UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OCEANIC EXPLORATION CO., *et al.*, Plaintiffs, v. CONOCOPHILLIPS, *et al.*, Defendants.	Civil Action Number: 4:07-cv-00815

CONOCOPHILLIPS' RESPONSE TO OCEANIC'S OPPOSITION TO REQUEST FOR JUDICIAL NOTICE AND EVIDENTIARY OBJECTIONS TO LYNCH EXHIBITS

Oceanic has raised objection to consideration upon this Rule 12(c) motion of the various documents appended to the Lynch Affidavit submitted by ConocoPhillips. As set forth in ConocoPhillips' Reply Memorandum being submitted concurrently herewith, even were all such documents hypothetically to be stricken by this Court, it would make no difference to the outcome of the motion: judgment on the pleadings would still be required against Oceanic's Second Amended Complaint.

Nevertheless, as set forth below, Oceanic's objections are not well taken. On a motion under Rule 12(b)(6) or Rule 12(c), this Court may consider facts of which it can take judicial notice. *E.g.*, *Hebert Abstract Co.* v. *Touchstone Properties*, 914 F.2d 74, 76 (5th Cir. 1990). The Lynch exhibits squarely fit within the judicial notice doctrine because the information is either (1) generally known within the territorial jurisdiction of this Court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be

questioned. Fed. R. Evid. 201. Accordingly, the documents to which Oceanic objects are properly before the Court.

1. 2000 Australia/UNTAET Exchange of Notes and 2002 Australia/East Timor Treaty

ConocoPhillips has put before this Court upon the motion: (1) the 2000 Exchange of Notes between UNTAET and Australia; and (2) the 2002 Treaty between East Timor and Australia — each of which confirmed ConocoPhillips' existing concessions in the Timor Gap. Oceanic's Opposition to consideration of these documents is baseless.

First, it is axiomatic that documents referenced in a party's own pleading — but not annexed — may properly be put before the court in full text for consideration upon a motion under Rule 12(b)(6) or 12(c). *E.g.*, *Kane Enterprises* v. *MacGregor (USA)*, 322 F.3d 371, 374 (5th Cir. 2003); *Collins* v. *Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000). Here, it is of course indisputable that Oceanic itself in its Second Amended Complaint referenced each of these documents (¶¶ 87, 104-06, 108-10).

Second, even if Oceanic had not done so, formal exchanges of notes and treaties between governments are matters of which courts may take judicial notice and therefore may be considered on a Rule 12(c) motion. *See Torrens* v. *Lockheed Martin Services Group*, 396 F.3d 468, 473 (1st Cir. 2005); *United States* v. *Reynes*, 50 U.S. 127, 147-48 (1850); *Hebert Abstract Co.*, 914 F.2d at 76.

2. Oceanic's SEC filings

A wealth of case law establishes that a court may take judicial notice of a party's SEC filings upon a motion of this nature. *See, e.g.*, *Lovelace* v. *Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996); *Kramer* v. *Time Warner*, 937 F.2d 767, 774 (2d Cir. 1991). And, while when proffered by the party that itself made the filing, the document is not considered for

the truth of the statements it contains, here of course the filing is being pointed to by an adverse party and the statements constitute party admissions. Such use is perfectly proper. *See Endovasc Ltd.* v. *J.P. Turner & Co.*, No. 02-7313, 2004 WL 634171, *2 (S.D.N.Y. Mar. 30, 2004), *rev'd in part on other grounds*, 169 Fed. Appx. 655 (2d Cir. 2006).

Oceanic in its Opposition cites to *In re Enron Corp.* in support of its contention that judicial notice should not be taken of such filings. In *Enron*, however, it was the directors of the very entity that had made the filings who were attempting to bootstrap their position upon the motion by offering the contents of those filings as supposed truths. 258 F. Supp. 2d 576, 641-42 (S.D. Tex. 2003).

Moreover, nowhere in Oceanic's Opposition is there any suggestion that any of the statements contained in those SEC filings and pointed to by ConocoPhillips are in any way inaccurate or subject to dispute. And, regardless of truthfulness, the content of the filings would obviously have been relevant to any appraisal by the governments involved of Oceanic's qualifications — or lack thereof — should there hypothetically have been a re-opening of bidding.

3. <u>Australian Senate Committee Report</u>

Oceanic also challenges reference to a report issued by the Australian Senate Foreign Affairs, Defence and Trade References Committee ("Senate Report"). As a document in the public record, the Senate Report is properly the subject of judicial notice. *See R2 Investments LDC* v. *Phillips*, 401 F.3d 638, 639 n.2 (5th Cir. 2005); *see also Oneida Indian Nation* v. *State of New York*, 691 F.2d 1070, 1086 (2d Cir. 1982) (judicial notice of legislative history proper when no dispute as to authenticity).

Oceanic cites to *Taylor* v. *Charter Medical Corp.* for the proposition that it is improper to take judicial notice of "findings of fact from other [court] proceedings for the truth as-

serted therein because these are disputable and usually are disputed." 162 F.3d 827, 830 (5th Cir. 1998).

