

ORIGINAL

CASE NO. 08-20338

U.S. COURT OF APPEALS

FILED

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CHARLES R. FULBRUGE III
CLERK

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)**

APPELLANTS' PETITION FOR PANEL REHEARING

DIAMOND MCCARTHY LLP
James D. McCarthy
Michael S. Truesdale
1201 Elm Street, Suite 3400
Dallas, TX 75270
Tel: 214/389-5300
Fax: 214/389-5399

BONDURANT, MIXSON &
ELMORE, LLP
Emmet J. Bondurant
John E. Floyd
1201 West Peachtree Street
NW, Suite 3900
Atlanta, GA 30309
Tel: 404/881-4126
Fax: 404/881-4111

ATTORNEYS FOR PLAINTIFFS-APPELLANTS

(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.

* 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.

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Appellants respectfully move, pursuant to Fed. R. App. P. 40, for a rehearing of the Opinion filed on November 6, 2009, that affirmed *per curiam*, the decision of the district court dismissing appellants' complaint under Fed. R. Civ. P. 12(c). A copy of the Opinion is attached as Appendix 1.

I. THE RULING OF THE PANEL

The complaint alleged that, as a direct result of the payment by ConocoPhillips of millions of dollars in illegal bribes to Mari Alkatiri, the Prime Minister of East Timor, in violation of RICO and § 2(c) of the Robinson-Patman Act, Oceanic was denied the opportunity to compete for oil and gas exploration rights in the Timor Gap. As a result of these bribes, Alkatiri used his influence to prevent East Timor from negotiating with Oceanic, and to instead enter into new production sharing contracts with ConocoPhillips that were less favorable than the terms offered by Oceanic.

Although the panel accepted as true appellants' allegations that ConocoPhillips had paid millions in bribes to Alkatiri, the panel held that Oceanic's allegations of proximate cause were not "plausible," based *solely* on the *assumption* (which amounted to an adverse inference) that East Timor could not have chosen Oceanic over ConocoPhillips to develop natural resources in the Timor Gap without Australia's consent. Slip Op. at 10-12. The panel held that even "[a]ssuming, absent [ConocoPhillips'] bribery [of Alkatiri], East Timor was

willing to consider replacing ConocoPhillips with Oceanic, *the Complaint presents no reason to believe Australia would have allowed this to happen.*" Slip Op. at 10 (emphasis added). *See also* p. 11.¹ These unsupported assumptions and inferences have no basis in the complaint and conflict with the allegations of the complaint.

II. SUMMARY OF ARGUMENT

Oceanic's allegations of proximate cause are far more plausible than the allegations of proximate cause of the plaintiffs that were upheld by the Supreme Court in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008). The contrary ruling of the panel is based solely on the unfounded assumption that East Timor – a sovereign nation – needed Australia's permission to contract with Oceanic. This assumption is not justified by anything in the complaint and was *negated* by the well-pleaded facts in the complaint, especially when those facts are construed in Oceanic's favor as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 570 (2007); *Erickson v. Pardus*, 551 U.S. 89 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

¹ There also is no basis in the complaint for the panel's statement that Australia had a "long-standing, extremely lucrative collaboration with ConocoPhillips" (Slip Op. at 11), that would have been "disrupted" if East Timor had awarded a contract to Oceanic. The complaint specifically alleged in paragraphs 105 and 108 that ConocoPhillips refused to proceed with the laying of a pipeline and the construction of a natural gas liquidation plant in Darwin, until after April 2003 when the Development Authority issued ConocoPhillips new production sharing contract to replace the 1991 contracts that had been abrogated by Article 158 of the East Timor Constitution. R4274-75 (¶¶ 105, 108).

The panel also overlooked the fact that any “veto rights” over the granting of concessions to Oceanic that Australia may have had existed as a result of agreements made by Alkatiri while under the influence of ConocoPhillips’ bribes. Thus, any ability that Australia may have had to block consideration of Oceanic’s proposal were the direct result of the bribes that Alkatiri received from ConocoPhillips did not reflect an impediment to Oceanic’s ability to demonstrate proximate cause.

