



11<sup>th</sup> July 2013

**JURY CASES AC24 AND AC25**

**JURY NOTICE JN074**

**EMIRATES TEAM NEW ZEALAND and the REGATTA DIRECTOR (CASE AC24)**

**&**

**LUNA ROSSA CHALLENGE 2013 and the REGATTA DIRECTOR (CASE AC25)**

**DECISION**

**MEDIATION**

1. On 11<sup>th</sup> June 2013 the Jury Chairman received a request for 'the assistance of the America's Cup International Jury to mediate the adoption of proposed rule amendments arising from safety recommendations issued by [the Regatta Director] on 22<sup>nd</sup> May 2013.'
2. Pursuant to Protocol Article 15.4(j), the Jury Chairman appointed two members of the Jury who conducted mediation in San Francisco between 19<sup>th</sup> June and 22<sup>nd</sup> June 2013 inclusive. Mediation continued in San Francisco from 4<sup>th</sup> July to 7<sup>th</sup> July 2013 inclusive.
3. The dispute was unable to be resolved by mediation and the Applications proceeded by way of an oral hearing before the Jury in San Francisco on 8<sup>th</sup> July 2013.

**THE APPLICATION BY EMIRATES TEAM NEW ZEALAND**

4. On 28<sup>th</sup> June 2013 the Jury received an Application from Emirates Team New Zealand (ETNZ) representing the Royal New Zealand Yacht Squadron.
5. ETNZ, sought a ruling from the Jury that the Regatta Director has exceeded his jurisdiction in seeking to introduce amendments to the AC72 Class Rule ('Class Rule') without obtaining the unanimous consent of the Competitors.
6. On 28<sup>th</sup> June 2013 the Jury issued Jury Notice JN072, Directions no. 1, inviting all Parties on the Service Address List to respond by 4<sup>th</sup> July 2013, and inviting ETNZ to reply by 6<sup>th</sup> July 2013. An oral hearing was scheduled for 8<sup>th</sup> July 2013 in San Francisco.

## THE APPLICATION BY LUNA ROSSA CHALLENGE 2013

7. On 2<sup>nd</sup> July 2013 the Jury received an Application from Luna Rossa Challenge 2013 (LR) on behalf of the Circolo della Vela Sicilia.
8. LR sought 'a ruling from the Jury that the Regatta Director has exceeded his jurisdiction and authority by issuing:
  - Regatta Notice 188 entitled 'Further Instructions to Regatta Notice 185 Regarding Asymmetrical Rudder Elevators'; and
  - Regatta Notice 189 entitled 'USCG Event Permit'.'

The Application also included a request for urgent interim relief 'that until the final decision of the Jury is published, and without implying predetermination, to approve the interim relief to instruct the Measurement Committee to reply and interpret the AC72 Class Rule as published without regard to any of the Regatta Director's Recommendations to the extent that such Recommendations have not been unanimously agreed by the Competitors.'

9. On 4<sup>th</sup> July 2013 by email from Luis Saenz Mariscal, LR General Counsel, LR withdrew the request for urgent interim relief, on the basis that it did 'not alter the rest of our submissions or our position, regarding the disputed Regatta Notices 188 & 189 or Measurement Memorandum No. 6.'
10. On 4<sup>th</sup> July 2013 the Jury issued Jury Notice JN073, Directions no. 1, inviting all Parties on the Service Address List to respond by 6<sup>th</sup> July 2013, and inviting LR to reply by 7<sup>th</sup> July 2013.

## CONSOLIDATION OF THE ETNZ APPLICATION AND THE LR APPLICATION

11. In Jury Notice JN073 the Jury also gave notice that it had determined, as the issues and applicable Rules were substantially the same (although not identical), the two Applications be heard together.

## THE ORAL HEARING

12. The oral hearing was held on 8<sup>th</sup> July 2013. The hearing was attended by the following Parties and their representatives:

ETNZ, represented by Russell Green and Ausra Deluard  
LR, represented by Luis Saenz Mariscal, Aaron J. Foxworthy, Marco Mercuriali  
Measurement Committee (MC), represented by Nick Nicholson  
America's Cup Race Management (ACRM), represented by Iain Murray, Hamish Ross  
America's Cup Event Authority (ACEA), represented by Sam Hollis, Stephen Barclay  
Oracle Team USA (OTUSA), represented by Richard Slater, Grant Simmer  
Artemis Racing (AR), represented by Paul Cayard, Melinda Erkelens, Dave Perry  
Golden Gate Yacht Club (GGYC), represented by Tom F. Ehman Jr.

## COMPOSITION OF THE HEARING PANEL

13. The Jury Chairman introduced the Jury members and asked all Parties whether they had any objection to any of the members hearing the matter. No objections were raised by any of the Parties to any of the Jury members hearing the matter.

## OBSERVERS AND MEDIA

14. The Jury heard submissions from all Parties concerning attendance by observers, as per the Jury Rules of Procedure and Guidelines for the Dissemination of Information. All Parties agreed that each Party be permitted to have two observers, which may include an accredited media representative from that Party, to attend the hearing. The Jury so directed, noting that confidentiality provisions of the Jury's Rules of Procedure and Guidelines for the Dissemination of Information would apply to any such observers.

## OTHER PRELIMINARY MATTERS

15. No Party objected to the Jury's jurisdiction under the Protocol to consider these Applications. The Jury is empowered under Protocol Article 15.4 to act 'both as a jury under the RRSAC and as an arbitral body' with the powers referred to therein.
16. The Jury Chairman invited Parties to raise any preliminary matters prior to taking submissions on the substantive issues. Hamish Ross (HR) referred to the legal opinion attached to LR's Reply. He submitted that even though the Reply had been received in accordance with the Jury's Directions in JN073, he had not had sufficient opportunity to consider and research matters raised therein. The Jury Chairman advised that, although the opinion referred to matters of general application in these proceedings, if HR considered he was disadvantaged by this, following the hearing of submissions and evidence, he should raise this matter further in his final submissions. The concern was not raised further by HR during final submissions.

## APPLICATION, REPLY AND ORAL SUBMISSIONS BY EMIRATES TEAM NEW ZEALAND

17. ETNZ sought a ruling from the Jury that 'the Regatta Director has exceeded his jurisdiction in seeking to introduce amendments to the AC 72 Class Rule ("Class Rule") without obtaining the unanimous consent of the Competitors as required by Clause 4 of the Class Rule and that any such amendments are invalid and of no effect.'
18. ETNZ submitted that the Jury 'need to rule on the validity and enforceability of certain conditions contained in the document entitled "2013 America's Cup AC72 Safety Requirements 1.1" and subsequent amendments to this document, contained in the Application for a Marine Event Permit, and amendments, lodged with the U.S. Coast Guard by the Golden Gate Yacht Club ("GGYC"), the America's Event Authority "ACEA", and America's Cup Race Management ("ACRM") as the sponsoring organization.'
19. ETNZ noted '[t]he Regatta Director has informed ETNZ that once the Marine Event Permit is issued by the U.S. Coastguard he will issue a Regatta Notice advising Competitors that all the conditions contained in the Safety Plan submitted with the Marine Event Permit Application, including the contentious Class Rule amendments, will be rules of the Event with which Competitors will have to comply under Article 16 of the Protocol.' ETNZ submitted that this procedure is flawed and not in accordance with the rules of the America's Cup competition, including the Protocol.
20. ETNZ submitted that 'the particular proposed rule amendments to which ETNZ objected are contained in a document entitled Attachment C: AC72 Class rule Amendments 1-14 (Redline version) circulated by the Regatta Director to Competitors on June 24 in a communication entitled "Supplementary Regatta Director Safety Recommendations No.2" where the Regatta Director said:  
*"The Regatta Director has been advised by the Competitors and organizers that they*

*agree to all of the Supplementary Recommendations No. 2 with the exception of:*

*+ an additional 100 kilograms being added to the maximum weight of an AC72 Yacht for safety purposes;*

*+ rudder elevators being permitted to extend beyond maximum beam; and*

*+ a 150 millimeter reduction in the required clearance of rudders relative to the sternplane.*

*Regardless, as Regatta Director I feel strongly that the foregoing three recommendations, though not unanimously agreed, must remain in force...*

*Supplementary Recommendations No. 2 will be submitted to the U.S. Coast Guard to form part of the Regatta Safety Plan."*

Since the Regatta Director issued his Supplementary Recommendations No 2, all Competitors have now formally responded to the proposed Class Rule amendments contained in Attachment C. Oracle Team USA and Artemis Racing both voted to approve the Class Rule amendments as a block. ETNZ agreed with some changes but did not agree with the changes referred to by the Regatta Director in his communication. Luna Rossa Challenge also only approved some changes.'

