**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

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

**TOTALENERGIES SE'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND INSUFFICIENT SERVICE OF PROCESS**

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## INTRODUCTION

The State of Delaware ("Plaintiff") seeks to hale nonresident defendant TotalEnergies SE ("TotalEnergies") into this Court based on bare and conclusory allegations that TotalEnergies participated in a nationwide conspiracy through the American Petroleum Institute ("API"), that reached Delaware. Plaintiff's arguments in response to TotalEnergies' Motion to Dismiss ("Motion") miss the mark. ***First***, because Plaintiff fails to meet its burden to demonstrate any statutory basis that supports personal jurisdiction, the Court need not proceed with a Due Process analysis.[1] ***Second***, Plaintiff does not present any good cause for why it did not properly serve TotalEnergies within the required 120-day period, and proper service is a jurisdictional prerequisite.

## ARGUMENT

### I. PLAINTIFF CANNOT MEET ITS BURDEN TO SHOW ANY STATUTORY BASIS FOR JURISDICTION

To meet its burden of demonstrating a basis for this Court's exercise of jurisdiction over TotalEnergies, Plaintiff relies on Section 3104(c)(3) and the conspiracy theory of jurisdiction. Plaintiff's failure to show that TotalEnergies' conduct falls under Delaware's long-arm statute, however, is fatal.

[1] Plaintiff fails to meet the Due Process test for all the reasons stated in TotalEnergies' Opening Brief [Dkt. 267] and the Joint Opening Brief [Dkt. 259].

### A. Plaintiff Fails to Show Delaware's Long-Arm Statute Confers Jurisdiction

Delaware courts must apply an "independent" two-test analysis "unlike other jurisdictions which combine the two tests." *Wright v. Am. Home Prods. Corp.*, 768 A.2d 518, 527 (Del. Super. Ct. 2000) ("That 'independence' has been interpreted to mean that there must ***first*** be an analysis under the long arm statute and ***then*** a Due Process analysis.") (emphases added). Plaintiff asserts that "in practice these two inquiries collapse into one." Plaintiff's Opposition ("Opp.") at 4. Plaintiff thus argues that "[b]ecause the Due Process Clause is satisfied here, the Long Arm Statute is also satisfied." *Id.* at 7. But Plaintiff is mistaken.

Plaintiff's failure to make a specific showing that TotalEnergies' alleged conduct falls under Delaware's long-arm statute is reason alone to grant TotalEnergies' Motion. *See 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."); *see also Munoz v. Vazquez-Cifuentez*, 2019 WL 669935, at *2 (Del. Super. Ct. Feb. 18, 2019) (Plaintiff's burden "is met by a threshold *prima facie* showing that jurisdiction is conferred by statute."). Because Plaintiff fails to show a statutory basis, the Court need not engage in a Due Process analysis. *Ciabattoni v. Teamsters Local 326*, 2020 WL 707642, at *2 (Del. Super. Ct. Feb. 12, 2020) ("This Court does not address the constitutional prong of

the analysis where Plaintiff has failed to demonstrate that personal jurisdiction exists under Delaware's long-arm statute.").

Plaintiff's sole statutory basis for jurisdiction is that TotalEnergies allegedly "cause[d] tortious injury in [Delaware] by an act or omission in [Delaware]." 10 *Del. C.* § 3104(c)(3); Opp. at 8. Plaintiff ultimately fails to make a *prima facie* showing that TotalEnergies engaged in any tortious act or omission ***in Delaware***, either on its own or through an alleged co-conspirator. *See Joint Stock Soc'y v. Heublein, Inc.*, 936 F.Supp. 177, 194 (D. Del. 1996) ("[T]he court cannot ignore the strict language of Delaware's long-arm statute requiring that the defendant perform a tortious act 'in Delaware.'").

