IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

EASTMAN CHEMICAL COMPANY, Plaintiff, v. ALPHAPET INC., INDORAMA HOLDINGS ROTTERDAM B.V., INDORAMA POLYMERS ROTTERDAM B.V., INDORAMA POLYMERS WORKINGTON LTD., and INDORAMA POLYMERS PCL, Defendants.	)	Civ. Action No. 09-971-LPS-CJB

MEMORANDUM OPINION

In this action, Plaintiff Eastman Chemical Company ("Eastman" or "Plaintiff") has filed an Amended Complaint alleging patent infringement (Count One) against Defendants AlphaPet, Inc. ("AlphaPet") and Indorama Polymers PCL ("IRP"). (D.I. 15) The Amended Complaint also alleges breach of contract (Count Two) against IRP and additional Defendants Indorama Holdings Rotterdam B.V. ("IHR"), Indorama Polymers Rotterdam B.V. ("IPR") and Indorama Polymers Workington Ltd. ("IPW"), and alleges trade secret misappropriation (Count Three) against all Defendants.

In lieu of answering the Amended Complaint, which was filed on March 31, 2010, Defendants collectively moved to dismiss the breach of contract claim and the trade secret misappropriation claim under Fed. R. Civ. P. 12(b)(6) ("the 12(b)(6) motion"), and Defendant IRP moved under Fed. R. Civ. P. 12(b)(2) for dismissal of all claims against it for lack of personal jurisdiction ("the 12(b)(2) motion"). (D.I. 19) Plaintiff timely opposed the 12(b)(6)

motion (D.I. 31), but rather than filing a brief in opposition to the 12(b)(2) motion, Plaintiff filed a Motion Seeking Jurisdictional Discovery of Defendants ("motion for jurisdictional discovery") (D.I. 27). Defendants timely opposed Plaintiff's motion for jurisdictional discovery.[1] While these motions were pending, Plaintiff filed a separate motion under Fed. R. Civ. P. 17 and 25(c) seeking to substitute Grupo Petrotemex, S.A. de C.V. ("Petrotemex") and DAK Americas LLC ("DAK") with Eastman as plaintiffs with respect to all claims in this action ("the motion for substitution"). (D.I. 55) The Court heard oral argument on the three fully-briefed motions on October 12, 2011. (D.I. 71)

This Memorandum Opinion addresses Plaintiff's motion for jurisdictional discovery.[2] For the reasons discussed below, I GRANT-IN-PART Plaintiff's motion for jurisdictional discovery, with the scope of any jurisdictional discovery limited to the topics outlined in the accompanying Order.

I. BACKGROUND

A. The Parties

Plaintiff is a Delaware corporation with its principal place of business in Tennessee. (D.I. 15 at ¶ 2) Defendant AlphaPet is also a Delaware corporation with its principal place of business in Alabama. (*Id.* at ¶ 3) Defendants IHR and IPR are Dutch corporations with their principal

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[1] The Court received and carefully considered a total of five briefs addressing Plaintiff's motion for jurisdictional discovery. (D.I. 28, 36, 42, 44, & 46)

[2] The Court addresses Defendants' 12(b)(6) motion in a separate Report & Recommendation. The parties indicated at oral argument that it appeared they had reached agreement on the issues addressed in the motion for substitution. The parties stated that they anticipated filing a stipulation with the Court to this effect very soon. (D.I. 71 at 16–18) The Court will therefore await the filing of this stipulation in lieu of ruling on the motion for substitution at this time.

place of business in the Netherlands. (*Id.* at ¶¶ 4–5) Defendant IPW is a UK corporation with its principal place of business in England. (*Id.* at ¶ 6) Defendant IRP is a Thai corporation with its principal place of business in Thailand. (*Id.* at ¶ 7) IRP is the parent corporation of AlphaPet, IPR, and IPW. (*Id.* at ¶ 26) Defendants are all directly or indirectly related corporations whose business includes, *inter alia*, the manufacture and development of polyethylene terephthalate ("PET") products. (*Id.* at ¶¶ 30-36) PET is a type of polyester polymer resin commonly used in plastic beverage containers. (D.I. 28 at 1)

B. The Technology License Agreement

On March 31, 2008, IHR, IPR, and IPW entered into a Technology License Agreement ("TLA") with Plaintiff. (D.I. 15 at ¶ 13) The TLA was executed "in connection with [Plaintiff's] divestment of its North-West European PET and Purified Terephthalic Acid Business assets under a Master Business Sale Agreement" ("the MBSA"), and conferred, *inter alia*, certain intellectual property rights to Plaintiff's PET technology. (*Id.*) The TLA includes a forum selection clause providing that any suits [redacted] (D.I. 8, ex. B at § 13.3)

C. Plaintiff's Allegations

Pursuant to the TLA, certain of Plaintiff's employees left Eastman and became employees of IHR, IPR, and IPW. (D.I. 15 at ¶ 15) Plaintiff alleges that, at the behest of one or more Defendants, these former Eastman employees traveled in mid-2009 from Europe to Decatur, Alabama, to assist in the design and start-up of AlphaPet's melt-to-resin PET manufacturing

plant. (*Id.* at ¶ 37) According to Plaintiff, during the design, start-up, or operation of AlphaPet's melt-to-resin PET manufacturing process, those "former employees or other former Eastman employees" improperly disclosed trade secrets and other confidential information not licensed in the TLA—including information related to Eastman's IntegRex™ PET technology—to AlphaPet and IRP. (*Id.* at ¶ 39) Plaintiff alleges that these actions breach the express and implied terms of the TLA, thus giving rise to Plaintiff's claims for breach of contract and trade secret misappropriation. (*Id.* at ¶¶ 54–69, Counts II & III) In addition, Plaintiff contends that IRP and AlphaPet's manufacturing and commercial activities in the PET market infringe three of Plaintiff's patents.[3] (*Id.* at ¶¶ 49–53, Count I)

II. STANDARD OF REVIEW

A. Standard for Jurisdictional Discovery

As a general matter, "jurisdictional discovery should be allowed unless the plaintiff's claim [of personal jurisdiction] is 'clearly frivolous.'" *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1042 (3d Cir. 1997) (internal citations omitted) (hereinafter "*Andover*"); *accord Toys 'R' Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) ("Although the plaintiff bears the burden of demonstrating facts that support personal jurisdiction . . . courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claim is 'clearly frivolous.'") (internal citations omitted).[4] Thus, the question of whether to allow

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[3] Plaintiff asserts direct and indirect infringement of U.S. Patent Nos. 6,906,164 ("the '164 patent"); 7,358,322 ("the '322 patent"); and 7,459,113 ("the '113 patent"). Plaintiff's motion for substitution indicates that the infringement claims based on the '322 and '113 patents will likely soon be withdrawn. (D.I. 55 at 3)

[4] Although Federal Circuit law governs issues unique to patent law, the law of the Third Circuit governs whether jurisdictional discovery should be permitted. *Autogenomics, Inc.*

jurisdictional discovery turns on the related question of whether Plaintiff's claim of personal jurisdiction over IRP is "clearly frivolous."

Any such consideration "begins with the presumption in favor of allowing discovery to establish personal jurisdiction." *Hansen v. Neumueller GmbH*, 163 F.R.D. 471, 474 (D. Del. 1995). If a plaintiff makes factual allegations that suggest the possible existence of requisite contacts between the defendant and the forum state with reasonable particularity, the court should order jurisdictional discovery. *See Power Integrations, Inc. v. BCD Semiconductor Corp.*, 547 F. Supp. 2d 365, 369 (D. Del. 2008) (citing *Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1323 (Fed. Cir. 2005) (hereinafter "*Chi Mei*")). However, a court should not permit discovery as a matter of course; before allowing jurisdictional discovery to proceed, "[t]he court must be satisfied that there is some indication that th[e] particular defendant is amenable to suit in this forum." *Hansen*, 163 F.R.D. at 475; *accord Draper, Inc. v. MechoShade Sys., Inc.*, No. 1:10-cv-01443-SEB-TAB, 2011 WL 1258140, at *1 (S.D. Ind. Mar. 31, 2011) ("While courts have the power to grant jurisdictional discovery, a motion to dismiss for lack of personal jurisdiction does not automatically trigger a right to jurisdictional discovery."). If a plaintiff does not come forward with "*some* competent evidence"