21. ETNZ submitted that, as a matter of principle, no Party may unilaterally amend any Rule after it has been published. They submitted that amendment procedures need to be followed, particularly in respect of the Class Rule, because Competitors have relied on them in respect of their design programs; that Competitors are responsible for their own design, not the Regatta Director; and that the Regatta Director is not allowed to do indirectly what he cannot do directly.
22. ETNZ submitted that the Marine Event Permit is not a Coast Guard Regulation. They submitted that the Coast Guard has promulgated regulations in respect of the 34<sup>th</sup> America's Cup in the past and that it had not done so in this case. They submitted that the Permit is not a regulation under Protocol Article 16, because it is not established by governmental authority.
23. They submitted that the conditions in the Safety Plan relating to class rules that have not been validly changed do not have the force of law. The Safety Recommendations need not be converted into class rules to meet the Coast Guard's requirements. The Regatta Director may still amend the Safety Plan. Failure to comply with the terms of the Permit does not immediately lead to forfeit of the Permit.
24. ETNZ further submitted that the Coast Guard Permit Manual recognizes risk is inherent and a no-risk scenario situation is impossible. Minimizing the risk by way of boat design is the Competitors' responsibility.
25. Since ETNZ filed their Application, the United States Coast Guard (USCG) issued the Marine Event Permit on 28<sup>th</sup> June 2013. Consequently, ETNZ sought leave to amend their Application. There were no objections to this revision from the Parties and the Jury accepted the revised Application, which sought the following rulings:
  - (a) The Regatta Director exceeded his jurisdiction and violated the Protocol and the AC72 Class Rule by publishing regulations that amend the Class Rule without the unanimous consent of the Competitors;
  - (b) The safety of the yacht's design under the Class Rule is the responsibility of the Competitors;
  - (c) The Regatta Director has not provided a reasonable basis for the Jury to conclude how the contested Class Rule Changes could affect the overall safety of the event;
  - (d) Pursuant to its power under Article 15.4(e) of the Protocol to enforce and give

- effect to its decisions above, the Jury orders the Regatta Director to inform the U.S. Coast Guard that:
- a. The contested Class Rule Changes have not received unanimous consent of the Competitors and therefore, the safety plan is revised to clarify that the Class Rule Changes are advisory recommendations that the Competitors can choose to follow within the confines of the existing Class Rule.
  - b. The Competitors remain responsible for the safety of their yacht design.
  - c. There is no reasonable basis to determine how the change could affect the overall safety of the 34<sup>th</sup> America's Cup Regatta.
- (e) Alternatively, the Jury finds that the existing Class Rule coexist with the safety plan and orders Competitors to comply with both the existing Class Rule and the safety plan. In the event of any inconsistency or conflict between the safety plan and the existing Class Rule, the Jury orders that the most restrictive provisions shall prevail.'
26. ETNZ submitted Competitors undertook their design programs knowing that the Regatta would be sailed in AC72s in San Francisco, a known windy venue, between July and September 2013 with an upper wind limit for starting racing of 33 knots. They submitted they 'always believed that this upper limit was unrealistic', but 'knew that the Defender's design brief for the drafting of the Class Rule was that the design had to be capable of sailing in anything, as the intention of the GGYC and the Challenger of Record was that the event was intended to be a TV spectacle where there were no postponements of racing due to wind conditions.'
  27. ETNZ further submitted that the Regatta Director exceeded his jurisdiction by purporting to implement the proposed changes to the Class Rule that were attached to the Marine Event Permit Application as part of "Supplementary Regatta Director Safety Recommendations No. 2" ("Class Rule Changes") without obtaining the unanimous consent of Competitors as required by Class Rule 4. The Regatta Director's action is contrary to the underlying fundamental principle of mutual consent in the Deed of Gift which governs the creation and amendment of rules in the America's Cup competition. In contrast to other international sporting events, there is no governing body responsible for competition rules. Rather, the rules are achieved by mutual consent of the Competitors.'
  28. They submitted that under Protocol Article 4.3(k) 'ACRM may publish regulations consistent with the terms of the Protocol, **however**, such regulations **shall not** amend any of the governing documents referred to in Article 13, including the Class Rule.'
  29. They submitted it is well established in US caselaw that a party may not accomplish indirectly what is forbidden to do directly ("Quando aliquid prohibetur, prohibetur et omne, per quod devenitur ad illud").
  30. They submitted '[t]he establishment of the AC Review Committee in no way gave the Regatta Director jurisdiction to change the Class Rule', and that '[t]he Appointment Letter of the AC Review Committee recognizes that rule changes would be required regardless of the Committee's recommendations'. ETNZ, in a response to the Regatta Director on 13<sup>th</sup> May, reserved their right to assess any recommendations before agreeing to any consequential rule changes.
  31. They submitted that under Protocol Article 4.3(e), 'ACRM is responsible for *the management of on-water race areas and the **conduct** of all racing.*' (emphasis added)' They also submitted that 'the Regatta Director's responsibility for the conduct of racing is delineated in the Racing Rules of Sailing. The Racing Rules of Sailing ("RRSAC" or "Racing Rules") is the Protocol Article 13 document that governs the *conduct* of racing (as opposed to the Class Rule which govern Yacht design and which confer no power

on the Regatta Director to make any design decision singlehandedly). The Racing Rules relate to on water management of races, and do not indicate any wider role or jurisdiction for the Regatta Director in relation to the yachts and the Class Rule. The very fact that the Racing Rules 27.3 and 32.1 refer to the race officer, not the Regatta Director, establishes that the scope of the power is limited to on-the-water race management.'

32. ETNZ agreed 'that there is a general duty of care placed on the race officer and the Regatta Director to conduct safe races, but this does not extend beyond on-the-water race management. It is well established that race officers should not conduct racing in extreme weather conditions or when there are hazards on the course. Part of this obligation relates to control of spectator boats and keeping the course safe for the competitors. This duty is confirmed in the fourth Event Permit condition that requires the Event Sponsor to "ensure that all event participants, support vessels, and helicopters under its control operate in accordance with the applicable Management and Protective Measures outlined in the 34th America's Cup Environmental Assessment, such as the marine and air buffer zones."
33. ETNZ submitted that 'it is clear from the competition rules that safety in relation to the actual design of the yachts is the responsibility of Competitors, not the Regatta Director in that:
  - Article 18 of the Protocol states that "Each Competitor taking part in the Event does so at its own risk and responsibility" and requires the Competitors to provide a comprehensive waiver for the Event Sponsors.
  - The Class Rule Introduction states "Competitors are responsible for the structural integrity of their AC 72 Yachts."
34. They submitted that they support the comments made in the four submissions about the importance of safety: 'The death of a sailor has quite rightly put the focus on crew safety and the safety recommendations have done an excellent job in relation to that. However, the ultimate responsibility for safety of the yacht's design lies with the Competitors not ACEA, ACRM or the Regatta Director.'
35. ETNZ submitted that the 'Class Rule does not itself regulate safety, however it does allow a safe yacht to be designed within the parameters of the rule – as our design's 120 day track record demonstrates. The design has proved it is possible to design a safe yacht under the AC72 Class rule suitable for sailing in San Francisco conditions, but it does come with performance sacrifices, more noticeable in light winds.'
36. They further submitted that the contested Class Rule changes 'are not Article 16 regulations issued by the U.S. Coast Guard. According to 33 CFR §1.05, the U.S. Coast Guard Captain of the Port has the authority to issue two types of regulations: (1) those pertaining to the establishment of safety and security zones and (2) "special local regulations" (as defined in 33 CFR §100.35); he cannot delegate this authority.'
37. They submitted that '[i]f the U.S. Coast Guard plans to promulgate any special local regulations in connection with a marine event it approves, the Coast Guard is required, under 33 CFR §100.25, to disclose the nature of such special local regulations when it approves the application. Here, the Event Permit discloses only special local regulations related to safety zones ("movement of all vessels") and the U.S. Coast Guard's power to delay, shorten or terminate any America's cup race. It does not mention any special local regulations relating to the Class Rule Changes or yacht design parameters. Thus, if the Coast Guard were to incorporate the Class Rule Changes into a special local regulation, it would be in violation of 33 CFR §100.25.'
38. They further submitted that 'to promulgate special local regulations, the U.S. Coast Guard is required to follow certain rulemaking procedures dictated by the Administrative Procedure Act (5 U.S.C. §553) and 33 CFR Subpart 1.05. These

