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

BRADLEY J. JARVI,		CONSOLIDATED UNDER MDL 875
Plaintiff,		
v.		
FOSTER WHEELER COMPANY, ET AL.,	:	E.D. PA CIVIL ACTION NO. 2:11-30640-ER
Defendants.	:	

O R D E R

AND NOW, this **4th** day of **August, 2015**, it is hereby **ORDERED** that Defendant Hanna Mining Company's Motion for Partial Summary Judgment on grounds that it did not own the ships at issue (Doc. No. 82) is **GRANTED in part and DENIED in part**; its Motion for Partial Summary Judgment on grounds that it was not Plaintiff's employer (Doc. No. 81) is **GRANTED in part and DENIED in part.**[1]

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[1] This case was transferred in January 2011 from the United State District Court for the Northern District of Ohio to the United States District Court for the Eastern District of Pennsylvania, where it became part of the MDL-875 MARDOC docket.

Plaintiff alleges that he was exposed to asbestos while working aboard various ships, and that he developed an asbestos-related illness as a result of that exposure. Plaintiff brought claims against various defendants, including claims against Defendant Hanna Mining Company ("Hanna Mining" or "Defendant") for unseaworthiness under the general maritime law, and for negligence under the Jones Act. The ships for which Plaintiff asserts Defendant is liable for asbestos exposure thereon (as owner of the ship and/or as his employer while aboard the ship) include:

- Leon Falk, Jr. - 1961 (June to December) and 1962 (April to December)
- George R. Fink - 1963 (May to December)
- Joseph H. Thompson - 1964 (three periods)

Defendant has moved for partial summary judgment, arguing that Plaintiff's claims fail for one or both of the following reasons: (1) it was not the owner of any of the ships and, therefore, cannot be liable for unseaworthiness, and (2) it was not Plaintiff's employer during his work aboard those ships, and therefore cannot face liability under the Jones Act.

The parties agree that Plaintiff's claims are governed by maritime law, including the Jones Act.

I. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." Am. Eagle Outfitters v. Lyle & Scott Ltd., 584 F.3d 575, 581 (3d Cir. 2009) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." Pignataro v. Port Auth. of N.Y. & N.J., 593 F.3d 265, 268 (3d Cir. 2010) (citing Reliance Ins. Co. v. Moessner, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 250.

B. The Applicable Law

Plaintiff's claims arise under federal law (general maritime law as well as the Jones Act). In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. Various Plaintiffs v. Various Defendants ("Oil Field Cases"), 673 F.Supp.2d 358, 362-63 (E.D.Pa.2009) (Robreno, J.). Therefore, the Court will apply Third Circuit law in deciding Defendants' motion.

To the extent that resolution of the issues herein involves matters that are governed by substantive state law, the Court will apply the appropriate state's law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

C. Shipowner Status (General Maritime Law - Unseaworthiness)

Under maritime law, the owner of a ship has a "non-delegable duty to provide seamen a vessel that is reasonably fit for its purpose." Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 631 (3d Cir. 1994); see also Earles v. Union Barge Line Corp., 486 F.2d 1097, 1102 (3d Cir. 1973). A seaman who is injured as a result of the condition of a ship may bring a claim against the shipowner for "unseaworthiness." Id. In certain circumstances, an individual or entity who does not own the ship may become a "pro hac vice" owner, thus facing potential liability for unseaworthiness. See Matute v. Lloyd Bermuda Lines, Ltd., 931 F.2d 231, 235 (3d Cir. 1991); Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 609-10 (3d Cir. 1948). Such a situation arises where an individual or entity enters into a "demise charter." Matute, 931 F.2d at 235; Aird, 169 F.2d at 609-10; The Doyle, 105 F.2d 113, 114 (3d Cir. 1939). A demise charter exists when the charterer of the ship is given "sole possession and control of the vessel for voyage or service contemplated." Aird, 169 F.2d at 611; see also Matute, 931 F.2d at 235 (defining "demise charterer" as "one who contracts for the vessel itself and assumes exclusive possession, control, command and navigation thereof"). Such a charter is also referred to as a "bareboat charter." Reed v. Steamship Yaka, 307 F.2d 203, 205 (3d Cir. 1963), rev'd on other grounds by 373 U.S. 410, 83 S. Ct. 1349 (1963); see also Rao v. Hillman Barge & Const. Co., 467 F.2d 1276, 1277 (3d Cir. 1972); Hawn v. Pope & Talbot, Inc., 198 F.2d 800, 802-03 (3d Cir. 1952).

Under Third Circuit law, a defendant to a maritime law unseaworthiness claim may seek indemnity from another entity. SPM Corp. v. M/V Ming Moon, 22 F.3d 523, 526 (3d Cir. 1994) (citing M & O Marine, Inc. v. Marquette Co., 730 F.2d 133, 135 (3d Cir. 1984)("'when indemnification is sought either under a maritime contract or under a theory of primary/secondary negligence based on a maritime tort, federal maritime law applies' and permits such indemnification").

1. Reed v. S.S. Yaka

In Reed v. S.S. Yaka, 373 U.S. 410, 83 S. Ct. 1349 (1963), the United States Supreme Court held that a third-party defendant brought into the case by way of an indemnity claim brought by a ship's owner was potentially liable for unseaworthiness under the general maritime law because it was a pro hac vice owner of the vessel by way of a demise charter at the time of the plaintiff's injury. In doing so, it explained:

> Pan-Atlantic[, the third party defendant,] was operating the Yaka as demisee or bareboat charterer from [the owner,] Waterman. Under such arrangements full possession and control of the vessel are delivered up to the charterer for a period of time. The ship is then directed by its [(the charter's)] Master and manned by his crew; it makes his voyages and carries the cargo he chooses. Services performed on board the ship are primarily for his benefit. It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner pro hac vice.

373 U.S. at 412.

2. Matute v. Lloyd Bermuda Lines, Ltd.

In Matute v. Lloyd Bermuda Lines, Ltd., 931 F.2d 231 (3d Cir. 1991), the United States Court of Appeals for the Third Circuit considered whether a defendant was a pro hac vice owner of a ship, by way of a "demise charter," and concluded that it was not. 931 F.2d at 235. Instead, the court determined that the contractual relationship was a "time charter" in name and in fact, such that the defendant did not face potential liability as a shipowner under general maritime law. The court reasoned

that (1) the agreement between the shipowner (Procoast) and the defendant charterer was entitled a "Time Charter," (2) under its provisions, the owner (Procoast) was to bear (a) the responsibility for and control over the vessel, the captain and the crew, (b) including their hiring and firing. The Third Circuit stated that "courts are hesitant to imply a relinquishment of possession and control by the owner of a ship absent the most explicit language indicating that the owner completely and exclusively gives up 'possession, command, and navigation' of the vessel to the charterer." 931 F.2d at 235. (citing Guzman v. Pichirilo, 369 U.S. 698, 699, 82 S. Ct. 1095, 1096, 8 L.Ed.2d 205 (1962)). It concluded that, "there simply is no evidence of such a relinquishment by [the owner,] Procoast."

3. Aird v. Weyerhaeuser S.S. Co.

Aird v. Weyerhaeuser S.S. Co., 169 F.2d 606, 609-10 (3d Cir. 1948), was another case in which the Third Circuit addressed the status of an agent or charterer as a pro hac vice owner of a ship. In doing so, it explained that mere terminology on documents is not determinative of "ownership" status for purposes of assessing shipowner liability. It also held that there is a presumption against a finding of a demise charter, unless it is clear that such was the intention of the shipowner and the agent or charterer entering into the contractual relationship. In reaching its determination, the court put particular emphasis on the fact that the owner of the ship had been disclosed to the plaintiff in writing in his employment contract. Specifically, the Third Circuit wrote:

> If the owner of the vessel has given entire possession and control of it to another by virtue of a demise charter or otherwise and the master is, therefore, the agent of the charterer and not of the owner, the person thus put in possession and control of the vessel becomes special owner for the voyage and assumes all the responsibilities of owner . . . . Such a person is frequently described as 'owner pro hac vice' which is merely a convenient expression to indicate that he stands in the place of the owner for the voyage or service contemplated and bears the owner's responsibilities, even though the latter remains the legal owner of the vessel.

In the case before us the shipping articles which [Plaintiff] Aird signed with the master and which thus constituted his contract of employment showed on their fac[e] that the United States, through its agency the U.S. Maritime Commission, was the owner of the vessel. Since Carlson, the master, was in fact the agent of the United States it is clear that the articles disclosed to Aird that the United States was the employer to whom he must look for his wages. It necessarily follows that Aird's claim, if he has any, arising from his discharge from employment on the Walt Whitman is against Carlson as master and the United States as owner and against them alone, unless the relationship of Weyerhaeuser to the vessel was such as to impose liability upon it as owner of the vessel pro hac vice or in some other way as Aird's employer.

