CASE NO. 08-20338

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

On appeal from the United States District Court for the Southern District of Texas, No. 4:07-CV-0815 (Hon. Lynn N. Hughes)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

ARGUMENT AND CITATION OF AUTHORITY

The district court's judgment should be reversed. The ruling below took burdens that Oceanic may face at other phases of the case, overstated them, and then misapplied them in analyzing Oceanic's Second Amended Complaint (hereinafter "SAC"). Rather than assuming that all allegations in the SAC are true and drawing all reasonable inferences from those allegations in Oceanic's favor, the district court not only engaged in fact finding, but also interjected its personal opinions and prejudged the merits of this case.

The question before this Court is whether, assuming the facts alleged in the SAC to be true, and drawing all reasonable inferences in Oceanic's favor, ConocoPhillips could have proximately caused injury to Oceanic by bribing the Prime Minister of East Timor to reinstate ConocoPhillips' oil and gas production sharing contracts, thereby denying Oceanic the opportunity to compete for those interests.

ConocoPhillips' Brief fails to focus on this central issue. Instead, it continues the same overstatement and misapplication of the governing standards that occurred below, deluging this Court with extra-record documents and statements that cannot properly be considered at this stage.

I. OCEANIC'S COMPLAINT SUFFICIENTLY ALLEGES PROXIMATE CAUSE UNDER RICO AND ROBINSON-PATMAN

A. ConocoPhillips concedes that this is an appeal from the grant of a Rule 12(c) motion for judgment on the pleadings

ConocoPhillips concedes that the district court granted judgment on the pleadings solely under Rule 12(c), which is subject to the same standard as a Rule 12(b)(6) motion. Appellees' Br. at 1 ("Was the . . . District Court . . . correct in granting judgment on the pleadings pursuant to Rule 12(c). . . ?"). ConocoPhillips also recognizes that the truth or falsity of the allegations contained in the SAC was not before the district court, is not before this Court, and that the allegations in the SAC must be taken as true and viewed in the light most favorable to the plaintiff. *Id.* at 3, 15; *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1230 (2008). Moreover, it is uncontested that the district court did not convert the Rule 12(c) motion to one under Rule 56, and the record contains no notice of such a conversion. The district court should, therefore, have disregarded matters outside the pleadings.

ConocoPhillips cites J. Sutherland, *Law of Damages* (1882) for the proposition that: "Damages must be certain, both in their nature, and in respect to the cause from which they proceed." Appellees' Br. at 23. This proposition is wrong as a matter of law (*see, e.g. Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 535, 562-63 (1931), discussed at pp. 27-28), and does not

apply at the pleading stage. *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). At trial, Oceanic's only burden is to prove its claims by a ***preponderance*** of the evidence, not with "certainty."

B. The District Court and ConocoPhillips have not applied the correct standards

When 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). ConocoPhillips nevertheless argues that Oceanic must show, as a matter of law, at the pleading stage that "Oceanic . . . [can] be deemed a 'direct victim' of [ConocoPhillips'] bribery scheme," to establish the proximate cause element of its RICO, Robinson-Patman, and common law claims. Appellees' Br. at 3.

Section 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. This "by reason of" language incorporates "common law principles of proximate causation." *Holmes v. Secs. Investor Protection Corp.*, 503 U.S. 258, 268 (1992). Thus, "[i]f the defendant engages in a pattern of racketeering activity . . . [that] injure[s] the plaintiff in his 'business or property' the plaintiff has a claim under § 1964(c)." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985).

Despite ConocoPhillips' suggestion that *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) changed the pleading standards in federal courts, the Supreme Court's subsequent RICO decision in *Phoenix Bond* makes it clear that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in [the] complaint." *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2135 n.1 (2008) (*quoting Erickson, supra*).

Phoenix Bond also confirms that district courts may not dismiss a complaint based on a personal belief as to the truth of the allegations – or their proveability at trial. And *Bell Atlantic* makes it clear that judicial skepticism is not an excuse for circumventing the requirement that the allegations in the complaint be accepted as true. 127 S. Ct. at 1965 (*citing Neitzke v. Williams*, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Sheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely"). Certainly nothing in *Bell Atlantic* overrules the liberal pleading standard in FED. R. CIV. P. 8(a) that a complaint need only contain a "short and plain statement of the claim." *Erickson, supra.* Nor does it authorize consideration of matters outside the pleadings in the context of a Rule 12(c) motion.

C. The cases ConocoPhillips cites do not bar Oceanic's claims, but rather support their viability

1. *Phoenix Bond* governs, and permits Oceanic's RICO claim

Of the four Supreme Court cases discussed by ConocoPhillips, only *Phoenix Bond* involves the issue here: a RICO violation intended to induce governmental action and deprive competitors of the opportunity to compete for a government contract. *Phoenix Bond* is a unanimous decision and the most recent Supreme Court decision addressing proximate cause in RICO cases.

