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Case No. N20C-09-097 MMJ CCLD

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware, *Plaintiff* v. BP AMERICA INC., *et al.*, *Defendants.*	C.A. No. N20C-09-097 MMJ CCLD

TOTALENERGIES SE'S OPENING BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

The State of Delaware ("Plaintiff") asserts that the 30 named Defendants in this case are collectively responsible for causing and accelerating global climate change, and, specifically, the impacts of climate change in Delaware. Plaintiff brings various tort claims against TotalEnergies SE ("TotalEnergies"): (1) negligent failure to warn; (2) trespass; and (3) common law nuisance. But TotalEnergies is an energy holding company headquartered in France and cannot be haled into Delaware court on these claims. This Court should thus dismiss TotalEnergies from the instant suit for three reasons.[1]

First, Plaintiff fails to allege sufficient facts upon which this Court may exercise personal jurisdiction over TotalEnergies. Nor can it because TotalEnergies does not engage in any persistent course of conduct in Delaware, either on its own, through its indirect Delaware subsidiary, TotalEnergies Marketing USA, Inc. ("TEMUSA"), or through any alleged co-conspirators. ***Second***, the exercise of personal jurisdiction over TotalEnergies, a foreign corporation based in France, would offend constitutional due process. ***Lastly***, Plaintiff failed to make effective service on TotalEnergies, which is a threshold jurisdictional requirement.

[1] TotalEnergies also joins other non-resident Defendants' joint motion to dismiss for lack of personal jurisdiction and brief in support thereof, which assume *arguendo* Plaintiff's jurisdictional allegations for purposes of that motion. In doing so, TotalEnergies does not waive any rights to challenge personal jurisdiction.

STATEMENT OF FACTS

I. TOTALENERGIES LACKS CONTACTS WITH DELAWARE

TotalEnergies is a foreign corporation that functions independently of its U.S. subsidiaries. TotalEnergies is an energy holding company organized and existing under the laws of France. (Ex. A ¶ 4.) It maintains its corporate headquarters and principal place of business in France. (*Id*.) As a holding company, TotalEnergies does not sell any product in Delaware. (*Id.* ¶ 5.)

TotalEnergies does not conduct any regular business in Delaware of any kind: it has no offices, no real property, and no bank accounts in the state. (*Id*. ¶ 6.) TotalEnergies is not registered, licensed, or otherwise authorized to conduct business in Delaware, nor does it make any purposeful attempts to solicit business in Delaware. (*Id*. ¶ 5.)

TotalEnergies' indirect subsidiary TEMUSA is a Delaware corporation that markets and sells petroleum products across the United States. (*Id*. ¶¶ 7, 8.) TEMUSA does not maintain any offices, facilities, or product inventory in Delaware and has no employees, officers, or directors that reside in Delaware. (*Id*.) TEMUSA does not sell products through distributors or any direct channels in Delaware and does not target its marketing or advertising to consumers in Delaware. (*Id*. ¶ 8.)

Most importantly, TotalEnergies has not authorized TEMUSA to act on its behalf in Delaware or elsewhere. (*Id*. ¶ 9.) The two entities have distinct boards of

directors, officers, and employees. (*Id*.) TotalEnergies does not exercise control over TEMUSA's daily operations. (*Id*. ¶ 10.) TotalEnergies does not direct or control TEMUSA's activities, including whether and to what extent TEMUSA markets, produces, and/or distributes fossil fuel products. (*Id*. ¶ 11.)

Additionally, neither TotalEnergies nor TEMUSA has committed any acts in Delaware, including by and through the American Petroleum Institute ("API") or any other trade organizations, to disseminate (or not to disseminate) scientific information regarding climate change and the use of fossil fuel products related to climate change. (*Id*. ¶ 12.) In fact, TotalEnergies was an API member only between 2001 and 2007, and TEMUSA has never been an API member. (*Id*.)