Weyerhaeuser, as we have seen, was acting in this transaction solely as general agent for the United States in the general capacity of ship's husband. The form of service agreement under which it acted has been authoritatively held not to constitute the general agent the owner of the vessel pro hac vice. Nonetheless, under the service agreement it did have responsibility for procuring persons for employment as members of the crew and it did so procure Aird. But since in so doing Weyerhaeuser was acting solely as agent for the owner and inasmuch as its principal was disclosed to Aird on the face of the articles which he signed it did not thereby become a party to the employment contract or liable for wages due thereunder even if we assume that it and not the master actually hired Aird.

We do not overlook the fact that the shipping articles which Aird signed contained the statement that Weyerhaeuser was 'charterer' of the vessel. We do not think that this fact aids Aird, however. In the first place it is perfectly clear that this statement was erroneous and that Weyerhaeuser was acting solely as agent of the United States in the general capacity of ship's husband and was in no sense a [demise] charterer. In the second place even if true it would not without more compel the conclusion that Weyerhaeuser would be liable for the wages of the seamen of the Walt Whitman. For there are two distinct

> kinds of charter parties. On the one hand are those by which the use of the vessel is given without full possession and control of it. Such a charter party is frequently no more than a contract of affreightment. On the other hand, however, are those demise charters under which the charterer is given sole possession and control of the vessel for the voyage or service which is contemplated. As we have seen it is only in the case of a charter of the latter sort that the charterer becomes owner pro hac vice and liable for the seamen's wages. There is, however, a general presumption that the owner does not mean to put his vessel into the possession of the charterer to this extent. Accordingly Aird would not be justified in relying upon the statement in the articles that Weyerhaeuser was charterer as a basis for holding it liable as his employer.

169 F.2d at 609-11 (emphasis added). Ultimately, the Third Circuit held that the employer facing potential liability to Plaintiff Aird was the United States, and not the defendant agent Weyerhaeuser - despite the fact that Weyerhaeuser was identified as a "charterer" in the plaintiff's employment agreement.

D. Employer Status (Jones Act)

The Jones Act creates a cause of action for negligence against an injured seaman's employer. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 790, 69 S. Ct. 1317, 1321 (1949). A claim under the Jones Act lies only against the seaman's employer - and may not be brought against any other entity. Id.; Matute, 931 F.2d at 235-36. Ordinarily, the shipowner is also the employer of the seaman, although this need not be the case. Id. at 236. Where an individual or entity is retained by a shipowner to handle certain duties in connection with the ship, a question may arise as to who the "employer" is, for purposes of asserting a claim under the Jones Act. The Supreme Court addressed this situation in Cosmopolitan Shipping Co., where it wrote:

> The issue in this case is whether a construction of the Jones Act carrying out the intention of Congress to grant those new rights to seamen against their employers requires or permits a holding that the general agent under the contract here in question is an employer under

> the Jones Act. The decision depends upon the interpretation of the contract between [the plaintiff seaman] and Cosmopolitan[, the general agent,] on one hand and that between Cosmopolitan and the United States[, who owned the ship and retained Cosmopolitan to work as a general agent, 'handling certain phases of the business of ships owned by the United States'] on the other. We assume without deciding that the rule of the Hearst case applies, that is, the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied. Yet this Court may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines or definitions of employment or employer.
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> The solution of the problem of determining the employer under such a contract depends upon determining whose enterprise the operation of the vessel was. Such words as employer, agent, independent contractor are not decisive. No single phrase can be said to determine the employer. One must look at the venture as a whole. Whose orders controlled the master and the crew? Whose money paid their wages? Who hired the crew? Whose initiative and judgment chose the route and the ports? It is in the light of these basic considerations that one must read the contract.

337 U.S. at 795 (added internal quote at 785) (emphasis added). The Third Circuit has addressed the issue more recently, and has held that, "[t]he existence of the employment relationship is a question of fact, and the inquiry turns on the degree of control the alleged employer exerts over the employee." Reeves v. Mobile Dredging & Pumping Co., Inc., 26 F.3d 1247, 1253 (3d Cir. 1994) (citing Matute, 931 F.2d at 236). It has specified that, "[f]actors indicating control over the seaman include payment, direction, and supervision. Also relevant is the source of the power to hire and fire." Matute, 931 F.2d at 236.

Although it is true that, in 1949, the United States Supreme Court held in Cosmopolitan Shipping Co. that "under the Jones Act only one person, firm, or corporation can be sued as

employer," 337 U.S. at 791, it has more recently been held by the Third Circuit (and other Circuits) that a Jones Act plaintiff may have more than one employer, and that more than one employer can be liable for the same injury. Neely v. Club Med Management Services, Inc., 63 F.3d 166, 173, 203 (3d Cir. 1995) (citing Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1428-31 (5th Cir.1988); Self v. Great Lakes Dredge & Dock Co., 832 F.2d 1540, 1545-48 (11th Cir.1987); Joia v. Jo-Ja Service Corp., 817 F.2d 908, 915-18 (1st Cir.1987)); see also Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1980).

1. Cosmopolitan Shipping Co. v. McAllister

In Cosmopolitan Shipping Co., the plaintiff brought Jones Act claims against Cosmopolitan Shipping Co. ("Cosmopolitan"), alleging that it was liable for the negligence of the master and/or crew of a vessel for failing to take precautions against - and failing to provide proper treatment for - poliomyelitis that he contracted, which therefore resulted in permanent injury. Cosmopolitan had been retained by the War Shipping Administration to "manage[] certain phases of the business of ships owned by the United States and operated by the War Shipping Administration," pursuant to "the terms of the wartime standard form of agency agreement," which was known as the General Agency Service Agreement. 337 U.S. 785-87. In the space on the shipping articles entitled "Operating Company on this Voyage" there was written "Cosmopolitan Shipping Co., Inc., as general agent for the United States." The articles were stamped at the top as follows: "You Are Being Employed By the United States." Id. at 785-86.

The Supreme Court held that the agent (Cosmopolitan) was not the plaintiff's employer and that plaintiff therefore had no Jones Act claim against it. Instead, it found that the Government was plaintiff's employer. In doing so, it undertook four main considerations: (1) there was no evidence that Cosmopolitan ever gave orders or directions as to the route or management of the ship while on voyage, (2) the Court found that the language of the General Agency Agreement (and the conduct of the parties) made clear that "the United States had retained for the entire voyage the possession, management, and navigation of the vessel and control of the ship's officers and crew to the exclusion of the general agent" (Id. at 795), (3) the considerations which led to the establishment of the War Shipping Administration (and the Shipping Articles), and (4) the

means and source of payment of the crew and incidental ship expenses.

With respect to the second of these considerations (the General Agency Agreement), the Court noted that the terms of the General Agency Agreement indicated that: (a) Cosmopolitan had been "appointed by the United States 'as its agent and not as an independent contractor, to manage and conduct the business of vessels assigned to it;'" (b) the general agent agreed to "manage and conduct the business for the United States, in accordance with such directions, orders, or regulations as the latter has prescribed, or from time to time may prescribe;" (c) the general agent engaged itself to, specifically, (i) "maintain the vessels in such trade or service as the United States may direct," (ii) "collect all moneys due the United States" under the agreement, (iii) "equip, victual, supply and maintain the vessel, subject to such directions, orders, regulations and methods of supervision and inspection as the United States may from time to time prescribe," (iv) "arrange for the repairs of the vessels" and to "exercise reasonable diligence in making inspections and obtaining information with respect to the state of repair and condition of the vessels," (v) "procure the Master of the vessels operated hereunder, subject to the approval of the United States" (whereby the "Master shall be an agent and employee of the United States, and shall have and exercise full control, responsibility and authority with respect to the navigation and management of the vessel"), (vi) "procure and make available to the Master for engagement by him the officers and men required by him to fill the complement of the vessel" (whereby the "officers and members of the crew shall be subject only to the orders of the Master. All such persons shall be paid in the customary manner with funds by the United States hereunder.") Id. at 795-96. In short, the Court found that, pursuant to the terms of the General Agency Agreement, "the duties of the respondent were expressly and intentionally limited to those of a ship's husband who has been engaged to take care of the shoreside business of the ship and who has no part in the actual management or navigation of the vessel." Id. at 796 (emphasis added).

With respect to the third of the four main considerations (i.e., the considerations which led to the establishment of the War Shipping Administration, and the Shipping Articles), the Court explained that: (a) the United States through the master of the ship retained full control over the navigation and physical operation of the vessel; (b) the

general agent had the responsibility of husbanding the vessel and his duties were to victual, supply, maintain, and repair the ship - and he did not have duties (typically belonging instead to a berth agent) relating to the handling and loading of cargo and other port services such as wharfage and pilotage needed by the vessel; (c) neither the possession nor management of the vessel was conferred on Cosmopolitan; (d) the discretion vested in the agents was decreased by the master contracts which the United States executed for the furnishing of numerous services and supplies required by the vessels; (e) There were detailed instructions issued by the War Shipping Administration as to the terms of the contracts which the agents were authorized to enter into, and these contracts were required to be executed in the name of the United States as principal; (f) it was essential that the masters and crews be government employees in order to obviate strikes and work stoppages, to insure sovereign immunity for the vessels, and to preserve wartime secrecy by confining all litigation concerning operation of the vessels to the admiralty courts where appropriate security precautions could be observed; (g) The crew were to be hired by the master of the ship [i.e., a government employee] and were to be subject to his orders only, such that the crew hired became employees of the United States and not of the general agent; (h) "The shipping articles complied with the tenor of the General Agency Agreement . . . by making it clear that respondent was an employee of the United States."

