

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

ILUKA RESOURCES LIMITED

Plaintiff,

v.

CHEMOURS INTERNATIONAL OPERATIONS SARL,
AND THE CHEMOURS COMPANY SINGAPORE PTE LTD

Defendants.

Index No. 653398/2020

COMPLAINT

Iluka Resources Limited (“Iluka”), by its undersigned attorneys, states and alleges upon knowledge as to its own acts and upon information and belief as to the acts of others, as follows:

NATURE OF THE ACTION

1. This action arises out of a brazen attempt by Chemours International Operations Sàrl and The Chemours Company Singapore Pte. Ltd. (together, the “Chemours Subsidiaries”) to avoid current and future payment obligations under a long term “take-or-pay” supply contract with Iluka (the “Supply Agreement”) by taking advantage of the global COVID-19 pandemic to declare a spurious *force majeure* event. Iluka brings this action for breach in respect of the \$41,404,800 in payments that the Chemours Subsidiaries have failed to pay for previously scheduled shipments under the Supply Agreement, as well as the future payment obligations that the Chemours Subsidiaries have repudiated, which are estimated to amount to \$11,240,000. Iluka further seeks a declaration that the Chemours Subsidiaries’ future performance under the Supply Agreement is not excused by their feigned *force majeure* event.

2. Iluka is one of the world’s largest suppliers of raw and processed materials used to produce titanium dioxide pigment, which is used as a whitener in the production of paints and coatings, plastics, paper and other products. One of Iluka’s largest customers is The Chemours

Company, which was spun off from DuPont in 2015, and is the parent of the defendant Chemours Subsidiaries. The Chemours Company is one of the world's largest producers of titanium dioxide products, which it markets and sells to paint, plastics and paper manufacturers (among others).

3. The Supply Agreement was entered into in connection with Iluka's decision to develop a new titanium dioxide mine in Cataby, Australia, in 2017. Before committing to develop the mine, Iluka sought supply contracts from its largest customers to ensure that it would have sufficient demand to justify the Cataby mine's estimated AU\$270 million (US\$215 million) upfront investment and AU\$120-\$130 million (US\$95-\$103 million) per year ongoing operational costs.¹

4. Under the Supply Agreement, the Chemours Subsidiaries agreed to purchase and take delivery of certain minimum amounts of three different types of titanium dioxide feedstocks—*i.e.*, materials that could be used to make titanium dioxide—for an initial term of one year, with contingent options for two subsequent four year extensions. One of these feedstocks is created by processing ore that comes from the Cataby mine. In the event that the Chemours Subsidiaries failed to take delivery of the materials on the schedule provided under the Supply Agreement, they were nonetheless obligated to pay for those materials.

5. These types of “take or pay” contracts are common in the natural resources sector where, as here, there is substantial cost required to both develop and operate the facilities necessary to extract the resources. This form of contract benefits the supplier (here, Iluka) by providing certainty of demand so as to justify its significant upfront and ongoing investment in

¹ All AUD figures herein are converted to USD using the exchange rate as at September 1, 2017 (0.7975), which is the date of entry into the Supply Agreement. All dollar figures are in USD unless otherwise specified.

mining and production facilities. This form of contract also benefits the purchaser (here, the Chemours Subsidiaries) by providing certainty of supply of materials that require significant upfront cost to produce and thus are at risk of being in limited supply in fluctuating markets.

6. In 2018, a year after entering into the Supply Agreement, The Chemours Company adopted a new “Value Stabilization” strategy through which it sought to charge fixed-prices for its titanium dioxide products. That strategy did not produce the desired results, with Chemours’ sales in its Titanium Technologies division dropping through 2019. In December 2019, as a result of Chemours’ reduced business, it sought to renegotiate the Supply Agreement to allow the Chemours Subsidiaries to take delivery of lower volumes of the highest priced of the three titanium dioxide materials covered by the Supply Agreement, called “SR Premium.” Despite negotiating in good faith, the parties were unable to reach an agreement on revised terms and the Supply Agreement remained in effect unchanged.

7. In May 2020, the Chemours Subsidiaries failed to take delivery of one of the SR Premium shipments scheduled under the Supply Agreement. They also failed to pay for the shipment as required under the Supply Agreement (regardless of whether the delivery was taken). After Iluka notified the Chemours Subsidiaries of their default under the Supply Agreement, the Chemours Subsidiaries belatedly claimed, in June, that their performance had been prevented by the COVID-19 pandemic and was therefore excused under the Supply Agreement’s *force majeure* provision. Claiming the COVID-19 pandemic could excuse their performance for up to 180 days, the Chemours Subsidiaries further stated that they would refuse to take delivery of the additional SR Premium shipments scheduled under the Supply Agreement through at least the third quarter of 2020.

8. Contrary to their contention, the Chemours Subsidiaries' performance under the Supply Agreement has not been excused on account of the COVID-19 pandemic. First, pandemics are not among the specified "Events" under the Supply Agreement's *force majeure* provision that can excuse performance. Second, even if pandemics were a covered Event (which they are not), the COVID-19 pandemic has not prevented the Chemours Subsidiaries from performing their two obligations under the Supply Agreement—*i.e.*, taking and paying for shipments of materials—neither of which has been impacted by the pandemic. Instead, it is clear that, after Chemours unsuccessfully attempted to renegotiate their SR Premium purchase commitments in December 2019 as a cost-cutting measure, the Chemours Subsidiaries are now seeking to unilaterally modify those commitments under the false guise of declaring a *force majeure* event. Finally, even if COVID-19 could have constituted a valid *force majeure* event (which it could not), the Chemours Subsidiaries never complied with the Supply Agreement's required notice procedures.

