**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:21-cv-20556-KMM

NAVAL LOGISTICS, INC.,

Plaintiff/Counter-Defendant,

v.

BISCAYNE TOWING & SALVAGE, INC.

Intervenor,

v.

M/V PETRUS, *et al.*,

Defendants/Counter-Plaintiffs.
_____/

**ORDER**

THIS CAUSE came before the Court upon Plaintiff/Counter-Defendant Naval Logistics, Inc. d/b/a Middle Point Marina's ("Plaintiff" or "MPM") Renewed Motion to Dismiss Regarding Dismissal of Defendants/Counter-Plaintiffs' Amended Counterclaim with Prejudice. ("Motion" or "Mot.") (ECF No. 89). Defendants/Counter-Plaintiffs M/V Petrus ("M/V Petrus" or "Vessel"), *in rem*, Greg Pack ("Pack"), *in personam*, and Chartered Yachts Miami LLC ("CYM") (collectively, "Defendants") filed a response in opposition. ("Resp.") (ECF No. 96), and Plaintiff filed a reply. ("Reply") (ECF No. 99). The matter is now ripe for review.

## I. FACTUAL BACKGROUND[1]

[1] The following background facts are taken from the Complaint ("Compl.") (ECF No. 1) and the Intervening Complaint ("Intervening Compl.") (ECF No. 27) and are accepted as true for purposes of ruling on the instant Motion. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV-MOORE/SIMONTON, 2009 WL 10668267, at *1 (S. D. Fla. Oct. 21, 2009).

The Parties are surely well-versed in the factual circumstances of this case given the length of this proceeding and the corresponding appellate action. *See* Section II, *infra*. Therefore, the Court recites the facts only insofar as they are necessary for this Order.

On February 9, 2021, Plaintiff, a Florida corporation that operates a Miami-based shipyard, filed this action against Defendant M/V Petrus and Defendant Pack. Defendant Pack owns the M/V Petrus, an eighty-eight (88) foot motor vessel. Plaintiff alleges that on December 18, 2020, it agreed with Defendant Pack to pick up, tow, deliver, and store the Vessel at its shipyard following an incident where the Vessel sunk on November 7, 2020. Three days later, on December 21, 2022, the Vessel sank again. Plaintiff then salvaged, dewatered, and hauled the Vessel onto the shipyard's land. According to Plaintiff, the Parties reached an agreement about the payment, storage, and removal of the Vessel, but Defendant Pack failed to remove it from the shipyard by the agreed date of January 22, 2021. Plaintiff subsequently brought two claims against Defendants: breach of contract and maritime lien for necessaries.

Relevant to the instant Motion, Defendants filed a counterclaim on May 4, 2021. Approximately one month later on June 8, 2021, Defendants filed their Amended Counterclaim ("Am. Counterclaim") (ECF No. 57). Therein, Defendants assert that the Parties contracted for Plaintiff to haul the Vessel out of the water and put it into dry storage after Plaintiff cleaned and washed it. *Id.* ¶ 20. Crucial to this Motion is whether Plaintiff agreed to "wash" or "watch" the Vessel. Though the Amended Counterclaim says Plaintiff agreed to "wash" the Vessel (among other responsibilities), Defendants aver that the inclusion of this term was an error based on miscommunication between attorney and clients, and rather, Plaintiff had a contractual duty to keep watch over the Vessel. *See* (ECF No. 61 at 4 n.1). According to Defendants, Plaintiff delayed hauling the Vessel out of the water and consequently, it sunk once more at Plaintiff's

facility. Am. Counterclaim ¶ 23. Defendants thus bring two counterclaims against Plaintiff: (1) breach of contract and implied warranty of workmanlike performance; and (2) negligence. *See generally id.*

## II. PROCEDURAL HISTORY

Plaintiff filed a motion to dismiss Defendants' Amended Counterclaim. (ECF No. 60). The Court granted the motion to dismiss with prejudice. ("Order") (ECF No. 63). In doing so, the Court first found that a contract existed between the Parties which required Plaintiff to take care and custody, wash, haul out, and dry store the Vessel. *Id.* at 9. On its face, the Amended Counterclaim does not indicate that Plaintiff agreed to keep watch over the Vessel. *See id.* Thus, the Court found that the Amended Counterclaim does not allege facts demonstrating that Plaintiff breached the contract. *See id.* The Court noted that the terms of the agreement specified that the Vessel would remain in Plaintiff's care and custody over the weekend, and once Plaintiff finished washing the Vessel, it would be lifted from the water and placed in dry storage. *See id.* Because the Parties' contract expressly contemplated that the Vessel would remain in the water during the weekend, and the Vessel then sank over the weekend, the Court found that "Defendants fail to allege any facts to support their breach of contract theory." *Id.* (citation omitted).

