CASE NO. 08-20338

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCEANIC EXPLORATION COMPANY, a Delaware Corporation; PETROTIMOR COMPANHIA DE PETROLEOS, SARL, a corporation organized under the laws of Portugal,
Plaintiffs-Appellants,

v.

PHILLIPS PETROLEUM COMPANY ZOC, a Delaware Corporation; PHILLIPS PETROLEUM COMPANY INDONESIA, a Delaware Corporation; PHILLIPS PETROLEUM (96-20) INC., a Delaware Corporation; PHILLIPS PETROLEUM PRODUCTION INDONESIA INC.,
(caption continued)

On appeal from the United States District Court for the Southern District of Texas, No. 4:07-CV-815, (Hon. Lynn N. Hughes)

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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(*caption continued)* **a Delaware Corporation; PHILLIPS INDONESIA INC., a Delaware Corporation; PHILLIPS INTERNATIONAL INVESTMENTS INC, a Delaware Corporation; CONOCOPHILLIPS AUSTRALIA PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS AUSTRALIA GAS HOLDINGS PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS JPDA PTY LTD, an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS PIPELINE AUSTRALIA PTY LTD, an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS STL PTY LTD, an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS WA-248 PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS (03-12) PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS (03-13) PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS (03-16) PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS (03-19) PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS (03-20) PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS (03-21) PTY LTD., an Australian private company organized under the laws of the Commonwealth of Australia; CONOCOPHILLIPS CO., a Delaware Corporation; CONOCOPHILLIPS, a Delaware Corporation; DARWIN LNG PTY LTD, an Australian private company organized under the laws of the Commonwealth of Australia; PHILLIPS PETROLEUM CO, ZOC PTY LTD, an Australian private company organized under the laws of the Commonwealth of Australia; TOKYO TIMOR SEA, PTY LTD, an Australian private company organized under the laws of the Commonwealth of Australia,[*]**

Defendants-Appellees.

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[*] Appellants note that there are two errors in the caption for this appeal: (1) Tokyo Timor Sea Resources, Inc. has been left out of the caption; and (2) Tokyo Timor Sea Pty Ltd's actual name is Tokyo Timor Sea ***Resources*** Pty. Ltd.

CASE NO. 08-20338

IN THE
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OCEANIC EXPLORATION COMPANY and PETROTIMOR COMPANHIA DE PETROLEOS, S.A.R.L., ***Plaintiffs-Appellants,***

v.

CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, ***et al.,***
Defendants-Appellees.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellants 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.

PARTIES TO THE UNDERLYING CASE.

Plaintiffs-Appellants: Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L.

Defendants:

1. Parents: (a) ConocoPhillips; (b) ConocoPhillips Company

2. Present and former ConocoPhillips' "Domestic Subsidiaries":[**]

Phillips Petroleum Company Indonesia; Phillips Indonesia, Inc.; Phillips International Investments, Inc.; Phillips Petroleum Co. ZOC, n/k/a ConocoPhillips JPDA Pty. Ltd.; Phillips Petroleum (96-20), Inc. n/k/a ConocoPhillips (03-20) Pty. Ltd.; Phillips Petroleum Production Indonesia, Inc.; Phillips Petroleum Timor Sea, Inc. n/k/a Tokyo Timor Sea Resources, Inc.

3. Present and former ConocoPhillips' "Foreign Subsidiaries":

ConocoPhillips (00-21) Pty. Ltd., n/k/a ConocoPhillips (03-21) Pty. Ltd.; ConocoPhillips (91-12) Pty. Ltd., n/k/a ConocoPhillips (03-12) Pty. Ltd.; ConocoPhillips (91-13) Pty. Ltd., n/k/a ConocoPhillips (03-13) Pty. Ltd.; ConocoPhillips (95-19) Pty. Ltd. n/k/a ConocoPhillips (03-19) Pty. Ltd; ConocoPhillips (96-16) Pty. Ltd., n/k/a ConocoPhillips (03-16) Pty. Ltd.; ConocoPhillips (96-20) Pty. Ltd., n/k/a ConocoPhillips (03-20) Pty. Ltd.; ConocoPhillips Australia Pty. Ltd.; ConocoPhillips Australia Gas Holding Pty. Ltd.; Phillips Petroleum Company ZOC n/k/a ConocoPhillips JPDA Pty. Ltd.;

[**] The designations of Domestic Subsidiaries and Foreign Subsidiaries below were those used by the parties and the district court in connection with the personal jurisdiction rulings made on September 21, 2006. The parties' status as either foreign or domestic subsidiaries may have changed with the passage of time; however, the parties are grouped as they existed at the time of the ruling.

ConocoPhillips STL Pty. Ltd.; ConocoPhillips WA-248 Pty. Ltd., ConocoPhillips Pipeline Australia Pty. Ltd.; Darwin LNG Pty. Ltd., f/k/a/ Phillips Petroleum LNG Pty., Ltd.; Tokyo Timor Sea Resources, Pty. Ltd (listed in caption as Tokyo Timor Sea Pty. Ltd.) f/k/a Phillips Petroleum Timor Sea Pty. Ltd.

4. *Others*: PT Pertamina (Persero); Timor Sea Designated Authority for the Joint Petroleum Area;*** Badab Oelaksana Kegiatan Usaha Hulu Minyak Dan Gas Bumi

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OTHER PERSONS WITH DISCLOSABLE INTERESTS PURSUANT TO LOCAL RULE 28.2.1.

Plaintiffs-Appellants Oceanic and Petrotimor are privately held, and no publicly-held corporation owns 10% or more of any stock of either. Details regarding the private company business of Oceanic and Petrotimor, inclusive of any other entity as described in the fourth sentence of Rule 28.2.1, have been filed under seal in the district court below (Dkt # 149-50).

DIAMOND MCCARTHY LLP

By: _____
Attorney of Record for Appellants Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L

STATEMENT REGARDING ORAL ARGUMENT

Appellants Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L. (collectively, "Oceanic") request oral argument.

Oceanic's claims against ConocoPhillips (as defined herein) and others were dismissed pursuant to a judgment on the pleadings entered by U.S. District Judge Lynn N. Hughes in the year after the case was transferred to the Southern District of Texas, and after the District of Columbia judge had twice rejected dispositive motions on the same issue, in his three years with the case.

Oceanic believes oral argument will assist this Court in understanding the complex factual background for the case, the complicated procedural history of the case, the improper nature of the judgment on the pleadings and the manner in which it was rendered, and the case-specific need for a judicial reassignment on remand.

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INTRODUCTION

This is an appeal from a Rule 12(c) judgment on the pleadings. Plaintiffs allege that the Defendants' bribery of governmental officials in East Timor deprived them of an opportunity to compete for valuable oil and gas rights. After the transfer of the case to the Southern District of Texas, the court granted a Rule 12(c) motion based upon the same grounds that had twice been rejected by the transferor court in the District of Columbia. That ruling is erroneous because it is not based upon the proper application of the correct standards, including an analysis of the allegations of the complaint and inferences reasonably drawn therefrom, but rather upon the district court's personal opinions of the facts and the merits of the case. Accordingly, this Court should reverse and reassign the case on remand. This Court should also vacate the trial court's dismissal, on personal jurisdiction grounds, of the Plaintiffs' claims against ConocoPhillips' foreign and domestic subsidiaries.

STATEMENT OF JURISDICTION

Plaintiffs Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L (collectively "Oceanic" except as otherwise indicated) appeal from a final judgment (R6847) by the United States District Court for the Southern District of Texas (Hon. Lynn N. Hughes) after a transfer from the United States

District Court for the District of Columbia (Hon. Emmet G. Sullivan), rendering earlier interlocutory orders final.[1]

Judge Hughes' judgment, and the accompanying opinion granting defendants' Rule 12(c) motion for judgment on the pleadings was based upon the court's conclusion that the complaint failed to plead proximate cause, contrary to two prior orders by Judge Sullivan denying ConocoPhillips' motion to dismiss Oceanic's complaint. R6828-37. One of those orders also dismissed ConocoPhillips' Foreign and Domestic Subsidiaries, as defined in the Certificate of Interested Persons, on personal jurisdiction grounds. R6828.

The district courts had subject matter jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1330, 1331, 1337, 1338; 18 U.S.C. §§ 1964(c), 1965; and 15 U.S.C. §§ 15, 1121, and over the state law claims pursuant to 28 U.S.C. § 1367.

The final judgment was entered on April 22, 2008. R6866. Appellants' timely notice of appeal was filed on May 15, 2008. R6588. This Court has appellate jurisdiction over this action pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err by applying a heightened pleading standard in ruling on defendants' motion under Rule 12(c) for judgment on the pleadings when he said that "To recover, Oceanic must show what would

[1] Because two different federal district judges in two different districts presided over different phases of the case, Appellants on occasion refer to each judge by name.

have happened absent the bribe to a ***high degree of probability*** [and] . . . [i]t can not"? R6837.

2. Did the district court err in granting defendants' Rule 12(c) motion when it failed to accept the allegations of the complaint as true and indulge all reasonable inferences in favor of the plaintiff?

3. Should this case be remanded to the Southern District of Texas with instructions that it be reassigned to another judge because of the need to preserve the appearance of impartiality?

4. Should Judge Sullivan's order dismissing ConocoPhillips' Domestic and Foreign Subsidiaries on personal jurisdiction grounds, made final by Judge Hughes after transfer of venue, be vacated in light of (i) its error; and (ii) the effect of the transfer on that ruling?

STATEMENT OF THE CASE

The allegations of the complaint and the reasonable inferences therefrom demonstrate that Oceanic was denied a right to compete in a process untainted by bribery.

Oceanic's operative Second Amended Complaint, R4240, *et seq.* (Dkt.#81), alleges that Oceanic was injured in its business and property as a direct result of the payment by ConocoPhillips and its affiliates, including its predecessor, Phillips Petroleum (collectively, "ConocoPhillips"), of more than $2.5 million in illegal

bribes to government officials in East Timor, including Mari Alkatiri. Alkatiri was, *inter alia,* East Timor's first Prime Minister.

The complaint also alleges that Alkatiri used his influence to (1) prevent the government of East Timor from meeting with or considering proposals from Oceanic to develop oil and gas reserves in the Timor Gap;[2] and (2) induce East Timor to grant post-independence production sharing contracts to ConocoPhillips, similar to those production sharing contracts, since abrogated by the East Timor Constitution, that ConocoPhillips had obtained while East Timor was under unlawful military occupation by Indonesia.