9. For these reasons and others set forth herein, Iluka therefore seeks an award of damages for the deliveries of SR Premium the Chemours Subsidiaries have failed to take or have repudiated under the Supply Agreement, and a declaration that their purported *force majeure* event does not excuse their performance under the Supply Agreement in respect of future deliveries.

PARTIES

10. Plaintiff Iluka Resources Limited is an Australian resources company that specializes in mineral sands exploration, project development, operations and marketing. Iluka is the world's largest producer of feedstocks used to produce titanium dioxide. Iluka is organized under the laws of Australia with its registered office in Perth, Western Australia.

11. Defendant Chemours International Operations Sàrl (“Chemours Switzerland”) is organized under the laws of Switzerland with its registered office in Geneva, Switzerland.

12. Defendant The Chemours Company Singapore Pte. Ltd. (“Chemours Singapore”) is organized under the laws of Singapore with its registered office in Singapore.

13. Chemours Switzerland and Chemours Singapore are subsidiaries of, and are controlled by, The Chemours Company (“Chemours USA”), a chemical conglomerate with revenues in excess of \$5 billion per annum that was spun off from the DuPont company in 2015 (together with the Chemours Subsidiaries, “Chemours”). Through its “Titanium Technologies” division, Chemours is one of the world’s largest producers of titanium products for coatings, plastics, and laminates. Chemours USA has its headquarters in Wilmington, Delaware.

JURISDICTION AND VENUE

14. This Court has personal jurisdiction over Chemours Singapore and Chemours Switzerland pursuant to Section 19 of the Supply Agreement. Under that section, the parties agreed to “consent and submit exclusively to the jurisdiction and service of process of the courts of the State of New York or the courts of the United States located in New York.”

15. Venue is proper in the New York Supreme Court, New York County, pursuant to Section 19 of the Supply Agreement. Under that section, the parties further agreed that the Supply Agreement “shall be governed by, construed and enforced in accordance with the laws of the State of New York without giving effect to the principles of conflicts of law.” Iluka has incurred or faces damages in excess of the \$500,000 monetary threshold required for jurisdiction in the Commercial Division of New York County.

FACTUAL BACKGROUND

I. CHEMOURS' TITANIUM DIOXIDE PRODUCTION PROCESS

16. Titanium dioxide or "TiO₂" is a dark-colored mineral that, with further processing, becomes a white, opaque powder. Around 90 percent of titanium dioxide produced globally is used as a pigment in the manufacture of paint, plastic, paper and fiber where, in addition to being a non-toxic whitener, it also provides UV and chemical resistance. The wide range of end applications for titanium dioxide pigment include house and car paints, laminates, plastic pipes and packaging, inks, clothing, sunscreen, toothpaste and make-up.

17. Chemours' Titanium Technologies division produces titanium dioxide products by running different types of "feedstocks" through its processing facilities located in New Johnsonville (Tennessee), Delisle (Mississippi), Altamira (Mexico) and Kuan Yin (Taiwan). Feedstocks are typically differentiated by reference to their percentage of titanium dioxide. For example:

- a. Ilmenite is a naturally occurring low-grade titanium dioxide feedstock (TiO₂ content of 58-62%).
- b. HYTI 90 is an intermediate-grade titanium dioxide feedstock (TiO₂ content of 90%).
- c. Synthetic rutile is produced by upgrading ilmenite in a rotary kiln. It is a high-grade titanium dioxide feedstock (TiO₂ content of 89-93%).

18. As a general rule, feedstock with a higher TiO₂ content will generate less waste per unit of feedstock while also being transformed into more titanium dioxide pigment. Accordingly, higher-grade feedstocks—*i.e.*, feedstocks with a higher TiO₂ content—will typically have a higher price (per metric ton) than lower-grade feedstocks.

19. Chemours touts its “feedstock flexibility,” meaning that Chemours’ processing facilities can handle both low-grade and high-grade feedstocks. As a result, Chemours is able to switch amongst a wide variety of feedstocks depending on cost, availability, and customer demand.

II. THE SUPPLY AGREEMENT

A. Iluka Obtained A Long Term Supply Contract With Chemours To Justify Opening A New Mine

20. For a number of years prior to 2017, Iluka was considering developing a new mine in Cataby, Western Australia, to mine a large ilmenite deposit. Ilmenite—a low-grade titanium dioxide feedstock—would be extracted and then processed by Iluka to create synthetic rutile, a high-grade titanium dioxide feedstock. The estimated life of the mine was eight-and-a-half years, with the possibility to extend the mine life by a further four years. The estimated cost of developing the Cataby mine was AU\$270 million (US\$215 million). In order to determine whether this significant investment was justified, Iluka sought to confirm and establish customer demand by entering into a small number of large, long-term supply contracts with titanium dioxide producers, including Chemours, one of its major customers.

21. The Supply Agreement—entered into as of September 1, 2017—was expressly tied to the opening of the Cataby mine. Specifically, the contract had an initial term of only four months—from September 1 to December 31, 2017—with a “Further Term” that would run from January 1, 2018 to December 31, 2022, provided Iluka’s board of directors made a decision to proceed with the “Cataby Project” and informed the Chemours Subsidiaries of that decision by December 30, 2017. (Supply Agreement § 3B.)²

² The Supply Agreement originally provided a November 30, 2017 deadline for Iluka to communicate to the Chemours Subsidiaries its decision to proceed with the Cataby Project, but the parties agreed on November 29, 2017 to extend this date by one month.

