IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JAMES HOLDER,

Plaintiff,

v.

FRASER SHIPYARDS, INC., NORTHERN ENGINEERING COMPANY, LLC, and THE INTERLAKE STEAMSHIP COMPANY

Defendants.

OPINION AND ORDER

16-cv-343-wmc

In this lawsuit, plaintiff James Holder alleges injuries caused by exposure to lead and other hazards while working as a "welder-ship-fitter-fabricator" on a project to convert the *Herbert C. Jackson*, a 690-foot-long "bulk carrier ship," from steam to diesel propulsion. Plaintiff brings claims against the ship's operator, The Interlake Steamship Company ("Interlake"), for vessel negligence under the Longshore and Harbor Workers' Compensation Act (the "Act" or "LHWCA"), 33 U.S.C. § 905(b), as well as claims for third-party negligence under § 933 of the Act against defendant Fraser Shipyards, Inc. ("Fraser"), at whose shipyard the *Jackson* was dry docked during the conversion, and defendant Northern Engineering Company, LLC ("Northern"), who plaintiff alleges, like Fraser, was contractually involved in the conversion and refurbishment of the *Jackson*.

Before the court is defendant Interlake's motion to dismiss plaintiff's § 905(b) claims against it for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), based on the premise that plaintiff cannot establish the threshold elements of admiralty jurisdiction to prevail under the LHWCA. (Dkt. #24.) Also before the court is a 12(b)(6) motion to dismiss brought by defendants Fraser and Northern, who argue that

as a "borrowed employee," plaintiff is precluded from bringing tort claims against them by § 905(a) of the LHWCA. (Dkt. #12.) Finally, plaintiff moves for leave to file a second amended complaint to add claims against Todd Johnson and Capstan Corporation, which defendants Fraser and Northern oppose on similar grounds as their motion to dismiss, as well as undue delay. (Dkt. #37.) Subsequently, the parties stipulated that plaintiff would seek to add only Capstan Corporation—not Todd Johnson—as a defendant. (Dkt. #42.) For the reasons set forth below, the court will deny both of defendants' motions as at best premature and grant plaintiff's motion as modified by the parties' stipulation.[1]

ALLEGATIONS OF FACT[2]

The *Herbert C. Jackson* was built by Great Lakes Engineering Works in 1959, according to the specifications of the Interlake Steamship Company. When built, the *Jackson* was outfitted with steam turbine engines, and many of its surfaces were covered in lead-based paint.

Interlake operates a number of bulk carrier commercial vessels on the Great Lakes. In approximately 2006, Interlake began a ten-year project to modernize its fleet of ships, including converting ships with steam propulsion systems to diesel propulsion systems.

[1] Summary judgment briefing began on September 8, 2017 and such arguments will be considered in due course. Of course, depending on the record after the completion of summary judgment briefing, the outcome may be different on the undisputed facts at that time. In light of the court's ruling today denying Interlake's motion, the court will grant and deny in part the motion to amend the preliminary pretrial conference order (dkt. #46) as specified in the order below.

[2] Unless otherwise noted, the facts in this section of the opinion are derived from the now amended complaint and viewed in a light most favorable to the plaintiff. (Dkt. #9.)

In 2015, Interlake entered into agreements regarding the diesel conversion and refurbishment of the *Jackson* with Fraser and Northern. Among the work required was the installation of diesel engines, a new gearbox and propeller system, exhaust gas economizers, an auxiliary boiler, and new structural steel components. At the time the work on the *Jackson* began, plaintiff alleges that it was Interlake's "fourth steam-to-diesel conversion" since its fleet modernization initiative began in 2006, but includes no other facts regarding the progress of those other conversions.

At all relevant times for purposes of this lawsuit, plaintiff was employed as a welder-ship-fitter-fabricator by Tradesmen International ("Tradesmen").[3] Plaintiff alleges that Fraser and Northern entered into agreements with Tradesmen to provide skilled workers for the modernization, and he began working aboard the *Jackson*, which was dry docked at Fraser's shipyard in Superior, Wisconsin, on or around January 8, 2016.[4] Holder's responsibilities required him to use abrasive blasting tools and welding torches to blast, cut, chip, heat and weld painted surfaces on the *Jackson*, including areas in its ballast tanks.

Plaintiff further alleges that each defendant either "knew or should have known" based on the age of the *Jackson* that its surfaces were covered in lead paint and that lead exposure would result from the work being performed. In particular, plaintiff alleges that

[3] Tradesmen International is a recruiting company that provides skilled workers to construction and industrial companies. *See About Tradesmen*, Tradesmen International, http://www.tradesmeninternational.com/about.html.

[4] A dry dock is a vessel or basin that can be flooded and drained to allow ships to move in and out for construction and repairs. *Dry Dock*, Wikipedia, https://en.wikipedia.org/wiki/Dry_dock#Types.

the Occupational Safety and Health Administration ("OSHA") had cited Fraser for more than 60 safety violations for lead exposure in 1993, including 44 labeled "serious" violations, some involving a "substantial probability that death or serious physical harm could result from a hazardous condition" about which Fraser knew or should have known. In addition, plaintiff alleges that contemporaneous complaints were made to defendants about "unusual health ailments" caused by the working conditions on the *Jackson*, but that defendants did nothing to investigate or remedy the conditions and instead told workers that there was no cause for concern.

OSHA began investigating the *Jackson* modernization project in early 2016, and eventually stopped the project on or around March 29, 2016, in part because of the risk of lead exposure. As a result of OSHA's stoppage, Holder learned about his exposure to lead and other hazards. This prompted him to have his blood tested on April 1, 2016, which resulted in a diagnosis of lead poisoning based on a "critical" blood lead level of 36.5 micrograms per decileter. Plaintiff alleges that his lead poisoning and resulting symptoms—including headaches, abdominal pain and cognitive impairments—were caused by his exposure to lead through toxic fumes and airborne particulates while working aboard the Jackson.