Phoenix Bond reaffirms four points that are dispositive in this case. First, when considering a motion to dismiss a RICO case, all of the allegations contained in the plaintiff's complaint must be accepted as true. 128 S. Ct. at 2135 at n.1. Second, RICO does not limit standing to a single victim, but rather provides a right of recovery to "**[a]ny** person" injured by a violation. *Id.* at 2139 (emphasis in original). Third, an injury is direct if it is the foreseeable and natural consequence of the violation. *Id.* at 2144. Fourth, a RICO violation that denies a competitor a valuable economic opportunity is the proximate cause of a compensable injury. *Id.* at 2136-38 ("As a result, respondents lost the ***opportunity*** to acquire valuable liens.") (emphasis added).

Phoenix Bond involved the auction sale of tax liens by the Cook County, Illinois Treasurer's Office. *Id.* at 2135. If several bidders offered the same amount for a lien, liens would be allocated on a rotational basis. In order to prevent related

entities from manipulating the system to obtain a disproportionate share of the tax liens, the county required each "taxbuying entity" to submit bids in its own name and prohibited the submission of bids by related entities or agents. Respondents complained that petitioners conspired to file false statements claiming that they were independent bidders when they were in fact related, and therefore acquired a disproportionate share of liens. *Id.* at 2135-36. Petitioners argued that proximate cause was absent because the fraudulent attestations at issue were sent to the county, not to the competitive bidders, and therefore first-party reliance was lacking.

The Court held that first-party reliance is not required in a RICO case based upon mail fraud. The Court noted that, while there is a "demand for ***some*** direct relation between the injury asserted and the injurious conduct alleged," citing *Holmes*, 503 U.S. at 268 (emphasis added), the competing bidders did not have to allege or prove first-party reliance to establish a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiffs' injuries to satisfy the proximate cause principles articulated in *Holmes* and *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). 128 S. Ct. at 2144.

ConocoPhillips tries to distinguish *Phoenix Bond* on the ground that the only issue decided was whether first-party reliance is required in a RICO case based upon mail fraud. In rejecting this premise, the Court made it clear that the

proximate cause analysis in a RICO case is the same as under common law. Far from distinguishing *Phoenix Bond*, this analysis highlights the district court's erroneous application of a heightened proximate cause standard.

ConocoPhillips also attempts to distinguish *Phoenix Bond* on the basis that the county's allocation scheme would have given each defrauded competitor a larger share of the liens. The Court, however, rejected that distinction: "While a precise understanding of the county's system may be necessary to calculate respondents' damages, ***nothing in our disposition turns on this issue.***" 128 S. Ct. at 2136 n.3 (emphasis added). Indeed, the Court described the auction as a zero-sum game in which the "***foreseeable*** and ***natural consequence*** of petitioners' scheme to obtain more liens for themselves [was] that other bidders would obtain fewer liens." *Id.* at 2144 (emphasis added). *Phoenix Bond* ultimately turned on the ***forseeability*** of the plaintiffs' losses of the opportunity to participate in auctions unaffected by RICO violations, not upon whether each plaintiff would have acquired a particular lien or a certain percentage of the liens absent manipulation.

2. *AGC, Holmes, and Anza* do not control

Ignoring the pertinent lessons of *Phoenix Bond*, ConocoPhillips instead relies on three earlier cases, *Holmes; Anza;* and *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). The allegations of proximate causation in those cases were more attenuated than the

allegations in this case. None of these cases support the judgment on the pleadings entered by the district court.

In *AGC*, the plaintiffs were construction and building trade unions that contended they were injured in violation of the antitrust laws, as a result of increased ***competition*** caused by a conspiracy between an association of contractors and its members to weaken the rights of the union under its collective-bargaining agreement. 459 U.S. at 521-24. The complaint alleged that the defendants coerced owners and other parties to agree to divert business from union to non-union contractors and sub-contractors. *Id.* at 540-41. Since the unions were neither consumers nor competitors (*id.* at 539), the Court concluded that only the landowners who were coerced to deal with non-union construction contractors and subcontractors were directly injured by the alleged conspiracy, and that the injury to the unions from increased competition was only indirect and not protected by the antitrust laws. *Id.* at 541-42.

In *Holmes*, the Securities Investor Protection Corporation ("SIPC") brought a ***subrogation*** claim alleging that the defendants had manipulated the stock of six companies and caused the failure of two SIPC-insured broker-dealers that had invested funds in the manipulated stocks. 503 U.S. at 262-63. When the value of those stocks ultimately plummeted, the broker-dealers became insolvent, with the

result that the SIPC advanced nearly $13 million to cover the claims of the broker-dealers' customers. *Id.* at 262-63.