22. Iluka's board of directors voted to proceed with the development of the Cataby mine on December 12, 2017, and duly informed the Chemours Subsidiaries of that decision on December 15, 2017. Accordingly, the Supply Agreement's term was extended to run through at least December 31, 2022.³

23. Between December 2017, when the project was approved, and the second quarter of 2019, when production first commenced, Iluka spent approximately AU\$275 million (US\$205 million) to develop the Cataby mine. It will need to spend an additional AU\$60 million (US\$48 million) to further develop the mine over its remaining life, in addition to approximately AU\$120-\$130 million (US\$95-\$103 million) a year in operating costs.

B. The Chemours Subsidiaries Contracted On A "Take Or Pay" Basis

24. "Take or pay" contracts are relatively common in the natural resources sector. They require the buyer to either (a) take and pay for specified volumes of material at specified times, or alternatively (b) pay for that material if they do not wish to take it at the specified time. These types of contracts are entered into for various reasons, including that: (i) the supplier has to expend significant sums of money to build the facilities that allow it to extract the relevant natural resources from the ground and make them available (sometimes, as here, following further processing) to the buyer; (ii) once built, these facilities require a commitment of substantial ongoing operational costs; (iii) it is often difficult or impossible to find an alternative buyer for the natural resources, either on short notice or at all, given the small number of significant customers in the market; and (iv) it is often difficult or impossible to store the natural

³ Iluka also has the unilateral right to further extend the Supply Agreement for an "Additional Term," which would run from January 1, 2023 to December 31, 2026. (Supply Agreement § 3C.) In order to exercise this extension, Iluka's board of directors must decide to refurbish Iluka's "SR2 Kiln"—which is used to produce high-grade synthetic rutile from the ilmenite mined at Cataby—and inform the Chemours Subsidiaries of this decision on or before June 30, 2021. Iluka has not yet exercised its right to extend the Supply Agreement by the Additional Term, but reserves its right to do so.

resources until an alternative buyer can be found (if that is possible at all). Accordingly, the supplier needs certainty that, when it comes time for delivery, the buyer will in fact take and pay for the material (or alternatively pay for the material if they are not going to take it). Conversely, because there are often limited suppliers of the natural resources that require significant upfront cost to extract, buyers are willing to enter into take or pay contracts because they similarly need the certainty of being able to obtain a steady supply of the natural resource even if the cost of obtaining that certainty includes occasionally paying for deliveries the buyer has failed to take for one reason or another.

25. The Supply Agreement is a take or pay contract. Specifically, Section 2A states that:⁴

[ILUKA] must sell to CHEMOURS and CHEMOURS must purchase, take and pay for, or pay for if not taken, from [ILUKA], the following quantities of Material:

Material	For Period September 1 to December 31, 2017	Further Term	Additional Term
SR Premium	15,000 Metric Tons	80,000 Metric Tons per annum	80,000 Metric Tons per annum
EB Ilmenite	35,000 Metric Tons	100,000 Metric Tons per annum	100,000 Metric Tons per annum
HYTI 90	30,000 Metric Tons	30,000 Metric Tons per annum	18,750 Metric Tons per annum

26. “SR Premium” is a high-grade synthetic feedstock, for which the Chemours Subsidiaries agreed to pay US\$755 per metric ton in 2017. (Supply Agreement § 4.1.) “HYTI 90” is an intermediate-grade feedstock, for which the Chemours Subsidiaries agreed to pay US\$580 per metric ton in 2017. *See id.* “EB Ilmenite” is a low-grade feedstock, for which the Chemours Subsidiaries agreed to pay US\$150 per metric ton in 2017. *See id.* For 2018 and each year thereafter, the price of SR Premium, HYTI 90 and EB Ilmenite (each a “Material,” and

⁴ Underlining added.

together, the “Materials”) is set by a series of schedules and formulas in the Supply Agreement. (Supply Agreement §§ 4.2, 4.3.)

27. The volumes for each Material were specifically negotiated as part of a package deal. Chemours wanted a mixture of high-grade, intermediate-grade, and low-grade feedstocks, and Iluka agreed to provide that mixture on a package basis. While minimum volumes were agreed in advance, the parties specifically provided for certain adjustments that could be made “[i]n the event of a reduction in [the Chemours Subsidiaries’] total global feedstock requirements,” in which case the Chemours Subsidiaries could elect to reduce their volumes of the lower-grade HYTI 90 and EB Ilmenite feedstocks pursuant to a formula. (Supply Agreement § 2D.) There was no similar provision for any reduction in the volumes of the SR Premium as it—unlike the lower-grade feedstocks—was produced using ilmenite extracted from the Cataby mine, and its committed volumes were thus instrumental to the decision to develop that mine in the first place.

28. Consistent with “take-or-pay” clauses commonly used in fixed-term supply contracts throughout the natural resources sector, the Chemours Subsidiaries had two alternate means of performance under Section 2A of the Supply Agreement: they could either take and pay for the Material, or simply pay for the Material if they chose not to take it.

29. Section 2B of the Supply Agreement reiterates the Chemours Subsidiaries’ alternate obligations:

If at any time during the Term CHEMOURS fails to take a delivery of Material in accordance with this Agreement, CHEMOURS must, unless otherwise agreed in writing by [ILUKA], pay to [ILUKA] liquidated damages in an amount equal to the Price for such delivery multiplied by the quantity of Material that CHEMOURS has failed to take.