With respect to the last of the four considerations (i.e., payment of crew and incidental expenses), the Court noted:

> In order to pay the crew and the other expenses incidental to the operation of the ship, the War Shipping Administration deposited funds in a special joint bank account set up in the name of the agent 'as general agent for the War Shipping Administration.' From this special account the general agent drew the funds and turned them over to the master to pay the crew. No money of the general agent was used for this purpose or in the operation of the vessel.

Id. at 800 (emphasis added).

2. Matute v. Lloyd Bermuda Lines, Ltd.

Matute was a case in which an injured seaman brought Jones Act claims (and other claims under the general maritime law) against both an exclusive charterer of the ship (Lloyd Bermuda Lines)("LBL") and an agent of that charterer (Trans-Mar Agencies)("TMA"). The Third Circuit was faced with determining whether either of these entities had been the seaman's employer and, thus, whether they faced potential liability under the Jones Act. It began by stating:

> The existence of an employer-employee relationship is a question of fact; the critical inquiry turns on the degree of control exercised over the crewman. Factors indicating control over the seaman include payment, direction, and supervision. Also relevant is the source of the power to hire and fire.

931 F.2d at 236 (emphasis added).

The plaintiff, who had suffered an eye injury aboard the ship, believed that TMA had been his employer because, as set forth in his affidavit, "all my communications, every document and letters, all my arrangements for joining the ship, for leaving the ship and for my airline ticket was made by Trans-Mar." In seeking to establish that TMA had been his "employer," the plaintiff relied specifically upon the following facts and evidence: (1) a letter guaranteeing Matute employment, which, though signed by the ship's captain, was written on TMA stationery; (2) TMA arranged and paid for Matute's transport from Newark airport to the vessel; (3) TMA's representative came aboard the vessel each time it was docked in Newark to inquire as to the well-being of the crewmen; (4) TMA's representative arranged for Matute's visit to the eye doctor in New York City; (5) after Matute's discharge by the ship's captain, TMA arranged and paid for Matute's return trip to his home country.

In general, the role of the charterer (LBL) had been to provide services for the ship (through its agent, TMA), such as: obtaining crewmembers' immigration visas, meeting arriving crew at the airport, arranging and paying for transportation to the port, making advances to pay for certain expenses of the ship and crew while docked in New Jersey (the amounts to be deducted from Procoast's monthly charter hire fee (plus 2 1/2% commission)), assisting with the repatriation of foreign crewmen

returning to their countries (by preparing immigration documents and making the necessary travel arrangements).

The Third Circuit determined that neither entity was the plaintiff's employer - and that he therefore had no Jones Act claim against either one. Without explicitly stating as much, the Third Circuit indicated that it was actually the ship's owner (Procoast, who was apparently not named as a defendant in the action), who had been the plaintiff's employer. In setting forth its rationale, the court explained that (1) the charterer (LBL) was not ultimately responsible for payments made by TMA for plaintiff's transportation and that, under the terms of the time charter, LBL would be reimbursed by the owner (Procoast) for these expenses (plus a 2.5% commission); (2) the services provided by LBL through TMA did not involve the control, direction, and supervision over the plaintiff necessary to constitute an employer-employee relationship; and (3) the owner (Procoast), through the ship's captain, hired the plaintiff, terminated him, set the amount of his wages, was responsible for paying him, and supervised him in his position as oiler.

3. Neely v. Club Med Management Services, Inc.

In Neely, a plaintiff injured by boat propellers during her work as a scuba instructor at the Club Med Holiday Village resort in St. Lucia brought Jones Act claims (as well as general maritime law unseaworthiness claims) against four defendants: (1) Club Med, Inc., (2) Club Med Sales, Inc., (3) Club Med Management Services, Inc. ("Club Med Management"), and (4) Holiday Village (St. Lucia) Ltd. (a wholly owned subsidiary of Club Med, Inc.) ("Holiday Village"). The plaintiff was injured when the captain of the boat put the ship's engine into reverse after plaintiff had jumped into the water, thus sucking plaintiff under the boat and into the ship's propellers, which were not shielded by propeller guards. The scuba diving expeditions plaintiff led took place on a small fleet of boats operated by Holiday Village, including the Blue Lagoon (owned by Club Med), and the Long John (chartered by Holiday Village from its title owner - an individual living in Miami, Florida). The boat from which plaintiff's injury was sustained was the Long John.

At the completion of a trial, and in response to special interrogatories specifically pertaining to the Jones Act claims, the jury found that the plaintiff had been employed by

both Club Med Management and Holliday Village, that each of those defendants had been negligent, and that their negligence was a substantial factor in causing the plaintiff's injuries. 63 F.3d at 173. Upon cross-appeals filed by the parties, the Third Circuit held that these defendants' liability on the Jones Act claims was joint and several (and clarified that this was not to be misconstrued as strictly several). Id. at 203-04.

E. Joint Venturer Liability

Under both Delaware law and Ohio law, as is generally true under other states' laws, a third person who has a claim growing out of a breach of duty by the joint venture is entitled to recover for his entire claim against any member of the joint venture. See Hudson v. A.C. & S. Co., Inc., 535 A.2d 1361, 1363 (Del. Super. 1987) (citing 48A C.J.S. Joint Ventures § 63 at 507). Each joint venturer is liable to third persons for the acts of other members of the joint venture within the scope of the joint venture. Id.; see also Clifton v. Van Dresser Corp., 73 Ohio App.3d 202, 211, 596 N.E.2d 1075, 1080 (Ohio App. 1991); Al Johnson Const. Co. v. Kosydar, 42 Ohio St.2d 29, 32, 325 N.E.2d 549, 552 (Ohio 1975); U.S. v. USX Corp., 68 F.3d 811, 826 (3d Cir. 1995)("Each member of a joint venture 'is considered the agent of the others, so that the act of any member within the scope of the enterprise is charged vicariously against the rest.'") (quoting Pritchett v. Kimberling Cove, Inc., 568 F.2d 570, 579-80 (8th Cir.1977)(citing Restatement (Second) of Torts § 491), cert. denied, 436 U.S. 922, 98 S. Ct. 2274, 56 L.Ed.2d 765 (1978)).

II. Defendant's Motions for Summary Judgment

A. Defendant's Arguments

Wrong Shipowner

Defendant contends that Plaintiff's claims for unseaworthiness pursuant to the general maritime law fail because it was never the owner (or even the owner pro hac vice) of the three ships for which Plaintiff contends it is liable: the Leon Falk, Jr., George R. Fink, and the Joseph H. Thompson. According to Defendant, an unseaworthiness claim lies only against the owner (or owner pro hac vice) of a vessel.

In support of this contention, Defendants have submitted U.S. Coast Guard Abstracts of Title, which are

maintained by the U.S. Coast Guard National Vessel Documentation Center. (Doc. Nos. 82-3, 82-4, and 82-5.) Defendant points to the facts that: (1) the abstract of title for the Leon Falk, Jr. indicates that, during the period at issue, the vessel was owned by Skar-Ore Steamship Corporation ("Skar-Ore"), which remained the owner until the vessel was sold for scrap in 1985; (2) the abstract of title for the George R. Fink indicates that, during the year at issue for this ship (1968), the vessel was owned by The Hanna Furnace Corporation ("Hanna Furnace") (which had bought the vessel from National Steel Corporation ("National Steel") in April of 1963, and which owned it until it was scrapped in September of 1973); and (3) the abstract of title for the Joseph H. Thompson indicates that, during the years at issue (1969-72), the vessel was owned by Hansand Steamship Corporation ("Hansand Steamship") (which had purchased the vessel from Wisconsin & Michigan Steamship Company in October of 1951, and which owned it until it was sold to Upper Lakes Towing Company in November of 1984).

Defendant asserts that, during the relevant time periods, the Leon Falk, Jr. and the George R. Fink were demise (or bareboat) chartered to National Steel, which made National Steel the owner pro hac vice.

Wrong Employer

By way of separate motion, Defendant contends that Plaintiff's claims for negligence pursuant to the Jones Act fail because it was not Plaintiff's employer during his work (and alleged asbestos exposure) aboard the three ships at issue: again, the Leon Falk, Jr., George R. Fink, and the Joseph H. Thompson. According to Defendant, a negligence claim pursuant to the Jones Act lies only against the plaintiff's employer - and, under Third Circuit law, direction, supervision, and payment are activities of an employer. Defendant also asserts that, under caselaw arising outside of the Third Circuit, it has been held that the name on the side of a ship is evidence of the identity of the employer of a seaman aboard that ship - and that, in general, it is the owner of a ship (or owner pro hac vice) who is the employer of the seamen aboard the ship.

