EFiled: May 18 2023 02:18PM EDT
Transaction ID 70038428
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., BP P.L.C., CHEVRON CORPORATION, CHEVRON U.S.A. INC., CONOCOPHILLIPS, CONOCOPHILLIPS COMPANY, PHILLIPS 66, PHILLIPS 66 COMPANY, EXXON MOBIL CORPORATION, EXXONMOBIL OIL CORPORATION, XTO ENERGY INC., HESS CORPORATION, MARATHON OIL CORPORATION, MARATHON OIL COMPANY, MARATHON PETROLEUM CORPORATION, MARATHON PETROLEUM COMPANY LP, SPEEDWAY LLC, MURPHY OIL CORPORATION, MURPHY USA INC., ROYAL DUTCH SHELL PLC, SHELL OIL COMPANY, CITGO PETROLEUM CORPORATION, TOTAL S.A., TOTAL SPECIALTIES USA INC., OCCIDENTAL PETROLEUM CORPORATION, DEVON ENERGY CORPORATION, APACHE CORPORATION, CNX RESOURCES CORPORATION, CONSOL ENERGY INC., OVINTIV, INC., and AMERICAN PETROLEUM INSTITUTE,

Defendants.

C.A. No. N20C-09-097-MMJ CCLD

JOINT OPENING BRIEF IN SUPPORT OF CERTAIN DEFENDANTS' MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

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INTRODUCTION

Defendants BP p.l.c., Chevron U.S.A. Inc., Exxon Mobil Corporation, ExxonMobil Oil Corporation, Shell plc (f/k/a Royal Dutch Shell plc), TotalEnergies SE[1], and American Petroleum Institute ("API")[2] (collectively, the "Defendants") by their undersigned attorneys and pursuant to Superior Court Civil Rule 12(b)(2), respectfully submit this Joint Opening Brief in Support of their Motion to Dismiss Plaintiff's Complaint For Lack of Personal Jurisdiction. The 24 other Defendants that do not challenge personal jurisdiction are incorporated in Delaware. For ease of reference, the term "Defendants" is used throughout this Memorandum to refer to the seven out-of-state defendants challenging personal jurisdiction.

Plaintiff, the State of Delaware, seeks to impose liability on these seven out-of-state Defendants for impacts of global climate change, which as alleged include "global atmospheric and ocean warming, ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, drought, and sea level rise." Compl. ¶ 2, Trans. ID 65917326. Plaintiff claims that Delaware law permits it to seek damages from this group of Defendants for harms allegedly resulting from more

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[1] Defendant TotalEnergies SE has also filed a separate motion to dismiss for lack of personal jurisdiction and insufficient service of process for the reasons stated therein. TotalEnergies does not waive any rights to challenge personal jurisdiction by joining this joint motion.

[2] Defendant API is a trade association and does not sell, transport, or refine fossil fuels anywhere, let alone in Delaware. *See* Compl. ¶ 37(a).

than a century of energy consumption and climatic events around the world. The Complaint suffers from numerous fatal defects, including those addressed in Defendants' Joint Memorandum in Support of their Motion to Dismiss for Failure to State a Claim. This Memorandum focuses on one particular defect of Plaintiff's Complaint: the factual allegations, even when accepted as true, are insufficient to establish personal jurisdiction over these out-of-state Defendants.

There can be no dispute that this Court lacks general personal jurisdiction over these Defendants because none of them is incorporated or headquartered in Delaware; thus, none is "at home" in this forum. *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014). The Complaint does not allege otherwise. The Court also lacks specific personal jurisdiction over these Defendants for three separate reasons, each of which independently requires dismissal.

First, based on Plaintiff's own allegations—which Defendants accept as true for purposes of this Motion—Plaintiff's claims do not "arise out of or relate to" Defendants' alleged contacts with Delaware. *See Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021). To the contrary, Plaintiff's claimed injuries are, as the Complaint asserts, "*all due* to anthropogenic global warming," Compl. ¶ 10 (emphasis added), allegedly caused by the "increase in atmospheric CO_2 and other greenhouse gases" from the *worldwide* combustion of oil and gas and other sources of emissions over the past century, *id.* ¶ 4. Thus, it does not matter

how much oil and gas Defendants are alleged to have refined or sold in Delaware, or how much marketing or advertising purportedly occurred in Delaware, because the injuries Plaintiff allegedly suffered as a result of global climate change cannot legally, or logically, be said to "arise out of or relate to" the limited in-state production and marketing activities allegedly conducted by each Defendant.

Under the Supreme Court's decision in *Ford Motor*, to satisfy the "arising out of or related to" prong, a plaintiff must allege facts that, taken as true, would show that *use of a defendant's product in the State injured the plaintiff* in the State. *See* 141 S. Ct. at 1027 ("specific [personal] jurisdiction attaches . . . when a company like Ford serves a market for a product in the forum State and the *product malfunctions there*") (emphasis added). Here, Plaintiff has not made any allegation that the use of Defendants' products in Delaware (or any acts in Delaware) injured Plaintiff in Delaware, because it is undisputed that total energy consumption in Delaware accounts for a negligible fraction of worldwide total greenhouse gas emissions. Even if one accepts as true Plaintiff's allegations that Defendants marketed and sold products in Delaware (as Defendants do solely for purposes of this Motion), those allegations do not establish personal jurisdiction because Plaintiff's alleged injuries could not have resulted from the use of Defendants' products in Delaware. In other words, because Plaintiff's alleged injuries are necessarily based on the cumulative emissions from fossil fuels across the world

over many decades, among many other causes, they do not depend on Defendants' fossil fuels ever being sold, marketed, or consumed in Delaware. Thus, Plaintiff's allegations that Defendants marketed and sold those products in Delaware are insufficient to establish personal jurisdiction over Defendants.