II. PLAINTIFF FAILED TO EFFECT SERVICE ON TOTALENERGIES

Plaintiff did not perfect service upon TotalEnergies by mail to any addressee at its French headquarters. Plaintiff purportedly sent copies of the summons and complaint to TotalEnergies, but TotalEnergies has no record of receipt. (*Id*. ¶ 13.) Plaintiff relies on tracking information that does not include a signed receipt or any specific information that shows to whom the mail was delivered. (Ex. B. at 3–6.) The tracking information shows only that "item was delivered in FRANCE at 1:00 pm on October 28, 2020." (*Id*. at 3.) On December 21, 2022, TotalEnergies' informed Plaintiff that its attempted service was improper. (*Id*. at 1.) Plaintiff has not since taken any action to effect service on TotalEnergies.

LEGAL STANDARDS

The Court must dismiss a plaintiff's claims under Superior Court Civil Rule 12(b)(2) when the plaintiff fails to meet its burden of showing a *prima facie* case of personal jurisdiction over a non-resident defendant. *See Wiggins v. Physiologic Assessment Servs., LLC*, 138 A.3d 1160, 1165 (Del. Super. Ct. 2016). Although the factual record is read in the light most favorable to the plaintiff in ruling on the motion, "the plaintiff must plead ***specific*** facts and cannot rely on mere conclusory assertions." *Ciabattoni v. Teamsters Local 326*, 2016 WL 4442277 at *4 (Del. Super. Ct. Aug. 22, 2016) (quoting *Mobile Diagnostic Grp. Holdings, LLC v. Suer*, 972 A.2d 799, 802 (Del. Ch. 2009) (emphasis added). To determine whether to exercise personal jurisdiction over a non-resident, Delaware courts employ a two-prong analysis that requires both a statutory and constitutional basis. *See Aeroglobal Cap. Mgmt. v. Cirrus Industries*, 871 A.2d 428, 438 (Del. 2005) ("The court must first consider whether Delaware's Long Arm Statute is applicable, and next evaluate whether subjecting the nonresident to jurisdiction in Delaware violates the Due Process Clause of the Fourteenth Amendment (the so-called 'minimum contacts' requirement).").

A defendant may file a motion to dismiss pursuant to Superior Court Civil Rule 12(b)(5) if a plaintiff fails to properly serve process on that defendant. *Lewis v. May*, 2021 WL 4516706, at *1 (Del. Super. Ct. Sept. 30, 2021). Under Delaware's

long-arm statute, service of process may be made "[b]y any form of mail addressed to the person to be served and requiring a signed receipt." 10 *Del. C.* § 3104(d)(3). If service is made by mail, proof of service "shall include" either "a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court." 10 *Del. C.* § 3104(e).

ARGUMENT

I. PLAINTIFF FAILS TO SHOW ANY STATUTORY BASIS FOR PERSONAL JURISDICTION OVER TOTALENERGIES

As a threshold matter, Plaintiff must show that Delaware maintains jurisdiction under its long-arm statute. 10 *Del. C.* § 3104(c); *see also Greenly v. Davis,* 486 A.2d 669, 670 (Del. 1984) ("The burden [is] upon the plaintiff to make a specific showing that the Delaware court has jurisdiction under the long-arm statute.").

Plaintiff has not specifically alleged and cannot make a showing of general jurisdiction over TotalEnergies under 10 *Del. C.* § 3104(c)(4). *See Red Sail Easter Ltd. Partners, L.P. v. Radio City Music Hall Prods., Inc.*, 1991 WL 129174, at *3 (Del. Ch. July 10, 1991) ("[S]ubsection (c)(4) will apply when a defendant has had contacts with this state that are so extensive and continuing that it is fair and consistent with state policy to require that the defendant appear here and defend a claim[.]"). Plaintiff identifies no facts that demonstrate continuous or substantial contacts with Delaware. Indeed, Plaintiff identifies no facts showing any type of

contact at all by TotalEnergies. Plaintiff instead correctly states that TotalEnergies is "a French energy conglomerate, with its headquarters in Courbevoi[e], France." (Cmplt. ¶ 30(a).) TotalEnergies maintains no offices in Delaware, owns no property in Delaware, and makes no purposeful attempts to solicit business in Delaware. (Ex. A ¶¶ 5, 6.) As a holding company, it does not sell any product in Delaware. (*Id.* ¶ 5.) There is thus no general jurisdiction over TotalEnergies in Delaware.

