

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PENN WAREHOUSING &
DISTRIBUTION, INC.,

Plaintiff,

v.

SS UNITED STATES CONSERVANCY,

Defendant.

Civil Action No. 2:22-cv-02285-AB

**DEFENDANT SS UNITED STATES CONSERVANCY’S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION TO BE RELIEVED FROM JUDGMENT UNDER RULE
60(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Defendant SS United States Conservancy (the “Conservancy”), by and through its undersigned counsel, submits this Memorandum of Law in support of its Motion for Relief from Judgment under Rule 60(b)(3), (5), and (6) of the Federal Rules of Civil Procedure and respectfully requests that the Court relieve the Conservancy of this Court’s June 14, 2024 Order requiring that the Ship be removed from Pier 82 on or before September 12, 2024 and enter a new Order extending the deadline by which the Ship must be removed until December 5, 2024 because (i) the Conservancy has contracted with Okaloosa County to remove the Ship from the Pier, and (ii) Plaintiff Penn Warehousing & Distribution, Inc.’s (“Penn Warehousing”)’s continuing bad faith is preventing the Conservancy from removing the Ship.

I. INTRODUCTION

Within one week of this Court’s August 19 Order the Conservancy executed a Purchase and Sale Agreement (the “Agreement”) with Okaloosa County, Florida to effectuate the removal of the Ship from Pier 82 and create an artificial reef off the County’s coast. Penn Warehousing, however, has failed to honor its representations to this Court that it would “make a deal with [the

County] to leave [the Ship at the Pier] until hurricane season passes.” Instead, Penn Warehousing is holding the SS *United States* hostage at Pier 82 until Okaloosa County, or the Conservancy, pay a \$3 million ransom for her release. Penn Warehousing’s continued bad faith (now, in total disregard of its representations to this Court) threatens the future of the SS *United States* and the Conservancy’s ability to preserve her in any form, including a land-based legacy museum. Accordingly, the equities weigh heavily in favor of extending the deadline by which the Ship must be removed until December 5, 2024 in order to prevent Penn Warehousing from executing its stated plan to either collect its ransom or arrest the Ship shortly after September 12 and sell it to the highest bidder, all in retribution for its embarrassment at trial.

II. BACKGROUND

The Court’s June 14 Order provided that “Defendant SS United States Conservancy must remove the SS *United States* from its berth at Pier 82 . . . no later than September 12, 2024.” [June 14 Order (ECF 52).] After the Conservancy received a letter from Penn Warehousing in early July, 2024 threatening to impose a baseless \$3 million penalty if the Ship were not removed by September 12, 2024 for any reason, the Conservancy filed a Motion for Reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure requesting that the Court extend the deadline by which the Conservancy must remove the Ship until December 5, 2024. [Declaration of Susan Gibbs (“Gibbs Dec.”), ¶¶ 3, 5; Rule 59(e) Motion, Ex. A (ECF 54-4).] At the hearing on that Motion, the Court entertained two possibilities: (i) Extending the removal date until December 5, 2024 and, if the deadline were not met, then title to the Ship would be transferred to Penn Warehousing, or (ii) leaving the September 12, 2024 deadline in place but converting it from one by which the Ship must be removed to one by which the Conservancy must enter into a contract with one of two counties that it was in discussions with for reefing the Ship. *See* [Declaration of

Scott Wardell (“Wardell Dec.”), ¶ 3, Ex. 1, August 19 Hearing Transcript (“Hearing Transcript”), 16:3-18:11.]

Ultimately, the Court decided that the latter option was reasonable and converted the September 12, 2024 deadline accordingly. The following exchange from the August 19 Hearing highlights the responsibilities of the Parties as of August 19, 2024:

3 THE COURT: Well, before you do that, would that --
4 would that satisfy you if you knew that if he doesn't get it
5 out by December the 5th that you would take possession of the
6 -- including -- including -- excuse me -- repairs, paying for
7 the repairs that have to be done, and that the ship would be
8 -- I would transfer the ownership of the ship to you.

9 MR. MILLS: I believe that would be satisfactory to
10 my client, Your Honor, except I'm not just -- I'm not sure
11 that's how the law works, that the Court has the power to
12 transfer --

13 THE COURT: Well, that's what I want you to think
14 about.

15 MR. MILLS: There would have to be an arrest, and
16 what we would suggest, Your Honor, is what we suggested
17 before. Leave the deadline in place. They've got over three
18 weeks to sign that contract with one of the two counties.