Moreover, even if the panel was correct that Australia’s approval was required, Australian approval would have been at most a *condition subsequent* to a contract between East Timor and Oceanic, which is not an element of Oceanic’s claim, but is an affirmative defense on which ConocoPhillips would have the burden of proof. *United States v. Standiford*, 148 F.3d 864, 868 (7th Cir. 1998) (citing *United States v. Hyde*, 520 U.S. 670, 678 (1997)). Even under the pleading standard of *Iqbal*, 129 S. Ct. at 1937 and *Twombly*, 550 U.S. at 570, a plaintiff is not required by Fed. R. Civ. P. 8 to plead facts to negate every affirmative defense that might be asserted by a defendant.

III. ARGUMENT

Although the panel recited the requirement that it must “accept the well-pleaded facts as true and construe the Complaint in the light most favorable to the plaintiff” (Slip Op. at 8), it actually did the opposite. The panel affirmed based on

the unsupported *assumption* that the sovereign nation of East Timor needed Australia's consent to award a contract to develop the oil and gas deposits located on East Timor's side of the midline in the Timor Gap which East Timor claimed as a part of its territorial waters, and that such consent would not issue. R4306 (Map, Exh. B2).

This assumption was the *sole* basis for the panel's decision to affirm the decision of the district court to dismiss the complaint under Fed. R. Civ. P. 12(c) without giving Oceanic the opportunity to conduct any discovery to prove that ConocoPhillips' illegal acts of bribery were the proximate cause of Oceanic's exclusion from the Timor Gap. In effect, rather than drawing all inferences in favor of Oceanic, as required by the applicable standard at this stage, the panel found Oceanic's allegations "implausible" by adopting adverse inferences.

A. The Fact that "The Timor Gap is Disputed Territory" (Slip Op. at 3) is Inconsistent with the Panel's Assumption that Australia's Consent was Required.

The panel's ultimate conclusion regarding the need for, and assumed unavailability of, Australian consent, conflicts with undisputed facts recognized by the panel. Specifically, it cannot be reconciled with facts demonstrating East Timor's autonomy to decide matters affecting its own territorial waters. That misapprehension led to the panel's erroneous ultimate decision.

The principal oil and gas reserves at issue in this case are located in the Timor Sea between East Timor and Australia on the East Timor side of the midline between East Timor and the Australian coast in an area known as the Timor Gap. R4305 (Map attached to complaint as Exhibit B-2). The panel acknowledged that the boundary between the territorial waters of East Timor and those of Australia in the Timor Gap has never been established by treaty or otherwise. As the panel explained, although “the boundary [in the Timor Gap] between East Timor and Australia has not been settled,” and as a consequence, “The Timor Gap is disputed territory.” Slip Op. at 3; *see also* Slip Op. at 10 (“the Timor Gap is a ‘gap’ because the border between East Timor and Australia is uncertain – the two countries claim overlapping territory.”).

The panel failed to recognize the significance of these undisputed facts. In the absence of a treaty with Australia establishing a different boundary (or a ruling of the International Court of Justice resolving a maritime boundary dispute between the two countries), East Timor had a far stronger and more legitimate claim to ownership of the resources located on East Timor’s side of the midline between East Timor and Australia than did Australia.² While the unsettled nature of national boundaries running through the Timor Gap might have given Australia

² This probably explains why Australia “withdrew from the jurisdiction of the ICJ [International Court of Justice] for maritime boundaries” (Slip Op. at 11); it knew it would lose any claim to that portion of the Timor Gap.

