Case No. 08-20338

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCEANIC EXPLORATION COMPANY and
PETROTIMOR COMPANHIA DE PETROLEOS, S.A.R.L.

Plaintiffs-Appellants

— v. —

PHILLIPS PETROLEUM COMPANY ZOC; PHILLIPS PETROLEUM COMPANY INDONESIA; PHILLIPS PETROLEUM (96-20) INC; PHILLIPS PETROLEUM PRODUCTION INDONESIA INC; PHILLIPS INDONESIA INC; PHILLIPS INTERNATIONAL INVESTMENT INC; CONOCOPHILLIPS AUSTRALIA PTY LTD; CONOCOPHILLIPS AUSTRALIA GAS HOLDINGS PTY LTD; CONOCOPHILLIPS JPDA PTY LTD; CONOCOPHILLIPS PIPELINE AUSTRALIA PTY LTD; CONOCOPHILLIPS STL PTY LTD; CONOCOPHILLIPS WA-248 PTY LTD; CONOCOPHILLIPS (03-12) PTY LTD; CONOCOPHILLIPS (03-13) PTY LTD; CONOCOPHILLIPS (03-16) PTY LTD; CONOCOPHILLIPS (03-19) PTY LTD; CONOCOPHILLIPS (03-20) PTY LTD; CONOCOPHILLIPS (03-21) PTY LTD; CONOCOPHILLIPS CO; CONOCOPHILLIPS; DARWIN LNG PTY LTD; PHILLIPS PETROLEUM CO, ZOC PTY LTD; TOKYO TIMOR SEA, PTY LTD

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF OF DEFENDANTS-APPELLEES CONOCOPHILLIPS AND RELATED ENTITIES

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DEFENDANTS-APPELLEES

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an

interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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ConocoPhillips (03-12) Pty. Ltd.; ConocoPhillips (03-13) Pty. Ltd.; ConocoPhillips (03-16) Pty. Ltd.; ConocoPhillips (03-19) Pty. Ltd.; ConocoPhillips (03-20) Pty. Ltd.; ConocoPhillips (03-21) Pty. Ltd.; ConocoPhillips Company; ConocoPhillips; Darwin LNG Pty. Ltd.; Phillips Petroleum Co., ZOC Pty. Ltd.; Tokyo Timor Sea Resources Pty. Ltd.; Tokyo Timor Sea Resources, Inc.

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e. Does 1 through 50

B. Information called for by F.R.A.P. 26.1(a)

ConocoPhillips, a publicly held company, holds 10% or more of the stock, directly or indirectly, of the following defendants-appellees:

Phillips Petroleum Company ZOC;
Phillips Petroleum Company Indonesia;
Phillips Petroleum (96-20) Inc.;
Phillips Petroleum Production Indonesia Inc.;
Phillips Indonesia Inc.;
Phillips International Investment Inc.;
ConocoPhillips Australia Pty. Ltd.;
ConocoPhillips Australia Gas Holdings Pty. Ltd.;
ConocoPhillips JPDA Pty. Ltd.;
ConocoPhillips Pipeline Australia Pty. Ltd.;
ConocoPhillips STL Pty. Ltd.;
ConocoPhillips WA-248 Pty. Ltd.;
ConocoPhillips (03-12) Pty. Ltd.;
ConocoPhillips (03-13) Pty. Ltd.;
ConocoPhillips (03-16) Pty. Ltd.;
ConocoPhillips (03-19) Pty. Ltd.;
ConocoPhillips (03-20) Pty. Ltd.;
ConocoPhillips (03-21) Pty. Ltd.;
ConocoPhillips Company;
Darwin LNG Pty. Ltd.;
Phillips Petroleum Co., ZOC Pty. Ltd.

Tokyo Gas Co., Ltd., a publicly held company, holds 10% or more of the stock, directly or indirectly, of defendants-appellees Tokyo Timor Sea Resources Pty. Ltd. and Tokyo Timor Sea Resources, Inc.

Tokyo Electric Power Company, Inc., a publicly held company, holds 10% or more of the stock, directly or indirectly, of defendants-appellees Tokyo Timor Sea Resources Pty. Ltd. and Tokyo Timor Sea Resources, Inc.

Eni SpA, a publicly held company, holds 10% or more of the stock, directly or indirectly, of defendant-appellee Darwin LNG Pty. Ltd.

Inpex Corporation, a publicly held company, holds 10% or more of the stock, directly or indirectly, of defendant-appellee Darwin LNG Pty. Ltd.

Santos Ltd., a publicly held company, holds 10% or more of the stock, directly or indirectly, of Darwin LNG Pty. Ltd.

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/s/ John F. Lynch
Attorneys for Defendants-Appellees
ConocoPhillips and related entities

STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellees ConocoPhillips and its subsidiaries believe that, contrary to the position of plaintiffs-appellants that this appeal presents complex issues, the judgment of the Southern District of Texas may be summarily affirmed; nevertheless, the ConocoPhillips parties are perfectly amenable to oral argument.

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Jurisdictional Statement

Oceanic originally filed this case in the United States District Court for the District of Columbia (Sullivan, J.). The case was later transferred pursuant to 28 U.S.C. § 1404 to the Southern District of Texas (Hughes, J.). The District Courts had subject-matter jurisdiction under 28 U.S.C. §§ 1330, 1331 and 1337(a); 18 U.S.C. § 1964(c); 15 U.S.C. § 1121(a); and 28 U.S.C. § 1367(a).

This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 15 U.S.C. § 1121(a) to review the final judgment entered in the Southern District of Texas dismissing Oceanic's claims against all defendants.

Statement of the Issues

1. Was the United States District Court for the Southern District of Texas correct in granting judgment on the pleadings pursuant to Rule 12(c) against Oceanic's claims — RICO, Robinson-Patman Act, unfair competition and intentional interference with prospective economic advantage — where Oceanic's pleading failed to satisfy the requirement of proximate cause in that it failed to allege a direct injury and further failed to establish Oceanic as a direct victim of ConocoPhillips' alleged misconduct?[1]

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[1] "Oceanic" is used herein to refer both to plaintiff-appellant Oceanic Exploration Company and its subsidiary, plaintiff-appellant Petrotimor Companhia de Petroleos, S.A.R.L. "Conoco-Phillips" is used herein to refer to defendant-appellee ConocoPhillips and all of its affiliated defendants-appellees.

2. Was the United States District Court for the District of Columbia correct in having previously dismissed Oceanic's claims against 22 ConocoPhillips subsidiaries on the independent ground of lack of personal jurisdiction?

Statement of the Case

A. Nature of the case

East Timor occupies the eastern portion of the island of Timor, situated northwest of Australia. Historically a Portuguese colony, East Timor was subsequently for years after 1975 occupied and controlled by its neighbor, Indonesia. On May 20, 2002, East Timor became independent.

Oceanic's case, in its current incarnation, paints a lurid picture. In its Second Amended Complaint, Oceanic alleges that in 2002, upon the very day of East Timor's independence, ConocoPhillips supposedly handed $2 million in cash to Mari Alkatiri, the incoming Prime Minister of the newly independent nation, in order to avoid abrogation of oil and gas concessions in an area of the seabed between Australia and East Timor known as the "Timor Gap." Those concessions had been awarded to ConocoPhillips by Australia and Indonesia back in 1991; ConocoPhillips had subsequently discovered major oil and gas deposits in the concessions; and ConocoPhillips had been actively developing those deposits ever since.

The theory of the Second Amended Complaint is that the new East Timor Constitution supposedly vitiated all previously granted concessions and that, but for the bribery scheme, East Timor would have re-opened the concessions for new bidding and Oceanic would have both bid — and won.

ConocoPhillips has categorically denied Oceanic's bribery allegations (Answer ¶¶ 1, 4, 93-94, 99-101, 103, 107 (R5540-41, R5558-62)), and, to say the least, the claims are also highly implausible. *See* pages 15-20, *infra*. But the truth — or more accurately, the complete falsity — of these allegations was not before the Court below and is not before this Court upon this appeal. For, even assuming the truth of these allegations for purposes of the motion (as the District Court did), the legal issues are: (a) whether Oceanic's complaint satisfies the essential element of proximate cause required by its RICO, Robinson-Patman Act, and common-law claims; and (b) whether Oceanic would as a matter of law be deemed a "direct victim" of any such bribery scheme.[2]

The District Court granted judgment on the pleadings in favor of ConocoPhillips, holding that Oceanic's tortuous and highly speculative necessary

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[2] The District of Columbia Court had previously dismissed Lanham Act and unjust enrichment claims of Oceanic on different grounds, and such claims therefore were not before Judge Hughes in the Southern District of Texas. Mem. Op. at 48-50, 53-54 (R5374-76, R5379-80). Oceanic does not challenge the dismissal of those claims upon this appeal. Those claims are in any event barred for the same reasons that bar the remaining claims that were rejected by Judge Hughes. *See* pages 22-56, *infra*.

chain of causation failed to meet the pleading requirement of proximate cause — that theory of causation being that, but for the alleged bribery:

- the government of East Timor would have chosen to abrogate the existing concessions;
- the government of Australia would have gone along with any such abrogation;
- Oceanic would have chosen to bid in such a hypothetical re-opened bidding;
- Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by East Timor and Australia;
- Oceanic would have won the hypothetical bidding; and
- Oceanic would have developed the concessions at a profit.

As shown below, the holding of the Court below was entirely correct: no less than three decisions of the Supreme Court — *Associated General Contractors* v. *California State Council*, 459 U.S. 519 (1983), *Holmes* v. *SIPC*, 503 U.S. 258 (1992), and *Anza* v. *Ideal Steel*, 547 U.S. 451 (2006) — as well as firmly established common law, mandate dismissal for lack of proximate cause in that there is a total absence of the required direct, non-speculative relationship between the claimed wrong and the purported injury and, moreover, Oceanic is not a direct victim of the claimed wrong. The judgment below should be affirmed in all respects.