OPINION

A. Interlake's Motion to Dismiss

1) Subject matter jurisdiction

Since Interlake argues that this court lacks subject matter jurisdiction over the entirety of this lawsuit, its motion must be addressed first. The gist of Interlake's motion is as follows: "before a ship owner negligence claim can even be cognizable under § 905(b), federal court maritime jurisdiction must be established." (Def.'s Opening Br. (dkt. #26) at 5.) More specifically, Interlake argues that to invoke this court's subject matter jurisdiction, plaintiff must allege facts sufficient to show both that: (1) the tort underlying his LHWCA claim took place "on or near navigable waters"; and (2) there is a "substantial relationship between the activity giving rise to the incident and traditional maritime activity." (*Id.* (citing *Ozzello v. Peterson Builders, Inc.*, 743 F. Supp. 1302, 1309 (E.D. Wis. 1990).)

As plaintiff correctly points out in response, however, Interlake confuses the elements plaintiff must plead to make out a cognizable § 905(b) claim with the prerequisites for the court to exercise subject matter jurisdiction over his LHWCA claims.[5] If a plaintiff has a claim that can fall under a federal district court's admiralty jurisdiction *and* "the court's subject matter jurisdiction on some other ground," he has

[5] Although Interlake's subject matter jurisdiction arguments are misplaced, and plaintiff puzzlingly does not defend his choice to pursue his claims under this court's diversity jurisdiction with much vigor, the court will address subject matter jurisdiction in some detail, since the basis of the court's jurisdiction may have significant consequences with respect to how this case proceeds, including the availability of interlocutory appeals and entitlement to a jury trial. *See T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585, 586-87 (5th Cir. 1983).

the option whether to "designate the claim as an admiralty or maritime claim."[6] Fed. R. Civ. P. 9(h); *see also Diesel "Repower," Inc. v. Islander Invs. Ltd.*, 271 F.3d 1318, 1322 (11th Cir. 2001) ("The saving to suitors clause [of 28 U.S.C. § 1333(1)] allows an *in personam* action, whether the action is instituted in state court or in a federal court under diversity jurisdiction or in a federal court under maritime jurisdiction."); *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir. 1987) (plaintiff can elect to invoke jurisdiction for maritime claims not "cognizable only in admiralty" under the "law side" of the court, as opposed to the "admiralty side").

Here, plaintiff's *in personam* LHWCA claims appear to be the type that *can* be brought within either the court's admiralty or diversity jurisdiction.[7] *See, e.g., Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1055-56 (9th Cir. 1997) (holding that diversity jurisdiction over plaintiffs' LHWCA claims existed); *May v. Transworld Drilling Co.*, 786 F.2d 1261, 1263-64 (5th Cir. 1986) (same); *Price v. Atlantic Ro-Ro Carriers*, 45 F. Supp. 3d 494, 513 (D.Md. 2014.) (same); *Ozzello*, 743 F. Supp. at 1315 (same). However, to designate a claim as one being brought under admiralty jurisdiction, a plaintiff must do so explicitly, by specifically mentioning Rule 9(h) in his complaint or at least by identifying his causes of action as admiralty or maritime claims. *See Price*, 45 F. Supp. 3d at 512-13.

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[6] As the Seventh Circuit has explained, "the terms 'admiralty' and 'maritime law' are virtually synonymous in this country today," so they are used interchangeably in this opinion. *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 381 n.2 (7th Cir. 2001) (quoting Grant Gilmore and Charles L. Black, Jr., *The Law of Admiralty* § 1-1 (2d ed., 1975)).

[7] Plaintiff would have no option if his claims were exclusively under the admiralty jurisdiction of the federal courts, such as an *in rem* claim. *See Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 665 (7th Cir. 1998); Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 3-2 (5th ed).

Although plaintiff pleads in his amended complaint that his "claims for relief are maritime tort claims," he makes no mention of Rule 9(h). On the contrary, plaintiff states explicitly that "diversity jurisdiction is invoked and admiralty and maritime jurisdiction is not invoked." (Am. Comp. (dkt. #9) at 11.) Moreover, plaintiff's description of his claims as "maritime tort claims" presents no ambiguity by itself, as §905(b) simply "codified the existing tort of maritime negligence, which courts have recognized for over a century." *Price*, 45 F. Supp. 3d at 501-02. Finally, plaintiff demands a jury trial, which further evinces his intent not to pursue his LHWCA claims under the court's admiralty jurisdiction. *See Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 666-67 (7th Cir. 1998) (determining whether a plaintiff elected to proceed in admiralty requires an evaluation of the totality of the circumstances, including the "important" factor whether he included a jury demand in his complaint).

Accordingly, there is no doubt that plaintiff has opted *not* to bring his LHWCA claims under this court's admiralty jurisdiction, and now that he has perfected his allegations regarding the amount in controversy exceeding $75,000 and complete diversity among the parties in his amended complaint, plaintiff has established that this court has subject matter jurisdiction over this action under 28 U.S.C. § 1332.

2) Failure to state a claim

As already alluded to, the above subject matter jurisdiction discussion is in some sense academic, since "[t]he test to determine the existence of a cause of action in maritime tort is identical with that applied to determine jurisdiction in admiralty." *May*,

786 F.2d at 1265; *see also Oliver v. Lauderdale Marine Ctr., LLC*, No. 08-61690-CIV, 2009 WL 6046983, at *2-3 (S.D. Fla. Oct. 7, 2009) ("In order to assert a section 905(b) claim, . . . the claim must meet the tests for admiralty tort jurisdiction in addition to being based upon an occurrence on navigable waters." (alteration in original) (quoting Thomas J. Schoenbaum, Admiralty & Mar. Law § 7-10 (4th ed. 2009)). Therefore, although Interlake's arguments miss the mark with respect to subject matter jurisdiction, those same arguments attack the merits of plaintiff's § 905(b) claim, and so the court will convert its Rule 12(b)(1) motion into a 12(b)(6) motion to dismiss for failure to state a claim.[8] *Miller v. Herman*, 600 F.3d 726, 732-33 (7th Cir. 2010).