Plaintiff asserts that any in-state marketing activities suffice for this Court to exercise personal jurisdiction over each Defendant, notwithstanding that the use of the marketed products in Delaware is not alleged to have injured Plaintiff in Delaware. That is not the law, and for good reason. If credited, Plaintiff's theory would obliterate the bounds of specific personal jurisdiction by subjecting each Defendant to jurisdiction in any State in which any amount of its products existed, no matter how insignificant and attenuated the connection to the alleged claims—effectively exposing any defendant to the general jurisdiction of the courts of any State in which it does business. Such an unprecedented and unprincipled expansion of personal jurisdiction would violate Defendants' due process rights and has been squarely rejected by the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017), and by the Delaware courts, *Ross v. Earth Movers, LLC*, 288 A.3d 285, 294 (Del. Super. Ct. 2023) ("Delaware law requires that the out-of-state defendant committed an act or omission in Delaware that resulted in the tortious injury.").

Second, producing, promoting, or selling oil and gas in Delaware did not reasonably place Defendants on "clear notice," as due process requires, that they would become subject to jurisdiction in this forum for claims for injuries allegedly resulting, not from any local use of their products, but instead from the cumulative worldwide use of all oil, natural gas, and other sources of emissions—the vast majority of which has no connection to Defendants, much less to Delaware. *Ford Motor*, 141 S. Ct. at 1025 (citation omitted). There are billions of contributors to greenhouse gas emissions across the world (including Plaintiff itself). *City of Oakland v. BP p.l.c.*, 325 F. Supp. 3d 1017, 1026 (N.D. Cal. 2018) ("*Oakland I*") ("Everyone has contributed to the problem of global warming and everyone will suffer the consequences—the classic scenario for a legislative or international solution."), *vacated on other grounds*, 960 F.3d 570 (9th Cir. 2020). In fact, Plaintiff alleges that "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses [sic] quickly diffuse and comingle in the atmosphere." Compl. ¶ 245. Given the lack of any discernible link between Defendants' in-state contacts as alleged in the Complaint, emissions in Delaware, and any local impacts of global climate change, Defendants could not reasonably

have anticipated—let alone have "clear notice"—that they could be haled into a Delaware court based on Plaintiff's sweeping and novel claims.

Third, the exercise of specific personal jurisdiction over Defendants would be unreasonable under the Due Process Clause. *See Intellectual Ventures I, LLC v. Ricoh Company, Ltd.*, 67 F. Supp. 3d 656, 659 (D. Del. 2014). Litigating this case in Delaware would contravene "the interstate judicial system's interest in obtaining the most efficient resolution of controversies" because Plaintiff's claims implicate *global* conduct and are not localized to Delaware. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). And it would threaten the "interest of the several States in furthering fundamental substantive social policies" because, among other things, many States and the federal government promote the very energy production, policies, and advocacy that Plaintiff seeks to penalize through this lawsuit. *Id.* Moreover, it would impermissibly require nonresident Defendants to submit to the "coercive power" of an out-of-state tribunal with respect to conduct unconnected with the forum, leaving their conduct in other States, as well as national and even worldwide conduct, subject to conflicting state rules. *See Bristol-Myers Squibb*, 137 S. Ct. at 1780.

Because the factual allegations in Plaintiff's Complaint provide no basis for exercising personal jurisdiction that would comport with the Due Process Clause, and because no amendment can remedy the inherent flaws in Plaintiff's

jurisdictional theory, the Court should dismiss all claims against Defendants with prejudice.

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff initiated this case on September 10, 2020. Defendants filed a timely notice of removal to the United States District Court for the District of Delaware. The District Court ordered remand to this Court but stayed execution of its remand order pending Defendants' appeal to the Third Circuit. The Third Circuit affirmed the remand order on August 17, 2022 and denied Defendants' petition for rehearing *en banc* on September 30, 2022. Defendants filed a timely petition for a writ of *certiorari* to the United States Supreme Court, which was denied on May 15, 2023.

This case was reopened in this Court on October 24, 2022. The Court entered the parties' Stipulation and Order governing the schedule for Defendants' motions to stay and for dismissal. Defendants filed a motion to stay these proceedings pending the outcome of the jurisdictional appeal of this and similar matters in the Supreme Court. This Court denied the stay motion on April 3, 2023.

These seven Defendants now file this joint brief in support of their motion to dismiss for lack of personal jurisdiction. Contemporaneously with this brief, all Defendants are jointly filing an opening brief supporting a motion to dismiss for failure to state a cause of action.

