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A Disconnect Between Title and Registry

By Francis X. Nolan III, Esq.

Creditors have long relied on the ability of admiralty courts to order foreclosure sales on vessels to enforce maritime lien claims and preferred mortgages. In many jurisdictions, including the United States, jurisdiction over the vessel owner is not required and the court-ordered sale transfers title to the purchaser, terminating all right, title and interest of the owner and all other parties in the foreclosed vessel.¹ The admiralty sale is, in each case, enabled by the national law where the vessel is found, and the forced sale occurs and is widely accepted in other jurisdictions under international concepts of comity. The finality of such sales and the clearing off of all prior claims enhances the foreclosure sale price, resolves title, results in more willing buyers appearing for the sale, and nets higher foreclosure sales proceeds.

Recent experiences and reported cases have raised concerns about the risks facing purchasers at forced sales of vessels. The problems seem not to be rooted in questions of title, but rather concern the requirements of a flag state for deletion from a vessel's prior registry. For example, the case of *Goldfish Shipping, S.A. v. HSH Nordbank AG* demonstrates that, while U.S. law provides that a court-ordered sale of the vessel transfers

¹ The concept of *in rem* jurisdiction over a vessel is widely grasped in the common law jurisdictions, but not so in the civil law jurisdictions.

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A Disconnect Between Title and Registry

By Francis X. Nolan III, Esq.

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title free of any liens or encumbrances,² this may not be sufficient to put the vessel's past behind it.³

In *Goldfish*, a major international shipping bank foreclosed on a Turkish-flag vessel in the Port of Philadelphia.⁴ The defaulting Turkish vessel owner was not personally before the court. At auction, an innocent third party bid on and purchased the vessel and received a bill of sale from the U.S. Marshal, by order of the U.S. District Court.⁵ The new owner provisionally re-registered the vessel in Panama and sailed with a cargo to the Mediterranean.⁶ The defaulting Turkish owner—whose title to the vessel was extinguished on the *in rem* sale—subsequently arrested the vessel upon arrival in Spain.⁷ After some delay, the Spanish courts lifted the arrest, and the vessel sailed to Italy, where the prior owner re-arrested the vessel.⁸ After more delays, the vessel was again released.⁹

The Turkish owner claimed that the vessel was still his, as it had not been deleted from the Turkish International Ship Register, which could not happen under Turkish law unless and until the mortgagee first released the mortgage.¹⁰ The mortgagee refused to file papers to release the mortgage on the Turkish register, claiming that this would also release the mortgagee's deficiency claim under Turkish law.¹¹ The buyer sued

the mortgagee claiming that the mortgagee had an obligation, as any other seller would in a sale "free and clear," to do whatever was necessary to permit the buyer to receive its bargained-for enjoyment of the vessel.¹² The mortgagee claimed that it had done all it could without surrendering its deficiency claim and that a buyer's claim can exist only against the prior owner, noting that a foreclosure sale in admiralty divested any claim of the prior owner in the vessel.¹³ The mortgagee also pointed out that the U.S. Marshal, and not the mortgagee, was the "seller" of the vessel.¹⁴

Ultimately, the Third Circuit Court of Appeals agreed with the mortgagee.¹⁵ The court held that the judicial sale did, in fact, result in the buyer receiving title free and clear of encumbrances.¹⁶ The actions by the prior owner, while certainly harmful to the buyer, were not caused by any failure in title (and, in fact, were unlawful and thus no different from any other wrongful arrest of the vessel); thus, the foreclosing lender was not liable for the actions of the former owner, nor was the foreclosing lender obligated to deregister its Turkish mortgage to prevent the former owner from continuing to attempt to arrest the vessel.¹⁷ In essence, the buyer was left to seek its own remedies against the former owner.

A similar scenario played out recently in the High Court of Ireland, in a case in which a South Korean-flag vessel was sold at auction in Belgium following arrest by an Irish mortgagee. In *SPV SAM DRAGON INC. v. GE Transportation Finance (Ireland) Limited*,¹⁸ (June 15, 2012), Mr. Justice McGovern considered the rights and obligations of a mortgagee on a Korean-flag ship foreclosed upon in Ghent while the defaulting owner was the subject of bankruptcy proceedings in Korea. The foreclosing mortgagee defendant declined to delete the entry

² 46 U.S.C. § 31326.

³ See *Goldfish Shipping, S.A. v. HSH Nordbank AG*, No. 07-3518, 2008 U.S. Dist. LEXIS 93135 (E.D. Pa. Nov. 3, 2008), motion to amend judgment denied, 623 F. Supp. 2d 635 (E.D. Pa. 2009), *aff'd*, 377 Fed. App'x. 150, 2010 U.S. App. LEXIS 8224 (3d Cir. Apr. 21, 2010).

⁴ *Id.* at 1.

⁵ *Id.* at 2.

⁶ *Id.* at 5. A number of jurisdictions allow provisional registration of vessels previously registered in other countries on the new owner's undertaking to provide a certificate of deletion within a defined period before permanent registration is effected. Failing delivery of the provisional deletion certificate, the provisional registry may be discontinued by the flag state.

⁷ *Id.*

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 3.

¹² *Id.* at 8-9.