Accordingly, the only means for Plaintiff to establish personal jurisdiction over TotalEnergies is by showing that it is subject to remaining specific jurisdiction provisions under 10 *Del. C.* § 3104(c). "Specific jurisdiction is triggered when the plaintiff's claims arise out of acts or omissions, by the defendant, that take place in Delaware." *Ross v. Earth Movers, LLC*, 288 A.3d 284, 294 (Del. Super. Ct. 2023). In other words, the question is "whether a cause of action arises from [TotalEnergies'] contacts with the forum." *Otto Candies, LLC v. KPMG LLP*, 2017 WL 3175619, at *4 (Del. Super. Ct. July 26, 2017). Plaintiff's conclusory allegation that "[t]he State's claims against Total[Energies] arise out of the acts and omissions of Total[Energies] in Delaware and Total[Energies'] actions elsewhere that caused the injuries in Delaware" is an insufficient basis for this Court to exercise specific jurisdiction. (Cmplt. ¶ 30(f).)

Plaintiff fails to allege any specific conduct by TotalEnergies that occurred in Delaware that would create a basis for finding specific jurisdiction. Plaintiff does

not identify any statements by TotalEnergies in Delaware or elsewhere. Plaintiff does not identify any business that TotalEnergies conducts in Delaware, any contracts to supply services or things in Delaware, any act or omission by TotalEnergies that caused tortious injury in Delaware, any real property owned or used by TotalEnergies in Delaware, or any contracts to provide insurance for a Delaware-located risk. *See* 10 *Del. C.* § 3104(c)(1)–(3), (5)–(6). Plaintiff does not identify any one of these factors because it cannot: TotalEnergies is not registered, licensed, or otherwise authorized to do any business in Delaware, let alone any extensive or continuing business in Delaware. (Ex. A ¶ 5.)

A. Plaintiff Cannot Establish Specific Jurisdiction over TotalEnergies under Agency Theory

Plaintiff fares no better relying on agency theory to establish personal jurisdiction over TotalEnergies. ***First***, Plaintiff fails to allege facts sufficient to establish that TEMUSA acted as TotalEnergies' agent. *See Monsanto Co. v. Syngenta Seeds, Inc.*, 443 F. Supp. 2d 636, 644 (D. Del. 2006). ***Second***, even if Plaintiff could establish that TEMUSA's actions are attributable to TotalEnergies (which they are not), Plaintiff has not alleged facts to show that TEMUSA's limited Delaware contacts are sufficient to establish jurisdiction over non-resident TotalEnergies. *See id.* at 645; *see also C.R. Bard Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998) ("When applying the agency theory, a court should focus its inquiry on the arrangement between the parent and the subsidiary, the authority

given in that arrangement, and the relevance of that arrangement to the plaintiff's claim."). Thus, Plaintiff's claims against TotalEnergies must be dismissed.

Plaintiff broadly alleges jurisdiction over non-resident Defendants, including TotalEnergies, because each is the parent to a subsidiary acting as the Defendants' agent in Delaware. Plaintiff alleges that each non-resident Defendant, including TotalEnergies, controls "decisions about the quantity and extent of its fossil fuel production and sales" of its subsidiary, "determines whether and to what extent to market, produce, and/or distribute [the subsidiary's] fossil fuel products," and "controls and has controlled decisions related to [the subsidiary's] marketing and advertising." (Cmplt. ¶ 46(a).) On these grounds, Plaintiff alleges that "the subsidiaries' jurisdictional activities are properly attributed to the parents, and serve as a basis to assert jurisdiction over the non-resident defendant parents." (*Id*.)

a. TEMUSA is not TotalEnergies' Agent

To determine whether a subsidiary is an agent of the parent, a court analyzes: (1) the extent of overlap of officers and directors; (2) methods of financing; (3) the division of responsibility for day-to-day management; (4) and the process by which each entity obtains its business. *See Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1463 (D. Del. 1991). "No one factor is either necessary or determinative; rather it is the specific combination of elements which is significant." *Id.* Ultimately, Plaintiff must show that "the parent corporation dominates the

activities of the subsidiary. . . . [T]he control must be actual, participatory, and total." *Japan Petroleum Co. (Nigeria) v. Ashland Oil, Inc.*, 456 F. Supp. 831, 841 (D. Del. 1978).