"The LHWCA was created to establish a compensation scheme for injured maritime workers." *McLaurin v. Noble Drilling (U.S.), Inc.*, 529 F.3d 285, 289 (5th Cir. 2008). Indeed, § 905(a) and (b) describe the LHWCA as providing the exclusive remedy for "nonseaman maritime workers" for injuries caused by a "vessel." *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001).[9] To prevail on a negligence claim against a "vessel" under § 905(b), a plaintiff must satisfy a two part test: "(1) his injury must occur within an area adjoining navigable waters of the United States, known as the 'situs' test, and (2) the nature of the work performed by him must be maritime in nature, known as the 'status' test." *McLaurin*, 529 F.3d at 289 (citing *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 279-80 (1977)); *see also In re La. Crawfish*

[8] There is no prejudice to plaintiff in doing so since plaintiff himself suggests this approach in his response brief. (Pl.'s Opp'n Br. (dkt. #32) at 2-3.)

[9] Seamen, on the other hand, may bring claims under the Jones Act. *See Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 488 (2005).

Producers, 772 F.3d 1026, 1029 (5th Cir. 2014 (describing the "location test" and "connection test"); *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 382 (7th Cir. 2001) ("locality test" and "nexus test").

Setting the "situs" test aside for the moment, in its opening brief,[10] Interlake argues that plaintiff's § 905(b) claim cannot satisfy "status" test. In particular, Interlake argues plaintiff fails to meet the four "[f]actors to be considered in determining whether an injury has occurred in furtherance of an activity bearing a substantial relationship to traditional maritime activity" applied by the Eastern District of Wisconsin in *Ozzello*:

> (1) whether the injury occurred in the course of maritime service; (2) whether the injury occurred in the course of navigation; (3) whether the injury occurred in the course of promoting maritime commerce or whether it presented a hazard to maritime commerce; and, (4) whether the conduct surrounding the injury gives rise to the need for the application of admiralty law, particularly the uniform "rules of the road" governing navigation.

743 F. Supp. at 1310 (citing *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 672-77 (1982); *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 253-74 (1972)). Indeed, Interlake argues that plaintiff's claim satisfies *none* of

[10] At least for the purposes of its present motion, Interlake does not dispute that it is a "vessel" under the meaning of § 905(b), as defined by the LHWCA (which is not to be confused with the parties' dispute regarding the situs requirement discussed below). *See* 33 U.S.C. § 902(21) ("Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, *and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer,* master, officer, or crew member.") (emphasis added). Nor does Interlake dispute that plaintiff is entitled to bring a § 905(b) claim as an "employee," as defined by the LHWCA. *See* 33 U.S.C. § 902(3) ("The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, *and any harbor-worker including a ship repairman*, shipbuilder, and ship-breaker[.]") (emphasis added).

these factors because the *Jackson* was inoperable in dry dock and because exposure to lead is not a hazard unique to maritime activity.

As plaintiff points out in response, however, the Supreme Court disapproved of such multifactor tests in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). In that case, the Court rejected a similar seven-factor test purportedly applied by the Fifth Circuit to determine admiralty jurisdiction,[11] opting instead for the situs and status test already discussed above: whether a plaintiff can "satisfy conditions both of location and connection with maritime activity." 513 U.S. at 534; *see also Cabasug v. Crane Co.*, 956 F. Supp. 2d 1178, 1182-85 (D. Haw. 2013) (describing historical development of the admiralty law test). In *Grubart*, the Supreme Court further explained that consistent with its earlier decision in *Sisson*, the "connection" (status) prong required courts to first "assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce" and second, "determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." 513 U.S. at 534 (internal quotation marks and citations omitted). Whatever arguable nuances the factors considered by the Eastern District of Wisconsin in *Ozzello* might suggest, therefore, Interlake effectively concedes in its reply brief, as it must, that

[11] Specifically, those factors were: (1) "the functions and roles of the parties"; (2) "the types of vehicles and instrumentalities involved"; (3) "the causation and the type of injury"; (4) "traditional concepts of the role of admiralty law"; (5) the impact of the event on maritime shipping and commerce; (6) "the desirability of a uniform national rule to apply to such matters"; and (7) "the need for admiralty expertise in the trial and decision of the case." *Grubart*, 513 U.S. at 544 (internal quotation marks omitted) (quoting *Mollett v. Penrod Drilling Co.*, 826 F.2d 1419, 1426 (5th Cir. 1987); *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973)).

Grubart's explanation of the "location" and "connection" tests govern plaintiff's § 905(b) claim, which the court applies here as well. *Cf. Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 246 (2d Cir. 2014) ("[T]he Court restated and formalized the current test for admiralty jurisdiction in [*Grubart*].").

i) Situs test

Turning first to the parties' arguments regarding situs, Interlake essentially concedes "[i]t is well-settled that vessels in drydock are still considered to be in 'navigable waters' for purposes of admiralty jurisdiction." *Cabasug*, 956 F. Supp. 2d at 1187; *id.* at 1187 n.11 (citing cases). Relying primarily on *Miles ex rel. Miles v. VT Halter Marine, Inc.*, 792 F. Supp. 2d 919 (E.D.La. 2011), Interlake nevertheless argues that plaintiff still cannot satisfy the situs test because the *Jackson* was "under construction, incomplete, and unfit for [its] intended purpose at the time of the incident," and therefore not "a vessel for purposes of admiralty jurisdiction." (Def.'s Reply Br. (dkt. #33) at 5 (alteration in original) (quoting *Miles*, 792 F. Supp. 2d at 924).)

