ORIGINAL

CASE NO. 08-20338

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
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NEW ORLEANS, LA

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 *EN BANC* REHEARING

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(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.

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[*] 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.

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.

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 the Joint Petroleum Area;*** Badab Oelaksana Kegiatan Usaha Hulu Minyak Dan Gas Bumi

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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 Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L

RULE 35 STATEMENT BY COUNSEL

The undersigned attorneys for Appellants express their belief, based upon a reasoned and studied professional judgment, that the panel opinion attached as Appendix "1" is contrary to or, alternatively, severely undermines the following decisions of the United States Supreme Court, and that consideration by the full court is necessary to secure and maintain the uniformity of the court's decisions:

1) *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008); and

2) *Ashcroft v. Iqbal*, 129 S. Ct 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 44 (2007); and *Erickson v. Pardus*, 551 U.S. 89 (2007).

The panel opinion errs in three areas of exceptional importance to the United States and its courts. First, it contradicts the ruling in *Phoenix Bond* by incorrectly raising the proximate causation pleading burdens of RICO and antitrust claimants. Second, it extends the "plausibility" analysis set forth in the *Twombly* line of cases – which deal with the factual sufficiency of a pleading – to allow subjective dismissals based upon individual judges' assessments of the merits, and particularly their assessments of the potential for a plaintiffs' success in the face of a defense theory. Third, the opinion contradicts Rule 8, the Official Forms, and Fifth Circuit precedent by incorrectly applying RICO proximate cause pleading standards to state law claims.

The great and unwarranted expansion of this Court's Rule 8 jurisprudence reflected in the panel's opinion raises questions of exceptional public importance that are best treated by an *en banc* panel of this Court. The panel's summary adjudication of this type of case, which involves allegations of international bribery and corruption, also raises questions of exceptional public importance. Those too are worthy of *en banc* treatment.

DIAMOND MCCARTHY LLP

By: _____

Attorney of Record for Appellants Oceanic Exploration Company and Petrotimor Companhia de Petroleos, S.A.R.L

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Pursuant to Fed. R. App. P. 35, Appellants respectfully request rehearing *en banc* in regard to the panel's November 6, 2009 *per curiam* opinion. That opinion affirmed a judgment on the pleadings entered by U.S. District Judge Lynn N. Hughes on April 22, 2008. A copy of the panel opinion is attached hereto as Appendix "1."

I. INTRODUCTION.

In this litigation, Oceanic has alleged that ConocoPhillips and its predecessors bribed the then-dominant public official in East Timor, Mari Alkatiri, as well as his associates, to insure that: (1) ConocoPhillips was awarded oil and gas production sharing contracts in the Timor Sea; and (2) that Oceanic would be denied any such opportunities. Oceanic further alleged that it was injured as a result of ConocoPhillips' misconduct and entitled to damages.

The panel in this case affirmed the district court's judgment on the pleadings, finding that "Oceanic failed to set forth a plausible theory of proximate causation" because Oceanic had failed to plead that Australia would have acquiesced in Oceanic's replacement of ConocoPhillips in the Timor Sea.[1] That

[1] Slip Op. at 2, 10-12. Given this holding, Oceanic would seemingly be able to replead to negate the assumption that Australia might need to (but would not have) acquiesced. If that were so, Oceanic would gladly do that. But the problem is greater than that. Under the panel's ruling, even that repleading would fail – because the panel has already concluded, on completely unknown grounds: (1) that Australia had to acquiesce and would not do so; and (2) on the basis of those alleged "facts," that Oceanic's claim is legally barred.

holding was necessarily based on three complex and profoundly erroneous factual assumptions – and on two erroneous legal conclusions.

The erroneous factual assumptions were: (1) that Australian acquiescence was required for Oceanic to replace ConocoPhillips; (2) that Australia would not have acquiesced; and (3) that any disagreement with these assumptions was and is "implausible." The panel's erroneous legal conclusions were that: (1) the governing law required such pleading; and (2) that if Oceanic's *pleadings* did not agree with the panel's errant factual assumptions regarding these terribly complex questions of geopolitics, the panel was empowered to decide such factual matters adversely to Oceanic, and to dismiss Oceanic's case as "implausible."