With respect to the Leon Falk, Jr., Defendant Hanna Mining asserts that (1) (a) the owner of the ship during the pertinent time period was Skar-Ore, while (b) the owner pro hac vice of the ship during that time was National Steel. It further asserts that (2) unlicensed crewmembers employed aboard the ship

(a) acted under the direction and supervision of National Steel, and (b) participated in the health, pension, and other benefit plans of National Steel. In addition, it asserts that (3) it was National Steel who paid Plaintiff for his work aboard this ship.

With respect to the George R. Fink, Defendant Hanna Mining asserts that (1) (a) the owner of the ship during the pertinent time period was Hanna Furnace, while (b) the owner pro hac vice of the ship during that time was National Steel. It further asserts that (2) unlicensed crewmembers employed aboard the ship (a) acted under the direction and supervision of National Steel, and (b) participated in the health, pension, and other benefit plans of National Steel. In addition, it asserts that (3) it was National Steel who paid Plaintiff for his work aboard this ship.

With respect to the Joseph H. Thompson, Defendant Hanna Mining asserts that (1) the owner of the ship during the pertinent time period was Hansand Steamship. It further asserts that (2) unlicensed crewmembers employed aboard the ship (a) acted under the direction and supervision of Hansand Steamship, and (b) participated in the health, pension, and other benefit plans of Hansand Steamship. In addition, it asserts that (3) it was Hansand Steamship who paid Plaintiff for his work aboard this ship.

In support of these contentions, Defendant relies upon the following evidence:

- U.S. Coast Guard Abstract of Title - *Leon Falk, Jr.*
  Defendant includes the Coast Guard "General Index or Abstract of Title" for the Leon Falk, Jr., which indicates that the ship was purchased by "Skar-Ore Steamship Corporation" in June of 1961 and that it remained the owner of the ship until it was sold to be scrapped in 1985.

  (Doc No. 81-3)

- U.S. Coast Guard Abstract of Title - *George R. Fink*
  Defendant includes the Coast Guard "General Index or Abstract of Title" for the George R. Fink, which indicates that the ship was purchased by "National Steel Corporation" in March of 1936 and that it was sold to "The Hanna Furnace Corporation" in February of 1963 (the last shown

"grantee" of the ship before it was scrapped in September of 1973).

(Doc No. 81-5)

- U.S. Coast Guard Abstract of Title - *Joseph H. Thompson*
  Defendant includes the Coast Guard "General Index or Abstract of Title" for the Joseph H. Thompson, which shows that, in December of 1964, "Hansand Steamship Corporation" became the "grantee" of the ship (for the second time, after a period of about twelve years in which "The Northwest Mutual Life Insurance Company" was the "grantee," upon its "Satisfaction 1st Pref. Mtg."). Although the record indicates that "Upper Lakes Towing Company" became the "grantee" in November of 1984, there is a notation in the document (during the period between 1964 and 1984) that reads: "Deleted from documentation 2 Jan 1985 Change of Ownership. Original Documents Dated 10 Nov 1983 Surrendered. Philadelphia, PA."

  (Doc No. 81-6)

- Social Security Administration Payroll Records
  Defendant includes information provided by a private records service (Renillo Record Services), which it contends includes information from official Social Security Administration payroll records, indicating that, during the periods at issue (June to December of 1961, April to December of 1962, May to December of 1963, and three separate periods of 1964), Plaintiff received payment from, among other employers, (1) "National Steel Corporation" (for 2nd and 4th quarters of 1961, 2nd, 3rd and 4th quarters of 1962, and 1st, 2nd, 3rd, and 4th quarters of 1963, and 1st quarter of 1964); and (2) "Hansand Steamship Corp" (for 2nd, 3rd, and 4th quarters of 1964, and 1st quarter of 1965).

  (Doc No. 81-4)

- Paychecks for Another Worker
  Defendant includes two paychecks from 1982 (with paystubs attached) for another individual (whose title was listed as "2nd Asst. Engr."), which indicate that the individual was paid by "Hansand Steamship Corporation" for work pertaining to the ship "JHT."

  (Doc No. 81-14)

- Photo of the *Leon Falk, Jr.*
  Defendant includes a photo of the Leon Falk, Jr., which shows the name "National Steel Corporation" displayed on the side of the ship.

  (Doc No. 81-20)

- Photo of the *George R. Fink*
  Defendant includes a photo of the George R. Fink, which shows the name "Hanna Furnace Corporation" displayed on the side of the ship.

  (Doc No. 81-23)

- Photo of the *Joseph H. Thompson*
  Defendant includes a photo of the Joseph H. Thompson, which shows that there was no name displayed on the side of the ship (other than the ship's own name).

  (Doc No. 81-22)

- Declaration of John S. Pyke, Jr.
  Defendant includes the declaration of Mr. Pyke, who is a former Vice President and General Counsel (among other job roles) for Defendant (Hanna Mining), employed by Defendant beginning in 1968 and continuing until sometime during or after 1979. Mr. Pyke provides testimony that:

  (1) Hanna Mining was appointed general agent by various vessel owners who authorized it to act in place of the owners in "handling, caring for and managing" at least eight different vessels;

(2) In 1985, Hanna Mining changed its name to M.A. Hanna Company - which Mr. Pyke refers to collectively (stating "The Hanna Mining Company/M.A. Hanna Company (hereinafter 'Hanna');"

(3) Hanna acted as the general agent of the Leon Falk, Jr. from 1953 (when Skar-Ore Steamship Corporation bought it) until 1985 (when it was sold); during those years, (i) the vessel was owned by Skar-Ore, but was demise/bareboat chartered to National Steel (which charter was repeatedly extended until its sale in 1985), during which period (i) National Steel was the owner pro hac vice of the vessel, (ii) National Steel was the employer of the vessel's crew; (iii) unlicensed crewmembers were paid by National Steel, (iv) unlicensed crew members acted under the direction and supervision of National Steel; and (v) unlicensed crew members participated in National Steel health, pension, and other benefit plans;

(4) Hanna acted as the general agent of the George R. Fink from 1936 (when National Steel Corporation bought it) until 1973 (when it was sold);

(a) during the years 1936 to 1963, (i) the vessel was owned by National Steel, (ii) its crew was employed by National Steel, (iii) unlicensed crewmembers were paid by National Steel, (iv) unlicensed crew members acted under the direction and supervision of National Steel; and (v) unlicensed crew members participated in National Steel health, pension, and other benefit plans;

(b) during the years 1963 to 1973, the vessel was owned by Hanna Furnace (a wholly owned subsidiary of National Steel), but was demise/bareboat chartered back to National Steel on April 1, 1963, until its sale in 1973, during which period (i) National Steel was the owner pro hac vice of the vessel, (ii) National Steel was the employer of the vessel's crew; (iii) unlicensed crewmembers were paid by National

Steel, (iv) unlicensed crew members acted under the direction and supervision of National Steel; and (v) unlicensed crew members participated in National Steel health, pension, and other benefit plans;

and

(5) Hanna acted as the general agent of the Joseph H. Thompson from 1951 (when Hansand Steamship Corporation bought it) until 1984 (when it was sold); during this period, (i) the vessel was owned by Hansand Steamship, (ii) its crew was employed by Hansand Steamship, (iii) unlicensed crewmembers were paid by Hansand Steamship, (iv) unlicensed crew members acted under the direction and supervision of Hansand Steamship; and (v) unlicensed crew members participated in Hansand Steamship health, pension, and other benefit plans;

(Doc No. 81-8.)

- Skar-Ore Demise Charter Agreements
  Defendant includes three agreements that appear to be demise charter agreements between Skar-Ore and National Steel. Two are unsigned agreement-style documents pertaining to an agreement anticipated to go into effect in 1960 and identify the vessel at issue only as a "T-2 Tanker." The third is a signed agreement pertaining to a demise/bareboat charter of the Leon Falk, Jr., to go into effect in 1980.

  (Doc Nos. 81-9 to 81-11)

Defendant acknowledges that some of the discharge certificates pertaining to Plaintiff's discharges from the three ships at issue indicate that the "employer" was "Hanna Mining Company" (while others identify it as "Hanna Mining Company, Agent"). (Doc. No. 81-7.) However, Defendant asserts that the mere use of the term "employer" or "agent" or "independent contractor" on a discharge certificate is not determinative of the legal status of an entity. Defendant asserts that it is identified as "employer" on some of the discharge certificates because, during the years at issue, it acted as the general

agent of the Leon Falk, Jr., George R. Fink, and Joseph H. Thompson.