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v. Oxford Gene Tech. Ltd., 566 F.3d 1012, 1021–22 (Fed. Cir. 2009) (noting that the denial of a motion for jurisdictional discovery should be reviewed for "abuse of discretion, applying the law of the regional circuit"); *see also Commissariat A L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 395 F.3d 1315, 1323 (Fed. Cir. 2005) (citing Third Circuit law in holding that if the plaintiff makes "factual allegations [that] suggest the possible existence of requisite contacts between the defendant and the forum state with 'reasonable particularity,'" then a Delaware court should order jurisdictional discovery). Federal Circuit law does, however, control the underlying issue of personal jurisdiction in patent infringement cases, although this inquiry naturally depends on the application of state law construing the applicable long-arm statute. *Autogenomics, Inc.*, 566 F.3d at 1016.

that personal jurisdiction over the defendant might exist, a court should not permit jurisdictional discovery to proceed. *Hansen*, 163 F.R.D. at 475 (emphasis in original); *see also Andover*, 107 F.3d at 1042 (noting that a mere "unsupported allegation" that the prerequisites for personal jurisdiction have been met would amount to a "'clearly frivolous'" claim, and would not warrant the grant of jurisdictional discovery) (citations omitted). This is because when the lack of personal jurisdiction is clear, further discovery serves no purpose and thus should be denied. *See Telecordia Techs., Inc. v. Alcatel S.A.*, No. Civ.A. 04-874 GMS, 2005 WL 1268061, at *9 (D. Del. May 27, 2005).

B. Standard for Establishing Personal Jurisdiction

To establish personal jurisdiction, the plaintiff must adduce facts sufficient to satisfy two requirements—one statutory and one constitutional. In analyzing the statutory prong, the Court must consider whether the defendant's actions fall within the scope of Delaware's long-arm statute, 10 Del. C. § 3104(c). *See Power Integrations,* 547 F. Supp. 2d at 369–70; *Intel Corp. v. Broadcom Corp.*, 167 F. Supp. 2d 692, 700 (D. Del. 2001). In analyzing the constitutional prong, the Court must determine whether the exercise of jurisdiction comports with the defendant's right to due process. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Due process is satisfied if the Court finds that "minimum contacts" exist between the non-resident and the forum state, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316 (internal quotation marks and citations omitted).

Under the Due Process Clause of the U.S. Constitution, a defendant is subject to the jurisdiction of a federal court only when the defendant's conduct is such that it should "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*,

444 U.S. 286, 297 (1980). Unless the defendant's contacts with the forum are "continuous and systematic," such that the Court has "general" jurisdiction over the defendant, those contacts must be specifically related to the present cause of action. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984). As such, "[s]pecific personal jurisdiction exists [only] when the defendant has 'purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or related to those activities.'" *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

When a defendant moves to dismiss a lawsuit for lack of personal jurisdiction, the plaintiff bears the burden of showing the basis for jurisdiction, and must make a prima facie showing that personal jurisdiction is conferred by statute. *See Power Integrations*, 547 F. Supp. 2d at 369 (citing *Greenly v. Davis*, 486 A.2d 669, 670 (Del. 1984)). All factual inferences must be drawn in the light most favorable to the plaintiff at that stage. *See id.* (citing *Wright v. Am. Home Prods. Corp.*, 768 A.2d 518, 526 (Del. Super. Ct. 2000)).

III. DISCUSSION

Plaintiff identifies three bases for the exercise of personal jurisdiction over IRP: (1) the forum-selection clause of the TLA, which Plaintiff contends is binding on IRP, although IRP was not a signatory to the TLA; (2) general jurisdiction over at least one of IRP's subsidiaries pursuant to 10 Del. C. § 3104(c)(4) and the imputation of these contacts to IRP under an "agency theory"; and (3) specific jurisdiction, pursuant to the long-arm statute, under a "stream-of-commerce" theory. (D.I. 15 at ¶ 12; D.I. 28 at 5; D.I. 42 at 9–10) Plaintiff seeks leave to take jurisdictional discovery regarding four topics: "(1) Defendants' contacts with Delaware; (2) the

activities of IRP and its affiliates, and their agency relationship; (3) IRP's relationship to the TLA; and (4) specific jurisdiction facts regarding patent infringement issues."[5] (D.I. 28 at 7)

A. Express Consent to Jurisdiction Through TLA Forum Selection Clause

When a party is bound by a forum selection clause, the party is deemed to have expressly consented to personal jurisdiction. *Res. Ventures, Inc. v. Res. Mgmt Int'l, Inc.*, 42 F. Supp. 2d 423, 431 (D. Del. 1999). Once a party has expressly consented to jurisdiction, "a minimum contacts analysis [under the Delaware long-arm statute and Due Process Clause of the U.S. Constitution] is not required." *Hornberger Mgmt. Co. v. Haws & Tingle Gen. Contractors, Inc.*, 768 A.2d 983, 987 (Del. Super. Ct. 2000). However, as Plaintiff itself acknowledges, typically only those parties that have actually signed the agreement-at-issue are bound by its forum selection clause. (D.I. 28 at 9) In this case, IRP is not a signatory to the TLA. Instead, IHR and two of IRP's subsidiaries, IPR and IPW, entered into the TLA with Eastman.[6] A representative of IHR signed the TLA on behalf of IHR, IPR and IPW. (D.I. 8, ex. B at 26)

Delaware courts have established a three-part test for determining whether a non-party to an agreement should nonetheless be bound by its forum selection clause:

> (1) Is the forum selection clause valid?
>
> (2) Is the non-signatory a third-party beneficiary of the agreement, or closely related to the agreement?
>
> (3) Does the present claim arise from the non-signatory's standing

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[5] At the status teleconference held on September 14, 2011, DAK and Petrotemex indicated that to the extent they were joined or substituted in this action, they would be relying on the arguments in support of jurisdictional discovery previously made by Eastman. (D.I. 69 at 11)

[6] Although the Amended Complaint notes that IPR and IPW are subsidiaries of IRP, it is not clear what corporate relationship, if any, IHR has with IRP. (D.I. 15 at ¶ 26)

relating to the agreement?

Hadley v. Shaffer, No. Civ. A. 99-144-JJF, 2003 WL 21960406, at *4 (D. Del. Aug. 12, 2003). Thus, if it is not "clearly frivolous" to contend, based on the facts alleged and the applicable law, that IRP should be bound by the forum selection clause, then jurisdictional discovery relating thereto is permissible.

1. Validity of Forum Selection Clause

"Forum selection clauses are presumptively valid and are entitled to great weight." *QVC, Inc. v. Your Vitamins, Inc.*, 753 F. Supp. 2d 428, 432 (D. Del. 2010). A forum selection clause is deemed valid unless the party objecting to its enforcement establishes: (1) it resulted from fraud or overreaching; (2) enforcing the clause would violate a strong public policy of the forum; or (3) enforcement of the clause would be unreasonable due to the serious inconvenience of the forum. *Hadley*, 2003 WL 21960406 at *4.

Given this presumption of validity, Defendants will bear the burden of demonstrating that the forum selection clause of the TLA is invalid. *See id.* ("Because the [defendants] have made no assertion regarding the validity of the clause, they have not overcome the presumption in favor of validity."). In their briefs, Defendants do not allege that the forum selection clause resulted from fraud, nor that its enforcement would violate public policy or would be unreasonable due to the inconvenience of the forum. Rather than directly challenging its validity, Defendants instead argue that Plaintiff has failed to plead or otherwise attest that the forum selection clause of the TLA is valid. (D.I. 36 at 8)

Defendants cite no authority requiring Plaintiff to explicitly plead the validity of the forum selection clause in the Amended Complaint. (*Id.* at 8–9) Indeed, this Court has repeatedly

stated that there is no requirement that a plaintiff allege the facts that support a finding of personal jurisdiction in a complaint. *See Mylan Pharms., Inc. v. Kremers Urban Dev.*, No. Civ. A. 02-1628 GMS, 2003 WL 22711586, at *4 (D. Del. Nov. 14, 2003); *Hansen*, 163 F.R.D. at 474. This is particularly true in the context of a jurisdictional dispute relating to a forum selection clause, where it is the party asserting *invalidity* of the forum selection clause who bears the burden to assert sufficient facts that would compel a court to set aside the clause. *See, e.g., Frietsch v. Refco, Inc.*, No. 92 C 6844, 1994 WL 494945, at *3 (N.D. Ill. Sept. 6, 1994) (noting that forum selection clauses are presumed valid in the absence of a "plead[ing] that they were fraudulently induced").