Here, TotalEnergies "purposefully established [TEMUSA] in order to obtain the multiple benefits that derive from the corporate structure, and corporate formalities should not be cavalierly disregarded." *Cuppels v. Mountaire Corp.*, 2020 WL 3414848, at *8 (Del. Super. Ct. June 18, 2020). TotalEnergies and TEMUSA each have their own distinct board of directors, officers, and employees who are responsible for and carry out each company's daily operations. (Ex. A ¶¶ 4, 9.) TEMUSA's revenue comes from the sale of its own products. (*Id*. ¶ 10.) TEMUSA has its own budget and the authority to spend it. (*Id*.) TEMUSA maintains its own accounting books and bank accounts, and files and pays its own taxes. (*Id*.) TotalEnergies does not direct or control TEMUSA's activities, including whether and to what extent TEMUSA markets, produces, and/or distributes fossil fuel products. (*Id*. ¶ 11.) TotalEnergies maintains a separate and distinct corporate communications department in France, while TEMUSA works with a U.S.-based marketing and communications department. (*Id*.)

These facts all show that TEMUSA is not TotalEnergies' agent. Plaintiff asserts that TotalEnergies "controls and has controlled companywide decisions, including those of its subsidiaries," and that TEMUSA "is a wholly owned

subsidiary of [TotalEnergies] involved in the marketing and distribution of [TotalEnergies'] fossil fuel products." (Cmplt. ¶ 30(c), (d).) Plaintiff does not state how TotalEnergies controls TEMUSA's decisions, or what those decisions were.

In short, Plaintiff has not alleged any of the facts required to establish that TotalEnergies intended for TEMUSA to act as its agent, nor has Plaintiff alleged any specific facts regarding TotalEnergies' control or domination over TEMUSA, or TotalEnergies' direction, authorization, or knowledge of TEMUSA's actions. Conclusory statements that TEMUSA acted as TotalEnergies' agent will not suffice to establish personal jurisdiction.

b. Even if TEMUSA were TotalEnergies' agent, TEMUSA's contacts are insufficient to establish jurisdiction

Even if Plaintiff were able to show that TEMUSA is TotalEnergies' agent for jurisdictional purposes, it still must show that the specific acts that TotalEnergies directed TEMUSA to carry out in Delaware were sufficient to establish personal jurisdiction in Delaware. *See Monsanto*, 443 F. Supp. 2d at 645 (quoting *C.R. Bard*, 997 F. Supp. at 560) ("The agency theory requires not only that the precise conduct shown to be instigated by the parent be attributable to the parent, but that such conduct satisfy [the long-arm statute]."). Under Delaware law, "the agency theory permits only the attribution to the principal of specific acts of the agent, not the attribution to the parent of the subsidiary's status as a Delaware entity." *Ross*

Holding Mgmt. Co. v. Advance Realty Grp., 2010 WL 1838608, at *13 (Del. Ch. Apr. 28, 2010).

