

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)**

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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 *foreseeability* 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 foreseeability.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.

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.