Moreover, even if Plaintiff was so required, it can at least be argued that Plaintiff has implicitly asserted the validity of the forum selection clause at issue by alleging in the Amended Complaint that the Court "has personal jurisdiction over Defendant IRP by virtue of IRP's status as an affiliate under, third party beneficiary of, or party related to the TLA," and by contending that all suits, actions, or proceedings arising out of or in connection with the TLA must be brought in Delaware. (D.I. 15 at ¶¶ 12, 25) This assertion that the forum selection clause of the TLA binds the parties, and that it is a sufficient basis on which to confer personal jurisdiction as to IRP with regard to the trade secret misappropriation and breach of contract claims, can be read as an assertion that the forum selection clause is valid. After all, were the clause not alleged to be valid, then it could not have the jurisdictional force that Plaintiff asserts.

For these reasons, it is not clearly frivolous for Plaintiff to assert that the forum selection

clause of the TLA is valid.[7]

2. IRP's Status Regarding the TLA

The second part of the test for determining whether a non-party to an agreement should nonetheless be bound by its forum selection clause requires the Court to assess IRP's status regarding the TLA. In doing so, it must examine whether Plaintiff has asserted sufficient facts to make out a non-frivolous claim that IRP may be considered a "third-party beneficiary" of the TLA, or that it is otherwise "closely related" to the TLA.

(a) Third-Party Beneficiary of the TLA

In order to determine the strength of Plaintiff's claim that IRP is a third-party beneficiary of the TLA, the Court must consider Delaware contract law. *See Hadley*, 2003 WL 21960406 at *1, *5 (reviewing Delaware contract law in order to determine whether a plaintiff was a third-party beneficiary of a given contract, where the contract stated that Delaware law applied to disputes regarding the contract). Delaware courts have established a three-part test to determine whether an entity qualifies as a third-party beneficiary of an agreement: "(i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract." *Madison Realty Partners 7, LLC v. AG ISA, LLC*, No. CIV.A. 18094, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2011) (hereinafter "*Madison*"); *accord Am.*

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[7] The Court's conclusion in this regard should not be read as an affirmative determination that this clause is, in fact, valid. All of the Court's conclusions in this Memorandum Opinion arise strictly within the context of Plaintiff's motion for jurisdictional discovery, and should not be read as precluding either party from arguing these points in connection with further briefing on the underlying 12(b)(2) motion.

Fin. Corp. v. Computer Sciences Corp., 558 F. Supp. 1182, 1185 (D. Del. 1983) (noting that "both parties must in some manner express an intent to benefit the third-party before third-party beneficiary status is found").

In *Hadley v. Shaffer*, No. Civ. A. 99-144-JJF, 2003 WL 21960406 (D. Del. Aug. 12, 2003), this Court explained that to determine whether the three-part third-party-beneficiary test was met, a court "must look to the terms of the contract and the surrounding circumstances." *Id.* at *5 (citing *Grand St. Artists v. Gen. Elec. Co.*, 19 F. Supp. 2d 242, 253 (D.N.J. 1998)). However, the TLA includes an integration clause, which states that [redacted] (D.I. 8, ex. B at § 13.10)[8] As Defendants note in their Answering Brief, (D.I. 36 at 9), some Delaware cases indicate that if a contract contains an integration clause or merger clause that specifies which documents are to be included as part of the agreement, a court may not consider other extrinsic evidence in considering whether an entity is a third-party beneficiary to that contract. *See Street Search Partners, L.P. v. Rincon Int'l, L.L.C.*, No. Civ.A. 04C-09-156PLA, 2005 WL 1953094, at *2 (Del. Super. Ct. Aug. 1, 2005) (holding that where a contract contained a standard merger clause and no oral modification clause, a court is prohibited from looking to extrinsic evidence in determining whether an entity was a third-party beneficiary); *Crow v. Erectors, Inc.*, 1988 WL 7617, at *2 (Del. Super. Ct. Jan. 21, 1988) (same). Defendants therefore argue that the Court should look

[8] The Court's opinion in *Hadley* did not specifically indicate whether the contract at issue there contained an integration clause or merger clause.

only to the TLA in undertaking its analysis, and should not consider any other "surrounding circumstances" cited by Plaintiff that might add insight as to the parties' intent.

The Court need not resolve this question here, because even if the "surrounding circumstances" referenced by Plaintiff are considered, the law would not permit Plaintiff to make a non-frivolous argument that IRP is a third-party beneficiary of the TLA.

(1) The Terms of the TLA

As was previously noted, the only parties who signed the TLA are Plaintiff and IHR. (D.I. 8, ex. B at 26) Yet the TLA specifically indicates that it is an agreement between Plaintiff, IHR, IPR and IPW, and all parties agree that the signature of IHR's representative on the document was also meant to bind IPR and IPW. (D.I. 71 at 33:8–12; D.I. 8, ex. B at 1)

However, absent from the 26-page TLA is any direct reference to Defendant IRP. IRP's name is not mentioned once in the TLA, nor in any of the exhibits attached thereto. In addition, while the introductory section of the TLA outlines several reasons motivating the parties to enter into the agreement, that section does not reference any intent to benefit IRP nor any other non-party. (D.I. 8, ex. B at 1) Where a contract does not specifically reference the third party at issue, it is more difficult for that third party to be deemed a third-party beneficiary. *See Street Search*, 2005 WL 1953094 at *2 (holding that company was not a third-party beneficiary of a contract that did "not objectively indicate any intent to benefit [that company], nor even acknowledge [its] existence").

Plaintiff points to only two elements of the TLA as evidence of the parties' alleged intent to benefit IRP. First, Plaintiff contends that IRP could be considered an "Affiliate" under the

TLA. (D.I. 71 at 25–26)[9] Article I of the TLA defines the term "Affiliate(s)" as [redacted] (D.I. 8, ex. B at 2)[10] [redacted] (D.I. 8, ex. B)

It is not clearly frivolous to contend that IRP would be considered an Affiliate under the TLA, given the evidence that IRP controls at least TLA-signatories IPR and IPW. (*See, e.g.*, D.I. 28 at 82) However, Plaintiff did not clearly articulate how IRP's Affiliate status is evidence of the parties' intent to benefit IRP, nor did it point to any particular provision of the TLA using the term "Affiliate" with such an intent in mind. (D.I. 71 at 25–29) When a plaintiff seeks jurisdictional discovery, it is the plaintiff's burden to come forward with some competent evidence or argument indicating that it could prevail on the related claim of personal jurisdiction. *Hansen*, 163 F.R.D. at 475. Plaintiff failed to provide any competent evidence or argument that IRP's status as an Affiliate under the TLA has any bearing on the third-party beneficiary analysis.

Moreover, if mere Affiliate status under the TLA was sufficient to transform a non-party into a third-party beneficiary of the agreement, then numerous other companies that [redacted] Eastman, IHR,

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[9] Plaintiff did not argue that IRP's status as an "Affiliate" in the TLA supports the conclusion that IRP is a third-party beneficiary in any of its three briefs regarding the motion for jurisdictional discovery. Instead, it was raised for the first time at oral argument.

[10] The definition goes on to indicate that [redacted] means [redacted] (D.I. 8, ex. B at 2)

IPR and IPW would all likewise be deemed third-party beneficiaries of the TLA. (D.I. 8, ex. B at 2) The record indicates that there are, for example, at least six other direct or indirect subsidiaries of IRP that appear to control, or be under common control with, Defendants IPR and IPW. (*See, e.g.*, D.I. 16, ex. A at 23; D.I. 70, Pl. ex. 1) The Court discerns no evidence (and Plaintiff has suggested none) that the parties to the TLA intended to create a broad category of third-party beneficiaries of the TLA that would effectively sweep in every corporate entity that is related in this way to one of the TLA signatories.