The Supreme Court concluded that only the brokers who were defrauded into investing in the securities were directly injured by the defendants' stock manipulation scheme and that SIPC's allegations of proximate cause failed because SIPC's injury was only derivative or indirect from those of the brokers. *Id.* at 273; *see City of New York v. Smoke-Spirits.com*, 541 F.3d 425, 441 (2d Cir. 2008) (describing plaintiff's injury in *Holmes* as "derivative"). The Court also emphasized that the more directly injured parties, the broker-dealers themselves, had ***already*** sued the defendants. *Holmes*, 503 U.S. at 273.

In contrast to SIPC, ConocoPhillips' bribery of Alkatiri directly caused Oceanic's injury. The intended purpose of the bribes was to induce East Timor to reinstate ConocoPhillips' interests after they had been abrogated by the new Constitution without giving Oceanic the opportunity to compete or negotiate for those production sharing contracts.

Anza also does not support dismissal of this case. In *Anza*, Ideal Steel Supply Company ("Ideal") alleged that Ideal's competition, National, violated RICO by failing to collect or pay New York State sales taxes from its customers, a practice that allowed National to reduce its prices without affecting its profit margin. 547 U.S. at 453-54.

The Supreme Court ruled that the State of New York was the direct victim of the fraud, not Ideal. *Id.* at 458. Ideal's lost sales were caused by increased price competition from National, which had lowered prices to cash-paying customers. *Id.* at 458. The Court ruled that National's tax fraud was not the cause of National's decision to lower its prices, and that National's decision to lower its prices could have been for any number of reasons unrelated to the alleged fraud. *Id.* at 459. The Court said that National could, for example, have used the savings from the non-payment of taxes for other purposes such as asset acquisitions, research and development, or to pay dividends. *Id.*

In contrast, Oceanic's injury was a direct and foreseeable result of ConocoPhillips' bribes. Oceanic alleges that ConocoPhillips bribed a specific person – Alkatiri – for the specific purpose (and with the effect) of achieving a specific result – depriving Oceanic of any opportunity to compete for oil and gas rights.

ConocoPhillips contends that East Timor is more analogous to the State of New York in *Anza* than to Cook County in *Phoenix Bond.* But just as ConocoPhillips violated RICO and Robinson-Patman by paying bribes to prevent Oceanic, its only competitor, from having an opportunity to compete for oil and gas rights in the Timor Sea and obtain those rights for itself, the defendants in *Phoenix Bond* conspired to prevent their competitors from obtaining a fair share of

the tax liens being auctioned by making false statements to Cook County. Although the defendants' fraudulent statements were directed at Cook County, just as ConocoPhillips' bribes were directed to Alkatiri, *Phoenix Bond* held that the injuries to the plaintiffs from defendants' illegal acts were sufficiently direct to establish proximate cause.

D. This Court should reject the incorrect standards applied by the District Court and advocated by ConocoPhillips

1. There is no "high probability" standard

Although ConocoPhillips argues that the district court did not apply a heightened pleadings standard, the district court's own words belie that assertion:

> Oceanic ***must*** show what would have happened absent the bribe to ***a high degree of probability***.

R6837 (Order at 10) (emphasis added).[1] Oceanic is not required to "show" anything at the pleading stage, let alone show anything to a "high degree of probability" standard. Neither the district court nor ConocoPhillips can cite a decision adopting a "high probability" standard in bribery cases. The only burden applicable to a RICO case is a preponderance of the evidence. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236 (1989).

[1] The district court also did not explain how Oceanic was supposed to make a "showing" "to a high degree of probability" without discovery.

2. Oceanic is not required to show anything "as a matter of law"

ConocoPhillips contends that one of the issues in this case is "whether Oceanic would, ***as a matter of law***, be deemed a 'direct victim' of any such bribery scheme." Appellees' Br. at 3 (emphasis added). This argument is even more of a stretch than the "high degree of probability" standard imposed by the district court below. To justify a dismissal or a judgment on the pleadings, it was ConocoPhillips' burden to show, as a matter of law, that Oceanic (or any other competitor) could never be directly injured by ConocoPhillips' payment of bribes to obtain a contract from a foreign government. It was not Oceanic's burden to show the opposite.

3. RICO requires a foreseeable injury, not a "direct victim"

ConocoPhillips incorrectly argues that RICO requires a "direct victim." The Seventh Circuit has explained that RICO proximate cause requires a direct (or reasonably foreseeable) ***injury***, not a direct ***victim***:

> In examining whether a RICO violation proximately caused the plaintiff's injury, "the central question . . . is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006). Saying that the injury to the plaintiff is "direct" is akin to saying that the victim was reasonably foreseeable, the traditional principle for hemming in tort liability.