include publishing the regulations, giving the Competitors proper notice that references the legal authority under which the rule is proposed, issuing a statement of basis and purpose, and holding a “notice and comment” period or demonstrating good cause to excuse it. The Coast Guard has not followed these procedures with respect to the Class Rule Changes. The Coast Guard did, however, follow these procedures in promulgating the America’s Cup safety zone regulations, which indicates that the U.S. Coast Guard knows how to issue regulations when it wants to and that its failure to follow the proper procedures with regards to the Class Rule changes reflects an intentional decision not to give those changes the force of law.’

39. ETNZ further submitted that ‘not only can the “safety plan” established by the Regatta Director be adjusted by the event sponsors, but failure to comply with the “safety plan” does not result in automatic forfeiture of the Event Permit. The U.S. Coast Guard merely retains the authority to nullify the Event Permit if, in its discretion, the event becomes unsafe for any number of reasons (*“If at any point, your event becomes unsafe due to weather, vessel traffic, irresponsibility on part of the sponsor or participants, failure to meet conditions in the Marine Event Permit, or any other reason, the USCG COTP has the authority to nullify the Marine Event Permit and stop the event.”*). Moreover, unlike special local regulations and safety zone regulations that carry the force of law whereby violations can carry civil and criminal penalties (e.g., a safety zone violation can result in a \$40,000 civil fine or a criminal felony conviction with a sentence of six years in prison. A violation of the “safety plan” would not result in civil or criminal penalties imposed by the U.S. Coast Guard.’
40. ETNZ submitted that they raced on 7<sup>th</sup> July 2013 in compliance with the Class Rule and all Safety Recommendations. All the suggested Class Rule changes, except proposed new class rule 8.8(b) (increased rudder depth), are permissive, not prohibitive. They submitted that three teams can comply with the current Class Rule and the Safety Recommendations, but AR cannot. ETNZ asked the Jury to make an order that AR receives dispensation for not complying with the Class Rule.

#### APPLICATION, REPLY AND ORAL SUBMISSIONS BY LUNA ROSSA CHALLENGE 2013

41. LR submitted that the Regatta Director has ‘exceeded his jurisdiction and authority by issuing several Documents among which... Regatta Notice (RN) 188 entitled “Further Instructions to Regatta Notice 185 Regarding Asymmetrical Rudder Elevators” and RN 189 entitled “USCG Event Permit”.’
42. LR submitted that the ‘above actions by the Regatta Director are contrary to the Deed of Gift, a breach of the Rules of the 34<sup>th</sup> America’s Cup, and also consist of a breach of his obligation to provide neutral management.’
43. LR further submitted that ‘the actions by the Regatta Director (in relation to Recommendations 1.3 and 1.5) are absolutely arbitrary, without any scientific or technical justification and interfere with the Competitors obligation and responsibility for the structural integrity of their AC72 yachts.’ LR questions ‘how [they] can be responsible for the structural integrity of [their] equipment when it is the Regatta Director and not the AC72 Class Rule who is determining the design parameters.’
44. LR applied to the Jury to ‘cancel parr. 8 of ... Measurement Methodology No. 6... as it is in excess of the Class Rule.’
45. LR submitted that they ‘approved all the proposed Amendments that were genuinely safety issues’ but that they ‘rejected those Recommendations which are only related to speed’, and which in their view do not increase safety but ‘on the contrary, convert the AC72 into a more dangerous boat for the crew.’

46. LR requested that the Jury rule:
  - that RN 188 and RN 189 are against the Deed of Gift and the Rules;
  - that '[a]ll the Recommendations, including RN 188 and 189, are just that (recommendations)';
  - that '[t]he Recommendations, to the effect that they alter a Class Rule without the unanimous consent of the Competitors, are null and void;
  - that Measurement Methodology No. 6 paragraph 8 is a breach of the jurisdiction and authority of the Measurement Committee and it is against the rules.
47. LR further requested that the Jury '[o]rder the Regatta Director to amend the Recommendations deleting Recommendations 1.3 and 1.5; and '... to send the Recommendations and the Measurement Methodology No. 6 (both as modified by the Decision of the Jury), to the USCG with the request for the Marine Event Permit to be reissued.'
48. LR submitted that each Competitor takes part in the Event and decides to race, and continue to race, at its own risk and responsibility and is responsible for the design (including structural integrity), construction, sailing and maintenance of its yachts.
49. LR submitted that the Safety Recommendations may be followed voluntarily.
50. LR submitted that the Regatta Director is not responsible for design, construction or maintenance of the Competitor's AC72 yacht, and that by imposing design parameters without obtaining the required consent of the Competitors, as required to amend the Class Rule, he exceeded his authority.
51. LR submitted that the 34<sup>th</sup> America's Cup is a contest based upon mutual consent as per the Deed of Gift; that the Class Rule is the expression of the mutual consent as to the boat to be sailed in the 34<sup>th</sup> America's Cup; and that this was a 'fundamental pillar' of the America's Cup.
52. LR submitted that ACRM may publish regulations, but that such regulations shall not amend any of the Rules, including the AC72 Class Rule (Protocol Article 4.3(k)).
53. LR submitted that Regatta Notices 188, 189 and paragraph 8 of Measurement Methodology No. 6 were in excess of the jurisdiction of the Regatta Director.
54. LR submitted that the attachment of the Regatta Director's Recommendations to the request of the Marine Event Permit do not convert those Recommendations into 'laws and regulations', and that the Marine Event Permit issued by the US Coast Guard is not a 'law or regulation' within the meaning of Protocol Article 16, or even a directive.
55. LR submitted the issuing of the Permit is an executive function, and it has not been promulgated. The Permit comes from the regulated body, not the regulator, and for that reason it cannot be elevated to the status of a regulation.
56. LR further submitted that there is no conflict between the Protocol and the Class Rule and therefore Protocol Article 13 is not required to resolve any conflict.
57. LR submitted that, even if there is a conflict, the amendment of the Class Rule without the unanimous agreement of Competitors constitutes a breach of the mutual consent provisions of the Deed of Gift.
58. LR submitted that the Regatta Director cannot amend the AC72 Class Rule, directly or indirectly, without the unanimous consent of the Competitors, under the pretension of safety or otherwise.
59. LR submitted that the changes referred to by ACEA relating to Formula One car racing were based on the unanimous consent of the teams.



60. LR submitted that GGYC's letter of 14<sup>th</sup> May 2013 noted that:
- i) some recommendations required the cooperation and support of Competitors; and
  - ii) Competitors take part in the 34<sup>th</sup> America's Cup at their own risk.
  - iii) the Trustee expected all Competitors any amendments to any Rules ... in order to fully implement the recommendations of the Review Committee.
61. LR submitted that, whilst thanking the Regatta Director for his intense work, they 'endlessly declared that these Recommendations would not become compulsory until agreed by all Competitors by a Class Rule Amendment.'
62. LR submitted they had taken an active role in proposing safety changes for the Event and had initiated several changes to the rules, which had been approved through the proper process.