a *claim* to a portion of the natural resources in that area, there is no allegation, nor is there any basis to infer, that Australia had a *veto* over East Timor's exploitation of those resources on its side of the midline.³ Indeed, even where border disputes exist, no nation disputes that the eventually-determined true titleholder has an absolute sovereign right to make grants therein:

the boundaries of discoveries were many times vague and indefinite, and this led to disputes and even wars between the nations over the sovereign or legal title or ownership to a given area of land. **But the basic principle of sovereign title was recognized by all. It gave the sovereign the absolute right to sell, give or grant the legal title to another person or to another nation.**

Sac & Fox Tribe of Indians v. United States, 383 F.2d 991, 997 (Ct. Cl. 1967) (emphasis added), citing *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 570-603 (1823) (Marshall, C.J.). The panel's unsupported assumption that Australia had a veto over East Timor's right to contract simply because of a border dispute runs afoul of this accepted principal of international law.

B. The Fact that the East Timor Constitution Repudiated all Prior Concessions is Also Inconsistent with the Panel's Assumption.

The panel's ultimate conclusion is also inconsistent with findings regarding East Timor's decisions to, and ability to repudiate prior concession (particularly

³ Although the panel quotes the complaint's reference to East Timor as "new and impoverished nation," Slip Op. at 11, it does not follow, as the panel implied, that because East Timor was poor, it could not exercise sovereign authority over its natural resources without Australia's consent.

governing its own territorial waters) without Australia's consent. Those decisions, and that ability, undermine the court's conclusion about the plausibility of action by East Timor absent Australian consent that would not be forthcoming.

The panel recognized that "Australia [had] collaborated with Indonesia to exploit oil and gas in the Timor Gap," during the period that East Timor was under military occupation by Indonesia, by creating a Joint Authority that "awarded Timor Gap exploration rights in the area" claimed by East Timor to ConocoPhillips' predecessor, Phillips Petroleum in 1991. Slip Op. at 3. As the panel also recognized, however, when East Timor finally regained its independence from Indonesia in 1999, after almost 25 years of military occupation, this newly-won independence "creat[ed] an opportunity for reassessment of the Timor Gap relationships." Slip Op. at 3.

Moreover, the complaint specifically alleged that "[t]he leadership of East Timor was adamant that all interests previously granted in the Timor Sea" while East Timor was under Indonesian occupation were invalid. R4266-67 (¶¶ 84, 85). Mari Alkatiri, the leader of the largest political party in East Timor, who ultimately became East Timor's first Prime Minister, stated publicly that his party "would not legitimize a treaty between a thief" of East Timor's natural resources, Indonesia, "and the receiver of stolen goods [Australia]" and that "[w]e are not going to be a successor to an illegal treaty." Slip Op. at 6 (¶ 84).

According to the complaint, Article 158 of the new East Timor Constitution went into effect in May 2003, and “vitiat[e] all prior interests including those of ConocoPhillips’ in East Timor natural resources.” R4268 (¶ 88 (quoting Articles 139 and 158)). Indeed, the panel acknowledged that the East Timor Constitution specifically stated that “East Timor would not recognize ‘acts or contracts’ regarding its natural resources entered into” previously, “unless they were ‘confirmed’” by the East Timorese government after the Constitution went into effect.

There is nothing in the complaint to suggest that Articles 139 and 158 of the new East Timor Constitution were conditioned on Australia’s consent.⁴ The only inference that can be reasonably drawn from these allegations is that East Timor is a sovereign nation and was not required to obtain Australian consent before making decisions regarding the award of concessions, as the panel held.

C. The Complaint Alleged that Oceanic was Denied the Opportunity to Bid as a Result of Bribe-Induced Agreements Between Alkatiri and Australia.

The panel misapprehended the fact that East Timor retained the right to select Oceanic, but more importantly, it misapprehended that if Australia had any

⁴ As a sovereign nation, East Timor had the right to exercise absolute control over its natural resources. The fact that ConocoPhillips illegally influenced East Timor in exercising that control by bribing Alkatiri to issue ConocoPhillips new production sharing contracts after the new Constitution went into effect does not alter East Timor’s authority to control those resources in its own interest without seeking the permission of Australia.

say in who received concessions concerning the development of the Timor Sea, such say was the result of agreements negotiated by Alkatiri under the influence of the illegal bribes. In other words, the panel misapprehended that any power held by Australia was not an impediment to demonstrating proximate cause, but instead was part and parcel of the harm alleged by Oceanic.