In its reply brief, Defendant Hanna Mining asserts that Hansand Steamship was 1/3 owned by it (with Sand Products Corporation and Wheeling-Pittsburgh Steel Corporation each owing 1/3 as well). In support of this assertion it attaches the following evidence:

- 1974 Agreement re: Hansand Steamship Corporation
  Defendants include an agreement dated April 1, 1974, which indicates that it is one of three companies who together own Hansand Steamship (with each being 1/3 owner). The other two companies (beside Defendant Hanna Mining) are Sand Products Corporation and Wheeling-Pittsburgh Steel Corporation. The agreement indicates that (1) Hansand is the owner of the Joseph H. Thompson, and that (2) Hanna Mining and Wheeling-Pittsburgh Steel Corporation "are desirous of arranging for the Great Lakes transportation of iron ore pellets and iron ore material from upper Great Lakes ports to Lake Erie ports." The agreement ends with what appears to be a one-page addendum, indicating that a later agreement (dated April 1, 1979) "supercedes and cancels the 4/1/74 agreement" covering transportation of iron ore on the Great Lakes in the Joseph H. Thompson. The agreement is governed by Ohio law.

  (Doc No. 97-2)

- 1979 Agreement re: Hansand Steamship Corporation
  Defendants include an agreement dated April 1, 1979, which indicates that it is one of three companies who together own Hansand Steamship (with each being 1/3 owner). The other two companies (beside Defendant Hanna Mining) are Sand Products Corporation and Wheeling-Pittsburgh Steel Corporation. The agreement indicates that (1) Hansand is the owner of the Joseph H. Thompson, and that (2) Hanna Mining and Wheeling-Pittsburgh Steel Corporation "are desirous of arranging for the Great Lakes transportation of iron ore pellets and iron ore material from upper Great Lakes ports to Lake Erie ports." The

agreement begins with what appears to be a one-page addendum, indicating that it "supercedes and cancels the 4/1/74 agreement for the same transportation." The agreement is governed by Ohio law.

(Doc No. 97-3)

B. Plaintiff's Arguments

Wrong Employer

Plaintiff does not dispute that a negligence claim pursuant to the Jones Act lies only against the plaintiff's employer. Rather, Plaintiff asserts that Defendant identified itself as - and held itself out to be - Plaintiff's employer aboard the vessels at issue. It asserts that, despite an explicit contractual obligation to do otherwise, it failed to disclose its status as an agent managing vessels.

Without directly stating as much, Plaintiff suggests that Defendant was one and the same as (and with) the two entities that Defendant contends were Plaintiff's employers. Specifically, Plaintiff asserts that Defendant was one of four entities that entered into an intercompany agreement - and that these entities included National Steel and Hansand Steamship (the two entities that Defendant asserts were Plaintiff's employers aboard the three ships at issue). Plaintiff contends that the evidence indicates that (1) Defendant Hanna Mining negotiated insurance and benefits for employees such as Plaintiff (and made the logistical arrangements around those, including payroll deductions), and that (2) the pension funds for Plaintiff were actually co-mingled funds from all four companies.

Plaintiff argues that he should not have to guess who to sue - and he notes that Defendant can seek indemnity from whichever of the other entities it deems appropriate.

In support of these contentions, Plaintiff relies upon the following evidence:

- Certificates of Discharge
  Plaintiff includes discharge certificates for approximately a dozen other seamen who worked

aboard the two ships at issue during the same general time period, which indicate throughout that: (1) the "Employer" of the individuals aboard the Leon Falk, Jr. was identified as "Hanna Mining Co.", (2) the "Employer" of the one individual aboard the George R. Fink was identified as "Hanna Mining Co. Agents," and (3) the "Employer" of those aboard the Joseph H. Thompson was listed for some as "Hanna Mining Co." and for some as "Hanna Mining Co. Agents."

(Doc Nos. 94-6 and 94-7)

- Management Agreement with Hanna Furnace
Plaintiff includes an agreement dated January 1, 1963 between The Hanna Furnace Corporation and The Hanna Mining Company, which reflects an agreement for Hanna Mining to act as "Managing Agent" for the George R. Fink, which Hanna Furnace owns. The agreement indicates that Hanna Mining may pay "wages, extra compensation, overtime, bonuses, payroll taxes . . . vacation allowances, damages or compensation for death or personal injury or illness, insurance premiums, Social Security taxes, state or federal unemployment insurance taxes and contributions and other payments . . . to a pension, welfare or similar fund (and that Hanna Furnace will reimburse it for these payments).

With respect to the duties of the Managing Agent, the agreement indicates that Hanna Mining will, inter alia, "manage and conduct the business of the Owner's vessel," including (1) "all matters with respect to voyages," (2) procuring and providing "all services incidental thereto," including but not limited to, port activities, wharfage and dockage, pilotage, canal transits and services of subagents, (3) collecting and remitting or depositing to Owner's account all monies due the Owner," (4) "equip, victual, supply and arrange for inspection and repair of the vessels," and including "maintenance and voyage repairs and replacements," (5) procure all officers and men required to fill the complement of the vessels, (6) keep records and accounts,

(7) if required, "adjust, settle, and liquidate the business of the vessel," (8) handle activities with respect to cargos, charters, rates of freight and charges, and procure services incidental thereto, (9) issue shipping documents, freight contracts, and bills of lading, (10) procure or provide insurance against all insurable risks of any kind.

The agreement also indicates that the owner will indemnify Hanna Mining for "any and all claims and demands . . . of whatsoever kind or nature, whether or not such claim or demand arises from or is based upon the negligence of the master or crew of the vessel, and by whomsoever asserted, for injury to persons or property arising out of or in any way connected with the activities, maintenance or business of said vessels."

The agreement states that it will be in effect until December 31, 1968.

(Doc No. 94-8 at 13-21.)

- Intercompany Agreements as to Pension Plans, Management, and Insurance
  Plaintiff includes correspondence and an agreement, which indicate that Hanna Mining negotiated group benefits, including health insurance, not only for itself, but also, acting as an agent, for National Steel, Hansand Steamship, and Hanna Furnace.

  (Doc Nos. 94-9 to 94-10)

Plaintiff maintains that the existence of an employment relationship is a question of fact and that the inquiry turns on the degree of control the alleged employer exerts over the employee. In support of this assertion, Plaintiff relies upon Reeves v. Mobil Dredging and Pumping Company, Inc., 26 F.3d 1247 (3d Cir. 1994) (citing Matute v. Lloyd Bermuda Lines, 931 F.2d 231, 236 (3d Cir. 1991)), and Osorio v. Texaco, Inc., 1990 WL 65709 (E.D. Pa. 1990). Plaintiff asserts that "control" includes the power to determine the route of the ship and the activities of the crew and, for this assertion, relies upon Cosmopolitan Shipping Company v.

McAllister, 337 U.S. 789, 69 S. Ct. 1370 (1949). He asserts that, pursuant to the rule set forth in Mastute, some of the factors demonstrating "control" include payment, direction, supervision, and discretion to hire and fire.

Wrong Shipowner

Plaintiff does not dispute that an unseaworthiness claim lies only against the owner (or owner pro hac vice) of a vessel. Rather, Plaintiff contends that Defendant held itself out as the pro hac vice owner of the vessels it managed (including the Leon Falk, Jr., George R. Fink, and Joseph H. Thompson). Specifically, Plaintiff contends that the evidence indicates that Defendant considered the vessels at issue to be part of its fleet, and that it treated all of the vessels alike (whether it owned them or was appointed as an agent to manage them).

Again, without directly stating as much, Plaintiff suggests that Defendant was one and the same as (and with) the two entities that Defendant contends were the owners of the ships at issue. Specifically, Plaintiff asserts that Defendant was one of four entities that entered into an intercompany agreement - and that these entities included Hanna Furnace and Hansand Steamship (the two entities that Defendant asserts were the owners of two ships at issue). For example, Plaintiff contends that the evidence indicates that Defendant Hanna Mining negotiated insurance and benefits for crewmembers on behalf of itself, Hanna Furnace, Hansand Steamship, and National Steel.

Again, Plaintiff suggests that he should not have to guess who to sue - and that Defendant can seek indemnity from whichever of the other entities it deems appropriate.

In support of these contentions, Plaintiff relies upon the following evidence:

- Agreements With National Steel Corporation (re: the *George R. Fink*)
  Plaintiff includes three agreements (dated January 1, 1950, January 1, 1955, and January 1, 1960) between M.A. Hanna Company and National Steel Corporation. Each of the agreements indicates that (1) National Steel "does hereby put and place the handling, care and management

of its vessels, [including, among others, the George R. Fink] for the transportation of iron ore and other bulk cargoes on the Great Lakes." Each agreement also indicates that (2) M.A. Hanna Company "does hereby accept the handling, care and management of said vessels and agrees to use its best efforts in such handling care and management and to attend to all business matters and details in connection therewith."