¹³ *Id.* at 10-11 and 18.

¹⁴ *Id.* at 24.

¹⁵ *Id.* at 155.

¹⁶ *Id.* at 153.

¹⁷ *Id.*

¹⁸ [2012] IEHC 240.

of its mortgage on the Korean Register of Shipping until after the Korean bankruptcy proceeding was recorded, claiming to rely on "legal advice that to do so could imperil its entitlement to the proceeds of the judicial auction, the priorities in respect of which were to be decided in accordance with Korean law."¹⁹

After taking the legal expert advice of the parties' Korean lawyers at trial, Mr. Justice McGovern specifically rejected the claim that it was necessary for the defendant mortgagee to maintain the mortgage entry on the Shipping Registry. However, the Court nonetheless concluded that "under Korean law, a mortgagee is not obliged to voluntarily delete the mortgage entry where there has been a judicial sale of a vessel in another jurisdiction,"²⁰ which the Court found to be "supported by International Maritime custom and practice."²¹ This conclusion rests alongside the Court's further conclusion that sale of the vessel in Ghent was "free from all encumbrances."²²

The difficulties experienced by the buyers in *SPV SAM DRAGON* and *Goldfish* involved the Korean and Turkish ship registries, respectively. However, this type of problem could occur with other registries for a variety of reasons. For example, U.S. law prohibits the transfer to non-citizens of vessels documented under U.S. law or which were last documented under U.S. law without the written approval of the United States Maritime Administration ("MARAD").²³ The practical effect of this provision may be felt regardless of whether ownership of a U.S. flag vessel is transferred in a U.S. District Court or in a foreign judicial foreclosure.

U.S. law provides that a "vessel is subject to deletion from the roll of actively documented vessels" for a variety of reasons, including, among others, placement of the vessel under foreign flag, or sale to a non-citizen.²⁴ The National Vessel Documentation Center ("NVDC") issues a "certificate evidencing deletion" upon presentation of evidence of the transfer and evidence that MARAD has consented to the sale,

either in a specific letter or under blanket approval provisions of 46 C.F.R. Part 221.²⁵ Conversely, when an owner applies to document a vessel under U.S. flag, he "must present evidence of removal from foreign registry" of any vessel that had been registered under foreign flag.²⁶

In order to better understand the issues underlying *Goldfish* and *SPV SAM DRAGON*, it is useful to take a closer look at the origin and nature of ship registries. One might search a vessel registry to confirm the entry of a given vessel in the name of a person or entity and thereby conclude that the vessel is, in fact, legally owned by the registered owner. But it appears that national vessel registries are not intended to be true title registries. Vessel registries will not necessarily meekly follow title changes to which they have not consented for a variety of policy reasons completely apart from the purpose of evidencing the reliability of ownership records.

The creation of national ship registries was driven by purposes other than those which inspired the creation of registries for land transactions. Registries established to record ownership interests, transfers and encumbrances on real estate were intended to avoid chaos in competing claims to land and fixed structures on the land. Strangers to the title are able to rely on filings in the registry which are indexed to the designated parcel. Transactions affecting interests in land, as the most immobile of property, are necessarily filed with the registrar of the district or county in which the parcel is located.

Ships, as the most mobile of property, do not necessarily have permanent homes. Moreover, historical evidence and logic suggest that a vessel registry is not intended primarily as the definitive authority on who owns or otherwise has an interest in a vessel. The entry of a vessel in a registry of vessels appears, rather, intended to identify the vessel as a subject for the protection of the sovereign and therefore gives the vessel nationality. A vessel acquires thereby the privileges, protections and the burdens of vessels operating under allegiance to the sovereign.²⁷

¹⁹ *Id.* at § 16(j).

²⁰ *Id.* at § 43.

²¹ *Id.*

²² *Id.* at § 40.

²³ 46 U.S.C. Sections 56101 *et seq.* (2007). The requirement of MARAD consent excludes certain smaller vessels and certain vessels involved in the fisheries.

²⁴ 46 C.F.R. §§ 67.171(a)(i) and (ii) (2007).

²⁵ 46 C.F.R. §§ 67.171(c) and (d) (2007).

²⁶ 46 C.F.R. § 67.55 (2007).

²⁷ In England, registration of ships began in the middle of the 17th century in order to permit the kingdom to restrict trade to vessels owned by British subjects. This registry was apparently not compulsory. Registration of Merchant Ships, The National Archives, United Kingdom, <http://www.nationalarchives.gov.uk/records/research-guides/merchant-shipping-registration-1786-1994.htm>

Flag is the insignia which identifies the vessel as a ship subject to the laws and protections of the sovereign. More often than not, the entry in the registry correctly identifies the person holding title in the ship. In that respect, nationality, flag and ownership are interwoven.