II. THE PROCEEDINGS TO DATE.

A. THE DISTRICT OF COLUMBIA PROCEEDINGS.

After three years of motion practice in the United States District Court for the District of Columbia, Judge Emmett Sullivan twice sustained Oceanic's RICO, Robinson-Patman, unfair competition and interference claims over serial defense efforts to dismiss them. Both times, he carefully evaluated all of the plaintiffs' claims, including the RICO standing/proximate cause issues now before this Court.

In the first instance, he concluded that:

> ... the plaintiffs have sufficiently alleged a legally cognizable injury at this juncture. 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 secure that business opportunity due to the unlawful activities of ConocoPhillips.[2]

In the second instance, in denying defense efforts to obtain the reconsideration and reversal of his standing rulings, Judge Sullivan stated:

> As explained in the court's September 21, 2006 Memorandum Opinion and Order, **Plaintiffs have standing to bring the case because they have a legally cognizable injury.**[3]

B. THE HOUSTON PROCEEDING.

Neither of Judge Sullivan's orders, nor the law of the case doctrine, nor Rule 12(g)(2), nor the doctrine of judicial estoppel[4] stopped the defense from relitigating the proximate cause issue once it was transferred to the Southern District of Texas. The result of that effort, and of a "status conference" before Judge Hughes followed by a one year halt to the proceedings, was the caustic judgment on the pleadings that gave rise to this appeal.

C. PROCEEDINGS BEFORE THIS COURT.

Though it simply cannot be the case that one American oil company's action against another – for foreclosing international exploration and production

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2 *Oceanic Exploration Co. v. ConocoPhillips*, 2006 WL 2711527 at *11 (D. D.C. September 21, 2006). Judge Sullivan also noted separately, and to make the point clearly, that this finding regarding Oceanic's standing allegations (as to all counts) also satisfied the injury/standing requirements of RICO. *Id.* at *15 n. 29.

3 R 5702, Order, at 1 (emphasis added).

4 The defense had promised Judge Sullivan that, if they obtained the latter day transfer order to the Southern District of Texas they sought, they would not then relitigate his rulings in the transferee court.

opportunities through the bribery of government officials – is either "implausible" or non-actionable by the injured competitor,[5] the panel concluded that it was not plausible to assert that Oceanic would have secured the concession it sought.

That was so because – however beneficial Oceanic's proposal was to the East Timorese – the panel believed that Australia would stop that proposal in its tracks. The only factual proposition that was "plausible" to the panel was that Australia would have prohibited East Timor from giving concessions to anyone other than the party paying bribes for those concessions – ConocoPhillips.

There is no basis for that proposition in the operative Second Amended Complaint, and none in the facts or law relevant to this action. The panel reached its decision only by misapplying the law to misapprehended facts.[6]

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[5] There is very good authority to the contrary, in both the international and domestic contexts. *See, e.g., W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), *affirming, Environmental Tectonics Corp. Int'l v. W.S. Kirkpatrick & Co., Inc.*, 847 F.2d 1052 (3rd Cir. 1987) (sustaining one American company's RICO, antitrust, and state law claims against another for using bribes to Nigerian officials to foreclose competition for construction contracts); *see also, Bieter Co. v. Bloomquist*, 987 F.2d 1319 (8th Cir. 1993); *Astech-Marmon, Inc. v. Lenoci*, 349 F. Supp. 2d 265 (D. Conn. 2004); *Mylan Labs, Inc. v. Azko, N.V.*, 770 F. Supp. 1053 (D. Md. 1991).

[6] The panel opinion, and the district court opinion as well, are based on a large array of easily verifiable but misapprehended facts concerning: (1) the low state of oil and gas development in the Timor Gap in 1999-2003, the most relevant years; and (2) the highly fluid state of the relationships between and among Australia, East Timor, and ConocoPhillips in those years. The three facts most in need of correction are simple: First, in 1999-2003, ConocoPhillips had no "ongoing multibillion dollar operation in the Timor Gap" for Oceanic to "usurp" or "disrupt," though the panel accuses Oceanic of that. Slip Op. at 10, 11. Second, there was no "long-standing, extremely lucrative collaboration" between ConocoPhillips and Australia that Australia would fight to preserve, in the Timor Gap or elsewhere, though the panel asserts that there is. Slip Op. at 11. Third, there was no reason for Australia to refuse to acquiesce in the replacement of ConocoPhillips (if any acquiescence were required). The Australian Navy

III. THE PANEL OPINION CONFLICTS WITH SEVERAL IMPORTANT DECISIONS OF THE UNITED STATES SUPREME COURT AND THIS COURT.

Rehearing and reversal are required because the panel's decision conflicts with numerous opinions of this Court and the United States Supreme Court regarding: (1) the pleading of proximate cause in the RICO and non-RICO contexts; and (2) the summary adjudication of cases and controversies.

