No. _____

In the Supreme Court of the United States

Christopher J. McIntyre,

Petitioner,

v.

BP Exploration and Production Inc., and
BP America Production Company

Respondent.

On Petition For A Writ Of Certiorari
To The Court of Appeals
for the Ninth Circuit
Ninth Circuit Docket No. 15-35234

PETITION FOR WRIT OF CERTIORARI

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Constitution of the United States
Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure
Rule 12(b)(6) 1, 5

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

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(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

QUESTION PRESENTED

1. Whether the district court was required under Rule 12(d) of the Federal Rules of Civil Procedure to either exclude matters outside the pleadings or to give notice that the motion would be converted to a motion for summary judgment under Rule 56 and whether the failure to give notice violated McIntyre's due process rights.

PARTIES AND RULE 29.6 STATEMENT

The caption of this case contains the names of the parties who participated in the proceedings below and no corporate disclosure statement is necessary on McIntyre's behalf.

OPINIONS AND ORDERS BELOW

The district court issued an unpublished decision on March 3, 2015. (App. 6-18).[1] The Ninth Court of Appeals issued its unpublished opinion on September 15, 2017.(App. 2-5).[2] A petition for rehearing and for rehearing En Banc was timely filed and denied on October 31, 2017. (App. 1).

The district court issued an order[3] and then an amended order dismissing McIntyre's complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6). In dismissing plaintiff's complaint, the district court concluded that McIntyre had failed to sufficiently plead or otherwise prove that he conferred a substantial benefit upon

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[1]. *McIntyre v. BP Expl. & Prod.*, No. 3:13-cv-149 RRB, 2015 U.S. Dist. LEXIS 26927 (D. Alaska Mar. 5, 2015) .

[2]. McIntyre v. BP Expl. & Prod., 697 F. App'x 546, 2017 U.S. App. LEXIS 17944 (9th Cir. 2017) .

[3]. ER 16-28.

respondents. (App. 10, 12-13). The Ninth Circuit Court of Appeal agreed with the district court. (App. 2-5). The Court of Appeals concluded there was no plausible factual basis for McIntyre's assertion that he conferred an actual benefit on respondents. (App. 3).[4] The Court of Appeals also held that McIntyre's ideas were not developed enough to be ready for immediate use. (App. 4). The Court of Appeals further concluded that there were defects in McIntyre's complaint that could not be cured by amendment. (App. 4).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Circuit Court's decision on Writ of Certiorari.

STATEMENT OF THE CASE

This case arose from the Macondo Oil Well (herein "Well") disaster in the Gulf of Mexico, which was owned and operated by respondents.[5] On April 21, 2010, an explosion occurred at the Well which resulted in the uncontrolled leaking of oil into the surrounding coastal waters.[6] After initial efforts to stop the leak failed, respondents issued a solicitation seeking ideas and input from the general public.[7] McIntyre asserted that beginning on May 11, 2010, he answered respondents' request by telephone and by online submission of drawings illustrating methods for capping the

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4. *Citing Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1143 (Alaska 1996) (per curiam).

5. ER 202-250.

6. CR 86, at 7.

7. CR 86, at 9-10.

Well.[8] McIntyre could not be considered a novice, as he had considerable experience working on Alaska's North Slope with oil field experience.[9] Respondents' representatives replied to McIntyre and asked for additional details.[10] McIntyre alleges that respondents used his ideas, at least in part, when successfully capping the Well and are required to compensate him for the substantial benefit conferred upon them by his response to their solicitation.[11] Those ideas called for attachment of a "ventable valve" to do a "soft shutoff" of escaping hydrocarbons at the "riser" landing site; i.e., at a "new un-deformed riser" connection at the Riser Flex Joint.[12] In light of the excessive depth of the blow out, (18,000 feet) and destruction to the equipment at the sea floor from the explosion, resulting fire, and the sinking of the drilling rig, it was not practical to follow the normal protocol to cap a blow out of this nature.[13] The substantial benefit conferred upon respondents was the ability to successfully cap the Well, after several failed attempts to do so, which stopped the flow of oil into the Gulf of Mexico and thereby mitigated the damages ultimately paid out by respondents. Because respondents' refused to compensate him, McIntyre filed a complaint in the superior court for the State of Alaska and respondents removed the complaint to the federal district court, district of Alaska.[14] McIntyre sought damages for respondents'