As recently as the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea, the prevailing view among nations was that "there must be a genuine link between a ship and a flag state..."²⁸ The Preamble to the Registration Convention asserts that this "genuine link" is necessary in order to permit a flag state to "exercise effectively its jurisdiction and control over ships flying its flag."²⁹

In Article 4, the Registration Convention provides, *inter alia*, that a ship may fly the flag of one nation only and that it may not change flags while away from its home port except in the case of a real transfer of ownership or change of registry. The "Owner" or "Shipowner" for purposes of the Registration Convention is defined to be "unless clearly indicated otherwise, any natural or juridical person recorded in the register of ships of the state of registration as an owner of a ship."³⁰

Aside from the fact that very few nations ratified the Registration Convention, subsequent developments have served to diminish its importance. While registry states still exert control over tonnage entered in the registries, at least in the most substantial national flag fleets, the impact of Port State Inspections and Control under the Paris Memorandum of Understanding on Port State Control, the Tokyo Memorandum of Understanding on Port State Control and other regional accords has been widely felt.³¹ The rise of open registries following World War II has also inverted the ratio of vessels under national flags to those in open

registries, divorcing the bulk of the blue water fleet from active control by strong flag sovereigns. Finally, the relatively recent and widespread adoption of bareboat charter registries by both the open registry jurisdictions and many national registries is inconsistent with the Registration Convention and serves to further sunder the connection between registry and flag.

The purpose of control over deletion from national registries appears to be varied. These provisions no doubt allow sovereigns to retain control over vessels deemed important to national security or economic benefit. They also may be designed in part to protect mortgagees from loss of rights in the event an unscrupulous owner attempts to evade mortgagee liens. The protection of mortgagees is also a feature of laws in place in the open registry jurisdictions.

Since national flag registries generally impose citizenship restrictions on ownership of vessels under their flags, non-citizen buyers are unable to reflag their foreclosure purchases under the same flag as the defaulted prior owner. Even where citizenship is not an insuperable barrier to the national flag, the fact that most national flags tax their fleet's revenues or income often defeats the economic goals of the bidder at auction. Open registries generally do not tax the revenues or income of vessels operating internationally under their flags.

Out of their own self-interest to be seen as rational and flexible from the perspective of international shipping, and devoid of policy concerns based on their own national defense and trade preservation, open registries have straightforward and transparent mechanisms for deletion of vessels from their flags. The deletion provisions of Marshall Islands' law illustrate this:

A vessel which is the subject of a preferred Mortgage may not be canceled from the Register for so long as the indebtedness secured by the Preferred Mortgage remains unsatisfied or the Mortgage is not otherwise discharged; provided however, that the Maritime Administrator may, not less than 60 days following the mailing of notice to all mortgagees of record at their last known mailing addresses of its intent to do so, strike a vessel from the Registry and Flag of the Republic as a result of receipt by it of evidence satisfactory to it that the vessel has been lost, destroyed, or

²⁸ Preamble to United Nations Convention on Conditions for Registration of Ships, 1986 (hereafter "Registration Convention").

²⁹ *Id.*

³⁰ Registration Convention, Article 2.

³¹ These multilateral regional agreements coordinate enforcement of a wide variety of international rules and regulations involving shipboard living and working conditions, safety of life at sea, and prevention of pollution from ships. The port states conduct inspection and enforcement on vessels of whatever flags enter their ports. Under the Paris MOU for example, flag states are ranked and categorized based on these inspections into white (best), gray, and black (worst) lists and allocate inspection resources going forward on the basis of which registries' vessels lag the most in compliance. See <http://www.parismou.org>

transferred to another registry following sale by order of an Admiralty Court in a civil action *in rem*; such administrative action by the Maritime Administrator shall not impair or affect the lien or status of any Preferred Mortgage recorded under this Chapter, nor shall it terminate the interest of a mortgagee in such a vessel.³²

If a vessel is "sold or transferred by process of law" and the prior owner fails or refuses to return the vessel's document to the Maritime Administrator, the Maritime Administrator is authorized nonetheless to issue a new document to the buyer.³³

It seems then that the difficulties in obtaining deletion from registries following forced sales are confined to the national flags and not the open registries. This problem is not easily addressed in the forum where arrest and foreclosure take place. Very often, the court in the forum of arrest or seizure has no jurisdiction over the registered owner. Certain issues, such as deficiency claims, for example, cannot be fully addressed by that court. It is also unlikely that a court in the jurisdiction of arrest would order a mortgagee to have its mortgage struck from the registry since the court would not wish to intrude on the processes of the foreign registrar. The court's sole function is to resolve a sale and transfer of title.

Cases such as *Goldfish* and *SPV SAM DRAGON* suggest that potential bidders at auction should pay special heed to the deletion requirements in national flag registries when they apply. These can also suggest that mortgagees should consider deletion requirements when evaluating transaction exit strategies, particularly if

these restrictions would tend to impair a buyer's right to re-employ a vessel in income-producing activity without prolonged delays.

One would imagine that this problem would be less in instances where a bankruptcy court transfers a vessel, inasmuch as a bankruptcy court is exercising much broader personal jurisdiction over the debtor, property of the debtor's estate wherever located and usually over a vast collection of creditors as well.

Maritime lienors and mortgagees depend on the successful forced sale of vessels to provide a means to satisfy delinquent debts and claims. This writer is not aware of any reported cases where transfer of title was voided by virtue of deletion impediments. The fear remains, however, that acquiring title without certainty that registration can be pursued by the buyer may chill interest in acquiring vessels at forced sales, particularly vessels registered under national flags on approval to open registries. More likely, lenders will come to avoid financing of vessels in certain registries and prospective buyers will refrain from bidding at auctions of certain flag vessels absent assurance that deletion will be promptly forthcoming.