Similarly, the Court rejected Defendants' claim for breach of implied warranty of workmanlike performance. *Id.* As the Court explained, "[t]he services allegedly contracted for include dockage, cleaning and washing, and a hauling out of the Vessel after the weekend for dry storage." *Id.* (citation omitted). Nothing in the contract indicated Plaintiff had any further duty to watch the Vessel. *See id.* Because Defendants failed to allege that Plaintiff did not perform

the contracted-for services competently, safely, or in a timely manner, the Court denied this claim.

The Court then turned to Defendants' negligence claim and dismissed it as well. *See id.* at 10–11. Defendants argued that they pled negligence in the alternative to breach of contract, but the Court found that the negligence claim was barred under the economic loss doctrine. *See id.*

Each of Plaintiff's claims were dismissed with prejudice. *See id.* at 9 n.3, 11 n.4. In the footnotes, the Court explained:

> "Although a district court 'should freely give leave [to amend] when justice so requires,' Fed R. Civ P. 15(a)(2), it may deny leave, *sua sponte* or on motion, if amendment would be futile." *L.S. ex rel. Hernandez v. Peterson*, 982 F.3d 1323, 1332 (11th Cir. 2020). "A district court may find futility if a prerequisite to relief 'is belied by the facts alleged in [the] complaint.'" *Id.* (quoting *Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1248 (11th Cir. 2015)).

Order. at 9 n.3. Without further elaboration, the Court denied Defendants leave to amend and dismissed the Amended Counterclaim with prejudice. *See generally id.*

Defendants filed an interlocutory appeal of the Court's Order. *See* (ECF No. 73). On appeal, the Eleventh Circuit considered four issues: the Court's dismissal of Defendants' (1) breach of contract claim, (2) breach of implied-warranty claim, and (3) negligence claim and the Court's (4) denial of leave to amend. *See Naval Logistics, Inc. v. M/V PETRUS*, 21-12934, 2022 WL 4128603 (11th Cir. Sept. 12, 2022). As to the first issue, the Eleventh Circuit affirmed the Court, finding that the terms of the contract as alleged in the Amended Counterclaim did not contain a term that Plaintiff agreed to watch or attend the vessel over the weekend; thus, there can be no breach of contract on the basis of Plaintiff's alleged failure to do so. *See id.* at 10–11. Regarding the implied-warranty claim, the Eleventh Circuit affirmed the Court because (1) there can be no breach of implied warranty when the contract, as alleged, did not require Plaintiff to

watch or attend the vessel over the weekend, and (2) Defendants did not otherwise allege facts demonstrating that Plaintiff did not perform the contracted-for services with the requisite skill, care, or safety. *See id.* at 12–13. As to Defendants' negligence claim, the Eleventh Circuit did not decide the matter on the basis of the economic loss doctrine, but instead found Defendants failed to state a claim for negligence because they did not allege facts demonstrating Plaintiff had a duty to protect them from the injury caused by the second sinking, or that Plaintiff's action or inaction caused the breach of such duty. *See id.* at 13–14.

On the fourth issue—whether Defendants should have been given leave to amend—the Eleventh Circuit vacated the Court's order and remanded it for further consideration. *See id.* at 15. The Eleventh Circuit explained that the Court's vague reference to futility, without more, did not provide it with "an opportunity to conduct meaningful appellate review." *Id.* Moreover, the Eleventh Circuit specifically mentioned that it was "unsure [] whether the court recognized and considered the [Defendants'] request to substitute the word "watch" for "wash" in their Amended Counterclaim as a request to amend the pleading," and secondly, that the Court did not explain why "any amendment necessarily would be subject to dismissal under Rule 12(b)(6) and therefore futile." *Id.* Thus, the Eleventh Circuit remanded the case to this court for the narrow issue of whether amendment would have been futile. *Id.* at 16.

## III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). This requirement "give[s] the defendant fair notice of

what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). The court takes the plaintiff's factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007). A pleading that offers "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

## IV. DISCUSSION

Once more, the Court analyzes the Amended Counterclaim, and accordingly, the instant Motion to Dismiss, in light of the Eleventh Circuit's directive. The Eleventh Circuit explained that it "was left unsure of whether the [C]ourt recognized and considered [Defendants'] request to substitute the word 'watch' for 'wash.'" *Naval Logistics, Inc.*, 2022 WL 4128603 at 15. Moreover, the Eleventh Circuit stated that "though the district court may have good reasons to be suspicious of the [Defendants'] desire to substitute 'watch' for 'wash' in describing the parties' oral contract, we cannot say that this amendment necessarily would fail at the motion-to-dismiss stage." *Id.* at 15–16. The matter was thus referred to this Court to "revisit the issue of leave to amend." *Id.* at 16.