A. THE PANEL OPINION CONFLICTS WITH *BRIDGE V. PHOENIX BOND & INDEM. CO.*, 128 S. CT. 2131 (2008).

In evaluating Oceanic's pleading of RICO proximate cause, the panel largely relied on and applied the multifactor pleading standard set forth in *Zervas v. Faulkner*, 861 F.2d 823 (5th Cir. 1988), a Fifth Circuit opinion predating all of the relevant Supreme Court authority, and contradicted by the greatly simplified approach to such pleading set forth in *Phoenix Bond*, the leading Supreme Court case on the subject.

1. *Phoenix Bond* and Proximate Cause Pleading.

The pleading of proximate cause in RICO and antitrust cases differs from other cases because those claims are premised on federal statutes containing language regarding standing. As a result, to establish RICO standing (and

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would not be summoned to bully the poorest and most pitied nation on earth – just to protect ConocoPhillips' slot as the incumbent contractor.

Robinson-Patman Act standing),[7] a RICO plaintiff must plead that his injury was proximately caused by a RICO violation.[8]

The Supreme Court explained and applied its jurisprudence regarding the pleading of (RICO) proximate cause in its recent *Phoenix Bond* opinion:[9]

> Proximate cause . . . is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case.' . . . Instead, we "use[d] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," . . . with a particular emphasis on the "demand for some direct relation between the injury asserted and the injurious conduct alleged," . . . ('When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries').[10]

As the *Phoenix Bond* Court further noted, this "central question" as to the relationship between a defendant's wrongful conduct and the plaintiff's injury must be carefully considered in each case, as proximate cause "is generally not amenable to bright-line rules."[11]

In *Phoenix Bond* itself, the Court made that considered inquiry, finding that the allegations of wrongful conduct by a bidder on government contracts, intended

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7 Because of the uniform origins of their statutory "standing" provisions, the parties agree that the standards for pleading proximate cause in RICO and Robinson-Patman actions are the same.

8 See e.g., *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 147 (5th Cir. 1997) (citing *Holmes v. Security Investor Protection Corp.*, 503 U.S. 258 (1992)).

9 *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131 (2008).

10 128 S. Ct. at 2142 (internal citations omitted).

11 128 S. Ct. at 2145.

in the first instance to induce government action for its own benefit, had directly and foreseeably injured a competitor for those contracts adequately pleaded "proximate cause."

2. The Panel Misapplied the *Phoenix Bond* Standards.

Phoenix Bond concerned governmental (Cook County, Illinois) auctions of tax liens. As auction practices had evolved, the bidding for those valuable liens would often result in a "tie." In such circumstances, the subject tax liens would be allocated on a rotating basis among those who had tied with the "best" bids.

As the Court noted, this created a "perverse incentive" for bidders to send agents to bid for them, so as to supplement their own bidding, and thereby gain for themselves a disproportionate allocation of the tax liens being auctioned.[12] To foreclose that prospect, the County required sworn bidder affidavits that bidders were not bidding as agents for others.

The lawsuit in *Phoenix Bond* arose when rival bidders discovered that the defendants had engaged in the wholesale submission of fraudulent affidavits to Cook County, in order to circumvent the no-agents rule and thereby gain a disproportionate allocation of the tax liens.