B. The course of proceedings

Australian action. Although Oceanic has chosen not to mention it in its brief in this Court, the earliest round in this sequence of litigation was a lawsuit that Oceanic commenced in Australia in August 2001. No claim of bribery of East Timorese officialdom was alleged in that lawsuit. Rather, the predicate for Oceanic's asserted rights in the Timor Gap was that Oceanic had received a concession from *Portugal* — back in 1974, just before Portugal gave up its colonial interest in East Timor. *See Petrotimor* v. *Commonwealth*, (2003) 126 F.C.R. 354, 368-69, 2003 WL 259335 (Austl.); Statement of Claim No. 1224/2001, *Petrotimor* v. *Commonwealth* (filed Aug. 21, 2001) (Austl.) (R5929-43). Oceanic, however, did not inform the Australian court in its pleading that Oceanic had previously been formally advised by the Portuguese government that — whatever rights Oceanic might have been granted back in the 1970s — any such rights had long since been terminated.[3]

On April 8, 2002, Oceanic then filed an Amended Statement of Claim in the Australian court reiterating the allegation that it was the current holder of

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[3] Letter of May 30, 2001 from Emilio Aquiles de Oliveira to Charles N. Haas (Attachment 1 to the Notice of Supplemental Authority by Defendant Timor Sea Designated Authority for the Joint Petroleum Development Area, filed Sept. 21, 2004) (R5972-76). The documents referenced in this and the next footnote and the accompanying text were properly before the District Court upon the motion (*see* page 12 n.8, *infra*), and no objection thereto has been raised by Oceanic in this Court.

valid concessions to the Timor Gap gas and oil rights from Portugal. Amended Statement of Claim No. 1224/2001, *Petrotimor* v. *Commonwealth* (filed Apr. 8, 2002) (Austl.) (R5944-68). By this time, the Portuguese government had sent three separate letters notifying Oceanic that its claimed rights in the Timor Gap had been terminated.[4] Yet again, Oceanic did not mention this in its Amended Statement of Claim.

The Australian court dismissed Oceanic's Portuguese concession claims in February 2003, declaring them non-justiciable under Australia's version of the act-of-state doctrine. *Petrotimor* v. *Commonwealth*, 126 F.C.R. 354, 369, 374, 2003 WL 259335 (Austl.). Oceanic initially requested leave to appeal that decision to the High Court of Australia, but then withdrew that request.

The present action. Oceanic thereupon commenced the present litigation in the District Court for the District of Columbia on March 1, 2004 and filed a First Amended Complaint on May 26, 2004. The suit was brought against no less than 24 ConocoPhillips entities, the Timor Sea Designated Authority for the Joint Petroleum Development Area (the Australian/East Timorese authority), the previous Timor Gap Joint Authority for the Zone of Cooperation (the

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[4] Letters of May 30, 2001, October 31, 2001 and March 21, 2002 (Attachments 1-3 to the Notice of Supplemental Authority by Defendant Timor Sea Designated Authority for the Joint Petroleum Development Area, filed Sept. 21, 2004) (R5972-89).

Australian/Indonesian authority), as well as certain Indonesian entities. The First Amended Complaint contained essentially the same allegations of supposed bribery of East Timorese officials — principally Mari Alkatiri — as are asserted in the present Second Amended Complaint. *E.g.*, FAC ¶¶ 176-77, 179, 193-94, 202 (R268-70, R275-76, R279-80). But that First Amended Complaint did not rest upon any link between such claimed bribery and a supposed decision by newly independent East Timor not to re-open bidding for ConocoPhillips' concessions in the Timor Gap, or on any theory that the East Timorese Constitution had "vitiated" ConocoPhillips' interests.

Rather, the First Amended Complaint — like the Australian action before it — rested upon Oceanic's purported rights under a 1974 Portuguese concession. Here again, Oceanic assured the American court that, by virtue of the Portuguese concession, it was the current holder of valid rights in the Timor Gap. FAC ¶¶ 3, 66, 233, 272 (R212, R228-29, R297-98, R307). Again, however, Oceanic made no disclosure of the letters it had long since received from the Portuguese government itself that refute any such claim.[5]

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[5] The same claim of current ownership of an existing, valid concession from Portugal has repeatedly been made by Oceanic in filings with the SEC: filings that — with glaring disregard of Securities Exchange Act Rule 10b-5 — "omit to state [the] material fact" of the Portuguese government's communications to the contrary. *See, e.g.*, Oceanic Form 10-KSB for 2005 (filed March 13, 2006) at 6, 27 (R5998, R6019); Oceanic Form 10-KSB for 2004 (filed March 24, 2005) at 29 (R6065).

Defendants moved to dismiss the First Amended Complaint under Rules 12(b)(1), 12(b)(2) and 12(b)(6). Upon those motions, Judge Emmet G. Sullivan of the District Court in Washington dismissed that complaint in its entirety and granted Oceanic "*one final opportunity* . . . to precisely respond to each and every argument raised by defendants' compelling motions to dismiss." Order dated Feb. 9, 2005 at 1 (emphasis in original) (R4138). Judge Sullivan wrote that he was "troubled by the incongruity of the First Amended Complaint" and informed Oceanic that he would "view with great suspicion any claims emanating from Portugal's colonial concession." *Id.* at 1-2 (R4138-39).

On March 1, 2005, Oceanic then filed its present Second Amended Complaint, which — in an attempt to salvage the action in the face of Judge Sullivan's directive — for the first time was predicated upon the theory that the claimed bribery scheme had operated to preclude the re-opening of bids for the Timor Gap rights and prevented Oceanic from participating in (and winning) such hypothetical re-bidding. SAC ¶ 125 (R4281).

Defendants once again moved to dismiss. The District of Columbia Court granted that motion as to 22 ConocoPhillips subsidiaries and as to the Timor Sea Designated Authority (the Australian/East Timorese entity).[6] Mem. Op. at 12-

[6] Oceanic did not choose to include the Indonesian entities or the Australian/Indonesian Joint Authority as defendants in the Second Amended Complaint.

25, 28-37 (R5338-51, R5354-63). The Court also dismissed Oceanic's Lanham Act and unjust enrichment claims against the ConocoPhillips parent company and its ConocoPhillips Company subsidiary, but based upon the particular grounds of challenge asserted in the District of Columbia Court by way of 12(b)(6) motion — principally a claim of lack of constitutional standing under Article III and the defense of the Act of State doctrine — the Court declined to dismiss Oceanic's RICO and Robinson-Patman Act claims or its common-law claims of unfair competition and intentional interference with prospective economic advantage. Mem. Op. at 25-28, 37-55 (R5351-54, R5363-81).

The standing argument presented by ConocoPhillips in the District of Columbia Court was, however, limited to the threshold issue of Article III standing — *i.e.*, only "injury in fact." *See Plains Commerce Bank* v. *Long Family Land & Cattle*, 128 S. Ct. 2709, 2717 (2008). Accordingly, that dismissal motion in the District of Columbia did not raise the *Associated General Contractors*/*Holmes*/*Anza* Supreme Court holdings with respect to proximate cause and the need for direct injury that were subsequently the subject of ConocoPhillips' post-transfer motion for judgment on the pleadings in the Southern District of Texas. R4502-09, R5267-73. Oceanic's assertion that Judge Hughes granted the Rule 12(c) motion on grounds previously rejected by Judge Sullivan (Oceanic Br. 1) is simply false. *See*, *e.g.*, *Focus on the Family* v. *Pinellas*

Suncoast Transit, 344 F.3d 1263, 1273 (11th Cir. 2003) ("[I]n evaluating Article III's causation (or 'traceability') requirement, we are concerned with something less than the concept of 'proximate cause.'").[7]

ConocoPhillips answered the Second Amended Complaint on October 10, 2006. On February 5, 2007, the United States District Court for the District of Columbia transferred the case to the United States District Court for the Southern District of Texas. Although Oceanic now contends on appeal that the District Court in Texas, post-transfer, should have reconsidered the District of Columbia Court's rulings on personal jurisdiction — suggesting that the ConocoPhillips defendants who were ruled to be outside the jurisdiction of the D.C. Court were properly subject to personal jurisdiction in Texas (Oceanic Br. 23-24, 46, 51-52) — Oceanic never asked the District Court in Texas to revisit those rulings.

The remaining ConocoPhillips defendants moved for judgment on the pleadings under Rule 12(c) on March 13, 2007.

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[7] Moreover, even if Judge Hughes had revisited some prior ruling of the District of Columbia Court — which Judge Hughes did not — he would have been fully entitled to do so. *See Loumar, Inc.* v. *Smith*, 698 F.2d 759, 762 (5th Cir. 1983) ("predecessor judge could always have reconsidered his initial decision so long as the case remained in his court"; transferee court is under no stronger constraint).

C. The disposition below

After full briefing, the Southern District of Texas granted ConocoPhillips' Rule 12(c) motion, issued a ten-page Opinion on Dismissal, and entered judgment in favor of all defendants based upon the combination of its own ruling and the prior dismissals directed by Judge Sullivan in the District of Columbia. Contrary to Oceanic's argument that District Judge Hughes granted the motion "because he did not believe the factual allegations of Oceanic's complaint" (Oceanic Br. 22), the Court made clear in the very opening paragraph of its opinion (and repeatedly thereafter) that — as required by Rule 12(c) — it was *accepting* those allegations for purposes of ruling upon the motion: "The claim fails," the Court held, "because it does not plead facts that, *if true*, would show that its loss was proximately caused by the bribery." Op. at 1 (R6828) (emphasis added); *see* pages 50-53, *infra*.

Statement of Facts[8]

A. Background facts

East Timor, situated some 400 miles northwest of Darwin, Australia, occupies the eastern part of the island of Timor. The western portion of the island is part of Indonesia. (A map demonstrating the relative positions of Australia, East Timor and Indonesia is included in an addendum to this brief.)

Before 1975, East Timor was a Portuguese colony. Portugal, however, gave up its colonial interest that year, and Indonesia promptly invaded. Indonesia then remained in control of East Timor until 1999 when, under United Nations auspices, a referendum was held in which the people of East Timor opted for independence. A UN entity — the United Nations Transitional Administration in East Timor ("UNTAET") — was then empowered to exercise "all legislative and executive authority, including the administration of justice" in East Timor (U.N. Sec. Council Res'n 1272) until full independence was achieved and a new Constitution adopted on May 20, 2002. East Timor is one of the world's newest

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[8] Except as otherwise noted, this Statement of Facts is drawn from the allegations on the face of plaintiffs' Second Amended Complaint and documents referenced therein. Certain facts are based upon statements that plaintiff Oceanic Exploration Company has made in official SEC filings or upon public facts or statements of which this Court may take judicial notice. Such sources are properly considered upon a motion under Rule 12(b)(6) or Rule 12(c). *See Southland Securities* v. *INSpire Insurance Solutions*, 365 F.3d 353, 367 n.10 (5th Cir. 2004) (court can properly consider a party's SEC filings upon a motion to dismiss); *Hebert Abstract Co.* v. *Touchstone Properties*, 914 F.2d 74, 76 (5th Cir. 1990) (judgment on the pleadings may be rendered under Rule 12(c) based on the substance of the pleadings and any judicially noticed facts).

nations and one of its poorest on a per capita basis. SAC ¶¶ 57, 83, 100-01, 110 (R4258-59, R4266, R4272-73, R4276).

For decades, a dispute had existed between Australia and its neighbors to the north as to the proper maritime boundary between them. In 1971, Australia and Indonesia reached agreement upon a seabed boundary between those two nations. But because East Timor was at that time still under Portuguese rule, that Australia-Indonesia agreement did not cover the portion of the seabed between Australia and East Timor: hence, the "Timor Gap." SAC ¶ 49 (R4255-56); *see* Addendum Map.

