IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE, *ex rel.* KATHLEEN JENNINGS, Attorney General of the State of Delaware,	)	
Plaintiff,	)	C.A. No. N20C-09-097 MMJ CCLD
v.	)	**TRIAL BY JURY OF 12 DEMANDED**
BP AMERICA INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF'S ANSWERING BRIEF IN OPPOSITION TO DEFENDANT TOTALENERGIES SE'S MOTION TO DISMISS PURSUANT TO 12b2 AND 12b5

OF COUNSEL:

Victor M. Sher
Matthew K. Edling
Stephanie D. Biehl
SHER EDLING LLP
100 Montgomery Street
Suite 1410
San Francisco, CA 94104
(628) 231-2500

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Christian Douglas Wright (#3554)
Director of Impact Litigation
Jameson A.L. Tweedie (#4927)
Ralph K. Durstein III (#912)
Sawyer M. Traver (#6473)
Deputy Attorneys General
820 N. French Street
Wilmington, DE 19801
(302) 683-8899

Attorneys for Plaintiff

Dated: July 3, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

For decades, TotalEnergies[1] knew that the use of fossil fuels would cause global climate change and its attendant harms to people and governments across the globe, including in Delaware. Despite this knowledge, TotalEnergies promoted fossil fuel products while failing to warn of these harms and actively working to deceive the public about them. Now, the State of Delaware faces tremendous costs to cope with rising seas, acidifying oceans, and more.

TotalEnergies argues that this Court lacks personal jurisdiction over it. But the Complaint alleges that TotalEnergies, along with its collaborators, directed its deceptive conduct at the State of Delaware, and TotalEnergies cannot seriously dispute the foreseeable harms it has caused the State.[2] TotalEnergies also claims that service of process was insufficient, but TotalEnergies was properly served—twice—as the State has diligently worked to ensure compliance with the Hague Convention and applicable Delaware law. The Motion to Dismiss should be denied.

STATEMENT OF FACTS

TotalEnergies is an energy company headquartered in France. Compl. ¶ 30(a). Along with other Defendants, TotalEnergies spent decades promoting its

[1] At the time the Complaint was filed, TotalEnergies SE ("TotalEnergies") was called Total S.A.

[2] The State incorporates by reference all arguments it asserts in its Joint Opposition as if fully set forth herein.

fossil fuel products while downplaying, denying, and distracting from fossil fuels' contributions to climate change. *E.g.*, *id.* ¶ 30(g). This campaign "was intended to reach and influence the State, as well as its residents . . . to continue unabated use of Defendants' fossil fuel products." *Id.* Among other things, TotalEnergies was a key member of the American Petroleum Institute ("API"), and TotalEnergies executives served on API's board of directors. *Id.* ¶ 37(e). API spent millions of dollars to promote fossil fuels in Delaware and obscure the link between fossil fuel products and severe climate change impacts. *Id.* ¶¶ 37(c), 198–201. API's deceptive conduct in Delaware includes a Super Bowl commercial, radio and television spots, and online articles and advertisements. *Id.* ¶¶ 198–201.

As a result of this campaign of deception, Delaware is already facing, and will continue to face, the effects of climate change, including "sea level rise and attendant flooding, erosion, and loss of wetlands and beaches in Delaware; increased frequency and intensity of extreme weather events in Delaware, including coastal storms, flooding, drought, extreme heat, extreme precipitation events, and others; ocean warming and acidification; and the cascading social, economic, and other consequences of these environmental changes." *Id.* ¶ 226; *see also id.* ¶¶ 227–33.

On October 14, 2020, the State sent the Complaint and Summons to TotalEnergies' French headquarters by certified mail. Declaration of Christian Douglas Wright ¶ 3, Ex. 1. That package was reported as delivered by the United

States Postal Service ("USPS"). *Id.* For the next two years, TotalEnergies fully participated in this case. After TotalEnergies filed the present Motion, the State sent the Complaint and Summons again to the same location, where it was received and signed. Wright Decl. ¶ 4, Ex. 2.

