht, so as to constitute contempt by San Diego if it chooses to defend in such a boat.

Resolution of the issue of whether a multihulled boat is permitted to race in the America's Cup cannot properly be determined by the court in the context of a contempt motion. The purpose of a contempt motion is to determine whether a party violated the clear and unequivocal mandate of the court. In this case, even that determination is somewhat premature since any improper act by San Diego would necessarily occur in the future. The deed specifically gives the defender the right to name its boat at the last possible moment, at the starting line on the

first day of the races. In this case, absent mutual agreement by the parties, on September 19, 1988. In addition, the court notes that even Mercury Bay has not been consistent in defining the characteristics of what it would consider a suitable defender. Instead, Mercury Bay's definition of what it regards as sufficiently like and similar to "New Zealand" has evolved significantly over time, as to such characteristics as length, weight, suitable rigging and whether the boat must be a keel yacht (even though the deed specifically states that centerboards and sliding keels are always allowed).

It would be manifestly improper for the court to dictate conditions for the upcoming races, in the context of a contempt proceeding where the only issue that can properly be determined is the extremely narrow issue of whether the clear and unequivocal mandate of the court has been violated.

In addition to being procedurally improper in the context of a contempt proceeding, to determine the boat issue at this time would be to render a largely meaningless advisory opinion. Again, under the deed, the defender is not required to choose its boat until it arrives at the starting line. The conclusion that a pre-race determination regarding permissible boats would be premature, is bolstered by the ever evolving position of Mercury Bay regarding the precise nature of a boat that it would deem suitable and the numerous practical difficulties with Mercury Bay's suggested "like or similar" standard. For the court to render a definitive determination at this juncture would countenance continued bickering, and encourage further litigation.

FROM GONDON & FORSYTH

7.25.1988 14.02

which would inevitably delay commencement of the races. The court therefore concludes that such a determination cannot be made prior to completion of the America's Cup races. This court cannot be used by the parties to obtain preliminary rulings on issues of naval architecture. The parties will not suffer substantial prejudice by being required to seek such rulings at the conclusion of the races, since both boats are already built and launched and have been practicing in San Diego, where the competition will be held.

Nothing in this decision should be interpreted as indicating that multihulled boats are either permitted or barred under the America's Cup deed of gift.

The America's Cup deed is a relatively simple document that seeks to encourage international competition among sportsmen without providing for intricate rules and dispute resolution mechanisms that have become prominent focal points in our time. The vision that Schuyler and the other donors sought to perpetuate over the years was that of an international race on a grand scale among boats on the seas and not a land bound battle among clever lawyers in the courthouse. No provisions are made in the deed for any international yachting organization or panel to plan, set terms, promote and generally referee the running of the races.

The intent of the deed seems to be that the parties must design, build and race their boats at their own risk, subject to possible disqualification and forfeiture at the conclusion of the

FROM GANDON & FORSYTH

For instance, forfeiture or disqualification would be mandated if a contestant's boat exceeds the length limitations in the deed or if the challenger's boat exceeds the length dimensions listed in its Notice of Challenge. The same result is possible if a boat is so radical in its design as to risk being outside of the minimal bounds set by the deed.

The parties, by their three appearances before this court and their well-chronicled inability to negotiate their differences in the best interests of the America's Cup, have firmly convinced this court that even if the dispute regarding the proper characteristics of the defender was resolvable at this juncture, there would likely be a number of additional pre-race disputes involving matters of naval architecture, rules or terms of the race. For the court to resolve such disputes in a piecemeal fashion would be inefficient and would countenance additional disputes. To do so would likely cause harm to the America's Cup and run counter to the expressed intent of the deed to foster "friendly competition between foreign countries."

The time has come for the sailors to be permitted to participate in the America's Cup. The parties are directed to proceed with the races and to reserve their protests, if any, until after completion of the America's Cup races.

FROM CONDON & FORSYTH

Accordingly, the motion by Royal Burnham Yacht Club to intervene is denied, as is Mercury Bay's motion to hold San Diego Yacht Club in contempt of court.

This constitutes the order of the court.



J. B. C.

Dated: *July 25, 1988*

FIRST DEED OF GIFT (1857)

Any organized yacht club of any foreign country shall always be entitled through any one or more of its members, to claim the right of sailing a match for this cup with any yacht or other vessel of not less than thirty or more than three hundred tons, measured by the custom-house rule of the country to which the vessel belongs.