In *Miles*, the district court analyzed what effect the approach of the U.S. Supreme Court in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005), or the Fifth Circuit in subsequent cases applying *Stewart*, had upon that Circuit's "longstanding precedent holding that a watercraft under construction is not a 'vessel in navigation' for purposes of the Jones Act." 792 F. Supp. 2d at 922. In *Stewart*, the U.S. Supreme Court, after "grant[ing] certiorari to resolve confusion over how to determine whether a watercraft is a 'vessel' for purposes of the LHWCA," held that a "dredge" is such a "vessel." 543 U.S. at 484, 486. In doing so, the Court applied the definition of "vessel" in 1 U.S.C. § 3,

explaining that "[u]nder § 3, a 'vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment."[12] *Id.* at 497. Having applied that definition, the Court concluded that the dredge, although "temporarily stationary" when the injury occurred, was such a vessel in light of its "waterborne transportation function." 543 U.S. at 492, 496. In further support of its holding, the Court in *Stewart* drew a distinction between a dredge or a ship "berthed for minor repairs" and a watercraft that "has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* at 494. That distinction was consistent with the principle, sometimes described as the requirement that a vessel must be "in navigation," that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Id.* at 496 (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 373-74 (1995); *Roper v. United States*, 368 U.S. 20, 21 (1961); *West v. United States*, 361 U.S. 118, 122 (1959)).

Of particular importance for the purposes of deciding Interlake's motion, *Stewart* held that with respect to the "in navigation" element for determining whether a watercraft is a vessel in the admiralty sense, or whether it is "used, or capable of being used for maritime transportation," the overriding question is "whether the watercraft's use as a means of transportation on water is a practical possibility or merely a theoretical one." *Id.* (internal quotation marks omitted). Therefore, the central inquiry with respect to the situs prong is whether the *Jackson* had reached the point at which the work being

[12] The Fifth Circuit has "recognized that *Stewart*'s analysis of the term "vessel" applies equally to the LHWCA and to the Jones Act." *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 299 (5th Cir. 2008).

done on it became "sufficiently significant that [it could] no longer be considered in navigation." *Chandris*, 515 U.S. at 374; *see also Lozman v. City of Riviera Beach, Fla.*, 586 U.S. 115, 133 S. Ct. 735, 750 (2013) (Sotomayor, J., dissenting) ("[S]hips that 'have been withdrawn from the water for extended periods of time' in order to facilitate repairs and reconstruction may lose their status as vessels until they are rendered capable of maritime transport.") (citing *Stewart*, 543 U.S. at 496).

The parties offer little by way of citation to case law addressing how this "in navigation" question should be answered in this case. Plaintiff insists simply that his claims meet the situs test because the *Jackson* was in a dry dock. (Pl.'s Opp'n Br. (dkt. #32) at 11-13.) For its part, Interlake does little more than take up the language of the district court in *Miles* to argue that the *Jackson* was not a vessel because it was "under construction," as opposed to "routine repair," having been "rendered inoperable for more than six months" with "[t]he very nature of [defendant] Fraser's ship building contract with Interlake render[ing the *Jackson*] totally incapable of navigation throughout the time Plaintiff claims to have been exposed to workplace toxins." (Def.'s Reply Br. (dkt. #33) at 5-6.)

Interlake's reliance on *Miles* alone is not enough for it to prevail on its motion. Aside from it being a district court decision that departed from the language of the Supreme Court in *Stewart*, the facts of that case are obviously distinguishable, at least at the pleadings stage, from those here. In particular, the structure held not to be a vessel in *Miles* was a barge under construction in April of 2006 and would be incapable of carrying out its intended purpose of transporting liquid cargo until 2010, while the plaintiff in

Miles was injured in October of 2009. 792 F. Supp. 2d at 920, 923-24. Moreover, the Supreme Court's lengthy discussion of the "in navigation" requirement in *Chandris* demonstrates there is a balancing required that is wholly missing from either side's arguments at the motion to dismiss stage:

> In *West v. United States*, 361 U.S. 118, 80 S. Ct. 189, 4 L.Ed.2d 161 (1959), we held that a shoreside worker was not entitled to recover for unseaworthiness because the vessel on which he was injured was undergoing an overhaul for the purpose of making her seaworthy and therefore had been withdrawn from navigation. We explained that, in such cases, "the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done." *Id.*, at 122, 80 S. Ct., at 192. *See also United N.Y. and N.J. Sandy Hook Pilots Assn. v. Halecki*, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed.2d 541 (1959); *Desper*, 342 U.S., at 191, 72 S.Ct., at 218. The general rule among the Courts of Appeals is that vessels undergoing repairs or spending a relatively short period of time in drydock are still considered to be "in navigation" whereas ships being transformed through "major" overhauls or renovations are not. *See Bull*, 6 U.S.F.Mar.L.J., at 582–584 (collecting cases).
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> Obviously, while the distinction at issue here is one of degree, the prevailing view is that "major renovations can take a ship out of navigation, even though its use before and after the work will be the same." *McKinley v. All Alaskan Seafoods, Inc.*, 980 F.2d 567, 570 (CA9 1992). Our review of the record in this case uncovered relatively little evidence bearing on the *Galileo*'s status during the repairs, and even less discussion of the question by the District Court. ***On the one hand, the work on the Chandris vessel took only about six months, which seems to be a relatively short period of time for important repairs on oceangoing vessels***. *Cf. id.*, at 571 (17–month–long project involving major structural changes took the vessel out of navigation); *Wixom v. Boland Marine & Manufacturing Co.*, 614 F.2d 956 (CA5 1980) (similar 3-year project); see also Senko, supra, at 373, 77 S.Ct., at 417 (noting that "[e]ven a transoceanic liner may be confined to berth for lengthy periods, and while there the ship is kept in repair by its 'crew'"—and that "[t]here can be no doubt that a member of