30. Section 2C of the Supply Agreement memorializes the Chemours Subsidiaries’ acknowledgement that their obligation to pay Iluka for Material—even if the Chemours

Subsidiaries chose not to take it—was specifically negotiated and a reasonable estimation of the loss that Iluka would suffer if the Material was not taken:

The Parties acknowledge that the liquidated damages payable under this clause 2 has been the subject of negotiation and constitutes a reasonable and genuine pre-estimate of the anticipated loss which would be incurred if the relevant circumstances were to occur and does not constitute a penalty.

C. Parties Agreed Deliveries Would Be Made Pursuant To An Annual Shipping Schedule

31. While Section 2A of the Supply Agreement specifies the total annual volume of each Material that the Chemours Subsidiaries are required to take, Section 7.2 requires the parties to negotiate and agree a “Confirmed Shipping Schedule” for each calendar year that breaks the total annual volume into an evenly-spaced series of individual shipments.

32. The Confirmed Shipping Schedule for 2020 is as follows:⁵

Delivery Date	Material Type	Quantity (metric tons)
Feb. 22, 2020	SR Premium	17,000
Feb. 27, 2020	EB Ilmenite	9,500
Feb. 29, 2020	SRL Ilmenite	10,800
Mar. 13, 2020	HYTI 90	7,500
May 6, 2020	SR Premium	20,000
May 11, 2020	HYTI 90	7,500
May 11, 2020	EB Ilmenite	5,000
Jun. 10, 2020	SRL Ilmenite	10,800
Jul. 14, 2020	SR Premium	5,000
Jul. 16, 2020	SR Premium	13,000
Jul. 21, 2020	EB Ilmenite	10,000
Sep. 7, 2020	SR Premium	10,000
Sep. 12, 2020	EB Ilmenite	9,700
Sept. 29, 2020	SRL Ilmenite	10,800
Oct. 4, 2020	HYTI 90	7,500
Nov. 17, 2020	SR Premium	15,000
Nov. 22, 2020	EB Ilmenite	20,800

⁵ In January 2019, the parties agreed to amend the Supply Agreement to allow Iluka to nominate certain of its affiliates to supply Material as it fell due under the Confirmed Shipping Schedule, including an affiliate named Sierra Rutile Limited (“SRL”). As a result, the Confirmed Shipping Schedules for 2020 occasionally included “SRL Ilmenite,” which constituted EB Ilmenite for purposes of the Supply Agreement.

Dec. 1, 2020	SRL Ilmenite	12,600
Dec. 4, 2020	HYTI 90	7,500

33. The Chemours Subsidiaries are required to provide Iluka with information regarding the ship that the Chemours Subsidiaries have nominated to take delivery of each shipment at least 14 days prior to the specified delivery date. (Supply Agreement § 7.3A.) Iluka then arranges for the Material to be loaded on board the ship at the specified port.

III. CHEMOURS ADOPTS A STRATEGY AFTER ENTERING INTO SUPPLY AGREEMENT THAT CAUSES IT TO LOSE BUSINESS

34. Starting in or around 2018, Chemours' Titanium Technologies division adopted what it referred to as a "Value Stabilization" strategy. As part of this strategy, Chemours sought to have its customers adopt fixed pricing for the titanium dioxide products that Chemours sold, in place of prices that might fluctuate based on market-demand.⁶ Chemours USA's President and CEO, Mark Vergnano, described the strategy in 2018 as "something that we believe is important for us, our customers, and also our investors,"⁷ and made clear that the Chemours companies "are dedicated to the strategy of Value Stabilization and we're going to move forward with it."⁸

35. Through 2019, however, Chemours' new strategy produced negative results. Sales for Chemours' Titanium Technologies division for the first quarter of 2019 dropped to \$555 million, from \$854 million the year before, a reduction which Chemours acknowledged was "driven by a combination of weak demand and expected market share loss as we continue

⁶ In Chemours' own words, the intention of its Value Stabilization strategy was for Chemours to "absorb the demand variance in our customer's marketplace, while holding value-based pricing for [Chemours titanium] products," with the aim of "[r]educ[ed] business volatility [that] stabilizes Chemours' cash generation and enables more consistent capacity planning to serve our customers." See The Chemours Company, *Investor Presentation* (March 2019), at 14. (https://s21.q4cdn.com/411213655/files/doc_presentations/2019/March-2019-Deck.pdf).

⁷ The Chemours Company, *Q3 2018 Earnings Conference Call Transcript* (September 30, 2018) (<https://www.fool.com/earnings/call-transcripts/2018/11/02/the-chemours-company-cc-q3-2018-earnings-conferenc.aspx>).

⁸ *Id.*

the implementation of our Value Stabilization strategy.”⁹ Chemours’ titanium dioxide segment sales for the whole of 2019 also fell to \$2.3 billion, from \$3.2 billion the year before, again driven by “market share loss in the first half of the year as we implemented our Value Stabilization strategy.”¹⁰ As late as November 2019, Mr. Vergnano was forced to concede that “[w]e’re instituting a very different way of buying TiO₂ and we also go into a weak market at the same time. The result has been loss of market share beyond what we had anticipated.”¹¹

36. These negative results led Chemours to try and cut costs in its Titanium Technologies division wherever it could. In November 2019, Mr. Vergnano explained: “Our planning is to hunker down a bit from a cost perspective and make sure we are smart around what we can control going forward.”¹²

IV. CHEMOURS SEEKS IN DECEMBER 2019 TO REDUCE ITS SR PREMIUM OBLIGATIONS UNDER THE SUPPLY AGREEMENT

37. As explained above, Chemours has the ability to switch between higher-grade and lower-grade titanium dioxide feedstocks in its processing facilities, and would use higher-grade feedstocks only where necessary to more quickly or efficiently produce its titanium dioxide products. When the demand for Chemours’ titanium dioxide products dropped in 2019 as a result of its Value Stabilization strategy, Chemours was commercially incentivized to switch to lower-grade feedstocks, because it no longer needed the higher titanium dioxide output generated by more expensive high-grade feedstocks such as SR Premium.