Plaintiff's second argument that IRP should be deemed a third-party beneficiary relates to a European facility discussed in the TLA. Plaintiff argues that the TLA grants a license to make certain products at a "Lithuania Plant," which is defined as [redacted] (D.I. 8, ex. B at 4) Plaintiff contends that because this Lithuania Plant is "indirectly-owned" by IRP and was permitted to use technology licensed under the TLA, the parties therefore intended to benefit IRP. (D.I. 28 at 10) While the record is somewhat unclear as to who owns the Lithuania Plant—neither party was able to identify the owner in its briefs or during oral argument, (D.I. 71 at 43–44, 62)—it is clear that neither party contends that IRP directly owns the plant (*see, e.g.*, D.I. 15 at ¶ 14). The fact that technology licensed under the TLA could be used by those working at a Lithuanian plant, which in some undefined way is indirectly owned by IRP, is not evidence of an intent to benefit IRP. *Cf. Tradition Chile Agentes de Valores Ltda. v. ICAP Securities USA LLC*, No. 09 Civ. 10343(WHP), 2010 WL 4739938, at *10 (S.D.N.Y. Nov. 5, 2010) (determining that a parent company who derives an incidental benefit from its subsidiaries under a contract is not a third-party beneficiary of that contract because "'a benefit received

through corporate ownership is insufficient to establish rights as a third-party beneficiary'") (internal citations omitted). Moreover, in its briefing on the motion for jurisdictional discovery, Plaintiff never articulates in any detail *why* IRP's attenuated connection to this plant demonstrates evidence of the requisite intent. (*See* D.I. 28 at 10; D.I. 42 at 6–7)

Instead, in its briefs, Plaintiff relies primarily on *Hadley* in support of its third-party beneficiary argument. (D.I. 28 at 5) In *Hadley*, the contract at issue was a Merger Agreement between StatesRail L.L.C. and Kiamichi Railroad Company ("Kiamichi"). 2003 WL 21960406 at *1. Before the merger, Kiamichi was a closely held corporation with approximately 16 shareholders, including third-party defendants Jack Hadley (who, along with his wife, were the majority shareholders of Kiamichi, owning 60% of the shares) and Thomas Hadley (collectively, "the Hadleys"). *Id.* at *1, *5. The Hadleys argued that, as non-signatories to the Merger Agreement, they were not bound by its forum selection clause. *Id.* at *2. However, the small group of Kiamichi shareholders (including the Hadleys) were not only repeatedly referenced in the Merger Agreement, but were also to receive payments of up to $1.4 million under the terms of the agreement if the merger was completed. *Id.* at *1. Moreover, the Merger Agreement itself had to be approved by the Kiamichi shareholders before it could become final, and thus the Hadleys had individually consented to the stock purchase and merger that was at the heart of that agreement. *Id.* at *5. These factors led this Court to conclude that "[t]he Hadleys, as [majority] shareholders, were undoubtedly intended to receive a benefit from the sale of their stock through the Merger Agreement" and that they were third-party beneficiaries of the agreement. *Id.*

As discussed above, the TLA has no analogous provisions. IRP is never specifically named in the TLA; the TLA only refers to IRP indirectly as one of a group of "Affiliates" of the

contracting parties. There is no evidence that IRP's approval was a pre-condition for the TLA, nor that the TLA's terms provided that IRP would receive any direct, immediate benefit from the contract—certainly nothing like the benefits to shareholders that were so central to the Merger Agreement in *Hadley*. Thus, while the intent to benefit the shareholders in the *Hadley* Merger Agreement was clear upon the face of that agreement, there is no such evidence of any similar intent in the TLA to benefit IRP.[11]

(2) Surrounding Circumstances

Plaintiff's argument similarly fails even when the "surrounding circumstances" of the TLA are considered. Nowhere in Plaintiff's Amended Complaint—or in the numerous briefs and exhibits submitted in support of its motion for jurisdictional discovery—does Plaintiff point to evidence indicating that any party possessed the intent to benefit IRP through the TLA, or that such a benefit was intended as a "gift or in satisfaction of a pre-existing obligation" to IRP, or that "a material part of the parties' purpose in *entering* into" the TLA was to benefit IRP. *Madison*, 2001 WL 406268 at *5 (emphasis added). Instead, the only "surrounding circumstance" that Plaintiff cites in its briefs is the notion that "[t]hat IRP was in *a position to benefit* from the TLA [due to the benefits its subsidiaries obtained via the TLA] and publicly announced the benefits it received." (D.I. 42 at 7 (emphasis added))

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[11] Also important to the decision in *Hadley* were the equitable principles of Delaware contract law that are designed to prevent a non-signatory to an agreement "from reaping the benefits of a contract they seek to enforce, while, at the same time, avoiding the burdens or limitations of the contract, such as a forum selection clause." 2003 WL 21960406 at *6. In that case, there was evidence that Thomas Hadley, one of the third-party defendants, had "used his third-party beneficiary status to his benefit by seeking compensation for alleged breaches of the" agreement-at-issue in other courts. *Id.* at *5. In this case, however, there is no allegation that IRP has ever directly or indirectly sought to enforce the terms of the TLA. Indeed, the only party who seeks to enforce the terms of the TLA in the present litigation is Plaintiff.

IRP may have been in a "position" to incidentally benefit from the TLA at some later stage as the parent corporation of certain TLA signatories. But that possibility does not clearly speak to the question of whether the contracting parties *intended* to benefit IRP in signing the agreement. *See, e.g., Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386–87 (Del. Super. Ct. 1990) ("In order for third-party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party . . . should be a material part of the contract's purpose.") (citation omitted).[12]

Indeed, the Third Circuit has explained that under Delaware law, "if it was not the promisee's intention to confer direct benefits upon a third party, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then the third party will have no enforceable rights under the contract." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 196 (3d Cir. 2001) (emphasis added). In *E.I. DuPont*, the Third Circuit specifically rejected the argument that a parent company, E.I. DuPont de Nemours and Company ("DuPont"), was a third-party beneficiary of a contract entered into by its subsidiary, DuPont China ("DPC"), explaining that "[a]lthough DuPont as the parent of DPC would certainly benefit from the success of DPC, DuPont was not an intended third party beneficiary of the Agreement any more than any parent

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[12] Any contract entered into by a wholly-owned subsidiary inherently could be said to confer some indirect benefit on the parent that wholly owns that entity. Were this sufficient to render the parent a third-party beneficiary under Delaware law, then any parent corporation would be a third-party beneficiary of any contract entered into by any of its subsidiaries. Plaintiff has cited no reason here to depart from "Delaware's general policy of not extending the rights and obligations of contracts to parties that did not execute them" in such a significant way. *Weygandt v. Weco, LLC*, C.A. No. 4056-VCS, 2009 WL 1351808, at *4 (Del. Ch. May 14, 2009).

who expects to benefit from the success of . . . [its] subsidiary." *Id.* at 196–97. Plaintiff's argument here is no more detailed than that rejected in *E.I. DuPont*—that IRP expects to (and did) benefit financially from any success of IHR, IPR and IPW that was generated pursuant to the TLA, simply because it controls those companies or is the parent corporation of those companies. This bare argument provides no support for a third-party-beneficiary claim.

Unless the parties' purpose and intent in entering the TLA was to effect the benefits that Plaintiff has claimed, IRP can not properly be considered a third-party beneficiary of the TLA. Plaintiff has provided no basis to conclude that discovery would unearth such a purpose and intent. Accordingly, Plaintiff's contention that IRP is a third-party beneficiary is clearly frivolous and cannot be used to justify jurisdictional discovery.

(b) "Closely Related" to the TLA

Alternatively, Plaintiff suggests that IRP may be bound by the forum selection clause in the TLA because "IRP is 'closely related' to the TLA." (D.I. 28 at 10) There are two ways that an entity can be closely related to an agreement: (1) it receives a direct monetary or non-monetary benefit from the agreement; or (2) it was foreseeable that the entity would be bound by the agreement. *Baker v. Impact Holding, Inc.*, Civil Action No. 4960-VCP, 2010 WL 1931032, at *4 (Del. Ch. May 13, 2010). There is a "subtle, but important distinction" between a claim that a person is a third-party beneficiary to a contract and a claim that the person is "closely related" to the contract. *Capital Group Cos. v. Armour*, No. Civ.A. 422-N, 2004 WL 2521295, at *6 (Del. Ch. Nov. 3, 2004). While a court must look to the intentions of the contracting parties under the third-party-beneficiary theory, when examining whether a person is "closely related" to a contract, the court generally looks instead to the parties' conduct after the contract was executed.

Id. at *6 n.40 (citing *E.I. DuPont*, 269 F.3d at 200).

Plaintiff does not argue that it was "foreseeable" that IRP would be bound by the terms of the TLA, but instead asserts that it "appears [that] IRP enjoys a monetary benefit from the TLA by virtue of its management and control of the signatory entities." (D.I. 28 at 10) As such, resolving whether it is clearly frivolous for Plaintiff to contend that IRP is "closely related" to the TLA requires the Court to consider only whether IRP received a direct benefit from the TLA.