Francis X. Nolan III is a Shareholder in Vedder Price P.C. of New York. He is the current Chair of the Marine Financing Committee of The Maritime Law Association of the United States. He is also the author of "Financing of Vessels" in the Matthew Bender Treatise "Equipment Leasing."

³² Marshall Islands Maritime Act of 1990, as amended, P.L. 1990-92, § 67; amended by P.L. 1992-32, § 4.

³³ *Id.*, Section 225.

**623 F.Supp.2d 635
GOLDFISH SHIPPING, S.A.**

v.

**HSB NORDBANK AG.
Civil Action No. 07-3518.
United States District Court, E.D.
Pennsylvania.
April 1, 2009.**

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MEMORANDUM

PADOVA, District Judge.

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On November 3, 2008, we issued a Memorandum Opinion and Order, dismissing the nine-count Amended Complaint that was filed by Plaintiff Goldfish Shipping, S.A. ("Goldfish") and entering judgment in favor of Defendant HSH Nordbank AG ("Nordbank"). Ten days later, Goldfish filed a Motion to Amend the Judgment pursuant to Fed.R.Civ.P. 59(e), and sought leave to file a Second Amended Complaint pursuant to Fed.R.Civ.P. 15(a). The proposed Second Amended Complaint, which Goldfish attached to the Motion to Amend, contains twelve counts and essentially seeks the same relief as was sought in the First Amended Complaint. Goldfish has refrained the legal claims, however, and asserted new legal theories in an apparent attempt to circumvent the legal deficiencies identified in our November 3, 2008 Memorandum Opinion. For the following reasons, we deny Goldfish's Motion.

I. BACKGROUND

In early 2003, Odin Denizcilik, A.S. ("Odin") was the owner of the M/V Ahmet Bey (the "Ship"). Nordbank held a first mortgage on the Ship. Odin defaulted on the mortgage, Nordbank had the Ship arrested, and the Marshal sold the Ship to Goldfish in a foreclosure sale. Thereafter, Odin had the Ship seized in both Barcelona,

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Spain and Ravena, Italy, claiming continued ownership.¹

Goldfish commenced the instant action against Nordbank on August 24, 2007, seeking damages associated with Odin's two seizures of the Ship. Nordbank filed an Answer to the Complaint on October 31, 2007. Soon thereafter, the parties commenced discovery. On May 7, 2008, Goldfish filed a Motion for Leave to File an Amended Complaint, asserting that the Amended Complaint would "tailor the allegations to more accurately reflect facts gleaned during discovery" and that amendment would "ensure that the claims are ... narrowly tailored and specific." (Mem. in Supp. of Mot. for Leave to File Am. Compl., Docket No. 16, at 2, 4.) We granted the Motion as unopposed on May 22, 2008, and the Amended Complaint (the "First Amended Complaint") was filed that same day. The First Amended Complaint asserted nine claims against Nordbank: (1) Unjust Enrichment, (2) Promissory Estoppel, (3) Misrepresentation, (4) Fraud/Fraud in the Inducement, (5) Breach of Warranty, (6) Breach of Implied Warranty, (7) Contract Implied in Fact, (8) Contract Implied in Law, and (9) Breach of the Implied Covenant of Good Faith and Fair Dealing. The crux of the First Amended Complaint was that Nordbank had failed to deliver the Ship to Goldfish "free and clear" of Odin's claims to the Ship. Goldfish asserted that Odin remained the registered owner of the Ship on the Turkish Registry of Shipping, and that Nordbank should therefore be liable for the damages

that Goldfish suffered on account of Odin's arrests of the Ship in Barcelona and Ravenna.

On May 30, 2008, Nordbank filed a Motion to Dismiss the Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6). Approximately six weeks later, on July 18, 2008, upon the joint request of the parties, we stayed discovery pending resolution of the Motion to Dismiss.² We held argument on the Motion on October 6, 2008, and granted the Motion in a lengthy Memorandum and Order dated November 3, 2008. Essentially, we held that all of Goldfish's claims failed because they rested on the premise that the Ship had *not* been sold "free and clear of all liens, claims and encumbrances." As we explained, Goldfish's reliance on this premise was fatal to its claims because the Ship had been sold pursuant to the Ship Mortgage Act, which, by its terms, mandates that the Ship had been "sold free of all ... claims." See 46 U.S.C. § 31326(b). In the alternative, we stated that Goldfish's claims failed because, *inter alia*, the First Amended Complaint did not allege (1) any contract or warranty between the parties, (2) any promise or misrepresentation made by Nordbank to Goldfish, (3) any legal duty on the part of Nordbank that had been violated, and (4) any unjust enrichment. Finally, we added at the end of the opinion that we believed the dismissal of the First Amended Complaint to be "fair under the circumstances," because, among other things, Nordbank's alleged failures occurred before final distribution of the proceeds of the judicial sale (the "res") and yet Goldfish did not bring those failures to this Court's attention, or seek compensation

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from the res before its final distribution.