> its crew would be covered by the Jones Act during this period, even though the ship was never in transit during his employment"). ***On the other hand, Latsis' own description of the work performed suggests that the modifications to the vessel were actually quite significant, including the removal of the ship's bottom plates and propellers, the addition of bow thrusters, overhaul of the main engines, reconstruction of the boilers, and renovations of the cabins and other passenger areas of the ship***. *See* App. 93–94. On these facts, which are similar to those in *McKinley*, it is possible that Chandris could be entitled to partial summary judgment or a directed verdict concerning whether the Galileo remained in navigation while in drydock; the record, however, contains no stipulations or findings by the District Court to justify its conclusion that the modifications to the *Galileo* were sufficiently extensive to remove the vessel from navigation as a matter of law.

515 U.S. at 374-75 (emphasis added). Indeed, *Chandris* explains that "the underlying inquiry whether a vessel is or is not 'in navigation' for Jones Act purposes is a *fact-intensive* question that is normally for the jury and not the court to decide." *Id.* at 373 (emphasis added).

Although likely an issue that could be resolved on summary judgment, therefore, the court cannot resolve whether plaintiff can satisfy the situs test on this undeveloped record. Put differently, taking the facts as pled, it is as least plausible that the *Jackson* was "in navigation" when plaintiff was injured. Accordingly, the court will not grant Interlake's motion on the basis that plaintiff has failed to plead adequately that his LHWCA claims satisfy the situs requirement.

ii) Status test

The parties' discussion of the status test is somewhat more robust, although both parties (most importantly, Interlake) similarly fail to deliver the rigor necessary for the

court to resolve at this stage whether the activity that caused plaintiff's injury can support a claim under the LHWCA. As already discussed, a plaintiff must satisfy two components to meet the status test: (1) "the general features of the type of incident involved" must have "a potentially disruptive impact on maritime commerce"; and (2) "the general character of the activity giving rise to the incident" must have a "substantial relationship to traditional maritime activity." *Grubart*, 513 U.S. at 534 (internal quotation marks omitted) (quoting *Sisson*, 497 U.S. at 363, 364 n.2). In analyzing the first, the court must "use[] 'a description of the incident at an intermediate level of possible generality' that is neither too broad to distinguish among cases nor too narrow to recognize potential effects on maritime commerce." *Crawfish Producers*, 772 F.3d at 1029 (internal citations omitted) (citing *Grubart*, 513 U.S. at 538-39); *see also Weaver*, 255 F.3d at 386 (explaining that in evaluating the activity's *potential* effects, "[t]he key is not whether the incident affected maritime commerce, but whether it could do so"). In analyzing the second, the court must consider "whether a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart*, 513 U.S. at 539-40.

In his brief in opposition to Interlake's motion, plaintiff cites a number of cases for the proposition that exposure to asbestos while working on a ship satisfies the status test, but most, if not all, of these cases arose in factual contexts and involved theories of liability that appear to be easily distinguishable from those here. By way of example, plaintiff relies heavily on *Cabasug* as a case holding that individuals exposed to toxins

while working on a ship in dry dock satisfy the status elements, but because the plaintiff in *Cabasug* sued an asbestos manufacturer based on injuries he suffered while working on Navy ships in dry dock, the district court found it appropriate to define the activity giving rise to the action as "the manufacture of products for use on vessels." 956 F. Supp. 2d at 1190. Plaintiff obviously cannot similarly define the activity at issue here.

Interlake likewise fails to cite cases in a sufficiently analogous context so as to permit the court to dismiss plaintiff's LHWCA claims as barred by the status test at the pleadings stage. Without more context regarding plaintiff's duties, the type of work performed and the nature of his exposure, the court is left with an unclear picture whether he can prevail on his § 905(b) claim. Still, it has at least been pled sufficiently. Therefore, defendant Interlake's motion will be denied. [13]

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[13] To eventually recover against a vessel on a § 905(b) claim, a plaintiff "must show (1) that the vessel had a duty to protect against the hazard; (2) breach of that duty; (3) injury; and (4) that the injuries were proximately caused by the negligence of a vessel." Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 7-10 (5th ed). The Supreme Court has outlined three duties of care that vessels owe to longshoremen: (1) the turnover duty; (2) the active control duty; and (3) the duty to intervene. *See Price*, 45 F. Supp. 3d at 506 (citing *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 97-98 (1994); *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 166-78 (1981)); *see also* Thomas J. Schoenbaum, 1 Admiralty & Mar. Law § 7-10 (5th ed). With respect to any duties it may have owed plaintiff, Interlake did little more in its opening brief than assert that "Plaintiff does not allege the breach of a specific duty he claims Interlake owed him, but instead asserts generally that Interlake's 'actual knowledge of the presence of lead paint' on its vessel the [*Jackson*], renders it liable to him under § 905(b) of the LHWCA for lead poisoning," and cite case law for the general proposition that an employer or independent contractor at least shares a duty to provide safe working conditions, especially in the context of ship repair. (Def.'s Opening Br. (dkt. #26) at 1, 4-5 (citation omitted)). Interlake argues further in its reply brief that "there is no allegation, nor could there be, that project delays, job shutdowns or an OSHA investigation involving Fraser Shipyards have any bearing on any fact or issue relevant to Interlake's supposed breach of a *Scindia* duty." (Def.'s Reply Br. (dkt. #33) at 6-7.) To the extent that Interlake intended to challenge plaintiff's § 905(b) claim with respect to whether it owed any duty to plaintiff in its motion, therefore, the court deems its arguments on that issue as underdeveloped and will presumably take the issue up in its summary judgment submission. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) (undeveloped, conclusory arguments are waived); *Nelson v. La Crosse Cty. Dist. Attorney*, 301 F.3d 820, 836 (7th Cir. 2002) (issues