⁹ PR Newswire, *The Chemours Company Reports First Quarter 2019 Results* (May 2, 2019) (<https://www.prnewswire.com/news-releases/the-chemours-company-reports-first-quarter-2019-results-300843132.html>).

¹⁰ Chemours, *The Chemours Company Reports Fourth Quarter and Full Year 2019 Results* (February 13, 2020) (<https://www.chemours.com/en/news-media-center/all-news/press-releases/2020/the-chemours-company-reports-fourth-quarter-and-full-year-2019-results>).

¹¹ Chemical Week, *Chemours Earnings Drop On Titanium Dioxide, Fluoroproducts Weakness* (November 5, 2019) (<https://chemweek.com/CW/Document/107109/Chemours-earnings-drop-on-titanium-dioxide-fluoroproducts-weakness>).

¹² *Id.*

38. On December 12, 2019—approximately one month after Mr. Vergnano told the market Chemours was seeking to “hunker down” from a costs perspective—representatives from Chemours’ Titanium Technologies division emailed Iluka “asking for Iluka’s consideration to reduce [the Chemours Subsidiaries’] purchase commitment for [SR Premium],” because “our true needs for this ore are lower [than set out in the Supply Agreement], *in large part due to our commitment towards our Value Stabilization strategy.*” (Emphasis added). Chemours did not seek to reduce the Chemours Subsidiaries’ purchase commitment for the lower-grade HYTI 90 and EB Ilmenite Materials.

39. Iluka engaged in good faith negotiations with Chemours in late 2019 and early 2020 regarding Chemours’ request to reduce the Chemours Subsidiaries’ purchase commitment for SR Premium. Ultimately, however, the parties were unable to come to an agreement, and the Chemours Subsidiaries’ purchase commitment for SR Premium under the 2020 Confirmed Shipping Schedule remained unchanged.

V. **THE CHEMOURS SUBSIDIARIES BREACH THE SUPPLY AGREEMENT IN MAY AND JULY 2020**

40. The first shipment of SR Premium in 2020 was for 17,000 metric tons with a Confirmed Shipping Schedule date of February 22, 2020. Iluka duly supplied, and the Chemours Subsidiaries took and paid for, this shipment.

41. The second shipment of SR Premium in 2020 was for 20,000 metric tons with a Confirmed Shipping Schedule date of May 6, 2020. While Iluka stood ready to supply this shipment, the deadline for the Chemours Subsidiaries to nominate the necessary ship expired with no such nomination from the Chemours Subsidiaries.

42. On May 11, 2020, Iluka sent the Chemours Subsidiaries a letter noting their obligation to “take delivery of (or pay for, if not taken) 20,000 Metric Tons of SR Premium

during May 2020,” and noted that the Chemours Subsidiaries had failed to nominate a suitable ship in accordance with the Confirmed Shipping Schedule. Iluka further requested that the Chemours Subsidiaries “nominate a suitable vessel to take delivery of 20,000 Metric Tons of SR Premium as soon as possible ... , and in any event by no later than 15 May 2020.”

43. The Chemours Subsidiaries rejected Iluka’s request that they take or pay for the May 6 shipment of SR Premium. Instead, by letter dated May 15, 2020, the Chemours Subsidiaries asserted that “the current pandemic has had a devastating effect on the global economy,” citing Chemours’ purported reports from customers of “a decline in revenues of 20%-50%, which has, in turn, negatively impacted demand for Chemours TiO₂ products,” and proposed that the parties talk to see “whether we can work to bridge any differences.”

44. On June 5, 2020, Iluka sent the Chemours Subsidiaries a “Notice of Default.” That notice memorialized the Chemours Subsidiaries’ failure to take and pay for the May 6 SR Premium shipment in accordance with the Supply Agreement and the Confirmed Shipping Schedule, noting that this failure constituted “a material breach of Chemours’ obligations under the Agreement.” The notice gave the Chemours Subsidiaries until June 25 to remedy the default, either by taking and paying for the May shipment, or by paying Iluka the sum of \$21,792,000, as due under Section 2B of the Supply Agreement.

45. The Chemours Subsidiaries responded to Iluka’s June 5 letter on June 19, 2020. For the first time, the Chemours Subsidiaries contended that their performance under the Supply Agreement was “excused,” referencing the *force majeure* provision in Section 17. In support of this assertion, the Chemours Subsidiaries referred to “the extraordinary unforeseeable and uncontrollable events or circumstances presented by the COVID-19 pandemic” which “have dramatically impacted Chemours and its customers, along with much of the world.” The

Chemours Subsidiaries stated that “[t]hese events or circumstances, which are outside the reasonable control of Chemours, have substantially hindered Chemours’ performance of its obligations under the Agreement with respect to SR Premium.”

46. Tellingly, the Chemours Subsidiaries’ June 19 letter did not explain how COVID-19 had prevented or hindered them from either taking and paying for, or alternatively paying for, the May 6 shipment of SR Premium. Instead, the Chemours Subsidiaries asserted that COVID-19 had “hindered *Chemours’ customers’* operations around the world and in almost all of Chemours’ customers industries, particularly the automotive industry.” (Emphasis added).