The complaint expressly alleges that Oceanic was denied a valuable opportunity to compete or bid for oil and gas exploration rights in the Timor Gap as a direct result of the bribes paid by ConocoPhillips to Alkatiri and other officials. R4244 (Dkt.#81, ¶ 1). Oceanic asserted claims for damages[3] under the Racketeer-Influenced and Corrupt Organizations ("RICO") Act (18 U.S.C. §§ 1961 *et seq.*), Section 2(c) of the Robinson-Patman Act (15 U.S.C. § 13(c)), as well as state common law tort claims.

I. Course of Proceedings

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[2] The Timor Gap is an area of the Timor Sea lying between East Timor's southern coast and Australia's northern coast as to which no international maritime boundary has been finally agreed. R4255-56 (¶ 49).

[3] This is an action for actual, statutory and punitive damages and for traditional forms of related relief. To the extent that the constructive trust claim asserted in the Oceanic complaint, *see* R4302, has not already been outstripped by events or implicitly abandoned, Oceanic hereby abandons it.

The complaint was originally filed in the United States District Court for the District of Columbia on March 1, 2004, R61, and assigned to Judge Sullivan. A First Amended Complaint was filed on May 26, 2004. R205. After motions to dismiss were filed by numerous defendants, Judge Sullivan entered an Order dismissing the First Amended Complaint without prejudice and directing plaintiffs to file a Second Amended Complaint. R4138-39.

After the filing of the Second Amended Complaint, and additional motion to dismiss briefing by all parties, Judge Sullivan entered a Memorandum Opinion, R5327 (Dkt.#92), and Order, R5325 (Dkt.#91), granting the motion to dismiss submitted by the Timor Sea Designated Authority, granting in part and denying in part ConocoPhillips' motion to dismiss,[4] and directing that ConocoPhillips answer the Second Amended Complaint and submit (with Oceanic) a Rule 26(f) Conference Report and Discovery Plan. R5326.

In denying ConocoPhillips' motion to dismiss, Judge Sullivan expressly rejected the argument that Plaintiffs did not have Article III "standing because they failed to assert a concrete, particularized injury-in-fact," caused by or resulting from ConocoPhillips' bribery of Mari Alkatiri and other East Timorese officials, and held that "Plaintiffs have sufficiently alleged a legally cognizable injury at this juncture." R5354. Judge Sullivan explained:

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[4] One portion of that opinion and order dismissed the Plaintiffs' claims against ConocoPhillips' foreign and domestic subsidiaries.

> Taking all of the factual allegations in the complaint as true, ***plaintiffs have demonstrated that ConocoPhillips' alleged wrongdoing caused plaintiffs' alleged injury. . .*** Namely, they were harmed when they were deprived of a valuable business opportunity to develop oil and natural gas from the Timor Sea and of a fair opportunity to compete to secure that business opportunity due to the unlawful activities of ConocoPhillips.

R5353-54 (emphasis added). Judge Sullivan also ruled that Oceanic had pleaded sufficient facts to state a substantive claim for damages under RICO, R5365-70, Section 2(c) of the Robinson-Patman Act, R5367-73, and for intentional interference with prospective economic advantage and unfair competition. R5367-73.

ConocoPhillips' motion for reconsideration, SR80 (Dkt.#93), which re-urged its lack of standing argument, was denied by Judge Sullivan on November 17, 2006. R5702 ("As explained in this Court's . . . Memorandum Opinion and Order, ***plaintiffs have standing to bring this case because they have alleged a legally cognizable injury***.") (emphasis added).

On February 5, 2007, nearly three years after the case had been filed, Judge Sullivan entered an order under 28 U.S.C. § 1404(a) granting ConocoPhillips' motion to transfer venue from the District of Columbia to the Southern District of Texas. R5763. The case was then assigned to Judge Hughes.

II. The Disposition Below

On March 13, 2007, ConocoPhillips filed a Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c) on the ground that the complaint failed

to plead proximate cause, R5828, 5849-62 (Dkt.#115, #116). A previous ConocoPhillips' motion to dismiss under Rule 12(b)(6) had been twice denied by Judge Sullivan.

Judge Hughes' questions to Oceanic's counsel at the one and only status conference on April 5, 2007, reflected that he had already decided that the allegations of the complaint could not be true. R6525, *et seq.* (Dkt.#153). He granted ConocoPhillips' Rule 12(c) motion for judgment on the pleadings on April 16, 2008. R6828.[5] The Opinion on Dismissal stated that the complaint "does not plead facts that, if true, would show that [Oceanic's] loss [of the opportunity to compete for an oil concession] was proximately caused by the bribery." *Id.*

The district judge disregarded the factual allegations of the complaint as "abstractions . . . with over 50 pages of trivia . . . a metaphysical leap from [a] list of gossip and debris." R6833. Although he acknowledged that "Oceanic pled that the president of ConocoPhillips flew to East Timor to hand an official a suitcase of cash" – and Oceanic had been allowed ***no discovery*** in the four years the case had been pending – the district judge discounted the significance of that allegation on his belief that Oceanic "can not possibly have an idea why the president of an

[5] Judge Hughes also rejected Oceanic's argument that he was precluded by the doctrine of the law of the case or judicial estoppel from reversing Judge Sullivan's prior decisions denying ConocoPhillips' motion to dismiss the complaint. R6830.

international corporation would personally deliver cash in a briefcase to an official of East Timor. It has assumptions – nothing more." *Id.*

The district judge also repeatedly concluded Oceanic could not show that East Timor would have abrogated the prior concessions granted during the occupation of the country even though, in multiple instances, Oceanic expressly alleged, in reliance on the East Timorese constitution, that East Timor had in fact abrogated those concessions. R4268 (¶ 88). And while Oceanic alleged that such bribes had led Mari Alkatiri to manipulate the award of oil and gas production sharing contracts in one of the most corrupt corners of the world, R4269 (¶ 91), the district judge ridiculed the very thought that such bribes could succeed, calling it both "fanciful" and "on the impossible edge of difficult." R6834.

III. Statement of Facts

Because the district court granted ConocoPhillips' Rule 12(c) motion for judgment on the pleadings solely on the ground that the complaint failed to plead proximate cause, the only relevant facts for purposes of the Rule 12(c) argument are those set forth in the Second Amended Complaint.

A. Oceanic's Background And Experience.

Oceanic is an established company with a long history of successful oil and gas exploration 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. R4256-57 (¶ 51).

B. Oceanic's Exclusive Agreement With Portugal To Explore And Extract Oil And Gas From The Timor Gap.

In 1968, when Oceanic first obtained permission to explore oil and gas in the Timor Gap, East Timor was a Portuguese colony. In 1974, after forming a Portuguese subsidiary, Petrotimor Companhia de Petroleos, S.A.R.L., Oceanic and Petrotimor were granted an exclusive concession by Portugal to explore for and extract oil and gas in a 14.8 million acre area of the Timor Gap. R4257-58 (¶¶ 52-54). Oceanic opened an office in Dili, the capitol of Portuguese East Timor, shortly thereafter. R4258 (¶ 55).

C. Indonesia's Occupation Of East Timor – 1975-1999.

Oceanic's exploration in the Timor Gap was interrupted in 1975, when Indonesia invaded East Timor. One-third of the population of East Timor was killed during the invasion. The Indonesian army ransacked and occupied Dili, including the offices of Timor Oil, in which all of Oceanic's geologic maps and seismic exploration data were stored. R4258-59 (¶ 57).

Although Indonesia purported to annex East Timor as its 27th province, the United Nations and the international community refused to recognize the legality of the invasion and annexation, and consistently for the next 25 years continued to

recognize that Portugal, not Indonesia, was the lawful government of East Timor. R4259 (¶ 58).

In 1989, while East Timor was still under Indonesian occupation, Indonesia and Australia created a "Joint Authority" to exploit the oil and gas in the Timor Gap claimed by Portugal, including the 14.8 million acre area that had been granted by Portugal to Oceanic. R4263-64 (¶¶ 72-76).

As a result of a long history of corrupt activities in Indonesia, ConocoPhillips had ultimately secured a favored position in the Timor Sea when Pertamina officials were assigned to work for the Joint Authority on the award of oil and gas production contracts in the Timor Gap. R4262-63 (¶ 71).

ConocoPhillips had little or no experience or interest in the Timor Sea prior to 1991, and used its influence with the Indonesian government to obtain from the Joint Authority the right to explore for and extract oil and gas from the 14.8 million acre tract that had been granted to Oceanic by Portugal. R4264-65 (¶ 79)

D. East Timor Votes For Independence From Indonesia In 1999.

Indonesia's 24 years of occupation of East Timor ended in August 1999, when the people of East Timor voted for independence from Indonesia in a referendum held under the auspices of the United Nations. R4266 (¶ 83). By agreement with Portugal, temporary administrative authority over East Timor was transferred to the United Nations, which established an interim government for

East Timor known as the United Nations Transitional Administration in East Timor ("UNTAET"). *Id.*

E. Mari Alkatiri.

Mari Alkatiri was the leader of the largest political party in East Timor at the time of the independence vote. R4267 (¶ 84). After that vote, ***Alkatiri had direct responsibility for all natural resources in East Timor*** (including oil and gas resources in the Timor Gap), both during UNTAET's interim administration, and later as the first Prime Minister of East Timor. R4269 (¶¶ 91, 92, 95). In all of his positions, Alkatiri had a continuing ability to influence determination as to whether (1) a company could bid for oil and gas concessions in the Timor Gap; and (2) whether the UNTAET or its successors would award production sharing contracts to companies like ConocoPhillips (that held concession rights granted while Indonesia unlawfully occupied East Timor) or allow others to compete for those production sharing contracts. R4269 (¶ 91).

The post-independence prospects for ConocoPhillips were very poor. Alkatiri and his political party were originally

> ***. . . adamant that all interests previously granted in the Timor Sea were invalid, including all prior production sharing contracts that the Joint Authority had awarded. Mari Alkatiri, the leader of the largest East Timorese political party, and ultimately Prime Minister for East Timor, stated that his party 'would not legitimatize a treaty between a thief and the receiver of stolen goods,'*** referring to the Timor Gap Treaty between Indonesia and Australia that permitted their joint commercial exploration of the oil and natural gas in the Timor Sea. ***Alkatiri later stated that 'we still***

consider the Timor Gap Treaty an illegal treaty. This is a point of principle. We are not going to be a successor to an illegal treaty.' As such, ConocoPhillips interests in the Timor Gap would have been vitiated.