RWB Services, LLC v. Hartford Computer Group, Inc., 539 F.3d 681, 688 (7th Cir. 2008) (Flaum, J.). As the Second Circuit recently put it, "So long as a defendant's

acts played a substantial part in causing the alleged injury, those acts may be said to have "directly" caused the injury, as *Anza* requires." *Smokes-Spirits.com*, 541 F.3d at 443 n.23. These cases, together with *Phoenix Bond* and *Holmes*, establish that proximate cause and "direct cause" are synonymous and proximate cause does not have a different meaning in RICO cases. It is nothing more than the common law concept of forseeability.[2]

Not only was Oceanic's injury – exclusion from any opportunity to compete for the interests – direct, it was also the foreseeable and intended result of ConocoPhillips' scheme, without which the scheme could not have succeeded. *See, e.g.*, R4269 (SAC ¶¶ 90, 145, 154); *see also, Phoenix Bond*, 128 S. Ct. at 2144 ("It was a foreseeable and natural consequence of petitioners' scheme to obtain more liens for themselves that other bidders would obtain fewer liens").

4. RICO's remedies are not limited to one victim per violation

ConocoPhillips also suggests that there can be only one "best plaintiff" who may sue for damages in a RICO case. This is patently incorrect: "The existence of multiple victims with different injuries does not foreclose the finding of proximate cause; in fact one of the hallmarks of a RICO violation is 'the occurrence of

[2] *RWB Services* is therefore consistent with *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990), a case that ConocoPhillips attempts to distinguish on the ground that it pre-dates *Holmes* and *Anza*.

distinct injuries' affecting several victims." *RWB Services,* 539 F.3d at 688 (*citing Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986)).

The Second Circuit has also rejected the "single plaintiff" argument in *Smokes-Spirits.com.* In that case, the City of New York sued for lost taxes. 541 F.3d at 444. Defendants argued that the City could not sue because the State of New York was a better plaintiff. *Id.* at 443-44. The Second Circuit rejected that argument:

> The fact that the State may also have been targeted by defendants' schemes does not change the result. "No precedent suggests that a racketeering enterprise may have only one 'target' or that only a primary target has standing"; indeed "there is a broad class of plaintiffs under RICO."

Id. at 444.

Nor was the existence of multiple RICO plaintiffs a barrier to proximate cause in *Phoenix Bond. See* 128 S. Ct. at 2144 (noting that "***respondents and other losing bidders***" were injured by petitioners' misrepresentations) (emphasis added). The Court was not concerned in *Phoenix Bond* that there were a number of losing bidders who were injured as a result of defendants' RICO violations who were plaintiffs at ***different levels*** and were only indirectly injured. The Court's only concern was to prevent plaintiffs down the chain of causation from seeking ***duplicative*** recoveries, a problem that does not exist here. *Id.*

While East Timor was ***also*** injured by ConocoPhillips' bribery, East Timor's injuries are fundamentally different from the injury to Oceanic. *See W.S. Kirkpatrick, supra* (recognizing that defendant's bribery of Nigerian officials caused the distinct injuries to the Nigerian government and the plaintiff). East Timor lost the honest services of Alkatiri, a government official, and may well have received substantially lower consideration from ConocoPhillips than it would have received if Oceanic had been allowed to compete. *See* R4245 (SAC ¶ 4). In contrast, Oceanic lost the valuable economic opportunity to compete and the profits it would have earned had it been successful. As the Seventh Circuit held in *Phoenix Bond*, "***[l]oss of a (valuable) chance is real injury***." *Phoenix Bond & Indemnity Co. v. Bridge*, 477 F.3d 928, 930 (7th Cir. 2007), *aff'd* 128 S. Ct. 2131 (2008) (*citing Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) (emphasis added)). There is no more immediate victim that is better situated to sue for ***those damages*** than Oceanic.

5. There is no requirement that ConocoPhillips' bribes be the sole cause of Oceanic's injury

RICO's civil damages remedy is based upon the Clayton Act. *See, e.g., Holmes, supra.* Under the antitrust laws, a plaintiff need not prove that the violation was the ***sole*** cause of any injury. *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n.9 (1969); *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 317 (5th Cir. 1978).

Essentially the same rule applies in a RICO case. A plaintiff need only prove that the defendants' misconduct was a "substantial factor in the sequence of responsible causation, and [plaintiff's] injury was reasonably foreseeable or anticipated as a natural consequence." *Smokes-Spirits.com*, 541 F.3d at 442; *see also Williams v. Mohawk Indus.*, 465 F.3d 1277, 1288 n.5 (11th Cir. 2006) (under RICO, "proximate cause is not . . . the same thing as a sole cause, and it is enough for the plaintiff to plead and prove that the defendant's tortious or injurious conduct was a substantial factor in the sequence of responsible causation").

