No.

# In The
# Supreme Court of the United States

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MITCHELL MIORELLI and DANNAMARIE PROVOST,
*Petitioners,*
v.

ROYAL CARRIBEAN CRUISE LINE, LTD.,
*Respondent.*

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**On Petition For A Writ Of Certiorari To The Eleventh Circuit of Appeals**

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## PETITION FOR WRIT OF CERTIORARI

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March 11, 2019

## QUESTIONS PRESENTED

1. Whether Summary Judgment Was Proper Where the Respondent Royal Caribbean Cruise Line, LTD. Moved To Dismiss Before Filing An Answer, No Discovery Had Taken Place, And There Were Disputed Issues Of Material Fact?

## PARTIES TO THE PROCEEDING

a. Patrick Michael Megaro – Attorney for Petitioners

b. Sam Miorelli – former Attorney for Petitioners

c. Mitchell Miorelli – Petitioner

d. DannaMarie Provost – Petitioner

e. Royal Caribbean Cruise Line LTD – Respondent

f. Markell Hall Jr – Defendant (not an interested party in this appeal)

g. Jacques Clay Williams – Defendant (not an interested party in this appeal)

h. Angelo Williams Jr – Defendant (not an interested party in this appeal)

i. Nicholas Allen Applin – Attorney for Defendant

j. Darren W. Friedman – Attorney for Defendant

k. Catherine J. MacIvor – Attorney for Defendant

l. Honorable Martha G. Cooke – District Court judge

m. Honorable Jonathan Goodman – US Magistrate Judge

n. Catherine J. MacIvor, Esq. – attorney for Respondent

o. Darren Freidman, Esq. – attorney for Respondent

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners' Mitchell Miorelli and DannaMarie Provost respectfully petition for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

## OPINIONS BELOW

The December 10, 2018 opinion of the Eleventh Circuit Court of Appeals, whose judgment herein are sought to be reviewed, are not reported, and are reprinted in the separate Appendix to this Petition, App. 1-13.

## STATEMENT OF JURISDICTION

This Petition is filed within 90 days of the December 10, 2018 order of the Eleventh Circuit Court of Appeals. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## RELEVANT CONSTITUTIONAL PROVISION

Article III, Section 2 of the United States Constitution empowers "all cases of admiralty and maritime jurisdiction to be heard by the federal judiciary. Rule 56, Federal Rules of Civil Procedure.

## STATEMENT OF THE CASE

Petitioner commenced suit in the United States District Court, Southern District of Florida on July 27, 2017, alleging claims for assault, battery, and negligence. (App. 1-13). Respondent Royal Caribbean Cruise Line, Ltd. filed a pre-answer motion to dismiss and/or a motion for final summary judgment on

August 29, 2017. (App. 1-13). The remaining Defendants have never appeared in this action or otherwise answered the Complaint.

On February 6, 2018, the District Court denied the motion to dismiss. (App. 1-13). However, the District Court converted the motion into a motion for summary judgment and directed the Petitioners to respond with affidavits or other material. (App. 1-13). Petitioners filed the same on February 14, 2018. (App. 1-13).

Oral argument was held on the motion on March 28, 2018. (App. 18-33). Thereafter, the District Court granted the motion for summary judgment and entered a final judgment dismissing the action in its entirety. (App. 18-33). Petitioners filed a notice of appeal on April 18, 2018. (App. 1-13).

On November 22, 2015, Mitchell Miorelli and his then-fiancé DannaMarie Provost (now known as DannaMarie Miorelli) embarked on a cruise with the extended Miorelli family. (App. 1-13). The vessel they rode, Allure of the Seas, was owned and operated by Royal Caribbean Cruise Line, Ltd. and it departed from Fort Lauderdale, Florida. The cruise was scheduled for 7 days. This trip was an annual family vacation during the Thanksgiving weekend, during which the Miorelli family would spend together. Unfortunately, this particular cruise was the last time the Petitioners ever went on an annual cruise as a family, as a result of the subject incident.

The tickets were purchased for Petitioners by Luke Miorelli and was done through a travel agency named Vacations To Go. (App. 1-13). Neither Petitioner received the tickets nor any of the subject terms on the tickets. The terms of the ticket were not provided to either of the Petitioners.

On the third day of the cruise, November 25, 2015 was in international waters poised to dock in St. Thomas, Virgin Islands the next day. (App. 1-13). Throughout that day, as with all days spent at sea, passengers were engaged in many activities, many of which included drinking alcohol. As with most days at sea, the crew was somewhat aggressive in selling alcoholic beverages to the passengers by constantly approaching people and promoting drink specials.