(1) Benefits Through IRP Subsidiaries

In an attempt to articulate why IRP was closely related to the TLA, Plaintiff highlights IRP's alleged "management and control over the integrated Indorama enterprise, including its oversight of the PET manufacturing operations of AlphaPet and IRP's European subsidiaries." (D.I. 42 at 3) As an initial matter, AlphaPet is not a party to the TLA, and thus the evidence that Plaintiff cites regarding IRP's oversight or management of AlphaPet is irrelevant to the question of IRP's status relating to the TLA.[13] More significantly, with respect to IRP's European subsidiaries (which the Court interprets as a reference to the three entities that are parties to the TLA: IHR, IPR and IPW), Plaintiff is unable to explain how any benefit which accrued to IRP through those entities is anything but *indirect*.

Plaintiff first cites information demonstrating IRP's management and control of IPW and IPR. For example, it states that IRP is "deeply involved in the management and control of its subsidiaries' PET manufacturing activities" and notes that IRP has represented that it has the

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[13] Moreover, Plaintiff contends that the intellectual property licensed in the TLA was to be used only at European plants, not at any U.S.-based PET manufacturing facilities. (D.I. 15 at ¶ 16) Thus, it is unclear how IRP's alleged U.S.-based oversight is relevant to the question of whether it received direct benefits under the TLA.

power to govern its subsidiaries "so as to obtain benefits from [their] activities." (D.I. 42 at 5) Plaintiff similarly cites to sources indicating that there is significant overlap between the officers and directors of IPW and IPR and those of IRP, and that an IRP executive responded to a 2009 letter from Eastman regarding the parties' rights and obligations under the TLA. (*Id.* at 4–5)

In addition, Plaintiff emphasizes the financial benefits to IRP that resulted from the TLA's transfer of technology from Eastman to IRP's subsidiaries. Plaintiff references publicly available documents demonstrating that IRP was the entity that "[a]nnounced [the] acquisition" of the two PET polymers plants that were obtained from Eastman, emphasizing that IRP's press release called these "two important acquisitions." (*Id.* at 3) Relatedly, Plaintiff cites financial reports from IRP, which reveal that "the European plants and the AlphaPet plant in Alabama account for more than one-half of IRP's total worldwide PET manufacturing capacity," enabling IRP to become the "2nd largest producer of PET Polymers in the world in 2009," such that "the TLA has clearly paid off for IRP." (*Id.* at 4)

Yet, none of the evidence cited by Plaintiff actually shows a *direct* benefit flowing to IRP from the terms of the TLA. In each case, Plaintiff's argument amounts to this: (1) the TLA conferred various benefits on three parties that are either subsidiaries of IRP or share some corporate affiliation with IRP; and then (2) whatever financial or non-monetary benefits these three parties directly derived from the TLA were later passed on to IRP, in some way, as a result of IRP's status as the parent corporation of (or as an entity that otherwise controlled) those parties. The movement of benefits in these circumstances is, at its heart, indirect—flowing *first* from the Plaintiff (Eastman) to the Defendant signatories (IHR, IPR and IPW) *and then* to IRP. *Cf. Dow Corning Corp. v. Chem. Design, Inc.*, 3 F. Supp. 2d 361, 365–66 (W.D.N.Y. 1998)

(finding that claim that a parent corporation was a third-party beneficiary to a contract signed by its subsidiary would be "futile," in part because it could not be said that any benefits "directly flowed" from subsidiary to parent, as only benefit transferred was "any benefit by way of [the subsidiary's] operating at a profit and thus generating dividends to . . . its parent"); *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 988 F. Supp. 367, 372 (S.D.N.Y. 1997) (finding that benefits did not "flow[] directly" from an agreement to a third party corporation, where the benefits provided did not go "beyond that provided to any parent corporation from assets held by its wholly owned subsidiaries"). If the requirement in Delaware law of a "direct" benefit is to mean anything, it must mean more than this.

This conclusion is bolstered by a review of all of the cases cited by the parties regarding whether an entity was "closely related" to an agreement under Delaware law. In each of those cases, where a party was found to have directly benefitted from a contract, the nature of that benefit was far less attenuated than what is at issue in the circumstances here, making each of these cases readily distinguishable from the present litigation.

For instance, in *Hadley*, where this Court also found that the Hadleys were "closely related" to the Merger Agreement at issue, that agreement specifically referenced the financial benefits that the shareholders of a merging corporation would receive upon the merger, through the sale of their stock in the contracting company. 2003 WL 21960406 at *5–6. Indeed, the agreement further explained how those same shareholders, who were found to have directly benefitted from the agreement, were required to first approve the agreement before it became final. *Id.* at *5. In contrast, Plaintiff points to no portion of the TLA providing IRP with the same type of immediate, direct financial benefit analogous to what the Hadleys were promised.

In *Capital Group Cos. v. Armour*, No. Civ.A. 422-N, 2004 WL 2521295 (Del. Ch. Nov. 3, 2004), defendant Nina L. Ritter asserted that she could not be bound by a forum selection clause in a Stock Restriction Agreement ("the SRA"). *Id.* at *3. In connection with divorce proceedings in California, Ritter claimed a direct ownership interest in stock that had been transferred to a trust (in which Ritter and her husband were the sole trustees) pursuant to the SRA. *Id.* at *7. In connection with the transfer of the stock to the trust, Ritter signed a Joinder Agreement and a series of Purchaser Representation Letters where she agreed to be bound by the terms of the SRA (which included a Delaware forum selection clause). *Id.* at *2. The Delaware Chancery Court concluded, in holding that Ritter was "closely related" to the SRA and was bound by its forum selection clause, that Ritter had received a direct, beneficial interest in the stock by agreeing to the terms of the SRA. *Id.* at *7. Here, in contrast, there is no evidence that IRP ever agreed to be bound by the TLA, nor that it received a direct ownership interest in tangible or intangible assets pursuant to the TLA.

Finally, in *Weygandt v. Weco*, LLC, C.A. No. 4056-VCS, 2009 WL 1351808 (Del. Ch. May 14, 2009), the Delaware Chancery Court held that counterclaim and third-party defendant Weygandt & Associates ("W&A") was "closely related" to an Asset Purchase Agreement ("APA") that was signed by W&A's controlling shareholder (William Weygandt), and not W&A itself. *Id.* at *1–2. As a condition of closing, the APA specifically required that several related agreements be executed, including a lease agreement, under which W&A was to be directly paid more than a million dollars of rent. *Id.* at *1, *5. As such, W&A received a substantial monetary payment from a contract referenced in the APA, which was a direct result (and precondition of) the execution of the APA. *Id.* at *5. Moreover, absent the enforcement of the forum selection

clause, "W&A would have the power to cause duplicative and inefficient litigation in multiple forums and undermine the benefit of predictability that W&A's controller, Weygandt, provided . . .by agreeing to . . . the [APA]." *Id.* at *6. In this case, by contrast, the TLA does not reference a separate agreement that a representative of IRP actually signed that conveys direct financial benefits on IRP,[14] nor does the TLA impose conditions of closing requiring that direct monetary payments be made to IRP.

In each of these cases, the third party held to be closely related to a contract could point to something in that contract—a term or some reference to a separate agreement—that required a direct payment or conveyance of other benefits to the third party. Plaintiff points to no such reference in the TLA. In addition, the Court has also surveyed other more recent cases interpreting Delaware state law. In doing so, it has found no instance where a parent corporation was held to be bound by a forum selection clause in an agreement executed by a subsidiary, absent facts showing far more than the general, indirect benefits that a parent corporation might receive from any transaction involving their subsidiary. For instance, in *JFE Steel Corp. v. ICI Americas, Inc.*, --- F. Supp. 2d ----, Civ. No. 08-633-LPS, 2011 WL 2490593 (D. Del. June 22, 2011), this Court determined that a foreign non-party ("JFE") to an asset purchase agreement ("APA") was nonetheless closely related to that agreement, such that it was bound by a forum selection clause in the contract. *Id.* at *10. This Court highlighted that "[t]he close relationship between KSC, JFE's predecessor, and KSP, the signatory to the APA is illustrated by the facts

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[14] The TLA does reference the MBSA—the contract through which the European plants discussed in the TLA were apparently acquired. The MBSA, however, has not been submitted to the Court. At oral argument, when asked, the parties were unsure as to which companies were the signatories to that contract. (D.I. 71 at 32) As a result, the Court can draw no conclusions from the current record as to what IRP's relationship is to the MBSA.

that KSC was KSP's parent and that, in a related framework Agreement, *KSC guaranteed KSP's performance under the APA*." *Id.* (emphasis added). Plaintiff has provided no such evidence of a "guarantee of performance" or of any type of similar commitment by IRP relating to the TLA.

