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

PETITION FOR WRIT OF CERTIORARI

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September 15, 2009

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QUESTION PRESENTED

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". Other Circuit Courts of Appeal Construe The Rule As Applying To Substitution Of The Correct Defendant For A Related Corporation With A Similar Name. The Eleventh Circuit Has Concluded That There Can Be No Such "Mistake" Where The Plaintiff Had Imputed Knowledge Of The Identity Of The Added Defendant Prior To Filing Suit. Does The Eleventh Circuit Construction Of Rule 15(c)(1)(C) Undermine The Purpose Of The Rule And Is It Inconsistent With The Decisions In Other Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner Wanda Krupski is a Michigan resident who booked a cruise aboard the Costa Magica through a South Carolina-based travel agent. The Costa Magica departed from Florida on February 18, 2007. Three days later, 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 this Petition.

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 affiliate based in Hollywood, Florida. Petitioner initially filed suit against Costa Cruise. She later filed an Amended Complaint against Costa Crociere. As defendant in the underlying personal injury suit, Costa Crociere is Respondent in this Court.

CORPORATE DISCLOSURE STATEMENT

BENDURE & THOMAS is a partnership comprised of MARK R. BENDURE and MARC E. THOMAS, with no parent corporation and is not a publicly held corporation.

CERTIFICATE OF INTERESTED PARTIES

Petitioner certifies that the following is a complete list of attorneys, persons, associated persons, firms, partnerships or corporations that have a financial interest in the outcome of this case, including heirs, executors, administrators, agents and assigns that have a financial interest in the outcome of this case, and other identifiable legal entities related to a party:

(A) Krupski, Wanda - Petitioner

(B) Bendure & Thomas

(C) Bendure, Mark R. - Appellate Counsel for Petitioner

(D) Berlowitz, Jeffrey S. - Counsel for Petitioner

(E) Phillips, Canton & Berlowitz, P.A.

(F) Turner & Turner, P.C.

(G) Turner, Matthew L. - Counsel for Petitioner

(H) Carnival Corporation (CCL)

(I) Costa Crociere, S.p.A.

(J) Costa Cruceros S.A.

(K) Costa Cruceros S.L.

(L) Costa Cruise Lines, N.V.

(M) Costa Cruise Lines UK Ltd.

(N) Costa Cruzerios Agencia Maritima E Turismo Ltd.

(O) Costa Finance, S.A.

(P) Costa Holding Srl

(Q) Costa International B.V.

(R) Costa Kruesfahrten Gmbh

(S) Horr, Davis J. - Counsel for Appellee

(T) Horr, Novak & Skipp, P.A.

(U) International Risk Services, Inc.

(V) Scarry, Brian T. - Counsel for Respondent

(W) Turnoff, The Honorable William C. - L.T. Magistrate

(X) Wylie, Stephanie H. - Counsel for Respondent

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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,[1] 8a-22a). In substance, she held 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 Wanda Krupski, an American citizen, against Costa Crociere, an Italian corporation. Ms. Krupski sought recovery for injuries sustained on a cruise ship in international waters. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1333(1).

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[1] Designations beginning "DE" identify the docket entry number of the District Court filing referred to.

On October 28, 2008, Hon. Cecilia M. Altonaga, United States District Court Judge for the Southern District of Florida, Miami Division, issued a 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. 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."

This Petition, filed within 90 days of the Court of Appeals Judgment, is timely under this Court's Rule 13.1.

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 of 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, a Michigan resident, purchased passage on the cruise vessel, 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, Ex. 1; 25a):

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

The Travel Documents were sent by Costa Cruise.

Plaintiff also received an eleven page Passenger Ticket (DE 6-2; 27a-37a). The Ticket required suit to be filed within one year (28a). The term "CARRIER" was defined to include Respondent Costa Crociere, various agents onboard the vessel, and the manufacturer (27a). According to documents filed by Plaintiff in the District Court, there are numerous "Costa" corporations (DE 26, Ex. 2, 3).

The ship departed from Port Everglades, Florida on February 18, 2007. Three days later, on February 21, 2007, Plaintiff was injured, falling in the ship's theater. She apparently tripped over a camera cable left near her chair, suffering a fractured right femur.

By letter of July 2, 2007, Plaintiff's counsel wrote to Costa Cruise in Hollywood, Florida, providing notice of the injury. In response, counsel received a letter from the Claims Administrator for Costa Cruise (DE 26, Ex. 6; 24a) seeking additional information, "[i]n order to facilitate our future attempts to achieve a pre-litigation settlement".