During the evening, Petitioners went to dinner with the family. After dinner, Petitioners changed their clothing, socialized with family until approximately midnight. At this time, they attended a scheduled dance party in the Solarium on Deck 16 and were accompanied by Sam Miorelli (Petitioner's brother), and his domestic partner. There were two entrances to the area where the dance floor and the bar were situated – one at the rear and one in the front. Security guards were stationed at each entrance. The rear entrance was roped off and inaccessible to the general public. The front entrance had at least one security guard posted to check identification to ensure any entrants were of legally drinking age because alcohol was served. In addition to the dance floor, there was a DJ booth staffed by a DJ, and a bar staffed by at least three bartenders.

Petitioners' party entered from the rear entrance. Initially, the security guard informed them this was not allow, but subsequently changed his mind allowed them to enter from the rear and failed to check their identification. Upon entering, Petitioners' noticed the decorations throughout the interior of the Solarium as these decorations contrasted with the previous night. The decorations and drapes were there to set the theme of that night's event.

Both Petitioners danced on the dance floor but due to light attendance, decided to leave after approximately fifteen minutes. Sam Miorelli and his partner decided to stay. As Mitchell Miorelli left with his wife, they were stopped as one of the Co-Defendants confronted them and attempted to lift DannaMarie Provost's skirt. The Co-Defendant became aggressive and threatening and started shouting "You don't want none of this, you don't want none of this."

DannaMarie Provost shielded herself behind Mitchell Miorelli, and they attempted to back away from the Defendant, who continued to shout threats and pursue them. The other people on the dance floor stopped dancing and began to watch the confrontation as Petitioners tried to leave the club. The DJ stopped the music, and the shouted threats continued as Petitioners passed the DJ booth, situated adjacent to the front entrance.

The three Co-Defendants then simultaneously attacked Mitchell Miorelli in full view of the DJ booth,

the bar, and just a few feet away from the front entrance and the security guard there. DannaMarie Provost shouted for help and attempted to intervene. Miorelli was tackled and pushed through the stage equipment next to the DJ booth, landed on the ground, and was battered by all three Co-Defendants. The attack lasted several minutes, in full view of the security guard on only ended at the intervention of other passengers. Petitioners then left the Solarium and were approached for the first time by security personnel.

Miorelli was visibly injured, bleeding, his clothing tattered, and was immediately taken to the infirmary for medical attention. Petitioners were taken through crew quarters, during which time several other crew members stopped to laugh and point at them. At no point in time did any of those crew members offer them any aid or assistance. Miorelli was administered first aid at the infirmary, and given conflicting diagnoses of his injuries, while crew members attempted to minimize the situation, telling him it was "no big deal." At some point Sam Miorelli arrived at the medical clinic and asked to see Mitch Miorelli and identified himself as an attorney. Immediately, additional security personnel responded with a different attitude.

Petitioners then gave a statement, escorted to their cabin where they were confined under guard for twenty-four hours, and not permitted to leave their cabin. Petitioners were cut off from their family during their confinement. Petitioners complained about their treatment and the next day repeated their statements

to a law enforcement officer in the Virgin Islands when the ship docked. (App. 1-13). Petitioners learned that two of the three Co-Defendants had been removed from the ship in the Virgin Islands, but the third was permitted to stay on. That individual was later identified as Markell Thomas, Jr. For the remainder of the cruise, Miorelli spent his time nursing his injuries in seclusion due to fear. Those injuries included a concussion and broken cartilage in his nose, requiring continuing medical treatment well after the conclusion of the cruise. When the cruise ended, and the ship returned to Fort Lauderdale, Petitioners were met by American law enforcement agents, including Broward County Sheriffs, and gave statements before disembarking the ship. (App. 1-13). An investigation was commenced by the Broward County Sheriff and Co-Defendants were charged as a result of this investigation.

Petitioners later filed a claim with Royal Caribbean, a self-insured entity, who assigned a claims adjustor. The adjustor requested various pieces of information from Petitioners' counsel who complied with the requests. (App. 1-13). Counsel made several attempts to negotiate with the adjustor, who broke off communication without explanation. (App. 1-13). After hearing nothing from the adjustor, Petitioners commenced the instant action, relying on both diversity jurisdiction and maritime jurisdiction. (App. 1-13). None of the individual Co-Defendants appeared in the action, despite being served.