R4266-67 (¶ 84) (emphasis added).

ConocoPhillips "recognized Alkatiri's significant influence over the East Timor natural resources, including the oil and gas in the Timor Gap, and dealt with him almost exclusively on this issue from August 30, 1999 [after the independence vote]." R4269 (¶ 91).

F. ConocoPhillips Recognized That Its Concession Rights In The Timor Gap Were In Jeopardy.

James Godlove, ConocoPhillips' Darwin [Australia] Area Manager, recognized that ConocoPhillips' contract in the Timor Gap was in jeopardy as a result of East Timor's vote for independence, and explained: "[I]f by the end of 2001 we do not have a declaration of commercial discovery and an approved development plan . . . we run the risk of losing all of the investments we have made and our rights to develop this field. This would be a disaster of major proportions." R4267 (¶ 86).

G. ConocoPhillips' Bribery Of Alkatiri.

"To avoid this 'disaster of major proportions' . . . ConocoPhillips conducted a campaign of making cash payments and payments in kind ["gifts" of trucks] to and for the benefit of Mari Alkatiri and other East Timor officials . . . [exceeding] US$2.5 million, [t]he significance [of which] can be best understood by comparing

this to Mr. Alkatiri's current US$450 monthly salary as Prime Minister." R4269 (¶ 89).

Paragraphs 90-103 of the complaint describe in detail a lengthy and continuing series of substantial bribes paid by officials of ConocoPhillips to Mari Alkatiri in the pre- and post independence periods:

> 90. ***. . . ConocoPhillips made these payments to influence Mari Alkatiri and to induce him to use his influence to ensure that East Timor would reinstate the production sharing contracts that ConocoPhillips previously held and to ensure that Oceanic would not be awarded production sharing contracts in the Timor Gap.***
>
> 93. ConocoPhillips' 2000 Annual Report stated that the company had "donated 13 trucks for agricultural use," purportedly "to help the new nation of East Timor." The 2000 Annual Report pictured Stephen Brand, "Australasia division president" presenting an additional vehicle – to be used as "a mobile medical clinic" – to three nuns. ***In fact, the "trucks" were Toyota SUVs intended to become personal vehicles for the senior political leadership in East Timor. These SUVs have been so used; they can be seen nightly parked in the driveways of government officials, including the Alkatiri residence.*** Senior ConocoPhillips management not only intended that these SUVs be a bribe to curry favorable treatment for the company, but also have actually witnessed in trips to East Timor that the vehicles in no way are actually "for agricultural use." ***Subsequently, ConocoPhillips has "contributed" a number of other vehicles for the personal benefit of officials in East Timor.***
>
> 94. ***Ahmed Alkatiri is Mari Alkatiri's brother. During this time and thereafter, Mari Alkatiri sometimes used Ahmed to collect bribes made by foreign companies, including ConocoPhillips, to secure favorable treatment. Beginning in January 2001, Ahmed Alkatiri received $74,000 in U.S. funds that were then paid into bank accounts in Australia.*** Those accounts are with the Australia and New Zealand Bank ("ANZ Bank") facility, one of which is Account Number 0164955606-24866. Another account used for this purpose at the same bank, but in the name of Mari Alkatiri, is Account Number 0159015376-18038. Some of the cash was

deposited at the ANZ branch at 247 Trower Road, Monterey House, Casuarina. ***This money was paid by ConocoPhillips in its effort to solidify approval by Mari Alkatiri, on behalf of East Timor, of the prior production sharing contracts that had been secured from the Joint Authority in the Timor Gap.***

99. ***At the end of October, Mari Alkatiri and Ahmed Alkatiri, on his brother's behalf, received approximately $44,000 U.S. funds which ultimately were paid into bank accounts in Australia at the ANZ Bank in Casuarina. These payments were made by ConocoPhillips to influence the decision by East Timor to reduce its tax rates.***

100. On April 14, 2002, Mari Alkatiri was designated the Prime Minister. Mulva, originating his travel in the United States on a ConocoPhillips aircraft, Registration No. N663P, visited Dili, departing on April 17, 2002, in the company of Billy Parker, Stephen Brand and Blair Murphy, with a destination of Sydney, Australia. East Timor planned to have its "independence day" the next month. ***ConocoPhillips paid to Alkatiri US$500,000 purportedly for the celebrations. The payment has never been accounted for to the East Timor public and was not spent on the celebrations.***

101. Mulva, ConocoPhillips CEO, traveled to Dili and attended the celebrations. Originating his travel in the United States on a ConocoPhillips aircraft, Registration No. N667P, Mulva arrived in Dili on May 19, 2002, in the company of Blair Murphy, Stephen Brand and Billy Parker. Prior to the arrival in Dili, the aircraft stopped in Darwin, Australia. ***Mulva arranged to have over $2 million in U.S. funds paid to Mari Alkatiri during Mulva's trip as a bribe for Alkatiri's participation in ensuring that ConocoPhillips maintained its interests in the Timor Sea on the same terms as it had previously secured from Australia and Indonesia. This US$2 million cash payment was then ferried in various amounts to Australia and placed in a bank account in the name of Ahmed Alkatiri, for the benefit of Mari Alkatiri.*** Between May and December, 2002, Alkatiri and members of his family and cohorts made over 80 trips from Dili to Darwin for this purpose. The resulting cash was deposited at the Wespac Bank at 7 Bradshaw Terrace, Casuarina. In transactions with the Westpac Bank, Ahmed – in an effort to cover-up his actions – used at least four different names: Ahmad Alkatiri, Ahmad Bin Hamud Alkatiri, Ahmed Alkatiri and Ahmade Hamute Alkatiri.

> 102. ***On June 15, 2002, Rogerios Lobato – an Alkatiri bagman – was stopped at the Darwin airport by Australian customs authorities with approximately $1 million in United States currency in a suitcase.*** Because of his assertion of diplomatic immunity, he was allowed to proceed into Australia, but a report of suspicious financial activity was generated by the Australian officials. This money ended in Alkatiri's bank accounts in Australia.
>
> 103. ***In addition, in the period between May and July, 2002, additional monies were given to Ahmed and Mari Alkatiri by ConocoPhillips in an amount approximating A$138,000. These funds, as well, were ultimately transported to Australia for placement in the separate ANZ bank accounts.***

R4269-74 (¶¶ 90, 93, 94, 99, 100, 101, 102, 103) (emphasis added).

H. <u>Proximate Cause Allegations.</u>

The complaint also expressly alleges that after first stating, as a matter of principle, that East Timor would not recognize agreements made while East Timor was under Indonesian rule, as a result of ConocoPhillips' bribes, Alkatiri reversed his position and used his influence to ultimately grant concession rights to ConocoPhillips.

> ***As a direct result of those bribes, Mari Alkatiri reversed his position and influenced the Timor Sea Designated Authority, in 2003, to reinstate ConocoPhillips' production sharing contracts*** in the Timor Gap on terms [that were even] more favorable to ConocoPhillips than those that applied when Indonesia occupied East Timor.

R4245 (¶ 4) (emphasis added).

The complaint contains numerous other proximate cause allegations directly linking the bribes to the refusals of both the UNTAET and the post-independence

government of East Timor (of which Alkatiri became the Prime Minister), to meet or negotiate with Oceanic and to deal exclusively with ConocoPhillips. These include allegations that:

> 95. ***As a direct result of the illegal payments ConocoPhillips made to and for the benefit of Mari Alkatiri, he no longer condemned ConocoPhillips' production sharing contracts that ConocoPhillips was awarded during the Indonesian occupation of East Timor.*** To the contrary, on July 5, 2001, Mari Alkatiri, then the East Timorese Cabinet Member for Economic Affairs for the UNTAET, signed a Memorandum of Understanding with Australia. In that document, Alkatiri agreed that upon East Timor's independence, an arrangement similar to the one that existed between Australia and Indonesia would govern joint exploitation of the Joint Petroleum Development Area (previously Area A of the Zone of Cooperation under the Timor Gap Treaty). The Joint Petroleum Development Area, like Area A of the Zone of Cooperation, overlapped the area of Oceanic's concession from Portugal, as shown in Exhibit B.
>
> 107. At about this same time, ***Alkatiri, through his brother Ahmed, received approximately $54,000 in U.S. funds from ConocoPhillips to secure his approval and participation in the treaty ratification.*** These funds were ultimately deposited in ANZ Bank accounts in the name of Mari and Ahmed Alkatiri.
>
> 145. ***The acts of bribery, corruption and wrongdoing as specified in this Complaint, and which resulted in the exclusion of Oceanic from the opportunity to compete and bid for the rights to explore for and produce oil and natural gas in the Timor Gap,*** . . .
>
> 154. The enterprise as described herein is at all relevant times a continuing enterprise because, ***it was designed to and did unlawfully prohibit and prevent Plaintiffs from fairly competing with ConocoPhillips and prevent Plaintiffs from obtaining rights to explore for oil and natural gas in the Timor Gap.*** . . .

R4271, 4275, 4288-91 (¶¶ 95, 107, 145, 154) (emphasis added).

I. ConocoPhillips' Bribes Directly Caused An Injury To Oceanic's "Business And Property."

Oceanic's complaint also expressly and repeatedly alleges that Oceanic was injured in its business and property as a direct result of ConocoPhillips' bribery of Alkatiri and other East Timorese officials:

> 6. ***ConocoPhillips' bribery of East Timorese officials deprived Oceanic of any opportunity to meaningfully compete for, or even to bid for, rights to explore for or produce oil and natural gas in the Timor Gap.*** Had Oceanic not been deprived of this opportunity, Oceanic would have been the successful bidder for rights to explore for and produce oil and natural gas in the Timor Gap.
>
> 158. ***Plaintiffs, and each of them, have been injured in their business or property as a direct and proximate result of the defendant Conspirators' violations of 18 U.S.C. § 1962(c),*** including injury by reason of the predicate acts constituting the pattern of racketeering activity.
>
> 159. ***Oceanic and Petrotimor have been injured, at a minimum, in their valuable business and property by the actions of the defendant Conspirators*** in unlawfully preventing and interfering with their ability to compete fairly for the ability to extract hydrocarbons from the Timor Sea and preventing and interfering with their ability to secure production sharing contracts to explore for and produce oil and natural gas in the Timor Sea.
>
> 174. ... As a result of the ConocoPhillips defendants' improper conduct, Plaintiffs had no meaningful opportunity to obtain production sharing contracts with the named entities or even to meaningfully communicate with them in pursuit of such contracts. ***By reason of the ConocoPhillips defendants' improper conduct, Plaintiffs were deprived of any opportunity to fairly compete and bid for the opportunity to explore for and produce oil and natural gas from below the Timor Sea.***

R4246, 4294, 4297-98 (¶¶ 6, 158, 159, 174) (emphasis added).