B. Remaining Defendants' Motion to Dismiss

1) Borrowed Employee Doctrine

Pursuant to Rule 12(b)(6), defendants Fraser and Northern Engineering move to dismiss plaintiff's § 933 claims for third-party negligence under the LHWCA for failure to state a claim upon which relief can be granted. Calling for the application of the "borrowed employee doctrine," defendants argue that they are immune to tort liability under the LHWCA because they were the "joint employers" of plaintiff. As an initial matter, defendants' motion is better captioned as a Rule 12(c) motion for judgment on the pleadings, since it relies on an affirmative defense external to the complaint. *See Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 n.1 (7th Cir. 2012). Because the analysis to be applied is the same for purposes of deciding defendants' motion, including whether the court can consider documents defendants attach to their motion without converting it to a Rule 56 motion, the court addresses its merits below. *See Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963, 975-76 (7th Cir. 2013).

In particular, as support for their motion, defendants filed an affidavit from James Farkas, Fraser and Northern's president and CEO, with copies of the "Client Services Agreement" between Fraser and Tradesmen and all of the time slips that Holder submitted to Fraser attached as exhibits. Defendants also filed an affidavit from their counsel, asserting that twenty Fraser employees are pursuing administrative LHWCA

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raised for the first time in a reply brief are waived). Of course, this raises a larger question as to why plaintiff insists on complicating these proceedings by pursuing claims under the LHWCA in light of its apparent rights to proceed under the common law before a federal jury on diversity grounds. That, too, is a discussion for another day.

claims against Fraser for lead exposure while working aboard the *Jackson*, as well as an attached exhibit purporting to be a "Certificate of Cover" from Fraser's insurer that names Northern as a "Related Employer."

Plaintiff contends that the court cannot consider these documents unless it converts defendants' motion to one for summary judgment under Fed. R. Civ. P. 12(d) and 56, which plaintiff unsurprisingly insists would be inappropriate before further development of the facts. As the Seventh Circuit has explained, a district court has discretion whether to consider or ignore additional materials outside of the pleadings submitted in support of a motion to dismiss. *Berthold Types Ltd. v. Adobe Sys. Inc.*, 242 F.3d 772, 776 (7th Cir. 2001) ("A motion to dismiss must be *treated* as a motion for summary judgment if the judge *considers* matters outside the complaint, but the judge may elect to treat a motion as what it purports to be and disregard the additional papers.") (emphasis in original). In particular, an exception to the general rule that the court is restricted to an analysis of the complaint when deciding a Rule 12(b)(6) motion applies for "[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to [his] claim." *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993). This incorporation-by-reference" doctrine prevents a plaintiff from evading dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proves his claim has no merit.") *Brownmark*, 682 F.3d at 690 (brackets and internal quotation marks omitted).

Defendants cite to *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993), for the proposition that "items subject to judicial notice, matters of public record, and

documents the authenticity of which are not disputed by the parties" may also be considered by the court without converting the motion to a motion for summary judgment. (Defs.' Reply Br. (dkt. #27) at 10.) Contrary to defendants' assertion, this "public record exception" does not permit this court's consideration of "the number of Fraser employees pursuing LHWCA claims for lead exposure" because it is "a matter of public record." *See Ennenga v. Starns*, 677 F.3d 766, 773-74 (7th Cir. 2012) (citing *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997))(interpreting the public record exception consistent with Federal Rule of Evidence 201). Similarly, the court may not consider the insurance "Certificate of Cover" simply because "Plaintiff has not disputed the authenticity of that document." Indeed, to do so would be inconsistent with *Watterson* itself, which describes the exception as a "narrow one." Nor, without converting defendants' motion into one for summary judgment, can the court consider as subjects "referenced in Plaintiff's Amended Complaint," the attached time sheets or the "various facts" regarding the work performed on the *Jackson* "outline[d]" in Farkas's affidavit (Defs.' Reply Br. (dkt. #33) at 10-11). *See Burke v. 401 N. Wabash Venture, LLC*, 714 F.3d 501, 505 (7th Cir. 2013) (*documents* may be considered if both referred to in the plaintiff's complaint *and* central to his claims); *Frederick v. Simmons Airlines, Inc.*, 144 F.3d 500, 504 (7th Cir. 1998) ("Affidavits are not properly considered in deciding upon a motion under Rule 12(b)(6) unless the district court converts the motion into one for summary judgment under Rule 56."). Finally, contrary to Fraser's argument, the court cannot consider these additional materials as

bearing on a determination of its subject matter jurisdiction for the reasons already explained with respect to defendant Interlake's motion above.

Whether the court could consider the "Client Services Agreement" between Fraser and Tradesmen without converting defendants' motion is a closer question. Plaintiff alleges in his amended complaint that "Defendants Fraser Shipyards, Inc. and Northern Engineering Company, LLC entered into subcontracts and/or agreements with the plaintiff's employer, Tradesmen International, for performance of certain skilled work during the engine conversion and refurbishment work on the [*Jackson*]." (Am. Compl. (dkt. #9) ¶ 19.) Therefore, agreements fitting this description if attached by defendants to a motion to dismiss would likely fall under the incorporation by reference doctrine, permitting this court to "independently examine the document and form its own conclusions as to the proper construction and meaning to be given the material." *Burke*, 714 F.3d at 505 (quoting *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661 (7th Cir. 2002)).