(Doc No. 94-2)

- 1984 Management Agreement With Skar-Ore Steamship (re: *Leon Falk, Jr.*)
  Plaintiff includes a "Management Agreement" dated August 31, 1984 between Defendant Hanna Mining Company and Skar-Ore Steamship Corporation, which reflects an agreement for Hanna Mining to manage four vessels (including the Leon Falk, Jr.). The agreement indicates that:

  (1) Skar-Ore appoints Hanna Mining "as its agent to manage the operation and to conduct the business of the Vessels,"

  (2) Hanna Mining "agrees to manage the operation and to conduct, as agent only, the business of the Vessels in accordance with the orders of the Company,"

  (3) "Nothing in this Agreement shall be construed as giving [Hanna Mining] control or possession of any Vessel or as having any interest whatever in the business, profits, insurance proceeds or liabilities resulting from the operation of any vessel,"

  (4) "Ultimate control over the operation and navigation of the Vessels shall remain with [Skar-Ore],"

  (5) Hanna Mining "shall perform all the customary duties of a managing agent," which, in particular, requires it to:

(a) "[a]ssist [Skar-ore] in the selection and engagement of suitable Master, officers and crew personnel for each Vessel,"
(b) "[c]ause to be furnished to each Vessel, provisions, fuel, fresh water, stores, supplies and equipment required for the business of such Vessel,"
(c) "[a]ppoint local agents for the business of each Vessel,"
(d) "[a]rrange for and, when necessary, supervise periodic drydockings and routine and casualty repairs to the extent authorized and approved by [Skar-Ore],"
(e) "[m]aintain, in separate accounts, which shall be subject to audit by [Skar-Ore] at reasonable times, an accounting of the funds advanced to [Hanna Mining] for operation of the Vessels,"
(f) "[a]rrange for the loading and discharging of cargoes; the preparation and execution of bills of lading; and in general provide what is known as 'Traffic Management' for each Vessel and each Vessel's business if and to the extent required by [Skar-Ore],"
(g) "[a]s instructed by [Skar-Ore], arrange for Marine Hull and Machinery, P. & I., War Risk and other insurance with such underwriters, with such limits and at such premium rates as the Company shall approve,"
(h) "[a]s instructed by [Skar-Ore], receive, handle, supervise and arrange for the adjustment of Hull and P. & I. claims,"
(i) "[a]ssist [Skar-Ore] in the negotiation of bargaining contracts with labor organizations; review and discuss labor problems and in general perform what is referred to as "Labor Management" in connection with the operation and business of each Vessel," and
(j) "maintain a qualified staff of personnel adequate to perform the operations required under this Agreement."

(Doc No. 94-3)

- 1988 Management Agreement With Stinson, Inc. (re: Management of Another Vessel)
Plaintiff includes a "Management Agreement" dated March 25, 1988 between M.A. Hanna Company and Stinson, Inc., which reflects an agreement for M.A. Hanna to manage a vessel not at issue in this motion. The agreement indicates that:

(1) Stinson, Inc. is a "bareboat charterer,"

(2) M.A. Hanna is appointed manager of the vessel,

(3) M.A. Hanna is to "perform all the customary duties of a managing agent," including a list of duties similar to those set forth under the agreement discussed above (in connection with the Skar-Ore agreement),

(4) M.A. Hanna "shall not hold itself out or represent itself as the owner or charterer of the Vessel, but shall always disclose its agency, the name of Charterer, and that Charterer is a bareboat charterer of the Vessel,"

(5) Stinson, Inc. "shall protect [M.A. Hanna] against liability or claims of liability by including [M.A. Hanna] as an insured in all [policies against liability on the Vessel]," and

(6) Stinson, Inc. "hereby indemnifies [M.A. Hanna] against all liability for personal injury claims and collision claims, and any other losses or liabilities which may result directly or indirectly from the operation of the Vessel, whether or not caused by negligence of [M.A. Hanna] or its employees."

(Doc No. 94-4)

- 1951 Agreement With Hansand Steamship Corporation (re: Management of *Joseph H. Thompson*)
Plaintiff includes an agreement dated July 5, 1951 between Hansand Steamship Corporation (a Delaware Corporation) and Hanna Coal & Ore

Corporation, which reflects an agreement for Hanna Coal & Ore Corporation to manage the Marine Robin (whose name was later changed to the Joseph H. Thompson). The agreement does not indicate what state law governs it.

(Doc No. 94-5)

- Deposition Testimony of Paul Aquilla
  Plaintiff cites to deposition testimony (from another action) of Mr. Aquilla, who worked as an Assistant Fleet Engineer for the Hanna Dock and Vessel Department. Mr. Aquilla initially testified that Hanna Mining owned only 1 and 1/3 vessels (which included 1/3 of the Joseph H. Thompson), but that he later discussed another seven vessels as well, which Plaintiff asserts he referred to as "The Hanna Fleet" (although, in the excerpt of the deposition transcript submitted on the docket, Mr. Aquilla never refers to the vessels by this name).

  He testified that (1) his work for Hanna Dock and Vessel Department included (a) communicating with the vessels regarding repairs needed (either by land phone or by personally visiting the boats), (b) ordering supplies for the vessels, (c) supervising renovation of vessels, (d) retaining companies to perform renovation work, (e) performing design functions and developing specifications for repairs for the whole fleet of vessels, and (f) overseeing renovations. He provides testimony that (2) others from "Hanna" oversaw renovations, (3) for at least one vessel, "Hanna" paid for the renovations, and (4) "Hanna" approved specifications for work on the vessels, including replacement of insulation with asbestos.

  In particular, Plaintiff quotes the following portions of Mr. Aquilla's deposition:

  A: Right, but the design functions that I have been talking to you about apply to the whole fleet.

Q: Even the ships that were operated by Hanna?
A: That's correct.
Q: And owned by others.
A: That's correct yes.

. . .

Q: Mr. Aquilla, just a couple of questions. My name is Reg Kramer. I want to ask you about the work you performed for Hanna with regard to the supervision of major repairs and some of the design work that you and your department might have done with respect to those repairs. When it came to the specifications for those sort of repairs, who was responsible for specifying the insulating materials that would replace existing materials?
A: By and large the shipyards.
Q: Did you have to approve those specifications before they would be performed on the Hanna ships?
A: Yes.

Having reviewed the deposition transcript, the Court notes also that Mr. Aquilla testified that (1) National Steel was one of "the Hanna companies," (2) of the eight ships discussed as being in "the fleet," he testified that (a) five were owned by National Steel (including the Leon Falk, Jr.), (b) 1 and 1/3 were owned by "Hanna (including 1/3 of the Joseph H. Thompson), and (c) he believed one was owned by Hanna Furnace (the George R. Fink, which he testified was managed by "Hanna"), although he was not certain, and (3) his work included ordering asbestos-containing materials, and approving replacement of insulation with asbestos-containing material.

(Doc No. 94-11)

- Discovery Responses of Defendant

Plaintiff cites to the discovery responses of Defendant, which indicate that (1) in 1985, The Hanna Mining Company changed its name to "M.A. Hanna Company" (a Delaware corporation), (2) in

1929, a different corporation, "The M.A. Hanna Company" (an Ohio corporation), helped form National Steel Corporation and subsequently acted as manager of its vessels, (3) Hansand Steamship Corporation was formed in 1951 and, in 1971, was an equal joint venture among three corporations, including The Hanna Mining Company, and (4) The Hanna Mining Company agreed to assume the liabilities and obligations of National Steel Corporation under a Memorandum of Agreement dated January 1, 1960 (but only the liabilities accruing after the assignment's effective date of November 1, 1961).

The Court notes also that, although the discovery responses do not explicitly mention Hanna Furnace, they note that, for some period of time, The M.A. Hanna Company had a "blast furnace business," some part of which was sold in 1929.

(Doc No. 94-12)

In essence, Plaintiff suggests that Defendant is liable for the three vessels at issue because Defendant Hanna Mining (which is now M.A. Hanna Company), (1) was an equal joint venturer with Hansand Steamship (which Defendant contends was both the owner of - and Plaintiff's employer while aboard - the Joseph H. Thompson), and (2) assumed the post-November 1, 1961 liabilities of National Steel (which was created in part by The M.A. Hanna Company, and whose vessels were managed by The M.A. Hanna Company)[and which Defendant contends was the pro hac vice owner of - and Plaintiff's employer aboard - the Leon Falk, Jr. and George R. Fink]. In addition, the Court notes that, implicit in Plaintiff's argument is the suggestion that (3) The M.A. Hanna Company (which Defendant seems to imply is, for liability purposes, the same as the current M.A. Hanna Company) was either the same as or an owner of Hanna Furnace, which Defendant contends was the owner of the George R. Fink.

Moreover, Plaintiff asserts that it was Defendant who made the decisions to place asbestos materials aboard the vessels at issue, and implies that it is therefore the entity properly named as a defendant in this asbestos action.

C. Analysis

Wrong Shipowner

The parties do not dispute that an unseaworthiness claim lies only against the owner (or owner pro hac vice) of a vessel. Defendant contends that U.S. Coast Guard records confirm that, during the relevant time periods, it was not the owner of either of these ships and that, instead, the Leon Falk, Jr. was owned by Skar-Ore (which had demise/bareboat chartered the vessel to National Steel), the George R. Fink was owned by Hanna Furnace (which had demise/bareboat chartered the vessel to National Steel), and the Joseph H. Thompson was owned by Hansand Steamship. Plaintiff disputes this and contends that, during the times of his employment aboard the vessels at issue (the Leon Falk, Jr. (1961 (June to December) and 1962 (April to December)), the George R. Fink (May to December 1963), and the Joseph H. Thompson (1964)), Defendant held itself out as the pro hac vice owner of the vessels and is therefore the entity properly liable for unseaworthiness.