J. The District Court's "No Proximate Cause" Rationale.

According to the district judge, "Oceanic complains that ConocoPhillips paid bribes to preserve its existing, ***legitimate*** investment from arbitrary cancellation, while Oceanic lobbied East Timor to ***expropriate*** ConocoPhillips' concession for its benefit." R6834 (emphasis added). That is a fundamental misreading of the allegations of the complaint. The district judge further ruled that even if "Oceanic shows that ConocoPhillips bribed officials expressly to keep the concessions, [Oceanic] must show that, absent the bribes, East Timor would have unilaterally abrogated [the 1991] concession from [the] Australia and Indonesia [Joint Authority]." *Id.*

The district judge concluded that to prove proximate cause, "Oceanic's facts must be that if ConocoPhillips had not bribed East Timor: (a) East Timor would have chosen to abrogate the concessions, [and] (b) Australia would have acquiesced." R6833. He said that "[i]t is debatable whether East Timor could have abrogated the [1991] concessions" without Australia's consent, R6834, and that in any event, "[t]o attribute a decision by a government at a high level to [a] single person [*i.e.,* Mari Alkatiri] is ***fanciful***." *Id.* (emphasis added).

These conclusions notwithstanding, the complaint expressly alleges that ConocoPhillips' 1991 production sharing contracts were ***not legitimate***, but rather were obtained by ConocoPhillips' bribery of occupying Indonesian officials, and

were in fact ***abrogated by the new East Timor Constitution***, without the consent of Australia. R4262-65 (¶¶71-79); 4268 (¶ 88).

K. ConocoPhillips' Lease Was Repudiated Without Australia's Consent By § 157 Of The New East Timor Constitution.

The complaint also alleges that "The East Timor Constitution … vitiated all prior exploration, production or property interests in the Timor Gap, including the ConocoPhillips defendants' interest in all production sharing contracts." R4268. The complaint quotes the express language of the new East Timor Constitution in paragraph 88 to support this allegation:

> The resources of the soil, the subsoil, the territorial waters, the continental shelf and the exclusive economic zone, which are essential to the economy, shall be owned by the State and must be used in a just and equitable manner in accordance with national interests. (Constitution of the Democratic Republic of East Timor, art. 139, para. 1).
>
> ***The Democratic Republic of East Timor shall not recognize any acts or contracts concerning the natural resources referred to in number 1 of Article 139 entered into or undertaken prior to the entry into force of the Constitution which are not confirmed by the competent organs after the Constitution enters into force.*** (Constitution of the Democratic Republic of East Timor, art. 158, para. 3).

R4268 (Dkt.#81, ¶ 88) (emphasis added).

STANDARD OF REVIEW

This Court reviews "Rule 12(c) motion(s) for judgment on the pleadings *de novo*" and "[t]he standard for deciding a Rule 12(c) motion is the same as a Rule 12(b)(6) motion to dismiss" for failure to state a claim. *Guidry v. Am. Pub. Life*

Ins. Co., 512 F.3d 177, 180 (5th Cir. 2007). "'The central issue is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citations omitted), *cert. denied*, 128 S. Ct. 1230 (2008); *see also* 5C CHARLES ALAN WRIGHT ET AL, FEDERAL PRACTICE AND PROCEDURE § 1368 (3d ed. 2008) ("[F]or purposes of ... the Rule 12(c) motion, all of the well pleaded factual allegations in the [complaint] are assumed to be true and all contravening assertions in the movant's [answer] are taken to be false.").

Personal jurisdiction dismissals are reviewed *de novo*. *Stroman Realty v. Antt*, 538 F.3d 382, 385 (5th Cir. 2008).

SUMMARY OF ARGUMENT

The decision of the district court granting defendants' motion for judgment on the pleadings was driven by the district judge's "disbelief of [the] complaint's factual allegations," *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007), and reflects such a departure from established rules of procedure and controlling precedents in interpreting Rules 8(a)(2) and Rule 12(c), as to require not only reversal, but reassignment for trial before another judge.

First, the district judge incorrectly applied a heightened pleading standard, not supported by any rule or case law in judging the sufficiency of Oceanic's allegations of proximate cause. That ruling conflicts with precedents rejecting the

use of heightened pleading standards in cases such as this. This application of an incorrect legal standard is alone sufficient to require that the judgment be reversed. Moreover, this erroneous ruling on Oceanic's burden permeated the district court's entire analysis of the allegations of proximate cause in Oceanic's complaint.

Second, Oceanic alleged that ConocoPhillips' ongoing bribery of Mari Alkatiri to use his influence to ensure that both the UNTAET and the East Timorese government refused to deal with Oceanic and would deal instead exclusively with ConocoPhillips, caused a direct injury to Oceanic's "business and property" by denying Oceanic a fair opportunity to compete for exploration rights in the Timor Gap. No more specific pleading of proximate cause is required to establish Oceanic's Article III standing to sue for a violation of RICO or Section 2(c) of the Robinson-Patman Act. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066-67 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 400 (1990); *Astech-Marmon, Inc. v. Lenoci*, 349 F. Supp. 2d 265 (D. Conn. 2004) (same); *Mylan Labs., Inc. v. Akzo, N.V.*, 770 F. Supp. 1053, 1084 (D. Md. 1991) (same), or to state a substantive claim for relief under RICO, § 2(c), or for common law tortious interference. *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008) (approving the proximate cause allegations in a RICO complaint alleging that plaintiffs had been denied the opportunity to compete for a fair share of tax

liens being auctioned by the City of Chicago as a result of their competitors' misrepresentations to the City).

It is evident, however, that the district judge granted the defendants' Rule 12(c) motion because he did not believe the factual allegations of Oceanic's complaint. He dismissed the allegations of the complaint as "abstractions with over 50 pages of trivia . . . gossip and debris . . . assumptions – nothing more," and also called them "fanciful." R6833-34. In doing so, the district judge disregarded the long line of decisions of the Supreme Court, *see, e.g., Phoenix Bond*, 128 S. Ct. at 2135, n.1; *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), and of this Circuit, *In re Katrina*, 495 F.3d 191, holding that a court is required, in ruling on a motion to dismiss or for judgment on the pleadings under Rule 12, "to accept as true all of the factual allegations of the complaint." He also violated the well-established rule that neither Rule 12(b)(6) nor Rule 12(c) "countenance . . . dismissal based on a judge's disbelief of the complaint's factual allegations." *Twombly*, 127 S. Ct. at 1965 (*quoting Neitzke v. Williams*, 490 U.S. 319, 327 (1989). As the Supreme Court emphasized in *Twombly*, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely." *Id.*

Third, the district judge's barbed comments, and his injection of personal beliefs, unsupported assumptions and adverse inferences, both at the status

conference, R6525 *et seq.* (Dkt.#153), and in the Order of Dismissal, demonstrate a prejudgment of the merits of plaintiffs' substantive claims. These comments are unjustified by anything in the record. For example, he said that even if ConocoPhillips paid $2.5 million in bribes to Alkatiri, who was the highest official in East Timor, that Oceanic could never prove that it was injured by ConocoPhillips' bribery, because "[t]o attribute a decision by a government at a high level to a single person is fanciful." R6834. If that were true, Congress would not have enacted the federal bribery statute, 18 U.S.C. § 201, or the Foreign Corrupt Practices Act, (the "FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, the Supreme Court would have reversed the *W.S. Kirkpatrick* case, and many former government officials would not be in prison.

The terms of his rulings, apparent reliance on extra-record "facts" and extreme departures from the Federal Rules of Civil Procedure unavoidably lead to the conclusion that Judge Hughes "would reasonably be expected upon remand to have substantial difficulty [in] putting [aside his] previously expressed views," making "reassignment . . . advisable to preserve the appearance of justice." *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700-01 (5th Cir. 2002).

Finally, Oceanic notes that the dismissal of ConocoPhillips' Foreign and Domestic Subsidiaries for lack of personal jurisdiction in the District of Columbia was error in light of the pleadings, and that such error was compounded and

magnified when the case was transferred to Texas, which should have given rise to an entirely new jurisdictional inquiry.

ARGUMENT

I. The District Court Erred In Applying A Heightened Pleading Standard In Judging The Sufficiency Of Oceanic's Proximate Cause Allegations

The district judge applied a heightened pleading standard in judging the sufficiency of Oceanic's allegations of proximate cause, ruling that "To recover, Oceanic must show what would have happened absent the bribe to a high degree of probability." This ruling is in direct conflict with the decision of the Supreme Court in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), in which the Court held that only a preponderance of the evidence is required to establish predicate acts. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989); *see also, Crawford-El v. Britton*, 523 U.S. 574, 594 (1998); *see Erickson*, 127 S. Ct. at 2200 (holding that "it was error for the Court of Appeals to conclude that the allegations . . . [of] harm caused petitioner . . . were too conclusory to establish for pleading purposes.").

As these cases hold, it is error to apply a heightened standard of proof ***after discovery*** in ruling on motions for summary judgment or for directed verdict at trial. It was an even greater and more prejudicial error to apply a heightened standard at the pleading stage, which is governed by the liberal notice pleading standards of Rule 8(a)(2). This error pervades the district court's entire analysis of

the sufficiency of the allegations of proximate cause in Oceanic's complaint and is alone sufficient to require that its judgment be reversed.

II. The District Court Did Not Accept Oceanic's Well-Pleaded Allegations As True And Failed To Draw Reasonable Inferences In Oceanic's Favor

When ConocoPhillips paid more than $2.5 million in bribes to Mari Alkatiri to obtain the concessions it desired, it specifically intended to injure Oceanic – its only competitor for the subject oil and gas rights – by denying Oceanic a fair opportunity to compete with ConocoPhillips for the same oil and gas exploration rights in the Timor Sea. The denial of the opportunity to compete as a result of ConocoPhillips' payment of bribes was the direct and proximate result of ConocoPhillips' violations of § 1962(c) and (d) of RICO and § 2(c) of the Robinson-Patman Act and was an injury to Oceanic's "business or property" that occurred "by reason of" those violations of both provisions. Accordingly, it gave rise to a claim for damages under § 1964(c) of RICO and § 4 of the Clayton Act. 15 U.S.C. § 15. *See, e.g., W.S. Kirkpatrick,* 847 F.3d at 1066-67; *2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 738 (3d Cir. 2004).