Royal Caribbean filed a pre-answer motion to dismiss, or in the alternative, a motion for summary

judgment. (App. 1-13). The thrust of the motion was that Petitioners were time-barred from commencing the action as a result of a statute of limitations limitation provision on the ticket. (App. 1-13). Petitioners opposed the motion, arguing that issues of fact precluded both a motion to dismiss and a motion for summary judgment, and the District Court denied the motion to dismiss but permitted Petitioners to file affidavits and other material in response to the motion for summary judgment. (App. 1-13, 18-33).

Petitioners filed a subsequent response with affidavits that set forth facts regarding the case, putting at issue whether Respondent could properly claim a statute of limitations defense and raising equitable tolling as a defense in the alternative. (App. 1-13). However, the District Court rejected the arguments, ruling from the bench that there was no evidence to support an equitable tolling defense, and that there was no request from Petitioners' counsel to the claims adjustor to toll the statute of limitations, implicitly holding that the statute of limitations provision applied. (App. 1-13). Petitioners appealed from that order to the Eleventh Circuit Court of Appeals. (App. 1-13). Petitioners were denied by the Eleventh Circuit Court of Appeals and the motion for final summary judgment was affirmed on December 10, 2018. (App. 1-13). This timely appeal follows.

## REASONS FOR GRANTING THE WRIT

### SUMMARY JUDGMENT WAS IMPROPER IN FAVOR OF THE RESPONDENT WHERE THERE WERE SHARPLY DISPUTED ISSUES OF MATERIAL FACT AND WHERE THE MOTION WAS MADE BEFORE AN ANSWER WAS FILED OR ANY DISCOVERY EXCHANGED.

A party moving for summary judgment must establish that the undisputed facts entitle it to judgment as a matter of law. However, "[u]nder summary judgment, a conclusion may not be established as a matter of law unless 'no genuine issue as to any material fact' exists." Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586–587, (1986). (citing Fed. R. Civ. P. 56(c)). See United States v. Diebold, Inc., 369 U.S. 654, 655, (1962).

This Court has clearly held that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Thus, "evidence of the non-movant is to be believed" with all inferences being drawn in Petitioners' favor. Id.

A District Court may not even credit evidence favoring the moving party "unless that evidence is 'uncontradicted and unimpeached, at least to the extent that [the] evidence comes from disinterested witnesses.'" Kidd v. Mando Am. Corp., 731 F.3d 1196,

1205 (11th Cir. 2013) (citing Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 151 (2000)).

This Court reviews an order granting summary judgment in the light most favorable to the non-moving party. White v. Pauly, 137 S.Ct. 548, 550 (2017). See Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639 (2002).

### *A. The District Court's Reliance Upon Documents Outside of the Four Corners of the Complaint Was Erroneous*

For purposes of a motion to dismiss, a district court must accept the allegations of the complaint as true. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 589 (2007). A motion to dismiss a complaint should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Ashcroft v. Iqbal, 556 U.S. 662, 659 (2009). The complaint must be viewed in the light most favorable to the plaintiff. Twombly, 550 U.S. at 589.

Thus, dismissal of a complaint or a portion thereof is only appropriate when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action. Id.

In deciding a motion to dismiss, a court may only examine the four corners of the complaint and not matters outside the complaint without converting the motion to dismiss to a motion for summary judgment. Fed.R.Civ.P. 12(b)(6); See also Johnson v. Federal

Home Loan Mortg. Corp., 793 F .3d 1005, 1007 (9th Cir. 2015); Crowell v. Morgan Stanley Dean Witter Servs., Co., Inc., 87 F.Supp.2d 1287, 1290 (S.D. Fla. 2000).

The exception to this rule is where the complaint contains internal references to other documents, or the plaintiff attaches documents to the Complaint, and the facts concerning those outside documents are undisputed. Bickley v. Caremark Rx, Inc., 461 F.3d 1325, 1329 n. 7 (11th Cir. 2006) (permitting court to consider defendant's exhibits only if "the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim"); Hoffman–Pugh v. Ramsey, 312 F.3d 1222, 1225 (11th Cir.2002) (same); see also Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1284 (11th Cir. 2007) (considering materials beyond complaint and its exhibits where plaintiff referred to document in complaint, document was central to claim, contents were undisputed, and defendant attached document to motion to dismiss).