In its Motion to Amend the Judgment, Goldfish argues that we erred in dismissing its First Amended Complaint without further leave to amend, and contends that we should remedy that error by permitting it to file the

proposed Second Amended Complaint that it attaches to its Motion. Like the First Amended Complaint, the proposed Second Amended Complaint asserts claims of promissory estoppel, misrepresentation, fraud, breach of contract implied in fact, breach of contract implied in law, breach of warranty, and breach of the implied covenant of good faith and fair dealing.³ In addition, it adds three counts for "breach of duty." Essentially, the Second Amended Complaint appears to accept that the Ship was sold free and clear of all liens, claims, and encumbrances pursuant to 46 U.S.C. § 31326, and asserts instead that, irrespective of this fact, Nordbank breached a contractor tort-based duty to (1) take all actions "ministerial and otherwise" to erase Odin's last-remaining "indicia of ownership" by deleting (or unconditionally consenting to the deletion of) the Ship from the Turkish Registry, and (2) deliver "marketable" title to the Ship.

II. LEGAL STANDARD

Under Fed.R.Civ.P. 59(e), after final judgment is entered, the plaintiff has "a ten-day window in which to seek to reopen the judgment and amend the complaint." *Id.* "[L]eave to amend within this window should, as Federal Rule of Civil Procedure 15(a) puts it, 'be freely given when justice so requires.'" *Id.* (quoting Fed.R.Civ.P. 15(a)). "Where a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and 59 inquiries turn on the same factors." *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir.2001) (citing *Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir.1984), and *Newark Branch, NAACP v. Town of Harrison, N.J.*, 907 F.2d 1408, 1417 n. 14 (3d Cir.1990)). In other words, the district court should consider the propriety of amendment under the standards applicable to Rule 15, as if the complication of the prior entry of judgment had not occurred.⁴ *Adams*, 739 F.2d at 864; *Newark Branch, NAACP*, 907 F.2d at 1417 ("[C]ourts have held that grants for leave to amend complaints should be routinely

granted to plaintiffs, even after judgments of dismissal have been entered against them, if the appropriate standard for leave to amend under Fed.R.Civ.P. 15(a) is satisfied."). That said, "the factors that guide [the review under Rule 15] may be affected by the fact that a ... judgment was granted before plaintiffs sought leave to amend their complaint." *Adams*, 739 F.2d at 864.

"Both a motion to amend a judgment and a motion for leave to amend a complaint are addressed to the sound discretion of the district court." *Cureton*, 252 F.3d at 272. Under Rule 15(a), we may deny leave to amend for "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,

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undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "The first four of these reasons devolve to instances where permitting amendment would be inequitable." *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir.2002). "Thus amendment must be permitted ... unless it would be inequitable or futile." *Id.*

Futility in this context "means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir.1997) (citations omitted). In assessing futility, we apply the same standard of legal sufficiency as applies under Federal Rule of Civil Procedure 12(b)(6). *Id.* (citations omitted); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 337 (3d Cir.2004) (finding no error in district court's denial of plaintiff's motion under Rules 59(e) and 15(a) when proposed amended complaint failed to state a claim under Rule 12(b)(6) and, therefore, leave to amend would be futile). Thus, we take the factual allegations of

the proposed amended complaint as true, draw all reasonable inferences in favor of the plaintiff, and deny the motion to amend if the factual allegations in the complaint do not raise plausible claims and are not sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d.2004)); *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir.2008) (citing *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n. 7 (3d Cir.2002)).

III. DISCUSSION

Goldfish argues in its Motion to Amend the Judgment that allowing it to file a Second Amended Complaint at this "early stage" of the litigation is "not inequitable," is "in the interest of justice," and is "anything but futile."⁵ (Mem in Supp. of Rule 59(e) Mot., at 3.) Nordbank responds that the proposed amendment is both inequitable and futile. For the following reasons, we deny Goldfish's Motion and refuse its request for leave to file a Second Amended Complaint.

A. The Equities/Undue Delay

Goldfish argues that the equities favor amendment, because this is a case of "first impression," which requires an "exploration into the nature of a judicial sale," and which is still in the "early stages," so that no prejudice will result from amendment. (*Id.*) We find, to the contrary, that the equities—and, more particularly, considerations of undue delay—favor denial of Goldfish's Motion.

As stated above, a court may deny amendment of a complaint if such amendment

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would be inequitable, i.e., the need for the amendment is the result of the movant's

undue delay, bad faith or dilatory motive; the need for the amendment is the result of movant's repeated failure to cure deficiencies by amendments previously allowed; and/or the amendment would cause undue prejudice to the opposing party. "The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point, the delay will become 'undue,' placing an unwarranted burden on the court, or will become 'prejudicial,' placing an unfair burden on the opposing party." *Adams*, 739 F.2d at 868 (citing *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir.1982), and *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir.1982)).

Delay "becomes 'undue,' and thereby creates grounds for the district court to refuse leave [to amend], when it places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend." *Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263, 266 (3d Cir.2008) (citing *Cureton*, 252 F.3d at 273). As such, the inquiry into undue delay includes consideration of the court's "[i]nterests in judicial economy and finality," as well as a "focus on the movant's reasons for not amending sooner." *USX Corp. v. Barnhart*, 395 F.3d 161, 168 (3d Cir.2004); see also *Cureton*, 252 F.3d at 273 (citing cases involving motions to amend after summary judgment is granted, in which the interest of judicial economy and finality of litigation became "particularly compelling"). Drawing on this precedent, the Third Circuit has recently indicated that it is appropriate to assess undue delay by focusing on the movant's reasons for not amending sooner and then balancing those reasons against the burden of delay on the district court. *Bjorgung*, 550 F.3d at 266.