In addition, Plaintiff suggests that, even if Defendant's assertion of ownership of the ships is correct, Defendant is nonetheless liable. With respect to the Joseph H. Thompson, Plaintiff suggests that this is because Defendant Hanna Mining (which is now M.A. Hanna Company), was one of three equal joint venturers comprising Hansand Steamship (the entity Defendant contends was the owner of the ship). With respect to the Leon Falk, Jr. and the George R. Fink, Plaintiff suggests that this is because (1) Defendant Hanna Mining (which is now M.A. Hanna Company) assumed the post-November 1, 1961 liabilities of National Steel (which was created in part by The M.A. Hanna Company, and whose vessels were managed by The M.A. Hanna Company) - and which Defendant contends was Plaintiff's employer aboard the George R. Fink; and/or (2) The M.A. Hanna Company (which Defendant seems to imply is, for liability purposes, the same as the current M.A. Hanna Company) was either the same as or an owner of Hanna Furnace, which Defendant contends was the owner of the George R. Fink.

The Court considers the evidence pertaining to each ship separately:

(i) The *Leon Falk, Jr.*

Plaintiff worked aboard the Leon Falk, Jr. during the periods of June to December 1961 and April to December 1962. Defendant asserts that the pro hac vice owner of the ship during this time period was National Steel. Defendant's discovery responses state that, in 1960, it (Hanna Mining, which is now M.A. Hanna Company) assumed the future, post-November 1, 1961 liabilities of National Steel. As such, even under Defendant Hanna Mining's own assertion of the facts regarding ownership of the vessel (i.e., that National Steel was the pro hac vice owner), it is liable for injury sustained by Plaintiff as a result of unseaworthiness during his time aboard the Leon Falk, Jr. Accordingly, Defendant's motion for partial summary judgment on the basis that it was not the owner of the Leon Falk, Jr. is denied. See Anderson, 477 U.S. at 248-50.

The Court notes that Third Circuit law provides that Defendant Hanna Mining was free to seek indemnity from National Steel on the unseaworthiness claim had it believed that any liability to Plaintiff was properly absorbed by National Steel. SPM Corp. v. M/V Ming Moon, 22 F.3d 523, 526 (3d Cir. 1994).

(ii) The *George R. Fink*

Plaintiff worked aboard the George R. Fink during the period May to December 1963. Defendant asserts that the pro hac vice owner of the ship during this time period was National Steel. Defendant's discovery responses state that, in 1960, it (Hanna Mining, which is now M.A. Hanna Company) assumed the future, post-November 1, 1961 liabilities of National Steel. As such, even under Defendant Hanna Mining's own assertion of the facts regarding ownership (i.e., that National Steel was the pro hac vice owner), it is liable for injury sustained by Plaintiff as a result of unseaworthiness during his time aboard the George R. Fink. For this reason alone, partial summary judgment on the basis that Defendant was not the owner of the George R. Fink is not warranted. See Anderson, 477 U.S. at 248-50.

However, in addition (and in the alternative), there is evidence in the record that, during the entire year of 1963, Defendant Hanna Mining operated the ship as a "Managing Agent" for its owner (Hanna Furnace). The agreement surrounding this relationship indicates that Defendant Hanna Mining (1) procured all "officers and men" for the vessel, (2) paid wages, compensation, overtime, bonuses, payroll taxes, and vacation

allowances (among other things) for those aboard the ship, (3) procured insurance against all risks of any kind, (4) procured supplies for the vessel, (5) arranged for maintenance and repair of the vessel, (6) generally "manage[d] and conduct[ed] the business of the Owner's vessel," including "all matters with respect to voyages," port activities, and dockage, (7) and even had the authority to "adjust, settle, and liquidate the business of the vessel."

Under Third Circuit law, a demise charter exists when the charterer of the ship is given "sole possession and control of the vessel for voyage or service contemplated." Aird, 169 F.2d at 611; Matute, 931 F.2d at 235. The arrangement between Defendant Hanna Mining and Hanna Furnace seems to be one in which Defendant was given "full possession and control of the vessel . . . for a period of time," and in which the ship was "directed by" Defendant's Master, manned by Defendant's crew, and performing services primarily for Defendant's benefit (transport of mined iron ore). See Reed v. S.S. Yaka, 373 U.S. 410, 412.

Unlike the situation in Matute, it was Defendant Hanna Mining (rather than the owner of the vessel, Hanna Furnace) who bore the responsibility for and control over the vessel, the captain and the crew, including their hiring and firing. See 931 F.2d at 235. Unlike the situation in Aird, there is no evidence that Plaintiff in the present case was explicitly informed that the vessel was owned by Hanna Furnace (rather than Defendant). See 169 F.2d at 609-10.

Thus, despite the presumption against a finding of demise charter, it is clear from the facts and evidence in the present case that there is sufficient evidence from which a reasonable jury could conclude that Defendant Hanna Mining was acting as a demise (or bareboat) charterer during the period of Plaintiff's work aboard the vessel. See Matute, 931 F.2d at 235; Aird, 169 F.2d at 609-10. (This is true despite the fact that the agreement between Defendant and Hanna Furnace indicated that Defendant was a managing "agent." See Aird, 169 F.2d at 609-10.)

The fact that Mr. Pyke testified that, during the time period at issue, Hanna Furnace (a wholly owned subsidiary of National Steel) had demise/bareboat chartered the George R. Fink back to National Steel (on April 1, 1963, and continuing until its sale in 1973) - during which period Defendant contends that National Steel was the owner pro hac vice of the vessel - merely

creates a genuine dispute of material fact. See Anderson, 477 U.S. at 248-50. Accordingly, Defendant's motion for partial summary judgment on the basis that it was not the owner of the George R. Fink is denied. See Anderson, 477 U.S. at 248-50.

The Court notes that, not only does Third Circuit law provide that Defendant Hanna Mining was free to seek indemnity from National Steel on the unseaworthiness claim had it believed that any liability to Plaintiff was properly absorbed by National Steel, but the explicit terms of the agreement at issue indicate that Defendant Hanna Mining was free to seek indemnity from Hanna Furnace as well. SPM Corp. v. M/V Ming Moon, 22 F.3d 523, 526 (3d Cir. 1994).

(iii) The *Joseph H. Thompson*

Plaintiff worked aboard the Joseph H. Thompson during three separate periods in 1964. Defendant asserts that Hansand Steamship was the owner of the vessel during Plaintiff's time aboard it. Plaintiff contends Defendant Hanna Mining was a joint venture with Hansand Steamship Corporation. Defendant's discovery responses confirm that Hansand Steamship Corporation was formed in 1951 and, by 1971, was an equal joint venture among three corporations - one of which was Defendant (Hanna Mining) - but do not contain confirmation of this joint venture existing prior to 1971. There is no other evidence in the record that is sufficient to support a conclusion that Defendant was part of a joint venture with Hansand Steamship during the year 1964. The mere fact that Defendant may have negotiated benefits for several different companies (including itself and Hansand Steamship) does not, by itself, establish a joint venture involving the two entities.

Therefore, the Court next considers Defendant's argument regarding pro hac vice ownership of the vessel. Under Third Circuit law, there is a presumption against a finding of demise charter, unless it is clear from the facts and evidence that a demise charter was intended. See Matute, 931 F.2d at 235; Aird, 169 F.2d at 609-10. With respect to this particular time period (1964), Plaintiff has not presented any evidence that Defendant Hanna Mining was given "sole possession and control of the vessel for voyage or service contemplated." Aird, 169 F.2d at 611; see also Matute, 931 F.2d at 235. As such, no reasonable jury could conclude from the evidence that Defendant was a "demise charterer" or "bareboat charter" such that it took on the status and liabilities of a pro hac vice owner of the

vessel. See Aird, 169 F.2d at 611; Matute, 931 F.2d at 235; Reed, 307 F.2d at 205. Accordingly, with respect to Plaintiff's unseaworthiness claims arising from the alleged asbestos exposure arising aboard the Joseph H. Thompson (during the year 1964), Defendant is entitled to partial summary judgment on this basis. See Anderson, 477 U.S. at 248-50.

Wrong Employer

Defendant next contends that it cannot be liable on Plaintiff's Jones Act claims because it was not Plaintiff's employer during his work aboard the two ships at issue. The parties do not dispute that a Jones Act claim for negligence lies only against the plaintiff's employer at the time of the alleged asbestos exposure. Defendant contends that, during the relevant time periods, Plaintiff's employers aboard these ships were National Steel (while aboard the Leon Falk, Jr. and George R. Fink) and Hansand Steamship (while aboard the Joseph H. Thompson.) Plaintiff disputes this and contends that, during the times of his employment aboard all of the vessels at issue (the Leon Falk, Jr. (1961 (June to December) and 1962 (April to December)), the George R. Fink (May to December 1963), and the Joseph H. Thompson (1964)), Defendant held itself out as Plaintiff's employer and is therefore the entity properly liable for negligence pursuant to the Jones Act.