Plaintiff broadly alleges that "TotalEnergies marketed fossil fuel products inside Delaware and failed to warn about the dangers that those products would cause in Delaware."[2] Opp. at 8. However, TotalEnergies is a holding company that does not conduct business or purposefully attempt to solicit business in Delaware. Renard Declaration ¶ 5. TotalEnergies has not "committed any acts in Delaware to disseminate (or not to disseminate) scientific information regarding climate change

[2] Plaintiff fails to meet its burden of establishing jurisdiction through an agency theory and indeed fails to rebut TotalEnergies' argument that TEMUSA is not its agent. Thus, any Delaware contacts by TEMUSA cannot be attributed to TotalEnergies for jurisdictional purposes. *See also Grynberg v. Total Compagnie Francaise Des Petroles*, 2012 WL 4105089 (D. Del. Sep. 18, 2012).

and the use of fossil fuel products related to climate change." *Id.* ¶ 12. Plaintiff's allegations are not only conclusory and non-specific, but also plainly contradicted by TotalEnergies' affidavit. *See Hartsel v. Vanguard Group, Inc.*, 2011 WL 2421003, at *7 (Del. Ch. June 15, 2011) ("[A]llegations regarding personal jurisdiction in a complaint are presumed true, unless contradicted by affidavit…").

### 1. Plaintiff Fails to Allege Any Act or Omission in Delaware to Satisfy a Finding of Conspiracy Jurisdiction Under Section 3104(c)(3)

Plaintiff inappropriately relies on a conspiracy theory of jurisdiction as an alternative to showing that this Court has jurisdiction under Delaware's long-arm statute. But "the conspiracy theory itself is not an independent basis for jurisdiction that alleviates the need to establish a statutory hook to support service under Section 3104." *Harris v. Harris*, 289 A.3d 310, 338-39 (Del. Ch. 2023). The conspiracy theory "merely provides a framework with which to analyze [TotalEnergies'] contacts with Delaware." *Hercules Inc. v. Leu Tr. & Banking (Bahamas) Ltd.*, 611 A.2d 476, 482 n.6 (Del. 1992). Accordingly, the test for conspiracy jurisdiction is "construed narrowly" to avoid "the risk of expanding jurisdiction to encompass defendants who would otherwise be beyond the reach of the forum." *Lacey v. Mota-Velasco*, 2020 WL 5902590, at *6 (Del. Ch. Oct. 6, 2020).

Plaintiff fails to assert "specific facts"—"not conclusory allegations"—in support of ***each*** of the five *Istituto* factors required for conspiracy jurisdiction.

*Hartsel*, 2011 WL 2421003, at *10.[3] With respect to the first *Istituto* factor, Plaintiff asserts that a conspiracy "to conceal and misrepresent the known dangers of fossil fuels" exists between API and its members.[4] Opp. at 9. In essence, Plaintiff seeks to have this Court conclude that mere membership in a trade association is sufficient to establish the "meeting of the minds" requisite to showing a conspiracy.[5] Plaintiff does not make any specific allegations regarding API and its members' decision-making, including when the alleged co-conspirators agreed to a course of action, or even when the alleged co-conspirators decided on an object to be accomplished, much less any allegations specific to TotalEnergies' consent to such an agreement.

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[3] Plaintiff must "make a factual showing that: (1) a conspiracy to defraud existed; (2) the defendant was a 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." *Istituto Bancario Italiano SpA v. Hunter Eng'g Co*., 449 A.2d 210, 225 (Del. 1982).

[4] For the first time, Plaintiff cites a 2021 research paper to assert that TotalEnergies is a member of the International Petroleum Industry Environmental Conservation Association ("IPIECA"). Opp. at 12. This new allegation is not only absent from the operative Complaint, but it is also inapposite because Plaintiff fails to assert any specific facts tying IPIECA membership to a tortious act or omission "in Delaware" that would satisfy Section 3104(c)(3).