E. The District Court made impermissible credibility determinations

The SAC contains voluminous allegations concerning the bribery of Alkatiri. These include the amount of the bribes, the dates of payment, who transported the bribe money, the accounts into which it was deposited, and how the money was ultimately delivered to Alkatiri. R4269-4274 (SAC ¶¶ 89-103). The district court disregarded these specific allegations in favor of its own conclusion that Oceanic "cannot possibly have an idea why the President of an international corporation would personally deliver cash in a briefcase to an official of East Timor." R4833 (Order at 6). To the contrary, there are few if any ***legitimate*** reasons for the President of ConocoPhillips to personally deliver ***cash*** in a briefcase to a government official – and Oceanic spelled out in detail the illegitimate reasons for ConocoPhillips' delivery of cash.

Oceanic also alleged that bribes caused Alkatiri to reverse his previous position and reinstate ConocoPhillips' production sharing contracts in the Timor Gap. R4245, 4269, 4271 (SAC ¶¶ 4, 90, 95). Again, the district court simply chose to disbelieve allegations it was required to accept as true and substituted its own opinion that "[t]o attribute a decision by a government at a high level to [a] single person [*i.e.*, Mari Alkatiri] is ***fanciful***." R6834 (Order at 7) (emphasis added). A district court may not disregard a party's detailed pleadings in this fashion. *Twombly*, 127 S. Ct. at 1965 ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.").

F. The District Court relied upon matters outside the pleadings to decide the motion, and ConocoPhillips does the same here to defend the Order

Although the district court made passing reference to the governing standards, it failed to follow them. For example, in determining Oceanic's likely ability to successfully compete for the interests, Judge Hughes referred to "ConocoPhillips' geology, capital, geologists, engineers [and] sources of supply," concluding that "Oceanic cannot rationally compare its prospects with the historic achievement of ConocoPhillips." R6836 (Order at 9). There is ***nothing*** in the SAC that indicates that Oceanic's own abilities are so limited, nor is there anything about the "historic achievements" the district court attributed to ConocoPhillips. Either the district court made up these "facts" or it considered and relied upon

unidentified extra-record materials about the relative capabilities of Oceanic and ConocoPhillips. Either hypothesis is sufficient to require reversal and reassignment.

While ConocoPhillips also pays lip service to the Rule 12(c) standards,[3] it ignores them by flooding its Brief with extra-record materials.[4] For instance, after acknowledging that "Oceanic's claim of bribery must be accepted as truthful for purposes of the Rule 12(c) motion and this appeal" (Appellees' Br. at 15), ConocoPhillips presents over five pages of extra-record materials that, ***if admissible***, could be considered only after discovery either in the summary judgment context or at trial, not on a Rule 12(c) motion. *Id.* at 15-20.

A notable example of ConocoPhillips' reliance on matters outside the record is the lengthy quote attributed to Josè Ramos-Horta, Alkatiri's successor, as Prime Minister of East Timor. Appellees' Br. at 19-20. This quote is taken from an Australian tabloid newspaper and is offered solely to challenge the truthfulness of allegations set forth in the SAC. This hearsay statement would be inadmissible at trial and could not even be considered in support of a motion for summary judgment.

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[3] Oceanic discusses the correct standards in its Opening Brief at pages 35-41.

[4] Oceanic objected to these extraneous materials. (R6412-6416; R6418-6437; R6696-6714; R6623-6657; R6615-6622). But the district court did not rule on Oceanic's objections and relied on objectionable documents in its opinion (R6835) without converting to a Rule 56 motion as required by Rule 12(d).

This and other extra-record materials referred to by ConocoPhillips do not appear in the SAC, and are offered to show the "complete falsity" and "extreme unlikelihood" of Oceanic's allegations, described by ConocoPhillips as "highly implausible" and "fanciful," inviting credibility determinations that would be prohibited even at the summary judgment stage. *Id.* at 3, 38-39. The district court should not have accepted that improper invitation.

G. Determining proximate cause in this case does not present any insurmountable hurdles.

In ruling that Oceanic "could not have won," the district court effectively reversed a previous order by Judge Sullivan, which held:

> Plaintiffs have sufficiently shown that they had invested a significant amount of research and resources in analyzing and developing ways to explore for and produce petroleum and natural gas in the Timor Gap since the 1970s. ***Therefore, plaintiffs have demonstrated a reasonable likelihood or probability that, but for the alleged interference by ConocoPhillips, a contract would have resulted.***

Oceanic Exploration v. ConocoPhillips, 2006 WL 2711527 at *20 (Sept. 21, 2006, Opinion at 52-53) (emphasis added).

The district court based its ruling on a series of supposed hurdles it thought Oceanic would have to satisfy in order to demonstrate proximate causation. Each of these "hurdles" was a quintessential factual determination that either is inconsistent with the actual allegations of the complaint or one that could not be resolved adversely to Oceanic without allowing discovery.

1. "The government of East Timor would have chosen to abrogate the existing concessions"

This is ***exactly*** what Oceanic alleges – that ***all prior production sharing contracts*** (including ConocoPhillips') were abrogated by the adoption of Articles 139 and 158 of the new Constitution. R4268 (SAC ¶ 88). As the SAC alleges, Alkatiri had publicly stated that "[W]e 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." R4267 (SAC ¶ 84). The district court was not free to ignore these allegations.