When settlement could not be reached, suit was filed against Costa Cruise on February 1, 2008, in the United States District Court for the Southern District of Florida, with jurisdiction predicated on 28 U.S.C. § 1332, 28 U.S.C. §1333(1) and 28 U.S. C. § 1333. The Complaint was served three days later on CT Corporation System, the Registered Agent for Costa Cruise. On February 25, 2008 (one year and four days after the injury), Costa Cruise filed its Answer, through its counsel, the Horr, Novak & Skipp law firm. At the end of its Answer, Costa Cruise alleged that it

was a sales and marketing agent for the carrier/vessel operator, Respondent Costa Crociere.

Eventually, Orders were entered allowing the filing of an Amended Complaint and dismissing the suit against Costa Cruise. Accordingly, Plaintiff filed an Amended Complaint against Respondent Costa Crociere on July 11, 2008, which was served, via the Hague Convention, on August 21, 2008.

Respondent Costa Crociere filed its Motion to Dismiss on September 3, 2008, represented by the same law firm as Costa Cruise. In substance, it alleged that it had been sued after the one year period set forth in the Passenger Ticket, and that the Amended Complaint did not "relate back" under Fed. R. Civ. P. 15(c)(1)(C).

Plaintiff filed her Response to the Motion to Dismiss, arguing that "relation back" was appropriate. Plaintiff explained the mistake in suing Costa Cruise, rather than Respondent, initially: the second page of the Travel Document (25a) listed Costa Cruise; that document was sent by Costa Cruise; the website listed Costa Cruise as the only active entity with a United States office; Costa Cruise was the only such active entity registered with the Florida Division of Corporations; and the pre-suit response of the claims adjustor led counsel to believe that Costa Cruise was the responsible entity.

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").

On October 21, 2008, Judge Altonaga issued her Order (DE 50; 8a-22a). In her opinion, Respondent received timely constructive notice due to its sufficient "identity of interest" with Costa Cruise and their shared counsel (14a-17a). However, relying on and citing the Answer filed by Costa Cruise after expiration of the one year period, the District Court concluded that there was no "mistake" in failing to name Respondent Costa Crociere earlier (19a-20a). Accordingly, she granted the Motion to Dismiss (construed as a Motion for Summary Judgment) (21a). A Final Judgment was entered on October 28, 2008, and Petitioner filed a timely Notice of Appeal.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed 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).

Petitioner now seeks Supreme Court review. She submits that the Eleventh Circuit construction and application of Rule 15(c) and its "mistake" criterion clash with the approach of other Circuits.

THE REASONS WHY CERTIORARI SHOULD BE GRANTED

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". Other Circuit Courts of Appeal Construe The Rule As Applying To Substitution Of The Correct Defendant For A Related Corporation With A Similar Name. The Eleventh Circuit Has Concluded That There Can Be No Such "Mistake" Where The Plaintiff Had Imputed Knowledge Of The Identity Of The Added Defendant Prior To Filing Suit. The Eleventh Circuit Construction Of Rule 15(c)(1)(C) Undermines The Purpose Of The Rule And Is Inconsistent With The Decisions In Other Circuits

The Federal Rules of Civil Procedure are the principal blueprint for the administration of justice in the courts of the United States. They are a national compendium, designed for uniform application across the Nation. The decision of the Eleventh Circuit creates an "imputed knowledge" exception which is inconsistent with the language and purpose of Fed. R. Civ. P. 15(c)(1)(C), and is in conflict with the approach of other Circuits. This Court should review the

aberrant decision to assure the evenhanded application of the Rule throughout the Country.

A. The Critical Issue: The Meaning Of The Phrase, "Mistake Concerning The Proper Party's Identity"

Whether Petitioner's case is summarily dismissed, or whether she may obtain an outcome based on the substantive merits of her personal injury action, turns on Fed. R. Civ. P. 15(c) which states in pertinent part, and with the language at issue emphasized:

> "**An amendment to a pleading relates back to the date of the original pleading** when:
>
> * * *
>
> (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 com-plaint, the party to be brought in by amendment:**
>
> (i) received such notice of the action that it will not be prejudiced in the 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."