A. Proximate Cause in the RICO and Antitrust Context.

Commercial bribery is a form of racketeering activity prohibited by § 1961 of RICO (18 U.S.C. § 1961(1)) and also an antitrust violation prohibited by § 2(c) of the Robinson-Patman Act (15 U.S.C. § 13(c)). For example, the Supreme Court has held that bribery by a defendant of state officials (*H.J., Inc.*, 492 U.S. 229) or

of officials of a foreign government (*W.S. Kirkpatrick & Co. v. Environmental Tectonics*, 493 U.S. 400 (1990)) is both a civil violation of § 1961(1) of RICO for which a defendant is liable in a suit for treble damages under § 1964(c) of RICO (*H.J., Inc.*, 492 U.S. 229; *W.S. Kirkpatrick*, 493 U.S. 400) and is also punishable as a felony. *Salinas v. United States*, 522 U.S. 52 (1997) (affirming a decision of this Circuit upholding the conviction of a Texas Sheriff); *United States v. Marmolejo*, 89 F.3d 1185 (5th Cir. 1996), *aff'd*, 522 U.S. 52 (1997) (same).

The Supreme Court has likewise held that commercial bribery is an antitrust violation under § 2(c) of the Robinson-Patman Act. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169, n.6 (1960); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). A defendant who pays a bribe to secure a contract in violation of § 2(c) is civilly liable to injured competitors in a suit for damages under § 4 of the Clayton Act. 15 U.S.C. § 15; *see, e.g., W.S. Kirkpatrick*, 847 F.2d at 1066-67.

Section 1964(c) of RICO was modeled on Section 4 of the Clayton Act (15 U.S.C. § 15), which in turn was based on § 7 of the original 1890 Sherman Act. *Holmes v. Securities Investor Protection Corp*, 503 U.S. 258, 267-68 (1992). Both § 1964(c) of RICO and § 4 of the Clayton Act state that "***[a]ny*** person injured in his business or property ***by reason of*** a violation" of § 1962 of RICO or § 2(c) of the Robinson-Patman Act may sue for treble damages. (emphasis added).

The Supreme Court has held that the "***by reason of***" language in both § 4 of the Clayton Act (*see Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 519 (1983)) and § 1964(c) of RICO was intended to "incorporate common law principles of proximate causation." *Holmes*, 503 U.S. at 267-68) (interpreting § 1964(c) of RICO). As the Supreme Court explained in *Holmes*, the "proximate cause requirement" means only that there must be "some direct relation between the injury asserted and the injurious conduct [or statutory violation] alleged," as distinguished from "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts," that is only remote or indirect. *Holmes* 503 U.S. at 268; *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006) ("*Holmes* . . . turned to the common-law foundations of the proximate-cause requirement and specifically the 'demand for some ***direct relation*** between the injury asserted and the injurious conduct alleged.'") (emphasis added); *Phoenix Bond*, 128 S. Ct. at 2144. As the Supreme Court explained in *Sedima*, "If the defendant engages in patterns of racketeering activity . . . [that] injure the plaintiff in his 'business or property,' the plaintiff has a claim under § 1964(c)." 473 U.S. at 495.

In *W.S. Kirkpatrick*, 847 F.2d at 1066-67, the Third Circuit held that a competitor (ETC) had standing to sue W.S. Kirkpatrick under ***both*** § 1964(c) of RICO and Section 2(c) of the Robinson-Act for damages sustained by ETC "by

reason of" Kirkpatrick's payment of bribes to members of the Nigerian military to obtain a contract to supply military uniforms to the Nigerian government. The Court held that "Short of alleging that it was next in line for the Nigerian contract, ETC could not have pleaded a more direct injury from Defendant's alleged violation of Section 2(c)." *Id.* at 1067. The Third Circuit also held that "To have standing to assert a civil RICO claim, ETC need only to allege an injury to its business and property . . . ETC's allegations in the amended complaint of injury from the bribery scheme ... meet this standard." *Id.*

Cases decided by the lower federal courts prior to *W.S. Kirkpatrick* (some of which were cited by the Third Circuit (*see* 847 F.2d at 1066-67)), and after *W.S. Kirkpatrick*, have upheld the standing under RICO of competitors to sue for treble damages caused by commercial bribery of actual or potential customers. *See Bieter Co. v. Blomquist*, 987 F.2d 1319 (8th Cir. 1993) (upholding the RICO standing of a competitor who was denied an opportunity to compete by defendant's bribery of public officials to sue under RICO); *Astech-Marmon*, 349 F. Supp. 2d at 265 (same); *Johnson Controls, Inc. v. Exide Corp.*, 132 F. Supp. 2d 654 (N.D. Ill. 2001) (sustaining RICO claim); *Pharmacare v. Caremark*, 965 F. Supp. 1411 (D. Haw. 1996) (sustaining RICO claim); *In re American Honda Motor Co.*, 941 F. Supp. 528 (D. Md. 1996) (same); *Mylan Labs, Inc.*, 770 F. Supp. at 1084 (same).

The same is true of claims under the Robinson-Patman Act and common law. *See 2660 Woodley Rd. Joint Venture,* 369 F.3d at 741-42 (emphasizing that "[v]endors who may have been prevented from selling goods . . . because they refused to [pay illegal rebates in violation of § 2(c)] are far more direct victims of Sheraton's scheme than was Hancock [the buyer]"); *W.S. Kirkpatrick,* 847 F.2d at 1066 ("it is generally agreed that a direct competitor of a company that obtains a contract through commercial bribery has standing to press a 2(c) claim against the briber."); *Johnson Controls,* 129 F. Supp. 2d at 1137 (sustaining tortious interference claim.)

More recently, the Supreme Court, in *Phoenix Bond*, 128 S. Ct. at 2138-39, held that allegations in a RICO complaint by competitors alleging that they had been denied the opportunity to compete for a fair share of tax liens being auctioned by the City of Chicago alleged a direct injury "by reason of" defendant's misrepresentations – even though the misrepresentations had been made only to the City of Chicago, and had not been made to or relied on by the RICO plaintiffs.

Holmes, on which the district court relied, is distinguishable from *W.S. Kirkpatrick* and *Phoenix Bond*, and from this case. In *Holmes*, the plaintiffs' RICO claims were dismissed because the injuries alleged by the plaintiffs were not directly caused by the defendants' unlawful acts, but were derived from injuries to

third parties, for which the Securities Investors Protection Corporation (SIPC) was seeking subrogation.[6]

B. The Proximate Cause Allegations In Oceanic's Complaint Were More Than Sufficient To Satisfy The Requirements Of Rule 8(a)(2).

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Supreme Court specifically held that ***"[a]t the pleading stage general factual allegations of injury resulting from the defendant's conduct"*** [*i.e.*, proximate cause] are sufficient to establish that the plaintiff has standing to sue under Article III for the reason that "on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" 504 U.S. at 561 (emphasis added); *NOW v. Scheidler*, 510 U.S. 249, 256 (1994). Since no more than "general factual allegations of injury resulting from the defendant's conduct" are required "at the pleading stage" to satisfy the requirements of Rule 8(a)(1) that a plaintiff provide "a short . . . plain statement of the grounds for the court's [subject matter] jurisdiction" to even hear the case in the first instance under Article III (*Sedima*, 473 U.S. 479; *NOW*, 510 U.S. 249), it follows that no higher standard of pleading

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[6] In *Holmes*, the plaintiffs' alleged injuries were not direct. There, SIPC did not assert a claim for a direct injury caused to it but asserted a subrogation claim under RICO to recover payments to clients of registered brokers it insured and whose customers SIPC reimbursed but who had no purchased manipulated securities. The Court held that SIPC's subrogation claim failed "because the conspiratorial conduct did not proximately cause the non-purchasing customers' injury" (*id.*), and more generally the SIPC could not assert a subrogation claim on behalf of the brokerage houses that it insured, because of "the rule that creditors generally may not sue for injury affecting their debtors' solvency." 112 S. Ct. at 1321 n.19.

of proximate cause is required to state a substantive claim for damages under the liberal pleading requirements of Rule 8(a)(2). *Erickson*, 127 S. Ct. at 2200. Or, put another way, allegations of proximate cause that are sufficient to establish plaintiffs' standing for purposes of Rule 8(a)(1) are also sufficient under the liberal pleading standards of Rule 8(a)(2) to state a claim that will survive a motion to dismiss under Rule 12(b)(6) or for judgment on the pleadings under Rule 12(c). *American Honda*, 941 F. Supp. at 544 ("If plaintiffs have alleged a sufficiently direct injury resulting from the bribery scheme, they have satisfied the proximate causation requirement . . .") (*citing Holmes*).

C. ConocoPhillips' Bribes Denied Oceanic The Right To Fairly Compete For Exploration Rights In The Timor Sea.

Oceanic alleged in no less than nine different paragraphs that ConocoPhillips' unlawful payments of bribes to Mari Alkatiri in violation of RICO and Robinson-Patman was the direct cause of the East Timor government's refusal, from 1999 through 2003, to meet with Oceanic, to give Oceanic a fair opportunity to compete for exploration rights in the Timor Gap, and that the same bribes caused the government of East Timor, of which Alkatiri was Prime Minister, to revive and ratify the previously abrogated concessions to ConocoPhillips, not on the same terms, but on ***more favorable*** terms than those in the prior concessions:

> 4. . . . ***[A]s a direct result of those bribes, Mari Alkatiri reversed his position and influenced the Timor Sea Designated Authority, in 2003, to reinstate ConocoPhillips' production sharing contracts*** in the Timor Gap

on terms [that were even] more favorable to ConocoPhillips than those that applied when Indonesia occupied East Timor.

6. ***ConocoPhillips' bribery of East Timorese officials deprived Oceanic of any opportunity to meaningfully compete for, or even to bid for, rights to explore for or produce oil and natural gas in the Timor Gap.*** Had Oceanic not been deprived of this opportunity, Oceanic would have been the successful bidder for rights to explore for and produce oil and natural gas in the Timor Gap.

