No. 09-337

In The
Supreme Court of the United States

WANDA KRUPSKI, a single person,
Petitioner,
v.

COSTA CROCIERE, S.p.A.,
a foreign corporation (Italy),
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

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February 24, 2010

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QUESTION PRESENTED

Petitioner, Who Was Injured On The Costa Magica, An Ocean-Going Vessel, Filed Suit Seeking Recovery From The Vessel Operator For Breach Of The Legal Duties Imposed On A Vessel Operator. Suit Was Filed Against Costa Cruise, The Booking And Sales Agent, Rather Than Its Affiliate, Costa Crociere, The Actual Owner And Operator Of The Costa Magica. Fed. R. Civ. P. 15(c)(1)(C) Permits An Amended Complaint To "Relate Back", For Limitation Purposes, When The Amendment Corrects A "Mistake Concerning The Proper Party's Identity". Did The Court of Appeals For The Eleventh Circuit Err In Upholding The Denial Of "Relation Back" On The Ground That There Can Be No Such "Mistake" Where The Plaintiff Had "Imputed" Knowledge Of The Identity Of The Added Defendant Prior To Suit By Its Identification As "Carrier" In The Eleven Page Ticket?

PARTIES TO THE PROCEEDINGS

Petitioner Wanda Krupski is a Michigan resident who booked a cruise aboard the Costa Magica, which departed from Florida. While at sea, Ms. Krupski fractured her femur when she tripped over a camera cable. Petitioner filed the personal injury suit which gives rise to these proceedings.

Respondent Costa Crociere S.p.A. ("Costa Crociere"), the owner and operator of the Costa Magica, is an Italian corporation. It sold the cruise ticket to Petitioner through Costa Cruise Lines N.V. LLC ("Costa Cruise"), its affiliated booking agent based in Florida. Petitioner initially filed suit against Costa Cruise, which was dismissed by stipulation. That entity was not involved in the appeal and is not a party in this Court.

Petitioner filed an Amended Complaint against Costa Crociere. The dismissal of the suit against Costs Crociere is the subject of this Brief. As Defendant in the underlying personal injury suit and Appellee in the Court of Appeals, Costa Crociere is the Respondent in this Court.

Petitioner's Rule 29.6 Disclosure Statement is found at p. iii of her Petition for a Writ of Certiorari.

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OPINIONS AND ORDERS BELOW

Suit was filed in the United States District Court for the Southern District of Florida, Miami Division (# 08-60152-CIV). On October 21, 2008, Hon. Cecilia M. Altonaga, United States District Judge, issued her summary judgment Order (DE 50; 8a-22a),[1] holding that Petitioner's identification of Costa Cruise, but not Costa Crociere, in the initial Complaint did not constitute a "mistake concerning the proper party's identity" within the meaning of Fed. R. Civ. P. 15(c)(1)(C)(ii). Therefore, she ruled, the Amended Complaint did not "relate back" and the claim against Costa Crociere was time-barred by the one-year limitation period found in the ticket. The District Court Order is unpublished.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit (#08-16569-JJ). By Opinion of June 22, 2009 (1a - 7a), the Court of Appeals affirmed (Hon. Ed. Carnes, Hon. Charles R. Wilson, Hon. Peter T. Fay). That Opinion is available online, but is otherwise unpublished.

SUPREME COURT JURISDICTION

This suit was brought by an American citizen against an Italian corporation, to recover for injuries sustained in international waters. The District Court

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[1] Designations beginning "DE" identify the docket entry number of the District Court filing. Appendix notations in lower case, like "8a", refer to documents found in the Appendix to the Petition for Writ of Certiorari. Materials found in the Joint Appendix are designated "JA".

had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1333(1).

On October 28, 2008, the District Court issued its Final Judgment. Petitioner filed her Notice of Appeal on November 17, 2008. She invoked the jurisdiction of the United States Court of Appeals for the Eleventh Circuit under 28 U.S.C. § 1291.

The Court of Appeals issued its Opinion and Judgment on June 22, 2009. The Petition for Writ of Certiorari was filed within 90 days of the Court of Appeals Judgment and was timely under this Court's Rule 13.1. On January 19, 2010, the Court issued its Order granting the Petition.

Petitioner relies on the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1), "Cases in the court of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

This appeal turns on the interpretation and application of Fed. R. Civ. P. 15(c)(1), which states, in full:

> **"Relation Back of Amendments.** An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out - - or attempted to be set out - - in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

STATEMENT OF THE CASE

In May of 2006, Ms. Krupski purchased passage on the Costa Magica through a travel agent in South Carolina. In January of 2007, the travel agent received "Travel Documents", on which the second page stated (DE 26, Response to Motion for Summary Judgment, Ex. 1; 25a):

"Costa Cruise Lines N.V.
200 South Park Road,
Suite 200
Hollywood, FL 33021-8541"

The Travel Documents were mailed to the travel agent from Italy by Costa Cruise (DE 19, Costa Cruise Motion for Summary Judgment, Ex. 3, Klutz Affidavit, ¶ 14; JA 36). These documents included a cover page (Klutz Affidavit, Ex. B; JA 40) and an eleven page Passenger Ticket (Klutz Affidavit, Ex. B; 27a - 37a).

The definitional section of the ticket (27a) defines "CARRIER" as including, "Costa Crociere S.p.A., an Italian corporation, and all Vessels and other ships owned, chartered, operated or provided by Costa Crociere S.p.A., and all officers, staff members, independent contractors, medical providers, concessionaires, pilots, suppliers, agents and assigns on board such Vessels, and the manufacturers of said Vessels, and all their component parts". As a precondition to suit, the ticket requires notice of the injury to the carrier or its agent within 185 days[2], the filing of suit within one year,[3] and service upon the

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[2] 46 U.S.C § 30508(b)(1) allows a vessel operator to contractually require notice no less than six months after the injury. Petitioner complied with the contractual notice requirement by her counsel's letter of July 2, 2007 to Costa Cruise (DE 26, Response to Motion for Summary Judgment, Ex. 5; JA 69a - 70a).

[3] 46 U.S.C. § 30106 establishes a three year limitation period for maritime personal injury actions. However, 46 U.S.C. § 30508(b)(2) permits a contractual limitation period of not less than one year. Petitioner does not challenge the validity of the one year limitation period found in the ticket. In this Brief, the term "statutory limitation period" is used when referring to the

carrier within 120 days of filing[4] (27a - 28a). Other provisions of the ticket limit the carrier's liability (28a - 30a, 36a), and extend the benefit of limitations to the carrier's agents, including "Costa Cruise Lines, N.V., the Netherlands Antilles corporation that is a sales and marketing agent for the CARRIER and the issuer of this Passenger Ticket Contract" (29a). After several pages of additional conditions, the ticket contains a forum selection provision requiring suit in Broward County, Florida for incidents on vessels which departed from the United States (36a).

The ship left Port Everglades, Florida on February 18, 2007. Three days later, on February 21, 2007, Petitioner was injured, falling in the ship's theater. She tripped over a camera cable, suffering a fractured right femur (DE 1, Complaint, ¶ 12; JA 23 - JA 24; DE 31, Amended Complaint, ¶ 13, JA 76 - JA 77).

By letter of July 2, 2007, Krupski's counsel wrote to Costa Cruise in Florida, providing notice of the injury (DE 26, Response to Motion for Summary Judgment, Ex. 5; JA 69 - JA 70). In return, counsel received a letter dated July 9, 2007 from Mr. Klutz of International Risk Services, Inc. ("IRSI") (DE 26, Ex. 6; 23a - 24a), the Claims Administrator retained by Costa Cruise to handle claims by passengers on vessels

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three year period of 46 U.S.C. § 30106. Otherwise, the unqualified term "limitation period" or the phrase "contractual limitation period" refers to the one year period found on the ticket.

[4] The original Complaint (DE 1; JA 21 - JA 28) was served on Costa Cruise within 120 days after filing, and the Amended Complaint (DE 31; JA 73 - JA 84) was served on Costa Crociere within 120 days after filing.

operated by Costa Crociere (DE 19, Ex. 3, Klutz Affidavit, ¶ 2; JA 33 - JA 34). The Klutz letter sought additional information, "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement". The letter bore the heading "Costa" and was sent from Hollywood, Florida (*Id*.). Mr. Klutz identified himself as an agent of IRSI, "As Claims Administrator for Costa Cruise Lines N.V." (*Id*.).

When no settlement was reached, suit was filed against Costa Cruise on February 1, 2008, in the United States District Court for the Southern District of Florida. The case was assigned to Hon. Cecilia A. Altonaga, District Court Judge. Three days after filing, the Complaint was served on CT Corporation System, the Registered Agent for Costa Cruise (DE 3, DE 4).