## RESPONSES AND ORAL SUBMISSIONS

### AMERICA'S CUP RACE MANAGEMENT

63. America's Cup Race Management (ACRM) submitted that new circumstances had been thrust on the Regatta as a result of two serious accidents at the venue and that a full safety review was required to satisfy reasonable safety concerns including concerns of local authorities.
64. ACRM also submitted that '[t]he Golden Gate Yacht Club in its role as trustee of the America's Cup immediately appointed a safety committee ("the Safety Committee") to review the training and racing of AC72 yachts in the 34th America's Cup, and make recommendations to the Trustee, the organizers, and the Competitors. All Competitors supported the appointment of the Committee at a meeting held on 14 May 2013 at the Louis Vuitton offices in San Francisco.'
65. ACRM further submitted that all Competitors agreed to cooperate and assist the Safety Committee in its work. 'All Competitors actively did so and made their personnel available to the Committee. The United States Coast Guard (USCG) was appointed to liaise with Safety Committee, and Lt. Jon Lane USCG participated in many of the interviews conducted by the Committee.'
66. ACRM submitted that '[o]n 22 May 2013 the Regatta Director issued the Safety Recommendations [arising from the work of the Safety Committee] to the Trustee, organizers and the Competitors.'
67. In ACRM's view the outcome of that safety review needed to be implemented in full if it was to have any value.
68. ACRM submitted that the 'Safety Recommendations and the Supplementary Regatta Director Safety Recommendations No. 2 represent the professional judgment and opinion of the Regatta Director, based on 46 years of experience, as to the best practical means to reduce risk in racing AC72 yachts in the Regatta. These further refined the Safety Recommendations, and incorporated matters agreed during consultation and mediation (including now allowing asymmetric rudder winglets to address concerns raised), as well as a copy of the rule documents with the amendments marked. It was sent to the USCG as part of the Regatta safety plan with other documentation requested by the USCG necessary for the issue of a marine event permit on 25 June 2013.'
69. ACRM further submitted that Competitors were advised that the Recommendations 'would form part of a safety plan submitted to the USCG for a marine event permit, and that they were likely [to] become conditions of the marine event permit for the Regatta to be issued by the USCG. The rule changes set out in Regatta Notice 185 (now published and later amended by RN 186 as to timing of completion, and Regatta

Notice 188 as to rudder winglet loads), the Racing Rules of Sailing (AC ed.) and the Protocol have now all been agreed. Regatta Notice 188 as to seeking rudder winglet loads has been objected to by Luna Rossa.'

70. ACRM submitted that there was 'insufficient support from Competitors to pass the AC72 Class Rule ("Class Rule") amendments to give effect to the Safety Recommendations. Class Rule 4 requires all Competitors to agree to any amendment. Two Competitors accepted all proposed amendments, and two objected to an increase in the weight of the yacht and provisions relating to rudder winglets.'

ACRM further submitted the following:

71. 'The Regatta Director issued on 28 June 2013 Regatta Notice No. 188 to require load studies of rudder winglets as part of the structural review of each AC72 yacht required by RN 185.'
72. 'The USCG issued an event permit on 28 June 2013 ("Permit"). A copy is attached marked with the letter "G". The Permit has been issued on this condition:  
a. **You are expected to conduct your event in accordance with your Marine Event Permit Application, including all attachments...**You are required to immediately inform the Coast Guard if circumstances necessitate a change to any component of your safety plan along with your assessment on how the change affects the overall safety of your event. The Coast Guard will review any requested adjustments to your plan and supporting justifications in our assessment of overall event safety and your adherence to the conditions of this permit.'" (Emphasis added.)
73. 'The Regatta Director in issuing RN 189 has not exceeded his jurisdiction. RN 189 reflects the provisions of art 16 and art 13.2 which have been agreed by all Competitors. It was issued as an extreme last resort after extensive consultation, and mediation to resolve an impasse and save the Regatta.'
74. 'The Marine Event Permit Application included the changes made to the Class Rule as outlined in the Supplementary Regatta Director Safety Recommendations No. 2. They now have the status of Permit conditions to be complied with.'
75. 'The Oxford English Dictionary, Second Revised Edition (2009) ("OED") is determinative of the meaning of any word used in the Protocol (art 1.3). "Regulation" is defined in the OED as "*a rule or principle governing behavior or practice; esp. such a directive established and maintained by an authority.*" That definition includes not only delegated legislation, but also encompasses a much wider class of obligations to include a directive of any authority. The Permit and its conditions (*you are expected to conduct your event in accordance with your marine Event Permit Application, including all attachments...*) is a directive in that it contains specific requirements and imposes clear obligations for the Regatta and its participants (See Permit at page 2, paras 1-6 for example), and are maintained by an authority (USCG) and are consequently are "regulations" for the purposes of art 16.'
76. 'The Competitors have each agreed that conflicts between the Protocol and the Class Rule are to be resolved in favour of the Protocol'.
77. 'The USCG is a government authority with jurisdiction. The Permit and its conditions are regulations in terms of art 16.'
78. 'The need to obtain a Permit from the USCG, the Permit and the conditions attached to it constitute laws and regulations. The Competitors, the Regatta Director, and ACRM must comply with the permit and its conditions.'
79. 'USCG has advised the Regatta Director that before it could accept any alterations to the event safety plan submitted to it and any issue of a new permit, would require alternative safety measures to compensate for the loss of a safety measure. This may

for example include a further substantial reduction in the wind limits.’

80. ‘The outcome is consistent with the purpose and intent of art 2 of the Protocol.’
81. ‘Suggestions made publicly by some that the Safety Recommendations have been made to intentionally favour some Competitors at the expense of others are utterly unfounded, libellous, and severely damaging to the integrity of the Regatta, and the personal reputation and integrity of the Regatta Director and must not be given any support.’
82. ‘If despite these submissions the Jury finds it is unable to support the interpretation of art 16 to make changes to the Class rule in all the circumstances (it is submitted there are good grounds to support the interpretation), it is invited to exercise the wide jurisdiction conferred on the Jury under art 15.4(b) to make the necessary changes to the Class Rule to allow the Regatta to proceed.’

#### EVIDENCE FROM UNITED STATES COAST GUARD

83. ACRM called as witnesses Captain Matt Bliven (principal coordinator for the United States Coast Guard in respect of the 34<sup>th</sup> America’s Cup) and Captain Kevin Bruen (primary legal advisor to the United States Coast Guard in California).
84. The Captains explained the USCG’s role with respect to the maritime environment. That role includes regulating commercial traffic and recreational users of the Bay. It does not include imposing design regulations on the event participants. They also explained the process by which an Event Sponsor obtains a Marine Event Permit.
85. The USCG stated that they do not dictate what is in a Safety Plan and if a component of a Safety Plan could not be implemented, it was incumbent upon the Event Sponsors to communicate with USCG. This would not immediately affect the status of the Marine Event Permit but the event sponsor through consultation would need to restore the USCG’s confidence in the Safety Plan. This would require the Event Sponsor to detail how that issue would be mitigated in respect of risk and there would be further review by USCG.
86. The USCG witnesses stated that the USCG relies on Event Sponsors to be informed and knowledgeable and to communicate with them.
87. If the Safety Plan needs to be changed, they advised it does not mean that the USCG will revoke the Permit. Rather, they will look at how to mitigate that issue.
88. The USCG’s relationship with respect to the Permit process is with the Event Sponsors, which in the case of the 34<sup>th</sup> America’s Cup are ACRM, ACEA and the Golden Gate Yacht Club, not with individual Competitors. They also stated that the responsibility for safety of the Event remains with the Event Sponsors, and not with USCG.
89. USCG stated that there was always risk on the water and a Marine Event Permit will not eliminate all risk.
90. A number of previous incidents were raised (such as involving ‘Speed Chase’ and ‘OneAustralia’). In none of these cases did the USCG impose regulations relating to the design or construction of yachts.