STATEMENT OF FACTS

Plaintiff's claims depend on the cumulative and worldwide use of oil and gas products over the course of more than a century. Plaintiff alleges an attenuated (and implausible) causal chain between Defendants' allegedly tortious acts and Plaintiff's purported injuries from global climate change. Among the links in Plaintiff's causal chain are the decisions of countless third parties around the world—as well as Plaintiff itself—to purchase, sell, refine, transport, and ultimately combust (*i.e.*, use) fossil fuel products.[3] Plaintiff alleges that "normal use of Defendants' fossil fuel products" results in greenhouse gas emissions. *See* Compl. ¶ 104.

That combustion, in turn, releases greenhouse gas emissions to varying degrees depending on the manner of the combustion. Plaintiff then alleges that those emissions—in addition to emissions originating from other sources, virtually all of which are also outside of Delaware—increase the total amount of greenhouse gases in the global atmosphere. *Id.* ¶ 4. And, according to Plaintiff, that change in atmospheric composition causes the atmosphere to trap heat, which increases global

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[3] Plaintiff's jurisdictional allegations improperly conflate Defendants' activities with those of their separately organized predecessors, subsidiaries, and affiliates. There is no factual basis alleged in the Complaint for imputing to any Defendant the alleged jurisdictional contacts of any other entity, and Defendants deny that doing so would be proper. Solely for purposes of this joint motion, however, Defendants assume *arguendo* Plaintiff's (erroneous) imputation of the alleged forum contacts of their direct and indirect subsidiaries and affiliates throughout history. Even with this assumption, Plaintiff's allegations are insufficient. Defendants reserve all rights to challenge Plaintiff's imputation theory and allegations about corporate relationships for any other purpose or proceeding.

temperature, which, in turn, raises global sea levels, among other effects. *Id.* ¶ 55. Plaintiff contends that its injuries flow from rising sea levels, as well as from other alleged effects of climate change. *Id.* ¶¶ 226–33.

Put simply, Plaintiff repeatedly alleges that its injuries are "caused by" and "all due to" "anthropogenic greenhouse gas *emissions*." *Id.* ¶¶ 10, 48 (emphasis added). *Emissions* are, to use Plaintiff's words, "[t]he mechanism" of the alleged injuries. *Id*. ¶ 48. And these emissions result from billions of daily choices, over more than a century, by governments, companies, and individuals, about what activities to engage in, what types of fuels to use, and how to use them. And although Plaintiff alleges that Defendants conducted business or promoted their products in Delaware (which Defendants accept as true for purposes of this Motion), Plaintiff does not, and cannot, allege that Defendants' in-state activities led to the emissions that caused global warming or its alleged in-state injuries. Rather, Plaintiff alleges that it suffered injuries from the production, promotion, and use of oil and gas products (among *many* other sources of greenhouse gases) occurring in virtually every State in this Nation and every country in the world—and by countless others besides the few Plaintiff named as Defendants.

ARGUMENT

Plaintiff does not, and cannot, allege facts that support this Court's exercise of personal jurisdiction over Defendants for the claims asserted in the Complaint.

There is no general jurisdiction over Defendants because none of them is "at home" in Delaware. Nor is there specific jurisdiction because (1) the Complaint avers that Plaintiff's alleged injuries arise out of and relate to *worldwide* conduct by countless actors, not Defendants' alleged contacts with Delaware; (2) Defendants' alleged contacts with Delaware did not reasonably provide "clear notice" that Defendants could be sued here for damages for global climate change based on activities worldwide; and (3) exercising jurisdiction would be constitutionally unreasonable.

I. LEGAL STANDARD

Plaintiff bears the burden of establishing this Court's personal jurisdiction over Defendants. *Schweitzer v. LCR Capital Partners, LLC*, 2020 WL 1131716, at *5 (Del. Super. Mar. 9, 2020). "Personal jurisdiction over a nonresident defendant is proper where: (1) Delaware's long-arm statute applies; and (2) the Court's exercise of jurisdiction does not violate constitutional due process." *Owens v. Lead Stories, LLC*, 2021 WL 3076686, at *3 (Del. Super. July 20, 2021). The "Delaware long-arm statute confers the identical scope of jurisdiction as does the Due Process Clause." *Registered Agents, Ltd. v. Registered Agent, Inc.*, 880 F. Supp. 2d 541, 547 (D. Del. 2012).

Accordingly, even if Delaware's long-arm statute is satisfied, personal jurisdiction must comport with the Due Process Clause. *Walden v. Fiore*, 571 U.S.

277 (2014); *see also Kabbaj v. Simpson*, 547 Fed. Appx. 84, 86 (3d Cir. 2013).[4] In applying the Due Process Clause, courts have recognized two types of personal jurisdiction: general and specific. *Bristol-Myers Squibb*, 137 S. Ct. at 1779–80. General jurisdiction allows a court to adjudicate any claim against a defendant, regardless of the connection between the claim and the forum, so long as the defendant is "at home" in that forum. *Id.* (internal quotation marks omitted). Specific jurisdiction applies "only as to a narrower class of claims"—these claims "must arise out of or relate to the defendant's contacts with the forum." *Ford Motor*, 141 S. Ct. at 1025 (internal quotation marks omitted). Put differently, for specific jurisdiction, a plaintiff must make "a showing that the cause of action arises from conduct occurring within the state." *Owens*, *supra*, at *3 (citations omitted).