Notwithstanding the lack of an agreed boundary as to the Timor Gap, in 1989 — *i.e.*, while East Timor was still under Indonesian control — Australia and Indonesia entered into a treaty for joint development of whatever oil and gas reserves might exist in the Timor Gap seabed. The treaty set up a binational body, the Timor Gap Joint Authority for the Zone of Cooperation, to issue concessions to qualified oil companies for the exploration, development and production of any such oil and gas reserves. Prospective revenues, after distribution of the oil companies' interests, would be shared between Australia and Indonesia. SAC ¶¶ 72-75 (R4263-64).

In 1991, the Joint Authority accordingly opened certain concession areas for competitive bidding. ConocoPhillips was a successful bidder for certain

of these concessions. Oceanic — albeit ostensibly engaged in oil and gas development, and concededly having knowledge of the bidding process — chose not to bid. SAC ¶¶ 77-78, 80 (R4264-65).

ConocoPhillips, pursuant to its concessions, began work in the Timor Gap in 1991. Exploration resulted in the discovery of a large reserve of hydrocarbons. SAC ¶ 82 (R4266). Major construction commenced on the infrastructure necessary to pump oil and gas from beneath the seabed and transport it to terminals on land — a $2.5 billion project. *See* FAC ¶ 163 (R264).

As noted above, on May 20, 2002, East Timor became an independent republic, with its government under the new Constitution succeeding the interim UNTAET administration. *See* SAC ¶¶ 83, 100-01 (R4266, R4272-73).

B. Oceanic's claim of wrongdoing

Oceanic's bribery allegations proceed from the premise that the incoming government of East Timor had supposedly determined that, upon independence, it would abrogate all oil and gas concessions entered into by the previous Australian/Indonesian Joint Authority and open them up for re-bidding. That would include the 1991 concessions awarded to ConocoPhillips. SAC ¶ 84 (R4266-67). The new Constitution was supposedly explicit in "vitiat[ing] all prior interests, including those of ConocoPhillips, in East Timorese natural resources."

SAC ¶ 88 (R4268). ConocoPhillips was therefore supposedly desperate to avoid abrogation of its concessions. SAC ¶ 89 (R4269).

For that reason, starting in 2000, ConocoPhillips allegedly bribed one Mari Alkatiri — an East Timorese official active in the UNTAET interim administration and then, upon independence, the first Prime Minister of East Timor — as well as associates of Alkatiri, to "reverse" the decision to abrogate ConocoPhillips' concessions. This sequence of bribery, it is alleged, culminated on East Timor's Independence Day (May 20, 2002) with a supposed payment of $2 million in cash to Alkatiri, allegedly arranged by ConocoPhillips' very CEO. SAC ¶¶ 1, 4, 93-94, 99-101, 103, 107 (R4244-45, R4270-75).

Oceanic contends that, as a result of this alleged bribery, the concessions were not abrogated and re-opened for bidding; if they had been, Oceanic would have bid; and not only that, Oceanic would have gone on to win the bidding. SAC ¶¶ 1, 6, 125, 190 (R4244, R4246, R4281, R4300).

Notwithstanding that Oceanic's claim of bribery must be accepted as truthful for purposes of the Rule 12(c) motion and this appeal, it may be helpful to set forth certain undisputed facts that demonstrate the baseless nature of the tale sought to be presented by Oceanic so that this Court may appreciate the context in which ConocoPhillips' motion was made. For it is clear here that ConocoPhillips had no reason to engage in any such bribery scheme. A long line of statements by

East Timorese political leaders demonstrates that ConocoPhillips' concessions were not in any jeopardy of abrogation by newly independent East Timor, and Oceanic's Complaint egregiously misrepresents the import of the provisions of the new Constitution. Thus:

- As early as 1998, long before the Complaint puts forward any suggestion of bribery of any East Timorese person, Mari Alkatiri himself — along with his co-leaders in the National Council for Timorese Resistance ("CNRT"), José Ramos-Horta and Joao Carrascalao — issued a public statement that the CNRT "supports the rights of the *existing* Timor Gap contractors and those of the Australian government to jointly develop East Timor's offshore oil reserves in cooperation with the people of East Timor."[9]

- On October 20, 1999 — still considerably before the claimed commencement of any supposed East Timor bribery scheme and now even after East Timor had voted for independence — the CNRT leaders once again confirmed this position, issuing a public statement assuring contractors that their rights would continue: "[W]e wish to assure all

[9] Statement of the National Council for Timorese Resistance dated July 21, 1998 (R5872-74); *East Timor: Final Report of the Senate Foreign Affairs, Defence and Trade References Committee* at 68 (Dec. 2000) (R5887) (emphasis added).

[Zone of Cooperation] contractors operating under current Production Sharing Contracts that their legal rights will continue through the full term of those contracts and that fiscal policies applicable to production sharing and taxation will be no more onerous than current policies as they relate to the contractors[’] share." The CNRT leaders forwarded a copy of that statement to ConocoPhillips itself.[10]

- The next month, José Ramos-Horta — who went on to succeed Mari Alkatiri as Prime Minister of East Timor — reiterated the East Timorese leadership position on the continuation of the existing concessions: "No mining company should have any concern whatsoever. In the end it's in our national interest."[11]

- Then, in February 2000 — still upfront of any supposed inception of a bribery scheme — UNTAET (the United Nations agency administering East Timor) signed a formal Exchange of Notes with Australia providing that the terms of the Australian-Indonesian Timor Gap Treaty would *continue*, including the contracts under which the Cono-

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[10] Statement of the National Council for Timorese Resistance dated Oct. 20, 1999 (R5895-97) (referenced at FAC ¶ 165) (R264); *East Timor: Final Report of the Senate Foreign Affairs, Defence and Trade References Committee* at 63 (Dec. 2000) (R5882).

[11] Shawn Donnan, "East Timor Prospects Oil Zone for Income," *Christian Science Monitor* (Nov. 3, 1999) (R5898-99).

coPhillips companies were developing oil and gas fields in the Timor Sea.[12]

- Finally — contrary to the key contention in the Second Amended Complaint (¶ 88) (R4268) that the new Constitution "vitiated all prior interests, including those of ConocoPhillips, in East Timorese natural resources" — the Complaint itself recognizes that the only interests that were vitiated by the Constitution were those "which are not confirmed . . . after the Constitution enters into force." SAC ¶ 88 (R4268). But the Complaint somehow omits to state that the very *same day* that the Constitution came into force, newly independent East Timor entered into a treaty with Australia that *confirmed* existing concessions, including those held by ConocoPhillips.[13]

Accordingly, it may readily be seen that the entire predicate of the Complaint — the supposed imperative to pay bribes to avoid the abrogation of

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[12] Exchange of Notes Constituting an Agreement Between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) Concerning the Continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and Northern Australia of 11 December 1989, at 4, 2000 Austl. T.S. No. 9 (Austl.-UNTAET, Feb. 10, 2000) (R5900-06); SAC ¶ 87 (R4268).

[13] Timor Sea Treaty, Annex F, 2003 Austl. T.S. No. 13 (Austl.-East Timor, May 20, 2002) (R5907-25).

ConocoPhillips' Timor Sea concessions and the supposed "vitiat[ion]" of such concessions by the new Constitution — is made up of whole cloth. There is no dispute that East Timor was in desperate need of energy revenues. *See* SAC ¶ 110 (R4276). By 2002, ConocoPhillips had been engaged for over a decade in the exploration and development of oil and gas pursuant to the 1991 concessions. The company had made major investments in that endeavor. *See* SAC ¶ 89 (R4269). Revenues had already begun to flow to East Timor. The concept that, in the absence of supposed bribery, East Timor would have been prepared to disrupt its ongoing receipt of those revenues by opening up a new bidding process is fanciful indeed and unsupported by any factual allegation in plaintiffs' pleading. Moreover, it is clear from the face of the pleadings themselves — and express *concessions* by Oceanic in its briefing to the District Court (R6639) — that Australia was in no way willing to be a party to any abrogation of the existing concessions (*see* pages 29-31, *infra*), and the pleadings are bereft of *any* allegation of bribery by ConocoPhillips of any Australian person.

José Ramos-Horta, a Nobel Peace Prize winner, was a leader in the East Timorese fight for independence. As noted above, he succeeded Mari Alkatiri as Prime Minister of East Timor. The Complaint contains no allegation of wrongdoing on his part. His publicly expressed view as to Oceanic's claims in this

action of supposed bribery by ConocoPhillips of his predecessor Prime Minister, Mari Alkatiri, puts these issues in context:

> The statement of claim filed by Petrotimor and Oceanic is a vexatious distraction at this difficult and crucial time of East Timor's national reconstruction — not least because of the *spurious allegations* against our Prime Minister, his family and members of our national parliament.
>
> * * *
>
> I cannot fathom the immorality that motivated the Petrotimor-Oceanic Exploration action.[14]

Summary of the Argument

Even if Oceanic's allegations were plausible, even if they were true, its causes of action are barred by the express holdings of no less than three decisions of the United States Supreme Court — *Associated General Contractors* v. *California State Council*, 459 U.S. 519 (1983), *Holmes* v. *SIPC*, 503 U.S. 258 (1992), and *Anza* v. *Ideal Steel*, 547 U.S. 451 (2006) — as well as by firmly established common law, for lack of proximate cause in that there is a total absence of the required direct, non-speculative relationship between the claimed wrong and the purported injury, and Oceanic moreover would not be a direct victim of the alleged misconduct.

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[14] *Australian Financial Review* (Apr. 17, 2004) (R5926-28) (emphasis added).

To find any connection between the alleged bribery scheme and any injury to Oceanic, the causal chain would necessarily require that, absent the alleged bribes:

- East Timor would have chosen to abrogate the 1991 concessions under which ConocoPhillips was operating in the Timor Gap;
- Australia would have acquiesced in that abrogation;
- East Timor and Australia would have re-opened bidding for the concessions;
- Oceanic would have chosen to bid in the hypothetical new auction;
- Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by East Timor and Australia;
- Oceanic would have won the hypothetical bidding; and
- Oceanic would have developed the concessions at a profit.

This chain of causation — which Oceanic nowhere disputes would be necessary to any recovery — is entirely indirect and speculative in the extreme. Under *AGC*, *Holmes*, *Anza*, and the common law principles that form the bedrock of those decisions, the causal theory fails on the pleadings as a matter of law. The District Court properly so held, and, having so held, did not expressly discuss the closely related rationale for dismissal that, under *Holmes* and *Anza*, Oceanic as a matter of law could not be deemed the "direct victim" of the claimed wrongful scheme. Moreover, Oceanic's attempts to distort and misstate the District Court's

opinion and distract this Court's attention from the straightforward principles of proximate cause and direct injury that control here are meritless.