Even if the court reviewed the Client Services Agreement, however, defendant Fraser still would not be entitled to judgment on the pleadings. Fraser argues that plaintiff's § 933 claim is barred by the borrowed employee doctrine, citing several circuit court cases applying that doctrine to preclude plaintiffs from bringing LHWCA tort claims against entities considered the rightful employer. For example, in *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), the Fifth Circuit analyzed nine factors to determine whether the borrowed employee doctrine provided the defendant immunity from the plaintiff's LHWCA tort claims:

> (1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
>
> (2) Whose work is being performed?
>
> (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
>
> (4) Did the employee acquiesce in the new work situation?
>
> (5) Did the employer terminate his relationship with the employee?
>
> (6) Who furnished tools and place for performance?
>
> (7) Was the new employment over a considerable length of time?
>
> (8) Who had the right to discharge the employee?
>
> (9) Who had the obligation to pay the employee?

Id. at 616-17 (citing *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969)); *see also Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1123-24 (11th Cir. 2011) (applying borrowed employee doctrine to LHWCA claims); *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 149 (4th Cir. 2000) (same); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 940 (4th Cir. 1990) (same); *cf. Warrington v. Elgin, Joliet & E. Ry. Co.*, 901 F.2d 88, 90 (7th Cir. 1990) (positing possible application of borrowed servant doctrine to claims under the Federal Employer's Liability Act) (citing *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974)).

While the Client Services Agreement may well bear on *some* of these factors, it is certainly not dispositive. Moreover, plaintiff not only disputes generally that Fraser and Northern were his employers for purposes of the LHWCA, he has certainly not pled

himself out of court, as his assertion in the amended complaint that Tradesmen was his employer is at least plausible on its face. *See EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007).

Once again, defendants' motion is premature at best. Indeed, as plaintiff correctly points out, the cases that defendants cite analyze the borrowed employee doctrine under a more fulsome set of the facts regarding the employee's working arrangements. Accordingly, the court agrees that the number of undeveloped factual issues preclude entry of judgment in favor of defendants Fraser and Northern on the basis of the borrowed employee doctrine at this stage of the proceedings.

2) Duty Owed by Northern

In the brief in support of its motion, defendant Northern also argues alternatively that plaintiff's negligence claims against it should be dismissed because he pleads no facts to support a claim that Northern owed or breached any duty to Holder. In contrast to the fact laden employer immunity arguments, this argument is proper under a Rule 12(b)(6) motion, since it attacks the sufficiency of the claims as pled. Specifically, Northern argues that "[t]here is not a single fact alleged in the Amended Complaint that would demonstrate that Northern owed a duty to keep Plaintiff safe or to provide a safe environment for Plaintiff to work in," asserting instead that plaintiff merely pled "unsupported legal conclusions." (Defs.' Opening Br. (dkt. #13) at 28.)

In response, plaintiff identifies several paragraphs of his complaint in which he alleged that Northern: (1) contracted with Tradesmen for work on the *Jackson*; (2) knew

or should have known that the *Jackson*'s surfaces were covered in lead paint that would cause harmful exposure to workers on the ship; and (3) ignored complaints from workers about adverse effects of the work on their health. (Pl.'s Opp'n Br. (dkt. #21) at 4-5.) The court agrees that these allegations are sufficient to support a negligence claim against Northern. For the reasons already discussed, Northern's further attempt to rely on facts outside of the complaint, again introduced through the affidavit of its president and CEO, are premature. The court also finds unpersuasive its argument that plaintiff is required to plead more to show more than a speculative entitlement to relief. (Defs.' Opening Br. (dkt. #13) at 28-29; Defs.' Reply Br. (dkt. #27) at 9.) Accordingly, defendants Fraser and Northern's motion to dismiss will also be denied.[14]

C. Plaintiff's Motion for Leave to Amend the Complaint

Finally, pursuant to Fed. R. Civ. P. 15, plaintiff moves for leave to file a second amended complaint, which is attached to his motion as an exhibit. (Dkt. #37.) Rule

[14] Also for another day is plaintiff's puzzling ambiguous allegation at ¶ 50 in the "Claims for Relief" section of his amended complaint that: "The claims for relief against [Fraser] and [Northern] are permitted by LHWCA § 933 and brought pursuant to general admiralty and maritime law, or alternatively general admiralty and maritime law supplemented by state law, or alternatively applicable state law." This is in contrast to ¶ 49, which states: "The claims for relief against The Interlake Steamship Company are expressly authorized by LHWCA § 905(b) and this statute makes clear that general admiralty and maritime law governs these claims." To further add to the confusion, plaintiff's original complaint referenced only the Wisconsin Safe Place Statute, and not the LHWCA or even maritime or admiralty law at all, yet when prompted to file an amended complaint to perfect his citizenship allegations as to the LLC defendant, plaintiff also removed all reference to the safe place statute (or any specific state law basis for his claims at all) in his amended complaint, as well is true in his proposed second amended complaint. Still, plaintiff requested leave to amend his complaint if the court granted Fraser and Northern's motion and neither plaintiff nor defendants address whether plaintiff intended to plead state common law claims. Having now denied Fraser and Northern's motion to dismiss, the court assumes that plaintiff is not pressing his state law claims, if any, going forward, unless advised otherwise.

15(a)(2) governs amendments of pleadings falling outside the deadline for amendments as a matter of course. Specifically, it states that "[t]he court should freely give leave when justice so requires." The Seventh Circuit has explained, however, that Rule 15's directive for courts to give leave freely "does not mean it must always be given." *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 432 (7th Cir. 2009). Consistent with that principle, "district courts have broad discretion to deny leave to amend where there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile[.]" *Arreola v. Gonzalez*, 546 F.3d 788, 796 (7th Cir. 2008) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

As plaintiff explains in his motion, the proposed second amended complaint would add "Capstan Corporation as [a] defendant[] in this case," as well as "additional facts to the 'Background Facts' and 'OSHA Shut Down the Job sections,' based on additional information that has been learned to date." (Mot. for Leave to File Second Am. Compl. (dkt. #37) at 2.) Plaintiff further explains in his motion that he seeks to add Capstan as a defendant because as he "continued his investigation," he became aware that it "played a critical role in his exposure to toxins aboard the [*Jackson*]." (*Id.*) Defendants Fraser and Northern point out in their brief in opposition to plaintiff's motion for leave that Capstan is the sole shareholder and parent corporation of Fraser. (Defs.' Opp'n Br. (dkt. #38) at 2.)