47. The Chemours Subsidiaries concluded their June 19 letter by asserting that “we currently anticipate that [the COVID-19 event] will continue to hinder Chemours’s performance through at least the second and third quarters of 2020,” and that “Chemours currently anticipates that the duration of the [COVID-19] Event(s) will extend for at least one hundred and eighty (180) days,” during which Chemours’ “obligations to provide a [shipping] date and take or pay for SR Premium . . . is excused.”

48. The third shipment of SR Premium in 2020 was for 5,000 metric tons with a Confirmed Shipping Schedule date of July 14, 2020. While Iluka stood ready to supply this shipment, the deadline for the Chemours Subsidiaries to nominate the necessary ship expired with no such nomination from the Chemours Subsidiaries.

49. The fourth shipment of SR Premium in 2020 was for 13,000 metric tons with a Confirmed Shipping Schedule date of July 16, 2020. While Iluka stood ready to supply this shipment, the deadline for the Chemours Subsidiaries to nominate the necessary ship also expired with no such nomination from the Chemours Subsidiaries.

50. On July 24, 2020, Iluka sent the Chemours Subsidiaries a “Notice of Default” in respect of the July 14 and July 16, 2020, shipments of SR Premium. That notice memorialized the Chemours Subsidiaries’ failure to take and pay for, or alternatively pay for, the July 14 and July 16, 2020, shipments of SR Premium in accordance with the Supply Agreement and the Confirmed Shipping Schedule, noting that this failure constituted “a material breach of Chemours’ obligations under the Agreement.” The notice further specified that the Chemours Subsidiaries’ payment obligations in respect of the July 14 and July 16, 2020, shipments were \$5,448,000 and \$14,164,800, respectively.

51. The fifth shipment of SR Premium in 2020 is for 10,000 metric tons with a Confirmed Shipping Schedule date of September 7, 2020. While Iluka will stand ready to supply this shipment, the Chemours Subsidiaries stated in their June 19 letter that they do not intend to accept delivery of that shipment, or to pay for it in lieu of delivery.

52. Throughout 2020, up to the date of filing of this Complaint, the Chemours Subsidiaries have continued to take and pay for the lower-priced Materials under the Supply Agreement (*i.e.*, HYTI 90 and EB Ilmenite), notwithstanding that they are contractually permitted under Section 2D of the Supply Agreement to reduce their volumes of those Materials “[i]n the event of a reduction in the [the Chemours Subsidiaries’] total global feedstock requirements” irrespective of the occurrence of any *force majeure* Event.

VI. THE CHEMOURS SUBSIDIARIES' BREACHES ARE NOT EXCUSED

53. Section 17 of the Supply Agreement, entitled "Excused Performance," is a *force majeure* clause that either party can invoke by issuing a "FM Notice." It states:

If, and to the extent that, performance by a Party (the "Affected Party") of any of its obligations under the Agreement is prevented, hindered or delayed by events or circumstances that are outside the reasonable control of the Affected Party, including (without limitation) fire, flood, hurricanes, earthquakes, other elements of nature, or by acts of war, terrorism, riots, rebellions or revolutions, acts of governments, or civil disorders (each an "Event"), then the Affected Party shall be excused for such resulting non-performance, hindrance or delay for as long as such Event continues, provided, however that: (i) such Event could not have been prevented by reasonable precautions; (ii) the Affected Party is diligently and in good faith attempting to promptly recommence performance in whole or in part (including through alternate means); and (iii) the Affected Party will not be relieved from an obligation to pay money under this Agreement, except as provided in clause 17. The Affected Party shall within three (3) days give notice ("FM Notice") to the other Party of the occurrence of the Event and shall describe the Event in reasonable detail.

54. While purporting in their June 19, 2020 letter to invoke Section 17 as a basis for excusing their performance under the Supply Agreement, the Chemours Subsidiaries' performance is not excused under that provision for multiple reasons.

55. *First*, the circumstances that the Chemours Subsidiaries identify as the basis for excusing their performance under the Supply Agreement do not fall within any of the covered "Events" listed in Section 17 of the contract. The Events listed in Section 17 include "fire, flood, hurricanes, earthquakes, other elements of nature, ... acts of war, terrorism, riots, rebellions or revolutions, acts of government, [and] civil disorders." In their June 19 letter, the Chemours Subsidiaries claimed to invoke Section 17 on the basis of the COVID-19 pandemic. However, "pandemics" are not included within the Events listed in Section 17, and thus cannot under any circumstance constitute a valid basis for excusing performance under the Supply Agreement.

56. *Second*, even if pandemics could constitute an Event under Section 17 (which they cannot), the Chemours Subsidiaries have failed to identify how COVID-19 has "prevented,

hindered or delayed” the performance of their obligations under the Supply Agreement. The Supply Agreement imposes only two obligations on the Chemours Subsidiaries: (1) to take the Materials from Iluka, including by coordinating with Iluka regarding shipping and transportation; and (2) to pay for the Materials, either upon delivery to the contracted vessel at the loading port or in lieu of accepting delivery. The Chemours Subsidiaries have failed to identify any way in which their ability to either take SR Premium or to pay for it—*i.e.*, their only performance obligations under the contract—has been impacted at all by COVID-19, let alone prevented, hindered or delayed.