Argument

This Court reviews *de novo* the District Court's judgment dismissing all claims of Oceanic against ConocoPhillips and its subsidiaries. *Hughes* v. *Tobacco Institute*, 278 F.3d 417, 420 (5th Cir. 2001); *Delgado* v. *Reef Resort*, 364 F.3d 642, 644 (5th Cir. 2004).

The standard for judgment on the pleadings under Rule 12(c) is the same as the standard on a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *Bennett-Nelson* v. *Louisiana Board of Regents*, 431 F.3d 448, 450 n.2 (5th Cir. 2005). As the Supreme Court has recently emphasized in stating that the "no set of facts" formulation of *Conley* v. *Gibson*, 355 U.S. 41, 45 (1957), had "earned its retirement," a "formulaic recitation of the elements of a cause of action will not do," and factual allegations "must be enough to raise a right to relief above the speculative level . . . ." *Bell Atlantic* v. *Twombly*, 127 S. Ct. 1955, 1964-65, 1969 (2007).

The Court need not credit "conclusory allegations or unwarranted deductions of fact" (*Collins* v. *Morgan Stanley*, 224 F.3d 496, 498 (5th Cir. 2000)); nor "allegations of inferences that are contradicted by the facts pleaded or set out in the exhibits attached to or incorporated in the pleading" (*United States* v. *ITT*

Educational Svcs., 284 F. Supp. 2d 487, 494 (S.D. Tex. 2003) (citing *Blackburn* v. *City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995))); nor "legal conclusion[s] couched as . . . factual allegation[s]" (*Papasan* v. *Allain*, 478 U.S. 265, 286 (1986)).

In addition to pleaded allegations, moreover, the Court upon such motions may consider SEC filings as well as facts that are properly the subject of judicial notice. *See Southland Securities* v. *INSpire Insurance Solutions*, 365 F.3d 353, 367 n.10 (5th Cir. 2004); *Hebert Abstract Co.* v. *Touchstone Properties*, 914 F.2d 74, 76 (5th Cir. 1990).

I. OCEANIC'S RICO CLAIM FAILS FOR LACK OF PROXIMATE CAUSE.

A. RICO plaintiffs must plead proximate cause.

At common law, it is axiomatic in a tort action that proximate cause is required as between the claimed wrong and the claimed injury and that an essential element of proximate cause is that there be a direct, and not remote, connection between the wrong and the injury: "Damages must be certain, both in their nature, and in respect to the cause from which they proceed." J. Sutherland, *Law of Damages* 94 (1882).

These principles find clear expression in three decisions of the United States Supreme Court: *Associated General Contractors* v. *California State Council*, 459 U.S. 519 (1983); *Holmes* v. *SIPC*, 503 U.S. 258 (1992); and *Anza* v.

Ideal Steel, 547 U.S. 451 (2006). These decisions were fully briefed in the District Court, advanced by ConocoPhillips as barring all of Oceanic's claims, and, in the case of *AGC* and *Holmes*, expressly cited in the District Court's opinion. Op. at 6 (R6833). Yet Oceanic barely mentions these decisions in its appellate brief and makes no attempt to distinguish them. Oceanic Br. 27, 29-31.

As shown below, the *AGC*, *Holmes*, and *Anza* decisions establish requirements of proximate cause that Oceanic has not met and indisputably cannot meet:

AGC. — In 1983, in the *AGC* case (*Associated General Contractors*), the Supreme Court held that Congress intended these common-law requisites of proximate causation and directness of injury to apply to antitrust damage litigation. 459 U.S. at 534-35. The statutory provision creating a private right of action under the antitrust laws — Section 4 of the Clayton Act — permitted suit for damages for injury suffered "by reason of" anything forbidden by such laws. 15 U.S.C. § 15(a). Rejecting an argument that this language was broad enough to encompass indirect consequences of wrongful conduct, the Court rather concluded that the "by reason of" language meant that antitrust damage suits "would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation," including the essential elements of "proximate cause, directness of injury, [and] certainty of damages." *AGC*, 459 U.S. at 529, 532-33 (footnotes omitted).

Holmes. — In 1992, then, in *Holmes* v. *SIPC*, the Supreme Court likewise rejected a "but for" causation test and held that the RICO statute, which employs this same "by reason of" language, similarly adopted the common-law "demand" for a "direct relation between the injury asserted and the injurious conduct" alleged, characterizing this "requirement" as "one of [the] central elements" of proximate causation. 503 U.S. at 268-69. As the Court explained, a principal reason for this requirement of a "directness of relationship" is to ensure that it would be clear that the alleged misconduct caused the claimed injury. Otherwise, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent[] factors." *Id.* at 269.

Another key consideration for the *Holmes* Court was that if parties who were harmed only indirectly could maintain RICO claims, then courts would be "force[d] . . . to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." *Id.* (citing, *e.g.*, *AGC*, 459 U.S. at 543-44). And since "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely," the Court reasoned that the "general interest in

deterring injurious conduct" could not justify the complications inherent in extending causes of action to indirect victims. *Id*. at 269-70.

Anza. — Then in 2006, in *Anza* v. *Ideal Steel*, the Supreme Court further delineated this requirement of direct injury, giving emphasis to the requirement of certainty of damages set forth in *AGC* and *Holmes* and the impermissibility of countenancing a complaint where the link between wrongful conduct and injury is indirect and speculative. The claim in *Anza* was that evasion of New York State sales taxes by defendants had allowed their company, a competitor of the plaintiff, to capture market share from the plaintiff. Pointing to "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action," and "the speculative nature of the proceedings that would follow" if such a claim were permitted, the Court reversed the Second Circuit's holding that proximate cause had been adequately pled. The Court set forth that: "The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Anza*, 547 U.S. at 458-60. The Court further noted that the "direct victim of this conduct was the State of New York, not [the plaintiff]." *Id.* at 458. And since "the State can be expected to pursue appropriate remedies," there was no need to engage in such "intricate, uncertain inquiries" to deter the alleged misconduct. *Id*. at 460.

B. *AGC, Holmes* and *Anza* bar Oceanic's RICO claim.

The proximate-cause principles that the Supreme Court laid down in *AGC*, *Holmes* and *Anza* bar Oceanic's RICO claim. Indeed, Oceanic's theory of causation is far weaker even than the claim in *Anza*, the most recent of the Supreme Court trio, because here — in tracing the tortuous chain of supposed causation from claimed misconduct (the supposed bribery) to claimed injury (the fact that East Timor and Australia never re-opened the concession bidding so that plaintiff could supposedly bid for, and win, the right to develop the Timor Gap resources) — it would, among other things, become necessary to "deconstruct" the decision-making of two separate sovereigns: East Timor and Australia.

For, putting aside all of the other highly speculative elements of plaintiffs' proposed chain of causation, the decisional law establishes that any such attempt to deconstruct governmental decision-making is *in and of itself* too speculative for courts to engage in. As set forth by the District Court of the District of Columbia in dismissing a RICO action brought by a foreign government asserting that it would have made different governmental decisions with respect to tobacco if not for fraudulent information furnished to it by the tobacco industry: "*Few inquiries are more speculative than this*. In other contexts, courts traditionally have been reluctant to deconstruct the reasons for governmental decision-making because of the great number of subjective influences at play." *In*

re Tobacco (Guatemala), 83 F. Supp. 2d 125, 130 (D.D.C. 1999) (citations omitted) (emphasis added), *aff'd sub nom.*, *Service Employees* v. *Philip Morris*, 249 F.3d 1068 (D.C. Cir. 2001). *See also, e.g.*, *City of Columbia* v. *Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991) ("[W]e have consistently sought to avoid" the "deconstruction of the governmental process and probing of the official 'intent.'"); *Sessions Tank Liners* v. *Joor Mfg.*, 17 F.3d 295, 300 (9th Cir. 1994) (legally inappropriate for courts to "deconstruct[] the decision-making process to ascertain what factors prompted . . . governmental bodies" to take particular actions); *Treadway* v. *Lisotta*, 2008 WL 3850462, at *6 (E.D. La. Aug. 15, 2008) (applying *Anza* and holding the asserted causal chain impermissibly attenuated because, among other reasons, "[i]t would be nearly impossible to determine what effect, if any, the defendants' misconduct had" on the decision-making of a government-run insurance company).

Thus, as District Judge Hughes saw it in his opinion below, "To reconstruct a collective decision-making process in the absence of a single input — bribes — and predict what would have happened otherwise is on the impossible edge of difficult." Op. at 7 (R6834). The District Court's refusal to engage in such speculation was fully in line with the case law and entirely correct.

But — even putting aside the prohibition against deconstructing governmental processes — it is indisputable that Oceanic's claimed chain of

causation is speculative in the extreme. As noted above, its claim of injury necessarily entails the following chain of steps. If defendants had not supposedly bribed East Timorese officialdom:

- East Timor would have determined to re-open bidding for the 1991 oil and gas concessions;
- Australia would have concurred in that determination;
- Oceanic would have determined to bid;
- Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by Australia and East Timor;
- Oceanic would have won the bidding; and
- Oceanic would have gone on to develop the concession profitably.

See Op. at 7-9 (R6834-36). To say that this is a highly speculative series of steps is a massive understatement. This purported chain of causation — which Oceanic does not dispute would be essential to any recovery — cannot meet the direct injury test of the Supreme Court's *AGC/Holmes/Anza* trilogy.

That East Timor would have determined to re-open bidding for the 1991 oil and gas concessions, and Australia would have concurred in that determination. — To take the case of Australia first — for, even standing alone it is indisputably dispositive of Oceanic's claimed causal chain — there is a total absence of any suggestion in the Complaint that Australia would have been willing to acquiesce in any decision to re-open the concession bidding, even if East Timor

itself had been so inclined. To the contrary, in its *First* Amended Complaint, Oceanic spells out in detail the irresistible pressures that Australia placed on East Timor beginning in October 2000 to *honor* the terms of the previous Australian-Indonesian Timor Gap Treaty — Australia being anxious to have the Timor Gap development proceed without interruption (including the construction by ConocoPhillips of a destination refinery at Darwin). FAC ¶¶ 175, 181-82, 196, 205 (R268, R271, R276-77, R280) (reciting Australian pressures, including threats to cut off aid to East Timor if the existing arrangements in the Timor Gap were not continued). These pressures were assertedly so intense as to be termed "blackmail." FAC ¶ 205 (R280).[15] And in its brief in the District Court on the very Rule 12(c) motion before Judge Hughes, Oceanic itself expressly *acknowledged* that there was an "alignment of interests" between Australia and

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[15] Australia's pressures on East Timor to honor the terms of the Timor Gap Treaty did not involve any concern that East Timor would seek to re-open ConocoPhillips' concessions. As noted above (pages 15-17), the East Timorese leaders had already given repeated assurances that they had no such intention. Rather, Australia's concern was that East Timor would seek to hold out *vis-à-vis Australia* for a larger share of the natural-resource revenues to be generated. *See* FAC ¶¶ 175, 183 (R268, R271-72). *See also* Statement of the National Council for Timorese Resistance dated Oct. 20, 1999 (R5895-97) ("[F]iscal policies applicable to production sharing and taxation will be no more onerous than current policies *as they relate to the contractors['] share*.") (emphasis added); *East Timor: Final Report of the Senate Foreign Affairs, Defence and Trade References Committee* at 71 (Dec. 2000) (R5890) (Australia's "position was stated by a spokesman for Foreign Minister Alexander Downer on 11 July 2000, who said that Australia 'understands the discussion or debate is about the share of revenue . . .'" as between the two countries). Discussions between Australia and East Timor took place amidst a background agreement that it was "very important that there [be] *a seamless transition or arrangements governing petroleum exploitation in the Timor Gap*." *Id.* at 72 (R5891) (emphasis added).