As the District Court correctly noted (14a), there are three criteria for "relation back" of an amendment changing the name of, or adding a new, defendant. *Makro Capital of Am., Inc. v. UBS, AG*, 543 F.3d 1254, 1258 (11th Cir. 2008); *Goldman v PraxAir, Inc.*, 494 F.3d 458, 468 (4th Cir., *en banc*, 2007). First, the amendment must assert a claim arising out of the same transaction [Rule 15(c)(1)(B),(C)]. As the parties, District Court and Court of Appeals agree, the Amended Complaint asserts the same essential claim as the original Complaint; only the name of the Defendant is changed - - from Costa Cruise to Costa Crociere.

Secondly, within 120 days after expiration of the limitation period ["within the period provided by Rule 4(m) for serving the summons and complaint"], the added defendant must have, "received such notice of the action that it will not be prejudiced in defending on the merits" [Rule 15(c)(1)(C)(i)].[2] Here, Costa Cruise was served well within the "one year plus 120 day" deadline. Within that period, the claims adjuster was

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[2] An earlier version of Rule 15 was interpreted as requiring notice to an **added** defendant within the **limitation period itself**. *Schavione v. Fortune*, 477 U.S. 21 (1986). This led to the anomalous result that, for an added defendant, the plaintiff was given **less** time to provide notice than for the initial defendant. Criticism of *Schavione* led to the 1991 amendment to Rule 15 to its current form, "within the time provided by Rule 4(m) for service of the summons and complaint . . ." *Hill v. United States Postal Service*, 961 F.2d 153, 155 (11th Cir. 1992).

notified of the claim, the suit was filed, and served, and its counsel - - who later represented Respondent - - had filed an Answer. The District Court had no difficulty concluding that Respondent Costa Crociere likewise had timely notice and would suffer no prejudice (14a-18a).

The third, and critical, requirement is that the added Defendant, Respondent, must have, "kn[own] or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity". The meaning of the phrase, "mistake concerning the proper party's identity", in Rule 15(c) frames the issue.

More particularly, this case presents the issue of what constitutes a "mistake concerning the proper party's identity" which, when corrected, "relates back" for limitation purposes. Here, the "mistake", as explained by Petitioner's counsel,[3] was an initial misunderstanding over which of the many "Costa" entities was the name of the ship operator responsible for Ms. Krupski's injuries. On the basis of the designation of Costa Cruise in the travel documents (25a), the name on the letter from the claim representative (24a), and his determination that Costa Cruise was the name of the only entity registered in Florida, where the voyage began, he concluded that

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[3] There was no evidentiary hearing or similar proceeding in the trial court. The only explanation of record is that found in the Responses filed by Petitioner in the District Court in response to Summary Judgment or dismissal motions (DE 26, DE 47).

Costa Cruise was the name of the "proper party".[4] Whether that is a "mistake concerning the proper party's identity" within the meaning of the Rule, or whether the "imputed knowledge" of Respondent's identity (because named as the "carrier" on one page of the eleven page Passenger Ticket), is what this case is all about.

B. The Circuit Courts of Appeal Are Divided On The Meaning And Application Of The Term, "Mistake Concerning The Proper Party's Identity"

On a broader level, the decision below underscores the differences between the Circuits in interpreting the critical phrase. As a result, the same Federal Rule of Civil Procedure means something different in Florida than what it means in California, New York, or Ohio. The ability to maintain a cause of action depends on the vagaries of where suit is filed.

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[4] The original Complaint sued Costa Cruise in the belief that it was the "Costa" entity which operated the Costa Magica and owed the legal duties arising from the status of cruise ship operator. Plaintiff sued Costa Cruise in the belief that the Costa Magica was "Defendant's vessel" (DE 1, Complaint, ¶ 6). She alleged that Costa Cruise "owned and operated" the vessel (DE 1, Complaint, ¶ 10). The suit alleged that Costa Cruise was the invitor with the premises liability obligations arising from that role (DE 1, Complaint, ¶ 14). The Complaint alleged that Costa Cruise was negligent in its capacity as vessel operator (DE 1, Complaint, ¶¶ 15, 16, 17, 18). Plainly Plaintiff sought to sue the operator of the Costa Magica and believed Costa Cruise was the name of the "Costa" entity which had that status.