95. ***As a direct result of the illegal payments ConocoPhillips made to and for the benefit of Mari Alkatiri, he no longer condemned ConocoPhillips' production sharing contracts that ConocoPhillips was awarded during the Indonesian occupation of East Timor. . ..***

145. ***The acts of bribery, corruption and wrongdoing as specified in this Complaint, . . . resulted in the exclusion of Oceanic from the opportunity to compete and bid for the rights to explore for and produce oil and natural gas in the Timor Gap. . .***

149. . . . ***ConocoPhillips' acts of bribery, and the corruption of the officials of East Timor who accepted and acted thereon . . . den[ied] Oceanic any opportunity to compete for or bid for the rights to explore for or produce oil or natural gas from the Timor Sea . . ..***

154. The [RICO] enterprise ... ***was designed to and did unlawfully prohibit and prevent Plaintiffs from fairly competing with ConocoPhillips and prevent Plaintiffs from obtaining rights to explore for oil and natural gas in the Timor Gap....***

158. ***Plaintiffs, and each of them, have been injured in their business or property as a direct and proximate result of the defendant Conspirators' violations of 18 U.S.C. § 1962(c), including injury by reason of the predicate acts constituting the pattern of racketeering activity.***

159. ***Oceanic and Petrotimor have been injured, as a minimum, in their valuable business and property by the actions of the defendant Conspirators in unlawfully preventing and interfering with their ability to compete fairly for the ability to extract hydrocarbons from the Timor Sea and preventing and interfering with their ability to secure production***

sharing contracts to explore for and produce oil and natural gas in the Timor Sea.

174. ... ***As a result of the ConocoPhillips defendants' improper conduct, Plaintiffs had no meaningful opportunity to obtain production sharing contracts with the named entities or even to meaningfully communicate with them in pursuit of such contracts. By reason of the ConocoPhillips defendants' improper conduct, Plaintiffs were deprived of any opportunity to fairly compete and bid for the opportunity to explore for and produce oil and natural gas from below the Timor Sea.***

R4245-46, 4271, 4288-91, 4294, 4297-98 (¶¶ 4, 6, 95, 145, 149, 154, 158, 159, 174) (emphasis added).

D. Oceanic's Allegations Of Proximate Cause Are Far Stronger And More Direct Than Those In *Phoenix Bond*.

Oceanic's proximate cause allegations are far stronger than the proximate cause allegations that the Supreme Court held sufficient in the *Phoenix Bond* case. The complaint alleges that ConocoPhillips paid over $2.5 million in bribes to East Timor officials for the purpose of excluding Oceanic, ConocoPhillips' only competitor, from exploration rights in the Timor Sea, and with the specific intent of injuring Oceanic in its "business and property," by depriving Oceanic of a fair opportunity to compete with ConocoPhillips for those rights. The Third Circuit relied on similar allegations in the *W.S. Kirkpatrick* case in holding that Environment Tectonics had standing to sue to recover the RICO and Robinson-Patman damages caused by Kirkpatrick's bribery of members of the Nigerian military.

In *Phoenix Bond*, the Supreme Court upheld the rights of not one competitor, but a group of competitors, to sue for RICO damages incurred by the plaintiffs when they were deprived of the opportunity to receive a fair share of the delinquent tax liens being sold at auction by the City of Chicago. The defendants in *Phoenix Bond* were a group of affiliated companies who were ultimately allowed to submit separate bids for tax liens by misrepresenting to the City that they were independent and unaffiliated companies, when they were not. Even though defendants' false statements to the City had not been relied upon by the RICO plaintiffs, the Supreme Court held that the defendants' false statements to the City were nevertheless the proximate cause of the plaintiffs' injuries because they caused the City to allocate a larger share of delinquent tax liens to the defendants than would have been the case had the City known that the defendants were affiliated, leaving fewer liens to be allocated to the plaintiffs and other bidders. 128 S. Ct. at 2138-39.

The district court's decision on the proximate cause issue in this case cannot be reconciled with the decisions of the Supreme Court in *W.S. Kirkpatrick*, *Phoenix Bond,* and *Lujan*, or with the liberal pleading requirements of Rule 8(a)(2). That decision must be reversed.

E. The District Court Ruled On The Basis Of Conclusions That Had No Basis In The Complaint.

It is evident from the Order that the district judge granted the defendants' Rule 12(c) motion because he did not believe the factual allegations of Oceanic's complaint – apparently because they conflicted with his own opinions as to how businesses (ConocoPhillips in particular) and governments function. According to the district judge, the allegations of the complaint are "fanciful" – "abstractions with over 50 pages of trivia . . . gossip and debris . . . assumptions – nothing more." R6833-34.

In so ruling, he disregarded the many decisions of the Supreme Court, *see, e.g.*, *Phoenix Bond*, 128 S. Ct. at 2135 n.1; *Erickson,* 127 S. Ct. at 2200), and of this Circuit, *see, e.g., In re Katrina*, 495 F.3d at 191, holding that, in ruling on a motion to dismiss or for judgment on the pleadings under Rule 12(c), a court is required "to accept as true all of the factual allegations of the complaint," "taking the allegations of the complaint in the light most favorable to petitioners." *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989).[7] He also violated the well-established rule that neither Rule 12(b)(6) nor Rule 12(c) "countenance . . . dismissal based on a judge's disbelief of the complaint's factual allegations." *Twombly*, 127 S. Ct. at 1965 (*quoting Neitzke*, 490 U.S. at 327. As the Court emphasized in *Twombly*, "a well-pleaded complaint may proceed even if it strikes

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[7] The requirement that the court draw all reasonable inferences in favor of plaintiff was not undermined by *Twombly*. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008).

a savvy judge that actual proof of the facts alleged is improbable and 'that a recovery is very remote and unlikely.'" *Id.*

Not only did the district judge disregard express factual allegations of the complaint, R4269, 4245 (¶¶ 90,4), he also refused to draw reasonable inferences from those allegations in Oceanic's favor as he was required to do when ruling on a motion for judgment on the pleadings. Finally, he ignored both the express allegations of a causal link to Oceanic's injury, R4245 (¶ 4), and the reasonable inferences of a causal link which can arise from a bribe.[8]

For example, the complaint alleged that, after Alkatiri and his party had stated "as a matter of principle," that East Timor would not recognize concessions granted while East Timor was under Indonesian occupation, ConocoPhillips bribed Alkatiri to reverse his position, and to use his influence as Prime Minister to persuade the new East Timor government to reinstate ConocoPhillips' production sharing contracts after they had been abrogated by the new East Timor Constitution. R2469 (¶90) The district judge simply refused to accept these allegations as true:

> Oceanic simply can not link this fact with its injury. That is, ***it can not possibly have an idea why the president of an international corporation***

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[8] As to linking a bribe to subsequent injury, *see generally*, *United States v. Vaknin*, 112 F.3d 579, 590 (1st Cir. 1997) (where "arrangements for a bribe precede and relate to the making of a loan, a commonsense inference arises that subsequent losses referable to the loan's uncollectibility are causally linked in reasonable proximity to the bribe").

> ***would personally deliver cash in a briefcase to an official of East Timor. It has assumptions – nothing more.***

R6833 (emphasis added).

He also refused to accept the express allegations of the complaint that ConocoPhillips' bribes achieved their intended effect, stating that:

> To attribute a decision by a government at a high level to a single person is fanciful. 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.

R6834.[9]

These assumptions that the decision-making process in a new and impoverished island nation like East Timor is the same as the decision-making process of the government of the United States, R6834, and that it is impossible for a single well-placed official to influence a governmental decision, are both unsupported ***and directly contrary to the express allegations of the complaint.*** R4269.[10] Other courts have not hesitated in cases involving bribery of U.S.

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[9] Here and elsewhere, the district judge does not acknowledge Oceanic's allegations of numerous and continuing bribes to Alkatiri. The complaint does not allege a single bribe, for a single purpose, occurring at a single time. Rather, the complaint alleges multiple bribes, delivered over an extensive period of time, and totaling over $2.5 million with the objective of protecting and expanding ConocoPhillips' access to production sharing contracts in the Timor Gap.

[10] The United States is a wealthy, established democracy with a government based on the principals of checks and balances. East Timor is a tiny, poor, war-ravaged, newly-independent nation with a unicameral parliament in which the prime minister has control of both executive and legislative agendas. It was improper for the district judge to extrapolate how much influence a particular person could have in East Timor based upon his impressions of how government works in the United States.

officials to infer that a single highly-placed official can have significant influence in "collective decision-making." In *Bieter Co. v. Blomquist*, 987 F.2d 1319, 1327 (8th Cir. 1993), for example, a RICO claim based on the bribery of three public officials, the Eighth Circuit rejected defendants' causation argument that plaintiff had to show that defendants bribed a majority of the officials whose decision was adverse to plaintiff. In rejecting what it referred to as the "narrow vote-counting view of causation," the Eighth Circuit held that "we find that it relies on too narrow a view of causation in group decisionmaking."

> A jury could reasonably find that Bieter's injuries were caused by the defendants' bribery of Blomquist, Smith, and Wachter. Such a finding need not be predicated on any vote-counting done by the fact-finder. The jury could instead find that ***given the extent of Blomquist's alleged role in the proceedings -- not simply her efforts on behalf of Federal and the Hoffman defendants involving the Cliff Lake project, but her lobbying of the APC and other city administrators to oppose the project, her attempts to persuade Target to consider another site, and her seeming control over the conduct of city business -- the defendants' bribery of her caused Bieter's injuries. A finding that bribery of a councilmember proximately caused a plaintiff's injury can therefore rest on evidence of that individual's influence over the proceedings***. A contrary finding would simply encourage potential wrongdoers to place the most efficient bribe possible: one that will reach the desired result without the expense of bribing a majority (or supermajority) of councilmembers.

Id. (emphasis added). The Court reversed the district court for having "***failed to draw all reasonable inferences in favor of the nonmovant.***" *Id.* (emphasis added).

In paraphrasing the allegations of Oceanic's complaint, the district judge distorted and expressly contradicted Oceanic's allegations:

> Simply put, Oceanic complains that ConocoPhillips paid bribes to preserve its existing, ***legitimate*** investment from ***arbitrary*** cancellation, while Oceanic lobbied East Timor to ***expropriate*** ConocoPhillips' concession for its benefit.

R6834 (emphasis added).

First, it is hardly a defense to bribery to say that ConocoPhillips was merely seeking to "preserve" its investment.