Defendants oppose plaintiff's attempt to add Capstan as a defendant on the basis of futility, as well as undue delay. Their arguments as to futility are readily cast aside,

since they rely on the same LHWCA employer immunity and single entity arguments denied in their motion to dismiss.

Defendants' argument that plaintiff's motion should be denied for undue delay presents a closer question. As defendants explain in their opposition brief, the stay of discovery in this case was lifted without further order of the court on January 3, 2017. (Pretrial Conference Order (dkt. #35) at 2.) Defendants further assert that plaintiff delayed in filing his motion for leave until May 2, 2017, even though the allegations in his proposed second amended complaint are "[b]ased on a sworn transcribed statement of a former employee of a sister company to Fraser and Northern, taken [by plaintiff's counsel] on January 16, 2017." (Def.'s Opp'n Br. (dkt. #38) at 8.) Therefore, defendants contend, "Plaintiff's counsel became aware of the purported basis for [his new] allegations no later than January 16, 2017, and most likely earlier than that," making his delay in asserting claims against Capstan unreasonable, particularly given the dispositive motions deadline of September 8, 2017. (*Id.*) In support of their assertion regarding the date on which plaintiff learned of the facts underlying his newly-asserted claims against Capstan, defendants file an affidavit from their counsel, who avers "on information and belief" that plaintiff's allegations regarding Capstan are based on the sworn statement dated January 16, 2017, about which defendants' counsel first learned "through [his] review of Plaintiff's initial disclosures in this case served on March 2, 2017." (Aff. of Richard J. Leighton (dkt. #39) ¶ 3.)

Plaintiff does not explain precisely when he learned about the facts giving rise to the claims he seeks to assert against Capstan, only denying generally that he was aware of

their conduct "[a]t the time of the initial filing and after a diligent investigation." (Mot. for Leave to File Second Am. Compl. (dkt. #37) at 2.) Neither, however, do defendants submit the sworn statement, purportedly taken by plaintiff's counsel nearly four months before filing his motion for leave, on which they assert the claims plaintiff now seeks to bring against Capstan are based, let alone further explain beyond "information and belief" the basis of their assertion that his new claims stem from that statement.

At the time he filed his amended complaint on July 1, 2016, plaintiff at least knew about the *identity* of Capstan Corporation, which he identified as the sole member of Fraser Industries, LLC (and in turn, identified as the sole member of Northern Engineering Company, LLC). (Am. Compl. (dkt. #9) ¶ 3.) In any event, plaintiff does not dispute knowledge of the identity of Capstan at the time he filed his amended complaint, but rather insists that he was "unaware of [its] conduct . . . as it related to plaintiff's injuries." (Mot. for Leave to File Second Am. Compl. (dkt. #37) at 2.)

Still, in light of the factual allegations regarding Capstan in plaintiff's proposed second amended complaint, including that Capstan personnel were central figures in planning meetings for bidding on the *Jackson* project and that they put an end to measures to ensure abatement of lead exposure aboard the ship, plaintiff's assertion that he learned about their specific roles in the events underlying this lawsuit through discovery is at least plausible. (*See* Ex. to Mot. for Leave to File Second Am. Compl. (Dkt. #37-1) ¶¶ 24, 30.) Moreover, defendants make no claim that they would be prejudiced by plaintiff being given leave to file his second amended complaint. Furthermore, beyond adding Capstan as defendants, plaintiff's second amended

complaint does not appear to otherwise alter the scope or nature of his claims in this lawsuit. Finally, any additional discovery of Capstan can likely be completed on an expedited basis and permitting plaintiff to add it as a defendant is unlikely to present unique defenses or affirmative theories of liability from those of Fraser and Northern. (*See* Defs.' Opp'n Br. (dkt. #38) at 3-7 (discussing the degree of overlap between those parties).) Accordingly, plaintiff will be given leave to file his second amended complaint.[15]

[15] It appears that plaintiff inadvertently neglected to include Capstan (in addition to Fraser and Northern) in ¶ 70 of his second amended complaint and may do so without further leave of the court. Other than Capstan, defendants need not further respond to the second amended complaint. Defendant Capstan may have until October 2, 2017, to do so.

ORDER

IT IS ORDERED that:

1) Defendant Fraser Shipyards, Inc. and defendant Northern Engineering Company, LLC's motion (dkt. #12) is DENIED. Likewise their motion to withdraw their motion to dismiss (dkt. #47) is DENIED as moot.

2) Defendant The Interlake Steamship Company's motion (dkt. #24) is DENIED.

3) Plaintiff's motion for leave to file a second amended complaint (dkt. #37) is GRANTED as modified by the parties' stipulation (dkt. #42). Plaintiff may have until September 19, 2017 to file his second amended complaint as a separate docket entry, as well as proof of service.

4) The joint motion amending the preliminary pretrial conference order (dkt. #46) is GRANTED IN PART AND DENIED IN PART. Defendant Interlake may have 30 days to file its motion for summary judgment. Plaintiff may have 21 days from the service of Interlake's motion to provide a consolidated response to defendants' motions for summary judgment. If Defendant Interlake chooses not to file its own motion, it shall notify plaintiff promptly, with plaintiff having 21 days to respond after receipt of such notice. Defendants shall have 14 days to respond after service of plaintiff's response.

Entered this 12th day of September, 2017.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge