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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This case turns on subsection **(ii)** of **Fed. R. Civ. P. 15 (c)(1)(C).** The outcome depends on whether, at any time before June 1, 2008, Respondent Costa Crociere "knew or should have known that the action would have been [initially] brought against it, but for a mistake concerning the proper party's identity".

Respondent's Brief ("Resp. Brief") offers no definition of "mistake concerning the proper party's identity" enabling it to prevail consistent with the language and purpose of **Rule 15.** Instead, it argues that Petitioner made a "deliberate choice" to sue the wrong party or forego recovery from the "proper party", and is disentitled to relation back.

The Rule forgives "mistake[s]" of all kinds. Relation back is not lost through blame or negligence. The term "deliberate choice" is not used in Rule 15. If relevant at all, "deliberate choice" describes the opposite of "mistake", an informed tactical choice to sue one defendant, or class of defendant, rather than another.

Petitioner did not intentionally sue the wrong defendant or jettison her cause of action against the proper party. The pre-suit notice documents and the Complaint make clear her intent to sue the "proper party", the vessel operator.

Respondent suggests that relation back is lost unless the added defendant is served with an amended complaint within 120 days of the initial suit. This suggestion misunderstands the reference to "the period provided by Rule 4(m) for serving the summons and

complaint". The 120 day period is the time frame for assessing whether the added defendant received timely notice of the suit and its intended involvement.[1]

The shortcomings of Respondent's "deliberate choice" theme are addressed in Arguments II and III. Three subsidiary points are discussed in Argument I.

ARGUMENT

I. APART FROM RESPONDENT'S "DELIBERATE CHOICE" ARGUMENT, ITS REPLY BRIEF DOES NOT UNDERMINE THE CASE FOR RELATION BACK

A. The Meaning Of Rule 15(c)(1)(C) Is Informed By Its Remedial Purpose

Petitioner has pointed out the purpose underlying relation back under **Rule 15 (c)(1)(C)** (Pet. Brief, pp. 14-18): to enhance access to courts by overlooking errors which do not implicate limitation concerns of notice and prejudice. Respondent characterizes this as an attempt by Krupski to "thro[w] herself on the mercy of the Court" (Resp. Brief, p. 9), asking the Court to

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[1] **Rule 15(c)(1)(C)** requires, for relation back, that the added defendant (Costa Crociere) had notice "of the action [so] that it will not be prejudiced" and that "the action would have been brought against it, but for a mistake . . ." . This notice to the added defendant must be "within the period provided by Rule (m)", 120 days. The Complaint against Costa Cruise was filed on February 1, 2008. Respondent calculates 120 days thereafter as June 2, 2008 (Resp. Brief, p. 19). The date of June 1, 2008 is used for simplicity.

"ignore the plain language of Rule 15 (c)" to avoid a "harsh" "result" (Resp. Brief, pp. 19-20). Krupski relies on the language of the Rule itself, particularly the unvarnished phrase, "mistake concerning the proper party's identity", which does not exclude any category of "mistake". The phrase should be interpreted in harmony with the intent behind the Rule. There is nothing remarkable about the proposition that interpretation of an enactment is informed by its intended purpose. ***SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Rosenau v. Unifund Corp*., 539 F.3d 218, 221 (3rd Cir. 2008); *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997).**

B. Petitioner's Argument Is Not Tied To Relation Back Of "John Doe" Suits

Providing an overview of the interpretation of **Rule 15(c)(1)(C)** by District Courts and Circuit Courts, Petitioner noted the treatment of "John Doe" suits (Pet. Brief, pp. 31-32). Respondent argues that, if Krupski prevails, this will open the floodgates to "John Doe" suits (Resp. Brief, pp. 24-26). If **Rule 15(c)(1)(C)** is interpreted broadly enough to permit relation back in "John Doe" suits, it surely permits relation back here. However, rejection of "John Doe" amendments does not doom relation back in this case.

Many cases hold that a suit against "John Doe" does not relate back once an individual is identified. This view, aptly noted by Respondent, posits that, "a plaintiff's lack of knowledge of the intended defendant's identity is not a 'mistake concerning the proper party's identify'" [Resp. Brief, p. 24, citing ***Garrett v. Fleming*, 362 F.3d 692, 696 (10th Cir. 2004)].** Accepting that assumption, **Rule 15(c)(1)(C)**

would be decimated if both "lack of knowledge" and "knowledge" make relation back unavailable. If relation back is denied in "John Doe" suits for "lack of knowledge", it cannot also be withheld in cases involving "imputed knowledge" (Pet. Brief, p. 40).

C. Through Events Preceding June 1, 2008, Respondent "Received Such Notice of the Action That It Will Not Be Prejudiced In Defending On The Merits"

The courts below found that Petitioner satisfied subsection **(i)** of **Fed. R. Civ. P. 15 (c)(1)(C)** (Pet. Brief, pp. 20-23). Respondent offers no disagreement with that assessment. It is beyond dispute that, in a timely fashion, Respondent "received such notice of the action that it will not be prejudiced in defending on the merits". It received this "notice" through the pre-suit letter to its claims agent (JA 69 - JA 70)[2] and through the service of the initial suit - - well within "the period provided by Rule 4" - - on its agent, Costa Cruise,[3] represented by the same attorney as Respondent. Acknowledging that this information satisfies subsection **(i)** ("such notice of the action that it will not be prejudiced in defending on the merits"), Respondent denies that the same information satisfies **(ii)** ("knew or should have known that the action would have been

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[2] According to the Affidavit of Mr. Klutz, ¶ 2 (JA 33 - JA 34), his Company was retained by Costa Cruise to administer claims arising on Costa Crociere vessels.

[3] The Italian word for "cruise" is "crociera". "Costa Cruise" is both a separate entity serving as Respondent's agent and Respondent's own name in English.

brought against it, but for a mistake concerning the proper party's identity").

II. "DELIBERATE CHOICE" IS A SHORTHAND REFERENCE TO A PLAINTIFF'S INTENT THAT IS THE OPPOSITE OF "MISTAKE"

A. The Meaning Of "Mistake Concerning The Proper Party's Identity"

A variety of situations are commonly understood to constitute a "mistake concerning the proper party's identity" (Pet. Brief, pp. 26-30). Petitioner suggested a general definition, consistent with the breadth of the unlimited term "mistake", the purpose of **Rule 15(c)(1)(C)**, and the authorities permitting relation back where the other criteria of subsections **(i)** and **(ii)** are met (Pet. Brief, pp. 33-35). "Fault" is not inconsistent with the existence of a "mistake" (Pet. Brief, pp. 30-31). Suing the wrong defendant is, almost by definition, a "mistake" which could have been averted with sufficient diligence. The very existence of **Rule 15 (c)(1)(C)** allows forgiveness of preventable mistakes.

The meaning of "mistake" in **Rule 15** draws substance from different Rules. **Fed. R. App. P. 4(a)(5)(A)(ii)** permits extending the time for filing a notice of appeal for "excusable neglect or good cause". In contrast, **Rule 15** does not require an "excusable" error, emphasizing that fault does not disqualify an amendment from relation back.

Fed. R. App. P. 4(d) uses the term "mistakenly", treating as filed in the district court a notice of appeal

"mistakenly filed in the court of appeals". In this context, an error is forgiven even though there is some measure of "fault": the court rules, if read carefully, explain a "proper" filing.

The contrast between "mistake" and "intent" finds expression in **Fed. R. Civ. P. 9(b)**:

> "In alleging fraud or **mistake**, a party must state with particularity the circumstances constituting fraud or mistake. Malice, **intent**, knowledge, and other conditions of a person's mind may be alleged generally." (emphasis supplied).

Focusing on the term "proper party" also helps understand the meaning of "mistake". A "proper party" is a defendant, correctly named, whose actions give rise to the liability alleged. A "mistake" is "concerning the proper party's identity" if it "concerns" the "identity" of the defendant actually responsible. This leads to a working definition. A "mistake concerning the proper party's identity" occurs when the plaintiff intends to correctly name the entity with the status on which the suit is founded, but fails to do so.[4] In a case such as this, an amendment to correctly

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[4] The failure to sue the proper party initially may arise from a variety of causes falling within the broad term "mistake". An intended premises liability suit against the "123 Corporation" may, by transposition of digits, name the "321 Corporation". A product liability action may name "Ford Motor, Inc" instead of the actual name, "Ford Motor Company". A suit against a vessel operator may misidentify one corporate affiliate, Costa Cruise,

name the proper party satisfies the second clause of **Rule 15(c)(1)(C)(ii)** and relates back if the other requirements of subsections **(i)** and **(ii)** are satisfied (Pet. Brief, pp. 36-39).

B. "Deliberate Choice"

Without suggesting its own meaning of "mistake", Respondent argues that a "deliberate choice" is not one. To be sure, there is some level of intentionality so far removed from "mistake" that it is outside the scope of **Rule 15**. However, the dimensions of "deliberate choice" are far from clear.

Respondent employs multiple descriptions of the mindset it invokes: "conscious choice" not to sue Costa Crociere (Resp. Brief, pp. 7, 12), "foolish" "failure to sue Costa Crociere" (Resp. Brief, p. 8), "deliberate decision" (Resp. Brief, pp. 9, 11), "deliberate, conscious decision" (Resp. Brief, pp. 11, 14), "deliberate choice" (Resp. Brief, p. 14), "intentional choice" (Resp. Brief, p. 15). The cases cited in ***Lundy v. Adamar of New Jersey*, 34 F.3d 1173, 1183 (3rd Cir. 1994)** use different phrases to describe the non-mistake prohibiting relief: "deliberate choice between potential defendants", "not named . . . for tactical reasons", "deliberate choice".

Conceptually, there is a state of mind so different from "mistake" that relation back is unavailable. The

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rather than another, Costa Crociere. In each instance, the plaintiff intended to sue the responsible defendant but failed to do so, making a "mistake concerning the proper party's identity".

contours of that state of mind, "deliberate choice" for purposes of this Brief, are amorphous.

In deciding whether a plaintiff made a "mistake" or "deliberate choice" by identifying an entity other than the proper party in the initial Complaint, the plaintiff's mindset is gauged by the "knowledge" obtained before filing. ***Kilkenny v. Arco Marine, Inc*., 800 F.2d 853, 856 (9th Cir. 1986)** ("our inquiry regarding the existence of a mistake of identity should be limited to [the] state of mind as of the time the initial complaint is filed"); ***Garvin v. Philadelphia*, 354 F.3d 215, 221-222 (3rd Cir. 2003)** (relation back unavailable, "if the plaintiff had been aware of the identity of the newly named parties when she filed her original complaint and simply chose not to sue them"); ***Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000).**

The cases use different formulations of the "knowledge" from which one might infer a "deliberate choice" rather than "mistake". ***Powers v. Graff*, 148 F.3d 1223, 1226 (11th Cir. 1998)** ("where the newly added defendants were known to the plaintiff before the running of the statute of limitations and where the potential defendants should not necessarily have known that, absent a mistake by the plaintiffs, they would have been sued"); ***Loveall v. Employer Health Servs., Inc*., 196 F.R.D. 399, 403 (D.C. Kan. 2000)** ("with full knowledge of all potential defendants, a plaintiff's tactical decision to pursue a particular defendant in lieu of another"); ***Nelson v. Adams, U.S.A., Inc*., 529 U.S. 460, 467, fn. 1 (2000)** ("it knew of Nelson's role and existence").

The District Court framed the issue as whether "the newly added defendant was known to the plaintiff

before the running of the statute of limitations" [19a, citing ***Powers*** and ***Chumney v. U.S. Repeating Arms Co.*, 196 F.R.D. 419 (D.C. Ala. 2000)**] (emphasis supplied). The Court relied on information provided **after** expiration of the one year period (19a), concluding that, "This is not a case where there was a lack of knowledge of the existence of the proper party or the identity of the proper party" (20a). The Circuit Court took a different tack, relying on the pre-suit "identity and knowledge of Costa Crociere as a potential party" that was "imputed to Krupski" because it "was clearly identified in the ticket's definition of 'Carrier' " (6a).

Respondent has cited no other case going as far as the "imputed" "knowledge" approach of the Eleventh Circuit. In ***Williams v. Doyle*, 494 F. Supp. 2d 1019, 1030 (W.D. Wisc. 2007)**, the Court explained the flaw in that approach:

> ". . . [T]he 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. . . .".

The divergent views show the inability to clearly define, or identify the evidence necessary to show, a "deliberate choice" outside the phrase, "mistake concerning the proper party's identity". The cases relied on by Respondent do not fit the characteristics of this case: amendment to change the name from one corporation to that of a similar-sounding affiliate which is the actual entity occupying the status (vessel

operator) on which the suit was based from the outset, permitting relation back (Pet. Brief, pp. 36-39).

Respondent invokes ***Ish Yerushalayim v. United States Dep't Of Corrections*, 374 F.3d 89 (2nd Cir. 2004)** and ***Nelson*** (Resp. Brief, pp. 12, 14-15, 17). In each, the initial suit was filed against an institutional defendant, sued on a theory of institutional liability. The proposed amendment would add an individual defendant, alleging that this individual was personally liable.[5] Quite reasonably, the courts could conclude that there was no "mistake" in the initial filing. The intended target from the outset was the institution, not the individual. There was no misunderstanding of the individual's actual name, and there could be no plausible misapprehension that the individual occupied the institutional status on which the suit was based.

C. The Interplay Between "Deliberate Choice" And "Mistake Concerning The Proper Party's Identity"

Rule 15(c)(1)(C) makes no reference to "deliberate choice" or anything similar. If the "mistake" standard is met, relation back is allowed. Thus, "deliberate choice" has no foundation in the language of the Rule, and is best understood as a rough description of intentionality that is not a "mistake concerning the proper party's identity". The notions loosely

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[5] As another rationale for the outcome, omission of the individual from the original Complaint may have been a considered tactical decision. Litigators commonly believe that jurors return higher damage awards against institutional defendants.

characterized as "deliberate choice" are not a talismanic incantation to ward off relation back. They are linguistic shorthand for arguing that a "mistake concerning the proper party's identity" did not in fact occur.

Similarly, "knowledge" is simply a fact from which, under proper circumstances, one might infer the absence of "mistake". It is a form of possible circumstantial evidence, not a proxy for the critical inquiry: whether there was a "mistake concerning the proper party's identity".

The term "knowledge" is an over-broad substitute for serious analysis. Does one have "knowledge" of a fact learned in elementary school, buried in the recesses of the mind? Having read the Bible once, does one "know" the content of every verse and grasp its theological significance? Is a shortcoming in recall, or memory, or information processing, anything other than a "mistake"? As these questions reflect, "knowledge" can be a matter of nuance or degree. Reading something in the past does not inherently equate to current "knowledge".

Petitioner suggests that a "mistake concerning the proper party's identity" occurs where the plaintiff intended to sue the "proper party" whose status gives rise to the liability asserted (the vessel operator), but identified the defendant in a way that failed to accomplish this purpose. This is a "mistake", not a "deliberate choice", and the amendment relates back.

III. THE DOCUMENTARY EVIDENCE AND SURROUNDING CIRCUMSTANCES SHOW A "MISTAKE CONCERNING THE PROPER PARTY'S IDENTITY"

For its thesis that it was a "deliberate choice" rather than a "mistake" for Krupski's counsel to sue Costa Cruise, Respondent stresses the ticket's mention of Costa Crociere within the definition of "carrier". It castigates Petitioner's counsel for not having sued Costa Crociere initially in view of the ticket. Seemingly conceding that "relation back" would apply if sought before June 1, 2008 (Resp. Brief, pp. 8, 16-19), Respondent notes that the Motion to Amend was filed shortly after that date. Costa Crociere apparently regards these two factors alone - - the content of the ticket and motion to amend after June 1, 2008 - - as establishing that it did not "[know] or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity" .

A. <u>The Issue Entails No Deferential Standard Of Review</u>

Recognizing disagreement over the standard of review, Costa Crociere urges deference to the "district court's conclusion" (Resp. Brief, p. 26). It suggests that affirmance is in order because "Krupski did not come forward with any sworn proof" (*Id*., p. 27).

It is not clear whether Respondent implies that every relation back dispute requires an evidentiary hearing. Or whether, if an evidentiary hearing is required for informed decision on a summary judgment motion, the non-movant bears the brunt of a trial

court's failure to conduct one. Considerations of judicial economy and the wise use of judicial resources disfavor formal subsidiary litigation over relation back.

It is true that Krupski did not present "sworn" proof. Nor, for that matter, did Respondent. Petitioner did present her counsel's explanation, the documentary evidence showing efforts to identify the "Costa" company doing business in Florida (JA 56 - JA 68), counsel's notice letter to "Costa Cruise" reflecting his belief that this was the responsible entity (JA 69 - JA 70), and the response of the "Claims Administrator for Costa Cruise", sent from Florida, "[i]n order to facilitate our future attempt to achieve a pre-litigation settlement" (23 a - 24a). The Complaint (RE 1, JA 21 - JA 27) was on file, alleging "Costa Cruise" as the name of the responsible vessel operator. This documentary evidence was, and is, sufficient to permit deciding the relation back question.

Moreover, "deference" to the District Court would not avail Respondent. The District Court placed no reliance on the ticket, instead considering only the "notice" provided to Krupski after the one-year limitation period had already expired (19a). The District Court dismissed on the basis that, "whether a plaintiff made a 'mistake', rather than a conscious choice, in originally omitting the relevant defendant turns on whether the newly added defendant was known to the plaintiff **before the running of the statute of limitations"** (19a, emphasis supplied). "Deferring" to that analysis, Petitioner's case would be considerably **easier**. Information gained **after** the expiration of the limitations period does not suffice under a legal standard requiring knowledge "before the running of the statute of limitations".

Generally, whether a case involves a "mistake concerning the proper party's identity" presents a mixed question of law and fact. The outcome is driven by the legal question of what constitutes such a "mistake". Only after identifying what, legally, constitutes a "mistake concerning the proper party's identity", can one determine whether a "mistake" of that nature occurred. The overriding issue of law - - the meaning of the "mistake" clause - - presents a legal question subject to *de novo* review.

When a testimonial hearing is held, involving the opportunity to observe the demeanor of witnesses, there might be reason to defer to trial court fact-finding. Here, the District Court entertained no testimony. The Circuit Court and this Court have available the same documentary evidence presented to the District Court.

This case involves first discerning the legal meaning of **Fed. R. Civ. P. 15 (c)(1)(C)(ii)**, then applying that legal standard to the documents of record. This Court's ability to do so is not affected by a possible deferential standard of review in other cases.

B. The "Imputed" "Knowledge" Provided By The Ticket Does Not Create A "Deliberate Choice" Rather That A "Mistake"

Respondent heralds the name "Costa Crociere" among the many members of the "CARRIER" class mentioned in the "DEFINITIONS" section of the ticket (27a). It is unclear whether Respondent contends that the fault of counsel proves the absence of "mistake" or

whether it offers the ticket as circumstantial evidence of a "deliberate choice" to sue the wrong party.

Relation back is not restricted to blameless plaintiffs. The very notion of "mistake" embraces preventable errors. For example, the filing of a Complaint with transposed numbers (see fn. 4, *supra*) could be prevented with perfect proofreading. Review of corporate records would identify the automaker as Ford Motor Company rather than Ford Motor, Inc. (see fn. 4). Virtually always, the plaintiff's counsel could be criticized for failing to correctly identify the intended defendant initially. The fact that Plaintiff's counsel failed to discern from the definition of "CARRIER" that Costa Crociere was the name of the vessel operator is a mistake of debatable blameworthiness. Yet that is what **Rule 15(c)(1)(C)** is designed to forgive. The insight of ***Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000)** bears repeating:

> "[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."

Use of the "CARRIER" definition as evidence of a "deliberate choice" to sue the wrong party fares no better. Neither lower court directly found that Krupski sued the wrong party on purpose. The "knowledge" identified by the Eleventh Circuit was "imputed", the definition of "CARRIER" providing Petitioner's counsel with information enabling him to identify Costa Crociere as the vessel operator. That approach confuses "imputed knowledge" (more

accurately, constructive notice) with a deliberate choice.[6]

The ticket may have provided the means necessary to avoid the mistake, but it does not change a "mistake" (the erroneous designation of a defendant other than the intended target) into a "deliberate choice" to sue the wrong party, knowing that it has no responsibility. The facile leap from "imputed knowledge" to "deliberate choice", and the failure to recognize the nuanced continuum between notice and knowledge, lie at the heart of the lower court's error.

Intuitively, one cannot believe that, for no apparent reason, Krupski's counsel imperiled his client's rights by suing Costa Cruise, and omitting Costa Crociere, as a "deliberate choice", knowing that he was suing, as vessel operator, an entity that was not. It is far more likely that the error is attributable to a "mistake" - - the failure to carefully read the ticket, or appreciate the meaning of Costa Crociere's inclusion in the "CARRIER" definition, or reliance on the prominent reference to Costa Cruise as a "cruise company" in the ticket documents (25a), and the letter from Respondent's agent, Mr. Klutz (23a - 24a).

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[6] The two clauses of sub-rule **(ii)** address the state of mind of two different parties, with two different standards of mentation. For an **added defendant**, the Rule looks to **constructive knowledge or notice**, "knew or should have known that the action would have been brought against it . . .". For the **plaintiff** seeking amendment, the second clause considers whether the omission resulted from a **"mistake** concerning the proper party's identity". While the confusion is understandable, it is inaccurate to apply a constructive notice approach to the plaintiff, whose intent is measured by "mistake".

As "circumstantial evidence", the ticket content has no tendency to favor the "deliberate choice" conjecture over the "mistake" explanation. It no more proves "deliberate choice" here than it would in any other case where information about the "proper party" was available pre-suit.

To follow Respondent's argument, whenever information existed permitting identification of the "proper party", that information would, standing alone, prove a "deliberate choice" to sue the wrong party. Thus, the very existence of a "mistake" (in failing to correctly find, digest, and use the available information) would foreclose relation back under a Rule **allowing** relation back for a "mistake concerning the proper party's identity".

"Blameworthiness" does not disentitle a party to relation back. Neither is it barred by the notion that "imputed knowledge" constitutes "deliberate choice".

C. Delay In Filing The Amended Complaint Does Not Render The Initial Suit A "Deliberate Choice" Rather Than A "Mistake"

Respondent points to the litigation information provided by Costa Cruise, beginning with the Answer (RE 6; JA 29 - JA 31), filed more than one year after the injury. It argues that, because Petitioner did not file her Motion for Leave to Amend until more than 120 days after the initial Complaint was filed (RE 1, JA 21 - JA 27), this proves that her failure to sue Costa Crociere initially was a "deliberate choice" rather than

a "mistake' (Resp. Brief, pp. 7-8, 13-15, 16-19).[7] It seemingly admits that a Motion to Amend filed before June 1, 2008 would permit relation back.

The meaning of the 120 day period referred to (". . . within the period provided by Rule 4(m) . . .") warrants discussion. In ***Schiavone v. Fortune*, 477 U.S. 21 (1986),** this Court held that the earlier version of **Rule 15** required notice to the added Defendant within the limitation period itself. Since the initial defendant might not receive notice until 120 days after filing (the time for service of the Complaint), ***Schiavone*** had an anomalous effect. It meant that notice to an added defendant (by the end of the limitation period) had to be accomplished before notice to the original defendant (up to 120 days after filing). The disparity was illogical since subsection **(i)** anticipates that notice to the initial defendant could provide the added defendant with "such notice of the action that it will not be prejudiced in defending on the merits", especially where the two are affiliates represented by the same counsel (Pet. Brief, pp. 20-23).

The post-***Schiavone*** amendment corrects the disparity. It looks to the "notice" available to the added defendant ("such notice of the action that it will not be prejudiced"; "knew or should have known that the action would have been brought against it") for up to 120 days after the initial Complaint ["within the period provided by Rule 4(m) for serving the summons"].

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[7] Respondent offers no explanation why, if Petitioner truly made a "deliberate choice" not to sue Costa Crociere initially, she had a sudden change of heart.

This reference to the **Rule 4(m)** period does **not** dictate a deadline for filing an amended complaint. **Fed. R. Civ. P. 15 (b)** allows an amendment at any time with judicial permission. If amendment is allowed, the service period is 120 days **from the amendment**, or an extended time authorized by the court, **Fed. R. Civ. P. 4(m)**.[8]

If Respondent contends that the filing or service of the Amended Complaint occurred beyond a legal deadline, it is wrong. The amendment was sought and obtained, and the Amended Complaint was filed and served, in accord with all applicable Rules (Pet. Brief, p. 43).

The idea that an amendment can only relate back if sought, filed, and served within 120 days of the initial filing has no basis in **Rule 15** or any other body of law. Creation of that requirement would be practically unworkable.

With the time for serving the initial complaint, then a responsive pleading (perhaps after a stipulated extension), often a **Rule 12(b)** motion rather than an Answer, then eventually an Answer which may not identify the "proper party", the later filing of a motion to amend, securing a hearing date on the motion, obtaining a ruling, then preparing, filing and serving an amended complaint, the added defendant is often not served within four months of the initial Complaint.

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[8] Since the Amended Complaint was served on Costa Crociere in Italy pursuant to the Hague Convention in accord with **Rule 4(f)(1),** even the 120 day limit is inapplicable since the final sentence of **Rule 4(m)** states, "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) . . .".

With good reason the Rules permit an amendment to relate back if the criteria of **Rule 15(c)(1)(C)(i)** and **(ii)** are met, regardless of whether the amendment is more than four months into the suit.[9]

It is true that the reference to **Rule 4(m)** permits consideration of events up to 120 days after filing of the Complaint. However, that period is not a deadline for filing the amendment. It is, instead, the reference point for assessing the added defendant's notice.[10]

Here, Ms. Krupski relies exclusively on events occurring before June 1, 2008. Before that date, she sent the notice letter to Costa Cruise and received the letter from Mr. Klutz. After reviewing official records to identify the Costa entity doing business in Florida, Petitioner filed her Complaint, alleging negligence by the vessel operator, and served it on Respondent's

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[9] Respondent criticizes Petitioner for filing against Costa Cruise "just before the end of the limitation period", "on the eve of the running of the limitation period" (Resp. Brief, pp. 2, 3). Ironically, if she had waited until the end of the one year limitation period, suing Costa Cruise on February 21, 2008, the anniversary of her injury, her Motion to Amend filed on June 13th would be within 120 days of the initial Complaint.

[10] ***Kilkenny*** indicates that delay in amendment may bear on the first clause of **(ii)**, if the added defendant lacked reason to know that it was an intended target. That reasoning is flawed. If, at any time in the 120 day period, the added defendant "knew or should have known that suit would have been brought against it", the Rule's requirements are met. This is so regardless of what happened or didn't happen later or whether there was also reason to think otherwise. In all events, in this case the notice letter and allegations against the vessel operator in the Complaint provided Respondent with ample reason to know that, as the shipowner, it was the intended defendant.

affiliated agent, which was defended by Mr. Horr, the attorney for Costa Crociere. It is these events, occurring before June 1st, from which, Ms. Krupski argued, Costa Crociere, "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity". If Petitioner is correct on this point, Petitioner has met the **Rule 15** standard.