In that context, the *Phoenix Bond* plaintiffs' proximate cause allegations were simple: they alleged that "they had suffered the loss of property relating to

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12 *Id.* at 2135.

the liens they would have been able to acquire, and the profits flowing therefrom, had [the fraudulent bidder group] not implemented their scheme and acquired liens in excess of their appropriate share through their violation of the County Rule."[13] As the Court put it, the plaintiffs' claim was that the fraudulent bidder group had deprived them and other bidders of their fair share of liens and the attendant financial benefits."[14]

The Seventh Circuit sustained the complaint, holding that the plaintiff had sufficiently alleged proximate cause "because they (along with other losing bidders) were 'immediately injured' by the fraudulent bidders' scheme."[15] The Supreme Court affirmed unanimously – because

> **"the [plaintiffs'] alleged injury – the loss of valuable liens – is the direct result of [the defendants'] fraud. It was a foreseeable and natural consequence of [defendants'] scheme to obtain more liens for themselves that other bidders would obtain fewer liens."[16]**

The analogy to the Oceanic case is exact. Oceanic's alleged injury – the loss of tremendously valuable oil and gas concessions – was the direct result of ConocoPhillips' bribery. It was the foreseeable, natural and intended consequence of ConocoPhillips' scheme to obtain those concessions for itself that Oceanic, the

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13 *Id.* at 2136 n.3 (quoting from the underlying complaint).

14 *Id.* at 2136.

15 *Id.* at 2137 (citing the Seventh Circuit's opinion at 477 F.3d at 930-932).

16 *Id.* at 2145 (emphasis added).

only other bidder competing for those concessions, could not obtain them. Had this panel considered the implications of *Phoenix Bond* for this case, it would have reached the same conclusion the Supreme Court reached in *Phoenix Bond* – and easily sustained Oceanic's Complaint.

B. THE PANEL'S OPINION CONFLICTS WITH NUMEROUS OPINIONS PROSCRIBING THE SUMMARY ADJUDICATION OF COMPLEX LITIGATION ON THE PLEADINGS.

The panel's opinion also contradicts recent Supreme Court cases explaining the plaintiff's Rule 8 pleading burdens, including *Ashcroft v. Iqbal*, 129 S. Ct 1937 (2009), *Erickson v. Pardus*, 551 U.S. 89 (2007), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 44 (2007). That trilogy of cases construes Rule 8 as requiring the allegation of "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The rule is satisfied, and a claim has "facial plausibility" when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct at 1949.

As noted above, Oceanic's allegations of RICO and antitrust proximate cause easily satisfy the pleading requirements set out in *Phoenix Bond* and other post-*Twombly* cases,[17] and nullify any contention by the district court or the panel

[17] It is important to note that the pleading of proximate cause sustained in *Phoenix Bond* was tested by post-*Twombly* standards, and found adequate. Other post-*Phoenix Bond* cases have had the same result: the simplified pleading of proximate cause therein has also satisfied

that Oceanic's claims can be dismissed for failure to plead RICO proximate cause properly. As also noted above, Judge Sullivan sustained 12(b)(6) challenges to these and other Oceanic claims not once, but twice.

Unfortunately, the panel reached its conclusion not only by ignoring the relevant law on the pleading of proximate cause in the RICO/antitrust context, but also by substantially departing from *Iqbal, Erickson,* and *Twombly* standards. That happened when the panel employed the Rule 8 "plausibility" standard not to measure the facial sufficiency of plaintiff's *allegations*, but to measure the plaintiff's potential for success on the merits. The trilogy of cases does not confer so inherently subjective a power on the federal judiciary. To the contrary, *Twombly* itself cautioned that a complaint may proceed "even if it strikes a savvy judge that actual proof of the facts alleged is improbable and that a recovery is very remote and unlikely,"[18]

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the Rule 8 standards set out in the *Twombly/Erickson/Iqbal* trilogy. *See e.g., Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, L.L.C.*, 568 F.3d 374, 381-82 (2nd Cir. 2009) (concluding allegations of proximate cause were plausible under *Twombly* and *Iqbal*); *Brown v. Cassens Transport Co.*, 546 F.3d 347, 359 (6th Cir. 2008) (after being remanded for further consideration in light of *Phoenix Bond*, the Sixth Circuit reversed itself to find that proximate cause had been properly pleaded because the defendants' acts were a "substantial and foreseeable cause" of the injuries alleged by the plaintiffs).

[18] *Twombly*, 550 U.S. at 556 (*quoting Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *see also Lormand v. US Unwired, Inc.*, 565 F.3d 228, 248 (5th Cir. 2009) (*quoting Twombly*, 550 U.S. at 563 n.8 for the proposition "that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.").

Rule 8, like every one of the Federal Rules, is to be "construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding."[19] Interpreting Rule 8 to allow a district court and/or a panel to make very expansive factual determinations, at the pleadings stage, as to what would have happened in the Timor Sea in the chaotic world and oil politics of 1999-2003, does nothing to adjudicate pleading challenges justly or efficiently or even reliably. And construing Rule 8 to write the Rule 12 and 56 limitations on summary adjudication out of the Federal Rules is even worse.