Rule 15(c) is a part of a compilation of Federal Rules of Civil Procedure, the very first of which [Fed. R. Civ. P. 1] expresses the overriding philosophy:

> "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

The overriding commitment to an outcome based on the substantive merits is expressed in the "relation back" provisions of Rule 15. The Rule is to be liberally construed to avoid the undue forfeiture of meritorious claims. *Woods v. Indiana Univ.*, 996 F.2d 880, 883 (7th Cir. 1993). In the specific context of amendments adding a new party, Rule 15(c)(1)(C) permits amendments after the limitation period, so long as the purpose behind limitation statutes is preserved. *Goldman, supra.*

It is a truism of modern business that enterprises are often conducted by a number of related corporations, often sharing very similar names, performing discrete functions, 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 use of multiple names seems commonplace in the maritime industry. The application of Rule 15 "relation back" to vessel operators is illustrated by

Suppa v. Costa Crociere S.p.A., No. 07-60256-CV, 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, and *Korn v. Royal Carribean Cruise Line, Inc.*, 724 F.2d 1397 (9th Cir. 1984). In both cases, the Court held that an amended suit against the cruise ship operator related back to the earlier suit against a related, similarly named, sales agent. The same result was reached in *GF Company v. Pan Ocean Shipping Co. Ltd.*, 23 F.3d 1498 (9th Cir. 1994), a suit initially brought against the agent for a shipping company and amended to add the shipping company itself.

The plain language of the Rule simply requires "a mistake concerning the proper party's identity". It does not limit the kinds of "mistakes" which can result in mis-identification. So long as there is in fact "a mistake concerning the proper party's identity" - - whatever the nature of the "mistake" - - that precondition to relation back is satisfied. The text of the Rule does not support the "imputed knowledge" rationale of the Eleventh Circuit.

At its core, "a mistake concerning the proper party's identity" occurs through misnomer, as when the initial Complaint contains a technical mis-identification of the defendant's name, or names the incorrect one of similar sounding related entities. *Golden v. PraxAir, Inc., supra; Korn, supra; Roberts v. Michaels*, 219 F.3d 775, 778 (8th Cir. 2000).

However, in view of the breadth of the unlimited term, "mistake", the treatise authorities and sister Circuits recognize that the term is to be defined and

applied broadly, and liberally. While the term "mistake" does not apply to a conscious and deliberate choice not to sue a party initially, it is to be applied to various types of "mistake". As explained in 3-15 Moore's Federal Practice - Civil § 15.19[d]:

> "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, therefore has notice of the mistake.
>
> In contrast, a conscious choice to sue one party and not another does not constitute a mistake and is not a basis for relation back. 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.' "

* * *

"The First Circuit distinguished a prior precedent in which it had found that there was no mistake in identity when the plaintiff 'merely lacked knowledge of the proper party,' noting that in the earlier case the plaintiff sued the wrong party because of an erroneous theory of liability, not because of any mistake as to the identity of the defendant. District courts in other circuits have followed the First Circuit's approach and have taken the view that a lack of knowledge of the proper defendant may constitute a 'mistake' under Rule 15(c)(1)(C)(ii) even if the lack of knowledge results from an absence of diligence.

The Fourth Circuit has also taken a broad view of the 'mistake' requirement, reversing when the district court focused unnecessarily on the type of mistake rather than on the relevant considerations - - whether the new party received notice and whether the new party would be prejudiced if relation back were allowed. The type of mistake, in this view, is relevant to the extent it explains the type of notice the new party had.

The courts that take a broad view of the mistake requirement have the better-reasoned

> approach. A court should not limit its findings to 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 know that it was an intended party." (footnotes omitted).

The case law from other Circuits has likewise viewed the term "mistake" as excluding an initial conscious choice not to sue, but broadly covering a variety of actual "mistakes". *Leonard v. Parry*, 219 F.3d 25, 29 (1st Cir. 2000) (error in identifying the operator of the vehicle); *Goldman v. PraxAir, Inc*, 494 F.3d at 470 (change in name of defendant) ("the text of Rule 15(c)(3) does not support . . . parsing of the 'mistake' language"); *Roberts, supra* ("the principle [of relation back] has been applied more broadly [than classic misnomer]"); *Taliferro v. Costello,* 467 F.Supp. 33 (E.D. Pa., 1979); *Koal Indus. Corp. v. Ashland S.A.,* 808 F.Supp. 1143 (S.D. N.Y. 1992).