The Complaint (DE 1; JA 21 - JA 28) asserted liability based on the alleged status of Costa Cruise as the operator of the Costa Magica. It asserted that Ms. Krupski, "was a paying passenger on Defendant's vessel COSTA MAGICA" (DE 1, ¶ 6; JA 22). According to the Complaint, "Defendant COSTA CRUISE owned, operated, managed, supervised and controlled the ocean-going passenger vessel known as the COSTA MAGICA" (DE 1, ¶ 10; JA 23). The Complaint alleged that Costa Cruise was liable, under premises liability principles, for the dangerous conditions on the ship which it operated [DE 1, ¶¶ 13-16, 17 ("its vessel"), 18-19; JA 24 - JA 27].

On February 25, 2008, Costa Cruise filed its Answer (DE 6; JA 29 - JA 32), denying that it was involved in the operation, ownership, or management of the Costa Magica (Answer, ¶ 4; JA 30). It contended

that, in accord with the ticket (attached as an exhibit to the Answer), Costa Crociere was the vessel operator or carrier, and Costa Cruise was its sales and marketing agent (Answer, ¶ 11; JA 31).

Costa Cruise filed its Motion for Summary Judgment on May 6, 2008 (DE 19). The motion was supported by the Affidavit of Mr. Klutz (DE 19, Ex. 3; JA 33 - JA 39). Costa Cruise argued that it was not the "carrier" and was not subject to the duties imposed on the operator of a vessel.

Krupski responded to the Motion for Summary Judgment, seeking leave to amend the Complaint to add Costa Crociere as a defendant (DE 26; JA 41 - JA 55). With that filing, Petitioner presented as exhibits the travel document page with the name and address of Costa Cruise and a picture of an ocean liner (DE 26, Ex. 1; 25a), a printout from the "costacruise.com" website (DE 26, Ex. 2; JA 56 - JA 61), two printouts from the Florida Department of State Division of Corporations website (DE 26, Ex. 3, Ex. 4; JA 62 - JA 68), the notice letter to Costa Cruise (DE 26, Ex. 5; JA 69 - JA 70), and the letter from Mr. Klutz in response (DE 26, Ex. 6; 23a - 24a).

Krupski's counsel explained that he had noted the identification of Costa Cruise, with a Hollywood, Florida address, on page two of the Travel Documents (DE 26; JA 43, JA 49). Looking at the website, he learned that Costa Cruise was the only listed entity with a United States office (DE 26; JA 43 - JA 44, JA 49). The Florida Department of State webside confirmed that Costa Cruise was the only active "Costa" company registered to do business in the State (DE 26; JA 44 - JA 45, JA 49 - JA 50). His notice letter

to Costa Cruise and the response seemingly confirmed that Costa Cruise was the appropriate defendant (DE 26; JA 45).

Citing Fed. R. Civ. P. 15, Krupski sought to amend the Complaint to add Costa Crociere as a Defendant (DE 26; JA 47 - JA 48, JA 51 - JA 52). Her counsel recognized that the question of relation back would arise, but suggested that the question was not yet ripe for decision (DE 26, fn. 1; JA 52).

Following oral argument (DE 57, transcript of July 2, 2008 argument; JA 124 - JA 145), Judge Altonaga denied the Costa Cruise Motion for Summary Judgment without prejudice and granted the Motion for Leave to Amend (DE 30; JA 71 - JA 72). The Order, entered July 2, 2008, required service on Costa Crociere by September 16, 2008 (*Id.*).

The Amended Complaint (DE 31; JA 73 - JA 84) was filed on July 11, 2008 and served pursuant to the Hague Convention on August 21, 2008 (DE 43, Costa Crociere Motion to Dismiss; JA 88 - JA 89). It alleged that Costa Crociere was the operator of the vessel and was liable for its negligent breach of the duties imposed on a vessel operator (DE 31, ¶¶ 21-23; JA 80 - JA 83).

On September 3, 2008, Costa Crociere filed its Motion to Dismiss (DE 43; JA 87 - JA 101), represented by the same attorney who had formerly

represented Costa Cruise.[5] Ms. Krupski filed her Response to the Costa Crociere Motion on September 15, 2008 (DE 47; JA 102 - JA 112). Costa Crociere replied to that response with its filing of September 24, 2008 (DE 48; JA 113 JA - JA 123). Thus was framed the issue now before this Court: whether the Amended Complaint against Costa Crociere relates back under Fed. R. Civ. P. 15(c)(1)(C) to the original Complaint against Costa Cruise such that Petitioner's claims against Costa Crociere are not barred by the one year contractual limitation period.

It was agreed that the criterion of Rule 15(c)(1)(B) ("ari[sing] out of the conduct, transaction, or occurrence set out . . . in the original pleading") was satisfied. The dispute focused on the criteria of Rule 15(c)(1)(C)(i) ("[the added party] received such notice of the action that it will not be prejudiced in defending on the merits") and 15(c)(1)(C)(ii) ("[the added party] knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity").

Dispensing with oral argument, on October 21, 2008, Judge Altonaga issued her Order (DE 50; 8a-22a). She found that Respondent received timely constructive notice due to its sufficient "identity of interest" with Costa Cruise and their shared counsel (14a - 17a). However, the District Court concluded that there was no "mistake" in failing to name Respondent Costa Crociere earlier because "the newly

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[5] By this time, Costa Cruise was no longer in the case, having been dismissed by stipulation (DE 41) and Order of August 21, 2008 (DE 42; JA 85 - JA 86).

added defendants were known to the plaintiff before the running of the statute of limitations" (19a - 20a). She based this conclusion on the ticket's identification of Costa Cruise as the sales and marketing agent, and on the submissions of Costa Cruise (Answer, Corporate Disclosure Statement and Motion for Summary Judgment), filed after expiration of the one year period.

On appeal, the Court of Appeals affirmed, again without oral argument (1a - 7a). Its principal rationale was that Respondent was identified as "carrier" on page one of the eleven page Passenger Ticket (6a), thus, "The identity and knowledge of Costa Crociere as a potential party [before filing suit] must be imputed to Krupski and her counsel" (6a), and the identification of Costa Cruise, instead of Respondent, in the original suit, was therefore a "deliberate decision" rather than a "mistake" (5a - 6a). Additionally, the Court noted the delay in filing the Amended Complaint as a further reason why Rule 15(c) was inapplicable, "even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's Answer (filed on February 25, 2008)" (7a).

Ms. Krupski then sought Supreme Court review. By Order of January 19, 2010, the Court granted her Petition for Writ of Certiorari. She now files this Brief on the merits.

SUMMARY OF ARGUMENT

Fed. R. Civ. P. 15(c)(1)(C) seeks to permit the addition of new defendants, when the purposes of limitation statutes are not compromised. The

guardians of limitation policies are found in the requirements of subsection (i) ("notice" and "not prejudiced"). Here, the District Court correctly found, and the Circuit Court did not disagree, that Costa Crociere received the timely notice and absence of prejudice required by subsection (i). See Argument I B.

The rulings of the District Courts and Circuit Courts of the Nation are divergent on some aspects of the meaning and application of Rule 15(c)(1)(C). The more persuasive authorities recognize, as should this Court, that where the "notice" and "not prejudiced" requirements of subsection (i) are met, and the added defendant "knew or should have known" that it was an intended target of the Complaint, the "mistake" criterion of subsection (ii) does not create a separate hurdle. So long as the error was "concerning the proper party's identity", it is a "mistake" within the meaning of the Rule and relation back is available. See Argument I C (1).

In the instant case, Ms. Krupski sought to file suit against the operator of the Costa Magica for breach of the legal duties imposed on the vessel operator. Her error in misidentifying the operator as Costa Cruise rather than Costa Crociere was a "mistake concerning the proper party's identity". The overwhelming weight of authority recognizes that when the initial suit seeks recovery from the entity whose status gives rise to the legal obligations at issue, an amendment to add the entity actually occupying that status relates back to the earlier suit against an affiliated company with a similar sounding name. This Court should reach the same conclusion. See Argument I C (2).

In denying relation back, the lower courts relied on information provided by Costa Cruise, after suit was filed, as proof that there was no "mistake" in omitting Costa Crociere from the initial Complaint. If the knowledge of the plaintiff is germane to the question of "mistake", it is the actual knowledge possessed before the initial suit was filed. Information obtained after the one year period has already expired is irrelevant to the inquiry. See Argument I C (3).

The principal rationale of the Circuit Court was that Petitioner had "imputed" "knowledge" of the existence of Costa Crociere pre-suit, because it was mentioned within the definition of "CARRIER" on the ticket. This observation simply confirms and identifies the mistake made by Petitioner's counsel in not reading that portion of the ticket or grasping its significance. A mistake of this nature is precisely what Rule 15(c)(1)(C) addresses, "a mistake concerning the proper party's identity" for which the Rule allows relation back. Like other courts have done, this Court should reject the notion that relation back is inapplicable whenever there was information available from which the plaintiff's counsel could have discerned the name of the correct defendant pre-suit. The rationale of the Circuit Court (essentially that those who make a mistake are excluded from a Rule forgiving of mistakes) is at odds with the guiding spirit of the Federal Rules of Civil Procedure and, if embraced, would render Rule 15(c)(1)(C) impotent to accomplish its intended purpose. See Argument I C (3).

ARGUMENT

I. PETITIONER, WHO WAS INJURED ON THE COSTA MAGICA, AN OCEAN-GOING VESSEL, FILED SUIT SEEKING RECOVERY FROM THE VESSEL OPERATOR FOR BREACH OF THE LEGAL DUTIES IMPOSED ON A VESSEL OPERATOR. SUIT WAS FILED AGAINST COSTA CRUISE, THE BOOKING AND SALES AGENT, RATHER THAN ITS AFFILIATE, COSTA CROCIERE, THE ACTUAL OWNER AND OPERATOR OF THE COSTA MAGICA. FED. R. CIV. P. 15(c)(1)(C) PERMITS AN AMENDED COMPLAINT TO "RELATE BACK", FOR LIMITATION PURPOSES, WHEN THE AMENDMENT CORRECTS A "MISTAKE CONCERNING THE PROPER PARTY'S IDENTITY". THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ERRED IN UPHOLDING DENIAL OF "RELATION BACK" ON THE GROUND THAT THERE CAN BE NO SUCH "MISTAKE" WHERE THE PLAINTIFF HAS "IMPUTED" KNOWLEDGE OF THE IDENTITY OF THE ADDED DEFENDANT PRIOR TO SUIT BY ITS IDENTIFICATION AS "CARRIER" IN THE ELEVEN PAGE TICKET

To place the issue in perspective, this Argument provides an overview of relation back under Fed. R. Civ. P. 15 (c)(1)(C) (sub-section A, *infra*). Here, the lower courts correctly recognized that the policies behind the limitation period were satisfied : Petitioner met the "timely notice" and "not prejudicied"

requirements of Rule 15(c)(1)(C)(i) (sub-section B, *infra*). The lower courts erred in nonetheless denying relation back on the ground that the ticket's definition of "carrier" provided Petitioner with pre-suit "imputed" "knowledge" of Respondent (sub-section C, *infra*). Although there is some lack of uniformity in the decisions of other Circuit and District Courts [C (1), *infra*], the weight of authority permits relation back in "mistaken identity" cases like this [C (2), *infra*]. The reasoning of the courts below should be rejected, as it is flawed in several respects [C (3), *infra*].

A. An Overview Of Relation Back Under Fed. R. Civ. P. 15(c)(1)(C) And The Controlling Factors

"Relation back" under Rule 15(c)(1)(C) is intended, "to ameliorate the effect of a statute of limitations where the plaintiff has sued the wrong party but where the right party has had adequate notice of the institution of the action". ***Bloomfield Mech. Contracting, Inc. v. Occupational Safety and Health Review Comm'n*, 519 F.2d 1257, 1262 (3rd Cir. 1975),** citing 6 Wright & Miller, Federal Practice and Procedure §§ 1497-1500 at 489-523 (1971). Accord: ***Dutka v. Southern R. Co*., 92 F.R.D. 375 (N.D. Ga. 1981); *Mitchell v. CFC Fin. LLC*, 230 F.R.D. 548, 549-550 (E.D. Wisc. 2005)**. Relation back has been recognized and applied by this Court since before the adoption of the Federal Rules of Civil Procedure. ***Scarborough v. Principi*, 541 U.S. 401, 418 (2004),** citing the Advisory Committee's 1937 Note regarding Rule 15(c), which described "relation back" as "a well recognized doctrine of recent and now more frequent application".

In the past decade, the Court has adopted or approved "relation back", or its functional equivalent, to prevent dismissal of claims for inconsequential errors. ***Scarborough*** [allowing amendment to a fee application under the Equal Access to Justice Act where the fee application, filed within the 30 day deadline of 28 U.S.C. § 2412(d)(1)(B), lacked the requisite allegation that "the position of the United States was not substantially justified"]; ***Edelman v. Lynchburg College*, 535 U.S. 106, 115-116 (2002)** [upholding a regulation of the Equal Employment Opportunity Commission, treating a timely charge of employment discrimination which lacks the "oath or affirmation" required by 42 U.S.C. § 2000e - 5(b) as curable by relation back of a sworn amendment]; ***Becker v. Montgomery*, 532 U.S. 757 (2001)** (when a timely notice of appeal is filed without the required signature, the error can be cured by a signature provided after the deadline for appealing).

***Schiavone v. Fortune*, 477 U.S. 21 (1986)** was a defamation suit arising out of an article in Fortune magazine published by Time, Incorporated. The initial suit was filed against "Fortune", a trademark and the name of a division of Time (**477 U.S. at 22-23**). Service of the initial complaint, "was attempted only after [the limitation period] had expired" (**477 U.S. at 25**). The predecessor version of Rule 15 then in effect required, for relation back, that the added party had received notice "within the period provided by law for commencing the action against him" (**477 U.S. at 24**); *i.e.* **service** of the initial complaint within the limitation period. Applying this language literally, the Court concluded that the suit was properly dismissed, despite the relationship between "Fortune" (the named defendant) and "Time, Inc." (the proper defendant),

since the complaint was not served within the limitation period (**477 U.S. at 29**):

> "Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party. In this case, however, neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time."

In reaction to ***Schiavone*****,** which was regarded as taking a narrow view of relation back inconsistent with the guiding spirit of the Federal Rules,[6] Fed. R. Civ. P. 15(c) was amended effective December 1, 1991. ***Hill v. United States Postal Serv.*****, 961 F.2d 153, 154-155 (11th Cir. 1992)**. With the amendment, it is

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[6] The Advisory Committee Notes regarding the 1991 amendment state as to paragraph (c)(3) (which was later revised stylistically to the current form):

> "This paragraph has been revised to change the result in *Schiavone v. Fortune, supra*, with respect to the problem of a misnamed defendant. . . . On the basis of the text of the former rule, the Court reached a result in *Schiavone v. Fortune* that was inconsistent with the liberal pleading practices secured by Rule 8. See Bauer, Schiavone: *An Un-Fortune-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure,* 63 Notre Dame L.Rev. 720 (1988); Brussack, *Outrageous Fortune: The Case for Amending Rule 15(c) Again*, 61 S.Cal.L.Rev. 671 (1988); Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons For Civil Rules Revision*, 86 Mich.L.Rev. 1507 (1987)."

now sufficient for relation back if the added defendant received notice, "within the time period provided by Rule 4(m)", Fed. R. Civ. P. 15(c)(1)(C); that is, "within 120 days after the complaint is filed".

The ultimate outcome in ***Schiavone*** turned on a provision of Rule 15 which has since been repealed. However, the comments in the majority and dissenting opinions have continued importance in elucidating the purpose, meaning, and application of the unchanged features of Rule 15.

The ***Schiavone*** Court recited the "worthy goals and loftily stated purposes" found in Rules 1, 8(f) and 15(c) and its earlier decisions (**477 U.S. at 27**):

> "As amended, *Rule 1 of the Federal Rules of Civil Procedure* states: 'These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.' *Rule 8(f)* says: 'All pleadings shall be so construed as to do substantial justice.' And Justice Black reminded us, more than 30 years ago, in connection with an order adopting revised Rules of this Court, that the 'principal function of procedural rules should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts.' *346 U.S. 945, 946 (1954*).
>
> This Court, too, in the early days of the federal civil procedure rules, when *Rule 15(c),* see n. 5, *supra*, consisted only of what is now its first sentence, announced that the spirit and inclination of the rules favored decisions on the merits, and rejected an approach that pleading

> is a game of skill in which one misstep may be decisive. *Conley v. Gibson, 355 U.S. 41, 48 (1957).* It also said that decisions on the merits are not to be avoided on the basis of 'mere technicalities.' *Foman v. Davis, 371 U.S. 178, 181 (1962*)."

Justice Stevens, writing for himself and his dissenting colleagues, disagreed with the majority Opinion, noting its inconsistency with the spirit and purpose of Fed. R. Civ. P. 15(c) (***Schiavon*e, 477 U.S. at 32-33, 38-39)**:

> "In my view, the Court's decision represents an aberrational - - and, let us hope, isolated - - return to the 'sporting theory of justice' condemned by Roscoe Pound 80 years ago.
>
> * * *
>
> The principal purpose of *Rule 15(c)* is to enable a plaintiff to correct a pleading error after the statute of limitations has run if the correction will not prejudice his adversary in any way. That purpose is defeated - - and the Rule becomes largely superfluous - - if it is construed to require the correction to be made before the statute has run. Moreover, the specific liberalizing purpose of the 1966 amendment to the Rule is frustrated if the added language is construed to cut back on the number of cases in which relation back is permitted" (footnote omitted).

The ***Schiavone*** majority identified three factors in the relation back analysis (and a fourth which has been eliminated by the 1991 amendment) (**477 U.S. at 29**):

> "(1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; [and] (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it."

These three criteria identified in ***Schiavone*** have since been acknowledged as a blueprint of the necessary analysis. ***Makro Capital of Am., Inc. v. UBS, AG*, 543 F.3d 1254, 1258 (11th Cir. 2008); *Goodman v. Prax Air, Inc.*, 494 F.3d 458, 467 (4th Cir. 2007)(*en banc*).** In the instant case, the parties, District Court, and Circuit Court are all in agreement on the three controlling inquiries (4a - 5a; 14a - 21a).

The parties and lower courts are also in agreement that the amendment adding Costa Crociere satisfies Rule 15(c)(1)(B) ("asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading"). Consequently, the dispute has narrowed to subsections (i) and (ii) which accomplish relation back when the added party:

> "(i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity."

B. The Lower Courts Correctly Recognized That, Through Its Relationship With Costa Cruise And Their Shared Counsel, Costa Crociere "Received Such Notice Of The Action That It Will Not Be Prejudiced In Defending On The Merits"

As the Advisory Committee Note regarding the 1966 Amendment reflects, "[r]elation back is intimately connected with the policy of the statute of limitations". The purpose of limitation statutes is, of course, to assure that a defendant has timely notice of, and an opportunity to defend against, a suit against it. See ***Schiavone*, 477 U.S. at 35-36** (Stevens, J., dissenting). This core policy is protected in the relation back context by subsection (i), which requires that the added defendant, within the time for service of the original complaint, "received such notice of the action that it will not be prejudiced in defending on the merits".

Here, pre-suit notice was provided to IRSI, the service retained by Respondent's agent, Costa Cruise, to investigate and resolve claims arising on vessels operated by Respondent. The initial suit, seeking recovery from the vessel operator (misidentified as Costa Cruise), was served on Respondent's booking and sales agent, and corporate affiliate, Costa Cruise.[7]

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[7] While the record reflects their operational relationship, it does not show the precise corporate relationship between Costa Cruise and Costa Crociere. The Corporate Dislosure Statement in Respondent's Court of Appeals Brief identified Carnival Corporation, Carnival PLC, Costa Cruise, Costa Crociere, eight

From the outset, the suit was defended by Mr. Horr, who later represented Respondent.[8]

The "notice" required by subsection (i) need not be formal[9] or actual. Informal or constructive notice will suffice. ***Kirk v. Cronvich*, 629 F.2d 404, 407-408 (5th Cir. 1980); *Wine v. EMSA Limited P'ship*, 167 F.R.D. 34, 38 (E.D. Pa. 1996)** ("actual, constructive, or imputed notice"); ***Dutka, supra*, 92 F.R.D. at 378** ("Rule 15(c) does not require actual notice to be given to the party to be brought in by amendment . . . constructive notice on such party would be sufficient").

As ***Schiavone*** noted (**477 U.S. at 29**), timely commencement and service of suit on the initial defendant, "permit imputation of notice to a subsequently named and sufficiently related party". Later cases recognize that the requisite constructive or

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other "Costa" companies, and IRSI among those with a financial interest in the outcome.

[8] Attorney-client priviledge concerns preclude inquiry into defense counsel's communications with Costa Crociere. Perhaps for this reason, representation of both an initial defendant and an added defendant is regarded as evidence of notice and lack of prejudice to the added defendant, particularly when the initial defendant and added defendant are business affiliates. See *e.g.* ***Sanders-Burns v. City of Plano*, ___ F.3d ___ (5th Cir. 2010) (2010 U.S. App. LEXIS 2534, Ct. of App. # 08-40459, *rel'd* 1/11/10); *Chumney v. U.S. Repeating Arms Co., Inc.*, 196 F.R.D. 419, 430 (M.D. Ala. 2000); *Younger v. Chernovetz*, 792 F. Supp. 173, 176 (D.C. Conn. 1992); *Taliferro v. Costello*, 467 F. Supp. 33, 35 (E.D. Pa. 1979).**

[9] The Advisory Committee Notes to the 1966 Amendment, quoted in ***Schiavone* (477 U.S. at 31**), reflect that, "the notice need not be formal".

imputed knowledge exists when there is a substantial identity of interest between the original party and the added party. ***Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998)** ("Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other"); ***Bowden v. Wal Mart Stores, Inc*., 124 F. Supp. 2d 1228, 1242 (M.D. Ala. 2000); *Koal Indus. Corp. v. Asland S.A.*, 808 F. Supp. 1143, 1156-1157 (S.D.N.Y. 1992).**

As a result, corporate affiliates have a substantial "identity of interest" for Rule 15 purposes, such that timely notice to the original defendant constitutes notice to the related added defendant. ***Dutka, supra; Koal Indus., supra; Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1408, fn. 5 (11th Cir. 1998); *G.F. Co. v. Pan Ocean Shipping Co*., 23 F.3d 1498, 1502-1503 (9th Cir. 1994).**

Similarly, service on an agent (such as Costa Cruise) is deemed sufficient notice to the added principal (here, Respondent). ***Kirk v. Cronvich, supra; Mitchell v. Hendricks*, 68 F.R.D. 564 (E.D. Pa. 1975); *Washington v. T.G. & Y. Stores Co*., 324 F. Supp. 849, 853 (W.D. La. 1971); *Ramirez v. Burr*, 607 F. Supp. 170, 174 (S.D. Tex. 1984).**

Costa Cruise and Costa Crociere, two corporate affiliates with similar names, are engaged together in a cruise ship venture. Costa Cruise conducts the booking and management aspect of the business, while Costa Crociere operates the vessel, in an undertaking for the mutual profit of the two "Costa" companies, with Costa Cruise serving as the United States

presence. The travel documents were provided by Costa Cruise and prominently featured the Costa Cruise name. When Petitioner's pre-suit notice was presented, Costa Cruise and the claims adjustor it retained accepted the notice without protest and intimated that Costa Cruise was in a position to settle. These facts fully support the trial court's conclusion that the notice provided by the initial suit served on Costa Cruise likely came to the knowledge of, or provided imputed or constructive notice to, Costa Crociere. Thus, the trial judge correctly held that Costa Crociere received, through the filing of the initial Complaint against Costa Cruise, "such notice of the action that it will not be prejudiced in defending on the merits", the requirement of Rule 15(c)(1)(C)(i) (14a - 18a).

The Court of Appeals had no occasion to question that conclusion. Neither should this Court.

C. Petitioner Sought To Sue The Operator Of The Vessel On Which She Was Injured. The Initial Complaint Misidentified The Operator As Costa Cruise, Respondent's Affiliate. This Is A "Mistake Concerning The Proper Party's Identity" Within The Meaning Of Fed. R. Civ. P. 15(c)(1)(C)(ii) Permitting Relation Back Of An Amended Complaint Against Respondent Costa Crociere, The Actual Operator. The Fact That Petitioner's Counsel Could Have Discerned From The Ticket That Respondent Was The

"Carrier" Does Not Disentitle Petitioner To Relation Back

Both the initial Complaint and Amended Complaint were filed and served within all established deadlines. The very purpose of the Federal Rules of Civil Procedure, particularly Rules 1[10] and 8(e),[11] is to promote the resolution of disputes on their substantive merits, overlooking imperfections which do not affect substantive rights. ***Conley v. Gibson*, 355 U.S. 41, 48 (1957); *Schiavone*, 477 U.S. at 27.** Similarly, the purpose of Fed. R. Civ. P. 15(c)(1)(C) is to avoid the harsh effect of a limitations period when the policies underlying limitation periods are not compromised. This case falls squarely within the intended remedial purpose of Rule 15(c)(1) (C).

The lower courts nonetheless denied Petitioner the benefit of "relation back". In their view, Petitioner failed to qualify under subsection (ii), which looks to whether the added party, "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity".

Parsing that phrase, the portion preceding the comma asks whether the added party had reason to understand that it was an intended target of the suit ("knew or should have know that the action would

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[10] In pertinent part, Fed. R. Civ. P. 1 provides that, "These rules . . . should be construed and administered to serve the just, speedy, and inexpensive determination of every action and proceeding".

[11] Fed. R. Civ. P. 8(e) teaches that, "Pleadings must be construed so as to do justice".

have been brought against it"). Understandably, the District Court and Circuit Court did not rest their decision on this portion of subsection (ii).

The initial Complaint (DE 1; JA 21 - JA 28) sought redress from the operator of the vessel, based on the allegation that it failed to fulfill the legal duties imposed on a vessel operator. Knowing that it was the vessel operator, not Costa Cruise, Respondent "knew or should have known that the action would have been brought against it" if Petitioner's counsel realized the correct identity of the operator.

The outcome instead turned on the second half of the phrase: "but for a mistake concerning the proper party's identity". The meaning and application of the term "mistake" is the central area of dispute in this Court.

In construing and applying subsection (ii), the courts around the Country have issued decisions which are harmonious in part, but conflicting in some particulars. Under the better view, if the "notice" and "not prejudiced" requirements of subsection (i) are met, and if the added defendant "knew or should have known" that it was an intended target, "mistake" should be construed broadly, to avoid creating an independent bar to recovery, divorced from the policies behind limitation periods (sub-section 1). Under any reasonable construction of the Rule, the amendment sought in this case - - substitution of the actual "Costa" vessel owner for its agent, a related "Costa" corporation, when the suit targeted the vessel owner from the outset - - is a "mistake concerning the proper party's identity" (subsection 2). In reaching a contrary conclusion, the courts below engaged in an analysis

which is flawed in many respects, primarily in adopting an " 'imputed' 'knowledge' refutes 'mistake' " approach which effectively precludes relation back when the plaintiff makes a mistake in failing to properly identify the proper party initially (subsection 3).

(1) Despite A Lack Of Uniformity Among The Lower Courts Regarding, "A Mistake Concerning The Proper Party's Identity", The Phrase Is Best Construed Broadly, To Permit Relation Back Where The Policies Of The Statute Of Limitations Are Satisfied

As might be expected, "relation back" decisions are fact-specific and sometimes conflicting. Summaries and discussions of these variations can be found in 3-15 Moore's Federal Practice - - Civil § 15.19[d], in Engrave, *Relation Back of Amendments Naming Previously Unnamed Defendants Under Federal Rule of Civil Procedure 15(c)*, 89 Calif. L.Rev. 1549 (2001) ("*Previously Unnamed Defendants*"), and in Sparling, Note: *Relation Back of "John Doe" Complaints in Federal Court: What You Don't Know Can Hurt You*, 19 Cardozo L.Rev. 1235 (1997). A review of the areas of agreement and disagreement help shape the controversy over the meaning of "mistake".

(a) <u>The Lower Court Decisions Regarding The Meaning Of "Mistake"</u>

It is generally recognized that, so long as the "notice" and "prejudice" features of subsection (i) are satisfied, relation back is appropriate in cases of "misnomer", the "mistake" most obviously addressed by the Rule. As Moore's Federal Practice explains:

> "The classic example of mistake is misnomer; that is, when a plaintiff misnames or misidentifies a party in its pleadings but correctly serves that party. In these cases, relation back is appropriate because the defendant is already before the court. For example, a court may find misnomer when the proper corporate name is not easily attainable and the name used is close enough to the correct corporate name for the newly-named defendant to know that it was being sued. Misnomer may also apply, for example, when a plaintiff names a corporation instead of a partnership, a parent corporation instead of a subsidiary, a building instead of its corporate owner, or a corporation in liquidation instead of its successor. In some cases a legal mistake can lead to misnomer, as when a plaintiff names an institutional defendant because of confusion as to whether an individual or an institutional defendant is the proper party, but the individual is properly served and, therefor has notice of the mistake."

In "*Previously Unnamed Defendants*", the author uses the term "misnomer" to describe inaccuracies in the name of a party already before the Court (89

Cal.L.Rev. at 1564). A different term, "mistaken identity",[12] is used to describe a suit based on a status giving rise to liability which erroneously names a defendant that does not have that status and is amended to add the correct entity (89 Cal.L.Rev. at 1565).[13]

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[12] Using this terminology, Petitioner contends that this is a case of "mistaken identity". She sought to sue the operator of the Costa Magica, but mistakenly identified Costa Cruise rather than Costa Crociere as the "Costa" entity having that status.

[13] The author describes "mistaken identity" in this fashion:

> "Here, the plaintiff initially names B as a defendant, believing it to have characteristics U, V, and W that make it the legally liable party according to the substantive law governing the action. The plaintiff later learns that B does not have characteristics U, V, and W and hence cannot be liable, but another entity, C, has those characteristics and is therefore potentially liable.
>
> [T]his situation could arise in the following way. Sally is injured when the car she is driving is struck by another car. At the scene, the driver of the other car, Wayne Johnsen, mentions that the car is owned by his friend. Sally brings suit against Wayne and the friend, accomplishing service close to 120 days after the statute of limitations has run. Wayne's friend answers after the period is over, revealing that the car actually belongs to his girlfriend. Sally seeks leave to amend to substitute in the girlfriend. All along Sally has intended to sue the owner of the car (in addition to the driver); she just was mistaken as to the identity of the car's owner."

The Advisory Committee Notes to the 1966 amendment reflect that the new language clarified the availability of relation back to changes "including an amendment to correct a misnomer or misidentification of a defendant". Based on this language, courts have sometimes sought to limit the remedial purpose of the Rule to classic cases of "misnomer" or "misidentification". Other decisions differentiate between kinds of "mistake", *e.g.* ***Mitchell v. CFC Fin. LLC, supra,* 230 F.R.D. at 549-550.** In some cases, the term has been construed broadly enough to include mistakes of legal judgment or mistakes of law. ***Taliferro, supra; Employees Sav. Plan of Mobil Oil v. Vickery*, 99 F.R.D. 138, 143 (S.D.N.Y. 1983); *Jackson v. Kotter*, 541 F.3d 688, 696 (7th Cir. 2008).** In ***Rendall-Speranza v. Nassim*, 107 F.3d 913, 918 (D.C. Cir. 1997),** the Court rejected that view.

Most courts take a broad view of "mistake". See *e.g.* ***Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc.*, 801 F. Supp. 1450, 1457 (E.D. Pa. 1992); *Sendobry v. Michael*, 160 F.R.D. 471 (M.D. Pa. 1995); *Soto v. Corr. Facility*, 80 F.3d 34, 36 (2nd Cir. 1996); *Woods v. Indiana Univ.-Purdue Univ.*, 996 F.2d 880, 887 (7th Cir. 1993)** ("mistake, as used in Rule 15(c), applies to mistakes of law as well as fact"); ***Goodman, supra,* 494 F.3d at 470** ("the text of Rule 15(c)(3) does not support . . . parsing of the 'mistake' language"); ***Roberts v. Michaels*, 219 F.3d 775, 778 (8th Cir. 2000)** ("the principle [of relation back] has been applied more broadly [than classic misnomer]");***Williams v. Transp. of Canada, Ltd.*, 57 F.R.D. 53, 55 (D.C. Nev. 1972)** ("A mistake within the meaning of the rule exists whenever a party who may be liable for the actionable conduct alleged in the complaint was omitted as a party defendant"); ***Itel***

***Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1258, fn. 9 (11th Cir. 1983).**

Some courts have suggested that culpability by the plaintiff is a factor to be considered in denying relation back. For example in ***Phillip v. Sam Finley, Inc.*, 270 F. Supp. 292, 294 (W.D. Va. 1967)**, the court noted that, "[the] failure to discover the proper defendant is plaintiff's own doing and is not caused by any mis-conduct of the defendant". A later decision from that district, ***Bruce v. Smith*, 581 F. Supp. 902, 906 (W.D. Va. 1984),** cited, "Plaintiff's own inexcusable neglect" as a proper consideration in assessing prejudice to the new defendant.

The majority view declines to infuse "mistake" with degrees of blameworthiness. ***Staggers v. Otto Gerdau Co.*, 359 F.2d 292, 293 (2nd Cir. 1966)** (allowing relation back despite "a series of egregious errors committed by plaintiff's attorney"); ***Tenay v. Culinary Teachers Ass'n*, 225 F.R.D. 483, 486 (S.D. N.Y. 2005)** (although plaintiff was remiss in failing to file suit earlier, "given the language of Rule 15(c), that observation is of no moment"); ***DeCoelho v. Seaboard Shipping Corp.*, 535 F. Supp. 629, 637 (D.C. P.R. 1982)** (allowing amendment, although, "plaintiffs' neglect requires that they be sanctioned").

As explained in ***Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000)** and ***Centuori v. Experian Information Solutions, Inc.*, 329 F. Supp. 2d 1133, 1138 (D.C. Ariz. 2004):**

> "[T]he language of Rule 15(c)(3) does not distinguish among types of mistakes concerning identity. Properly construed, the rule

> encompasses both mistakes that were easily avoidable and those which were serendipitous."

One body of law adopts the view that "ignorance" precludes relation back. ***Baskin v. City of Des Plaines*, 138 F.3d 701, 704 (7th Cir. 1998)** ["Rule 15(c)(3) does not permit relation back where there is a lack of knowledge of the proper party"]; ***Wayne v. Jarvis*, 197 F.3d 1098, 1103 (11th Cir. 1999)** ("ignorance does not equate to misnomer or misidentification"; "[the plaintiff's] lack of knowledge regarding the identities of the deputy sheriffs was not a 'mistake concerning the identity of the proper party'"); ***Vineyard v. County of Nassau*, 329 F. Supp. 2d 364 (E.D.N.Y. 2004).** According to the Circuit Court decision in this case (6a), "imputed" "knowledge" is also a basis for denying relation back.

The line of authority regarding "ignorance" arises primarily in the context of "John Doe" suits, often brought pursuant to 42 U.S.C. § 1983. In that setting, the plaintiff may not know the name of the police officer involved, so suit is filed against "John Doe" with the hope to identify the claimed wrongdoer in discovery, then add the officer by name. In this context, relation back is frequently denied, sometimes with the explanation that ignorance of the name of the intended defendant is not a "mistake concerning the proper party's identity". See *e.g.* ***Sassi v. Breier*, 584 F.2d 234 (7th Cir. 1978); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir. 1996).**

Even in that context, some courts have focused on the question of whether the intended defendant, "knew or should have known that the action would have been brought against it". If so, the timely notice is deemed

sufficient to satisfy the requirement of subsection (ii). See *e.g.* ***Yellow Bird v. Barnes*, 82 F.R.D. 738 (D.C. Neb. 1979); *Varlack v. SWC Carribean, Inc.,* 550 F.2d 171 (3rd Cir. 1977); *Heinly v. Queen*, 146 F.R.D. 102, 107 (E.D. Pa. 1993).**

The Moore's treatise endorses a broad construction of "mistake":

> "The courts that take a broad view of the mistake requirement have the better-reasoned approach. A court should not limit its findings of mistake merely to cases of misnomer. Rather it should consider whether the new party knew that the failure to include it in the original complaint was an error rather than a deliberate strategy. While courts have focused on the mistake requirement in determining whether an amendment relates back, the more important considerations are (1) whether the new party received sufficient notice of the action to avoid prejudice, and (2) whether the new party knew or should have known that it was an intended party".

Relation back is ordinarily not allowed when a plaintiff, with full actual knowledge of a potential defendant and its role, makes a deliberate tactical judgment not to sue that entity, then later has a change of heart after expiration of the limitation period. ***Harris v. E.F. Hauserman Co.*, 575 F. Supp. 749 (N.D. Ohio 1983); *Loveall v. Employer Health Servs., Inc*., 196 F.R.D. 399, 403 (D.C. Kan. 2000).** In that setting, the failure to sue the entity known to be responsible is deemed a conscious choice rather than a "mistake".

While this result is sometimes thought to flow from the meaning of "mistake" (the opposite of a deliberate tactical choice), it is better explained on the ground that where it is evident that a conscious decision was made not to sue a known potential defendant, it is the **first** prong of subsection (ii) which is unsatisfied. As Moore's explains:

> "This result is also justified on the ground that, when the plaintiff sues one possible defendant but not another, the second defendant has no reason to believe that it was an intended party or, in other words, the second defendant does not possess actual or constructive knowledge that the action would have been brought against it, 'but for a mistake concerning the proper party's identity.' "

(b) A Suggested Construction Of "Mistake Concerning The Proper Party's Identity"

Under any reasonable construction of the Rule, the amendment in this case, substituting one "Costa" entity for another in a suit against the vessel operator, satisfies the "mistake" standard of Rule 15(c)(1)(C)(ii) (subsection 2, *infra*). To the extent that the Court wishes to address the meaning of the Rule more generally, Petitioner offers the following thoughts.

The current uncertainty leads to results which are difficult or impossible to reconcile. Some deserving plaintiffs seeking redress are barred from the courthouse steps for errors that are inconsequential. In the process, potential defendants are encouraged to conduct their affairs in a way that is, at worst, a

corporate shell game and, at best, confusing to the citizens with whom they interact.

With a miserly construction of the "mistake" clause, counsel for a plaintiff may feel impelled to sue all related corporations, expecting to sort them out later. If this occurs, unnecessary energy and cost is expended by the court and counsel alike, with the prospect of satellite Rule 11 litigation looming on the horizon.

The legal merits of a broad construction of "mistake" are aptly discussed by the commentators and the lower court decisions. Petitioner submits that the approach to be taken should deny relation back only where it would offend the policies underlying limitation statutes. Otherwise, the "mistake" clause should not create a separate hurdle.

The general remedial purpose of Rule 15 is critical. That purpose is subordinated, if at all, only to the policies underlying statutes of limitations; policies protected by the "notice" and "prejudice" features of subsection (i) and the "knew or should have known" clause of subsection (ii). Where those criteria of Rule 15(c)(1) (C) are satisfied, there is no remaining reason to deny relation back. The "mistake" clause of subsection (ii) should be broadly construed, to avoid erection of a separate hurdle to recovery, disconnected from the "notice" and "prejudice" concerns of limitation statutes generally and Rule 15 (c)(1)(C) particularly.

The language of the "mistake" clause contains a single qualification, "concerning the identity of the proper person". So long as the error meets that qualification, it suffices under the plain language of the Rule. The Court should reject efforts to classify or

compartmentalize "mistakes" or to exclude types of "mistakes". Provided that the notice and prejudice standards are met, an error "concerning the identity of the proper party" qualifies for relation back, regardless of whether the error is called a "mistake of fact", "mistake of law", "tactical mistake", "mistake in judgment" or any other conceivable sub-class of "mistake".

Any narrow construction of "mistake" is inherently at odds with the guiding spirit of Rule 15(c)(1)(C). A narrow construction would also mire the courts in the unnecessary and unproductive effort to sort "mistakes" into categories, withholding relief for some "mistakes" and granting it for others. The efforts of the judiciary and parties can better be directed to resolving disputes on their substantive merits.

(2) When Petitioner Sought To File Suit Against The Operator Of The Ship On Which She Was Injured, But Erroneously Named Costa Cruise, The Booking Agent, Rather Than Its Affiliate, Respondent Costa Crociere, This Constitutes A "Mistake Concerning The Identity Of The Proper Party"

The courts below focused on why Petitioner's counsel sued Costa Cruise rather than Costa Crociere initially. There was no evidentiary hearing or other

formal proof-taking process in the District Court.[14] However, Petitioner filed the documents her counsel had consulted (DE 26, Response to Motion for Summary Judgment, Exs. 2, 3, 4; JA 56 - JA 68) to explain his effort to identify the "Costa" entity operating a vessel in Florida, and counsel explained himself in the body of the Response to the Motion for Summary Judgment (JA 43 - JA 45, JA 49 - JA 50).

The Complaint itself, the contemporaneous filing which set forth the basis for seeking recovery, provides the most probative explanation for the "mistake". As it makes clear, Ms. Krupski sought recovery from the operator of the Costa Magica for breach of the legal duties imposed on one in that position. The "mistake", quite evidently, was identifying Costa Cruise, rather than Costa Crociere, as the operator having that status and attendant duties. This mistake, "mistaken identity" in the terminology of "Previously Unnamed Defendants", constitutes a "mistake regarding the identity of the proper party" under any reasonable construction of that phrase. See ***Mitchell v. CFC Fin. LLC*, *supra*, 230 F.R.D at 550** ("most courts allow relation back" in "mistaken identity" cases where "the plaintiff seeks to amend to substitute a new defendant

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[14] In its Response to the Petition for Writ of Certiorari, Respondent contended that the explanation by Ms. Krupski's counsel should be ignored because it is unsworn (Brief in Opposition, pp. 15-16). Ironically, Respondent has relied on the same explanation to support its thesis that Petitioner sued Costa Cruise as a matter of convenience. If the outcome depended on the truthfulness of the explanation by Petitioner's counsel, the trial court should have denied summary judgment pending resolution of that controlling issue of fact.

to correct its failure to name the legally responsible entity").

The basic factual paradigm is a familiar one. In virtually every other case of this nature, the courts have allowed relation back, finding the "mistake" to be one falling within the Rule. That result is particularly compelling where the initial suit was against an affiliate of the added defendant with a similar name. See, *e.g.* ***Montalvo v. Tower Life Bldg.*, 426 F.2d 1135 (5th Cir. 1970)** (the initial suit against "Tower Life Building" permits relation back of an amendment adding Tower Life Insurance Company, the owner of the building); ***Roberts v. Michaels*, *supra*** (employment suit against Midsouth Food Vending Services, Inc. relates back to the initial complaint naming Michaels d/b/a Mid-South Vending); ***Leonard v. Parry*, *supra*** (suit against Boulanger as driver of the vehicle that collided with plaintiff's car amended to add Parry, the actual driver); ***Goodman, supra*** (in a contract suit against the successor to Tracer Research Corp., substitution of Prax Air Services, Inc., the actual successor, relates back to the initial suit against Prax Air, Inc., its parent); ***Loveall, supra*** (product liability suit against the actual manufacturer relates back to the initial suit against another company sued as manufacturer); ***Dutka, supra*** (relation back allowed where the plaintiff, injured in an automobile-train collision, sued one railway company which did not own the train or supply the crew, then added its related company that did operate the train); ***Chumney*, *supra*** (mistake as to the name of the manufacturer); ***Tenay, supra*** (in a slip and fall case, suit against the Culinary Institute of America, which maintained the premises, relates back to the earlier suit against the Culinary Teachers Association,

the union of those working there); ***William H. McGee & Co. v. M/V Ming Plenty*, 164 F.R.D. 601 (S.D.N.Y. 1996)** (suit against Kenney Korea, which issued the bill of lading, relates back to the initial suit against Kenney USA, a related company also mentioned in the bill of lading).

Modern enterprises are often conducted by a number of related corporations, often sharing very similar names, working together as part of a consolidated business activity. Whether to confuse creditors, limit liability, or for other reasons, the decision to conduct business in this fashion leads to the likelihood of error by a claimant in identifying the correct defendant from among several sound-alike companies. The situation is rife with the risk of misidentification. It is also a prime reason for the liberality of amendment under Rule 15, lest businesses avoid liability through a corporate name game.

The likelihood of confusion is particularly great in the maritime industry where pleasure cruise and other enterprises do business under a multitude of names, leading to uncertainty by claimants. Examples of this phenomenon can be seen in cases like ***Fugaro v. Royal Carribean Cruises,* 851 F. Supp. 122 (S.D.N.Y. 1994); *Schrader v. Royal Carribean Cruise Line, Inc.*, 952 F.2d 1008 (8th Cir. 1991); *Axelrod v. Incres S.S. Co.*, 363 F.2d 531 (2nd Cir. 1966)** and ***Tenay***.

The application of Rule 15 "relation back" to vessel operators is illustrated by ***Suppa v. Costa Crociere S.p.A.*, No. 07-60526-CIV, 2007 WL 4287508; 2007 U.S. Dist. LEXIS 89165 (S.D. Fla. Dec. 4, 2007)** (DE 47, Response to Motion to Dismiss, Ex. 6) (where, as

here, the original suit was against Costa Cruise and the amended suit against Costa Crociere); ***Korn v. Royal Carribean Cruise Line, Inc.*, 724 F.2d 1397 (9th Cir. 1984);** and ***G.F. Co. v. Ocean Shipping Co.*, *supra*** (a suit initially brought against the agent for a shipping company and amended to add the shipping company itself).

Petitioner is not the only person mistaken as to the identity of the company operating a vessel. She should not be the only one denied the benefit of relation back.

As this body of case law demonstrates, where the plaintiff seeks recovery from the defendant whose status gives rise to actionable duties, a mistake regarding the identity of the company occupying that status is a "mistake concerning the proper party's identity." An amendment bringing in the actual company fitting the description set out in the initial Complaint relates back, so long as the "notice" and "prejudice" criteria of Rule 15(c)(1)(C) are met.

(3) The Errors In The Analysis Of The Circuit Court And District Court

In general, the approach of the District Court and Circuit Court departs from the mainstream of Rule 15 jurisprudence and the analysis offered in this Brief. In particular, there are several discrete flaws in their decisions.

(a) The District Court View That Both "Ignorance" And "Knowledge" Foreclose Relation Back Is Erroneous

The District Court began by noting that pre-suit **ignorance** of the identity of the proper defendant does not constitute a "mistake" (which, in her view, required "misnomer" or "misidentification") (18a, " 'mistake' . . . should not be construed to mean 'lack of knowledge"; " 'Ignorance does not equate to misnomer or misidentification' "). She then opined that "mistake" did not apply if "the newly added defendant was **known** to the plaintiff before the running of the statute of limitations" (19a). Taking these pronouncements together, there can be no "mistake" when there is either "ignorance" or "knowledge"; *i.e.* there could **never** be relation back. That untenable thesis - - "heads I win, tails you lose" so to speak - - is belied by the very nature and existence of the Rule and the numerous cases applying it to permit relation back.

(b) The District Court Erred In Assessing Petitioner's Pre-suit "Knowledge" On The Basis Of Information Provided After Suit Was Filed And The Limitation Period Had Expired

The District Court considered the information received by Krupski with the Costa Cruise Answer and later filings as evidence of Petitioner's pre-suit "knowledge" evidencing lack of "mistake" (19a - 20a):

> ". . . Krupski's First Amended Complaint cannot relate back under Rule 15(c)(1)(C)(ii) because her failure to timely name Costa Crociere S.p.A. as a defendant was not the result of a mistake. [Costa Cruise] informed Krupski that Costa Crociere S.p.A. was a proper party to the action as early as February 25, 2008. (*See Answer* [D.E. 6] at ¶ 11).
>
> On March 20, 2008, [Costa Cruise] listed Costa Crociere S.p.A. as an Interested Party in its Corporate Disclosure Statement [D.E. 13]. And in its Motion for Summary Judgment [D.E. 19], [Costa Cruise] once again, confirmed: "Costa Crociere S.p.A. is the 'Carrier' for purposes of this cause of action asserted by plaintiff. Defendant Costa Cruise Line L.V. L.L.C. does not occupy the legal status of the 'Carrier.'"

The Costa Cruise Answer and later documents were filed more than one year after the date of injury. By that time, as long as other time requirements were met - - and here they were - - it made no difference whether leave to amend was sought immediately or in response to a later motion for summary judgment. In either event, the maintainability of suit against Costa Crociere would rise or fall on the events which had already transpired. If relation back applied, a later suit against Costa Crociere could be pursued; if not, it was already time-barred.

The lapse in logic by the lower court was addressed in ***Leonard,* 219 F.3d at 29**:

> ". . . [K]nowledge acquired by a plaintiff after filing his original complaint is without weight in determining his state of mind at the time he filed the initial complaint and, thus, in determining whether a mistake concerning identity occurred."

(c) <u>The Lower Courts Erred In Considering The Delay In Seeking Leave To Amend As An Independent Basis For Denying Relation Back Under Fed. R. Civ. P. 15(c)(1)(C)</u>

In denying relief, the District Court explained as one reason (20a):

> "Krupski . . . did not seek to add Costa Crociere S.p.A. as a defendant until June 13, 2008, 133 days after the Original Complaint was filed [D.E. 26]. The court granted leave to amend the Complaint on July 2, 2008 [D.E. 30], and Costa Crociere S.p.A. was named as a defendant on July 11, 2008 [D.E. 31], 161 days after the Original Complaint was filed."

The Circuit Court also intimated that this was a permissible basis for denying Rule 15 relation back (7a):

> "Yet even assuming that she first learned of Costa Crociere's identity as the correct party from Costa Cruise's Answer (filed on February 25, 2008), Krupski failed to seek leave to amend her complaint until June 13, 2008 (133 days after she brought the original action) and did

> not file her Amended Complaint until July 11, 2008. Krupski offers no reason for this delay, and we expect she knew that the limitation period ran on February 21, 2008."

As an initial point, the Complaint and Amended Complaint were both indisputably filed and served within the necessary time limits. The Complaint was filed less than one year after the injury, complying with both the three year statutory limitation period of 46 U.S.C. § 30106 and the one year contractual limitation period. It was served within the 120 day period of Fed. R. Civ. P. 4(m). As a result, Costa Cruise (and, by extension, Costa Crociere) received timely notice that Ms. Krupski sought legal redress from the operator of the Costa Magica for her injury, about which her counsel had provided timely pre-suit notice.

Under Fed. R. Civ. P. 15(a)(2), by the time the Costa Cruise Answer was filed, an amended complaint could only be filed with the consent of the opposing party or by leave of the court. Once leave was obtained (DE 30; JA 71 - JA 72), the Amended Complaint was filed nine days later (DE 31; JA 73 - JA 84). It was served on Costa Crociere pursuant to the Hague Convention on August 21, 2008, well within the deadline established by the District Court's Order (DE 30; JA 71 - JA72).

Accordingly, Petitioner complied with all filing deadlines, including those of Fed. R. Civ. P. 15(c)(1)(C), providing Costa Cruise and Costa Crociere timely notice. The lower courts' view - - that relation back must nonetheless be withheld for delay in filing the motion to amend - - suggests that compliance with

legal deadlines is not enough; that a filing must be "early" in a permitted period rather than "late". That view is both perplexing and erroneous.

To be sure, "undue delay" in seeking leave to amend may be a basis for denying **a motion for leave to amend**. ***Foman v. Davis*, 371 U.S. 178, 182 (1962).** Here, the court **granted** leave to amend, despite the delay. Once leave was granted, the issue of relation back surfaced. On **that** issue, the controlling criteria are those of Rule 15(c)(1)(C), which does not include "delay in filing a motion to amend". To this extent, the decisions below are inconsistent with Rule 15(c)(1)(C) and ***Schiavone*** by creating a judge-made hurdle not found in the Rule or the decision of this Court.

Perhaps the lower courts had in mind the principle that a **deliberate choice** not to sue is not a "mistake" [see subsection (d) *infra*]. Under that premise, the failure to add the new defendant **within the initial limitation period**, despite knowledge of its identity and role **during the limitation period,** is **circumstantial evidence** that the failure to sue within the limitation period was a conscious choice rather than a "mistake". ***Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998); *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853, 856-857 (9th Cir. 1986); *Keller v. United States*, 667 F. Supp. 1351, 1357 (S.D. Cal. 1987).**

Other than the "imputed" "knowledge" found in the ticket, the information provided by Costa Crociere in litigation was filed after the limitation period had expired. These later filings, and the delay in seeking leave to amend afterward, do not change the analysis.

Petitioner's claimed delay in filing a motion to amend after the identification of Costa Crociere in the Costa Cruise Answer is of no legal significance. The outcome rises or falls on the "mistake" criterion of Rule 15(C)(1)(C)(ii) and the Respondent's contention that pre-suit "imputed" "knowledge" itself refutes the existence of a "mistake" within the meaning of the Rule.