QUESTIONS INVOLVED

1. Does this Court have personal jurisdiction over TotalEnergies?
2. Is dismissal justified based on "insufficiency of service of process," Super. Ct. Civ. R. 12(b)(5)?

LEGAL STANDARD

The basic contours of personal jurisdiction jurisprudence are well-established. On a motion to dismiss under Superior Court Civil Rule 12(b)(2), "Delaware courts will apply a two-prong analysis to the issue of personal jurisdiction over a nonresident." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 438 (Del. 2005) (citing *LaNuova D & B, S.p.A. v. Bowe Co., Inc.*, 513 A.2d 764, 769 (Del. 1986)). "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)." *Id.* The Long Arm Statute "is to be broadly construed to confer jurisdiction to the maximum extent

possible under the Due Process Clause." *Hercules Inc. v. Leu Tr. & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).

"[W]here, as here, no meaningful discovery has been conducted, [the plaintiff's] burden is a *prima facie* one." *Green Am. Recycling, LLC v. Clean Earth, Inc.*, 2021 WL 2211696, at *3 (Del. Super. June 1, 2021). In other words, the plaintiff is *not* required to "establish personal jurisdiction by a preponderance of the evidence." *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991) (citation omitted). "[A]llegations regarding personal jurisdiction in a complaint are presumed true, unless contradicted by affidavit, and, as with a motion to dismiss under Rule 12(b)(6), the court must construe the record in the light most favorable to the plaintiff." *Hartsel v. Vanguard Grp., Inc.*, 2011 WL 2421003, at *7 (Del. Ch. June 15, 2011), *aff'd*, 38 A.3d 1254 (Del. 2012).

ARGUMENT

I. The Court Has Personal Jurisdiction Over TotalEnergies

A. TotalEnergies' Deceptive Conduct Establishes Minimum Contacts With Delaware

Although Delaware's Long Arm Statute and the federal Constitution's Due Process Clause must both be satisfied for the Court to exercise personal jurisdiction, in practice these two inquiries collapse into one. The Long Arm Statute, 10 *Del. C.* § 3104(c), "has been broadly construed to confer jurisdiction to the maximum extent possible under the due process clause." *LaNuova D & B, S.p.A. v. Bowe Co.*, 513

A.2d 764, 768 (Del. 1986); *accord Hercules Inc. v. Leu Tr. & Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (Del. 1992).

The Due Process Clause permits personal jurisdiction over a "defendant [that] purposefully established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Jurisdiction will attach "if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Burger King*, 471 U.S. at 472 (cleaned up); *accord, e.g., Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S.Ct. 1017, 1024–25 (2021).[3] Because the defendant's activity directed at the state can arise out of *or* relate to the plaintiff's injury, a causal relationship between them is not required. *Ford*, 141 S. Ct. at 1026.

As set forth in the Complaint, TotalEnergies "purposefully directed [its] activities at residents of the forum." *Burger King*, 471 U.S. at 472. TotalEnergies participated in a campaign of deception and denial "in and outside of Delaware," and consistently failed to warn customers, including Delaware customers, of the global warming-related hazards of fossil fuel products. Compl. ¶ 30(g). Its

[3] TotalEnergies quotes a portion of Justice O'Connor's opinion in *Asahi Metal Industry Co. v. Superior Court*—"The placement of a product into the stream of commerce, without more, is not an act the defendant purposefully directed toward the forum State." 480 U.S 102, 112 (1987)—while neglecting to mention that it is not part of the opinion of the Court. Def.'s Mem. of Law ("MOL") at 15.

campaign of deception "was intended to reach and influence the State, as well as its residents . . . to continue unabated use of Defendants' fossil fuel products." *Id.* TotalEnergies has controlled companywide decisions, including those of its subsidiaries, relating to marketing, advertising, climate change, and greenhouse gas emissions from its fossil fuel products, as well as communications strategies concerning climate change and the link between fossil fuel use and climate impacts. *Id.* ¶¶ 30(c), 46(a).