If a motion to dismiss presents matters outside the pleadings and the court does not exclude these matters, the motion "must be treated as one for summary judgment under Rule 56." Fed.R.Civ.P. 12(d). Carter v. Stanton, 405 U.S. 669, 671 (1972); See Sellers v. M.C. Floor Crafters, Inc., 842 F.2d 639, 642 (2d Cir. 1988) ("To consider matters extrinsic to the pleadings, the court must convert defendants' motion for judgment on the pleadings into a motion for summary judgment, and determine the motion on the basis of the admissible evidence submitted by the

parties."); see also Berthold Types Ltd. v. Adobe Systems, Inc., 242 F.3d 772, 776 (7th Cir. 2001) ("A motion to dismiss must be treated as a motion for summary judgment if the judge considers matters outside the complaint, but the judge may elect to treat a motion as what it purports to be and disregard the additional papers.").

Once a motion to dismiss is converted to a motion for summary judgment, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Id.; see also Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997).

Here, the Complaint did not refer to any extrinsic documents, nor did Respondents attach any other documents to the Complaint when it was filed. It was Royal Caribbean that asked the District Court to consider evidence outside of the pleadings. Accordingly, the District Court was then required to convert the motion to a motion for summary judgment (which it did), and permit discovery (which it did not).

The record is clear that the District Court decided the case and entered final summary judgment on the basis of the outside documents that Royal Caribbean relied upon, and which Petitioners' specifically disputed. Thus, the consideration of the passenger-ticket contract as evidence was inappropriate.

### *B. Neither the District Court nor the Eleventh Circuit Followed the Requirements of Rule 56(d) of the Federal Rules of Civil Procedure in Entering Summary Judgment*

Rule 56(d) of the Federal Rules of Civil Procedure provides a mechanism for relief where a party faced with a summary judgment motion does not have the facts necessary to respond to it. The rule provides:

> (d) When Facts Are Unavailable to the Nonmovant
> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
> (1) defer considering the motion or deny it;
> (2) allow time to obtain affidavits or declarations or to take discovery; or
> (3) issue any other appropriate order.

This Court has held that if a district court converts a motion to dismiss under Rule 12 to a motion for summary judgment under Rule 56, an opportunity for discovery is required:

> After all, "if [a district court] considers materials outside of the complaint, [it] must [generally] convert [a] motion to dismiss into a summary judgment motion." SFM Holdings, Ltd. v. Banc of Am. Sec., LLC, 600 F.3d 1334, 1337 (11th

> Cir.2010). Critically, such a conversion requires notice to the parties and an opportunity for mutual discovery. See Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir.2002).

Adinolfe v. United Technologies Corp., 768 F.3d 1161, 1168 (11th Cir. 2014) (emphasis added).

Here, Petitioners argued to the District Court there are critical pieces of discovery that are missing that are in the exclusive possession of Royal Caribbean and highly relevant to Petitioners' claims:

> a. After the subject incident, Respondent took numerous written, and likely audio/video recorded, statements, from numerous witnesses, including Petitioners and the remaining Defendants. As well as Mitch Miorelli's medical record after treatment. Petitioners lack all of those statements at this point.
>
> b. Respondent has video surveillance of the common areas on Deck 16 and the location where the incident took place. This video will depict where security was posted prior to, and during, the subject incident, and will illustrate what efforts, if any, were made to stop or prevent the incident.

c. Respondent maintains incident reports which will list the names of other passengers and crew members who were witnesses to the incident and contain other relevant information concerning the subject incident. Combined with passenger pedigree information, this material will result in the names of additional witnesses who may be deposed or contacted to give their observations of the incident and conditions.

d. Respondent maintains electronically stored information concerning the identities of the other passengers who were at the Solarium on Deck 16 of the Allure of the Seas where the incident occurred, who either had their identification cards electronically checked by security to gain entrance, and who purchased drinks at the bar using their ship-issued identification/charge cards. This information will result in the identification of witnesses.

e. Respondent maintains employees logs and duty assignments of crew members who were assigned to work at various areas of the ship, including the Solarium on Deck 16 of the Allure of the Seas. This information will result in the identification of witnesses to the incident and more importantly, to the security

conditions existing at the time of the incident.

f. Petitioner Mitchell Miorelli was treated by medical personnel of Royal Caribbean on various occasions after the subject incident. Petitioners do not have those records.

g. Respondent maintains the records of purchases made by the three individual Co-Defendants using their ship-issued identification/charge cards, which would include purchases of alcoholic beverages prior the subject incident. Petitioner does not have access to those records, which would establish whether Royal Caribbean continued to serve the individual Co-Defendants alcohol.