Plaintiff has not identified any specific act by TEMUSA in Delaware, let alone one that could serve as the basis for exercising jurisdiction over TotalEnergies. Nor can it: TEMUSA does not target any of its marketing or advertising to consumers in Delaware, does not maintain an office in Delaware, and does not store any product inventory in Delaware. (Ex. A ¶¶ 7, 8.) The only specific fact that Plaintiff points to is that TEMUSA is incorporated in Delaware. (Cmplt. ¶ 30(d).) This, however, is insufficient to establish jurisdiction over TotalEnergies: "the mere fact that a non-Delaware corporation owns a Delaware subsidiary is not sufficient in itself to justify Delaware's exercise of personal jurisdiction over the non-Delaware parent." *Ace & Co. v. Balfour Beatty PLC*, 148 F. Supp. 2d 418, 422–23 (D. Del. 2001) (citing *Papendick v. Robert Bosch GmbH*, 410 A.2d 148, 152 (Del. 1979)). Plaintiff thus alleges no basis for establishing jurisdiction over TotalEnergies through its indirect subsidiary.

B. Plaintiff Cannot Establish Specific Jurisdiction over TotalEnergies under Conspiracy Theory

Plaintiff also alleges that each "Fossil Fuel Defendant," including TotalEnergies, "by and through" API or other trade organizations, participated in a conspiracy to make misrepresentations and omissions to Delaware consumers. (Cmplt. ¶ 46(b).) However, Plaintiff pleads no facts in support of any of the required

factors for prevailing under the conspiracy theory of jurisdiction. *See Istituto Bancario Italiano v. Hunter Eng. Co.*, 449 A.2d 210, 225 (Del. 1982).

Under the conspiracy theory of jurisdiction, a court can exercise personal jurisdiction over a non-resident defendant when the defendant is part of a conspiracy and the court has personal jurisdiction over a co-conspirator. *See id*. at 222. To successfully plead the conspiracy theory, a plaintiff must show that: (1) a conspiracy to defraud existed; (2) the defendant was a member of that conspiracy; (3) a substantial act or effect in furtherance of the conspiracy occurred in the forum state; (4) the defendant knew or had reason to know of the act in the forum state or that acts outside the forum state would have an effect in the forum state; and (5) the act in, or effect on, the forum state was a direct and foreseeable result of the conduct in furtherance of the conspiracy. *Id.* at 225. Delaware courts require "factual proof of each enumerated element." *Stimwave Techs. Inc. v. Perryman*, 2020 WL 6735700, at *5 (Del. Ch. Nov. 17, 2020) (citation omitted). The conspiracy theory of jurisdiction "is very narrowly construed to prevent plaintiffs from circumvent[ing] the minimum contacts requirement." *Id.* (citation omitted).

Plaintiff has failed to allege facts for each of the five required factors. First, Plaintiff has not pleaded facts sufficient to establish that a conspiracy to defraud existed. Plaintiff alleges that various Defendants have been API members, that API has been under the "supervision and control" of the Defendants, and that API has

sponsored advertisements Plaintiff claims are misleading. (Cmplt. ¶¶ 37, 198–200.) Plaintiff offers no facts showing that TotalEnergies intended to further a conspiracy via API or that the API advertisements it cites were in furtherance of a conspiracy. Plaintiff also fails to plead facts supporting its claim that TotalEnergies somehow "supervis[ed] and control[led]" the creation or dissemination of the cited advertisements. Because Plaintiff has not provided "specific factual evidence" that a conspiracy existed, its conspiracy argument fails. *See Ciabattoni*, 2016 WL 4442277 at *8 ("Plaintiffs must assert specific factual evidence, not conclusory allegations, to show that the non-resident defendants were conspirators in some wrongful act resulting in harm to Delaware entities or their owners in order for the Court to exercise jurisdiction over them.") (citation omitted).

Second, Plaintiff has not shown that TotalEnergies was a member of a conspiracy. Plaintiff merely states that TotalEnergies is among the Defendants who "are and/or have been core API members at times relevant to this litigation." (Cmplt. ¶ 37(e).) Plaintiff does not even allege when TotalEnergies was a member of API, let alone plead specific facts showing that TotalEnergies was a member of a ***conspiracy*** with API members. Plaintiff's failure is crucial because TotalEnergies was an API member only from 2001 to 2007 (and TEMUSA has never been an API member). (Ex. A ¶ 12.) Plaintiff does not explain how mere membership in a trade association equates to membership in an alleged conspiracy.

