

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)**

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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.

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.

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
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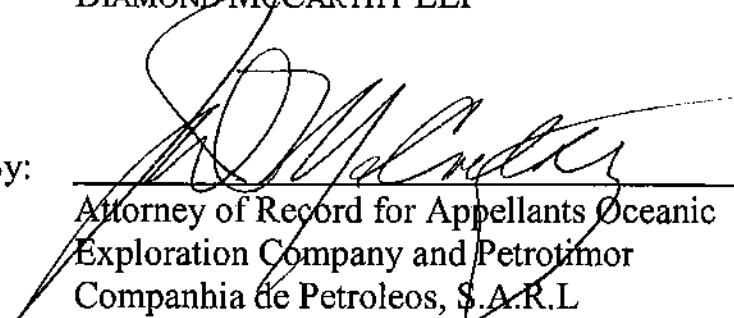
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OTHER PERSONS WITH DISCLOSABLE INTERESTS PURSUANT TO LOCAL RULE 28.2.1.

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
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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] . . . [it 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 damages³ 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

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:

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 legitimize 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