Second, the court's description of ConocoPhillips' "concession" as an "existing legitimate investment" is incorrect and directly contrary to the express allegations of the complaint. ConocoPhillips' "concessions" were not "existing" – they had expressly been abrogated by article 158 of the new Constitution, and were reinstated later as a result of the bribes. R4268, 4273-74 (¶¶ 88, 101-03) (detailing bribes paid after effective date of new constitution). ConocoPhillips' initial investment was not "legitimate" – it was acquired as a result of illicit relationships with the military force occupying East Timor, R4262-63 (¶ 71), at a time when East Timor was under Indonesian occupation. R4259 (¶ 58).

Third, the cancellation of ConocoPhillips' contract was not "arbitrary" – nor did Oceanic "lobby" for its "expropriation." ConocoPhillips' 1991 concession was abrogated by the express terms of the East Timor Constitution. R4268 (¶ 88). Oceanic merely sought to have its own proposals fairly considered in light of the

abrogation of all prior concessions by the East Timor Constitution. R4277-81 (¶¶ 112-125).

The opinion contains numerous other examples of the district judge's mischaracterization of the allegations of the complaint. For example, he said:

> With some irony, Oceanic says that ConocoPhillips violated its rights by convincing East Timor to maintain their business relationship; yet it insists that it was permissible for it to try to convince East Timor to breach its agreements with ConocoPhillips.

R6832-33. Nowhere in the complaint is it alleged that Oceanic tried "to convince East Timor to breach its agreements with ConocoPhillips." As Mari Alkatiri said, "East Timor would not legitimize a treaty between a thief [Indonesia] and a receiver of stolen goods [*i.e.*, Australia]." R4266-67 (¶ 84). This position was reflected by the new East Timor Constitution, which abrogated all prior agreements, including the production sharing contracts granted to ConocoPhillips by the Joint Authority during the military occupation of East Timor by Indonesia.

Similarly, in rejecting Oceanic's allegations that it was uniquely qualified to compete for and obtain a concession, Judge Hughes said that:

> Although Oceanic's fieldwork may have been profoundly insightful, other competitors have newer fieldwork and well data.... Without ConocoPhillips' geology, capital, geologists, engineers [and] sources of supply,... Oceanic cannot rationally compare its prospects with the historic achievement of ConocoPhillips.

R6836. There is absolutely no factual basis in the complaint for these statements. That is, there is nothing in the Oceanic complaint that so celebrates

ConocoPhillips' historic achievements or denigrates Oceanic's own abilities. Instead, those reflect an uncritical acceptance, by the district judge, of ConocoPhillips' self-serving assertions, or were based on his independent research into information that is outside the complaint and record, the source and reliability of which cannot be determined.

This refusal to accept as true the factual allegations of Oceanic's complaint, and belief and statements that Oceanic will be unable to prove its claims, permeate the opinion, and require that the decision be reversed.

III. This Court Should Reverse And Remand This Case With Instructions To Reassign The Case To A Different Judge

This Court has the power to order reassignment on remand. *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700 (5th Cir. 2002) ("We have the power, on remand, to reassign a case to another judge"). The exercise of that power is warranted here.

A. The Fifth Circuit Standards For Ordering Reassignment.

This Circuit has used two tests to decide reassignment, expressly declining to adopt one test over the other. *DaimlerChrysler,* 294 F.3d at 700. Under either test, reassignment of this case is warranted.

In *DaimlerChrysler* and *Johnson v. Sawyer*, 120 F.3d 1307, 1333 (5th Cir. 1997), this Court applied a test using three factors: (1) whether the judge would reasonably be expected to have substantial difficulty putting aside previously

expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *DaimlerChrysler*, 294 F.3d at 700-01.

Under the second test, a case should be reassigned simply "when the facts 'might reasonably cause an objective observer to question [the judge's] impartiality.'" *DaimlerChrysler*, 294 F.3d at 701 (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995). Actual bias or prejudice is not required. *Microsoft Corp.*, 56 F.3d at 1463-65.

In *DaimlerChrysler*, this Court found both tests were satisfied and ordered the case "reassigned because . . . the hostility demonstrated toward the defendants in the district court's response to the petitions for writ of mandamus . . . convinces us that, notwithstanding all good faith efforts on the part of the district court, it would be exceedingly difficult for the district court to regain some impartiality in this case." *Id.* at 701.

This Court has ordered reassignment where an appearance of bias arises from the district court's remarks in the record. *See Mata v. Johnson*, 210 F.2d 324, 333 (5th Cir. 2000); *Johnson*, 120 F.3d at 1334. The central theme in these cases is not whether the district judge would exercise a sincere effort to regain impartiality or whether that effort would succeed, but rather "the necessity to

preserve the appearance of impartiality, fairness and justice" on remand. *Johnson*, 120 F.3d at 1334.

B. Under Either Test This Case Should Be Reassigned.

Judge Hughes' statements both at the status conference and in the order bear a close resemblance to the conduct that required reassignment in *DaimlerChrysler*, *Mata* and *Johnson*.

An objective observer would reasonably question whether a judge who ***publicly*** characterizes the allegations of plaintiffs' complaint as nothing more than "50 pages of trivia" and a "list of gossip and debris," R6833, would have "substantial difficulty putting aside" these views of the merits of Oceanic's case on remand.

A very important factor in deciding whether a judge "would reasonably be expected to have difficulty putting aside" his previously expressed views is whether his earlier ruling was based upon factual assumptions that were improper because they contradicted the express allegations of the complaint, or were otherwise not supported by the record. This Court has ordered reassignment based solely on this factor. *See United States v. Tobias*, 662 F.2d 381, 389 (5th Cir. 1981) (directing reassignment on remand where the original judge sentenced on the basis of assumptions concerning the quantities of drug manufacturing chemicals involved that were not supported by the record).

This case is tainted by improper assumptions that go far beyond those in *Tobias,* demonstrating that the district judge can "***reasonably*** be expected to have ***substantial*** difficulty in putting aside" his previously expressed views of Oceanic and its allegations. Prominent among these assumptions are the district judge's glowing references to ConocoPhillips' capabilities and his disparaging descriptions of Oceanic's capabilities and motives. None of these statements have any basis in the allegations of the complaint and they suggest that reassignment is necessary to preserve the appearance that the proceedings on remand will be fair and impartial.[11]

Equally concerning is the district judge's demonstrated willingness to let his personal assumptions and beliefs control over the specific allegations of the complaint and the applicable law. For example, the district judge's ruling is based in part on his opinions that "[t]o attribute a decision by a government at a high level to [a] single person is fanciful," R6834, and that bribery of government officials could never be an effective tool for influencing government decisions. He applied these opinions even though they are contradicted by the express allegations of the complaint and effectively nullify Congress's purpose in adopting § 2(c) of

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[11] There will be no waste or duplication in reassigning the case. Judge Hughes has held only one status conference. He has heard no evidence, issued no scheduling or other orders to be enforced, has supervised no discovery, and conducted no pretrial proceedings related to the merits. In any event, this Court has held that any loss of efficiency and economy "pales in comparison" to "the necessity to preserve the appearance of impartiality, fairness and justice." *Johnson*, 120 F.3d at 1334.

the Robinson-Patman Act, the federal bribery statute (18 U.S.C. § 201), the FCPA (15 U.S.C.§78dd-1), and much of RICO (18 U.S.C. §§ 1961 *et seq.*).[12]

Judge Hughes also improperly assumed that bribery is rare or nonexistent in the region involved, an assumption that both contradicts the express allegations of the complaint and is plainly incorrect. [13]

The public records demonstrate the wisdom of prohibiting a judge from dismissing a case (before any discovery) based on that "judge's disbelief of the complaint's factual allegations." *Twombly*, 127 S. Ct. at 1965. They also suggest the appearance of bias in the district court's willingness to let personal assumptions and beliefs override (1) the express allegations of the complaint, (2) the intent of Congress in enacting substantive statutes, (3) the Rules of Civil Procedure, and (4) the decisions of the Supreme Court and this Circuit.

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[12] Sec. & Exch. Comm'n, 94th Cong., Questionable and Illegal Corporate Payments and Practices (Comm. Print 1976). Over four hundred companies, including one hundred seventeen Fortune 500 companies, admitted to the practice of paying bribes. H.R. Rep. No. 95-640, at 4 (1977). Those sophisticated businesses would not pay bribes if they did not think they would work.

[13] Former President Suharto of Indonesia, who governed Indonesia during the relevant period, has been described as the most corrupt leader in modern history, having extracted graft estimated at between $15 and $35 billion between 1967 and 1998, *see* Transparency International Global Corruption Report, 2004, at 13 (2004), and a host of American companies have paid large fines to settle cases based on bribes paid to Indonesian government officials. *See, e.g., Baker Hughes, Inc. Admin. Proc. Rel.*, No. 34-44784 (Sept. 12, 2001) (consent decree); *SEC v. Triton Energy Corp.*, SEC Litigation Rel. No. 15266 (Feb. 27, 1997) ($300,000 settlement); *Press Release, U.S. Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Gov't Official* (Jan. 6, 2005) ($1.5 million fine); Letter from Steven A. Tyrrell, Chief, Fraud Section, U.S. Dep't. of Justice (Sept. 21, 2007) and *Press Release, U.S. Dep't of Justice Paradigm B.V. Agrees to Pay $1 Million to Resolve Foreign Bribery Issues in Multiple Countries* (Sept. 24, 2007) (fine and deferred prosecution agreement).

Exercise of this Court's power to direct reassignment on remand is warranted.

IV. The District Court Erred In Dismissing ConocoPhillips' Subsidiaries For Lack Of Personal Jurisdiction.

This Court should reverse the order dismissing ConocoPhillips' Foreign Subsidiaries and Domestic Subsidiaries, as defined in the Certificate of Interested Persons, on personal jurisdiction grounds. That order was erroneous and, post-transfer, irrelevant.

The question that matters is whether the District Court for the Southern District of Texas court has jurisdiction over those subsidiaries.[14] When that question is considered, affirming the dismissal order will be seen to have absurd consequences: parties who reside in Houston, and/or are wholly controlled from Houston, will have been dismissed, by a court sitting in Houston, for want of personal jurisdiction.

A. Oceanic Established Personal Jurisdiction Over The Domestic Subsidiaries.

The Foreign and Domestic Subsidiaries were dismissed on separate grounds. We begin by addressing the dismissal of the Domestic Subsidiaries.