#### AMERICA’S CUP EVENT AUTHORITY

91. America’s Cup Event Authority (ACEA) submitted that ‘ACEA under Article 58.1 of the Protocol is granted full and exclusive control over the Race Area in the Venue ‘subject to and in full compliance with the laws and/or other lawful directives of the competent

- (relevant) government authorities.’
92. ACEA submitted that ‘[i]n order to hold the Regatta, ACEA was required to apply for and obtain a marine event permit from the United States Coast Guard (“USCG”), which has jurisdiction over the conduct of the Regatta on San Francisco Bay. (33 CFR 100.15).’
  93. ACEA submitted that ‘[u]nder 33 CFR 100.35, the USCG has authority to promulgate certain special local regulations deemed necessary to ensure the safety of life on navigable waters immediately before, during and after an approved regatta or marine parade. Such regulations may include a restriction on, or control of, the movement of vessels through a specified area.’
  94. ACEA further submitted that ‘Applicants for a marine event permit must demonstrate to the full satisfaction of the USCG that the proposed regatta will be conducted in a safe manner and in accordance with agreed upon safety measures and protocols provided by the event sponsor in consultation with the USCG.’
  95. ACEA submitted that ‘[t]he USCG compliance manual “Permitting of Regattas and Marine Parades”, Chapter 4, Section D, paragraph 4a provides: “For marine safety at the event – The event sponsor, not the Coast Guard, is responsible for the safety of the event.”’
  96. ACEA submitted that ‘[a]s is well known, both of the first two AC72 yachts launched and sailed on San Francisco Bay suffered catastrophic accidents.... Double Olympic medalist Andrew (Bart) Simpson tragically died aboard Artemis.’
  97. ACEA explained the process that led to the Safety Recommendations and ultimately the Marine Event Permit being issued by the USCG. This explanation was consistent with the submission by ACRM and all other Parties.
  98. ACEA submitted that [t]he Event Marine Permit includes the following statements: ‘Marine event sponsors are responsible for the safety of their events. You are expected to conduct your event in accordance with your Marine Event Permit Application, including all attachments’. ‘You are required to immediately inform the Coast Guard if circumstances necessitate a change to any component of your safety plan along with your assessment on how the change affects the overall safety of your event.’ ‘If at any point your event becomes unsafe ... the USCG COTP has the authority to nullify the Marine Event Permit and stop the event.’
  99. ACEA submitted that the ‘Marine Event Permit stands on its own as a lawful directive implementing required safety protocols that must be followed in order to hold the Regatta ... which means that under Article 16 of the Protocol all competitors must comply with those requirements.’
  100. ACEA submitted that ‘Article 13.2 of the Protocol provides that in the event of any conflict between the provisions of the Protocol and the AC72 Class Rule, the Protocol shall control.’
  101. ACEA further submitted that ‘[a]bsent a conflict with the Protocol, ACEA does not dispute that amendments to the AC72 Class Rule require the full consent of all Competitors. However, there is no such consent requirement for compliance with applicable laws and directives that are designed to promote the safe operation and conduct of the Regatta. If ETNZ and Luna Rossa continue to object to the disputed amendments to the AC72 Class Rule, the AC72 Class Rule will be in conflict with the USCG permit and Articles 58.1 and 16 of the Protocol, which both require full compliance by all Competitors with applicable laws and directives.’
  102. ACEA submitted that it ‘has no authority to negotiate any of the requirements of the Marine Event Permit or the Safety Recommendations. The Safety Recommendations have been presented as a complete package; all must be accepted. In other words,

safety cannot be negotiated.’

103. ACEA submitted that the ‘purpose and intent of the event Protocol is set forth in Article 2. ‘The death of a Competitor has already had a direct impact on “*the sporting potential of the America’s Cup*” as well as its reputation as a “*premier sporting event*”. The process underway and the outcome of the decisions made here will further impact the sporting, media and commercial potential of the Cup, as well as its world-wide status. By way of comparison, fatalities of NASCAR and Formula 1 drivers resulted in widespread media scrutiny, numerous investigations, and intense debate among fans, commercial partners and other stakeholders about the timing and circumstances of safety changes.’
104. ACEA submitted that ‘NASCAR ultimately mandated the use of numerous items of safety equipment and inspection procedures. The FIA swiftly implemented measures to improve safety and F1 has not seen a fatality since the death of Ayrton Senna. In both cases the tragic loss of life resulted in swift and effective organizational safety changes made for the good of the drivers, the sport, and fans, resulting in safer and more commercially viable events. Conversely, the America’s Cup does not have a governing body like NASCAR or the FIA to enforce our safety review outcomes.’
105. ACEA submitted that ‘[w]hile there have been greater losses than the commercial considerations at stake, ACEA has accepted the Safety Recommendations as a package even though many of them have a direct negative impact on ACEA’s commercial interests, the cumulative budget impact to ACEA being millions of Dollars.’
106. ACEA submitted that ‘[t]o achieve the objectives of Article 2, those inside and outside the America’s Cup family must see that we have completed the process and implemented the expert recommended outcomes following the fatality of May 9. The only process open to GGYC, ACEA and ACRM (as the event organizers) once mediation had failed is the one that has been followed. It has been exercised in good faith and in a transparent fashion. For the Event to survive, the process must now be honoured – and indeed Article 2(c) requires “*the cooperation and support of Competitors and Officials.*”’
107. ACEA submitted that ‘[n]o competitor can say that one of the 37 elements is more important than the other. It is not reasonable to allow a participant to pick and choose the safety conditions for their own perceived competitive advantage, or to disadvantage another. The Safety Recommendations is a package and should not be up for negotiation.’
108. ACEA submitted that ‘[i]f the Safety Recommendations are not implemented as a package, it is likely that other restrictions in maximum wind speed will have a disparate, negative impact on the Event and on ACEA.’
109. ACEA also submitted that the ‘Jury is not in a position to question the conclusions of the experts who conducted the Safety Review. In accordance with Articles 16 and 58.1 of the Protocol, the Event must proceed pursuant to the applicable laws, regulations, directives and conditions set forth in the approved Marine Events Permit.’

#### MEASUREMENT COMMITTEE

110. The Measurement Committee (MC) made no submissions in respect of the substantive issues of this matter.
111. The MC submitted that none of the Rules contain directions or constraints on the timing of issuing measurement certificates or the number of measurement certificates that may be issued over the Event, and that AC72 Class Rule 27 outlines the conditions for issuing measurement certificates.

112. The MC noted that the Measurement Methodology does not form part of the AC72 Class Rule. They submitted that the memo circulated in June 2012 was not a Measurement Methodology but a Guideline for the Issuing of Measurement Certificates, and was created because no Rule or other governing document specified such matters.
113. On 24<sup>th</sup> June 2013 the MC issued revised 'Guidelines for the Issuing of Measurement Certificates during a Series' as Measurement Methodology No. 6, and this codified the previously circulated Guidelines including certain modifications in respect of changes in rudder elevator details, which might require a new measurement certificate.
114. The MC submitted that in issuing Measurement Methodology No. 6 the MC changed no Rule, did not exceed their authority and did not interpret the Protocol.