The parties desiring to sail for the cup may make any match with the yacht club in possession of the same that may be determined upon by mutual consent; but, in case of disagreement as to terms, the match shall be sailed over the usual course for the annual regatta of the yacht club in possession of the cup, and subject to its rules and sailing regulations — the challenging party being bound to give six months' notice in writing, fixing the day they wish to start. This notice to embrace the length, custom-house measurement, rig and name of the vessel.

It is to be distinctly understood that the cup is to be the property of the club, and not of the members thereof, or owners of the vessel winning it in the match; and that the condition of keeping it open to be sailed for by yacht clubs of all foreign countries upon the terms above laid down, shall forever attach to it, thus making it perpetually a challenge cup for friendly competition between foreign countries.

SECOND DEED OF GIFT (1882)

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), practicable for vessels of 300 tons, shall always be entitled, through one or more of its members, to the right of sailing a match for this cup, with a yacht or other vessel propelled by sails only, and constructed in the country to which the challenging club belongs, against any one yacht or vessel as aforesaid, constructed in the country of the club holding the cup.

The yacht or vessel to be of not less than 30 or more than 300 tons, measured by the custom-house rule in use by the country of the challenging party.

The challenging party shall give six months' notice in writing, naming the day for the proposed race, which day shall not be later than seven months from the date of the notice.

The parties intending to sail for the cup may, by mutual consent, make any arrangement satisfactory to both as to the date, course, time allowance, number of trials, rules, and sailing regulations, and any and all other conditions of the match, in which case also the six months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then the challenging party shall have the right to contest for the cup in one trial, sailed over the usual course of the annual regatta of the club holding the cup, subject to its rules and sailing regulations, the challenged party not being required to name its representative until the time agreed upon for the start.

Accompanying the six months' notice there must be a custom-house certificate of the measurement, and a statement of the dimensions, rig, and name of the vessel.

No vessel which has been defeated in a match for this cup can be again selected by any club for its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time such contest has taken place.

Vessels intending to compete for this cup must proceed under sail on their own bottoms to the port where the contest is to take place.

Should the club holding the cup be for any cause dissolved, the cup shall be handed over to any club of the same nationality it may select which comes under the foregoing rules.

It is to be distinctly understood that the cup is to be the property of the club, and not of the owners of the vessel winning it in a match, and that the condition of keeping it open to be sailed for by organized yacht clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it perpetually a Challenge Cup for friendly competition between foreign countries.

GEORGE L. SCHUYLER.

As a Special Term, Part II, of
the Supreme Court of the State
of New York, held in and for
the County of New York, at the
County Court House, Borough of
Manhattan, City of New York,
on the 17th day of ~~July~~
1956.

PRESENT:

Wm. J. Brennan, J.

Justice.

-----X
In the matter of the application of
NEW YORK YACHT CLUB for an order pur-
suant to Section 12 of the Personal
Property Law, or otherwise, amending
the terms of the Deed of Gift of the
America's Cup.
-----X

Index No. 12696/56

ORDER WITH RECEIPT
TO ADMINISTRATOR
OF CUP

NEW YORK YACHT CLUB, having filed a verified peti-
tion dated September 21, 1956 praying that an order be made
pursuant to Section 12 of the Personal Property Law, or
otherwise, directing that the gift by George L. Schuyler
of the America's Cup which was won by the yacht AMERICA at
Cowes, England on August 22, 1851, in trust under a Deed of
Gift dated October 2-, 1857, shall be administered as if
the minimum load water-line length of the competing yachts
or vessels of one mast was thereby required to be forty-four
(44) feet and without regard to and free from the direction
contained therein that yachts or vessels competing for the
America's Cup shall sail, on their own bottoms, to the port
where the contest is to take place, and that such other and
further relief as to the Court may seem just and proper be
granted to petitioner; and it appearing to the satisfaction
of the Court from said petition and the papers exhibited there-

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to that circumstances have so changed since the execution of said Deed of Gift, in a manner not known to the said donor and not anticipated by him, as to render impractical a literal compliance with the aforesaid terms of said Deed of Gift; and it further appearing that the grantor of said Deed of Gift has died and that the Attorney General of the State of New York is the only person interested in this proceeding; and said Attorney General having appeared and certified that he has no objections to the entry of an order as prayed for by petitioner,

Now, upon motion of Carter, Ledyard & Milburn, attorneys for petitioner, it is

ORDERED that New York Yacht Club, as trustee of the America's Cup given under the Deed of Gift dated October 24, 1887 made by George L. Schuyler, hereby is directed to administer the said gift as if said Deed of Gift included no provision requiring yachts or vessels competing for the America's Cup to sail, on their own bottoms, to the port where the contest is to take place, and as if the minimum load water-line length of the competing yachts or vessels of one mast was thereby required to be forty-four (44) feet.