2. "The government of Australia would have gone along with any such abrogation"

This supposed hurdle presents no difficulty. The effectiveness of the new East Timor Constitution (R4268 (SAC ¶ 88)) did not require and was not conditioned on Australia's consent. All prior interests, including ConocoPhillips' interests from the Joint Authority, were abrogated when the new Constitution went into effect.

3. "East Timor and Australia would have re-opened bidding for the concessions"

The SAC alleged that after all prior interests, including ConocoPhillips', had been abrogated by the new Constitution, East Timor would have opened those areas to competition, but for ConocoPhillips' bribery.

ConocoPhillips argues that the courts cannot "deconstruct" East Timor's decision-making process. This "deconstruction" argument is simply a variant of the "act of state" doctrine, which the Supreme Court held in *W.S. Kirkpatrick*, did not bar a competitor in Oceanic's position from bringing a federal RICO action against a competitor that won a contract by bribing officials of the Nigerian Army. *W.S. Kirkpatrick*, 493 U.S. at 406 ("Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires"). *W.S. Kirkpatrick* establishes that bribery of government officials does not preclude proof of causation and none of the "deconstruction" cases upon which ConocoPhillips relies involve allegations of bribery.

Moreover, the inevitable consequence of an acceptance of ConocoPhillips' "deconstruction" argument would be to immunize companies that bribe government officials, foreign or domestic, from civil liability – even to the ***governments*** whose officials received the bribes. If, as ConocoPhillips claims, it is impossible to "deconstruct" the decision of a foreign government to award a contract, it is equally impossible for a federal, state or local government in the U.S. to deconstruct ***its own*** decisionmaking process in the event their own officials accept bribes in exchange for government contracts.

If ConocoPhillips' "deconstruction" argument is intended to indicate that more than one factor may have contributed to the injury to Oceanic, that argument likewise fails. A wrongful act need not be the sole cause of a plaintiff's injury. *See Zenith Radio Corp., supra*; *Blue Bird, supra*. A wrongful act is "a proximate cause if it is '***a substantial factor*** in the sequence of responsible causation.'" *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) (emphasis added). Consequently, "'[i]f the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.'" *Id.* at 1399. Assuming the truth of Oceanic's allegations, there is ample basis to conclude that ConocoPhillips' bribes to Alkatiri were a substantial factor in reinstating the interests previously abrogated pursuant to East Timor's Constitution, depriving Oceanic of a valuable opportunity to compete for those production sharing contracts. ***Not*** allowing Oceanic to bring its claim in these circumstances would nullify the Congressional purpose in creating "private attorneys general" under RICO and abandon any opportunity to shift the risk/benefit analysis that leads to bribery. *Williams*, 465 F.3d at 1290 (recognizing that the very "object of civil RICO is . . . to turn [victims] into prosecutors, private attorneys general dedicated to eliminating racketeering activity").

4. "Oceanic would have chosen to bid in such a hypothetical re-opened bidding"

This purported hurdle creates a false paradigm and in any event presents a question of fact. Oceanic has alleged in detail its efforts over fifteen years to obtain those exploration interests. R4277-4281 (SAC ¶¶ 112-127). Oceanic alleges that it would have competed for the oil and gas rights in the Timor Sea, but was prevented from doing so by ConocoPhillips' illegal acts of bribery. ConocoPhillips concedes that the truthfulness of Oceanic's allegations is not an issue at this stage of the proceedings. *See, e.g.*, R4277-4282, 4293 (SAC ¶¶ 112-127, 158). It was error for the district court to reject Oceanic's allegations and resolve the issue against Oceanic based solely on the complaint.

5. "Oceanic would have had the wherewithal to bid and would have been deemed a qualified bidder by East Timor and Australia"

Oceanic alleges that it is "an established oil and gas exploration company with a history of successful exploration." R4265-4266 (SAC ¶ 51). Oceanic has entered into major exploration agreements with the Greek government, and developed a field in Malaysia together with British Petroleum Company and Chinese Petroleum Company. *Id.* Oceanic is also participating in a development in a concession in the East China Sea together with Shell International Exploration and Eni S.P.A. *Id.* Oceanic has also formed a consortium that has been licensed for exploration in the British North Sea, teaming with Brit Oil and Deminex. *Id.*

Oceanic also alleges that it has engaged in exploration in Thailand, Cameroon, Nicaragua, Peru, and Panama. These allegations must be taken as true,[5] and it was inappropriate for the district court to speculate concerning what the evidence would be, rather than evaluate that evidence after discovery.[6]

6. "Oceanic would have won the hypothetical bidding"