[5] A plaintiff properly alleges a conspiracy by asserting the existence of: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds between or among such persons relating to the object or course of action; (4) one or more unlawful acts; and (5) damages as a proximate result thereof." *Altabef v. Neugarten*, 2021 WL 5919459, at *8 (Del. Ch. Dec. 15, 2021).

As to the second *Istituto* factor, Plaintiff's allegations regarding TotalEnergies' API membership are insufficient to show that TotalEnergies was a conspiracy member. Plaintiff's allegation that TotalEnergies was a "core API member[] at times relevant to this litigation" is conclusory. Cmplt. ¶ 37(e). TotalEnergies was only an API member from 2001 to 2007.[6] Renard Decl. ¶ 12. Plaintiff fails to include any specific allegations regarding TotalEnergies' API participation during this limited period, or any specific allegations regarding when or how TotalEnergies was a "core member." Opp. at 10. Plaintiff further fails to establish that this Court should attribute API membership by TotalEnergies' subsidiaries or affiliates to TotalEnergies.

Critically, Plaintiff wholly fails to allege the third *Istituto* factor, and thus its sole statutory basis for jurisdiction over TotalEnergies.[7] Section 3104(c)(3) requires that "one of the conspirators caused tortious injury in Delaware by an act in [Delaware]." *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 815 (Del. Ch. 2009). Even under a conspiracy theory, Plaintiff must still specifically allege "an anchoring Delaware act." *Altabef*, 2021 WL 5919459, at *8. Plaintiff, however, fails to

[6] The press release cited by Plaintiff explicitly states that the term "Total" is "generic" and "used solely for the sake of convenience," and it "cannot be construed as having any legal effect." Opp. at 11.

[7] Because Plaintiff fails to allege a "substantial act or substantial effect" in Delaware, Plaintiff also fails to satisfy the fourth and fifth *Istituto* factors. *See supra* note 3.

identify any "Delaware-directed [tortious] act of any one of the co-conspirators [that] can be attributed to [TotalEnergies] for purposes of jurisdiction under the Long-Arm Statute." *Harris*, 289 A.3d at 337-38.

Plaintiff argues that API's national advertisements constitute a substantial act or effect in Delaware. Opp. at 10. Plaintiff asserts that "[m]any of API's television, radio, and internet advertisements, including those directed at Delaware consumers, lead to a website run by API[.]" Cmplt. ¶ 200. But "[w]hen considering whether the defendant acted in the forum state, courts ... require 'something more' from the defendant than 'the knowledge that their website could be viewed or that their product could be used in the forum state.'" *Rotblut v. Terrapinn, Inc.*, 2016 WL 5539884, at *5 (Del. Super. Ct. Sep. 30, 2016) (citation omitted). Plaintiff does not allege that API "targeted the contents of its website toward Delaware in a way to purposefully avail itself of doing business with Delaware specifically, rather than North America generally." *Rotblut*, 2016 WL 5539884, at *6. Plaintiff also does not allege that API targeted any of its advertisements to Delaware specifically. Plaintiff thus fails to allege ***anything more*** than a national advertising campaign that may have reached Delaware and the other 49 states.

At best, all Plaintiff alleges "is that there was a conspiracy, parts of which took place in Delaware, and that [Fossil Fuel] Defendants were a part of the conspiracy," and this Court should decline to exercise jurisdiction over

TotalEnergies "in such an expansive and seemingly tenuous manner" under Section 3104(c)(3). *Aeroglobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 2003 WL 77007, at *5 (Del. Super. Ct. Jan. 6, 2003); Cmplt. ¶¶ 36-37.