In this case, Goldfish's explanations for not amending sooner are unavailing and its delay has placed a significant and unwarranted burden on the Court. First, it is plain that Goldfish had prior opportunities to

amend its complaint to state the very same claims it now includes in its proposed Second Amended Complaint. As detailed above, Goldfish filed its First Amended Complaint in May of 2008, after months of discovery had been undertaken. It does not argue that, since the drafting of the First Amended Complaint, it has obtained additional factual information, or that there has been a change in the law, that has permitted it to formulate new, more viable theories of recovery. Rather, it seems to argue that it simply did not think, earlier in the litigation, that it was necessary to advance its current theories of recovery or to allege the new facts that it sets forth, because it did not realize that the old theories were infirm or that the additional facts were important. (See Goldfish Reply Br. at 3 ("[Goldfish] ... had no reason to believe that the claims it brought failed to state a claim.").) However, as early as November 2007, Nordbank articulated during a court conference, at which counsel for Goldfish was present, that it believed that Goldfish's claims failed as a matter of law due to the operation of 46 U.S.C. § 31326. Thus, when Goldfish filed its First Amended Complaint, one would reasonably expect that it was articulating its claims in the most effective way that it could in order to avoid any such statutory bar. *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 74 (3d Cir.1994) (affirming district court's order refusing leave to amend, and noting that "a plaintiff has to carefully consider the allegations to be placed in a complaint before it is filed") (internal quotation marks omitted). Based in part on just such an expectation, we carefully considered the claims in the First Amended Complaint, concluded that they

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were barred by the statute (and failed for other reasons), and dismissed the Complaint without leave to amend.

Under these circumstances, Goldfish should not be permitted a "do-over" to assert new legal theories and permutations of its

prior claims that it could have asserted much earlier. Indeed, it seems self-evident that a litigant should not be permitted to present legal theories to the court seriatim, raising a new legal theory only after the court rejects its prior one. See *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469 (5th Cir.1967) ("A busy district court need not allow itself to be imposed upon by the presentation of theories seriatim.") (quoted in 6 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1489, at p. 697 (2d ed.1990)). If Goldfish had viable, alternative theories of recovery in this case, it was obligated to present those theories to the Court either in the First Amended Complaint or in response to Nordbank's Motion to Dismiss; it should not have withheld them while we invested considerable time and judicial resources evaluating what it now says was an incomplete set of theories, which emphasized the wrong facts, set forth the wrong sources of legal duties and, overall, charted the wrong course to the requested relief. See *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 655 (3d Cir.1998) (finding that the "substantial effort and expense of resolving defendants' Motion to Dismiss the First Amended Complaint ... supported] the district court's denial of leave to amend"), *abrogation on other grounds recognized by Forbes v. Eagleson*, 228 F.3d 471 (3d Cir.2000). Indeed, under the particular circumstances of this case, permitting Goldfish another chance to state claims on the same body of facts and law would certainly subvert the very important interests of judicial economy and finality.

We conclude from the foregoing that (1) Goldfish "had previous opportunities to amend" to assert the claims it now advances and yet it did not do so; (2) Goldfish has failed to advance defensible "reasons for not amending sooner," and (3) Goldfish's delay in seeking leave to amend "places an unwarranted burden on the court" and undermines the interests of judicial economy and finality. *Bjorgung*, 550 F.3d at 266 (citing

and quoting *Cureton*, 252 F.3d at 273). For these reasons, we feel confident exercising our discretion to deny Goldfish leave to amend on the basis of undue delay.⁶

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B. Futility

We also find that Goldfish's Second Amended Complaint is futile. Although we did not make an express finding in our November 3, 2008 Memorandum Opinion that any future amendment would be futile, at the time that we issued that opinion, Goldfish had articulated no legal theory on which we could have based a conclusion that a second amended complaint would *not* be futile. Accordingly, we would have been well within our discretion to have stated, at that time, that any future amendment would be futile. Not having expressly done so, however, we will consider the claims in the proposed Second Amended Complaint.

As explained above, the Second Amended Complaint is very similar to the First Amended Complaint in that it asks for the same relief, recites many of the same facts, and re-asserts certain Counts, albeit based on newly-formulated factual allegations. Essentially, however, what the Second Amended Complaint does is abandon the overall argument that the Ship was not sold "free and clear of all liens, claims and encumbrances" and instead argues that Nordbank violated some other duty, either in contract or in tort, to either delete the Ship from the Turkish Registry or unconditionally consent to the Ship's deletion from that registry in order to extinguish that "indicia of ownership."⁷