ConocoPhillips with respect to the concessions, and that "Australia favored the status quo." Oceanic Opp. Br. 11 n.12 (R6639). Yet neither the First nor Second Amended Complaint contains any suggestion of ConocoPhillips' having bribed any Australian officials.

It is thus plain from plaintiffs' own allegations and admissions that Australia under *no* circumstances would have concurred with any desire by East Timor to interrupt progress by re-opening the Timor Gap concessions for re-bidding — and without Australia's concurrence, East Timor was patently in no position to do so unilaterally. Oceanic does not even attempt to contest that that was the case. Oceanic's chain of causation thus inevitably and definitively breaks right there.

But, even as to East Timor, the documentary materials that were before the District Court upon the Rule 12(c) motion refute Oceanic's conclusory allegations that — in the absence of the supposed bribes — *East Timor itself* would have had any intent to re-open the bidding and thereby interrupt, delay and jeopardize the flow of revenues to *it* from ConocoPhillips' development of the Timor Gap. Indeed, as noted above, as early as November 1999, East Timorese leader José Ramos-Horta reiterated the East Timorese leadership's position that the existing concessions would *continue* in post-independence East Timor: "No mining company should have any concern whatsoever. *In the end it's in our*

national interest."[16] *See* page 17, *supra*. And as shown above, the concept that East Timor's new Constitution somehow vitiated ConocoPhillips' rights in the Timor Gap is a blatant distortion of the record. *See* page 18, *supra*.

Obviously, it is not the function of this Court upon this appeal to make any determination as to whether or not — absent the claimed East Timorese bribery scheme — the joint decision of Australia and East Timor to continue the existing concessions would have been any different. But it simply cannot be gainsaid that Oceanic — even as to these first two purported causal steps — has fallen far short of pleading the "certainty of damages" required by the Supreme Court's holdings. Most critically, there is no suggestion in the Second Amended Complaint that Australia ever would have concurred in any abrogation of the concessions and disruption of the flow of hydrocarbons and payment of royalties — and Oceanic indeed admitted below the precise contrary.

That Oceanic would have determined to bid. — But the impermissibly speculative nature of Oceanic's causal chain does not stop there. The next step in the purported connection between the alleged bribery scheme and the claimed injury is that Oceanic would have determined to take part in the hypothetical re-bidding. For this, we have little more than the Second Amended

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[16] Shawn Donnan, "East Timor Prospects Oil Zone for Income," *Christian Science Monitor* (Nov. 3, 1999) (R5898-99) (emphasis added).

Complaint's *ex post facto* unsupported conclusory claim to this effect (*see* SAC ¶¶ 1, 6, 190) (R4244, R4246, R4300) — an allegation that this Court has no obligation to credit. *Collins* v. *Morgan Stanley*, 224 F.3d at 498. Moreover, it is conceded in the Second Amended Complaint that — although Oceanic was fully cognizant that bids were open for these very concessions back in 1991 — Oceanic made the conscious decision *not* to attempt to participate, supposedly reasoning that bidding would be inconsistent with efforts to enforce its 1974 Portuguese concession: "Holding legitimate rights from Portugal, Oceanic had no reason [to] call into question its own rights by bidding for rights that it already [had]." SAC ¶ 80 (R4265).

But of course, if East Timor and Australia had re-opened bidding in *2002*, then that *same* rationale would have kept Oceanic out of that hypothetical second round of bids as well. For, as set forth above (*see* pages 5-8, *supra*), in 2002 Oceanic was still trying to maintain the validity of its Portuguese concession in the Australian courts, and Oceanic did not abandon that claim until *2005*, after Judge Sullivan refused to give it credence in dismissing the First Amended Complaint in *this* action. Order dated Feb. 9, 2005 at 1-2 (R4138-39). Accordingly, in 2002, Oceanic still "had no reason [to] call into question its own [Portuguese] rights by bidding for rights that it already" claimed to hold.

That Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by Australia and East Timor. — And then we have the next step in Oceanic's purported chain of causation: that it would have had the wherewithal to bid had the bidding been re-opened and that it would have been deemed a qualified bidder by Australia and East Timor. This link in the chain is dubious in the extreme.

> In its brief to this Court, Oceanic describes itself as follows:
>
> > Oceanic is an established company with a long history of successful oil and gas explorations around the world. This includes operations in such diverse locations as the North Aegean Sea, the British North Sea, the East China Sea, the sea near Sabah, Malaysia, and in various locations in Thailand, Cameroon, Nicaragua, Peru, Panama, and Ghana.
>
> — Oceanic Br. 8-9.

But a very different picture is painted by Oceanic's Form 10-KSB filed with the Securities and Exchange Commission for 2002, the period in time as to which Oceanic supposedly would have qualified and prevailed in a hypothetical multibillion-dollar auction had the Timor Sea concessions been re-opened for bidding.[17] According to that filing, Oceanic was engaged in *no* exploration or development of any oil or gas property. Oceanic Form 10-KSB for 2002 (filed

[17] The "SB" in "Form 10-KSB" stands for "small business." 17 C.F.R. § 228.10(a).

Mar. 26, 2003) at 3 (R6087). It had had zero "revenue from any oil and gas properties in 2002 and 2001" and did not expect to have any in 2003. *Id.* Its principal business was that of an *employment agency* in San Diego, based on assets it purchased back in 2000 for the grand sum of $581,000. Oceanic Form 10-KSB for 2001 (filed Mar. 29, 2002) at 2 (R6144). Other than those personnel devoted to the employment agency business, it apparently had only eight employees. *Id.* at 3 (R6145). Its *total* assets at the end of 2001 (before $1.1 million of liabilities) were $3.7 million. *Id.* at 19 (R6160). In other words, it wholly lacked the financial, structural or technological wherewithal even to qualify as a bidder on any such multibillion-dollar project. Thus, on this essential link in Oceanic's causal chain, the District Court quite correctly held that "Oceanic can only speculate that it would have been allowed to bid." Op. at 8 (R6835).

That Oceanic would have won the hypothetical bidding. — The speculative nature of the chain of causation does not even stop there, for Oceanic would still have to establish that it would have won the hypothetical bidding. On this point, there is nothing more than three totally unsupported, repetitive and wholly conclusory assertions in the Second Amended Complaint. SAC ¶¶ 1, 6, 190 (R4244, R4246, R4300). Again, these species of allegations need not be credited upon a motion for judgment on the pleadings. *See, e.g.*, *Collins* v. *Morgan Stanley*, 224 F.3d at 498.

But, even beyond factual insufficiency as a pleading matter, the claim that Oceanic would have won the hypothetical bidding if not for the alleged bribery is speculative *as a matter of law* and cannot satisfy the requirement of proximate cause. *See, e.g.*, *James Cape & Sons* v. *PCC Construction*, 453 F.3d 396, 403 (7th Cir. 2006) (dismissing bid-rigging RICO claim for lack of proximate cause: "A court *could never be certain whether Cape would have won* any of the contracts that were the subject of the conspiracy 'for any number of reasons unconnected to the asserted pattern of fraud'") (quoting *Anza*, 547 U.S. at 458) (emphasis added); *Strates Shows* v. *Amusements of America*, 379 F. Supp. 2d 817, 829 (E.D.N.C. 2005) (claim that, if not for defendants' bribery, North Carolina would have held a competitive bidding process and that plaintiff would have won was too indirect and speculative to satisfy pleading requirement of proximate cause).

Moreover, matter of law aside, as a matter of common sense — given the massive sums already invested in the project by ConocoPhillips and the Complaint's own allegations of ConocoPhillips' motivation to hold on to the concessions — it requires a flight of fancy indeed to assume that a shell company such as Oceanic would have prevailed in a bidding contest against an incumbent, multinational giant such as ConocoPhillips or any other of the major international energy companies that might have been motivated to enter any such re-opened bidding.

That Oceanic would have developed the hypothetical re-opened concessions at a profit. — And even if Oceanic could have prevailed at the hypothetical auction for the hypothetically abrogated concessions, its causal theory would still require the District Court to engage in the highly speculative and totally uncertain inquiry that would be required to determine whether a shell company in Oceanic's position could then develop the contract areas at a profit — and how much. As the District Court quite correctly noted, "[w]ithout ConocoPhillips' geology, capital, geologists, engineers, sources of supply, and the rest of its enterprises, Oceanic cannot rationally compare its prospects with the historic achievement of ConocoPhillips." Op. at 9 (R6836).

* * *

In sum, viewed separately, the likelihood that, if not for the supposed bribery, each of the steps in Oceanic's required causal chain would have taken place range from highly improbable to nil. And viewed cumulatively, the super-speculative nature of Oceanic's entire chain of causation from supposed wrong to claimed injury cannot come close to satisfying the requirement of "direct relationship" and "certainty of damages" as mandated by *AGC*, *Holmes* and *Anza*.

Here on appeal, Oceanic does not deny that each of these steps in its causal chain would be necessary to connect the bribery it alleges with the injury it claims. Nor does Oceanic ever take issue with the fact that each of these links is

highly speculative, if not entirely broken. Oceanic's only answer is to attack the supposed partiality of the District Judge who rejected Oceanic's causal theory and to claim that its conclusory causation allegations were sufficient at the pleading stage. *AGC, Holmes* and *Anza* foreclose that line of argument.

As the Supreme Court wrote in *Anza*, itself a face-of-the-pleading case, "[o]ne motivating principle [for the directness requirement] is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." 547 U.S. at 458. The *Anza* Court then continued:

> The injury Ideal alleges is its own loss of sales resulting from National's decreased prices for cash-paying customers. National, however, could have lowered its prices *for any number of reasons unconnected to the asserted pattern of fraud*.
>
> — *Id.* (emphasis added).