In this case, the courts below have posited that prior knowledge of the existence of the added Defendant necessarily shows the lack of "mistake". The **actual** principle is that a **deliberate choice** not to sue is not a "mistake", and the failure to add the new defendant within the initial limitation period, despite knowledge of its identity and role **during the**

limitation period,[5] is **circumstantial evidence** that the failure to sue within the limitation period was a conscious choice rather than a "mistake". *Kilkenny v. Arco Marine, Inc.*, 800 F.3d 853, 856-857 (9th Cir. 1986); *Keller v. United States*, 667 F.Supp. 1351, 1357 (S.D. Cal. 1987).

Under the approach of other Circuits, the naming of Costa Cruise, rather than Respondent Costa Crociere, in the initial Complaint was a "mistake" within the meaning of the Rule, not a deliberate choice to forego suit against it. There is no conceivable "tactical" benefit to foregoing suit against the vessel operator. It was simply a mistake in determining the name of the "Costa" entity which operated the Costa Magica. The initial Complaint reflects Petitioner's intent to sue the Costa operator of the Costa Magica. She was simply mistaken as to the name of that entity. As the cases from other Circuits make clear, where the Complaint manifests a desire to sue the entity occupying a certain status, a mistake as to the name of the company occupying that status is a "mistake" for which "relation back" is allowed by Rule 15. *Korn* (mistake as to the operator of a cruise ship); *GF Co. v.*

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[5] The District Court relied on the "knowledge" obtained by Petitioner from the Answer filed by Costa Cruise **after the limitation period had already expired**. The lapse in logic which occurs when **post-suit** information is considered to provide **pre-suit knowledge** 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."

Pan Ocean Shipping Co., 23 F.3d 1498, 1503-1504 (9th Cir. 1994) (mistake as to the operator of a cargo vessel); *Leonard v. Parry, supra* (mistake as to the operator of an automobile); *Chumery v. U.S. Repeating Arms Co.*, 196 F.R.D. 410 (D.C. Kan. 2000) (mistake as to the name of the manufacturer); *Goldman* (intent to sue company occupying a status may be discerned from the Complaint).

The "imputed" "knowledge" analysis of the Eleventh Circuit essentially scuttled the case because Petitioner's counsel did not notice the reference to Respondent Costa Crociere as "carrier" in the Passenger Ticket. The fact that an error was made does not belie the existence of a "mistake"; it is the very essence of what a "mistake" is. As the *Leonard* Court explained (219 F.3d at 29):

> "Virtually by definition, every mistake involves an element of negligence, carelessness, or fault - - and the 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 that were serendipitous. The examples assembled by the advisory committee - - e.g., the naming of a nonexistent federal agency or a retired officer, *see Fed. R. Civ. P. 15* advisory committee's note (1966 Amendment) - - confirm this construction. The drafters believed that such errors would trigger *Rule 15 (c)(3)* notwithstanding that reasonable diligence almost always would prevent them from occurring."

Even the existence of carelessness or negligence by Plaintiff or counsel does not undermine the availability of "relation back"; the issue is whether the failure to name was a "mistake" or deliberate omission, not whether the failure was blameworthy. *Centuori v. Experian Information Solutions, Inc.*, 329 F.Supp.2d 1133, 1139 (DC Ariz. 2004).

In the final analysis, the ruling below adopts an idiosyncratic view of Rule 15(c)(1)(C)'s remedial "relation back" language. That approach clashes with the view of other Circuits and the intent behind the Rule. This Court should review that aberrant approach to assure uniform treatment of a nationwide Rule.

C. The Alternative Rationale Of The Eleventh Circuit Is Untenable

The Eleventh Circuit affirmed, even "assuming that [Petitioner] first learned of Costa Crocier's identity from Costa Cruise's Answer" filed after the one year limitation period had already expired (7a). It did so because Petitioner delayed filing her Amended Complaint to name Costa Crociere after receipt of this information (7a). That alternative rationale is wholly untenable, and simply emphasizes why the Appeals Court's "mistake" analysis is outcome-determinative.

"Delay" might have been a consideration in the District Court decision whether to allow leave to amend to add Respondent as a defendant, but the Court **did** permit amendment (DE 30). By the time of amendment, the limitation period had already expired, making the Rule 15 "relation back" question critical. The "notice" feature of that Rule had **already** been

satisfied, through the initial suit against Costa Cruise, even before its Answer was filed. Just as it is illogical to consider post-suit information in assessing pre-suit knowledge (*Leonard, supra*), it is illogical to consider post-suit delay in amendment as probative of whether the failure to sue the added defendant initially was a "mistake concerning the proper party's identity".

WHEREFORE Petitioner WANDA KRUPSKI prays that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: September 15, 2009