19 THE COURT: And come back if they can't get it out?

20 MR. MILLS: And if they sign the contract with one
21 of the counties, then we'll make a deal with one of the
22 counties to leave it there until hurricane season passes,
23 until they can do all the things the Conservancy hasn't done.

24 THE COURT: Okay. Otherwise, they have to come to
25 court, to me, and -- come back and that -- that sounds like a
1 reasonable solution.

2 MR. MILLS: Yes, Your Honor. And if they refuse to
13 sign a contract with one of the two counties and they stay
14 past the September 12th expiration, then I'm advised we could
15 bring an action to arrest the ship and sell it to one of the
16 counties ourselves.

17 THE COURT: Okay. All right. Okay.
15 recess.

16 MR. WARDELL: Thank you.

17 (Recess, 10:50 a.m. to 11:11 a.m.)

18 MR. WARDELL: Yes, Your Honor. My client is willing
19 to -- agrees that keeping the September 12th deadline in place
20 but converting that deadline to be one that they enter into a
21 contract with a final destination for the ship would alleviate
22 our other concerns, assuming, of course, that -- that Penn
23 Warehousing, in exchange, would not be bringing any lawsuit to
24 obtain any additional funds or consistent with the --

25 THE COURT: I'll decide then.

[Wardell Dec., Ex. 1, Hearing Transcript, 16:3-18:11.]

Following the August 19 Hearing, Penn Warehousing represented to the Conservancy that it would negotiate in good faith with Okaloosa County to keep the Ship at Pier 82 for a reasonable time in order to finalize necessary preparations for the Ship's removal but that, in no circumstance, would Penn Warehousing begin such negotiations until after the Conservancy signed a contract to sell the Ship. [Gibbs Dec., ¶ 9.] Penn Warehousing also represented that, if the Conservancy did sign such a contract, it would no longer demand a \$3 million up-front payment. [*Id.*] Shortly thereafter, the Conservancy executed the Agreement with Okaloosa County, which was contingent on, among other things, Penn Warehousing and the County executing a separate agreement relating to docking the Ship at Pier 82 until it can be safely removed. [Affidavit of Craig Coffey ("Coffey Aff."), ¶ 10, Ex. A, Agreement, ¶ 2(C); Gibbs Dec., ¶ 11,]

After executing the Agreement, Okaloosa County set up a meeting with Penn Warehousing to discuss the terms and conditions under which the Ship would remain at Pier 82 while

preparations to move the Ship were finalized. [Coffey Aff., ¶ 14.] But at the meeting, Penn Warehousing repeatedly demanded a \$3 million payment (despite its representations that it would not) and the meeting ended quickly. [*Id.*] After its unsuccessful attempt to negotiate with Penn Warehousing, the County discussed the impasse with the Conservancy and redirected its efforts to develop a plan to immediately remove the Ship from the Pier as quickly as possible to circumvent Penn Warehousing’s bad faith tactics and hopefully remove the Ship before September 12. [Coffey Aff. ¶ 15.] Despite its best efforts, however, a local pier capable of supporting the Ship, a movement survey, subcontractors for tugs and other support, insurance, and Coast Guard coordination could not be accomplished prior to September 12. [*Id.*] Now, according to a relocation proposal secured by the County on September 6, the County should be able to relocate the Ship between late September and October 12, 2024. [*Id.*]

III. ARGUMENT

A. Standard

Under Rule 60(b) of the Federal Rules of Civil Procedure, a “court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; . . . (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.” Fed. R. Civ. P. 60(b). The decision to grant a Rule 60(b) motion is vested in the sound discretion of the trial court.

A motion based on a misrepresentation under Rule 60(b)(3) is appropriate if the movant can establish by clear and convincing evidence that (i) the non-movant engaged in fraud or similar misconduct, and (ii) the misconduct “prevented the moving party from fully and fairly presenting

[its] case.” See *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983). Such motions are particularly appropriate when one party makes affirmative misrepresentations to a court thereby preventing the court from assessing the evidence before it. See *Lazar v. Little*, 623 F.Supp.3d 518, 525 (E.D. Pa. 2022) (noting that relief under Rule 60(b)(3) was appropriate because “misrepresentations deceived the court and prevented the court from assessing all the evidence relevant to [movant’s] claim.”).

Under Rule 60(b)(5), a party may be relieved from the inequitable prospective application of injunctive relief and the court may “modify an injunction in adaptation to changed conditions.” See *Laurel Management Group, LLC v. White Sheep Corp.*, 2021 WL 1185922, at *5 (W.D. Pa. Mar. 30, 2021) (“That clause incorporates the time-honored rule that a ‘court of equity (may) modify an injunction in adaptation to changed conditions.’”) (citing *Marshall v. Board of Ed., Bergenfield, N.J.*, 575 F.2d 417, 425 (3d Cir. 1978)).