A key hub of TotalEnergies' climate deception efforts was API, which TotalEnergies controlled alongside certain other Defendants. *Id.* ¶ 37. TotalEnergies was a "core API member[]," and TotalEnergies executives served on API's board. *Id.* ¶ 37(e). API directed millions of dollars in advertisements in Delaware. *Id.* ¶¶ 37(c), 198–201. This included, among other things, a 2017 Super Bowl ad, Facebook ads, and online articles. *Id.* ¶¶ 198–201. TotalEnergies and other Defendants that controlled API bankrolled fringe climate scientists, whose research was intended to be distributed to and relied upon when buying Defendants' products, including in Delaware. *Id.* ¶ 131.

TotalEnergies' conduct also "arise[s] out of or relate[s] to" the State's injuries. *Ford*, 141 S. Ct. at 1026. TotalEnergies' representations and omissions in Delaware, in combination with similar or identical conduct elsewhere, contributed to injuries in Delaware. *Id.* ¶¶ 226–33; *see Ford Motor*, 141 S. Ct. at 1031. Both

TotalEnergies' contacts with Delaware and Delaware's claims have a direct connection to TotalEnergies' fossil fuel products, and to its sale, marketing, and promotion of those products. Moreover, the misrepresentations and omissions made by TotalEnergies had a direct impact on the consumption and use of their products, including in Delaware, as well as on Defendants' operations in the state. *See, e.g.*, Compl. ¶¶ 147–60, 226, 232–33. These connections are sufficient to satisfy *Ford*.[4]

B. This Case Falls Within Delaware's Long Arm Statute

As stated above, the Long Arm Statute "has been broadly construed to confer jurisdiction to the maximum extent possible under the due process clause." *LaNuova*, 513 A.2d at 768; *accord Hercules*, 611 A.2d at 480. Because the Due Process Clause is satisfied here, the Long Arm Statute is also satisfied. However, as TotalEnergies devotes substantial space to discussing the Long Arm Statute, the State will briefly address that Statute here.

Under the Long Arm Statute, "a court may exercise personal jurisdiction over any nonresident, or a personal representative, who in person or through an agent: . . .

[4] Due Process also requires that exercising jurisdiction be "reasonable," meaning "[t]he relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there." *Burger King*, 471 U.S. at 292. TotalEnergies does not argue that exercising jurisdiction would be unreasonable, and for good reason: "When a corporate defendant who has purposefully directed its activities at the forum State seeks to defeat jurisdiction, it must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 442 (Del. 2005) (cleaned up).

Causes tortious injury in the State by an act or omission in this State." 10 *Del. C.* § 3104(c)(3). As outlined above, TotalEnergies marketed fossil fuel products inside Delaware and failed to warn about the dangers that those products would cause in Delaware. Compl. ¶¶ 30(c), (g), 46(a). Among other means, TotalEnergies acted through API to mislead the Delaware public, including through the television, radio, internet advertisements, and online articles. *Id.* ¶¶ 37(c), 198–201. These actions caused and related to harms suffered by the State within its borders, from sea level rise to ocean acidification, reduced crop yields, and extreme weather events. *Id.* ¶¶ 147–60, 226–33. Just as these allegations satisfy the Due Process Clause's minimum contacts test, they also satisfy Delaware's Long Arm Statute.