The Court recognizes that the bar for showing entitlement to jurisdictional discovery is not high. But in light of the limited factual assertions put forward by the Plaintiff on this issue, and the current state of Delaware law, the Court finds that the Plaintiff has failed to cite any competent evidence or argument that IRP obtained a *direct* monetary or non-monetary benefit from the TLA. Because Plaintiff has not made a sufficient allegation that IRP was "closely related" to the TLA, the Court will not permit jurisdictional discovery on this ground.

3. Relationship Between Present Claim & IRP Standing

The third part of the test for determining whether a non-party to an agreement should nonetheless be bound by its forum selection clause is whether the present claim arises from the non-signatory's standing relating to the agreement. *Hadley*, 2003 WL 21960406 at *6. Defendants do not dispute that the claims in this case arise out of the TLA. (D.I. 71 at 47) However, because the Court has concluded that Plaintiff has put forward no competent evidence demonstrating that it could satisfy the second part of the relevant test, no jurisdictional discovery is warranted as to the forum-selection-clause issue.

B. General Jurisdiction Through Activities of IRP's Alleged Agents

As its second basis for jurisdictional discovery, Plaintiff argues that the Court can exercise general jurisdiction over at least one of IRP's subsidiaries pursuant to 10 Del. C. § 3104(c)(4), and that the subsidiaries' jurisdictional contacts may be imputed to IRP under "agency theory." (D.I. 28 at 7) Delaware's long-arm statute authorizes jurisdiction over a non-

resident when that party or its agent:

> Causes tortious injury in [Delaware] or outside of [Delaware] by an act or omission outside [of Delaware] if the person regularly does or solicits business, engages in any other persistent course of conduct in [Delaware] or derives substantial revenue from services, or things used or consumed in [Delaware.]

10 Del. C. § 3104(c)(4). This section confers general jurisdiction, such that while a general presence in Delaware is necessary to assert jurisdiction, the contacts of the non-resident (or its agent) need not relate to the instant litigation. *See Reach & Assocs., P.C. v. Dencer*, 269 F. Supp. 2d 497, 505 (D. Del. 2003). "While seemingly broad, the standard for general jurisdiction is high in practice and not often met." *Id.* (citation omitted).

Plaintiff has not alleged that IRP itself has "regularly [done] or solicit[ed] business" in Delaware, or that it maintains the other contacts with Delaware set forth in Section 3104(c)(4). Instead, it has advanced a jurisdictional theory based upon the contacts of IRP's alleged agents–namely, IRP's European subsidiaries (which appear to include at least Defendants IPR and IPW) and IRP's U.S.-based subsidiary, Defendant AlphaPet.

A Delaware court may exercise jurisdiction over a parent based upon the contacts that a subsidiary has with this forum "where the subsidiary acts on the parent's behalf or at the parent's direction." *C.R. Bard, Inc. v. Guidant Corp.*, 997 F. Supp. 556, 560 (D. Del. 1998). Among the factors for determining whether an agency relationship exists are: "[1] the extent of overlap of officers and directors, [2] methods of financing, [3] the division of responsibility for day-to-day management, and [4] the process by which each corporation obtains its business." *Applied Biosystems, Inc. v. Cruachem, Ltd.*, 772 F. Supp. 1458, 1463 (D. Del. 1991).

Plaintiff has offered competent evidence indicating that IRP's subsidiaries may be considered its "agents" for purposes of the jurisdictional analysis. Plaintiff submitted a number of excerpts from IRP's 2008 Annual Report, in which IRP notes that it "integrated the corporate teams of executives with the unit teams in Thailand, Europe and USA." (D.I. 28, ex. C at 4) This appears to have resulted in a significant overlap between the officers and directors of IRP and those of its subsidiaries, with a majority of AlphaPet's directors also serving as directors at IRP, and with a substantial overlap between the directors of IRP, IPR, and IPW. (*Id.* at 4–5) In addition, with respect to the division of responsibility for management of the respective companies, Plaintiff cites IRP's statement that the installation of the AlphaPet Decatur plant "[wa]s supervised by [IRP's] management team," which provides at least some support for the idea that day-to-day operations at AlphaPet are run (or have been run) by IRP personnel. (D.I. 15 at ¶ 28) Plaintiff has also alleged a number of facts in support of the proposition that IRP's representatives otherwise exercised a level of managerial control over the operations of IPR, IPW and AlphaPet, particularly with respect to PET plants operated by those subsidiaries. (*Id.* at ¶¶ 26–29) Defendants do not dispute these factual assertions. In light of these connections, it is not clearly frivolous to contend that AlphaPet, IPR, and IPW are agents of IRP for purposes of the long-arm statute. *See, e.g.*, *EBG Holdings LLC*, 2008 WL 4057745 at *12 (finding that a subsidiary was an agent of its parent corporation under 10 Del. C. 3104(c)(4) because, *inter alia*, the companies shared operating activities, management, and offices, and because the parent controlled the subsidiaries' business activities and funding).

As Defendants correctly note, however, it is not enough for Plaintiff to offer competent evidence of an agency relationship. Plaintiff must also offer some competent evidence to suggest

that those agents are "engaged in longstanding business in the forum state such as marketing or shipping products, or performing services or maintaining one or more offices there—activities that are less extensive than that will not qualify for general in personam jurisdiction." *Kloth v. Southern Christian Univ.*, 494 F. Supp. 2d 273, 280 (D. Del. 2007). On this point, Plaintiff's submissions are silent.

Plaintiff offers no evidence suggesting that the subsidiaries in question have any such significant Delaware contacts. Instead, in its briefs, Plaintiff simply recites the standard for general in personam jurisdiction and asks that it be permitted to take discovery to determine "whether" any of IRP's subsidiaries have sufficient contacts with Delaware pursuant to section 3104(c)(4), or to "test" Defendants' assertions that no such contacts exist.[15] (D.I. 42 at 8) When a plaintiff fails to offer anything other than speculation that a general presence might be uncovered, jurisdictional discovery is not appropriate. *See, e.g., LG Elecs., Inc. v. ASKO Appliances, Inc.*, Civil Action No. 08-828 (JAP), 2009 WL 1811098, at *3 (D. Del. Jun. 23, 2009) (denying plaintiff's request for limited jurisdictional discovery in order "to corroborate the declaration" of a third party that it had no Delaware contacts, where plaintiff otherwise failed to identify any such contacts with reasonable particularity); *see also Parker v. Learn Skills Corp.*, 530 F. Supp. 2d 661, 673–74 (D. Del. 2008) (declining to permit jurisdictional discovery regarding general jurisdiction claim pursuant to Section 3104(c)(4) where the plaintiff's allegations as to the nature of Delaware contacts did not go beyond "labels and conclusions").

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[15] Defendants have submitted a declaration from AlphaPet's Chief Financial Officer, who stated that AlphaPet "has not sold or marketed *any* products in Delaware." (D.I. 22 at 2 (emphasis added)) No such declaration was submitted from any representative of the European IRP subsidiaries.

At oral argument, when asked what facts it could put forward to suggest any contact between IRP's subsidiaries and the State of Delaware, Plaintiff's counsel mentioned only: (1) the fact that AlphaPet is incorporated in Delaware; and (2) IHR, IPR and IPW's execution of the TLA, which contains a Delaware forum selection clause. (D.I. 71 at 34–35) Neither of these asserted "contacts" with Delaware indicate that any of IRP's alleged agents are regularly doing business in Delaware, engaging in Delaware-based conduct, or deriving substantial revenue from activities occurring in Delaware. The fact that one of IRP's subsidiaries is incorporated in Delaware, for example, has no bearing on the Section 3104(c)(4) analysis. *See, e.g.*, *Vichi v. Koninklijke Philips Elecs. N.V.*, Civil Action No. 2578-VCP, 2009 WL 4345724, at *8 n.54 (Del. Ch. Dec. 1, 2009) (noting that it is "undisputed as a legal matter that the mere presence of subsidiaries or agents in Delaware is not sufficient to support personal jurisdiction over the parent or principal" under Section 3104(c)(4)); *accord IM2 Merch. & Mfg., Inc. v. Tirex Corp.*, No. CIV.A. 180777, 2000 WL 1664168, at *4 n.15 (Del. Ch. Nov. 2, 2000) (holding that the mere fact that a parent is incorporated in Delaware is insufficient to confer jurisdiction over a non-Delaware subsidiary under Section 3104(c)(4)).