Given the Eleventh Circuit's mandate, the Parties renewed their arguments as to whether, and to what extent, Defendants should be entitled to amend the Complaint. *See generally* Mot.; Resp; *see also* Reply at 2–3. According to Plaintiff, the only amendment that Defendants sought

leave to assert was substituting one word in the language of the Parties' contract ("wash" to "watch") which would alter Plaintiff's responsibility regarding the Vessel. Reply at 2. Defendants take a different view. Considering the Court's prior Order dismissing their claims and the Eleventh Circuit's opinion affirming the Order in part, Defendants assert that they should be allowed to allege many additional facts to support each of their claims and that they should be granted leave to add an additional Count to the Amended Counterclaim. *See generally* Resp. Defendants spend entire pages discussing new allegations that they, for the first time, plan to allege. *See id.* (explaining that Defendants will amend their Amended Counterclaim to allege, among many other allegations, that Plaintiff (1) failed to place a watchman on the Vessel, (2) failed to properly watch the Vessel, (3) failed to act as a competent watchman, (4) failed to call emergency services, (5) failed to take steps to protect the Vessel once it began taking on water, (6) the Parties' contract included the duty to notify emergency salvage services and to conduct an emergency haul when the Vessel flooded, and (7) an additional cause of action for bailment). The Parties also spend considerable time discussing whether the proposed amendment(s) would be futile. *See* Reply at 3–4; *see generally* Mot.; Resp.

The Court will not permit Defendants to amend their Complaint. Admittedly, the Court did not provide a thorough explanation for why it would not grant Defendants leave to amend in its Order. At best, the Court alluded to futility as its justification. But there is another reason why Defendants may not amend their Complaint: they never properly requested leave to do so.[2]

[2] "A party may amend its pleading once as a matter of course. . . 21 days after serving it, or. . . if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(A). Defendants have already amended the Amended Counterclaim once. Thus, they "may amend its pleading only with the opposing party's written consent or the court's leave. The Court should freely give leave when justice so requires." Fed

The Eleventh Circuit has clearly stated "[i]f a motion for leave to amend 'simply is imbedded within an opposition memorandum' then it 'has not been raised properly' and has 'no legal effect.'" *In re January 2021 Short Squeeze Trading Litig.*, 76 F.4th 1335, 1355 (11th Cir. 2023) (quoting *Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1277 (11th Cir. 2018)); *see also Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (same). Defendants' request to amend arose in an opposition memorandum to Plaintiff's initial motion to dismiss, *see* (ECF No. 61), where they state:

> In the Amended Counterclaim [DE 57], Counter-Plaintiffs stated the reason MPM delayed the haul out was that MPM wanted to wash the vessel prior to haul out. Due to a misunderstanding and miscommunication between client and attorneys, the allegations should have said watch, rather [sic] [than] wash. Counter-Plaintiffs respectfully request that this Court allow the Counter-Plaintiffs to either substitute the words or to amend the pleadings for accuracy as it was based on a misunderstanding.

*Id.* at 4 n.1 (emphasis in original). Defendants made no further request to amend the Complaint in their response or anywhere else on the docket prior to the Court's order granting the initial motion to dismiss. Even now, Defendants' numerous requests to amend appear exclusively within their Response.

There was, and continues to be, no motion to amend Defendants' Complaint. *See* Docket. Without any proper request for leave to amend which carries the force of law, the Court will not permit Defendants to alter their Complaint. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc) ("A district court is not required to grant a plaintiff leave to amend his complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court."). Thus, because there has been no proper request to amend, the Court need not grant Defendants

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R. Civ. P. 15(a)(2). But as described in further detail below, Defendants never properly requested leave to amend.

leave to amend its Counterclaim a second time; doing so without a proper request, with facts that were available at the time the original counterclaim was filed, is both improper and prejudicial to Plaintiff. *See Eiber Radiology, Inc. v. Toshiba Am. Med. Sys. Inc.*, 673 Fed. App'x 925, 930 (11th Cir. 2016) (holding that the Court did not err in dismissing a complaint with prejudice when the plaintiff already had a chance to amend their complaint and improperly requested leave to amend in a responsive pleading); *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1287 (11th Cir. 2003) (holding that dismissal with prejudice was proper and amendment would prejudice the defendant when, among other reasons, the potential amendment included a claim that could have been brought in the original complaint). The Motion is granted and Defendants' claims are dismissed with prejudice.

## V. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Plaintiff's Renewed Motion to Dismiss (ECF No. 89) is GRANTED. Defendants' Counterclaim is hereby DISMISSED WITH PREJUDICE. For the reasons explained above, Defendants are not granted leave to amend their Counterclaim.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of October, 2023.

K. M. Moore

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record