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6 Attorneys for Plaintiff  
 TODD THOLKE

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA

12 TODD THOLKE, an individual,  
 13 Plaintiff,

Civ. No. 12-5162 (RS)

14 v.

15 **EX PARTE MOTION AND <sup>RS</sup>[PROPOSED]  
 ORDER FOR APPOINTMENT OF  
 SUBSTITUTE CUSTODIAN**

16 THE SAILING VESSEL ENERGY TEAM  
 AC45, her sails, tackle, equipment, and  
 furnishings,

DATE: October 5, 2012  
 TIME: ASAP, per ADMIR. L.R. 9-1

17 Defendant.

20 PLAINTIFF, Todd Tholke, by and through his attorney, John D. Edgcomb, having appeared and  
 21 made the following recitals:

23 1. On October 4, 2012, the Complaint In Rem herein was filed by plaintiff praying that a  
 24 summons and warrant for the arrest of the defendant sailing vessel Energy Team AC45 ("Energy  
 25 Team AC45"), her sails, tackle, equipment and furnishings, may issue by the Court's Clerk.

26 2. On October 4, 2012, this Court issued two Orders, one authorizing the Court's Clerk to  
 27 issue an In Rem Arrest Warrant to the U. S. Marshal for the arrest of the Energy Team AC45 and  
 28

1 another providing that the timing of the arrest not preclude the Energy Team AC45 from  
2 participating in the racing events scheduled to be held in San Francisco Bay on October 5-7. On  
3 October 4, 2012, the Clerk of this Court issued a Warrant of Arrest for the Energy Team AC45,  
4 commanding the United States Marshal for the Northern District of California to arrest and take  
5 into custody the Defendant vessel and to detain the same in his custody until further Order of the  
6 Court.  
7

8 3. It is contemplated that the U. S. Marshal will seize the Defendant vessel after the last  
9 sailboat race on Sunday, October 7, 2012. Custody by the U. S. Marshal requires the services of  
10 one or more keepers alone, and not including charges for wharfage and the other services usually  
11 associated with safekeeping vessels similar to this vessel.  
12

13 4. The Energy Team AC45, when not racing, is currently moored off Pier 30/32, Port of  
14 San Francisco, California. Plaintiff is agreeable to allowing Nielsen Beaumont Marine, Inc.  
15 ("Nielsen Beaumont") to assume the responsibility of safekeeping the Energy Team AC45.  
16 Nielsen Beaumont has agreed to assume the responsibility of safekeeping the said vessel and has  
17 consented to act as the custodian upon order of this Court at a rate of approximately \$500 per day.  
18 The United States Marshal is unable to perform these same services at a comparable rate. The  
19 transfer of the Energy Team AC45 to the substitute custodian for safekeeping will not be effected  
20 until the Court approves such custodianship.  
21

22 5. Pursuant to the Local Rules of Practice in Admiralty and Maritime Claims before the  
23 United States District Court for the Northern District of California, Rule 9-1(a), a substitute  
24 custodian in place of the U.S. Marshal may be appointed by order of this Court.  
25

26 6. Don Beaumont, CEO of Nielsen Beaumont and on behalf of Nielsen Beaumont, by  
27 Declaration appended hereto as Exhibit A and made a part hereof, avers that Nielsen Beaumont  
28 has adequate facilities and supervision for proper maintenance and safekeeping of the vessel, her

1 sails, tackle, appurtenance, furnishings, etc., and has presented proof of insurance to the United  
2 States Marshal with an aggregate coverage limit of \$4,000,0000 and sufficient to respond in  
3 damage to the defendant Energy Team AC45, her sails, tackle, appurtenances, furnishings, etc., or  
4 for damage or injury sustained by third parties due to any acts, faults, or negligence of said  
5 substitute custodian or its agents.

6  
7 7. In consideration of the United States Marshal's consent to the appointment of  
8 Nielsen Beaumont as substitute custodian, Plaintiff and Nielsen Beaumont agree to release the  
9 United States and the United States Marshal from any and all liability and responsibility arising  
10 out of the care and custody of the defendant vessel, her sails, tackle, appurtenances, furnishings,  
11 etc., from the time the United States Marshal transfers possession of the said vessel over to said  
12 substitute custodian, and Plaintiff further agrees to hold harmless and indemnify the United States  
13 and the United States Marshal from any and all claims whatsoever arising out of the substitute  
14 custodian's possession and safekeeping.

15  
16 THEREFORE, IT IS ORDERED that the United States Marshal for the Northern District  
17 of California shall surrender the possession of the defendant Energy Team AC45 to the substitute  
18 custodian named herein upon executing the warrant in this action, and it is further

19  
20 ORDERED that Nielsen Beaumont Marine, Inc. be and is hereby appointed the custodian  
21 of said vessel to retain the same in his custody for possession and safekeeping for the  
22 aforementioned compensation until further Order of the Court. All costs for custodial service and  
23 moorage charges shall be paid by Plaintiff, and the expenses of the substitute custodian shall be  
24 considered *custodia legis*, and it is further

25  
26 ORDERED that all United States Marshal's costs be paid prior to release of said vessel,  
27 Energy Team AC45, and it is further

28  
ORDERED that Plaintiff's attorney will serve the owner or, as it is apparent, the person(s)

1 having current custody, of defendant Energy Team AC45, with a copy of this Order.

2 DATED this 5th day of October, 2012.

3 IT IS SO ORDERED:

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PRESENTED BY: Edgcomb Law Group, P.C.

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BY: 

John D. Edgcomb  
Attorneys for Plaintiff

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