Given the limited information made available to the Petitioners by the State Attorney for the Seventeenth Judicial District, Petitioners have identified several witnesses who were crewmembers of Royal Caribbean and were directly in a position to prevent the incident, stop the incident from escalating or continuing, and to witness the incident. Those witnesses are:

a. Michael Zaglin (DJ)
b. Borche Stanchev (security)
c. Jaime Celajes (security)
d. Madhav Vaidya (security)
e. Lennox Fitzroy Bobb (server)

f. Amy Tinasas (security)

Upon information and belief, there are additional witnesses, as set forth above. Moreover, had they been given the opportunity, Petitioners intended to depose these witnesses in order to obtain testimony regarding their observations concerning the incident and the conditions precedent, which counsel believes will support Petitioners' claims.

The claim against Royal Caribbean involves a claim of negligence due the actions, or inaction, of its employees. The law is settled that common law principles of negligence and strict liability apply in maritime cases, it would not be a stretch that respondent superior be applicable as well. East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 863 (1986); See Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225 (11th Cir. 2014).

Petitioners alleged, and believe they can prove, that Royal Caribbean owed a duty to Petitioners to provide security on the decks of M/S Allure of The Seas. Petitioners alleged, and believe they can prove, that Royal Caribbean failed to take reasonable precautions and safety measures for the safety of the passengers, including, but not limited to, having an adequate number of properly trained security personnel on board for the protection of Petitioners. Petitioners alleged, and believe they can prove, that Royal Caribbean breached this duty by failing to exercise reasonable care under the circumstances and Royal Caribbean's breach of this duty caused harm to Petitioners.

Preliminary investigation, without the aid of discovery, has produced information that Royal Caribbean failed to provide adequate security for Petitioners and failed to prevent this gang assault on Petitioners after it had begun. If proven, this would establish negligence on the part of Royal Caribbean.

Accordingly, because the District Court did not afford Petitioners the opportunity to conduct discovery on this issue, as well as the issue of timeliness, summary judgment was premature. This Court should reverse as a result.

### *C. The Lower Court Erroneously Concluded That Petitioners' Claims Were Time Barred and That Equitable Tolling Did Not Apply*

Royal Caribbean moved to dismiss the claims asserted against it in the Complaint based upon a time limitations defense pursuant to Rule 56 of the Federal Rules of Civil Procedure. Because the District Court entered final summary judgment, this Court reviews the order in light most favorable to the non-moving party. White v. Pauly, 137 S.Ct. 548, 550 (2017).

It is well-established that a ticket for passage on a cruise ship constitutes a maritime contract and is governed by United States maritime law. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). The Supreme Court has held that a clause in a form passenger ticket contract is enforceable when (1) the terms withstand judicial scrutiny as to reasonableness

and fundamental fairness and (2) the clause is "reasonably communicated" to the passenger by the carrier. Shute, 499 U.S. at 590. Under general maritime law, a term or condition of a cruise ticket contract is enforceable once it is reasonably communicated to the passenger. Id. at 595.

The test involves a two-pronged analysis of: (1) the physical characteristics of the clause in question; and (2) whether the plaintiff had the ability to become meaningfully informed of the contract terms. Estate of Myhra v. Royal Caribbean Cruises, Ltd., 695 F.3d 1233, 1244 (11th Cir. 2012).

The time limitation was not reasonably communicated to Petitioners. The decisions of other courts provide instruction as to what constitutes reasonable communication. Thompson v. Ulysses Cruises Inc., 812 F. Supp. 900 (S.D. Ind. 1993) (notice was conspicuous in that it was printed in highlighted or contrasting type in the lower right-hand corner); Dempsey v. Norwegian Cruise Line, 972 F.2d 998 (9th Cir. 1992)(ticket contained the notation "Important Notice" in a bright red box at the bottom right-hand corner of each of the first four pages); Coleman v. Norwegian Cruise Lines, 753 F. Supp. 1490, 1991 A.M.C. 1904 (W.D. Mo. 1991) (the notice was conspicuous because it was prefaced by the words "IMPORTANT NOTICE" and was printed in white ink within a red box); King v. Eastern Cruise Lines, 722 F. Supp. 709, 1989 A.M.C. 1744 (S.D. Ala. 1989) (term and condition in question is eye-catching because of its bold, all-capital printing).

These cases are distinguishable from the case at hand. The notice allegedly provided to Petitioners was not conspicuous. Neither was it highlighted, in boldface, nor in contrasting type. Further, both Petitioners submitted affidavits, which were undisputed, that they neither purchased nor received copies of the tickets, leaving a genuine question as to whether they could be bound by "notice" of something they never had. Accordingly, the District Court's decision to the contrary was erroneous.