Goldfish's claims fail to state claims upon which relief may be granted for a variety of reasons. The first three Counts aver that Nordbank violated a legal duty that arose out of (1) its status as the "seller and/or transferor of title and/or beneficiary of the

sale" pursuant to 46 U.S.C. § 31326 (2d Am. Compl. ¶ 63); (2) its status as the "initiator" of the 46 U.S.C. § 31326 sale (*see id.* ¶ 68); or (3) Turkish law (*see id.* ¶ 73). However, in our November 3, 2008 Memorandum Opinion, we found as a matter of law that the Marshal was the seller of the Ship, that title to the vessel was transferred directly from Odin to Goldfish, and that no duties attached to Nordbank on account of its alleged status as the "seller." *See* 11/3/2008 Mem. at 13-14. Goldfish has also provided us with no authority that supports its assertion that Nordbank's status as "beneficiary of or "initiator of the foreclosure sale pursuant to 46 U.S.C. § 31326 gave rise to a legally-enforceable duty to delete, or to consent to the deletion of, the Ship from the Turkish Registry. Finally, while Goldfish alleges that Turkish law imposes such duties on Nordbank (as the mortgagee or foreclosing creditor), the Turkish law that it recites in the proposed Second Amended Complaint,

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on its face, imposes no such duties.⁸ (*See* 2d Am. Compl. ¶ 24.)

In the fourth and fifth Counts of the proposed Second Amended Complaint, Goldfish alleges claims of promissory estoppel, in which it asserts that Nordbank *impliedly* promised that it would "take all actions ministerial or otherwise ... to delete the vessel from the Turkish Registry" and "that it could deliver ... marketable title." (*Id.* ¶¶ 79, 84.) However, the Third Circuit has stated that a promissory estoppel claim may not be based "on the alleged existence of ... a broad and vague implied promise." *C & K Petroleum Prods., Inc. v. Equibank*, 839 F.2d 188, 192 (3d Cir. 1988); *Burton Imaging Group v. Toys "R" Us, Inc.*, 502 F.Supp.2d 434, 439 (E.D.Pa. 2007) ("The first essential element of promissory estoppel requires an express promise between the promisor and promisee."). As both promissory estoppel claims rest on allegations of implied

promises, both claims fail to state claims upon which relief can be granted.

In the sixth and seventh Counts of the proposed Second Amended Complaint, Goldfish asserts claims of Misrepresentation and Fraudulent Concealment/Fraud in the Inducement. In our prior Memorandum Opinion, we dismissed Goldfish's misrepresentation and fraud claims, because Goldfish had not alleged a misrepresentation of material fact or identified any valid source of duty to disclose any of the allegedly omitted information. *See* 11/3/08 Mem. Op. at 17-18. Its current claims fail for very similar reasons. Again, Goldfish has identified no legally-recognized duty to disclose that is applicable here. Moreover, while the sixth Count alleges generally that Nordbank "misrepresented to [Goldfish] that it would promptly do all things ministerial or otherwise ... to delete the vessel and/or unconditionally consent to the deletion [of the vessel] and provide marketable title as a result of the sale," there are no additional allegations regarding the circumstances of this alleged affirmative misrepresentation. (2d Am. Compl. ¶ 89.) As such, we can only conclude that the claim is grounded in Goldfish's continuing belief, which finds no support in any identified legal authority, that Nordbank's role as the foreclosing creditor in the judicial sale alone gave rise to the "representation" that it would take certain actions to protect Goldfish against attacks on its title. Accordingly, the tort claims in Counts six and seven fail to state claims upon which relief may be granted.

Finally, the remaining five Counts of the proposed Second Amended Complaint allege claims of Breach of Implied Warranties,

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Breach of Implied Contracts, and Breach of the Implied Covenant of Good Faith and Fair Dealing. In our November 3, 2008 Memorandum Opinion, we stated that

Goldfish had failed to identify any basis on which we could find that there was a contractual relationship between Goldfish and Nordbank. The same remains true today. As we stated in November, the facts alleged are that Nordbank was a foreclosing creditor and that Goldfish was the buyer at the resulting judicial sale. While Goldfish would like us to find that this relationship (or some other creative characterization of it) gave rise to a contract and/or warranty, it has identified no additional facts or legal authority that would allow us to reach that conclusion. Accordingly, just as Goldfish failed to state a claim for breach of contract or warranty in the First Amended Complaint, where it presumably advanced its best, most persuasive theories, it has failed to state a contract or warranty claim on which relief could be granted here.

In sum, we find that the proposed Second Amended Complaint fails to present plausible theories of recovery and does not raise the right to relief "above a speculative level." *Twombly*, 127 S.Ct. at 1965. We therefore conclude that we are within our discretion to refuse Goldfish's request for leave to amend on the basis of the Second Amended Complaint's futility.

IV. CONCLUSION

For all of the above reasons, we deny Goldfish's Motion to Amend the Judgment and its concomitant request for leave to file a Second Amended Complaint on the basis of both undue delay and futility. An appropriate Order follows.

ORDER

AND NOW, this 1st day of April, 2009, upon consideration of Plaintiff Goldfish Shipping, S.A.'s Motion to Amend Judgment Under Fed.R.Civ.P. 59(e) (Docket No. 38), Defendant HSH Nordbank AG's response thereto, and Plaintiffs Reply, **IT IS HEREBY ORDERED** that the Motion is **DENIED**.