#### ORACLE TEAM USA

115. Oracle Team USA (OTUSA) noted that the expert Review Committee set up in response to the death of Andrew Simpson had only one member with a direct tie to a Competitor, namely Jim Farmer QC who had been a Trustee of ETNZ until the time of his appointment to the Committee. However, OTUSA supported the composition of the Committee and the process.
116. OTUSA contributed to the work of the Review Committee, specifically with 20 suggestions under various categories, respect the work of the Committee and firmly believe that its work is embodied in Iain Murray's recommendations.
117. OTUSA recognized that every Competitor would be affected differently by the recommendations and would be able to demonstrate that various items, notably the change to allow asymmetrical rudder wings, significantly affected the competitive preparation of their team to defend the Cup. They recognize that the changes will make all the yachts safer at the expense of speed in OTUSA's case.
118. OTUSA stated their belief that all of the recommendations relative to the rudder elevators were related to safety, contrary to the view of ETNZ.
119. OTUSA submitted that 'as a result of the US Coast Guard issuing its Special Local Regulations with the safety recommendations attached that these are now requirements that every Competitor must comply with in accordance with Protocol Article 16.'
120. OTUSA submitted that 'Iain Murray and the Safety Review Committee he chaired be applauded for taking positive action to reduce the risk of another tragic accident. ... It is inescapable that Iain acted fairly and neutrally and, most importantly, in the interests of every sailor who races on an AC72 yacht.'
121. OTUSA submitted that we owe it to the sailors to protect them, and it was irresponsible to pick and choose from the Safety Recommendations.
122. OTUSA stated it needed to respond to the suggestion that it was in a conspiracy with the Regatta Director, and this was an unfounded and outrageous suggestion.

#### ARTEMIS RACING

123. Artemis Racing (AR) submitted that '[t]he Regatta Director, in issuing the Safety Recommendations and directing the necessary changes to the Class Rules to give them effect, was acting as a reaction to a serious safety situation for the upcoming Event, which he presides over.'
124. They submitted that '[t]he issue at hand is an extremely difficult situation. On the one

hand, it is clearly preferable to preserve the sanctity of the Rules as agreed by the Competitors. On the other hand, the Regatta Director was faced with an immediate need to improve the safety of the Event; he took action in good faith and with the right intentions. Finally, it is important to note that if all the AC72 Class Rule changes except the ones regarding the max beam plane and the stern plane were passed, that would preclude Artemis Racing from competing in the America's Cup.'

125. They submitted '[t]he Jury itself has the ability to resolve the dispute raised by Jury Case AC24 pursuant to the powers listed under Protocol 15.4(b), and if it believes that doing so is in the best interests of the Event, the Jury itself could amend the AC72 Class Rule under Protocol 15.4(e).'
126. AR further submitted that '[s]omething had to be done. The Regatta Director stepped up, made a decisive move toward safety, using his best judgment. The Safety Recommendations are not about one team. They are about bringing safety to the fleet and the Event. At this stage of the competition, it would be impossible for the teams to agree on a meaningful list of safety rules to implement. Each team would likely put self-interest and performance before safety.'
127. AR submitted '[t]he fleet of AC72 Yachts is not identical, so a concept or rule that works for one team may not be technically possible for another team. The Safety Recommendations are intended to be an inclusive package achievable by all the Competitors (albeit for some, including Artemis Racing, compliance requires considerable efforts and cost).'
128. AR submitted it 'continues to use its best efforts to comply with the Rules, and to recover from the accident last month, so that it can be on the race course as soon as possible. In good faith and understanding that the Safety Recommendations would be incorporated into the Rules, we at Artemis Racing started designing and building new rudder elevators to the Safety Recommendation specifications on May 24, 2013, in order to have them as soon as possible and hopefully before racing. We believe that the other Competitors also made changes to their own designs and build schedules to accommodate the new Safety Recommendations. We used the entirety of the rudder wing (elevator) recommendations in designing those new elevators. We also will have one set that complies with the AC72 Class Rule as of May 22, 2013. Artemis Racing is prepared to demonstrate at oral hearing that it cannot comply with the larger and deeper rudder wings (as required under the Safety Recommendations) without exceeding the max beam and stern planes.'
129. AR submitted '[t]he impetus of ETNZ, in agreeing with all but 2 of the 37 recommendations (related to max beam plane and stern plane), seems to be a competitive one. If such a bid were successful, it would result in the exclusion of Artemis Racing from the Event because Artemis Racing cannot comply unless those 2 recommendations are included. If this matter goes back to a vote by the Competitors, Artemis Racing will have no choice but to vote against all the rudder changes so that it can comply with the AC72 Class Rule as it stood prior to the addition of the Safety Recommendation changes.'
130. AR requested the Jury 'to either:
  1. affirm the AC72 Class Rule changes proposed by the Regatta Director, or
  2. rescind the entirety of the rudder elevator recommendations.'
131. AR submitted '[i]f a third rudder option is the outcome of this proceeding, Artemis Racing will be eliminated from the competition, as it will not have time to comply. This would clearly be unacceptable, and AR hence reserves all rights in this respect.'
132. AR submitted '[t]he criticism of the Regatta Director is unfounded and AR completely supports the integrity of the Regatta Director. The AC72 Class is an untested class, a high-tech boat that sails on the edge. AR really want to race.'

## GOLDEN GATE YACHT CLUB

133. Golden Gate Yacht Club (GGYC) submitted a letter on 6<sup>th</sup> July by way of 'Submission of the Defender/Trustee Golden Gate Yacht Club'. That letter advised that GGYC, while a Party to these protests, 'declines to make a submission at this time out of respect for the International Jury's continuing efforts to mediate a solution ahead of Monday's jury hearing.'
134. At the time for Responses to the LR Application, GGYC further reserved the right to make submissions and call witnesses at the hearing.
135. The above approach was not helpful to the other Parties, nor to the Jury, in understanding the position of the Trustee prior to the hearing in relation to the important issues in these Cases.
136. In the hearing GGYC submitted that in respect of this Event there is no Commissioner with broad powers and that 'the bucks stops with GGYC'.
137. GGYC submitted that they had appointed an expert Safety Committee with experts agreed by all Parties. The Regatta Director had subsequently issued 37 Recommendations, which had been attached to the Marine Event Permit Application, sponsored by GGYC, ACRM and ACEA.
138. GGYC totally accepted these Recommendations 'without even looking at them', not caring who they affected, not even if it meant that AR could not race.
139. GGYC submitted that they were not willing to relax the Safety Recommendations.
140. GGYC submitted that under the plain language of the Protocol Competitors must comply with all applicable laws, including any regulations and directives by the US Coast Guard, and that that governmental authority has jurisdiction over the Event. Competitors must comply with the Permit, regardless of whether the requirements of the Permit conflict with the Class Rule.
141. GGYC produced a Memorandum, dated 8<sup>th</sup> July 2013, from their New York legal advisers, in support of GGYC's position.
142. GGYC further submitted that, as the USCG requires the Event be conducted in compliance with the Permit, Protocol Article 16 requires that Competitors comply with the Permit. The fact that the Permit may on its face conflict with certain Class Rules does not change that outcome.
143. GGYC submitted that pursuant to Protocol Article 13.2, the Protocol takes precedence over the Class Rule and that any conflict between those documents must be resolved in favour of the Protocol.
144. GGYC submitted that the USCG Permit met the requirements of Protocol Article 16, but that if it did not, the Jury had the required authority under Protocol Article 15.4 to resolve the dispute. In their view the dispute was not about the legality of winglets, but about liability. GGYC did not care if ACEA loses a lot of money, or about OTUSA's position and did not care if AR was able to continue. If the Safety Recommendations were cherry-picked, GGYC would face huge liability issues and the Regatta is likely not to continue.



## EVIDENCE IN CAMERA

145. With the approval of all Parties, the Jury heard evidence in camera from the following Parties:
  1. OTUSA
  2. AR
  3. LR
  4. ACRM
146. ACRM and the Measurement Committee, with the approval of all Parties, were present for the hearing of evidence in camera from OTUSA, AR and LR.
147. The Jury was satisfied that the submissions made and the evidence taken were of a technical nature, including confidential design information, and that these constituted 'exceptional circumstances' as required by the Jury's Rules of Procedure, paragraph 6. The Jury therefore made an Order of Confidentiality that such submissions and evidence be kept confidential to the Jury, ACRM, the MC, and the Competitor presenting such evidence.