The panel's ruling ultimately imports into Rule 8 a level of subjectivity that is inconsistent with both the language and purpose of the Federal Rules of Civil Procedure. Those rules were intended to establish a uniform set of standards for pleading in the federal courts – rules that would not vary from circuit to circuit, district to district, and judge to judge. That said, the rulings in this case could not provide a better example of the dangers of a subjective approach to Rule 8 "plausibility" determinations. A complaint that is sustained – twice – by a judge with years of experience with the case is dismissed on first contact by a transferee judge whose opinion is rife with subjective commentary on the merits of the case. Then that judgment is upheld by a panel with its own subjective and errant views as to the facts regarding far-away East Timor and Australia in the most tumultuous

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19 Fed R. Civ. P. 1.

years of their mutual history. No case could provide a better example of what happens when individual and idiosyncratic tests of plausibility come into play. Federal uniformity is lost in the process, but so is the sense of even-handed justice.

The district court and the panel went too far. Rule 8 is about the sufficiency of a plaintiff's notice *pleadings*. Rule 12(c) is about judgments *on the pleadings*. The panel's opinion, and the district court's before it, are different: they constitute the summary adjudication, at the pleadings stage, of complex factual issues that cannot and may not be addressed at that stage.

C. THE PANEL'S DISMISSAL OF THE STATE LAW CLAIMS CONFLICTS WITH NUMEROUS OPINIONS, AS WELL AS WITH THE FEDERAL RULES AND THE OFFICIAL FORMS.

In summarily dismissing Oceanic's properly-pleaded state law claims, the panel also failed to take into account the important differences between a plaintiff pleading proximate cause in connection with RICO/antitrust claims and a plaintiff who pleads garden variety federal or state law claims.

1. The Rules For Pleading Proximate Cause In The Non-RICO/Non-Antitrust Context.

Absent specific statutory guidance on the subject, there are no special requirements for pleading "proximate cause" in federal court.[20] Under FED. R. CIV. P. 8(a)(2), a plaintiff need only plead "a short and plain statement of the claim

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[20] *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (allegations of proximate cause are measured against Rule 8 standards).

showing that the pleader is entitled to relief,"[21] *i.e.*, one that "gives the defendant fair notice of what the claim is and the grounds on which it rests."[22]

As to state law claims like Oceanic's unfair competition and intentional interference claims then, nothing specific about proximate cause needs be pleaded.[23] That term need not even be mentioned.[24]

2. Oceanic's State Law Claims Were Properly Pleaded and Improperly Dismissed.

There can be no doubt that Oceanic pleaded its non-RICO/non-antitrust state law claims properly, and in accordance with Rule 8(a)(2) and the Official Forms,[25] or that Oceanic's pleading gave ConocoPhillips fair notice of the claims against it

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21 *See* Fed. R. Civ. P. 8(a)(2).

22 *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (quoting other Supreme Court cases).

23 *See, e.g., Ashe v. Corley*, 992 F.2d 540, 545 (5th Cir. 1993) (no basis for requiring special pleading of proximate causation in a Section 1983 claim); *In re Stanislaw R. Burzynski, M.D.*, 989 F.2d 733, 739 (5th Cir. 1993) (as to tortious interference claims under Texas law, enough to recite that actions of defendants proximately caused injury); *see also Lopez v. Rica Foods*, 277 Fed. Appx. 931, 2008 WL 2043510 at *2 (11th Cir. 2008) (investors not required to plead proximate causation as to common law fraud/misrepresentation claims).

24 The form complaints annexed to the Federal Rules of Civil Procedure provide actual illustrations of what is required to **plead** causation, *i.e.*, the relationship between the wrongful conduct and the plaintiff's injury. *See* Fed. R. Civ. P. Forms 10, 15, 16, 17, 18, 20, 21, 61 (no specific causation allegation required . . . "therefore" following a statement of the loss is enough of an allegation); Forms 11 and 12 ("as a result the plaintiff was injured . . ." is sufficient pleading of causation); Form 13 (sufficient to state that "defendant's negligence caused the plaintiff to be injured . . . as a result, the plaintiff was physically injured. . . ."); Form 14 (sufficient to note "as a result of the defendant's negligent conduct. . . ."); Form 19 (stating that defendant's continuing conduct is "causing irreparable damage" is enough).