Notes:

1. A more complete recitation of the factual and procedural background of this case, and the litigation that preceded the institution of this action, is included in our November 3, 2008 Memorandum Opinion.
2. The discovery deadline at the time was August 1, 2008. As of the date that we stayed discovery, the parties had conducted extensive written discovery but, according to Goldfish, both parties still desired to take Rule 30(b)(6) depositions. (See Goldfish Reply Br. at 6.)
3. The only legal claim that was in the First Amended Complaint, but is not included in the second, is the claim for Unjust Enrichment.
4. Accordingly, although a Rule 59(e) motion must ordinarily be based on either an intervening change in controlling law, the availability of new or previously unavailable evidence, or the need to correct a clear error of law or prevent manifest injustice, see *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995), the United States Court of Appeals for the Third Circuit has dispensed with these requirements when the Rule 59(e) motion is accompanied by a Rule 15(a) request to amend.
5. Goldfish also argues that we erred in dismissing its First Amended Complaint outright, without *sua sponte* offering it leave to amend. In support of this argument, it cites precedent that "in civil rights cases[,] district courts must offer amendment—irrespective of whether it is requested—when dismissing a case for failure to state a claim unless doing so would be inequitable or futile." *Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251 (3d Cir.2007). However, in non-civil rights cases, i.e., "in ordinary civil litigation[,] it is hardly error for a district court to enter final judgment after

granting a Rule 12(b)(6) motion . . . when the plaintiff has not properly requested leave to amend its complaint." *Id.* at 253. Here, Goldfish did not request leave to amend its First Amended Complaint before we granted Nordbank's 12(b)(6) motion and entered judgment. Accordingly, Goldfish's argument that we erred in dismissing its complaint without *sua sponte* offering it leave to amend is completely meritless.

6. Goldfish argues that amendment should not be denied in the absence of any identifiable prejudice to Nordbank. However, the Third Circuit has clearly stated: "A district court may deny leave to amend a complaint if a plaintiff's delay in seeking amendment is undue, motivated by bad faith, or prejudicial to the opposing party." *Cureton*, 252 F.3d at 272-73 (emphasis added) (citing *Foman*, 371 U.S. at 182, 83 S.Ct. 227); see also *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir.1993) ("In the absence of substantial or undue prejudice, denial [may] be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment.") (emphasis added) (citing *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir.1981)). Thus, we do not need to find prejudice to Nordbank in order to deny leave to amend. *But see Arthur v. Maersk, Inc.*, 434 F.3d 196, 204 (3d Cir.2006) ("We have consistently recognized . . . that 'prejudice to the non-moving party is the touchstone for the denial of an amendment.'") (quoting *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir.1978), and citing 3 James Wm. Moore et al., *Moore's Federal Practice-Civil* § 15.15[2] (3d ed.1997), and 6 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1488 (2d ed.1990)). That said, just as Goldfish's piecemeal presentation of its legal theories would impose an unwarranted burden on the Court, that same conduct would impose an unwarranted

burden on Nordbank, which would be required to respond seriatim to Goldfish's claims. Accordingly, we believe that the granting of leave to file a Second Amended Complaint would, in fact, be prejudicial to Nordbank.

7. Goldfish states in its Reply Brief that "[t]he critical difference between the two complaints is that the proposed Second Amended Complaint puts squarely at issue the allegation that the Bank had a legal obligation to delete the vessel from the Turkish Registry of Shipping and failed to do so." (Goldfish Reply Br. at 8.) Goldfish "respectfully submits" that we did not address these issues in our November 3, 2008 Memorandum Opinion. *Id.* Contrary to Goldfish's assertions, however, it *did* allege in the First Amended Complaint that Nordbank had a legal obligation to delete the vessel from the Turkish Registry and yet failed to do so and, in fact, we addressed that claim. Specifically, Goldfish alleged that Nordbank had such a duty pursuant to a contract between Nordbank, as the Ship seller, and Goldfish, as the Ship buyer, or, in the alternative, pursuant to the mortgage agreement between Odin and Nordbank. We found both of these theories to be legally infirm, because Nordbank was not the seller of the Ship and because Goldfish was not a third party beneficiary to the mortgage agreement. 11/3/08 Mem. Op. at 13-16.

8. The proposed Second Amended Complaint alleges that Turkish Law provides as follows:

Article 851. In the event that a vessel ... loses the right to fly the Turkish flag her registration will be deleted upon request.

* * *

In the event that the vessel loses its right to fly the Turkish flag, her registration may only be deleted with the consent of the mortgagees and third parties who have entitlement over the mortgage in accordance with the ship registration. If such consent has

not been documented with the deletion request, the fact that the vessel has lost its right to fly the Turkish flag will be requested at the ship registry, without delay. Such registration will have the effect of a ship registration deletion as long as the registered ship mortgages do not exist.

(2d Am.Compl. ¶ 24.) This provision, by its own terms, does not require mortgagees or any other parties to secure deletion of a ship from the Turkish Registry after the ship has lost its right to fly the Turkish flag. Rather, it merely says that a ship "will be" deleted from the registry "upon request" and "with the consent of the mortgagees and third parties." (*Id.*) Thus, we reject Goldfish's apparent assertion that this law imposed a duty on Nordbank to secure deletion (or to consent to the deletion) of the Ship from the Turkish Registry.