C. Alternatively, TotalEnergies' Conspiracy Establishes Personal Jurisdiction

As explained above, TotalEnergies' actions, in and of themselves, are sufficient to establish a *prima facie* case for personal jurisdiction. In the alternative, personal jurisdiction exists under "the conspiracy theory of jurisdiction." *Istituto Bancario Italiano SpA v. Hunter Eng'g Co.*, 449 A.2d 210, 225 (Del. 1982). Under that theory:

> [A] conspirator who is absent from the forum state is subject to the jurisdiction of the court . . . if the plaintiff can make a factual showing that: (1) a conspiracy to defraud existed;[5] (2) the defendant was a

[5] The conspiracy theory of jurisdiction is not limited to fraud claims. Instead, it can apply to a conspiracy to engage in any tortious conduct—including Defendants'

> member of that conspiracy; (3) a substantial act or substantial 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. The Complaint must allege facts to support each of these five elements,[6] which it does:

1. TotalEnergies and others "conspired to conceal and misrepresent the known dangers of fossil fuels." Compl. ¶ 46(b). For example, API's Global Climate Science Communications Team issued an "Action Plan" with its goal of making "[a]verage citizens 'understand' (recognize) uncertainties in climate science." *Id.* ¶¶ 123–24 & nn.108–09.

---

alleged campaigns of deception, disinformation, and failure to warn of the climatic hazards of their fossil fuel products. *See Harris v. Harris*, 289 A.3d 310, 337–38 (Del. Ch. 2023) ("When defendants conspire to engage in tortious activity, then the Delaware-directed act of any one of the co-conspirators can be attributed to the others for purposes of jurisdiction . . . . Although *Istituto Bancario* literally speaks in terms of a conspiracy to defraud, the principle is not limited to that particular tort." (cleaned up)).

[6] TotalEnergies writes that "Delaware courts require 'factual proof of each enumerated element,'" quoting *Stimwave Technologies Inc. v. Perryman*, 2020 WL 6735700, at *5 (Del. Ch. Nov. 17, 2020). MOL at 12. *Stimwave* makes clear, however, that facts need only be "alleged," and that decision evaluates the facts as alleged in the complaint. 2020 WL 6735700, at *5.

2. TotalEnergies was a member of the conspiracy. *Id.* ¶ 46(b). For example, TotalEnergies was a "core member" of API with its executives serving on API's board. *Id.* ¶ 37(e).
3. Both acts and effects in furtherance of the conspiracy occurred in Delaware. Among other things, API spent millions of dollars to push its climate disinformation in Delaware, *id.* ¶ 37(c), including through specific advertisements described in the Complaint, *id.* ¶¶ 198–201. And the State has and will continue to suffer the results of climate change in Delaware. *Id.* ¶¶ 226–33.
4. TotalEnergies knew that fossil fuel products would result in catastrophic climate change. "The fossil fuel industry has known about the potential warming effects of greenhouse gas emissions since as early as the 1950s." *Id.* ¶ 62; *see also id.* ¶¶ 62–103.
5. Similarly, it was foreseeable that the conspiracy would result in acts and effects in Delaware. For example, TotalEnergies would have known, as an API member, that API's deception campaign would reach Delaware. *Id.* ¶¶ 198–201. And TotalEnergies was well aware that climate change would impact Delaware, especially given the industry's early knowledge that fossil fuel products would lead to sea level rise. *See generally id.* ¶¶ 147–60, 226–33

Thus, either through the actions of TotalEnergies, or through the conspiracy theory, the State has shown a *prima facie* case for personal jurisdiction.

D. TotalEnergies' Affidavit from a New Employee Does Not Cast Doubt on Personal Jurisdiction, and at Most Justifies Jurisdictional Discovery

Though TotalEnergies appears to argue that the State's allegations are insufficient by themselves, *see, e.g.*, MOL at 1 ("Plaintiff fails to allege sufficient facts . . . ."), it also attaches a declaration by Philippe Renard, who has been employed at TotalEnergies for less than a year. Renard Decl. ¶ 3.