To survive a motion to dismiss or a motion for judgment on the pleadings before there has been any discovery, Oceanic need not ***prove*** that it would have been the successful bidder. *Phoenix Bond* makes this point quite clearly. In *Phoenix Bond*, the plaintiffs' theory of recovery was based upon misconduct by the successful bidder in an auction conducted by Cook County, Illinois. The Supreme Court recognized and approved that simple theory of recovery: "As a result, respondents lost the ***opportunity*** to acquire valuable liens. Accordingly, respondents were injured in their business or property by reason of petitioners' violation of § 1962 (c), and RICO's plain terms give them a private right of action for treble damages." 128 S. Ct. at 2138 (emphasis added). The Seventh Circuit also addressed this point below by holding that: "Extra bids reduce plaintiffs' chance of winning any given auction, and loss of a (valuable) chance is real

[5] The SAC also details Oceanic's continuing efforts during 1999-2003 to compete for and to bid for exploration and production rights in the Timor Gap. R4277-4281 (SAC ¶¶ 112-127).

[6] Discovery would show, among other things, that Oceanic is majority-owned by a company that is part of a group of commonly owned affiliates with over six thousand employees and current revenues exceeding $1.5 billion. The purpose of this point is simply to emphasize that discovery has not taken place and that ConocoPhillips' efforts to convince the Court that Oceanic could not qualify as a bidder or develop the concession are both premature and misleadingly incomplete.

injury." 477 F.3d at 930.[7] Thus, the lost ***opportunity*** to acquire valuable liens was an injury, separate from any ***actual acquisition*** of those liens.

This also explains why ConocoPhillips' reliance upon *James Cape & Sons Co. v. PCC Construction Co.*, 453 F.3d 396 (7th Cir. 2006) is misplaced. ConocoPhillips cites that case for the proposition that it is impossible to determine which non-violating company would have won contracts. However, *James Cape* was decided by the same judge who wrote the opinion in *Phoenix Bond* that was affirmed by the Supreme Court. Neither the Seventh Circuit nor the Supreme Court's decisions in *Phoenix Bond* indicated that it would be impossible to deconstruct the award process, and both recognized a separate category of damages consisting of the loss of the valuable opportunity to participate in a bidding process untainted by RICO violations.

But the greatest problem with ConocoPhillips' "hypothetical auction" argument is that it completely absolves successful bribers from liability for their misconduct.[8] The only reason the outcome of a fair competition is "hypothetical"

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[7] The question addressed in *Northeastern Florida Chapter, Associated General Contractors of America,* cited by the Seventh Circuit in *Phoenix Bond*, plainly refutes ConocoPhillips' argument:

> In this case we decide whether, in order to have standing to challenge the ordinance, an association of contractors is required to show that one of its members would have received a contract absence the ordinance. ***We hold that it is not.***

508 U.S. at 656 (1993)(emphasis added).

[8] R4269 (SAC ¶ 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

is that ConocoPhillips' bribery prevented that process from taking place. Now ConocoPhillips seeks to benefit a second time from that misconduct by arguing that because its bribery prevented abrogation and fair competition, it cannot be held responsible for the consequences of that misconduct.

7. "Oceanic would have developed the interests at a profit"

Whether Oceanic would have made a profit had it been awarded the production sharing contracts, goes only to the ***amount*** of Oceanic's damages, not to the fact of damage, and is a "measure of proof" that cannot be resolved as a matter of law adversely to Oceanic on the face of the complaint. *See, e.g., Story Parchment, supra* at 562-63 ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of ... justice to deny all relief to the injured person and thereby relieve the wrongdoer from making ... amend[s] ... [W]hile the damages may not be determined by mere speculation or guess, it will be enough if ***the evidence*** show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.") (emphasis added); *see also Continental Ore Co. v. Union Carbide & Carbon Group*, 370 U.S. 690, 697 n.7 (1962); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946); *Eastman Kodak Co. v. Southern*

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contracts that ConocoPhillips previously held and to ensure that Oceanic would not be awarded production sharing contracts in the Timor Gap").

Photo Materials Co., 273 U.S. 359, 379 (1927) (all upholding damage awards for plaintiffs who were wrongfully denied opportunities to compete).

In any event, lost profits from contracts that were not awarded due to a corrupt competition constitute injury to business within the meaning of 18 U.S.C. § 1964(c). *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1343 (2d Cir. 1994). Damages experts can reconstruct the profitability of the interests in Oceanic's hands by looking to, among other things, the area's production history and the market prices of oil and natural gas. But, "[t]he touchstone of the inquiry ... is proximate cause: there is no automatic rule against the recovery of any type of lost profits or lost value damages if proximate cause is shown." *Maiz v. Virani*, 253 F.3d 641, 663 (11th Cir. 2001)).