### B. Plaintiff is Not Entitled to Discovery Because Plaintiff Fails to Establish a Plausible Basis for Personal Jurisdiction

Both Plaintiff's Complaint and Opposition fail to assert "factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts" by TotalEnergies to Delaware that would warrant jurisdictional discovery.[8] *Green Am. Recycling, LLC v. Clean Earth, Inc.*, 2021 WL 2211696, at *6 (Del. Super. Ct. June 1, 2021). Plaintiff's grounds for personal jurisdiction thus "lack[] [the] minimal level of plausibility needed to permit discovery to go forward." *Hart Holding v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 540 (Del. Ch. 1991). While "[t]his standard is quite low," Plaintiff's discovery request in this case should be denied because "it is only based upon bare, attenuated, [and] unsupported assertions of personal jurisdiction." *Degregorio v. Marriott Int'l, Inc.*, 2018 WL 3096627, at *9 (Del. Super. Ct. June 20, 2018).

Plaintiff ultimately fails to assert "a non-frivolous nexus connecting [TotalEnergies] to Delaware." *Green Am. Recycling,* 2021 WL 2211696, at *6. The

[8] *See also Grynberg*, 2012 WL 4105089, at *4 (denying jurisdictional discovery where "[t]he Complaint falls short of making factual allegations suggesting with reasonable particularity the existence of contacts between Total and Delaware.").

term "non-frivolous" requires that Plaintiff's "proffered jurisdictional tie" have a legal or factual basis; otherwise, "jurisdictional discovery on it will be denied as futile." *Id*. Here, Plaintiff's sole proffered tie is that "TotalEnergies' (and API's) campaign of deception [] reached Delaware." Opp. at 13.

Not only does Plaintiff fail to establish a legal basis under Delaware's long-arm statute, but Plaintiff's factual basis is also plainly contradicted by TotalEnergies' affidavit. While Plaintiff notes that Mr. Renard "has been employed at TotalEnergies for less than a year," the facts stated in the affidavit are based upon both his personal knowledge and "review of pertinent corporate records." Opp. at 11; Renard Declaration ¶ 1. Plaintiff's last-ditch attempts to undermine TotalEnergies' affidavit by distorting a press release and asserting new allegations do not hold water. *See supra* notes 4, 6.

Plaintiff further seeks unreasonably broad discovery, including regarding TotalEnergies' activities through third parties and outside of Delaware. Yet Plaintiff "does not explain how [such] discovery would provide the 'something more' needed to establish personal jurisdiction" over TotalEnergies. *CLP Toxicology, Inc. v. Casla Bio Holdings LLC*, 2020 WL 3564622, at *15 (Del. Ch. June 29, 2020) (granting dismissal where plaintiff failed to demonstrate a non-frivolous ground for jurisdiction). Plaintiff's discovery request should thus be denied.

## II. PLAINTIFF LACKS GOOD CAUSE FOR ITS INEFFECTIVE SERVICE UPON TOTALENERGIES

Plaintiff attempted to serve TotalEnergies by mail under Article 10(a) of the Hague Convention, but, here too, fails to meet the requirements of the Delaware's long-arm statute.[9] *See Sustainable Energy Generation Grp., LLC v. Photon Energy Projects B.V.*, 2014 WL 2433096, at *11 (Del. Ch. May 30, 2014) ("Delaware case law holds that where the requirements for service of process under the Delaware long arm statute are satisfied, then so, too, are the service requirements under the Convention."); *see also Wright*, 768 A.2d at 526 (Del. Super. Ct. 2000) (holding that service by mail was effective where plaintiffs "complied with the long arm statute and the Hague Service Convention").[10]

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[9] Plaintiff's reliance on *Water Splash, Inc. v. Menon*, 581 U.S. 271 (2017) is misplaced. *Water Splash* is the first Supreme Court case to hold that the Convention allows service by mail, but it leaves the issue of "whether Texas law authorizes the methods of service ***used by Water Splash***" to be considered on remand. *Id.* at 284. (emphasis added). Plaintiff cannot simply avoid Section 3104's requirements by asserting that Delaware law authorizes mail service—its service must also meet the requirements of Delaware law. *See* Opp. at 16.

[10] Plaintiff fails to note, as the *Wright* Court observes, that in *Volkswagenwerk* "service by mail was not even an issue." *Id.* at 525; *see* Opp. at 15 (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988)).