25 R 4245-46 (¶¶ 4, 6); 4294 (¶¶ 158-160); 4296 (¶¶ 168-170); 4297 (¶¶ 174-175); 4299 (¶¶, 183, 185); 4300 (¶ 190); 4301 (¶¶ 194-195). Note that the later paragraphs' allegations incorporate by reference the earlier allegations.

and the grounds on which those claims rested. Not surprisingly then, Judge Sullivan twice sustained those claims over defense efforts to dismiss them for failure to state a claim.[26]

There can also be no doubt that Oceanic's state law claims should never have been dismissed on the pleadings – by Judge Hughes or by the panel.[27] A court simply cannot dismiss such claims for failing to plead proximate cause when no proximate cause pleading is required under the Federal Rules, the Official Forms, or the case law interpreting both, and proximate cause actually was pleaded to the extent required.

IV. A CORRECT DECISION IN THIS CASE IS EXCEPTIONALLY IMPORTANT TO THE UNITED STATES AND ITS COURTS.

The panel decision negatively impacts two extremely important issues, and cannot be allowed to stand. The first of these negative impacts will be felt by the effort to control international corporate corruption and bribery. Finding such utterly plausible conduct[28] to be implausible and non-actionable by its victims –

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26 *Oceanic Exploration Company v. ConocoPhillips*, 2006 WL 2711527 at *20, *21.

27 Judge Hughes gave no reason for dismissing them; he simply dismissed them without comment. The panel, as noted above, did little more.

28 The notion that this sort of international oil company bribery is "implausible" is – well – implausible, especially in Houston, Texas, the home of the international oil and gas business. Among the most recent cases in the Southern District of Texas, for instance, is *U.S. v. Kellogg Brown & Root, LLC*, H-09-071 ("KBR"). That case concerned KBR's bribery of senior Nigerian officials to obtain construction contracts for an LNG plant. Jack Stanley, KBR's former CEO, pleaded guilty to personally negotiating the bribes, and Halliburton, KBR's former parent, paid a record $559,000,000 fine to settle the claims. However, the *Halliburton* case is far from the only

and tossing out private actions like this one at the pleading stage – will not help the anti-corruption effort.

The second effect will be felt more broadly – by every plaintiff whose case is summarily adjudicated and rejected, at the pleadings stage, simply because the court in question has made complex but subjective factual assumptions, also at the pleadings stage, that have little or no basis or bearing on those facts and issues that really matter. *Twombly, Erickson, and Iqbal* can only be extended so far without undermining the system of uniform pleading rules that the Federal Rules were intended to create. For all these reasons, and the reasons noted above, extending those cases this far is bad law and worse public policy.

V. CONCLUSION.

For the foregoing reasons, this Court should grant this motion in all respects; rehear this matter *en banc;* reverse the district court's judgment on the pleadings; and remand this matter for a full, fair and final adjudication on the merits.

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example. In 2009 alone, the Houston courts have also taken guilty pleas and accepted multimillion dollar fines from Houston-based energy companies like Baker Hughes, Inc. (for bribing officials in Angola, Nigeria and Kazakhstan to obtain oil service contracts) and the Willbros Group, Inc. (for bribing Nigerian and Ecuadorian officials in connection with pipeline construction contracts).

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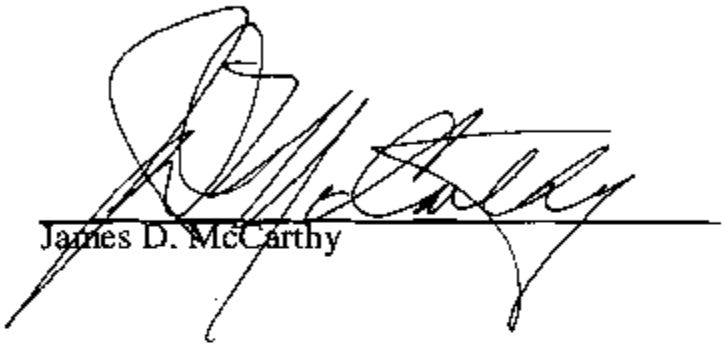

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