The Renard declaration does little to change the analysis. Virtually all statements in the declaration describe TotalEnergies' operations *at present*. They say very little about the past actions of the company. And the few statements about the past have a tenuous relationship with the truth. For example, Renard states, "TotalEnergies was a member of the American Petroleum Institute ("API") from 2001 to 2007. TEMUSA has never been a member of API." *Id.* ¶ 12. But a press release on TotalEnergies' website states that it left *in 2021*—and that it did so because API only "partially aligned" with the company's stated commitment to action on climate change. TotalEnergies, *Total Withdraws from the American Petroleum Institute* (Jan. 15, 2021), https://totalenergies.com/media/news/press-releases/total-withdraws-from-the-american-petroleum-institute.

Similarly, Renard writes, "Neither TotalEnergies nor any of its subsidiaries has committed any acts in Delaware to disseminate (or not to disseminate) scientific information regarding climate change and the use of fossil fuel products related to climate change, including by and through API or any other trade organizations." Renard Decl. ¶ 12. But a research paper published in 2021 (after the Complaint was filed) reveals that TotalEnergies "promoted uncertainty in their own communication and public relations," and "was actively involved" in the International Petroleum Industry Environmental Conservation Association ("IPIECA") and its "strategic production of doubt" about climate change. Christophe Bonneuil et al., *Early Warnings and Emerging Accountability: Total's Responses to Global Warming, 1971–2021*, 71 Glob. Envt'l Change 102386 (2021), https://www.sciencedirect.com/science/article/pii/S0959378021001655.[7] In 1988, TotalEnergies even hosted an IPEICA meeting at Total's Paris headquarters, where the IPIECA formed a working group that would become instrumental in climate denial throughout the United States, including in Delaware. *Id.*

Thus, Renard's declaration does nothing to cast doubt on TotalEnergies' contacts with the State of Delaware. To the extent that the Court finds that the facts above are insufficient, however, the State respectfully requests an opportunity to

[7] On its website, TotalEnergies acknowledges its ongoing membership in IPIECA. TotalEnergies, *IPIECA*, https://totalenergies.com/sustainability/reports-and-indicators/reporting-standards/ipieca (last visited June 16, 2023).

conduct jurisdictional discovery. A plaintiff, "may not ordinarily be precluded from reasonable discovery in aid of mounting" proof in support of personal jurisdiction. *Hart Holding Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 539 (Del. Ch. 1991) (citation omitted). "Only where the facts alleged in the complaint make any claim of personal jurisdiction over defendant frivolous, might the trial court, in the exercise of its discretionary control over the discovery process, preclude reasonable discovery in aid of establishing personal jurisdiction." *Id.* The State meets this low bar by alleging TotalEnergies' (and API's) campaign of deception that reached Delaware. If granted, the State would seek discovery in order to better establish (1) TotalEnergies' promotional activity in Delaware, including through third parties such as API and IPIECA; (2) TotalEnergies' knowledge that its communications, including through third parties, would reach Delaware; (3) TotalEnergies' knowledge of climate change impacts resulting from fossil fuel products, including in Delaware; and (4) any other area on which the Court might find the State's allegations lacking.

II. TotalEnergies Was Properly Served

TotalEnergies also seeks dismissal based on "insufficiency of service of process." Super. Ct. Civ. R. 12(b)(5). TotalEnergies has actually been served twice. On October 14, 2020, the State sent, by certified mail, copies of the Complaint and Summons to TotalEnergies' office in France, with its general counsel listed on the

attention line. Wright Decl. ¶ 3, Ex. 1. According to USPS, the "item was delivered in FRANCE at 1:00 pm on October 28, 2020." *Id.* TotalEnergies then litigated this case for two years, joining in the notice of removal to federal court, arguing against remand to state court in the first instance and on appeal, and seeking multiple stays of the action.[8]