ConocoPhillips was alarmed that the newly-independent East Timorese government intended to repudiate the production sharing contracts in the Timor Gap that its predecessor had obtained while East Timor was under military occupation by Indonesia. R4267 (¶ 86). ConocoPhillips paid millions in bribes to Mari Alkatiri to induce him to change his position and to use his influence to prevent both UNTAET (that governed East Timor from 1999 until 2002), and the new East Timor government from considering competing offers from Oceanic:

To avoid this perceived "disaster of major proportions," beginning 2000, ConocoPhillips bribed, among others, Mari Alkatiri, the official responsible for East Timor natural resources and later the Prime Minister of East Timor. As a direct result of those bribes, Oceanic was given no opportunity to bid.... 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 more favorable to ConocoPhillips than those that applied when Indonesia occupied East Timor.

R4245 (¶ 4).

Oceanic had a long history in the Timor Sea and had been awarded a concession in the Timor Gap by Portugal in 1974, just prior to Indonesia's invasion

of East Timor. R4257-58 (¶¶ 52-54). Oceanic's proposals to both UNTAET and to East Timor were more favorable to East Timor than was ConocoPhillips' plan which favored Australia.⁵ As the panel recognized, "Oceanic also proposed to build an undersea natural gas pipeline from the Timor Gap to East Timor, to be used instead of a ConocoPhillips pipeline running to Australia [but] East Timorese officials gave Oceanic cursory attention and rejected the proposals." Slip Op. at 5.

Oceanic alleged that its proposal were rejected as a direct result of the bribes paid by ConocoPhillips to Alkatiri, who had "direct responsibility for all resources in East Timor." R4269 (¶ 91). ConocoPhillips induced Alkatiri to use his influence to protect ConocoPhillips and to prevent both UNTAET and later the East Timor government from considering Ocean's proposals. Alkatiri was also induced by the bribes to negotiate a series of *agreements* with Australia, the purpose and the effect of which was to exclude Oceanic entirely from the Timor Gap and guarantee that ConocoPhillips would be granted new production sharing contracts in the Timor Gap by the Development Authority after the new East

⁵ Oceanic recognized that East Timor was an impoverished country that was in desperate need for investment and employment for its people. Oceanic offered not only to pay East Timor a royalty on oil and gas extracted from the Timor Gap, but also promised to create jobs for East Timorese workers by building a *natural gas liquification plant in East Timor* to be serviced by a pipeline connected to wells in the Timor Gap. ConocoPhillips' plan was to build a natural gas plant in Darwin, Australia, which would have resulted in no investment in East Timor or employment opportunities for East Timorese workers.

Timor Constitution went into effect. Those agreements locked in place ConocoPhillips' role favoring Australia, and froze out consideration of Oceanic.

Alkatiri *negotiated* a Memorandum of Understanding with Australia in 2001, in anticipation of the fact that ConocoPhillips' prior production sharing contracts would be repudiated by Article 158 of the new East Timor Constitution once the new constitution went into effect (which did not occur until May 2003). In the MOU, Alkatiri agreed that East Timor would reinstate ConocoPhillips' exploration rights in the Timor Gap once the new Constitution went into effect without considering an alternative proposal from Oceanic. This agreement was described in ¶ 95 of the complaint, which alleged:

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 ... [and] to the contrary, on July 5, 2001, [he] signed a Memorandum of Understanding with Australia ... agree[ing] that upon East Timor's independence an arrangement similar to the one that existed between Australia and Indonesia would govern joint exploration of the Joint Petroleum Area.

R4271 (¶ 95).