Lastly, Plaintiff does not allege any facts showing a substantial act or effect occurred in Delaware at all; thus, it fails on the third, fourth, and fifth factors. Plaintiff alleges no facts that show that Defendants' actions occurred in or were intended to have an effect in Delaware. *See Lacey v. Mota-Velasc*, 2020 WL 5902590, at *7 (Del. Ch. Oct. 6, 2020*)* ("Even assuming that [Defendant] was a part of a conspiracy, in order to establish jurisdiction the Plaintiff would have to allege that a substantial act in furtherance of that conspiracy was taken in Delaware."). Plaintiff states only that API advertisements may have been seen by Delaware consumers, without offering any specific examples of where or when. Thus, Plaintiff fails on the third factor. Likewise, without even alleging what substantial act or effect took place in Delaware, Plaintiff cannot make a specific factual showing that TotalEnergies knew the act took place in or would have an effect in Delaware, or that the act or effect was a direct and foreseeable result of conduct in furtherance of a conspiracy. Thus, Plaintiff fails on the fourth and fifth factors. In sum, Plaintiff cannot make a specific factual showing on *any* of the five factors, and this is fatal to its attempt to hale TotalEnergies into this Court under a conspiracy theory.

II. THE EXERCISE OF PERSONAL JURISDICTION OVER TOTALENERGIES WOULD OFFEND DUE PROCESS

Plaintiff fails to meet its burden to show a statutory basis for personal jurisdiction, and this Court need not engage in a due process analysis. Assuming *arguendo* that there is a statutory basis to exercise jurisdiction, the Court must

consider whether exercising jurisdiction is consistent with the limitations imposed by the Due Process Clause of the Fourteenth Amendment. "The focus of this inquiry is whether [TotalEnergies] engaged in sufficient 'minimum contacts' with Delaware to require it to defend itself in the courts of this State consistent with the traditional notions of fair play and justice." *Aeroglobal Cap. Mgmt.*, 871 A.2d at 440 (Del. 2005) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)). Plaintiff must show that TotalEnergies' contacts with Delaware "rise to such a level that it should 'reasonably anticipate' being required to defend itself in Delaware's courts." *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

In cases involving foreign parties, the Supreme Court has stated that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987). Due process requires a "substantial connection" between a defendant and a forum state brought about by an action the defendant "purposefully directed toward the forum state." *Id.* at 112. "The placement of a product into the stream of commerce, without more, is not an act the defendant purposefully directed toward the forum State." *Id.*; *see also Ciabattoni*, 2016 WL 4442277 at *7 (holding the "exercise of [specific] jurisdiction would offend Due Process" where "[p]laintiff fails to provide any specific factual evidence" that the defendant committed the alleged acts or that the alleged acts occurred in Delaware).

The Delaware Supreme Court has similarly recognized that "the minimum contacts which are necessary to establish jurisdiction must relate to some act by which the defendant has deliberately created continuing obligations between himself (itself) and the forum." *Sternberg v. O'Neil*, 550 A.2d 1105, 1120 (Del. 1988).

It would not be consistent with due process to exercise personal jurisdiction over TotalEnergies. There is no "substantial connection" between TotalEnergies and Delaware or any action TotalEnergies "purposefully directed" towards Delaware. *See Asahi*, 480 U.S. at 112. TotalEnergies neither conducts any regular business operations in Delaware, nor purposefully attempts to solicit business in Delaware. (Ex. A ¶ 5.) TotalEnergies thus has not deliberately created any continuing obligations with the forum state. *Sternberg*, 550 A.2d at 1120. Plaintiff has failed to allege facts that show that TotalEnergies committed acts or omissions in Delaware or that TotalEnergies purposefully directed any acts towards Delaware, whether on its own, through an agent, or via an alleged conspiracy — and it cannot do so because TotalEnergies is a holding company that does not sell *any* product in Delaware. (Ex. A ¶ 5.) It would violate due process to exercise jurisdiction over TotalEnergies based on the tenuous connection broadly alleged by Plaintiff. Because TotalEnergies lacks minimum contacts with the forum state, this Court should not require it to defend itself in Delaware.