Moreover, Plaintiff has cited no authority, and the Court is aware of none, that would support the exercise of jurisdiction over a parent corporation pursuant to Section (c)(4) of the Delaware long-arm statute, based on the sole fact that the parent's subsidiary had executed a contract containing a Delaware forum-selection clause. Where a plaintiff bases its general jurisdiction theory on such a thin evidentiary reed, jurisdictional discovery is inappropriate. *See, e.g.*, *Regan v. Loewenstein*, 292 Fed. App'x 200, 205 (3d Cir. 2008) (affirming the denial of jurisdictional discovery where "[t]he alleged physical presence of Defendants or their agents

during occasional concerts is plainly not a 'continuous and systematic' contact, and jurisdictional discovery cannot change this fact").

As such, the Court concludes that asserting jurisdiction over IRP based upon Section (c)(4) of the Delaware long-arm statute would be clearly frivolous, and thus no jurisdictional discovery on this basis should be permitted.[16]

C. Specific Jurisdiction–"Stream-of-Commerce" Theory

1. Whether Jurisdictional Discovery Should Be Permitted

In its opening brief, Plaintiff contends that "[t]he exercise of specific jurisdiction over IRP for patent infringement (directly or via its agent-subsidiary Alpha[P]et) is proper under 10 Del. C. § 3104(c)(1) if it either 'transacts any business or performs any character of work or service,' including the sale or offer for sale of infringing products, in Delaware." (D.I. 28 at 10) Plaintiff then expands on this argument in its Reply Brief,[17] asserting that "stream-of-commerce"

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[16] Because the Court concludes that Plaintiff has failed to advance a non-frivolous argument with regard to the statutory prong of the general jurisdictional analysis, it need not reach the constitutional prong. *Belden Techs., Inc. v. LS Corp.*, 626 F. Supp. 2d 448, 457 (D. Del. 2009). However, the Court notes that the U.S. Supreme Court recently clarified that general jurisdiction over foreign corporations is proper if and only if "their affiliations with the State are so 'continuous and systematic' as to render them *essentially at home in the forum State*." *Goodyear Dunlop Tires Ops. v. Brown*, 131 S.Ct. 2846, 2851 (2011) (emphasis added) (citing *Int'l Shoe*, 326 U.S. at 317). The *Goodyear* Court reaffirmed that the quintessential paradigm for general jurisdiction arises from the principal place of business for the corporation. *Id.* at 2856. Plaintiff offers no evidence or argument that any party's principal place of business is in Delaware, or that any of IRP's agents are "essentially at home in" Delaware.

[17] Defendants argue that the Court should disregard Plaintiff's stream-of-commerce arguments because they should have been made in Plaintiff's opening brief, rather than in a reply brief. (D.I. 44 at 3–4) While the Court is generally sympathetic to this view, Plaintiff did at least arguably raise some aspect of this argument in its opening brief. Further, the Court granted Defendants leave to file a sur-reply, in which they could have substantively addressed this argument. (D.I. 68) At this stage, the Court will consider the stream-of-commerce theory as a potential basis for asserting personal jurisdiction, but only insofar as it might support limited

theory may provide a basis to assert personal jurisdiction over IRP. (D.I. 42 at 9–10)

a. Stream-of-Commerce Theory as Formulated by the United States Supreme Court

More than thirty years ago, the U.S. Supreme Court first recognized that a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp.*, 444 U.S. at 297–98. The Supreme Court's next opportunity to address stream-of-commerce theory arose seven years later, in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). In that case, the Court addressed the question of whether "mere awareness on the part of a foreign defendant that the components it manufactured, sold, and delivered outside the United States would reach the forum State in the stream of commerce constitutes 'minimum contacts' between the defendant and the forum State" such that the requirements of constitutional due process were satisfied. *Id.* at 105.

In answering this question, the Supreme Court split into two plurality camps. Writing for one four-justice plurality, Justice O'Connor held that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. Instead, there must be some "[a]dditional conduct" evidencing an intent to serve a forum state, such as "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or

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jurisdictional discovery. As with all the underlying substantive issues, both parties will have a chance to revisit them as part of further briefing on IRP's 12(b)(2) motion. (D.I. 20)

marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* In contrast, writing for the other four-justice plurality, Justice Brennan concluded that due process requires only that a foreign defendant be "aware that the final product is being marketed in the forum State." *Id.* at 117.

b. Stream-of-Commerce Theory in Delaware

Against this backdrop, Delaware courts developed their own stream-of-commerce jurisprudence based on the Delaware long-arm statute. Although this body of law is unique to Delaware, its central premise—"that a non-resident may, under certain circumstances, be found to have sufficient contacts for jurisdictional purposes with any state in which its product ends up"—is consistent with the overarching principles from *Asahi* that were subsequently recognized and endorsed by the Federal Circuit and Third Circuit. *Power Integrations*, 547 F. Supp. 2d at 371 (citing cases). As applied to the Delaware long-arm statute, stream-of-commerce theory invokes two statutory subsections (10 Del. C. §§ 3104(c)(1) and (c)(4)),[18] so this theory is more accurately characterized as one of "dual jurisdiction." *Power Integrations*, 547 F. Supp. 2d at 371–72. Under this dual jurisdictional approach:

> [T]he enumerated activities in [10 Del. C. § 3104(c)(4)] should be analyzed to determine whether there is an intent or purpose on the part of the [nonresident] to serve the Delaware market with its product. Likewise, when analyzing § 3104(c)(1), it is not important that the [nonresident] itself act in Delaware. Instead, if the intent or purpose on behalf of the [nonresident] to serve the Delaware market results in the introduction of the product to this State and plaintiff[']s cause of action arises from injuries caused by that product, this section is satisfied.

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[18] Section (c)(1) of the Delaware long arm-statute provides that personal jurisdiction is proper over any nonresident who, in person or through an agent, "[t]ransacts any business or performs any character of work or service in the State." 10 Del. C. § 3104(c).

Id. at 372 (quoting *Boone v. Oy Partek Ab*, 724 A.2d 1150, 1158 (Del. Super. Ct. 1997)). As such, the stream-of-commerce theory under the Delaware long-arm statute may be used to establish jurisdiction when there is a showing of both: "(1) an intent to serve the Delaware market; and (2) that this intent results in the introduction of the product [at issue] into the market and that plaintiff's cause of action arises from injuries caused by that product." *Belden Techs., Inc. v. LS Corp.*, 626 F. Supp. 2d 448, 456 (D. Del. 2009) (citations omitted).

Under the Delaware long-arm statute, the "touchstone" of stream-of-commerce theory relates to the first prong of this analysis, the "intent and purpose to serve the Delaware market." *Power Integrations*, 547 F. Supp. 2d at 372 (citing *Boone*, 724 A.2d at 1158). Under this precedent, a "non-resident firm's intent to serve the United States market is sufficient to establish an intent to serve the Delaware market, unless there is evidence that the firm intended to exclude from its marketing and distribution efforts some portion of the country that includes Delaware." *Id.* at 373.

c. Application of Stream-of-Commerce Theory to Alleged Facts

In this case, Plaintiff contends that IRP's agent, AlphaPet, purposefully directed its PET products into the U.S. marketplace, knowing that those PET products (or plastic beverage containers incorporating those products) would end up in Delaware. (D.I. 42 at 9–10) Plaintiff has offered evidence indicating that IRP's alleged agents have made substantial sales of products in the United States since at least 2007. In 2007, for example, more than 40% of IRP's sales were in the U.S., and while that number declined in 2008, in that year IRP still reported that 29% of its global sales occurred in the U.S. (D.I. 28, ex. C at 32) Although IRP itself appears to sell products strictly in non-U.S. markets, the same cannot be true for all of IRP's subsidiaries. And

while the U.S. market appears to have been previously served only by non-party StarPet,[19] (*id.*), the evidence submitted supports the inference that AlphaPet has also been doing business in the U.S. market. (*See id.*, ex. E at 1) A September 2009 IRP press release stated that "AlphaPet['s] PET processing plant in Alabama will add to IRP's flexibility and reliability to serve customers throughout North America." (*Id.*) Moreover, "IRP and its subsidiaries have a marketing team in [the] USA . . . which is focused on sales in [that] respective region[]." (*Id.*, ex. C at 32) IRP has also publicly highlighted its relationships with major national and international distributors of products that are likely to incorporate PET products, including "Pepsi, Coke, Nestle, Danone, [and] Schweppes." (*Id.*)

In their briefs, Defendants do not substantively take issue with these assertions. Although Defendants have submitted declarations on behalf of both IRP and AlphaPet, neither of them directly addresses the key inquiry as to the first prong of the stream-of-commerce analysis—namely, whether there is evidence of an intent to serve the U.S. market with the products at issue in this litigation. These declarations merely attest that IRP has not "marketed or sold any products in Delaware," (D.I. 21 at ¶ 6), and that "AlphaPet Inc. has not sold or marketed any products in Delaware." (D.I. 22 at ¶ 3) But the issue, for purposes of the stream-of-commerce theory under the Delaware long-arm statute, is whether either IRP or AlphaPet intend to serve the U.S. and Delaware markets, and whether there are any Delaware sales of Defendants' PET products, or of *other products that incorporate* Defendants' PET products (even if those products themselves are not directly sold or marketed in Delaware). *See Power Integrations*, 547

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[19] Plaintiff has not argued that StarPet is IRP's agent, or that StarPet's activities in the U.S. might support the exercise of jurisdiction over IRP in Delaware.