Enter,

E. J. J.
J. S. C.

FILED
DEC 17 1956
NEW YORK
CO. CLERK'S OFFICE

Oct. 1, 1956

This is to certify that the undersigned has no objection to the entry of the foregoing proposed order.

Jacob K. Javits
ATTORNEY GENERAL of the
State of New York
By *Hodges Huber*
Assistant Attorney General

FILE # 42344 94

FINAL ORDER
APPROVED
 INDEX TO THE JUDICIAL RECORDS OF THE STATE OF NEW YORK
 DEPARTMENT OF STATE

THE ARM OF THE SEA INTERPRETATION

JUDGEMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK
DATED SEPTEMBER 20, 1984

An application having been made by petitioner The Royal Perth Yacht Club of Western Australia Incorporated for an order interpreting certain provisions of a Deed of Gift of the America's Cup dated October 24, 1887 between George L. Schuyler and The New York Yacht Club, as amended by order of the Court dated December 17, 1956 (Index No. 12696/56);

NOW, upon reading and filing the order to show cause dated August 8, 1984 (Alfred M. Ascione, Jr., J.) with proof of due and timely service on the Attorney General of the State of New York, the petition of The Royal Perth Yacht Club of Western Australia Incorporated, verified the 30th day of July, 1984, and annexed exhibits, and the affidavit of Eugene M. Kinney, sworn to the 20th day of July, 1984 and exhibits thereof, all in support of the petition, and the notice of appearance and consent of the Attorney General of the State of New York, acknowledged the 13th day of August, 1984, consenting to the petition;

AND, a memorandum decision and order dated September 4, 1984 and entered September 7, 1984, having been rendered granting the petition;

NOW, upon the motion of DeForest & Duer, attorneys for petitioner The Royal Perth Yacht Club of Western Australia Incorporated, it is

ORDERED AND ADJUDGED, that the petition of The Royal Perth Yacht Club of Western Australia Incorporated is granted with the consent of the Attorney General of the State of New York, representative of the public interest in the Deed of Gift, to the extent of declaring that the Deed of Gift entitles the Chicago Yacht Club, a yacht club of a foreign (i.e. competing) country as contemplated in the Deed of Gift, to enrol and compete as a contestant for the "America's Cup".

enter,
Hon. Robert E. White J.S.C.
Justice

THE SOUTHERN HEMISPHERE AMENDMENT

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK
DATED APRIL 5, 1985

An application having been made by petitioner The Royal Perth Yacht Club of Western Australia Incorporated for an order amending a certain provision of a Deed of Gift of the America's Cup dated October 24, 1887 between George L. Schuyler and The New York Yacht Club, as amended by order of the Court dated December 17, 1956 (Index No. 12696/56);

NOW, upon reading and filing the order to show cause dated February 27, 1985 (Stanley Parness, J.) with proof of due and timely service on the Attorney General of the State of New York and The New York Yacht Club, the petition of The Royal Perth Yacht Club of Western Australia Incorporated, verified the 27th day of November, 1984, and annexed exhibits, and the affidavit of Charles E. Kirsch, sworn to the 26th day of February, 1985, and annexed exhibits, all in support of the petition, and the notice of appearance and consent of the Attorney General of the State of New York, acknowledged the 7th day of March, 1985, consenting to the petition; and there being no opposition;

AND, a memorandum order dated March 11, 1985 having been rendered granting the petition of default;

NOW, upon the motion of DeForest & Duer, attorneys for petitioner The Royal Perth Yacht Club of Western Australia Incorporated, it is

ORDERED, that the petition of The Royal Perth Yacht Club of Western Australia Incorporated is granted; and it is further

ORDERED, that the Deed of Gift is amended, and the trust established pursuant to the Deed of Gift shall hereafter be administered, as if, following the phrase "no race shall be sailed in the days intervening between November 1st and May 1st", there were added the following language: "if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere."

enter,
Hon. Elliot Wilk J.S.C.
Justice

Note: The Deed of Gift printed herein incorporates this amendment.