III. PLAINTIFF FAILS TO MEET THE JURISDICTIONAL REQUIREMENT OF PROPER SERVICE OF PROCESS

This Court cannot have personal jurisdiction over TotalEnergies without proper service of process. *JulSaint v. Ramos*, 2017 WL 4457211 at *2 (Del. Super. Ct. Oct. 4, 2017) ("Proper service of process is a jurisdictional requirement[.]"). The Court should thus dismiss Plaintiff's Complaint against TotalEnergies under Superior Court Civil Rule 12(b)(5). Under Delaware law, "when service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court." 10 *Del. C.* § 3104(e); *see also id.* § 3104(d)(3) (requiring a signed receipt). Plaintiff cannot meet its burden to demonstrate service of process upon TotalEnergies or TotalEnergies' waiver of that requirement. *JulSaint*, 2017 WL 4457211, at *2.

Under Delaware Superior Court Civil Rule 4(j), service of summons and complaint must be made upon a defendant within 120 days after the filing of the complaint absent good cause. *See DeSantis v. Chilkotowsky,* 877 A.2d 52 (Del. 2005) (dismissing complaint where the plaintiff knew of insufficiency of service of process, but never requested more time to perfect service of process, and never obtained court permission to use a special process server). In analyzing good cause, a Court must exercise its discretion to determine whether a party's refusal to act constitutes "excusable neglect" or, in other words, "neglect which might have been the act of a reasonably prudent person under the circumstances." *JulSaint*, 2017 WL

4457211, at *2. That defendant will not be prejudiced or defendant has actual notice is irrelevant to establishing good cause. *See Griffith v. Wawa, Inc.*, 2017 WL 3017699, at *2 (Del. Super. Ct. July 14, 2017) ("[T]he absence of prejudice to the defendant is inapposite[.]"); *see also Padro v. Arzillo,* 1989 WL 158488, at *1 (Del. Super. Ct. 1989) ("Mere informal notice of the filing of suit is not an accepted alternative to compliance with a statutory procedure for acquiring personal jurisdiction.").

Plaintiff's attempted service of process does not comply with Delaware's statutory requirement. Plaintiff filed its Complaint on September 10, 2020, and Plaintiff purports that TotalEnergies was properly served on October 28, 2020. Plaintiff's proof of service, however, does not include a receipt signed by TotalEnergies, and there is no evidence of personal delivery to any addressee. The tracking information shows only that the "item was delivered in FRANCE" on October 28, 2020. (Ex. B at 3.) Upon receiving this tracking information, which on its face does not comply with Delaware law, a reasonably prudent person would have taken further steps to properly effect service upon TotalEnergies within the 120-day period under Rule 4(j). Plaintiff did not take any action.

On December 21, 2022, TotalEnergies notified Plaintiff that it has no records of receiving service, and that the tracking information provided lacks not only the required signed receipt but also any specific information regarding who may have

been served.[2] (*Id*. at 1, 3.) Despite this notice, Plaintiff still did not take any action to cure its ineffective service of process upon TotalEnergies.

With no signed receipt or other evidence of personal delivery to TotalEnergies, Plaintiff's attempt at serving process does not comport with 10 *Del. C.* § 3104(e), and this Court cannot exercise personal jurisdiction over TotalEnergies. Thus, Plaintiff's claims against TotalEnergies should be dismissed.

CONCLUSION

For the reasons stated above, TotalEnergies respectfully submits that the claims against TotalEnergies should be dismissed.

[2] The Delaware Superior Court has recognized that "[f]or a portion of the COVID-19 pandemic, the United States Postal Service (USPS) modified its policy regarding return receipts for certified mail, instructing carriers to avoid face-to-face contact with recipients and to record their names from a safe distance." *MidFirst Bank v. Mullane*, 2022 WL 4460810, at *1-2 (Del. Super. Ct. Sept. 26, 2022) (holding that the signature requirement is not met where the return receipt is signed with a "COVID-19" notation).

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