(d) <u>The Circuit Court Erred In Concluding That "Imputed" "Knowledge" Of The Existence Of The Added Defendant Before Commencement Of The Initial Suit Equates To Lack Of "Mistake Concerning The Proper Party's Identity"</u>

The most tenable justification for the decisions below rests on the body of law holding that a deliberate choice to exclude a known responsible party is not a "mistake". There are considerable questions about the correctness of this proposition. The proper focus under subsection (ii) ("knew or should have known") is on the knowledge of the added defendant, not the plaintiff. See ***Holden v. R.J. Reynolds Indus., Inc.*, 82 F.R.D. 157, 160 (M.D.N.C. 1979).** Furthermore, a conscious decision of this type is "concerning the proper party's identity", and if it is a mistake - - whether a mistake of judgment, mistake of law, or tactical mistake - - it is nonetheless a "mistake" and covered by the plain language of the Rule.

For present purposes, one can accept the proposition that it is not a "mistake" if the plaintiff has actual knowledge from the outset of the actual "proper party" against which to assert the intended claim, but

makes a "deliberate choice" to sue someone else. There is, however, absolutely no evidence in the record to support the conclusion that Petitioner intentionally forewent suit against Costa Crociere with actual knowledge that Respondent, not Costa Cruise, was the vessel operator.

The lower courts apparently concluded that, if counsel had read the ticket carefully, he would have seen, with sufficiently acute vision, that one page mentioned "Costa Crociere" in the definition of "carrier".[15] It was this "imputed" "knowledge", in the

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[15] Believing that the Rule does not consider degrees of blameworthiness for a "mistake", Petitioner will not belabor the reasons why her counsel's oversight was understandable. The documentation identifying "Costa Cruise" more prominently than "Costa Crociere", the correspondence with the claims adjustor, and Respondent's failure to register with the Department of State of Florida, in whose waters the voyage began, are self-explanatory.

Nonetheless, it bears mention that while Costa Crociere is the principal entity mentioned in the definition of "CARRIER", nothing in that definition says, in so many words, that the name of the "CARRIER" is necessarily the name of the entity operating the vessel and responsible for injuries aboard the ship. Indeed, the "CARRIER" definition also includes the galley cook, captain, entertainers, and doctor, as well as the manufacturer of every part on the vessel. All of these are as much "CARRIER" as Costa Crociere definitionally, but are not the vessel operator and are not subject to the legal duties imposed on a shipowner.

Petitioner acknowledges that if her counsel had read the ticket carefully, he might reasonably have inferred that "Costa Crociere" was the name of the operator. However, the language of the "CARRIER" definition is not unequivocal notice of the identity of the shipowner as Respondent and the lower courts suggest.

words of the Court of Appeals (6a), which led to the conclusion that the omission of Respondent was a deliberate choice rather than a mistake.

One shortcoming in this leap of logic is that it treats **constructive notice** ("imputed" "knowledge") as tantamount to **actual knowledge**. The principle favorable to Respondent addresses a conscious decision to forego suit against a known defendant. "Knowledge", to the extent relevant to the inquiry, is considerably more nuanced than the facile assumption that constructive notice or "imputed knowledge" automatically equates to a conscious decision to forego suit against a known wrongdoer.

The conclusion reached below clashes with cases which, at least by implication, reject the view that it cannot be a "mistake" when the plaintiff has pre-suit information or knowledge which could, or should, have led counsel to sue the proper party. See *e.g.* ***Tenay*** (relation back, even though the plaintiff had identified and written to the proper party before filing suit); ***William H. McGee & Co., supra*** (where the name of the correct party was on the bill of lading); ***DeCoelho* at 637** (although, ". . . plaintiffs were inattentive to the transcript of the investigation . . . where the correct name of [the] employer could have been found, we find this insufficient to deny them leave to include the proper defendant"); ***Centuori*, 329 F. Supp. 2d at 1139-1140** ("At best, these documents demonstrate that Centuori and/or his counsel might have been negligent, careless, or even arguably at fault for not naming MIS as the responsible credit reporting agency in the original Complaint; however, they do not show that the failure to name MIS was a strategic decision and not the result of a mistake concerning identity").

In ***Williams v. Doyle*, 494 F. Supp. 2d 1019, 1030 (W.D. Wisc. 2007),** the Court pointedly explained why previous awareness of a party does not constitute a "deliberate choice" rather than a "mistake":

> "In my view, the best interpretation of this statement is that a party may not use *Rule 15(c)(3)* if it makes a strategic decision, or 'chooses', not to sue a particular party. It cannot mean simply that a plaintiff is prohibited from adding a party if it was previously aware of that party. This would make the rule a virtual nullity in this circuit, because the court of appeals has held that parties may not use *Rule 15(c)(3)* to amend their complaints to replace a 'John Doe' defendant after they learn the identity of that party. *Hall v. Norfolk Southern Railway Co., 469 F.3d 590, 596 (7th Cir. 2006)* Thus, under plaintiff's [*sic*] interpretation, *Rule 15(c)(3)* would be read out of existence because it could not be used to add known parties or unknown ones. Further, if the new party's identity had been a complete mystery before the amendment, it would be unlikely that the plaintiff would be able to satisfy the other requirements of *Rule 15(c)(3)*, which are that the new party had notice of the claim previously and would not be unfairly prejudiced by the amendment."

In virtually every case, the plaintiff's counsel, with sufficient diligence, could have learned the true identity of the intended defendant. If "imputed" "knowledge" (another way of saying counsel knew or should have known of the true identity in time to avoid

the mistake) was fatal, Rule 15(c) relation back would be virtually impossible.

The reasoning of the lower courts essentially criticizes Petitioner's counsel for overlooking the information available in the ticket. If the criticism is well founded, it means that he made a mistake. An oversight or mistake of this nature is precisely what Rule 15(c)(1)(C)(ii) addresses. The Court should reject an analysis which, reduced to its essence, holds that those who make a "mistake" are disqualified from relief under a Rule which provides relation back for a "mistake concerning the proper party's identity".

Apart from this dubious leap of logic, Respondent offered no evidence, or even plausible reason to believe, that Petitioner's counsel, with actual knowledge that Costa Crociere was the responsible vessel operator, nonetheless made a deliberate choice to sue Costa Cruise, intentionally mis-describing it as the vessel operator. While other defendants have tried to thwart relation back by invoking the "deliberate choice" doctrine, courts have rejected the claim where it is lacking in evidentiary support, counter-intuitive, and contrary to the Complaint. See *e.g.* ***Loveall*, 196 F.R.D. at 403-404** and ***Goodman*, 494 F.3d at 469.** In ***Leonard*, 219 F.3d at 28, fn. 2,** the Court observed:

> "The district court suggested that Leonard may have intentionally opted to sue Boulanger on a theory of negligent entrustment (or so Parry could have thought) . . . This speculation is conclusively refuted by the fact that both the original and amended complaints were predicated exclusively on allegations of the

> driver's negligence in the operation of the motor vehicle."

In support of its argument that Petitioner made a deliberate choice to sue the wrong Defendant, Respondent has suggested, based on Petitioner's counsel's review of the Florida Department of State website, that Petitioner sued Costa Cruise because it was a convenient defendant. The same argument was made and rejected in ***Morel v. Daimler-Chrysler AG*, 565 F.3d 20 (1st Cir. 2009).** ***Morel*** was a product liability suit in which the plaintiff sued the wrong Daimler-Chrysler corporation. In ***Morel***, the First Circuit Court of Appeals said **(565 F.3d at 27)**:

> "It is obvious from the face of the original complaint that the plaintiffs intended to sue the manufacturer of the allegedly defective automobile. For aught that appears, they made a mistake concerning the manufacturer's identity.
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> * * *
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> DCAG attempts to parry this thrust by suggesting that the plaintiffs might intentionally have 'sued "Daimler-Chrysler" by an ambiguous name and served the complaint in Michigan in the hopes that [DCAG] would respond and thereby obviate the need for the costly and often time-consuming requirements of Hague Convention service.' Appellee's Br. at 32. We find this suggestion fanciful.
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> The summary judgment record contains nothing that would support this suggestion . . . What we do find - - for example, the assertion by plaintiffs' counsel that 'Daimler-Chrysler'

> was named because the corporate website did not distinguish between DCC and DCAG - - points in the opposite direction.
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> Litigation should not be reduced to a game of cat and mouse. In this last analysis, it seems highly improbable that, with the limitations period about to expire, the plaintiffs, represented by seasoned counsel, would have made such a risky strategic choice.
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> On this record, the only reasonable inference is that a mistake was made.
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> This inference is reinforced by the fact that, once the plaintiffs learned of their error, they had no difficulty in serving DCAG under the Hague Convention."

CONCLUSION

This Court should reverse the decisions of the Court of Appeals for the Eleventh Circuit and the District Court because those Courts erred in the interpretation and application of Fed. R. Civ. P. 15(c)(1)(C). The Court should clarify the meaning of the Rule and hold that, in this case, the Amended Complaint against Costa Crociere relates back to the timely initial Complaint against Costa Cruise, therefore Respondent is not entitled to summary judgment on statute of limitation grounds.

The case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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