Oceanic submitted a proposal to the UN in October 2001, but was again blocked when "Alkatiri asked ... [the] Head of the UNTAET Mission, to issue an edict prohibiting any UNTAET employee from speaking with Oceanic's representatives." R4278-79 (¶¶ 118-119).

ConocoPhillips paid Alkatiri (whose annual salary was \$450) over US \$2 million in bribes between May and July 2002, in addition to other payments. R4271-72 (¶¶ 101, 103). On May 21, 2002, Alkatiri signed a new treaty that provided that East Timor and Australia would negotiate “a separate agreement between the two countries because the Greater Sunrise gas field straddled the eastern border ... and is partially outside the boundaries covered by the East Timor Treaty.” R4272 (¶ 104).

ConocoPhillips paid Alkatiri another \$54,000 “to secure his approval in the treaty ratification” (R4273 (¶ 107)), and the East Timor Parliament ratified the treaty with Australia prior to the expiration of the deadline, but “without agreement that covered the Sunrise oil fields.” R4273 (¶ 106).

The day after the Timor Sea Treaty between East Timor and Australia went into effect on April 1, 2003 (Slip Op. at 4; R4273 (¶ 108)), East Timor, represented by Alkatiri, and Australia jointly formed a “Designated Authority” to commercially exploit the oil and natural gas in the Timor Gap. R4273 (¶ 109). Alkatiri was East Timor’s representative in the Designated Authority. As he had committed in the Memorandum of Understanding with Australia back in July 2001, Alkatiri “influenced the Timor Sea Designated Authority in 2003 to enter into six new production sharing contracts with ConocoPhillips in the Timor Gap,” on terms that were even more favorable to ConocoPhillips than the terms that

applied when Indonesia occupied East Timor. R4245 (¶ 4). The complaint specifically alleged that “Oceanic had no opportunity to bid for any production sharing contracts from the Designated Authority [because] ... the Designated Authority, under Alkatiri influence, awarded [six of] seven production sharing contracts in the Joint Petroleum Development Area ... to ConocoPhillips.” R4279-80 (¶¶ 125-126).

If it were true, as the panel assumed, that East Timor could not have repudiated the 1991 concession agreement between the Indonesian/Australia Authority and Phillips Petroleum or have dealt with Oceanic without Australia’s consent, then (1) East Timor could *not* have adopted Article 158 of its new Constitution repudiating that agreement, and (2) it would *not* have been necessary for Alkatiri and Australia to have negotiated the Memorandum of Understanding in July 2001, agreeing to grant ConocoPhillips new concessions in the Timor Gap after the new East Timor Constitution went into effect. It also would *not* have been necessary for Australia and East Timor to negotiate the new East Timor Treaty or the separate International Mitigation Agreement described in ¶ 104 of the complaint. These facts are consistent with East Timor’s status as a sovereign nation, and are inconsistent with the panel’s assumption that East Timor could have done nothing without Australia’s consent.

D. Australian Consent was at Most, a Condition Subsequent, that Oceanic had no Obligation to Negate in the Complaint.

Even assuming Australia's approval of a contract between Oceanic and East Timor was legally required (which it was not), the ruling of the panel is still in error because Oceanic had no burden to plead in the complaint, nor would it be Oceanic's burden to prove at trial, that Australia's approval could have been obtained. Rather, under well-established law, the absence of governmental consent would be an *affirmative defense*. It would be ConocoPhillips' burden in such circumstances to plead and prove that such approval could *not* be obtained. A requirement that Australia approve a contract between Oceanic and East Timor would be at most a condition subsequent, not a condition precedent to the contract. For example, the Seventh Circuit has held that where contractual obligations depend upon the approval of a governmental entity to the contract, such a condition is "a 'condition subsequent' that, if it occurred, would extinguish the defendant's contractual obligation. ..." *United States v. Standiford*, 148 F.3d 864, 868 (7th Cir. 1998) (citing *United States v. Hyde*, 520 U.S. 670, 678 (1997)). In *Hyde*, the Supreme Court concluded that the requirement that a court approve a plea agreement was in the nature of a condition subsequent, and did not preclude a binding obligation from being formed in the interim. *Tomlinson Fleet Corp. v. Commissioner*, T.C. Memo 1966-13 (T.C. 1966), (contract for sale of a vessel existed, "subject only to being defeated ... if that agency of the Government

withheld approval of delivery of the vessel to Stone, which was a condition subsequent in the contract.”).