In October 2022, counsel for Total Defendants[9] informed the State that it had no record of TotalEnergies being served. On October 28, 2022, the State provided TotalEnergies with an affidavit of service and the USPS tracking document showing that the Complaint and Summons were delivered. Wright Decl. ¶ 3. In a December 21, 2022 letter, Total's counsel stated the USPS notification lacked "any specific information to show who may have been served." Mot. Ex. B. TotalEnergies has not identified any legal authority requiring this "specific information." TotalEnergies filed the present Motion, raising the service issue, on May 18, 2023. Out of an abundance of caution, the State then mailed another copy of the Complaint and Summons on May 24, 2023, to the same office in France where it had sent the

[8] TotalEnergies actually participated in the litigation before service was completed. *See* Notice of Joinder to Notice of Removal, *State of Delaware v. BP Am. Inc.*, No. 1:20-cv-01429-LPS (D. Del.) (ECF No. 18).

[9] Total Defendants share counsel in this case, though they maintain that they are "separate legal entit[ies] and . . . operated as such." Renard Decl. ¶ 9.

first package. Wright Decl. ¶ 4. That second package was delivered on May 30, 2023, at 10:47, and was signed for by "M. CHRISTOPHE." *Id.* Ex. 2.

Both instances of service are sufficient. TotalEnergies attacks the first because Delaware law requires that "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), and TotalEnergies contends that "Plaintiff cannot meet [that] burden." MOL at 17.

As an initial matter, TotalEnergies ignores that the Hague Service Convention applies in cases of international service. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Apr. 24, 1967, 20 U.S.T. 361. "[T]he Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies," *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988), and "exclude[s] all other existing practices," *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 535 & n.15 (1987) (dicta). Article 10(a) of the Convention states, "Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." 20 U.S.T. 361. Thus, the Hague Convention permits service by mail if "the receiving state has not objected to service by mail" and "service by mail is authorized under otherwise-applicable law." *Water Splash, Inc.*

v. Menon, 581 U.S. 271, 284 (2017). Both requirements are met here. France has not objected to mail service. *Rsch. Sys. Corp. v. IPSOS Publicité*, 276 F.3d 914, 926 (7th Cir. 2002). And Delaware law authorizes mail service. *See generally* 10 *Del. C.* § 3104.

TotalEnergies may argue that—notwithstanding the preemptive sweep of the Hague Convention—all procedural requirements for service under Delaware law continue to apply. Even if that were correct, the State's initial service complied with 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) (emphasis added). That "other evidence" can take many forms. *See Maldonado v. Matthews*, 2010 WL 663723, at *4 (Del. Super. Ct. Feb. 23, 2010) (accepting evidence of a voicemail from person claiming to be the defendant stating that she had received service); *Bromhall v. Rorvik*, 478 F. Supp. 361, 364 (E.D. Pa. 1979) (under analogous Pennsylvania statute, accepting evidence that certified mail was returned as "refused"). Here, there is such "other evidence"—a receipt from USPS stating that the Complaint and Summons were delivered on October 28, 2020. Mot. Ex. 1.[10] In

[10] TotalEnergies suggests that the phrase used by USPS—"Your item was delivered in FRANCE at 1:00 pm on October 28, 2020."—is insufficient because it lacks a specific address. MOL at 18. But the package was addressed to TotalEnergies' office. Wright Decl. ¶ 3 & Ex. 1. It would be exceptionally odd if "delivered in FRANCE" meant delivery to somewhere other than the designated address.

fact, the only evidence that the Complaint and Summons were *not* delivered is the declaration of a person who did not work at TotalEnergies at the time. Renard Decl. ¶¶ 3, 13.

The State similarly complied with Section 3104(d)(3), which allows for service "[b]y any form of mail addressed to the person to be served and requiring a signed receipt." 10 *Del. C.* § 3104(d)(3). Service was made by certified mail, Wright Decl. ¶ 3 & Ex. 1, which "provides the sender with a mailing receipt and electronic verification that an article was delivered." USPS, *What Is Certified Mail?* (May 26, 2021), https://faq.usps.com/s/article/What-is-Certified-Mail.