To carry its burden of establishing personal jurisdiction, Plaintiff must allege facts sufficient to make out a *prima facie* case for personal jurisdiction. *Ross*, 288 A.3d at 293. Further, Plaintiff must establish personal jurisdiction over *each* defendant with respect to *each* claim. *See Tolliver v. Qlarant Quality Sols, Inc.*, 2022 WL 17097602, at *6 (Del. Super. Ct. Nov. 21, 2022).

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[4] Delaware courts regularly look to federal court decisions regarding personal jurisdiction as persuasive authority. *See Aero Global Capital Management, LLC v. Cirrus Industries, Inc.*, 871 A.2d 428, 441–43 (Del. 2005).

II. DEFENDANTS ARE NOT SUBJECT TO GENERAL JURISDICTION IN DELAWARE.

Plaintiff does not allege that Defendants are subject to general jurisdiction in Delaware. Plaintiff concedes that none of the Defendants is incorporated or headquartered in Delaware. Compl. ¶¶ 21(a); 22(e); 24(a)–(b); 28(a); 30(a); 37(a). Thus, no Defendant is "at home" in this State. *Daimler*, 571 U.S. at 139 (citation omitted); *Genuine Parts Co. v. Cepec*¸ 137 A.3d 123, 135 (Del. 2016). And Defendants' business activities in Delaware do not create general jurisdiction because it "would be 'unacceptably grasping' to approve the exercise of general jurisdiction wherever a corporation 'engages in a substantial, continuous, and systematic course of business,'" much less over Defendants with limited alleged contacts in Delaware. *Hartford Mut. Ins. Co. v. Hoverzon, LLC*, 2021 WL 461760, at *2 (D. Md. Feb. 9, 2021) (quoting *Daimler*, 571 U.S. at 138). Therefore, the Court lacks general jurisdiction over Defendants in Delaware.[5]

III. DEFENDANTS ARE NOT SUBJECT TO SPECIFIC JURISDICTION IN DELAWARE.

Because no Defendant is subject to general jurisdiction in Delaware, Plaintiff may proceed against each Defendant in this forum only if it can establish specific

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[5] Plaintiff's contention that Defendants are the alter egos of their subsidiaries or affiliates that are incorporated in Delaware (*see supra* note 3) is irrelevant to this analysis. Defendants are not deemed to be "at home" in Delaware merely because they maintain subsidiaries or affiliates that are incorporated in Delaware—and this is true *even if* Plaintiff alleges the subsidiaries or affiliates' contacts can be imputed to Defendants. *See Daimler AG*, 571 U.S. at 136 ("Even

jurisdiction over *each* Defendant independently, which it cannot do. *See Tolliver*, 2022 WL 17097602, at *6. Specific jurisdiction exists only if: (1) the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) the plaintiff's claims arise out of or relate to those activities; ***and*** (3) the exercise of personal jurisdiction would be constitutionally reasonable. *Outokumpu Engineering Enterprises, Inc. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 731–32 (Del. Super. 1996). These jurisdictional restrictions "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States," because a State's exercise of sovereign power "implie[s] a limitation on the sovereignty" of other States and even foreign nations. *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (alteration in original) (internal citation and quotation marks omitted). Accordingly,

> [e]ven if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

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if we were to assume that [subsidiary Mercedes–Benz USA, LLC] is at home in California, and further to assume MBUSA's contacts are imputable to [its foreign parent] Daimler, there would still be no basis to subject Daimler to general jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there."); *accord Ali v. Beechcraft Corp.*, 2014 WL 3706619, at *3 (Del. Super. June 30, 2014).

Id. at 1780–81 (alteration in original) (quoting *World-Wide Volkswagen*, 444 U.S. at 294).

Plaintiff does not allege a *prima facie* case of specific jurisdiction because, with respect to each Defendant, the Complaint fails to satisfy at least the second and third requirements for specific jurisdiction: the claims asserted in the Complaint do not arise from or relate to Defendants' alleged contacts with Delaware, and exercising personal jurisdiction in this case would be constitutionally unreasonable.

A. Plaintiff's Claims Do Not Arise Out of or Relate to Defendants' Alleged Contacts With Delaware.

Plaintiff cannot establish specific jurisdiction over each Defendant because the Complaint does not, and cannot, allege claims that "arise out of or relate to" each Defendant's alleged forum contacts. *Ford Motor*, 141 S. Ct. at 1025 (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780). While claims based on general jurisdiction "may concern events and conduct anywhere in the world," "[s]pecific jurisdiction is different: it covers defendants less intimately connected with a State, but only as to *a narrower class of claims*." *Ford Motor*, 141 S. Ct. at 1024 (emphasis added). For there to be specific jurisdiction, "[t]he plaintiff's claims . . . 'must arise out of or relate to the defendant's contacts' with the forum." *Id.* at 1025 (quoting *Bristol-Myers Squibb*, 137 S. Ct. at 1780). "When there is no such connection,

specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb*, 137 S. Ct. at 1781.