57. Indeed, any contention by the Chemours Subsidiaries that COVID-19 prevented, hindered or delayed their performance under the Supply Agreement would be irreconcilable with Chemours’ contemporaneous public statements. For example, on May 6, 2020—the very day that the Chemours Subsidiaries first failed to take delivery of SR Premium—Chemours USA reported in a filing with the Securities and Exchange Commission that it was experiencing “steady demand for our [titanium dioxide] products” resulting in a 10% *increase* in Titanium Technologies net sales and a 19% *increase* in Titanium Technologies sales volume over the first quarter of 2020 “[d]espite the onset of the COVID-19 pandemic.”¹³ It further described any “future declines in customer demand driven by COVID-19” as “*yet uncertain*,” noting that “we have yet to experience the material negative effects of COVID-19 in our financial results.”¹⁴

58. More recent public disclosures by Chemours further confirm that Chemours’ ability to take or pay for SR Premium shipments has not been prevented, hindered or delayed. For example, in late July Chemours USA confirmed that it had \$1.4 billion of total liquidity,

¹³ Chemours USA Form 10-Q, filed May 6, 2020, at 44 (emphasis added) (https://s21.q4cdn.com/411213655/files/doc_financials/2020/q1/CC_1Q20_Form_10-Q_FINAL_FOR_APPROVAL_5.6.2020.pdf).

¹⁴ *Id.* at 45 (emphasis added).

including \$1.0 billion of cash—far more than required to pay for the SR Premium shipments—that “all [Chemours] sites [are] operational,” and that “Chemours [is] open for business.”¹⁵ Indeed, in April and July Chemours USA even authorized payment of more than \$80 million in dividends to its shareholders in the second and third quarters of 2020, further demonstrating its sound financial performance through the COVID-19 pandemic.¹⁶

59. Instead, it would appear that the Chemours Subsidiaries are using COVID-19 as a pretense to get out of obligations they had determined were no longer commercially convenient long before the onset of COVID-19. As described above, the Chemours Subsidiaries began asking for a reduction in their SR Premium purchase commitments in December 2019—*months before* the outbreak of COVID-19. Those requests were driven by declining sales of titanium dioxide products as a result of Chemours’ Value Stabilization business strategy. They had nothing to do with Iluka, nothing to do with COVID-19, and nothing to do with the events described in Chemours’ June 19, 2020 letter.

60. The pre-textual nature of the Chemours Subsidiaries’ *force majeure* argument is further confirmed by their continuing to take and pay for the lower-priced feedstocks under the Supply Agreement, demonstrating conclusively that the Chemours Subsidiaries can in fact continue to both take and pay for titanium dioxide feedstock from Iluka. Indeed, even if the Chemours Subsidiaries’ overall need for titanium dioxide feedstocks has declined, they could still comply with their obligations under the Supply Agreement by reducing their volumes of the

¹⁵ The Chemours Company, Second Quarter 2020 Earnings Presentation (July 31, 2020) at 4 (https://s21.q4cdn.com/411213655/files/doc_financials/2020/q2/Q2-2020-Deck.pdf)

¹⁶ Chemours Announces Second Quarter Dividend (April 28, 2020) at 1 (<https://www.chemours.com/en/news-media-center/all-news/press-releases/2020/chemours-announces-second-quarter-dividend>); Chemours Announces Third Quarter Dividend (July 29, 2020) at 1 (<https://www.chemours.com/en/news-media-center/all-news/press-releases/2020/chemours-announces-third-quarter-dividend>).

lower-grade feedstocks—which they are contractually permitted to reduce on account of any global reduction in their feedstock needs—while maintaining the same volumes of the high-grade SR Premium that they are required to take under the Supply Agreement. The mere desire of the Chemours Subsidiaries to cut costs by reducing their use of higher-cost feedstock rather than lower-cost feedstock does not constitute a *force majeure* Event.

61. *Finally*, even if the Chemours Subsidiaries otherwise had a valid basis upon which to claim that their performance was excused under the Supply Agreement (which they do not), they failed to comply with the notice requirements to invoke that excuse. Specifically, the Supply Agreement requires that a party give a written FM Notice “within three (3) days ... of the Event [claimed to excuse performance],” that “describe[s] the Event in reasonable detail.” The Chemours Subsidiaries failed to give any purported written notice to Iluka under Section 17 of the Supply Agreement until June 19, 2020, which was not only months after the onset of COVID-19—the supposed Event excusing performance—but *six weeks* after the Chemours Subsidiaries had failed to take the required May 6 delivery of SR Premium or, in lieu of delivery, pay for it. Moreover, as described above, the June 19, 2020 notice failed to provide “reasonable detail” of the alleged *force majeure* Event, as it failed to identify with any detail at all how the COVID-19 pandemic had, in fact, prevented, hindered or delayed the Chemours Subsidiaries’ performance.

CAUSES OF ACTION**COUNT I:
BREACH OF CONTRACT**

62. Iluka repeats and realleges in full each of the preceding allegations.

63. The Supply Agreement is a valid and enforceable contract, and Iluka has performed all conditions, duties, obligations, and promises required to be performed by Iluka in accordance with the terms of the contract.

64. The Chemours Subsidiaries are in breach of the Supply Agreement by failing to either (i) take the May 6, 2020 shipment of 20,000 metric tons of SR Premium and pay \$21,792,000 for it, or (ii) pay \$21,792,000 for that shipment if not taken.

65. The Chemours Subsidiaries are in breach of the Supply Agreement by failing to either (i) take the July 14, 2020 shipment of 5,000 metric tons of SR Premium and pay \$5,448,000 for it, or (ii) pay \$5,448,000 for that shipment if not taken.