A plaintiff is not required to plead or prove compliance with conditions subsequent. *Pruitt v. Hardware Dealers Mut. Fire Ins. Co.*, 112 F.2d 140, 142 (5th Cir. 1940); *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 913-14 (8th Cir. 2007). *See Navigazione Libera Triestina v. Garcia & Maggini Co.*, 30 F.2d 62, 65 (9th Cir. 1929); *Western Casualty & Surety Co. v. Weimar*, 96 F.2d 635, 636 (9th Cir. 1938). *See also Gonzales v. Ross*, 120 U.S. 605, 625 (1887).

CONCLUSION

Appellants respectfully urge that their Petition for Rehearing be granted, that the judgment of the district court be reversed, and the case remanded to another district judge.

Respectfully submitted, this 20th day of November, 2009.

DIAMOND MCCARTHY LLP

By: 

James D. McCarthy

Michael S. Truesdale

1201 Elm Street, Suite 34

Dallas, TX 75270

Tel: 214/389-5300

Fax: 214/389-5399

-and-

BONDURANT, MIXSON & ELMORE, LLP

Emmet J. Bondurant

Michael B. Terry

John E. Floyd

1201 West Peachtree Street NW, Suite 3900

Atlanta, GA 30309

Tel: 404/881-4126

Fax: 404/881-4111

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served upon the following persons by electronic mail and regular mail on this, the 19th day of November, 2009:

Counsel for the ConocoPhillips Defendants:

Martin D. Beirne
Beirne, Maynard & Parsons, L.L.P.
1300 Post Oak Boulevard
Suite 2500
Houston, Texas 77056

Herbert M. Wachtell
John F. Lynch
Wachtell, Lipton, Rosen & Katz
51 W. 52nd Street
New York, New York 10019

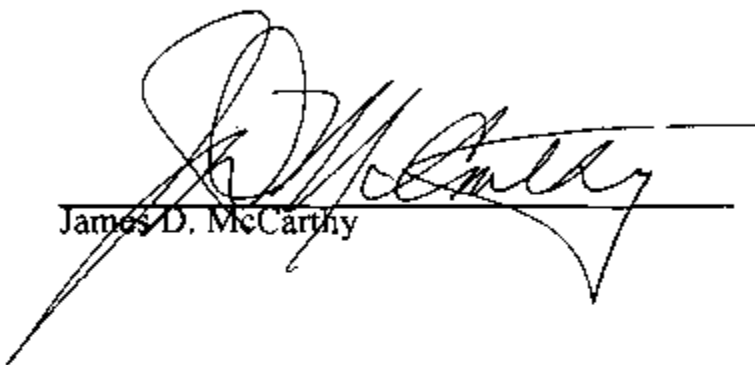
Finis E. Cowan, Jr.
Collin J. Cox
Yetter & Warden, LP
909 Fannin, Suite 3600
Houston, Texas 77010

Ronald D. Krist
The Krist Law Firm, P.C.
South Shore Harbour Resort Complex
2600 South Shore Boulevard, Suite 120
League City, Texas 77573

Thomas D. Yannucci, P.C.
Michael D. Jones
Brant W. Bishop
Kirkland & Ellis LLP
655 Fifteenth Street, N.W
Washington, D.C. 20005-5793

**Counsel for Defendant Timor Sea Designated Authority for the Joint
Petroleum Area**

B. Thomas Peele, III
Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006-4078



James D. McCarthy