## DISCUSSION

### THE SAFETY REVIEW COMMITTEE

148. Only LR raised any concerns as to the process by which the Safety Review Committee conducted its enquiry following the capsizing of the Artemis Racing AC72 and tragic death of Olympic sailor Andrew Simpson on 9<sup>th</sup> May 2013. However, all Competitors supported the appointments and cooperated fully with the Committee.
149. The work of the Safety Review Committee led to the Regatta Director publishing 37 Safety Recommendations on 22<sup>nd</sup> May 2013. The 'Safety Recommendations' reflected the work of well-qualified experts who conducted extensive interviews with team members and several independent technical experts.
150. Without having obtained independent expert technical advice, the Jury has no intention to review or attempt to selectively determine the merits or otherwise of any of the safety recommendations. The Jury considers there is no need to obtain such advice to enable it to decide this Case.

### RESPONSE AND ACTIONS OF THE REGATTA DIRECTOR

151. The Regatta Director chose to publish the Safety Recommendations of 22<sup>nd</sup> May 2013 on his own as there were concerns over liability amongst the Safety Review Committee members. The Regatta Director showed leadership in choosing to publish the Safety Recommendations and express his concern for the safety of the AC72 Yachts and their sailors. It reflected 46 years of experience of the Regatta Director as a sailor and extensive design experience.
152. Protocol Article 4.3(h) requires the Regatta Director to appoint Race Officer(s) to be responsible for the conduct of the races and on-the-water decisions while racing. The Race Officer(s) has/have a responsibility for safety under the Racing Rules of Sailing (America's Cup Edition) including rules 27.3 and 32.1, which provide him with the power to start, postpone, abandon or terminate races for any reason in respect to safety.
153. LR, in its Application of 2<sup>nd</sup> July 2013, was critical of the Regatta Director's conduct. The Application included a claim that he had 'blatantly breached the Rules' although no allegations were pursued by LR at the hearing. All the other Parties have been

supportive of the Regatta Director and did not doubt his professional integrity. In the Jury's view the Regatta Director has acted independently, with the utmost integrity and with a view to the safety of participating sailors and all others involved with the event being paramount.

154. ETNZ submitted that the Regatta Director has exceeded his jurisdiction with regard to his powers provided through ACRM under Protocol Article 4.3. Article 4.3(e) provides that ACRM is solely responsible for 'management of on-water race areas and the conduct of all racing'. The Jury considers that Protocol Article 4.3(e) does not preclude the Regatta Director from including within his jurisdiction matters that concern on-water safety involving AC72 Class Yachts.

#### THE COAST GUARD PERMIT

155. The consideration by the USCG of an Application for a Marine Event Permit envisages an application being made by an 'Event Sponsor', which in this case is ACEA, ACRM and GGYC.
156. The Supplementary Safety Recommendations that were issued by the Regatta Director on 22<sup>nd</sup> June 2013 included 37 Safety Recommendations from the original report. These had been changed to include a provision to allow asymmetric rudder winglets. These amended Safety Recommendations formed a part of the Safety Plan provided to the USCG and were attached to the Marine Event Permit issued by the USCG on 28<sup>th</sup> June 2013.
157. The Marine Event Permit included a provision that 'Marine event sponsors are responsible for the safety of their events. You are expected [emphasis added] to conduct your event in accordance with your Marine Event Permit Application, including all attachments.' The permit also includes provisions that in case of 'failure to meet conditions in the Marine Event Permit ... the USCG ... has the authority to nullify the Marine Event Permit and stop the event.' The Regatta Director is required by the terms of the Marine Event Permit to inform the USCG if any component of the Safety Plan (which includes the Safety Recommendations), which was included in such Permit have not been, or will not be, met. As a result of the evidence provided by Captains Bliven and Bruen at the hearing, the Jury is satisfied that the ability of the USCG to nullify or withdraw such Marine Event Permit will not be exercised in an arbitrary manner.
158. Where circumstances arise whereby the Regatta Director needs to inform USCG that components of the Safety Plan cannot be complied with, the USCG representatives made it clear there would first be a full consultation process with the Regatta Director and others representing the Event Sponsor to whom the permit was issued. Such consultation could result in the USCG agreeing to vary the conditions of the Permit. They made it clear the USCG does not claim expertise in the design rules of an AC72 Yacht; rather, they were concerned with the overriding requirement to hold an event that is safe for all event participants, spectators and users of San Francisco Bay. Until such a situation arises, in the Jury's view it is not helpful to speculate what the Event Sponsor, the Regatta Director or the USCG might do.
159. GGYC constitutes a part of the Event Sponsor, but is also the Defender. Where circumstances arise as referred to in the previous paragraph, it is appropriate in the interests of the neutral management provisions of Protocol Article 3 that other Competitors also have the ability to make their views known to the USCG through ACRM.

## REGATTA NOTICES 188 AND 189

160. Following the issue of the Marine Event Permit, the Regatta Director issued Regatta Notices 188 and 189 on 28<sup>th</sup> June 2013. ACRM made it clear in its submission that it was not an ideal situation and that RN189 was issued as an extreme last resort after extensive consultation and mediation to try to put into mandatory effect the Safety Recommendations. The heart of the dispute is that in issuing Regatta Notice 189 the Regatta Director exceeded his jurisdiction in that he has no power to amend the Class Rule. The Jury understands the difficult situation the Regatta Director was faced with which only occurred after resolution was unable to be reached in extensive discussions with all the interested Parties.

## COMPETITORS' RESPONSIBILITY

161. The Regatta Director's Recommendations of 22<sup>nd</sup> May 2013 included that such 'recommendations do not alter the responsibilities assumed and allocated by the Protocol....' and each 'Competitor and crew member remain responsible for their own safety at all times. Each Competitor and crew member must continue to make their own decision to race, or to continue racing.' This is a fundamental principle of the sport of sailing and is reflected in the ISAF approved Americas Cup Racing Rules of Sailing (Rule 4). Protocol Article 18.1 also provides that each Competitor taking part in the Event does so at its own risk and responsibility. The Jury cannot emphasize enough the importance of these key principles. While the Regatta Director does have some responsibilities for safety, the above are responsibilities directly required of 'Yachts', i.e. Competitors and skippers. To what extent the Regatta Director should seek to protect Competitors from failures of their own responsibilities and decisions within the context of the America's Cup Rules need not be addressed at this time.

## SAFETY MATTERS CONTAINED IN THE REGATTA NOTICES

162. There was debate in the submissions and the hearing as to what Competitors have actually done in terms of implementing the Regatta Director's Safety Recommendations. The Regatta Director submitted that 'none of the safety recommendations relating to the Class Rule have been accepted and adopted by the Competitors.' ETNZ and LR stated at the hearing that they had each implemented almost all of such recommendations. The matters in dispute were only with respect to the proposed increase of 100 kg in maximum sailing weight and limits to the extent the rudder winglets may extend outside the beam and towards the stern plane. ETNZ and LR argued that these measures were not necessary for their yacht designs to be 'safe'. Their lack of agreement to adopt all of the class rule changes en bloc necessary to implement the Safety Recommendations was because they disagreed fundamentally with the right of the Regatta Director to change the Class Rule without unanimity.

## IS THE COAST GUARD PERMIT A LAW OR REGULATION UNDER ARTICLE 16?

163. There was considerable debate amongst the Parties as to whether the conditions of the Marine Event Permit in including the Safety Recommendations amounted to 'laws and regulations' in relation to Protocol Article 16. ACRM relied in particular on the definition of 'regulation' in the Oxford English Dictionary, Second Revised Edition (2009) (the official dictionary under Article 1.3). Such definition includes the term 'directive' which both ACRM and ACEA submitted was what the Marine Permit and its

conditions were. OTUSA and GGYC supported this view; LR and ETNZ were opposed.