The Complaint is silent as to *any* connection between Defendants' purported Delaware-specific conduct and the alleged harm underlying Plaintiff's claims. That is because Plaintiff's litigation is, at its core, "a suit over *global* greenhouse gas emissions" that seeks "damages caused by fossil fuel emissions no matter where in the world those emissions were released (or who released them)." *City of New York v. Chevron Corp.*, 993 F.3d 81, 91, 93 (2d Cir. 2021); *see also City of Oakland v. BP p.l.c.*, 2018 WL 3609055, at *3 (N.D. Cal. July 27, 2018) (finding that substantially similar climate change claims "depend on a global complex of geophysical cause and effect involving all nations of the planet"), *vacated by* Order Granting Renewed Motion to Remand and Vacating Order Dismissing Certain Defendants, *City of Oakland v. BP p.l.c.*, No. 3:17-cv-06011-WHA (N.D. Cal. Oct. 24, 2022), ECF No. 357 at 15 (vacating order for lack of federal subject matter jurisdiction but noting "[i]n no way, however, should this vacatur be considered as changing this Court's view on the personal jurisdiction issue").

The Supreme Court's decision in *Ford Motor* confirms there is no specific personal jurisdiction over Defendants here. In *Ford Motor*, two individual consumers sued Ford in Montana and Minnesota state courts, asserting product-liability claims stemming from allegedly defective automobiles that Ford initially

manufactured and sold out-of-state but that were later *used* and *caused accidents* in the forum States. The Supreme Court held that Ford's in-state sales and marketing activities were sufficiently related to the plaintiffs' claims for injuries that were caused by the in-state use and malfunction of the vehicles to satisfy the arising under prong. Under *Ford Motor*, personal jurisdiction may exist where a company "[1] serves a market for a product in the forum State and [2] the product *malfunctions there*" "[3] *caus[ing] injury in the State* to one of its residents." 141 S. Ct. at 1022, 1026–27 (emphases added).

Critically, the Court held that in order to base personal jurisdiction on in-state "advertising, selling, and servicing," the plaintiff's alleged injuries must be *caused by the use and malfunction* of the defendant's products within the forum State. *Id.* at 1022. This holding—*i.e.*, that, at a minimum, the use of the defendant's product in the forum State injured the plaintiff in the forum State as a result of malfunctioning there—was essential to the Court's finding that there was personal jurisdiction. As the Court explained in the very first paragraph of its decision: "When a company like Ford serves a market for a product in a State and *that product* causes injury in the State to one of its residents, the State's courts may entertain the resulting suit." *Id.* at 1022 (emphasis added).

The Court reiterated this core rationale for its holding throughout the decision, explaining that the exercise of jurisdiction was appropriate because the plaintiffs

"used the allegedly defective products in the forum States" and "suffered injuries when those products malfunctioned there." *Id.* at 1031. Put differently, "specific personal jurisdiction attaches . . . when a company like Ford serves a market for a product in the forum State *and the product malfunctions there*." *Id.* at 1027 (emphasis added). In reaching its conclusions, the Court relied heavily on its prior decision in *World-Wide Volkswagen*, where the Court reasoned that, if a "manufacturer or distributor" makes "efforts . . . to serve, directly or indirectly, the market for its product" in certain States, "it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise ***has there been the source of injury*** to its owner or to others." *Id.* at 1027 (quoting 444 U.S. at 297) (emphasis added). Because the *Ford Motor* plaintiffs alleged that the vehicles at issue "malfunctioned and injured them in [the forum] States," *id.* at 1028, Ford's in-state activities, including marketing and advertising of those vehicles, were sufficiently related to the plaintiffs' claims and alleged injuries.

The Court explained that the test is whether the suit "arise[s] out of *or relate*[*s*] *to* the defendant's contacts with the forum." *Id.* at 1026 (emphasis in original). "The first half of that standard asks about causation," whereas the second half "contemplates that *some* relationships will support jurisdiction without a causal showing." *Id.* (emphasis added). But the Court cautioned that this "does not mean anything goes," and in "the sphere of specific jurisdiction, the phrase 'relate to'

incorporates real limits." *Id.* In *Ford Motor*, the Court placed "real limits" on the exercise of personal jurisdiction by requiring that the defendant's products were used and malfunctioned within the forum State causing injury there. In other words, although *Ford Motor* rejected a strict but-for causal relationship between the alleged in-state activities and the alleged injury, *Ford Motor does require* that the alleged injury within the forum State result from use and malfunction of the defendant's product within the State.

This Court's decisions are in harmony with *Ford Motor*'s reasoning. As this Court held in *Rotblut v. Terrapinn, Inc.*: "This Court may exercise personal jurisdiction over an out-of-state defendant under Section 3104(c)(3) 'if the plaintiff demonstrates that the non-resident defendant has caused a tortious injury in Delaware *and* such injury was due to an act or omission by the defendant in Delaware.'" 2016 WL 5539884, at *5 (Del. Super. Sept. 30, 2016).