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8. CR 52, at 13; CR 86, at 10; ER 202.
9. ER 252.
10. ER 211.
11. ER 202-249.
12. ER 253-254.
13. Id.
14. CR 1-1, State Complaint; CR 1, Notice of Removal.

use of his ideas and plans to cap the Well and stop the flow of oil. Within days of the removal, respondents filed a motion to dismiss for failure to state a claim upon which relief could be granted.[15] McIntyre opposed the motion to dismiss and filed a motion for leave to amend his complaint.[16] The amended complaint included numerous exhibits.[17] Leave to amend the complaint was granted and respondents answered the amended complaint by renewing the motion to dismiss for failure to state a claim.[18] Both the original complaint in the State court and the first amended complaints were filed *in pro se*.[19] The district court then issued a Rule 12(d) order giving notice to McIntyre that the motion to dismiss would be considered under Rule 56.[20]

McIntyre obtained counsel, and counsel filed a second motion for leave to amend the complaint.[21] The second amended complaint was filed and McIntyre also filed an affidavit and numerous exhibits. which showed several striking similarities and identical concepts between his idea and respondents' Well capping device.[22] These and numerous other documents raised disputed issues of fact with regard to the genesis of the ideas and methods used to successfully cap the Well. Respondents again filed a

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15. CR 13; Rule 12(b)(6) motion.
16. CR 14-15.
17. CR 15-2 - CR 15-66.
18. CR 31.
19. CR 1-1; CR 15-2.
20. CR 34.
21. CR 49.
22. CR 49, 49-1.

Rule 12(b) motion to dismiss for failure to state a claim.[23] The trial court did not issue another Rule 12(d) notice and although the district court considered documents and evidence outside the four corners of the complaint, the district court dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted. (App. 6-18).

McIntyre timely appealed the dismissal to the Court of Appeals for the Ninth Circuit. (App. 2-5). McIntyre argued, in part, that the district court erred in dismissing the complaint under 12(b)(6) because it considered evidence outside the margins of the complaint and, in doing so, resolved disputed issues of fact. The Court of Appeals failed to consider that argument and, without oral argument, affirmed the dismissal under 12(b)(6). (App. 2-6). The Court of Appeals held that the de novo standard of review would apply because it was reviewing grant of a 12(b)(6) motion. (App. 3). The court went to conclude that McIntyre's quasi-contract and unjust enrichment claims were insufficiently pleaded and there was no plausible factual basis for his allegation that he conferred an actual benefit on BP. The court further held that McIntyre's ideas were not sufficiently developed or concrete to be ready for immediate use and respondents extensively modified or completely changed any ideas McIntyre may have provided. Next, the court concluded that claims regarding use of confidential information failed because McIntyre failed to allege any plausible factual basis to believe that he disclosed any ideas in confidence. Finally, the court held that the

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[23]. CR 89.

district court did not abuse its discretion by concluding that there were defects in McIntyre's complaint that could not be cured by amendment. In spite of a clear record and argument that the district court considered reams of evidence outside the pleadings and resolved disputed issues of fact, the Court of Appeals summarily affirmed the district court's errors. (App. 2-6).

REASONS FOR GRANTING THE WRIT

I. This Court should grant the writ and clarify that Rule 12(b)(6) does not permit dismissal of a claim by considering matters outside the pleadings to resolve disputed issues of material facts and failure to comply with Rule 12(d) violates a plaintiff's rights to procedural due process.

In May 2007, the Court altered the way federal courts approach motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) with its decision in *Bell Atlantic Corp. v. Twombly*.[24] The court considered in detail what a complaint must contain to survive a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). In the process, *Twombly* construed the standard set more than 50 years earlier in *Conley v. Gibson*[25] that, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[26] *Twombly* adopted a more movant-friendly standard, requiring a complaint to allege facts that, if proven, would support the relief requested and to show that the alleged facts were

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[24]. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[25]. *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99 (1957).