164. The Jury is satisfied that the Marine Event Permit is not an applicable law or regulation in terms of Protocol Article 16. The evidence from the USCG representatives established that the special local regulations that had been established with regard to the 34<sup>th</sup> America's Cup related to management of navigational traffic in San Francisco Bay area, compelling, for example commercial traffic not to enter the designated area for racing. They noted that the USCG in the context of this event does not issue regulations relating to vessel design. The Marine Event Permit is also not a regulation in terms of Protocol Article 16, rather it is an adjudicatory action of the USCG applicable to the Event Sponsors named on the Permit, including ACEA and ACRM.
165. The Jury also notes that Protocol Article 58.1 provides for compliance with 'the laws and other lawful directives' whereas Protocol Article 16 makes no reference to the term 'directives'.
166. Such a permit where there is only an 'expectation' of compliance by the Event Sponsor cannot of itself amount to a law or regulation.
167. Therefore the Regatta Director cannot under Protocol Article 16 require Competitors to compulsorily meet the Safety Recommendations attached to the Marine Event Permit, if they do not meet the conditions of the Rules, including the Class Rule.

#### 'CONFLICT' PROVISIONS OF PROTOCOL ARTICLE 13

168. ACRM and ACEA, supported by GGYC, submitted that under Protocol Article 13.2 where there is any conflict between the provisions of the Protocol and the AC72 Class Rule, having regard to the precedence order of documents in Protocol Article 13.1, the Protocol would prevail. The Jury has determined that the Marine Event Permit and its attachments are not a law or regulation within the meaning of Protocol Article 16 and therefore does not need to consider this submission further.

#### PURPOSE AND INTENT PROVISIONS OF ARTICLE 2

169. ACRM and ACEA, supported by GGYC submitted that the actions taken reflect the 'purpose and intent' provisions of Protocol Article 2 in promoting 'a competitive regatta for all Competitors consistent with the provisions of the Deed of Gift'. It was submitted that following the fatality on 9<sup>th</sup> May 2013 they needed to show that action had been taken to implement the recommended measures. ACEA noted comparisons when deaths have occurred of racing car drivers in NASCAR and Formula 1. The Jury recognises the importance of safety and that ACEA, ACRM and GGYC have acted in a transparent way in how they best believed they could resolve the impasse. However, Class Rule 4 does not permit the Class Rule to be changed without the consent of all Competitors.
170. The submission of ACEA that the America's Cup does not have an independent governing body or person to enforce rules safety matters like NASCAR or the FIA to enforce safety review outcomes has considerable merit. This should be a matter for consideration in future editions of the America's Cup.

## DEED OF GIFT

171. The Deed of Gift dated 24<sup>th</sup> October 1887 is the foundation document of all America's Cups. It prevails over all other documents referred to in Protocol Article 13.1.
172. The 34<sup>th</sup> America's Cup is a challenge whereby agreement has been reached to mutually consent as provided for in the Deed of Gift to race for the 34<sup>th</sup> America's Cup. Such mutual consent includes the AC72 Class Rule. Class Rule 4 provides that the Class Rule can be amended only by the unanimous consent of Competitors still competing. Protocol Article 12 records: 'GGYC and CNR have mutually agreed, in accordance with the Deed of gift as follows: (a) all racing in the Regatta shall be undertaken in yachts that comply with AC72 Class Rule and this Protocol'. The Jury will take great care not to amend or alter what Parties have agreed to by mutual consent in accordance with the 'mutual consent' provisions of the Deed of Gift.
173. The Jury received submissions on the Jury's powers to make orders including to amend the Class Rule under Protocol Article 15.4. It would be entirely natural for the drafters of the Protocol to have included express language in the Protocol if they intended to empower the Jury to amend what had been agreed by mutual consent if it was their intention to change such a fundamental principle.

## DEED OF GIFT AND PROTOCOL ARTICLE 60 (PROTECTING THE REPUTATION OF THE AMERICA'S CUP)

174. The Deed of Gift provides that 'this Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries'.
175. The Jury recognises that the America's Cup is a world-renowned sporting event with a long history of competition, and is conducted in a highly competitive sporting environment.
176. The Jury particularly appreciates the sensitivities of the matter before it, noting that the Safety Recommendations were made by the Regatta Director following accidents involving two AC72 Class yachts, one of which tragically cost a sailor his life.
177. Inflammatory comments have been made by representatives of various Parties to these proceedings with many such comments being reported in the media.
178. Whilst making no finding as to whether or not any of these comments were in breach of Protocol Article 60 or any other Rule, the Jury specifically reminds all Parties of their obligation to respect and preserve the favourable reputation of the America's Cup and the sport of sailing, and to refrain from any conduct that may be perceived as being other than in compliance with Protocol Article 60.

## PROTOCOL ARTICLES 15.4 (a) (b) (e) AND (h)

179. ACRM, ACEA, GGYC and OTUSA submitted that if they were not able to succeed with their arguments with regard to Protocol Article 16, 13.2, and 58.1 to effect the Class Rule changes provided for in Regatta Notice 189, then the Jury has power to make the Class Rule change under Article 15.4 (b). The Jury was implored to do this in order to enable the Event to proceed.
180. AR submitted that if the Regatta Director did not have the authority to change the Class Rule as he intended to, the Jury has the right to do so as the 'final authority' under the Protocol.
181. Protocol Article 15.4(a) provides the Jury with a number of powers including 'to resolve all matters of interpretation of the Rules 'other than the Class Rules in Protocol Article

- 13.1(c) except as provided in Protocol Article 15.4(f)'. (Protocol Article 15.4(f) applies in the case of a claim that the Measurement Committee has exceeded its jurisdiction.)
182. ETNZ submitted in its additional Reply that the Jury had power under Protocol Article 15.4(e) to make orders regarding the conduct of the Event and enforce and give effect to the Rules with regard to their view on how the matter could be resolved by orders of the Jury.
183. Protocol Article 15.4(b) provides a power to resolve disputes between Competitors where it 'cannot be resolved by the terms of any Rule'. The Jury considers that as matters currently stand following this Decision there are existing Rules whereby the dispute can be resolved. The Jury is unaware of what the ultimate position of the Regatta Director or USCG might be when they are made aware of the effects of this Decision. Resolution is possible given the evidence of the USCG representatives that they would first wish to discuss and consider any amendments with regard to the safety report, which will in part depend on how the Regatta Director and Event Sponsors decide to address such matters.
184. With regard to the facts of this Case the Jury is not satisfied it has the power to amend the Class Rule to give effect to RN 189. To do so under Protocol Article 15.4(b) or (e) or 15.4(h,) of which 15.4(h) allows the Jury to determine its jurisdiction, requires clear and express language, which is absent. Such a determination would cut across an express provision of the Class Rule, which requires the unanimous consent of all Competitors to amend the Class Rule.

#### DECISION AND ORDERS

185. Regatta Notice 188, having been issued by the Regatta Director in accordance with Protocol Article 4.3(k), does not 'amend any of the documents referred to in Article 13'. They are therefore 'Regulations' with which Competitors are required to comply. (The Jury notes that the Regatta Director has, subsequent to the hearing, issued RN197 'Rudder Structural Review – Revised Requirements').
186. Regatta Notice 189 has the effect of changing the Class Rule and is therefore not in accordance with Protocol Article 4.3(k). The Regatta Director is ordered to withdraw RN 189.
187. The Jury will not make an order under Protocol Article 15.4(b) or (e).
188. To the extent that the Measurement Committee has acted as if RN189 has amended the Class Rule, the Measurement Committee is ordered to apply the Class Rule as it existed before the issue of RN 189.
189. The Jury orders the Regatta Director to make the views of all the Competitors known to the CG with regard to the Marine Event Permit if circumstances necessitate a change to any component of the safety plan along with the assessment on how the change affects the overall safety of the event.
190. With respect to ETNZ's requests for the Jury to make further orders, the Jury has no authority to give dispensation to AR.

#### MEDIATION

191. The Jury continues to offer a mediation service as envisaged by Protocol Article 15.

## COSTS

192. The Jury is minded not to make any Award of Costs in respect of the mediation which preceded the hearing and the Applications.
193. In the event that any Party wishes to make an Application concerning costs, they are directed to file such Application by way of [jurycomms72@ameriascup.com](mailto:jurycomms72@ameriascup.com) on or before 18h00 PDT, 15<sup>th</sup> July 2013.



David Tillett

JURY: David Tillett (Chairman), John Doerr, Josje Hofland, Graham McKenzie, Bryan Willis