66. The Chemours Subsidiaries are in breach of the Supply Agreement by failing to take the July 16, 2020 shipment of 13,000 metric tons of SR Premium and pay \$14,164,800 for it, or (ii) pay \$14,164,800 for that shipment if not taken.

67. As a direct and proximate result of the Chemours Subsidiaries' breach of the Supply Agreement in respect of the May 6, July 14, and July 16, 2020 shipments of SR Premium, Iluka has suffered injury and is entitled to monetary damages equal to the liquidated damages specified in the Supply Agreement of \$41,404,800, as well as amounts for such other shipments under the Supply Agreement that the Chemours Subsidiaries fail to take or pay for, and any applicable interest thereon.

COUNT II:
ANTICIPATORY BREACH OF CONTRACT

68. Iluka repeats and realleges in full each of the preceding allegations.

69. The Chemours Subsidiaries' assertion in their June 19, 2020 letter that "we currently anticipate that [COVID-19 Event(s)] will continue to hinder Chemours's performance through at least the second and third quarters of 2020" amounts to an express, definite, and final repudiation of future obligations under the Supply Agreement. This repudiation includes but is not limited to the Chemours Subsidiaries' obligation to take and pay for, or alternatively pay for, the shipment of 10,000 metric tons of SR Premium on September 7, 2020 in accordance with the Supply Agreement and the Confirmed Shipping Schedule.

70. As a direct and proximate result of the Chemours Subsidiaries' anticipatory breach of the Supply Agreement in respect of the September 7, 2020 shipment of SR Premium, Iluka has suffered injury and is entitled to monetary damages equal to the liquidated damages specified in the Supply Agreement, which are estimated to be \$11,240,000, as well as amounts for such other shipments under the Supply Agreement in respect of which the Chemours Subsidiaries repudiate their obligations, and any applicable interest thereon.

**COUNT III:
DECLARATORY JUDGMENT**

71. Iluka repeats and realleges in full each of the preceding allegations.

72. Under Section 2A of the Supply Agreement and the Confirmed Shipping Schedule for 2020, the Chemours Subsidiaries were required to either take and pay for, or alternatively pay for, shipments of SR Premium on May 6, July 14, and July 16, 2020.

73. The Chemours Subsidiaries have taken the position that they are excused from taking and paying for, or alternatively paying for, the May 6, July 14, and July 16, 2020 shipments of SR Premium, because they issued a valid FM Notice under Section 17A of the Supply Agreement on June 19, 2020.

74. Moreover, the Chemours Subsidiaries have taken the position that they will be excused from taking and paying for, or alternatively paying for, any future shipments of SR Premium under the Supply Agreement for so long as the alleged COVID-19 *force majeure* Event continues.

75. Iluka's position is that the notice issued by the Chemours Subsidiaries on June 19, 2020 did not constitute a valid FM Notice under Section 17A of the Supply Agreement, for the reasons articulated above, and that, accordingly, the Chemours Subsidiaries were not excused from their obligations to take and pay for, or alternatively pay for, the May 6, July 14, and July 16, 2020 shipments of SR Premium.

76. Moreover, Iluka's position is that the Chemours Subsidiaries are not excused from taking and paying for, or alternatively paying for, any future shipments of SR Premium under the Supply Agreement based on the June 19, 2020 notice.

77. An actual justiciable and substantial controversy exists between Iluka and the Chemours Subsidiaries concerning Iluka's rights and the Chemours Subsidiaries' obligations

under Section 2A of the Supply Agreement in light of the Chemours Subsidiaries' June 19, 2020 notice.

78. A declaratory judgment would serve the useful purpose of clarifying and settling the legal relations of the parties under the Supply Agreement

79. A declaratory judgment would finalize the controversy and offer relief from uncertainty. The substantial controversy between the parties is of sufficient immediacy and reality to warrant issuance of a declaratory judgment.

80. Iluka is entitled to a declaration that, notwithstanding the Chemours Subsidiaries' purported invocation of a *force majeure* Event on June 19, 2020, the Chemours Subsidiaries are required to perform their obligations to pay for the shipments of SR Premium they fail to take under the Supply Agreement.

PRAYER FOR RELIEF

WHEREFORE, Iluka requests that this Court enter judgment:

1. Declaring that, notwithstanding the Chemours Subsidiaries' purported invocation of a *force majeure* Event on June 19, 2020, the Chemours Subsidiaries are required to perform their obligations to pay for any shipments of SR Premium that they fail to take in a timely manner under the Supply Agreement;
2. Awarding damages in the amount of the liquidated damages specified in the Supply Agreement for the shipments of Materials the Chemours Subsidiaries failed to take under the Supply Agreement and the Confirmed Shipping Schedule, including but not limited to the May 6, July 14, and July 16, 2020 shipments of SR Premium, plus any applicable interest;
3. Awarding damages in the amount of the liquidated damages specified in the Supply Agreement for the future shipments of Materials under the Supply Agreement and the Confirmed Shipping Schedule in respect of which the Chemours Subsidiaries have repudiated their obligations to take delivery, including but not limited to the September 7, 2020 shipment of SR Premium, plus any applicable interest;
4. Awarding Iluka all legal fees and disbursements incurred in this action; and
5. Awarding Iluka such other relief as the Court deems just and proper.

JURY DEMAND

Pursuant to N.Y. C.P.L.R. 4102, Iluka demands a trial by jury on any and all issues so triable.

Dated: New York, New York
August 6, 2020

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