[26]. *Id., 355 U.S. at 45.*

"enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true."[27]

Though *Twombly* marked a clear departure from prior liberal federal pleading standards, conflict remained as to the legal standard governing Rule 12(b)(6). It was uncertain whether the *Twombly* standard only applied to antitrust cases or to all motions to dismiss for failure to state a claim and whether *Twombly* set forth a new pleading standard. That uncertainty created by *Twombly* was put to rest by the May 2009 decision in *Ashcroft v. Iqbal.*[28] This decision provides a great deal of guidance in resolving these issues raised by *Twombly*. *Iqbal* held that *Twombly* was not limited to antitrust disputes. Such a narrow reading, the Court reasoned, would go against the Federal Rules of Civil Procedure. Iqbal made plain that the Twombly analysis applies "in all civil actions and proceedings in the United States district courts."[29] In doing so, *Iqbal* makes it clear that *Twombly* applies to all cases governed by the Federal Rules of Civil Procedure. Under *Twombly* and *Iqbal*, a claim is plausible on its face if the complaint contains sufficient facts for a court to draw an inference that the defendant is liable for the alleged misconduct.

Although *Twombly* and *Iqbal* modified the standard to be applied in determining whether a complaint is sufficient to overcome a motion to dismiss under Rule 12(b)(6), Rule 12(d) was not modified and remains in effect. Under Rule 12(d), "If, on a motion

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[27]. *Twombly*, 550 U.S. at 555.

[28]. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009).

[29]. *Id.*, 556 U.S. at 684-85.

under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." In this case, there was a clear and classic procedural failure to adhere to the dictates of Rule 12(d).

The district court clearly had discretion to consider matters outside McIntyre's complaint.[30] However, there are limitations on the exercise of that discretion. If the court exercises that discretion and in fact considers outside matters, i.e., if the judge does not exclude them, Rule 12(d) requires the judge to comply with the requirements of Rule 56.[31] Rule 12(d) required that McIntyre be given a reasonable opportunity to present material that is relevant to a converted motion to dismiss. Moreover, because Rule 12(d) triggers the procedural opportunities under Rule 56, the required notice would have given McIntyre the right to file a Rule 56(f) motion for additional time to pursue limited discovery.[32]

In this case, the district court, as noted above, considered an excessive amount of material outside the pleadings and failed to comply with Rule 12(d) after the complaint was amended and a new motion to dismiss was filed. The district court was

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[30]. *Property Management & Investments, Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985).

[31]. Carter v. Stanton, 405 U.S. 669, 671, 92 S.Ct. 1232 (1972), *vacated on other grounds, sub nom. Samkowski v. Carter*, 416 U.S. 918, 94 S.Ct. 191 (1974).

[32]. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326; 106 S. Ct. 2548 (1986); *Id.*, 477 U.S. 326 fn. 6.

required, as a matter of procedure, to either give notice that it was excluding all of that material or that it was converting the Rule 12(b)(6) motion to one for summary judgment. It failed to do so and the Court of Appeals for the Ninth Circuit continued with that failure when it entered the cursory opinion affirming the district court's dismissal under Rule 12(b)(6). Notice to the parties that the motion to dismiss was being converted into a summary judgment motion never happened. As the court in *Finn v. Gunter*,[33] opined: "What is important is that [the non-moving party] be given an opportunity to present every factual and legal argument available. Proper procedures must be followed. We will not speculate on what action the parties will take . . . "[34] It is effectively hornbook law at all levels of courts, that the Rule 12(b)(6) motion in this case should have been converted to a Rule 56 motion and McIntyre was entitled to notice of the conversion. McIntyre need not belabor the point except to note that this Court should not speculate on what action McIntyre may have taken had the district court complied with Rule 12(d). The fact remains that the district court did not comply and therefore misapplied the law. The Federal Rules of Civil Procedure are designed to further the due process of law that the Constitution guarantees.[35] The district court's failure to follow the mandates of Rule 12(d) violated McIntyre's rights to procedural due process.

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[33]. *Finn v. Gunter*, 722 F.2d 711 (11th Cir. 1984).

[34]. *Id.*, at 713.

[35]. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465; 120 S. Ct. 1579 (2000).

CONCLUSION

The question presented in this case is whether recent decisions from this Court have an effect on the requirement that the district court must follow Rule 12(d) when considerating a motion for failure to state a claim under Rule 12(b)(6). Intertwined within that question is the question whether the failure to follow Rule 12(d) violates a plaintiff's procedural due process rights. Consideration of these important questions warrants grant of this petition and consideration of McIntyre's claims on their merits.

DATED this 2nd day of April 2018.

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