Specifically, Plaintiff asserts that Defendant was one of four entities that entered into an intercompany agreement (including National Steel and Hansand Steamship - the two entities that Defendant asserts were Plaintiff's employers aboard the two ships at issue), and that (1) Defendant Hanna Mining negotiated insurance and benefits for employees such as Plaintiff (and made the logistical arrangements around those, including payroll deductions), and that (2) the pension funds for Plaintiff were actually co-mingled funds from all four companies, such that joint and/or several liability is implied. Without directly stating as much, Plaintiff suggests that Defendant is and/or was one and the same as (and with) the two entities that Defendant contends were Plaintiff's employers.

In the alternative, Plaintiff seems to suggest that, even if Defendant's assertion of employer identification for the ships is correct, Defendant is nonetheless liable. With respect to the Joseph H. Thompson, Plaintiff suggests that this is because Defendant Hanna Mining (which is now M.A. Hanna Company), was one of three equal joint venturers comprising

Hansand Steamship (the entity Defendant contends was the owner of the ship). With respect to the Leon Falk, Jr. and the George R. Fink, Plaintiff suggests that this is because Defendant Hanna Mining (which is now M.A. Hanna Company) assumed the post-November 1, 1961 liabilities of National Steel (which was created in part by The M.A. Hanna Company, and whose vessels were managed by The M.A. Hanna Company) - and which Defendant contends was Plaintiff's employer aboard the George R. Fink.

The Court considers the evidence pertaining to each ship separately:

(i) The *Leon Falk, Jr.*

Plaintiff worked aboard the Leon Falk, Jr. during the periods of June to December 1961 and April to December 1962. Defendant asserts that Plaintiff's employer while aboard this ship was National Steel. Defendant's discovery responses state that, in 1960, it (Hanna Mining, which is now M.A. Hanna Company) assumed the future, post-November 1, 1961 liabilities of National Steel. As such, even under Defendant Hanna Mining's own assertion of the facts (i.e., that National Steel was Plaintiff's employer), it is liable for injury sustained by Plaintiff as a result of employer negligence during his time aboard the Leon Falk, Jr. Accordingly, Defendant's motion for partial summary judgment on the basis that it was not Plaintiff's employer while aboard the Leon Falk, Jr. is denied. See Anderson, 477 U.S. at 248-50.

(ii) The *George R. Fink*

Plaintiff worked aboard the George R. Fink during the period May to December 1963. Defendant asserts that Plaintiff's employer during this work was National Steel. Defendant's discovery responses state that, in 1960, it (Hanna Mining, which is now M.A. Hanna Company) assumed the future, post-November 1, 1961 liabilities of National Steel. Again, this alone is sufficient to hold Defendant Hanna Mining liable for injury sustained by Plaintiff as a result of employer negligence during his time aboard the George R. Fink. However, the Court notes that there is other evidence in support of a finding of potential liability of Defendant Hanna Mining as the employer during this period of Plaintiff's work: according to the agreement under which Defendant Hanna Mining operated the ship, during the entire year of 1963, Defendant (1) procured all "officers and men" for the vessel, (2) paid wages, compensation,

overtime, bonuses, payroll taxes, and vacation allowances (among other things) for those aboard the ship, (3) procured insurance against all risks of any kind (including those pertaining to employees aboard the ship), and (4) generally "manage[d] and conduct[ed] the business of the Owner's vessel," including "all matters with respect to voyages," port activities, and dockage (which, presumably, had to include directing and supervising the employees aboard the ship).

This fact pattern is distinguishable from that in Cosmopolitan Shipping Co., where (1) there was no evidence that Cosmopolitan ever gave orders or directions as to the route or management of the ship while on voyage, (2) the language of the agreement and the conduct of the parties made clear that the owner had retained the possession, management, and navigation of the vessel - and control of the ship's officers and crew - for the entire voyage, and to the exclusion of the general agent; and where the duties of the agent were expressly limited to those taking care of shoreside business of the ship (without actual management or navigation of the vessel), and (3) No money of the general agent was used for paying the crew or in the operation of the vessel. See 337 U.S. at 785-800.

It is also unlike the situation in Matute, where (1) the owner of the ship had hired and fired the plaintiff, (2) the services provided by the agent and charterer did not involve the control, direction, and supervision over the plaintiff, and (3) the owner of the ship was responsible for paying the plaintiff. See 931 F.2d at 235-36.

Under Third Circuit law, the existence of the employment relationship is a question of fact. Reeves, 26 F.3d at 1253 (citing Matute, 931 F.2d at 236). A reasonable jury could conclude from the evidence that Defendant Hanna Mining was Plaintiff's employer during his work aboard the George R. Fink. Accordingly, partial summary judgment in favor of Defendant on grounds that it was not Plaintiff's employer while he worked aboard this ship is not warranted. Anderson, 477 U.S. at 248-50.

(iii) The *Joseph H. Thompson*

Plaintiff worked aboard the Joseph H. Thompson during three separate periods in 1964. Defendant asserts that Hansand Steamship was Plaintiff's employer during his time aboard this ship. Plaintiff contends Defendant Hanna Mining was a joint venture with Hansand Steamship Corporation. Defendant's

discovery responses confirm that Hansand Steamship Corporation was formed in 1951 and, by 1971, was an equal joint venture among three corporations - one of which was Defendant (Hanna Mining) - but do not contain confirmation of this joint venture existing prior to 1971. There is no other evidence in the record that is sufficient to support a conclusion that Defendant was part of a joint venture with Hansand Steamship during the year 1964. The mere fact that Defendant may have negotiated benefits for several different companies (including itself and Hansand Steamship) does not, by itself, establish a joint venture involving the two entities.

Therefore, the Court next considers Plaintiff's argument that Defendant is liable because it held itself out as Plaintiff's employer. Plaintiff relies solely upon evidence which may indicate that Hanna Mining negotiated group benefits, including health insurance, not only for itself, but also, acting as an agent, for National Steel, Hansand Steamship, and Hanna Furnace. Plaintiff has presented no evidence that, during the relevant time period, Defendant paid, directed, or supervised him - or that it had the power to hire or fire him. See Cosmpolitan Shipping Co., 337 U.S. at 785-800; Matute, 931 F.2d at 235-36. Under Third Circuit law, the existence of the employment relationship is a question of fact. Reeves, 26 F.3d at 1253 (citing Matute, 931 F.2d at 236). However, when considering the evidence of the relationship as a whole, Plaintiff has failed to present sufficient evidence from which a reasonable jury could conclude that Defendant acted as his employer during his work aboard the Joseph H. Thompson during the year 1964. See Cosmopolitan Shipping Co., 337 U.S. at 795. Accordingly, with respect to Plaintiff's Jones Act claims arising from alleged asbestos exposure while aboard this ship, partial summary judgment in favor of Defendant on grounds that it was not Plaintiff's employer during this work is granted. Anderson, 477 U.S. at 248-50.

D. Conclusion

Defendant's motion for partial summary judgment (as to alleged exposure giving rise to Plaintiff's general maritime law claim for unseaworthiness) on grounds that it did not own the ships at issue is (1) denied with respect to (a) alleged asbestos exposure arising aboard the Leon Falk, Jr. during the years 1961 to 1962 (because Defendant assumed the future, post-1961 liabilities of National Steel, who Defendant contends was the pro hac vice owner of the vessel), and (b) alleged asbestos exposure arising aboard the George R. Fink (during the year

AND IT IS SO ORDERED.

EDUARDO, C. ROBRENO, J.

1963) (because, in 1960, Defendant assumed the future, post-1961 liabilities of National Steel, who Defendant contends was the pro hac vice owner of the vessel and/or because Plaintiff presented sufficient evidence that Defendant acted as a pro hac vice owner of the ship pursuant to a demise/bareboat charter); but is (2) granted with respect to alleged asbestos exposure arising aboard the Joseph H. Thompson (during the year 1964) (because Plaintiff has failed to present sufficient evidence to support a conclusion that Defendant was the ship's pro hac vice owner).

Defendant's motion for partial summary judgment (as to alleged exposure giving rise to Plaintiff's Jones Act claim) on grounds that it was not Plaintiff's employer while he was serving aboard the three ships at issue is (1) denied with respect to (a) alleged asbestos exposure arising aboard the Leon Falk, Jr. during the years 1961 to 1962 (because Defendant assumed the future, post-1961 liabilities of National Steel, who Defendant contends was Plaintiff's employer while aboard the vessel), and (b) alleged asbestos exposure arising aboard the George R. Fink (during the year 1963) (because, in 1960, Defendant assumed the future, post-1961 liabilities of National Steel, who Defendant contends was Plaintiff's employer while aboard the vessel and/or because Plaintiff presented sufficient evidence that Defendant acted as Plaintiff's employer while he was aboard the ship); but is (2) granted with respect to alleged asbestos exposure arising aboard the Joseph H. Thompson (during the year 1964) (because Plaintiff has failed to present sufficient evidence that Defendant acted as his employer.