F. Supp. 2d at 376 (granting jurisdictional discovery on stream-of-commerce theory where the defendants' accused power supply chips were incorporated into electronic devices such as cell phone chargers). Defendants' declarations do not address that question. (*See* D.I. 21, 22)

As such, Plaintiff has offered factual allegations that suggest, with reasonable particularity, IRP's intent to serve the United States market at least through its alleged agent, AlphaPet. *See Belden*, 626 F. Supp. 2d at 459 (granting jurisdictional discovery regarding personal jurisdiction when plaintiff's factual allegations suggest "with reasonable particularity the *possible* existence of the requisite contacts between the parties and the forum state") (internal quotation marks and citations omitted) (emphasis in original). While Plaintiff has offered some significant evidence relating to U.S. sales of PET products, Plaintiff has not provided direct evidence that any of these products ended up in the Delaware market specifically, as required by the second prong of the stream-of-commerce analysis set forth in *Power Integrations*. 547 F. Supp. 2d at 372.

However, the state of the record in this regard is analogous to that encountered in *Belden Technologies, Inc. v. LS Corp.*, 626 F. Supp. 2d 448 (D. Del. 2009). In that case, the Court noted that "[w]hile it is possible that the accused products penetrated Delaware's market, plaintiff presents no evidence to substantiate this conclusion." *Id.* at 456. The *Belden* plaintiff pointed to defendants' business and distribution relationships, much as Plaintiff has here with regard to IRP's and AlphaPet's PET products. Finding that "[t]hrough exploring these relationships, plaintiff *could* unearth transactions, sales, or other contacts by defendants with Delaware," this Court ordered jurisdictional discovery to proceed in *Belden.* 626 F. Supp. 2d at 459. Similarly, in light of the evidence in the record, Plaintiff should have the opportunity to take discovery

relating to IRP's and AlphaPet's PET sales and distribution relationships.

d. Recent Supreme Court Precedent on Stream-of-Commerce Theory

Given the facts outlined above, Plaintiff's stream-of-commerce theory cannot be considered clearly frivolous, particularly in light of the precedent established by the Delaware Supreme Court and the guidance from *Power Integrations* and *Belden*. However, after this Court decided *Power Integrations* and *Belden*, the U.S. Supreme Court issued its first decision analyzing the contours of stream-of-commerce theory since *Asahi*. *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S.Ct. 2780, 180 L.Ed 2d 765 (2011).[20] As was the case in *Asahi*, no single formulation of the stream-of-commerce test garnered a five-justice majority. Writing for a four-justice plurality, Justice Kennedy rejected the test from the Brennan concurrence from *Asahi* as "inconsistent with the premises of lawful judicial power." *Id.* at 2789. In rejecting the New Jersey Supreme Court's exercise of jurisdiction over a foreign defendant on due process grounds, the plurality held that "the defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted the forum*; as a general rule it is not enough that the defendant might have predicted that its goods will reach the forum state." *Id.* at 2788 (emphasis added). As such, "an intent to serve the U.S. market [does] not show . . . purposeful[] avail[ment]" of the a particular forum state. *Id.* at 2790.

In the wake of *Nicastro*, at least one court in this circuit has argued that the U.S. Supreme Court "overruled the line of cases exemplified by . . . *Power Integrations*," citing the *Nicastro* holding that "targeting the national market is *not* enough to impute jurisdiction to all the forum

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[20] None of the parties addressed *Nicastro* in their written submissions to the Court.

States." *Oticon, Inc. v. Sebotek Hearing Sys., LLC*, --- F. Supp. 2d ----, Civil Action No. 08-5489 (FLW), 2011 WL 3702423, at *9 (D.N.J. Aug. 22, 2011). However, the *Power Integrations* Court did not rely solely on targeting the national market to satisfy the stream-of-commerce test, but instead noted that the plaintiff had alleged that tens of thousands of defendants' accused products had been shipped into Delaware as components of cell phone chargers, and that at least one of the defendants had other relationships with end users of those products in Delaware. 547 F. Supp. 2d at 367.

Moreover, in his concurrence in the *Nicastro* judgement, Justice Breyer identified a number of factors that might be relevant in determining whether purposeful availment in a particular forum had occurred, which would take account of how large the manufacturer is, the distance of the forum, and the number of items that end up in the forum at issue. 131 S.Ct. at 2793. Justice Breyer's opinion (along with the three-justice dissent) suggests that intent to serve the national market, when coupled with other factors, remains a viable basis for the exercise of jurisdiction under stream-of-commerce theory. Indeed, as the *Oticon* court acknowledged, "*Nicastro* does not clearly or conclusively define the breadth and scope of the stream[-]of[-] commerce theory, as there was not a majority consensus on a singular test." 2011 WL 3702423 at *9.[21]

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[21] This has led at least one other court to note the limited applicability of *Nicastro*, and to continue to apply pre-*Nicastro* precedent when analyzing jurisdiction under the stream-of-commerce test. *See, e.g., Ainsworth v. Cargotec USA, Inc.*, Civil Action No. 2:10-CV-236-KS-MTP, 2011 WL 4443626, at *6–7 (S.D. Miss. Sept. 23, 2011) (denying a motion for reconsideration in light of *Nicastro* and holding that Justice Brennan's analysis in *Asahi* remains controlling precedent in that jurisdiction).

At this stage, the impact of *Nicastro*, if any, on the long-standing and well-established Delaware jurisprudence relating to stream-of-commerce theory is unclear. As such, *Nicastro* does not alter the Court's conclusion that Plaintiff's stream-of-commerce theory is not clearly frivolous, and thus that some limited jurisdictional discovery is appropriate. *See, e.g.*, *Chi Mei*, 395 F. 3d at 1322 (holding that a plaintiff is entitled to jurisdictional discovery when the factual record is inadequate to analyze stream-of-commerce theory).

2. Scope of Jurisdictional Discovery

Defendants expressed particular concern about the breadth of Plaintiff's requested discovery, which Defendants assert "far exceeds any jurisdictional issues in this case and aims straight for the merits of [Plaintiff's] trade secret and contract claims." (D.I. 36 at 13–14) While Plaintiff disagrees with that proposition, Plaintiff also asserts that "[t]his is not the appropriate time to address the *scope* of jurisdictional discovery, as the issue involved in this motion is *whether* jurisdictional discovery is warranted." (D.I. 42 at 10) Given the concerns raised by the Defendants, the Court's determination as outlined above, and for the sake of efficiency, the Court has outlined the permissible topics for jurisdictional discovery in an accompanying order. These topics relate generally to IRP's and AlphaPet's sales and distribution of PET products in the U.S. and Delaware.[22] *See Power Integrations*, 547 F. Supp. 2d at 376–77 (outlining seven categories of jurisdictional discovery based on the stream-of-commerce theory in light of "overly broad" requests by plaintiff).

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[22] The Court notes that these topics are similar to those for which Defendants had previously indicated that they would be willing to provide jurisdictional discovery. (D.I. 34, ex. I; D.I. 36 at 13 n.10)

IV. CONCLUSION

The Court is mindful that the standard for demonstrating entitlement to jurisdictional discovery is not onerous, but is likewise not automatic. *Toys 'R' Us, Inc.*, 318 F.3d at 456. Thus, after careful consideration, for the reasons outlined above, the Court has concluded that Plaintiff is entitled to only limited jurisdictional discovery relating to Plaintiff's stream-of-commerce theory. An appropriate Order follows.

Because this Memorandum Opinion may contain confidential information, it has been released under seal, pending review by the parties to allow them to submit a single jointly proposed redacted version of the Memorandum Opinion. Such redacted version shall be submitted no later than **November 8, 2011** for review by the Court. The Court will subsequently file a publicly-available version of its Memorandum Opinion.

Christopher J. Burke
UNITED STATES MAGISTRATE JUDGE