But *Taylor* is not on point. Here, Oceanic does not suggest any dispute concerning the matters as to which ConocoPhillips has referenced the Senate Report. First, ConocoPhillips cited to the report to demonstrate that Australia had no intention whatsoever of disrupting the existing Timor Gap exploration concessions. *See* Defs.' Mem. of Law at 17 n.14. Far from disputing this fact, Oceanic concedes it in no uncertain terms: "Of course Australia favored the status quo." Oceanic Rule 12(c) Brief at 11 n.12. Second, ConocoPhillips pointed to statements by East Timorese leaders referenced in the Senate Report regarding the existing Timor Gap concessions — statements entirely consistent with that position of Australia. Oceanic does not dispute that these statements were made; indeed, Oceanic itself referenced one of those statements in its First Amended Complaint (¶ 165).

Moreover, quite apart from any issue of "truth," the statements by East Timorese leaders were presented primarily to show that they were made and to provide this Court with context — *i.e.*, having repeatedly been assured that its concessions were *not* in jeopardy, was ConocoPhillips' state of mind such that it had any motive to engage in the bribery scheme asserted by Oceanic. And, as set forth in ConocoPhillips' Reply Memorandum, the truth or falsity of Oceanic's bribery allegations is in any event not before this Court upon this proximate cause motion. Reply Mem. of Law at 2.[1]

[1] Oceanic separately complains about ConocoPhillips' having put the *full* text of the statements by these East Timorese leaders before the Court from other sources. ConocoPhillips did this so that it could not be accused of having taken any statement out of context, and Oceanic nowhere disputes the accuracy of the full text.

4. Oceanic's Australian pleadings

Oceanic contends that this Court cannot take judicial notice of assertions contained in Oceanic's prior pleadings in the Australian action. The case law is to the contrary. *See, e.g.*, *Aldridge* v. *United States*, No. 06-0050, 2006 WL 2423417, *2 (N.D. Tex. Aug. 22, 2006); *Munno* v. *Town of Orangetown*, 391 F. Supp. 2d 263, 268 (S.D.N.Y. 2005); 5C Wright & Miller, *Federal Practice and Procedure* § 1364, at 138. The Fifth Circuit's opinion in *Taylor* is again not on point: there is no issue here of taking judicial notice of findings of fact; rather, the Australian pleadings have been referenced simply to give this Court, as a matter of background, the evolution of Oceanic's claims in this dispute.

And, once again, no issue upon the Rule 12(c) proximate cause motion depends upon any statements or positions taken in the Australian action.

5. Portuguese government letters

Oceanic also objects to consideration of the letters it received from the Portuguese government negating the claim it asserted in the Australian litigation — as well as in its First Amended Complaint in this action — that it still held a valid and existing concession from Portugal in the Timor Gap. (As noted in ConocoPhillips' opening Memorandum of Law, Oceanic never disclosed these letters either to the Australian Court or the District of Columbia Court. *See* Defs.' Mem. of Law at 9, 10.) Governmental documents of this nature are, however, part of the public record and properly the subject of judicial notice. *E.g.*, *Torrens*, 396 F.3d at 473. Oceanic objects that the particular copies of those letters appended to the Lynch Affidavit lack foundation. It neglects to mention that formal *apostilles* from the Portuguese government certifying the authenticity of the letters are actually in the record of this very litigation, having been placed before the District Court in Washington by the Timor Sea Designated Authority (Docket Entry 71). Such documents are thus properly before this Court. *See* Convention Abolishing the Re-

quirement of Legalisation for Foreign Public Documents, T.I.A.S. 10072, appended to Fed. R. Civ. P. 44; Fed R. Civ. P. 44(a)(2); Supplementary Note of Advisory Committee Regarding Rules 43 and 44, 1991 Amendment.

Moreover, yet again, the letters in question have been put before the Court to provide the context and background of this dispute and are not part of any analysis of the proximate cause issue.

6. Public statements and writings by José Ramos-Horta

Oceanic challenges two public statements by East Timorese leader and present Prime Minister, José Ramos-Horta. The first was made back in November 1999: "No mining company should have any concern whatsoever. In the end it's in our national interest." The second was made in 2004 in reaction to the filing of the present lawsuit — Ramos-Horta stating that he "cannot fathom the immorality that motivated the Petrotimor-Oceanic Exploration action." *See* Defs.' Mem. of Law at 6, 8.

Contrary to Oceanic's contention, there is no absolute bar in the law to taking judicial notice of newspaper reports of public statements or articles contained in newspapers. *See, e.g.*, *Benak ex rel. Alliance Premier Growth Fund* v. *Alliance Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006); *Washington Post* v. *Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991); *Hepting* v. *AT&T*, 439 F. Supp. 2d 974, 987 (N.D. Cal. 2006).

But, once again, Oceanic does not dispute that the 1999 statement was in fact made by Ramos-Horta, or that Ramos-Horta himself wrote the 2004 article, or that both his 1999 statement and his 2004 article are accurately quoted.[2]

[2] Only elliptically does Oceanic contend that the articles' "sources can be reasonably questioned." Oceanic Brief at 2.

In any event, once again, neither of these statements is necessary for consideration of the Rule 12(c) proximate cause motion. As set forth in ConocoPhillips' Reply Memorandum, the Second Amended Complaint fails to satisfy the requirement of proximate cause, quite apart from reference to either such statement.

Dated: April 27, 2007

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing Response was sent to all known counsel of record via electronic service, certified mail, return receipt requested, electronic mail, first class mail, and/or facsimile transmission, on the 27th day of April, 2007.

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