II. OCEANIC'S ROBINSON-PATMAN CLAIM SUFFICIENTLY ALLEGES PROXIMATE CAUSE

To state a claim for damages under Section 4 of the Clayton Act, an antitrust plaintiff is required to allege: (1) a violation of the antitrust laws; (2) an injury-in-fact to its "business and property" proximately caused by that violation; and (3) damages. *See, e.g., Blue Bird*, 573 F.2d at 317. Oceanic's complaint more than meets these requirements.

Oceanic alleges that ConocoPhillips obtained production sharing contracts in the Timor Sea and excluded Oceanic from competing for the same opportunity by paying millions of dollar in bribes to Alkatiri and other East Timor officials.

R4269-4277(SAC ¶¶ 89-111). Commercial bribery is a *per se* violation of Section 2(c) of the Robinson-Patman Act. Oceanic also alleges that as a direct result of these bribes, East Timor officials refused to negotiate or even allow Oceanic to compete for oil and gas rights in the Timor Sea, and instead, awarded those rights to ConocoPhillips ***on terms that were even more favorable than those that its predecessor, Phillips Petroleum, had obtained in 1992 from the Joint Indonesian-Australian Authority***. R4245 (*Id.* ¶ 4). Oceanic alleges that it was damaged in its business and property as a direct result of ConocoPhillips' violations of Section 2(c).

"Section 2(c) prohibits commercial bribery." ABA Antitrust Section, I Antitrust Law Developments (6), at 528 (6th ed. 2007). Section 2(c) is unique among antitrust laws, in that unlike Section 2(a) of the Robinson-Patman Act (which prohibits injuries to competition caused by primary line or secondary line price discrimination), or the general prohibition against contracts, combinations and conspiracies in restraint of trade in Section 1 of the Sherman Act, "Section 2(c) contains no requirement of injury to competition or indeed even injury to a competitor." Herbert Hovenkamp XIV, Antitrust Law, § 2362g (2d ed. 2007).

In response to Oceanic's Section 2(c) claim, ConocoPhillips relies on a single Fifth Circuit case, *Gulf Oil Trading Co. v. M/V Carib Mar*, 757 F.2d 743, 751 (5th Cir. 1985). Appellees' Br. at 55. *Gulf Oil Trading*, is however,

distinguishable for at least three reasons. *Gulf Oil Trading* was not a commercial bribery case brought under Section 2(c), but rather was a secondary line price discrimination case brought under Section 2(a). This Court denied the defendant leave to amend to assert a counterclaim against Gulf Oil Trading under § 2(a) because the defendant failed to allege competitive injury – a requirement of a claim under Section 2(a) – but ***not*** of a claim under Section 2(c). 757 F.2d at 751. Indeed, the defendant failed to allege that it was a competitor of the plaintiff. *Id.* In this case, Oceanic alleges that it was ConocoPhillips' ***only*** competitor for oil and gas rights in the Timor Sea and that Oceanic was denied the opportunity to compete and ultimately lost the contract as a direct result of ConocoPhillips' unlawful bribery in violation of Section 2(c). These allegations are more than sufficient to survive a motion to dismiss or for judgment on the pleadings.

III. CONOCOPHILIIPS WAIVED ITS ARGUMENTS CONCERNING PERSONAL JURISDICTION OVER THE SUBSIDIARIES

ConocoPhillips devotes one paragraph to the improper dismissal of the subsidiaries. Appellees' Br. at 56-57. Rather than setting forth its argument, ConocoPhillips incorporates by reference ***nine pages*** of the District Court's order. *Id.* at 57. This is improper and constitutes a waiver. *Prescott v. Northlake Christian School*, 141 Fed. Appx. 263, 275 (5th Cir. 2005) ("an appellant must include the substance of its arguments in the body of its brief"); *Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (incorporation of argument by reference

waived issue); *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404, 438 (5th Cir. 2008) (failure to substantively brief issues on appeal waived any consideration).

CONCLUSION

For the reasons set forth above and in Oceanic's initial brief, the decision of the district court granting judgment on the pleadings should be reversed and the case reassigned upon remand.

Respectfully submitted, this 21st day of October, 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 7,000 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

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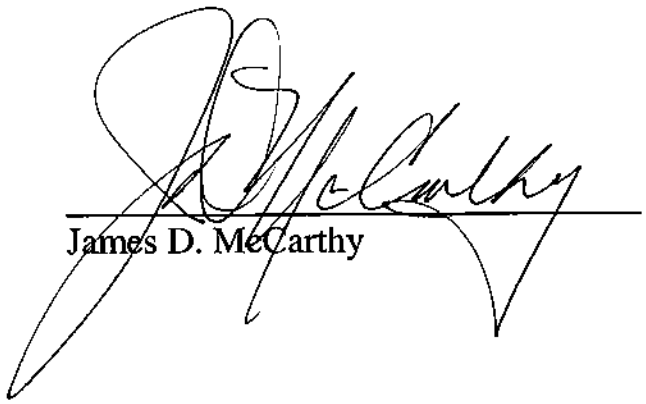

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