Finally, Rule 60(b)(6) is a catch-all provision allowing a party to seek relief from judgment for any reason justifying the relief not otherwise listed in Rule 60(b). Fed. R. Civ. P. 60(b)(6); see *Cox v. Horn*, 757 F.3d 113, 120 (3d Cir. 2014). Courts in this Circuit evaluate a number of factors when deciding a motion under Rule 60(b)(6), including: (1) the desirability that final judgments not be disturbed; (2) that a Rule 60(b) motion not be used as a substitute for an appeal; (3) the Rule should be construed liberally to effectuate substantial justice; (4) whether the motion was made within a reasonable time; (5) whether any intervening equities make it inequitable to grant relief; and (6) any other factor relevant to the justice of the order under attack. See *Lasky v. Continental Products Corp.*, 804 F.2d 250, 256 (3d Cir. 1986). And although Rule 60(b)(6) “may only be invoked upon a showing of exceptional circumstances,” deceiving a federal court qualifies as an

“extraordinary circumstance.” *See Lazar*, 623 F.Supp.3d at 525 (“Under Rule 60(b)(6), . . . misrepresentations to the federal courts constitute ‘extraordinary circumstances.’”).

Here, the misrepresentations that Penn Warehousing made to the Court during the August 19 Hearing combined with its attempts to collect a \$3 million ransom from Okaloosa County when contrasted with the Conservancy’s demonstrated good faith efforts to remove the Ship on or before September 12, 2024 provide ample basis under any of the Rule 60(b) categories above for the Court to relieve the Conservancy of that portion of its June 14 Order and enter a new Order extending the deadline to remove the Ship until December 5, 2024.

B. The Conservancy has taken all possible steps since the August 19 Hearing to remove the Ship from Pier 82 on or before September 12, 2024.

The Court identified two primary issues at the August 19 Hearing informing whether it would be amenable to extending the deadline by which the Ship must be removed from the Pier. First, the Court wanted to know what the Conservancy had done to comply with its June 14, 2024 Order to remove the Ship by September 12, 2024. [Wardell Dec., Ex. 1, Hearing Transcript, 7:25.] And second, the Court wanted an assurance from the Conservancy that an extension of the removal deadline until December 5, 2024 would be the only extension needed to remove the Ship. [*Id.*, 15:4-11; 16:3-8.] In response to these concerns, Penn Warehousing stated that “if [the Conservancy] sign[s] the contract with [Okaloosa County], then we’ll make a deal with [the County] to leave [the Ship at the Pier] until hurricane season passes, until [the County] can do all the things the Conservancy hasn’t done.” [*Id.*, 16:20-23.] The Court agreed that this was a “reasonable solution,” and that, if the Conservancy did not execute such a contract, “they have to come to court.” [*Id.*, 16:24-25.]

The Conservancy entered into the Agreement with Okaloosa County on August 27, 2024, thereby complying with this Court’s August 19 Order and alleviating any concerns that the

Conservancy was not doing all that it could to secure the Ship's removal. [Coffey Aff., Ex. A, Agreement.] In addition, Coleen Marine, a contractor engaged by the County, has worked with the Conservancy for weeks to access and perform testing on the Ship. [Coffey Aff., ¶¶ 7-8.] Specifically, Coleen Marine has (i) completed fuel tank soundings, (ii) lab testing for polychlorinated biphenyl chemicals ("PCBs"), (iii) completed a professional trip-in-tow survey report to remove the Ship, (iv) secured and analyzed a hydrographic survey, (v) coordinated with a receiving pier in Norfolk, VA, (vi) begun the U.S. Coast Guard approval process, (vii) and completed various other inspections and investigations to support and prepare the Ship for departure from Pier 82. [*Id.*, ¶ 8.] Coleen Marine has also prepared an expedited relocation proposal that should allow the Ship to be removed between late September and mid-October 2024. [*Id.*, ¶ 15.] Put simply, the Conservancy has done everything possible to alleviate the Court's concerns that the Ship be removed as expeditiously as possible under the circumstances. Accordingly, the Conservancy should not even need to file this Motion because, had Penn Warehousing honored its representation to make a deal with Okaloosa County "to leave the [Ship at the Pier] for a month or two while they prepare it for moving," [Wardell Dec., Ex. 1, Hearing Transcript, 9:19-22] this years-long dispute would finally be put to rest. But as Penn Warehousing has repeatedly demonstrated—what it says and what it means are not necessarily the same thing. Compare [Amended Complaint (ECF 7), ¶ 14 (alleging that "it became necessary for [Penn Warehousing] to increase the rent *due to rising costs.*")] with [Trial Transcript (ECF 47), Testimony of John Brown, 63:1-7 ("[W]e decided *we wanted to increase the rent to force the issue to get the ship off of the dock.*")].]