Consider Respondent's apparent concession that, if Petitioner had sought amendment before June 1, 2008, she would have been entitled to relation back under **Rule 15(c)(1)(C)(ii)**. If so,[11] it would be because she established, at that time, that Costa Crociere "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity". And, if Costa Crociere had reason to know before June 1, 2008 that it was the intended target, that knowledge did not magically evaporate afterward. If the relation back standards of **Rule 15(c)(1)(C)(i)** and **(ii)** were met at any time before June 1, 2008, they remained met when Petitioner filed her Amended Complaint.

Once the one year limitation period expired on February 21, 2008, the maintainability of suit against Costa Crociere depended on "relation back". Regardless of when the suit was amended, by June 1, 2008 Respondent had reason to know "that the action would have been brought against it, but for a mistake". The date of amendment has nothing to do with

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[11] Conversely, if there was truly no "mistake concerning the proper party's identity", then Petitioner would not have been entitled to relation back of an amendment filed before June 1, 2008.

whether the **Rule 15** criteria regarding constructive notice to the added defendant were met "within the period provided by Rule 4(m) for serving the summons and complaint".

D. The Initial Suit Against Costa Cruise Was A "Mistake" Rather Than A "Deliberate Choice" To Sue The Wrong Party

It defies rationality that Plaintiff, alleging liability of the ship operator, intentionally sued an entity known to have no liability, foregoing suit against the known proper party. Without compelling motivation to vex an innocent defendant, or ignore the only possible source of recovery, it makes no sense to assume that suing the wrong party was anything but a "mistake".

Respondent offers no direct evidence to support its "deliberate choice" contention. Its "pre-suit ticket" analysis does not favor the theory that Krupski's counsel deliberately sued the wrong party over the explanation that he mistakenly failed to carefully read the "DEFINITION" section of the ticket or deduce that the naming of Costa Crociere as one member of the "CARRIER" class meant that it (but no other defined "CARRIER") was the vessel operator. Information obtained by Petitioner from the litigation filings of Costa Cruise, after the limitation period had expired, adds nothing to deciding whether the initial filing, without benefit of that information, was a "mistake". The outcome is not altered by "delay" in seeking amendment, since once the anniversary of the injury passed, the ability to add Respondent depended on relation back and the events that already transpired.

Nothing in the record points legally or factually to the conclusion that Petitioner made a "deliberate choice" to sue Costa Cruise, rather than the proper party.

In contrast, the record is replete with facts pointing only to the conclusion that Petitioner harbored a "mistake concerning the proper party's identity". The ticket documents on which Respondent relies prominently identified "Costa Cruise", a "cruise company", with the vessel (25a). The documents were sent by Costa Cruise (Klutz Affidavit, ¶ 14; JA 36). The official records identify Costa Cruise, rather than Costa Crociere, doing business in Florida (JA 56 - JA 68). These facts explain how the mistake was made, lending support to the explanation that a "mistake concerning the proper party's identity" occurred.

More telling is the pre-suit letter (JA 69 - JA 70). That document reflects counsel's mistaken belief that the addressee, Costa Cruise, was responsible for the onboard injury. It stands as potent pre-suit proof of the "mistake concerning the proper party's identity" harbored by Petitioner's counsel.

The most probative indicator is the initial Complaint. That filing bespeaks the intent to obtain relief from the "proper party", the vessel operator. It also expresses the mistaken belief that "Costa Cruise" was the name of the operator.

This case involves a suit against an intended "proper party": the vessel operator. The initial Complaint misidentified the name of the proper party, Costa Cruise rather than Costa Crociere. The overwhelming weight of authority recognizes that this constitutes a "mistake concerning the proper party's

identity" as that phrase is used in **Fed. R. Civ. P. 15(c)(1)(C)** (see cases cited at Pet. Brief, pp. 36-39). This Court should adopt the same meaning of that phrase, and reach the same "relation back" outcome.

CONCLUSION

This Court should reverse the decisions of the Court of Appeals for the Eleventh Circuit and the District Court. The case should be remanded to the District Court for further proceedings.

Respectfully submitted,

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