### *D. The Evidence of Record Supports a Finding of Equitable Tolling*

Equitable tolling saves a cause of action otherwise barred by a time limitation. Justice v. United States, 6 F.3d 1474, 1478 (11th Cir. 1993); Booth v. Carnival Corp., 522 F.3d 1148, 1150 (11th Cir. 2008); see also David D. Doran, Comment, Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis, 64 Wash.L.Rev. 681, 682 (1989) ("Equitable tolling, like all equitable remedies, emerged as the 'equity courts' response to injustices resulting from decisions of the 'law courts' in cases involving inequitable conduct."). "Thus, courts, acting in their equitable capacity, will toll statutes of limitations, but only upon finding an inequitable event that prevented plaintiff's timely action." Justice, 6 F.3d at 1479 (quoting Doran, Comment, 64 Wash.L.Rev. at 682.). "Equitable tolling of a limitations period… is permissible under certain limited circumstances, e.g., when there is evidence that a party has diligently pursued a claim." See Racca

v. Celebrity Cruises, Inc., 606 F.Supp.2d 1373, 1375 (S.D.F.L. 2009).

The period of limitations was tolled by Petitioners' negotiations with Royal Caribbean in order to avoid litigation of their claims. Petitioners' diligent efforts in assisting in the prosecution of the individual Defendants and their on-going negotiations with Royal Caribbean was more than sufficient to equitably toll the one-year contractual limitation period.

On one hand, time limitations relieve courts and defendants of "the burden of trying stale claims when a plaintiff has slept on his rights." Justice, 6 F.3d at 1479 (citing Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1965)). On the other hand, these public policy considerations "may be outweighed when the interests of justice require that a plaintiff's rights be vindicated." Id. The interests of justice are most often aligned with the plaintiff when the defendant misleads her into allowing the statutory period to lapse. Id. (citing Irwin v. Veterans Administration, 498 U.S. 89, 96 (1990).

Royal Caribbean cited to Racca v. Celebrity Cruises, Inc., 606 F.Supp.2d 1373 (S.D.F.L. 2009) in its motion to dismiss. Racca is easily distinguishable from this case. In Racca, the plaintiff was injured on April 30, 2006 when he fell while a passenger on one of defendant's vessels. Id. at 1374. Suit commenced on April 22, 2008, and the defendant was served on May 1, 2008. Id. The Southern District of Florida held that passenger ticket limitations period was not tolled

because the plaintiff failed to diligently pursue his claim. Id. at 1376. The court noted that the plaintiff did not retain counsel until July 2007, and there was no record evidence that the plaintiff provided the defendant with written notice of his claim at any time prior to the filing of this lawsuit.

Here, in contrast to Racca, Petitioners placed Royal Caribbean on notice immediately after the assault and battery and sent a warning not to spoil evidence involving the incident. Royal Caribbean responded the following month instructing Petitioners to contact local law enforcement to proceed with the action even though the Broward County Sheriff's Office boarded the vessel on November 29, 2015.

Despite letters to Royal Caribbean sent throughout 2016, Royal Caribbean stated that it did not begin to revisit Petitioners' claims until roughly a year after the incident in a letter dated November 9, 2016. In that same letter, Royal Caribbean promised to reply to any settlement request in an effort to resolve the matter. In response, Petitioners promptly made an additional settlement request with a specified dollar amount. In several letters, Petitioners followed up on Royal Caribbean's failure to reply, as promised by Royal Caribbean.

Further, it cannot be said that Petitioners "slept" on their rights in light of Mitchell Miorelli actively cooperated in the criminal prosecution of the Co-Defendants and actively engaged in settlement negotiations with Respondent Royal Caribbean until early 2017. It was not until the negotiation process

broke down when Petitioners filed suit after it became clear that their efforts to settle were rendered fruitless. Co-Defendant Hall was not even convicted and sentenced until 2017.

Royal Caribbean made no genuine effort to engage in settlement negotiations with Petitioners for the purpose of misleading Petitioners into allowing the contractual period to lapse. For these reasons, the one-year limitation must be tolled, and this Court should reverse and remand for further proceedings on the Complaint.

## CONCLUSION

For the reasons set forth above, the Petitioner respectfully request that this Court reverse the order granting summary judgment in favor of the Respondent and remand this case back to the District Court for further proceedings, together with such other and further relief as this Court may deem just and proper.

Respectfully submitted on this 11th day of March, 2019

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