Courts across the country have recognized that *Ford Motor* requires the injury to occur in-state because of the use and malfunction of the product in-state. For example, the Rhode Island Supreme Court recently held that "it was key in *Ford* that the injury . . . occurred in the forum state" where a "car accident occurred in the state where the suit was brought." *Martins v. Bridgestone Am. Tire Ops., LLC*, 266 A.3d 753, 761 (R.I. 2022). Indeed, the *Martins* court emphasized that *Ford Motor* held specific personal jurisdiction was appropriate "[w]hen a company like Ford serves a

market for a product in a [s]tate and that product causes injury *in the [s]tate* to one of its residents[.]" *Id.* (quoting 141 S. Ct. at 1022) (emphasis in *Martins*). And like *Ford Motor*, the *Martins* court also relied on *World-Wide Volkswagen*, explaining that "[t]he phrase 'has *there* been the source of injury' in *World-Wide Volkswagen* suggests that the product has both been directed toward the forum state *and* has caused injury in the forum state." *Id.* (emphasis in *Martins*). Ultimately, personal jurisdiction did not exist in *Martins* because the plaintiff's claims did not arise from the use and malfunction of the product in Rhode Island, even though the plaintiff alleged that the defendant-manufacturers had "extensive contacts with Rhode Island and their intent [was] to conduct business in Rhode Island." *Id.* at 759.

Similarly, as the Ninth Circuit has correctly noted, where a plaintiff's alleged "injuries in [the] case" do not "arise out of or relate to [the defendant's] contacts with the forum," *Ford Motor* precludes the exercise of specific personal jurisdiction, even if the forum is the locus of the injuries. *LNS Enters. LLC v. Cont'l Motors, Inc.*, 22 F.4th 852, 863 (9th Cir. 2022). The court explained that the Supreme Court found there was personal jurisdiction in *Ford Motor* "because 'Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege *malfunctioned and injured them in those States*.'" *Id.* at 862 (quoting *Ford Motor*, 141 S. Ct. at 1028) (emphasis added). In *LNS*, the Ninth Circuit held that personal jurisdiction was lacking in Arizona even though the

plaintiffs' injuries resulted from a malfunction of an aircraft in Arizona, because the defendants' contacts with Arizona were insufficient. *Id.* at 862–64.

A number of recent authorities further confirm the same limiting principle. As one court recently explained, "a central limitation to the Supreme Court's holding in *Ford*" is "the fact that the plaintiffs' claims brought in Montana and Minnesota courts arose because the defendant's vehicles 'malfunctioned and injured them in those States.'" *Cappello v. Rest. Depot, LLC*, 2023 WL 2588110, at *4 (D.N.H. Mar. 21, 2023) (observing that "the *Ford* opinion is riddled with that qualification throughout," and noting that the Court distinguished *Bristol-Myers* "on the basis that the plaintiffs in *Ford* used the allegedly defective products in the forum state and were injured there"). And, as the Ninth Circuit highlighted, a claim relates to a defendant's in-forum contacts "absent causation" when "'a company . . . serves a market for a product in the forum State *and the product malfunctions there*.'" *Yamashita v. LG Chem., Ltd.*, 62 F.4th 496, 502 (9th Cir. 2023) (emphasis added) (*quoting Ford Motor*, 141 S. Ct. at 1026-27).[6]

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[6] *See also, e.g.*, *Wallace v. Yamaha Motors Corp, U.S.A.*, No. 19-2459, 2022 WL 61430, at *4 (4th Cir. Jan. 6, 2022) ("In *Ford*, the Court repeatedly emphasized that the injuries occurred in the forum states."); *Luciano v. SprayFoamPolymers.com, LLC*, 625 S.W.3d 1, 17 (Tex. 2021) (citing *Ford Motor* and explaining "that the lawsuit arises from an injury which occurred in the forum state is a relevant part of the relatedness prong of the analysis").

Here, neither the events giving rise to Plaintiff's claims nor its alleged injuries resulted from the use of any of Defendants' products *in Delaware*, nor do they even allege some kind of malfunction of those products in Delaware. Rather, Plaintiff's Complaint asserts that the alleged injuries occurred or will occur only as a result of all historical, global greenhouse gas emissions from global combustion of fossil fuels produced and sold by Defendants as well as countless other sources. *See* Compl. ¶¶ 2, 47–49. Plaintiff alleges that its injuries are "***all due*** to anthropogenic global warming," *id.* ¶ 10 (emphasis added), caused by the "increase in atmospheric CO_2 and other greenhouse gases" from worldwide combustion of oil and gas over the past century, *id.* ¶ 4. Indeed, Plaintiff alleges that "[t]he mechanism by which human activity causes global warming"—and thereby causes Plaintiff's injuries—"is overwhelmingly . . . anthropogenic greenhouse gas emissions." *Id.* ¶ 48. And Plaintiff alleges, as it must, that it is *global* emissions from the *worldwide* use of fossil fuel products (and other sources), not emissions from any specific location—and most importantly not any from Delaware—that themselves lead to the alleged climate disruption on which it bases its claims. *Id.* ¶¶ 47–48.

The alleged effects of global climate change in Delaware also cannot be said to "arise from or relate to" Defendants' contacts with Delaware because, as other courts have recognized, "the undifferentiated nature of greenhouse gas emissions from all global sources and their worldwide accumulation over long periods of time"

mean that "there is no realistic possibility of tracing any particular alleged effect of global warming to any particular emissions by any specific person, entity, [or] group at any particular point in time." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 880 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). *See also City of New York*, 993 F.3d at 92 ("Since greenhouse gases once emitted become well mixed in the atmosphere, emissions in New York or New Jersey may contribute no more to flooding in New York than emissions in China.") (quoting *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 422 (2011)) (cleaned up). In other words, "it is not plausible to state which emissions—emitted by whom and at what time in the last several centuries and at what place in the world—'caused' Plaintiff['s] alleged global warming related injuries." *Kivalina*, 663 F. Supp. 2d at 881. And, as Plaintiff itself alleges, "it is not possible to determine the source of any particular individual molecule of CO_2 in the atmosphere attributable to anthropogenic sources because such greenhouse gas molecules do not bear markers that permit tracing them to their source, and because greenhouse gasses [sic] quickly diffuse and comingle in the atmosphere." Compl. ¶ 245.