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[14] This is a very different question than the one decided by the district court in the District of Columbia. That court decided whether the subsidiaries had sufficient contacts with that district to confer jurisdiction there. The present question focuses on the defendants' jurisdictional contacts with the Southern District of Texas, including Houston, which is the hub of ConocoPhillips' worldwide operations. The facts relevant to that question yield a different result, with jurisdiction clearly proper in the Southern District of Texas, regardless of its propriety in the District of Columbia.

The district court dismissed the Domestic Subsidiaries: (1) because of Oceanic's allegedly improper service under the RICO service provision, 18 U.S.C. § 1965(b); and (2) because the Domestic Subsidiaries' stipulations (R315, R195) that they would not challenge Oceanic's "sufficiency of process or of service of process" were held not to relieve Oceanic of a supposed § 1965(b) obligation to ***re***-serve them through a marshal. R5355.

Both holdings are incorrect. First, § 1965(b) states only that a plaintiff "***may***" have a marshal serve a defendant, not that the plaintiff ***must*** have a marshal serve the defendant. *See, e.g., Selman v. American Sports Underwriters, Inc.*, 697 F. Supp. 225, 234-235 (W.D. Va. 1988). Second, because the challenge to Oceanic's manner of service fell squarely within the array of challenges to service supposedly waived by the stipulations, the district court's ruling wrongfully nullified those stipulations.[15]

Further, because Oceanic ***actually*** served six of the Domestic Subsidiaries at issue, R180-190, and because all of the Domestic Subsidiaries ***twice*** waived objections to service, any requirement that Oceanic impose on a marshal to serve them ***again*** would be an absurd interpretation of § 1965(b). *United States v. Turkette*, 452 U.S. 576, 580 (1981).

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[15] "Care must be taken to assure … that a rigid enforcement of the stipulation does not lead to an injustice." *Rice v. Glad Hands, Inc.*, 750 F.2d 434, 438 (5th Cir. 1985).

B. Oceanic Established Personal Jurisdiction Over The Foreign Subsidiaries.

As to the Foreign Subsidiaries, it is important to remember that only a *prima facie* showing is required on a jurisdictional motion. *See, e.g., Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1161 (5th Cir. 1983). Nevertheless, the district court held that Oceanic had not established personal jurisdiction over the Foreign Subsidiaries on an alter ego theory, or pursuant to Rule 4(k)(2). Those rulings were influenced by the district court's incorrect finding that:

> "in its Order of February 9, 2005, the Court directed plaintiffs to allege specific jurisdictional facts supporting this Court's jurisdiction over each of the foreign subsidiary defendants. ***Plaintiffs have failed to do so and therefore, the Court cannot concede that it has personal jurisdiction over ConocoPhillips' foreign subsidiaries.***"

R5360 (emphasis added).

Judge Sullivan had ***not*** required Oceanic to plead specific jurisdictional facts regarding the Foreign Subsidiaries. Rather, he directed Oceanic "to allege specific jurisdictional facts supporting this court's jurisdiction ***over each defendant under the Foreign Sovereign Immunities Act.*** **["FSIA"]**" R4139 (emphasis added). As no Foreign Subsidiary was subject to the FSIA or to this directive, Oceanic did not disobey the district court's order.

1. Oceanic Pleaded and Supported a Prima Facie Case for Personal Jurisdiction on Several Theories.

Moreover, Oceanic established its *prima facie* case for personal jurisdiction over the Foreign Subsidiaries on alter ego, single business enterprise, and Rule 4(k)(2) theories. It met that burden with, *inter alia*, allegations and proof that the Foreign Subsidiaries were alter egos of ConocoPhillips;[16] that those same allegations and proof also established a single business enterprise, such that jurisdiction over ConocoPhillips provided jurisdiction over the other parts of the enterprise (*i.e.*, the subsidiaries). *See AMX Corp. v. Pilote Films*, 2007 WL 2254943, at *4-5 (N.D. Tex. Aug. 7, 2007); and that Oceanic also met its Rule 4(k)(2) burdens.

2. The Foreign Subsidiaries Admitted that They Were U.S. Corporations, and/or were Ultimately Held by Houston-based ConocoPhillips, and/or were Either Wholly or Indirectly Owned by a U.S. Corporation.

The Defendants' own declarations show three "Foreign Defendants," (ConocoPhillips (03-20) Pty. Ltd., Phillips Petroleum Company ZOC Pty. Ltd., and ConocoPhillips JPDA Pty. Ltd.) were actually ***U.S.*** corporations during the relevant time period. *See* R2707(¶¶ 4,7). As such, they clearly had contacts with the ***U.S.***

[16] The operative Second Amended Complaint extensively alleges the very substantial degree of financial and operational control that ConocoPhillips exercised over the Foreign Subsidiaries and over every aspect of those actual affairs and events in the Timor Sea relevant to ConocoPhillips. *See, e.g.*, R4251-77 (¶¶ 37, 39, 50, 90, 96-98, 100-01, 110-11); R.4268-761; *see also* footnote 5, *infra*, regarding the structures by which that U.S.-based control was exercised.

Further, as of March 2004, twelve of the fourteen Foreign Subsidiaries had advised the Australian Securities and Investments Commission ("ASIC") that ***U.S.*** and Houston-based ConocoPhillips was their "Ultimate Holding Company," *see* R5132, 5139, 5151, 5158, 5167, 5175, 5181, 5188, 5197, 5205, 5214, 5221.[17] As significantly, twelve of the fourteen Foreign Subsidiaries were ***wholly and directly*** owned by a ***U.S.*** corporation, *see* R5133, 5152, 5158, 5168, 5176, 5182, 5189, 5198, 5205, 5214, 5222, 5242.[18]

3. Filings With the ASIC Confirm that the Foreign Subsidiaries Were Controlled by U.S.-based ConocoPhillips.

The ASIC evidence also shows that all of the Foreign Subsidiaries had largely U.S. citizen officers and directors, many of them residing in the U.S., R.4979-81(&& 32-36), and that twelve of the fourteen Foreign Subsidiaries also were registered with the ASIC as a "Small Proprietary Company that is Controlled by a Foreign Company" (***i.e., controlled by U.S.-based Phillips and later ConocoPhillips***). Each then filed annual reports as such. R5133-35, 5153, 5159-62, 5168-71, 5176-77, 5191-92, 5199-5200, 5208-09, 5215-16, 5224-25, 5234-36,

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[17] The other two, Phillips Petroleum Timor Sea Pty. Ltd., now known as Tokyo Timor Sea Resources Pty. Ltd., and Darwin LNG Pty. Ltd. f/k/a/ Phillips Petroleum LNG Pty. Ltd., had also listed ***U.S.***-based ConocoPhillips as their Ultimate Holding Company until mid-2003, when the Tokyo Gas/Tokyo Electric transaction changed that designation.

[18] The other two, ConocoPhillips (03-12) Pty. Ltd. and Darwin LNG Pty. Ltd., were owned ***indirectly*** by ***U.S.***-based ConocoPhillips entities. As to the former, *see* R5140,5189. As to the latter, *see* R.5231-32,5205.

5245-48.[19] In other words, these ASIC filings, as to both ownership and "control," contradict the basis on which the personal jurisdiction ruling was made.

In such circumstances, it is unreasonable to rule Oceanic has not established the requisite contacts with the ***U.S.***, as well as the alter ego/single business enterprise facts needed to establish its *prima facie* case for personal jurisdiction. The ConocoPhillips Subsidiaries cannot inform the Australian government that that they are ultimately held and/or directly held and/or "controlled" subsidiaries of a U.S.-based entity, and then tell the district court either that: (1) ConocoPhillips has no control over the subsidiaries; or (2) that the Foreign Subsidiaries have no contacts with the U.S.

C. Claims Against the Subsidiaries Should Not Have Been Dismissed Absent The Opportunity For Jurisdictional Discovery.

Finally, if the district court doubted the sufficiency of the allegations, it should have ordered discovery. In these circumstances, it was error not to do so. *See, e.g., Kelly v. Syria Shell Petroleum Development BV*, 213 F.3d 841, 855 (5th Cir. 2000). Judge Hughes compounded that error when he prohibited all post-transfer discovery. Because of these errors, and because of the new inquiry required by the transfer of the case to the Southern District of Texas, Oceanic

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[19] The other two (ConocoPhillips (03-12) Pty. Ltd. and ConocoPhillips Australia Pty. Ltd.) had different corporate category designations, and filed different reports during the relevant period, but acknowledged their **U.S.** ownership and control in other ways. R5131-5136 and R5180-5185.

requests that this Court reverse the order dismissing the ConocoPhillips' Foreign and Domestic Subsidiaries.

CONCLUSION

Appellants, Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L, respectfully urge that the above-referenced decisions of the district court be reversed and this case remanded to the district court with directions that it be reassigned to a different judge.

Respectfully submitted, this 19th day of August, 2008.

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RULE 32(a)(7) CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Fifth Circuit Rule 32.3:

1. This principal brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,211 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. 32(a)(6), and the requirements of Fifth Circuit Rule 32.1-32.2, because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14 point (12 point in footnotes), Time New Roman font.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the following persons by electronic mail and certified mail, return receipt requested on this, the 19th day of August, 2008:

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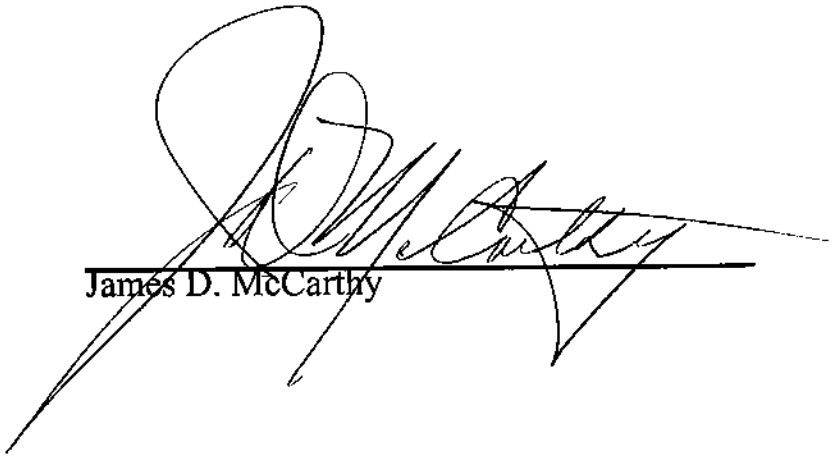

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