So too, here: there could be "any number of reasons unconnected to the asserted pattern of [bribery]" to explain why Oceanic today does not have the right to produce oil and gas in the Timor Gap: governmental decision-making in Australia; governmental decision-making in East Timor; Oceanic's lack of capital; Oceanic's lack of capability to produce oil and gas; or else the extreme unlikelihood that Oceanic, even if it sought to take part in the hypothetical bidding that it posits and qualified to do so, would have overcome its disadvantages and outbid the much more substantial competitors it presumably would have had to compete against,

and then would have had the capability to go on and develop the concession profitably.

C. Oceanic is not a direct victim of the claimed wrongdoing, so its claim is barred by *Anza*.

In keeping with the requirement that a claimed injury proceed directly from the alleged misconduct (as a means of eliminating possible causes of injury that are only remotely connected to the alleged wrongdoing), the case law also limits recovery to direct victims of wrongdoing. Recognizing that "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely," courts have declined to extend causes of action "beyond the first step." *Holmes*, 503 U.S. at 269-70, 271 (quoting *Southern Pacific* v. *Darnell-Taenzer Lumber*, 245 U.S. 531, 533 (1918) (Holmes, J.)).

Again choosing to ignore the controlling issues on this appeal, Oceanic's brief in this Court does not even attempt to discuss whether it qualifies as a direct victim. The closest Oceanic comes to the issue is to argue that ConocoPhillips paid bribes "with the specific intent of injuring Oceanic." Oceanic Br. 33. But even were this true rather than fanciful, it would not render Oceanic a direct victim. In *Anza* itself, plaintiff Ideal Steel claimed that the defendant competitors, with their evasion of state sales taxes, "sought to gain a competitive advantage over Ideal." And the Second Circuit, indeed, took the view that this

intent allegation made it "immaterial whether [the defendants] took an indirect route to accomplish their goal." The Supreme Court, however, expressly rejected that view, holding that a "RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Anza*, 547 U.S. at 460-61 (quoting *AGC*, 459 U.S. at 537 ("We are also satisfied that an allegation of improper motive . . . is not a panacea that will enable any complaint to withstand a motion to dismiss.")).

In *Anza*, the Supreme Court further reasoned that the direct victim of the alleged scheme to evade New York sales taxes was "the State of New York, not [plaintiff] Ideal." *Id.* at 458. And even though Ideal "suffered its own harms when [the defendants] failed to charge customers for the applicable sales tax," that did not mean that Ideal could satisfy proximate cause. *Id.* It was merely a collateral victim of the wrongful scheme.

Precisely so here. If there ever had been a bribery scheme such as Oceanic alleges, the "direct victim of this conduct" was the nation of East Timor and its citizenry. *See, e.g.*, *United States* v. *Chalmers*, 474 F. Supp. 2d 555, 560 (S.D.N.Y. 2007). For Oceanic's theory is that, but for the bribery, East Timor would have been able to gain massively *higher* revenues from the oil and gas resources in the Timor Gap by re-opening bidding and granting new concessions. Accordingly, just as in *Anza*, the most that can be said for Oceanic — even *if* it had

been able to plead a meaningful causal chain — is that it would be a collateral victim that somehow "suffered its own harms." But, under *Anza*, that does not suffice as a matter of law. *Anza*, 547 U.S. at 457-58.

And the vice of Oceanic's collateral victim theory is compounded by the fact that it would then not only be Oceanic that would be entitled to maintain suit. To the contrary, were an action of this nature to be countenanced, any number of other would-be bidders in a hypothetical re-opened auction — presumably major international companies such as Shell, Tokyo Gas and Samsung that, unlike Oceanic, *do* have current rights in the Timor Gap; or other major companies such as Chevron, BP and Marathon Oil that, unlike Oceanic, actually *participated* in the bidding for Timor Gap concessions in 1991 (R6511-12) — could similarly come into court: each with its own RICO, antitrust and common-law claims; each asserting that *it* had been deprived of the opportunity to bid upon a re-opened round of bidding; and each claiming that, had the bidding been re-opened, *it* undoubtedly would have been the winner. This is obviously untenable. All of the five (or ten) potentially interested bidders could not very well have ended up the "winner" of the hypothetical auction that Oceanic posits. Yet, if such a theory of recovery were permitted, a defendant such as ConocoPhillips would

face the spectre of duplicative recoveries — a key rationale underlying the *Holmes* rejection of indirect claims. *See* 503 U.S. at 269.[18]

D. The Supreme Court's *Phoenix Bond* decision is no help to Oceanic.

Oceanic attempts to rely upon the Supreme Court's recent decision in *Bridge* v. *Phoenix Bond*, 128 S. Ct. 2131 (2008), but that case alters neither the proximate cause nor the direct victim requirements of the present case and is of no help to Oceanic.

Phoenix Bond involved a RICO complaint based upon an underlying claim of fraudulent misrepresentation (mail fraud), and the issue upon which the Supreme Court granted *certiorari* — and as to which the entire opinion is essentially devoted — was "whether first-party reliance is an element of a civil RICO claim predicated on mail fraud." *Id*. at 2137, 2138-45. The opinion is therefore largely inapposite to the case at bar, which does *not* involve any

[18] Perhaps recognizing that its RICO claim, if upheld, would be equally available to any number of other companies, Oceanic argues that it was ConocoPhillips' "only competitor" seeking a "fair opportunity to compete" for ConocoPhillips' concessions in the Timor Sea. Oceanic Br. 33. Of course, no other companies were on the scene "competing" for any such right to bid in 2002, because the contracts were never re-opened for bidding upon East Timor's independence. But if one is to hypothesize that Australia and East Timor would have re-opened those concessions, as Oceanic insists, then one must also assume that other "competitors" would have vied for them — particularly given that major deposits of hydrocarbons had by then been discovered. And on Oceanic's view of the law, there would be nothing to stop each of those other companies from coming to court with a claim that it would have emerged the winner.

underlying predicate act of fraudulent misrepresentations nor any issue of reliance — first-party or otherwise.

Nevertheless, in the course of its opinion the Court did consider whether on the particular facts there at bar the *Holmes*/*Anza* requirement of proximate cause had been satisfied by the plaintiffs' pleading, and deemed that it had. *Id.* at 2144. The Court's conclusion in this regard rested upon a unique set of competitive bidding facts. The plaintiffs were a group of regular bidders in auctions through which Cook County sold tax liens on the property of delinquent taxpayers. The winning bidders at these auctions obtained the right to purchase the liens from the County for whatever amount of taxes were outstanding. The delinquent property owner, in order to redeem the property, would then have to pay the back taxes to the lienholders, plus a penalty that was established during the auction. *Id.* at 2135.

At the auctions, the County would award the tax liens to the bidder that agreed to charge the lowest penalty to the delinquent taxpayer. But because the bidders often wound up owning the properties and then selling them at a substantial profit, they were often willing to agree to charge no penalty at all. The bidding therefore frequently ended in a tie. *Id.*

The County's system for dealing with tied bids was to allocate the sale of the liens on a rotating basis, with each bidder winning by turns. This system,

however, would break down if a bidder were able to submit multiple bids through agents or related entities, because the bidder in that case would get extra "turns" and therefore extra liens. Cook County therefore adopted a "Single Simultaneous Bidder Rule" that required bidders to submit bids in their own name and prohibited them from using agents or related entities to submit simultaneous bids. And the County required bidders to affirm in affidavits that they were complying with that rule. *Id.*

Against this background, the RICO claim in *Phoenix Bond* alleged that the defendants had violated the Single Simultaneous Bidder Rule by submitting multiple bids through related firms, filing false affidavits, and thereby fraudulently receiving more liens than they should have and depriving plaintiffs of their fair share of awards. *Id.* at 2135-36.

On those unique facts, the Court in *Phoenix Bond* held that the requirements of proximate cause and direct injury were satisfied. In so holding, the Court distinguished *Holmes* and *Anza* as follows:

> [U]nlike in *Holmes* and *Anza*, there are no independent factors that account for [the plaintiffs'] injury, there is no risk of duplicative recoveries by plaintiffs removed at different levels of injury from the violation, and no more immediate victim is better situated to sue.
>
> — *Id.* at 2144.

The facts — and, *ergo*, the Court's conclusion — in *Phoenix Bond* thus have no parallel here. In *Phoenix Bond* there was no need for a court to speculate as to whether, in the absence of the alleged corruption: two different governments would have determined to re-open multi-billion-dollar oil and gas concessions for bidding; whether the plaintiffs would have elected to bid in that hypothetical auction; whether they would have been deemed qualified to bid; what they would have bid; and whether they would have won. Rather, the plaintiffs in *Phoenix Bond* were actual bidders, at an auction that had actually been held (not hypothetical), and their bids were known. The only issue to be resolved was how many more liens the plaintiffs should have received in the absence of the impermissible additional bids — essentially a matter of simple arithmetical calculation. *See id*. at 2144.

Nor was there any issue in *Phoenix Bond* as to whether the plaintiff bidders were direct victims of the allegedly improper bidding scheme. Unlike in the case at bar, where the direct victim of any alleged bribery would have been East Timor itself, Cook County itself was not harmed at all in *Phoenix Bond*: no matter who was awarded the liens and how, the County received the full amount of delinquent taxes. As the Supreme Court emphasized in distinguishing both *Holmes* and *Anza*, the "losing bidders were the *only* parties injured by [the defendants'] misrepresentations." *Id.* (emphasis in original).

In short, while the Supreme Court held on the unique facts of *Phoenix Bond* that the requirements of proximate cause and direct victim were there satisfied, in no way does the decision derogate the proximate cause and direct victim requirements that fully apply here. To the contrary, the opinion expressly reiterates and reaffirms those requirements of proximate cause and direct injury that are set forth in *Holmes* and *Anza*. *Id.* at 2142.

E. Oceanic fails in its attempt to invoke *pre-Anza* decisions from certain Courts of Appeals and District Courts.

Beyond *Phoenix Bond*, Oceanic tries to rely upon particular bribery cases from the Courts of Appeals and District Courts in an effort to persuade this Court not to follow *AGC, Holmes* and *Anza*. None of those cases supports Oceanic's position. They all *pre*-date *Anza*, and none of them can be reconciled with that Supreme Court authority. *See Bieter Co.* v. *Blomquist*, 987 F.2d 1319 (8th Cir. 1993) (cited at Oceanic Br. 28, 38) (no consideration of the fact that plaintiff's injury was indirect); *Environmental Tectonics* v. *W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1067 (3d Cir. 1988) (cited at Oceanic Br. 21, 25, 26, 27-28, 29) (no discussion of proximate cause), *aff'd*, 493 U.S. 400 (discussing the Act of State doctrine only); *Astech-Marmon, Inc.* v. *Lenoci*, 349 F. Supp. 2d 265 (D. Conn. 2004) (cited at Oceanic Br. 21, 28) (no consideration of the fact that the direct victim of the alleged bribery was not the plaintiff competitor but instead the municipality whose officials were bribed); *In re American Honda*, 941 F. Supp.