C. Penn Warehousing’s continuing bad faith demonstrated by its misrepresentations to the Court and the Conservancy provide ample basis to grant the Conservancy’s Motion and extend the deadline to remove the Ship until December 5, 2024.

A Rule 60(b) motion based on misrepresentations is particularly appropriate when the non-moving party makes misrepresentations to the court thereby preventing it from accurately assessing the evidence before it. *See, e.g., Lazar v. Little*, 623 F.Supp.3d 518, 524-25 (E.D. Pa. 2022) (granting motion under Rule 60(b)(3) and (6) based on misrepresentations made to the tribunal because “[o]fficers of the court are expected to act with candor towards the court. . . [and] affirmative misrepresentations to deceive the opposing party and the courts are therefore extraordinary.”).

Most recently, Penn Warehousing’s bad faith manifests through its utter failure to negotiate a short extension with Okaloosa County in good faith and in direct contradiction of its express representations to this Court. Like it attempted at trial, Penn Warehousing once again attempts to hide from the Court its true motivations regarding the Ship. To illustrate, at the August 19 Hearing, Penn Warehousing represented that it would enter a contract with Okaloosa County if the Conservancy first contracted with the County to remove the Ship. [Wardell Dec., Ex. 1, Hearing Transcript, 16:20-23.] The Conservancy did that, and the County engaged Penn Warehousing to negotiate a contract between the parties to keep the Ship at Pier 82 until the Ship can be removed. [Coffey Aff., ¶ 14.] But Penn Warehousing refuses to honor the representations made to this Court or the Conservancy. Instead, Penn Warehousing demands \$3 million from Okaloosa County to keep the Ship at the Pier for even a single day beyond September 12, 2024.¹ [*Id.*] And it is evident

¹ Incredibly, in a September 3, 2024 letter to the Conservancy, Penn Warehousing attempts to move the goal posts claiming that there is no “*binding* contract for the sale of the ship to a third party capable of moving it.” [Wardell Dec., ¶ 4, Ex. 2.] Of course, the reason there is no “binding” contract is because Penn Warehousing failed to negotiate a contract with the County in direct contradiction of its representations to this Court. [*See* Coffey Aff., ¶ 14, Ex. A, Agreement ¶ 2(C); Wardell Dec., Ex. 1, Hearing Transcript, 16:20-17:1.]

from the transcript that the Court relied on Penn Warehousing's representation that it would negotiate a contract extension with Okaloosa County if the Conservancy signed a contract with the County to remove the Ship. [*See* Wardell Dec., Ex. 1, Hearing Transcript, 16:20-17:1 (responding to Penn Warehousing's assurance that "if [the Conservancy] sign[s a] contract with [Okaloosa County], then we'll make a deal with [the County] to leave it there until hurricane season passes," by stating "that sounds like a reasonable solution.").]

Like Penn Warehousing's admission at trial that it doubled the daily dockage fee to force the Ship off of the Pier (and not due to "economic realities" as it represented in its Amended Complaint and in its purported termination letter to the Conservancy), Penn Warehousing's recent behavior reveals its true intentions now: Namely, to circumvent this Court's June 14 Order denying its recovery of any alleged damages by holding the Ship hostage under the threat of bringing an action to "arrest" the Ship as early as September 13, 2024. In other words, Penn Warehousing wants to shake-down the Conservancy and/or Okaloosa County to extort those funds (and more) that this Court already denied. Penn Warehousing's continuing misconduct should not be tolerated. Accordingly, the equities weigh heavily in favor of the Conservancy and the Court should relieve the Conservancy from this Court's June 14, 2024 Order and enter a new Order extending the date by which the Ship must be removed until December 5, 2024. Such an extension will ensure that the Ship can be removed without Penn Warehousing's consistent bad faith infecting the process.

IV. CONCLUSION

For the foregoing reasons, the Conservancy respectfully requests that the Court grant this Motion and relieve the Conservancy from this Court's June 14, 2024 Order and enter an Order extending the deadline by which the Ship must be removed until December 5, 2024.

Dated: September 11, 2024

Respectfully submitted,

/s/ Scott E. Wardell _____

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