The second instance of service was also sufficient. This time, an individual at TotalEnergies' office undisputedly signed for receipt of the Complaint and Summons. Wright Decl. ¶ 4 & Ex. 2. TotalEnergies fails to mention this instance of service in its Motion but suggests that such service was untimely. *See* MOL at 17. Rule 4(j) requires service either "within 120 days after the filing of the complaint," or on a showing of "good cause why such service was not made within that period." Super. Ct. Civ. R. 4(j). Good cause means "excusable neglect," that is, "a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the time specified in the rules." *Dolan v. Williams*, 707 A.2d 34, 36 (Del. 1998) (cleaned up).

The State easily meets the "good cause" standard. The State timely initiated service and was notified by USPS that the Summons and Complaint had been delivered at TotalEnergies' address. As stated above, the State contends that service complied with applicable law in all respects. Following service, TotalEnergies participated in the lawsuit without arguing that service was insufficient. During this two-year period, the State had no reason to think that there was any problem with its service, especially because insufficient service is a waivable defense. Super. Ct. Civ. R. 12(h)(1); *MidFirst Bank v. Mullane*, 2022 WL 4460810, at *1, *7 (Del. Super. Ct. Sept. 26, 2022) (finding good cause where plaintiff placed "apparent good-faith but mistaken reliance on the return receipts provided by USPS," during the COVID-19 pandemic where USPS "modified its policy regarding return receipts for certified mail"); *cf. Dolan*, 707 A.2d at 36–37 (good cause shown where plaintiff initiated service within 120-day time period but failed to check with Prothonotary's office that service had been completed). After TotalEnergies contested the sufficiency of service, the State provided an affidavit demonstrating that service was completed. When TotalEnergies raised service for the first time before the Court, the State served TotalEnergies a second time. The State "has made active efforts to comply with the rules of the court," and has met the good cause standard. *Lotcha v. D.O.W. Fin. Corp.*, 1999 WL 1847335, at *2 (Del. Com. Pl. Mar. 29, 1999).

Moreover, recognizing the second service as valid would lead to the same outcome that TotalEnergies seeks. TotalEnergies moves to dismiss for insufficient service of process. MOL at 19. Such a dismissal would be without prejudice, Super. Ct. Civ. R. 4(j), so after dismissal the State would file a new complaint, serve TotalEnergies once again, and seek consolidation. This would put affairs in the same place as they would be if the Court simply recognized the second service as sufficient. When two routes lead to the same place, the Court should choose the less circuitous one. Super. Ct. Civ. R. 1 ("These Rules . . . shall be construed, administered, and employed by the Court and the parties, to secure the just, speedy and inexpensive determination of every proceeding.").

CONCLUSION

TotalEnergies' decades-long campaign of deception, alone and with others, was directed at the State of Delaware and has caused harm here. And TotalEnergies was properly served on two occasions. For the foregoing reasons, the Motion to Dismiss should be denied; in the alternative, the Court should grant jurisdictional discovery.

Respectfully submitted,

DELAWARE DEPARTMENT OF JUSTICE

/s/ Christian Douglas Wright
Christian Douglas Wright (#3554)
Director of Impact Litigation

OF COUNSEL:

Victor M. Sher
Matthew K. Edling
Stephanie D. Biehl

Martin D. Quiñones
Katie H. Jones
Paul Stephan
SHER EDLING LLP
100 Montgomery Street
Suite 1410
San Francisco, CA 94104
(628) 231-2500

Dated: July 3, 2023

Jameson A.L. Tweedie (#4927)
Ralph K. Durstein III (#912)
Sawyer M. Traver (#6473)
Deputy Attorneys General
820 N. French Street
Wilmington, DE 19801
(302) 683-8899

Attorneys for Plaintiff State of Delaware, ex rel. *Kathleen Jennings, Attorney General of the State of Delaware*

WORDS: 4,499