528, 543 n.13 (D. Md. 1996) (cited at Oceanic Br. 28, 31) (noting that the direct victim of the defendant dealers' bribery scheme may not have been the plaintiff dealers but rather Honda corporate entities, yet nevertheless deeming proximate cause satisfied); *Mylan Labs* v. *Akzo, N.V.*, 770 F. Supp. 1053 (D. Md. 1991) (cited at Oceanic Br. 21, 28) (no consideration of the direct-injury requirement).

Indeed, the *Bieter*, *Kirkpatrick*, *American Honda* and *Mylan Labs* cases — in addition to the Second Circuit's decision in *Commercial Cleaning* v. *Colin Service Systems*, 271 F.3d 374 (2d Cir. 2001), which was heavily relied upon by the District Court in Oceanic's *Astech-Marmon* case, 349 F. Supp. 2d at 269-70 — were put before the Supreme Court in *Anza* itself and obviously not deemed persuasive. *See* Brief for Respondent in *Anza* at 17 n.13, 19, 23, 24, 28, 29, 29 n.20, 35 (available at 2006 WL 448207).

As opposed to the *pre-Anza* decisions upon which Oceanic purports to rely, the *post-Anza* decision of the Seventh Circuit in *James Cape & Sons* v. *PCC Construction* — refusing to countenance a RICO complaint involving a competitive bidding context — is highly instructive. *Cape*, 453 F.3d 396, 403 (7th Cir. 2006). Indeed, the rejected chain of causation in *Cape* was far *less* speculative than in the case at bar. For, in *Cape*, unlike here: (a) the wrongful conduct was not disputed — the defendants had previously pleaded guilty and been convicted of criminal bid-rigging; (b) there was no issue of whether governmental authorities

would decide whether or not to conduct a hypothetical bidding contest — a competitive bidding process had actually taken place; and (c) the aggrieved plaintiff had in fact participated in the bidding, and there was no suggestion of any issue as to its wherewithal to perform. *Id.* at 398-99. Nonetheless, the Seventh Circuit affirmed dismissal of plaintiff's RICO claim at the pleading stage. Reviewing the Supreme Court's decision in *Anza*, the Court of Appeals held that dismissal was required for failure to allege proximate cause: "A court *could never be certain whether Cape would have won* any of the contracts that were the subject of the conspiracy 'for any number of reasons unconnected to the asserted pattern of fraud.'" *Id.* (quoting *Anza*, 547 U.S. at 458) (emphasis added).

F. Oceanic's reliance on "liberal pleading standards" is misplaced.

Rather than trying to argue that it can satisfy the requirements of *Holmes* and *Anza* with its speculative and convoluted theory of what would have happened in the absence of the alleged bribes, Oceanic seeks to rely upon the "liberal" pleading standards of Rule 8(a)(2). Oceanic quotes at length from a number of paragraphs of the Second Amended Complaint that assert a link between the supposed bribery and Oceanic's claimed injury, and argues that a mere conclusory allegation of causation is enough. Oceanic Br. 30-33. This is obviously wrong, for if a plaintiff could overcome the hurdles of *Holmes* and *Anza* merely by alleging in conclusory fashion that its injury was a "direct result" of the

wrongdoing it alleges — which is the best Oceanic has done in its Second Amended Complaint (*see* SAC ¶¶ 4, 95) (R4245, R4271) — then the Supreme Court's decisions in those cases would serve no purpose at all. *See also Papasan* v. *Allain*, 478 U.S. at 286 (on a motion to dismiss, court is "not bound to accept as true a legal conclusion couched as a factual allegation").

The Supreme Court's decision in *Bell Atlantic* v. *Twombly*, paradoxically cited heavily by Oceanic itself (Oceanic Br. 20, 22, 35-36, 45), confirms that the pleading standards under Rule 8 are nowhere near as "liberal" as Oceanic contends. Rather, the Court in that case expressly put to rest the pleading standard from *Conley* v. *Gibson* to the effect that a complaint could survive a motion to dismiss "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" (355 U.S. at 45-46) — a standard that the *Twombly* Court said had been "questioned, criticized, and explained away long enough" and had "earned its retirement." 127 S. Ct. at 1969. Thus, in *Twombly*, the Court made clear that the obligation under Rule 8 to "show[ ] that the pleader is entitled to relief" "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 127 S. Ct. at 1964-65. Instead, the Supreme Court held, "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id.* (citations omitted). Oceanic's allegations of causation do not meet that standard.

Anza itself was before the Supreme Court as a pleading case, and it obviously pre-dated the Court's decision in *Twombly*. Yet the Court in *Anza* refused to countenance allegations of causation — nor even allegations of specifically intended causation — as satisfying the requirements of proximate cause and direct injury. If the allegations in *Anza* did not suffice under Rule 8(a)(2) in the days before *Twombly*, then Oceanic's allegations, *a fortiori*, do not suffice now.[19]

G. The District Court based its judgment on the controlling legal principles, not on any improper standard or personal beliefs.

As shown above, the controlling requirements of proximate cause, direct injury, certainty of damages, and a direct victim compelled judgment on the pleadings for ConocoPhillips. Without any legitimate basis to contend otherwise, Oceanic resorts to attacking District Judge Hughes for supposedly basing his judgment on an improper legal standard and a personal disbelief of the bribery allegations. This attack rests on an untenable distortion of the District Court's opinion.

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[19] The case law that Oceanic cites for its "liberal pleading" argument — *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992) (cited at Oceanic Br. 30); *NOW* v. *Scheidler*, 510 U.S. 249, 256 (1994) (cited at Oceanic Br. 30); *Erickson* v. *Pardus*, 127 S. Ct. 2197, 2200 (2007) (cited at Oceanic Br. 31); *In re American Honda*, 941 F. Supp. at 544 (cited at Oceanic Br. 28, 31) — is likewise unavailing. None of those cases excuses Oceanic from its obligation under *AGC*, *Holmes* and *Anza* to plead a direct, non-speculative link between the alleged misconduct and the claimed injury.

To argue that the District Judge based his decision on a personal disbelief of Oceanic's allegations, Oceanic has to ignore the explicit premise of the Court's opinion, which is that the facts pleaded by Oceanic were true. The Court made this premise clear just three sentences into its opinion — stating that "[t]he claim fails because it does not plead facts that, *if true*, would show that its loss was proximately caused by the bribery" (Op. at 1 (R6828) (emphasis added)) — and reiterated that premise of its decision repeatedly thereafter. *See id*. at 10 (R6837) (Oceanic "has not pleaded facts that, *if true*, show its injury is connected to the acts it describes") (emphasis added); *id.* ("Assuming its facts — as opposed to assumptions and contentions, legal theories, and demands — *to be true*, Oceanic[]'s pleadings do not show that the wrongful acts of ConocoPhillips . . . proximately caused the harm it claims.") (emphasis added).

Not only that, Oceanic also has to ignore the Court's five-and-a-half-page discussion of proximate cause — a discussion that thoroughly and accurately traces the indirect and speculative causal chain that supposedly links Oceanic's injury to the alleged bribes. Op. at 5-10 (R6832-37). That entire discussion proceeds on the assumption that bribes were actually paid. *See* Op. at 5 (R6832) ("Oceanic pleads that ConocoPhillips bribed the first ministry of East Timor"); 6 (R6833) ("The damage must be traceable directly to the bribes, with a minimum of intervening events or alternative plausible causes"); 7 (R6834) ("Simply put,

Oceanic complains that ConocoPhillips paid bribes to preserve its existing, legitimate investment from arbitrary cancellation"); 9 (R6836) ("Oceanic speculates that absent the bribery . . . ").[20]

Most of the language that Oceanic seizes upon in support of its personal-disbelief theory has nothing to do with the truth or falsity of the bribery allegations. Judge Hughes, indeed, did state, for example, that it is "fanciful" to "attribute a decision by a government at a high level to a single person," and that it is "on the impossible edge of difficult" to "reconstruct a collective decision-making process in the absence of a single input — bribes — and predict what would have happened otherwise." Op. at 7 (R6834) (quoted at Oceanic Br. 37, 44). But those statements merely captured the reasons why courts — as a matter of law — have repeatedly declared it impermissible to trace causal chains through the

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[20] Seeking to bolster the claim that the District Court did not accept its allegations as true, Oceanic faults Judge Hughes' description of ConocoPhillips' Timor Gap concessions as an "existing legitimate investment," and contends that the Court failed to credit the allegation that ConocoPhillips won its concessions in 1991 through improper relationships with Indonesian officials. Oceanic Br. 39. But Oceanic itself alleges that ConocoPhillips won the concessions through competitive bidding — bidding that Oceanic admittedly chose not to enter, for fear it would undermine its claim under a 1974 Portuguese concession. SAC ¶ 80 (R4265). And while Oceanic's Second Amended Complaint does allege that ConocoPhillips bribed Indonesian officials back into the 1960s (SAC ¶ 59 (R4259)) — presumably an effort by Oceanic to establish a "pattern" under the RICO statute — the crux of the Second Amended Complaint has nothing to do with those earlier allegations, nor anything to do with the award of the 1991 concessions. As set forth at the outset of Oceanic's Second Amended Complaint, Oceanic "bring[s] this action to recover damages for the loss of the opportunity *in the post-independence period* for East Timor to compete or bid for rights to explore for and produce oil and natural gas from the seabed between East Timor and Australia." SAC ¶ 1 (R4244) (emphasis added).

deconstruction of governmental decision-making. *See* pages 27-28, *supra*. A court's obligation to accept allegations as true does not override the impermissibility of deconstructing governmental decisions — any more than the supposedly "liberal" pleading standards under Rule 8(a)(2) override the requirements of *AGC*, *Holmes* and *Anza*.