Plaintiff does not, and cannot, allege that the use of any of Defendants' products in Delaware—regardless whether such use was motivated by Defendants' alleged misrepresentations or failure to warn—caused global climate change and the injuries Plaintiff alleges it has suffered as a result. Indeed, it is indisputable that *total*

energy consumption in Delaware, with a population of just over one million people, accounts for a *de minimis* percentage of energy consumption in the United States and around the world. Greenhouse gas emissions resulting from the use of oil and natural gas Defendants may produce, sell, or promote in Delaware (even assuming *arguendo* that such use was induced by Defendants' allegedly tortious marketing) thus make up, at most, a minuscule amount of the global greenhouse gas emissions that contribute to climate change, and, ultimately, Plaintiff's alleged injury. Unlike in *Ford Motor*, Plaintiff's alleged injuries were not caused by the use, much less the malfunction, of Defendants' products in the forum. Indeed, whereas in *Ford Motor*, the plaintiffs' injuries were caused by the use and malfunction of the product in the forum States, here Plaintiff alleges that its injuries are caused by the cumulative use of oil and gas and many other sources of emissions in *every* State in the country and around the world.[7]

Because Plaintiff's injuries could not have resulted from the use and malfunction of Defendants' oil and gas products in Delaware, Plaintiff's allegations that Defendants tortiously marketed and sold those products in Delaware (even accepting all of these allegations as true for purposes of this Motion) fail to satisfy the "arises out of or relates to" analysis. Put differently, if the in-state use of a

[7] Plaintiff's decision to sue a trade association like API—which does not sell, transport, or refine fossil fuels at all, let alone in Delaware—illustrates the chasm between Plaintiff's theory and the requirements of *Ford Motor*.

product does not cause an injury in the State, then personal jurisdiction is lacking irrespective of whether a defendant markets, advertises, and sells those products in the State. Those are the fundamental lessons from *World-Wide Volkswagen* and *Ford Motor*, and they compel dismissal here.

B. Defendants Are Not on "Clear Notice" That Personal Jurisdiction Would Exist in Delaware for Suits Based on Global Climate Change.

In *Ford Motor*, the Supreme Court also held that the "fair[ness]" requirement of the Due Process Clause requires that a defendant have "clear notice" that, in light of its activities in the forum, it is susceptible to a lawsuit in the State for the claims asserted by the plaintiff. *Id.* at 1025, 1030. Unlike in *Ford Motor*, where the Court found Ford had clear notice of potential lawsuits for harms caused by "product malfunctions" within the State, *id.* at 1027, the "clear notice" requirement is not met here.

Plaintiff's claims are predicated upon extra-forum, *worldwide* conduct by Defendants and countless others. Even accepting all of Plaintiff's allegations as true, Defendants could not reasonably have had "clear notice" that they would become subject to jurisdiction in this State's courts for the alleged local effects of decades-long global climate change—a complex worldwide phenomenon resulting from the cumulative effects of global greenhouse gas emissions by countless individuals and entities (including Plaintiff itself). Plaintiff's attempt at "[a]rtful pleading" does not

change the fact that this case is about *global* climate change. *City of New York*, 993 F.3d at 91, 97. Such claims inherently concern transboundary and global conduct, thus amounting to "an extraterritorial nuisance action." *Id.* at 91–92, 103.

Defendants had no way to anticipate that, by allegedly processing, marketing, or selling lawful fossil fuel products in Delaware, they could be subjected to retrospective liability for alleged local environmental injuries resulting from the undifferentiated conduct of countless individuals and entities who consumed fossil fuel products around the world. And to the extent Plaintiff's claims are based on *worldwide* activities, Defendants had no way to avoid being subject to personal jurisdiction here—which is significant because a defendant must be able to take steps to avoid jurisdiction for the exercise of jurisdiction to be reasonable and comport with due process. *See Ford Motor*, 141 S. Ct. at 1025 (a defendant must have "fair warning" that its activities could subject it to jurisdiction in a State, which allows the defendant to "structure its primary conduct to lessen or avoid exposure to a given State's courts"); *World-Wide Volkswagen*, 444 U.S. at 297 (the clear notice requirement ensures that a potential defendant could "act to alleviate the risk of burdensome litigation" including by "severing its connection with the State").

The facts here are thus far afield from those in *Ford Motor*, where the Supreme Court held that Ford should reasonably have expected to be sued for *in-forum* injuries resulting directly from *in-forum* use of specific products it sold,

advertised, marketed, and serviced widely *in the forum*. Exercising personal jurisdiction over Defendants in this case would deprive Defendants of the "fair warning" that "a particular activity may subject [them] to the jurisdiction of a foreign sovereign," and thus would not comport with core principles of due process. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotation marks omitted) (alteration in original). Such an unbounded exercise of jurisdiction exceeds the limits of due process.