Plaintiff wholly miscites *Societe Nationale Industrielle Aérospatiale. v. U.S. Dist. Court*, 482 U.S. 522, 534 (1987), which reads: "The [Convention] preamble does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices." *See* Opp. at 15.

On October 28, 2020—the date the mail was purportedly delivered—French President Emmanuel Macron reimposed a nationwide lockdown due to a severe COVID-19 outbreak.[11] Opp., Ex. 1. Under these circumstances, the fact that TotalEnergies has no record of receipt and that Plaintiff failed to obtain a signed receipt or any "evidence of personal delivery" under Section 3104 is significant. Renard Decl. ¶ 13.

While "this Court has discretion to allow service beyond the 120-day limit for good cause," Plaintiff fails to assert any good cause for failing to serve TotalEnergies under Superior Court Civil Rule 4(j). *Anticaglia v. Benge*, 2000 WL 145822, at *2 (Del. Super. Ct. Jan. 20, 2000) (granting dismissal where plaintiffs missed the 120-day deadline by several months). "A finding of good cause or excusable neglect certainly requires some attempt to perfect service after the first attempt at service failed." *Id*. at *3. Indeed, Plaintiff's belated attempt to perfect service in response to this Motion is telling of Plaintiff's lack of good cause or excusable neglect. But this second attempt is well after the 120-day period for service of process has passed, and such "delay[] resulting from half-hearted efforts by counsel to perfect service do[es] not" demonstrate excusable neglect. *Id.* at *2.

[11] *See* Reuters, *French President Macron announces new lockdown to curb COVID-19* (Oct. 28, 2020), https://www.reuters.com/article/us-health-coronavirus-france-highlights/french-president-macron-announces-new-lockdown-to-curb-covid-19-idUSKBN27D30R.

Plaintiff had ample time to seek an enlargement well before this Motion was filed—from the time it received the tracking information (which on its face fails to comply with Section 3104) to when TotalEnergies informed Plaintiff in October 2022 that it had no record of TotalEnergies being served, and nearly five months following TotalEnergies' notice of its intent to raise insufficient service on December 21, 2022. Opp. at 14. Notwithstanding, Plaintiff waited to attempt to perfect service until after TotalEnergies filed its Motion, without seeking leave of this Court. *See DeSantis v. Chilkotowsky,* 877 A.2d 52 (Del. 2005) (affirming trial court's dismissal where, among other things, plaintiff failed to request an enlargement of time to perfect service).

Under Delaware law, "[p]laintiffs carry the burden of demonstrating service of process or waiver of that requirement." *Julsaint v. Ramos*, 2017 WL 4457211, at *3 (Del. Super. Ct. Oct. 4, 2017) (finding that plaintiffs' impression that improper service was waived by defense counsel's appearance and participation in both a court-requested scheduling conference and discovery does not constitute good cause). Plaintiff "cannot rely on the prejudice [it] will suffer if [its] claims are dismissed as a substitute for good cause, nor can [] [P]laintiff rely on lack of prejudice to [TotalEnergies]." *Sidberry v. GEICO Advantage Ins. Co.*, 2019 WL 6318176, at *2 (Del. Super. Ct. Nov. 20, 2019). Plaintiff's assertion that if TotalEnergies were dismissed, it would file a new complaint and seek to properly

serve TotalEnergies also bears no weight on this Court's good cause analysis. Opp. at 19. Plaintiff has failed to meet its burden, and TotalEnergies should be dismissed.

## CONCLUSION

For the reasons stated above, TotalEnergies SE respectfully requests the Court dismiss the claims against TotalEnergies SE.


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Dated: August 17, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that on August 17, 2023, true and correct copies of *Defendant TotalEnergies SE's Reply Brief in Further Support of its Motion to Dismiss for Lack of Personal Jurisdiction and Insufficient Service of Process* were served via File & Serve*Xpress* upon all counsel of record.

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