As for the operative allegations of bribery, Judge Hughes did describe them as "implausib[le]" (Op. at 6) (R6833) — as they most definitely are (*see* pages 15-20, *supra*). But Judge Hughes expressly put that "[i]mplausibility aside" and went on to analyze the speculative and indirect connection between the alleged bribes and Oceanic's injury — again, on the express assumption that the bribery allegations were true. Op. at 6 (R6833). The District Court's analysis of that causal chain, and its conclusion that it did not meet the requirements of proximate cause, was mandated by *AGC*, *Holmes* and *Anza* and was entirely correct.[21]

Oceanic's notion that District Judge Hughes applied a "heightened pleading standard" in its analysis of proximate cause is equally devoid of merit. Oceanic seizes upon the Court's statement that "Oceanic must show what would

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[21] The *Twombly* decision states that a court may not dismiss an action at the pleading stage based on a belief that proof of the pleaded allegations is improbable. 127 S. Ct. at 1965. *Twombly*, however, in no way prohibits courts from commenting on the implausibility of a plaintiff's allegations, so long as that implausibility is not the basis of the court's conclusion that the pleading fails to state a claim — as it expressly was not in this case. Op. at 6 (R6833) ("Implausibility aside, Oceanic simply can not link this fact with its injury.").

have happened absent the bribe to a high degree of probability." Oceanic Br. 24 (quoting Op. at 10 (R6837)). That statement was an entirely appropriate description of the governing standards of proximate causation in a case of this nature. *AGC*, *Holmes* and *Anza*, again, require direct injury and "certainty" in the "causal connection between the wrong and the injury." *AGC*, 459 U.S. at 533 n.26. They forbid indirect, uncertain, speculative causal chains. *Id.*; *Holmes*, 503 U.S. at 268-69; *Anza*, 547 U.S. at 458-61. The District Court's requirement of a "high degree of probability" rather than arrant speculation in the connection between the alleged bribery and Oceanic's injury was completely in line with those authorities and, if anything, set forth a more lenient pleading threshold for Oceanic than the Supreme Court's "certainty" precedents command.[22]

II. OCEANIC'S ROBINSON-PATMAN ACT CLAIM AND ITS COMMON-LAW CLAIMS LIKEWISE FAIL FOR LACK OF PROXIMATE CAUSE.

The dismissal of Oceanic's Robinson-Patman Act claim must be affirmed for the same reasons as mandate dismissal of Oceanic's RICO claim. The Robinson-Patman Act claim is controlled by the same statutory provision — Section 4 of the Clayton Act — at issue before the Supreme Court in *AGC*, and the

[22] In any event, given that review here is *de novo* and — no matter what pleading standard is applied — Oceanic cannot demonstrate the required direct link between claimed wrong and claimed injury, this Court may of course affirm whether or not it agrees with the District Court's "high degree of probability" formulation.

requirements of proximate cause determined by the Supreme Court in *AGC*, as well as *Holmes* and *Anza*, apply in full force. *See, e.g.*, *Gulf Oil Trading* v. *M/V Caribe Mar*, 757 F.2d 743, 751 (5th Cir. 1985) (affirming refusal to allow assertion of a Robinson-Patman Act claim; "possibly speculative" injuries do not suffice; injury must be "direct," rather than "indirect" or "remote"); *Gregory Marketing* v. *Wakefern Food*, 787 F.2d 92, 98 (3d Cir. 1986) (applying *AGC* to affirm dismissal of "speculative" Robinson-Patman Act claim).

Oceanic's common-law claims — unfair competition and intentional interference with prospective economic advantage — were properly dismissed for like reasons. Each of these torts requires satisfaction of the long-settled common-law requirements of proximate cause — direct injury and certainty of damages — the very common-law requirements held by *AGC* and *Holmes* to have been incorporated into the antitrust and RICO federal statutes. *See, e.g.*, *Lee & Lee Int'l* v. *Lee*, 261 F. Supp. 2d 665, 679 (N.D. Tex. 2003) ("To establish a claim of tortious interference with existing or prospective business relationships, plaintiffs must prove . . . [that an] intentional act was a proximate cause of plaintiff's damage."); *Associated Tel. Directory Publishers* v. *Five D's Publishing*, 849 S.W.2d 894, 898 (Tex. App. – Austin 1993) (plaintiff seeking damages for unfair competition can only recover for "actual losses or injuries sustained as a natural and proximate result of the defendant's wrong").

Federal courts dismissing RICO and antitrust claims on grounds of remote and indirect injury have regularly gone on to dismiss state-law claims for the same reason. *See*, *e.g.*, *Laborers Local 17* v. *Philip Morris*, 191 F.3d 229, 243 (2d Cir. 1999) ("[A]nalogous principles to those that doomed plaintiffs' RICO causes of action also bar plaintiffs' common law fraud and special duty actions."); *Steamfitters Local 420* v. *Philip Morris*, 171 F.3d 912, 934 (3d Cir. 1999) ("The same principles that lead us to conclude that plaintiffs' antitrust and RICO claims were properly dismissed lead [us] to the inevitable conclusion that their state law claims must also fail."); *International Brotherhood of Teamsters* v. *Philip Morris*, 196 F.3d 818, 827-28 (7th Cir. 1999) (dismissing claims asserted under laws of 11 states).[23]

III. THE DISTRICT OF COLUMBIA COURT'S DISMISSAL OF CONOCOPHILLIPS' DOMESTIC AND FOREIGN SUBSIDIARIES SHOULD BE AFFIRMED.

Because the failure to satisfy the requirements of proximate cause requires dismissal of all of Oceanic's claims against all defendants, this Court need

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[23] As noted above (page 3 n.2, *supra*), Judge Sullivan in the District of Columbia dismissed Oceanic's Lanham Act and unjust enrichment claims on the pleadings, before transferring the case to the Southern District of Texas, on grounds unrelated to the requirements of proximate cause and direct injury. Mem. Op. at 48-50, 53-54 (R5374-76, R5379-80). Judge Sullivan's ruling on those claims was entirely correct and is not challenged by Oceanic on this appeal. But in addition to the grounds that Judge Sullivan ruled upon, the lack of proximate cause and the lack of direct injury would in any event require dismissal of the Lanham Act and unjust enrichment claims for all of the same reasons that dismissal is required of Oceanic's RICO, Robinson-Patman Act and common-law claims.

not even consider Oceanic's argument that the District of Columbia Court erred in dismissing ConocoPhillips' domestic and foreign subsidiaries under Rule 12(b)(2) for lack of personal jurisdiction: the claims against those subsidiaries would in any event be barred for lack of proximate cause. Should the Court nevertheless consider the issue, the ruling that the District of Columbia Court lacked personal jurisdiction over the subsidiaries was entirely correct. Mem. Op. at 29-37 (R5355-63). Oceanic argues here on appeal that the Southern District of Texas was required — in light of the transfer — to revisit that jurisdictional decision by Judge Sullivan and permit jurisdictional discovery. But Oceanic never presented any such motion or argument to Judge Hughes below. The argument is waived. *See, e.g.*, *Jethroe* v. *Omnova Solutions*, 412 F.3d 598, 601 (5th Cir. 2005).

Conclusion

For the foregoing reasons, this Court should affirm the judgment below dismissing all claims against all ConocoPhillips defendants.

Dated: October 6, 2008

Respectfully submitted,

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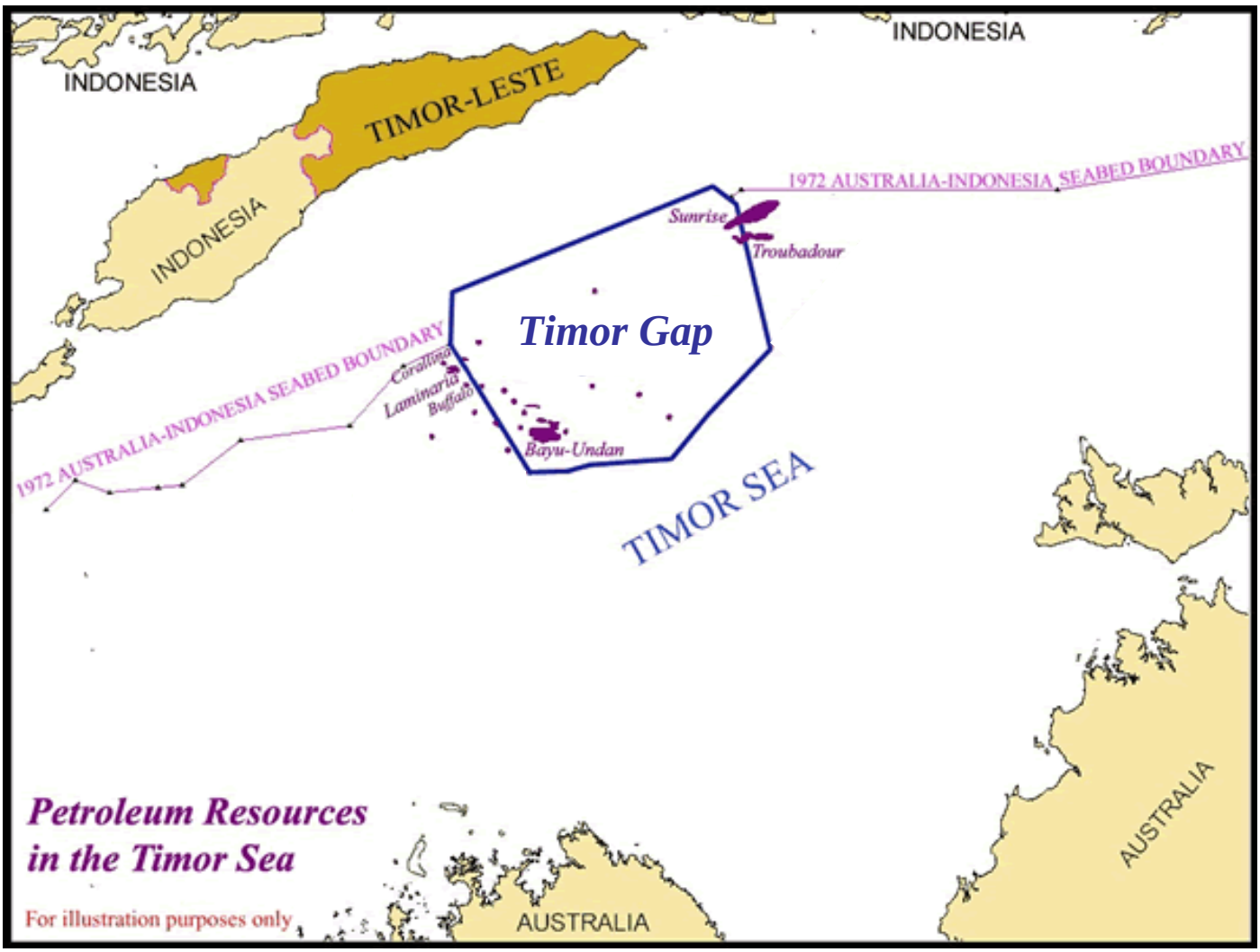

"Timor-Leste" is the Portuguese name for East Timor.

CERTIFICATE OF SERVICE

I certify that on this sixth day of October, 2008, seven paper copies and an electronic copy of the foregoing BRIEF OF DEFENDANTS-APPELLEES CONOCOPHILLIPS AND RELATED ENTITIES were sent by Federal Express for overnight delivery to the Clerk of this Court, and that paper and electronic copies of the brief were sent by Federal Express for overnight delivery to the attorneys listed below:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, the undersigned certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,723 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 SP2 in Times New Roman typeface and 14-point font, except for footnotes, which use a 12-point font.

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