C. Exercising Personal Jurisdiction Over Defendants Would Be Unreasonable and Conflict With Federalism Principles.

Because Plaintiff has not alleged, and cannot allege, facts that, if true, would show that its claims arise from or relate to each Defendant's alleged contacts with Delaware, the Court need not reach the reasonableness inquiry. Nonetheless, the unreasonableness of exercising jurisdiction here provides an additional, independent reason to dismiss the Complaint. *See, e.g.*, *Ford Motor*, 141 S. Ct. at 1024 (holding that exercise of jurisdiction must be "reasonable, in the context of our federal system of government") (internal citation and quotation marks omitted).

In determining whether jurisdiction is reasonable under the Due Process Clause, courts consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering

fundamental substantive social policies." *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (internal quotations omitted). The primary concern in assessing the reasonableness of personal jurisdiction is the burden of "submitting to the coercive power" of a court in light of the limits of interstate federalism on a court's ability to exercise jurisdiction. *Bristol-Myers Squibb*, 137 S. Ct. at 1780. "[R]estrictions on personal jurisdiction 'are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States.'" *Id.* (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)). Indeed, the Supreme Court has admonished courts to take into consideration the interests of the "several States," and emphasized 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 Ct.*, 480 U.S. 102, 115 (1987) (internal quotation marks omitted).

Furthermore, other fundamental constitutional principles also weigh decisively against the exercise of personal jurisdiction in this case. *First*, exercising specific jurisdiction over these out-of-state Defendants for global climate change-related claims would expand the jurisdiction of this Court well beyond the limits of due process, burdening Defendants by interfering with the power of each Defendant's home jurisdiction over its corporate citizens. It would also enable States to interfere with commercial conduct that occurred entirely outside their own

borders in violation of the "limits of interstate federalism." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. This is not a case where one State has a more "significant interest[]" in addressing climate change. *See Ford Motor*, 141 S. Ct. at 1030.

Plaintiff's position would resurrect the loose approaches to personal jurisdiction that the Supreme Court rejected in *Daimler* and *Bristol-Myers Squibb*, and would make companies targets for climate change suits in every forum in the country based on the barest of activity within the forum, or perhaps even without any activity in the forum at all. As the Supreme Court explained in *Asahi*, a products liability case involving the sale and distribution of tires to California by out-of-state defendants:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State.

480 U.S. at 115. This problem is particularly pronounced with respect to foreign Defendants.[8] Under Plaintiff's theory, *any* foreign company could be forced to

[8] As Plaintiff acknowledges, Defendant BP plc is registered in England and Wales with its principal place of business in London, England, Compl. ¶ 21(a); Defendant Shell plc (f/k/a Royal Dutch Shell plc) is registered in England and Wales, *id.* ¶ 28(a); and Defendant TotalEnergies SE is headquartered in France, *id.* ¶ 30.

appear before *any* court in the United States based on its alleged contribution to global climate change, so long as that company operates within that jurisdiction. Well-settled principles of due process do not permit such a result.

Second, the assertion of jurisdiction here would offend the principles underlying the interstate judicial system because Plaintiff seeks to use Delaware tort law to penalize and regulate Defendants' nationwide (indeed, worldwide) activities, including fossil fuel production and sale—activities heavily regulated by the federal government, all 50 States, and every other country in the world in which these companies operate. As the Second Circuit observed, "a substantial damages award like the one requested by the City would effectively regulate the [energy companies'] behavior far beyond [the State]'s borders." *City of New York*, 993 F.3d at 92. The interests of the "interstate judicial system" are not served by requiring witnesses and counsel to litigate the same climate-change actions simultaneously under different legal rules, especially given the substantial risk of inconsistent decisions.

Third, the "substantive social policies" Plaintiff seeks to advance—curbing energy production and the use of fossil fuels or allocating the downstream costs of consumer use to the energy companies to bear directly—are not shared uniformly across all the various States and nations. Indeed, the Second Circuit recognized that "amicus briefs [filed by States] on both sides of this dispute aptly illustrate[] that this is an interstate matter raising significant federalism concerns." *City of New York*,

993 F.3d at 92; *see also id.* at 93 ("[A]s states will invariably differ in their assessment of the proper balance between these national and international objectives, there is a real risk that subjecting the [energy companies'] global operations to a welter of different states' laws could undermine important federal policy choices."); *Oakland I*, 325 F. Supp. 3d at 1026 ("[P]laintiffs would have a single judge or jury in California impose an abatement fund as a result of such overseas behavior. Because this relief would effectively allow plaintiffs to govern conduct and control energy policy on foreign soil, we must exercise great caution."). Plaintiff's claims here similarly implicate the interests of numerous other States and nations, and thus this Court cannot reasonably exercise jurisdiction over Defendants. *See Asahi*, 480 U.S. at 115–16 (holding in part that the "international context" and "substantive interests of other nations," compared with "the slight interests of the plaintiff and the forum State," rendered the exercise of personal jurisdiction "unreasonable and unfair").

CONCLUSION

For the foregoing reasons, Plaintiff's claims against the out-of-state Defendants should be dismissed in their entirety, with prejudice, for lack of personal jurisdiction.

DATED: May 18, 2023

Respectfully submitted,

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