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

Mot. Seq. # 001

MEMORANDUM OF LAW IN SUPPORT OF THE CHEMOURS DEFENDANTS' MOTION TO DISMISS

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Pursuant to CPLR 3211(a)(7), defendants Chemours International Operations SARL and The Chemours Company Singapore PTE Ltd. (collectively, "Chemours") respectfully submit this memorandum of law in support of their motion to dismiss the complaint of plaintiff Iluka Resources Limited ("Iluka"), dated August 6, 2020, asserting breach and anticipatory breach of contract claims and seeking declaratory relief, on the grounds that their claims fail as a matter of law and are barred by documentary evidence.[1]

PRELIMINARY STATEMENT

The world changed profoundly with the arrival of the COVID-19 pandemic, as seemingly all would agree—but for plaintiff in this lawsuit. As the pandemic proceeded to hobble Chemours plant operations and decimate the markets for certain Chemours pigment products, Chemours sought in earnest to assess together with Iluka what this meant for the parties' Supply Agreement, by which Iluka sells ores to Chemours for use in making pigments. Chemours anticipated a cooperative, mutually advantageous discussion, since that had been the parties' longstanding experience, and since Iluka itself readily acknowledged the devastating ravages of the pandemic in its public pronouncements to its shareholders and others. Hearing quite the opposite, Chemours had no recourse but to invoke its contractual right to declare a temporary "excused performance" under the plain terms of the Agreement with regard to certain limited purchases of only some ore, while expressing the fervent hope that purchases would resume in short order as the pandemic hopefully subsided.

The Agreement calls for the parties to seek to sort out differences before embarking on litigation, and Chemours sought to do so and figured Iluka would as well. Iluka had other ideas, it turns out, and ignoring this plain contractual edict, launched this suit.

[1] Annexed as Exhibit 1 to the Affirmation of Allyson M. McKinstry, dated October 5, 2020 ("McKinstry Aff."), is a true and correct copy of the complaint (hereinafter "Compl.").

Contracts, at bottom, are about risk allocation, and there is no serious argument that the parties, in entering the Agreement over three years ago, sought to allocate to Chemours the utterly unforeseeable risk and consequences of a world-historic pandemic. The contract itself reveals as much, permitting "events or circumstances that are outside the reasonable control" of Chemours, "including (without limitation) …elements of nature"—among other uncontrollable circumstances—to constitute "Events" that "shall" excuse performance "for as long as such Event continues," and permitting even payment obligations to be excused when such "Events" arise. Chemours' responsibility in such circumstances is to perform its contract as best it can, mitigate the effects of the "Event" that gives rise to excused performance, and return to normal as promptly as the "Event" ceases. That is precisely what Chemours is doing, and has told Iluka it will continue to do.

The complaint is facially invalid and should be dismissed. In particular:

- All claims should be dismissed because Iluka breached conditions precedent to suit by not first seeking to resolve this matter through the mandatory informal resolution mechanism;
- The anticipatory breach count (Count II) should be dismissed because, by the complaint's own acknowledgement, Chemours has conveyed its intent to perform its contract obligations and in fact is doing so; and
- The declaratory judgment count (Count III) should be dismissed as duplicative of the contract claims and because an adequate remedy exists at law.

In comparable circumstances, courts of New York dismiss. Respectfully, that should be the outcome here.

FACTUAL BACKGROUND

I. The Parties Enter into a Supply Agreement.

On September 1, 2017, Iluka entered into a Supply Agreement with Chemours to supply the latter three types of titanium dioxide ("TiO2") ores, Synthetic Rutile Premium ("SR Premium"), Eucla Basin HyTi ("HyTi 90"), and Eucla Basin Illmenite ("EB Illmenite"). Compl. ¶¶ 4, 17, 21; Supply Agreement at §§ 2A, 3A, annexed to Affidavit of Min Chao, sworn to October 2, 2020 ("Chao Aff.") at Exhibit A ("Ex. A").[2] The Supply Agreement would have Iluka produce ore from its mine in Cataby, Australia. Compl. ¶ 21. The initial term of the Supply Agreement covered the four-month period between September and December 2017, but could be extended for an additional four-year term. *Id.* ¶¶ 21, 22. This extension would take effect if the Iluka Board of Directors voted to "proceed with the development of the Cataby mine[,]" which it did. *Id.* Following the vote, the Supply Agreement was extended to run through December 31, 2022. *Id.* ¶ 22.

Per the Supply Agreement, Chemours was to purchase and take, or in some circumstances pay for if not taken, specified metric tons of SR Premium, HyTi 90, and EB per year. *Id.* ¶ 25. There were notable exceptions, however, which were core to the parties' bargain, and which become relevant in this case.

II. The Supply Agreement Provides Exceptions to the "Take or Pay" Provisions.

The parties agreed to multiple exceptions to the Supply Agreement's take or pay provisions.

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[2] Despite plaintiff's failure to append a copy of the contract in question to the complaint, the Court may consider the full contract terms because it "conclusively establishes a defense to the asserted claims as a matter of law." *Levine Leichtman Capital Partners II, L.P. v. Inderdent, Inc.,* 68 Misc. 3d 1204(A), at *5 (Sup. Ct. N.Y. Cnty. 2020) (internal quotations and citation omitted); *see also* *CWCapital Invs. LLC v. CWCapital Cobalt VR Ltd.,* 182 A.D.3d 448, 452 (1st Dep't 2020) (dismissing contract related claims "[b]ecause the documentary evidence, namely the unambiguous contracts and the notice letters, shows that the OZ Funds and Carbolic did not engage in conduct prohibited by the contracts").

First, Chemours could, if faced with "a reduction in [] total global feedstock requirements," reduce the volume of of HyTi 90 and EB Illmenite it purchased from Iluka. *Id.* ¶ 27.

Second, the "Excused Performance" provision of the Supply Agreement steps in to excuse either party's performance where "prevented, hindered or delayed by events or circumstances that are outside the reasonable control of the" party affected by such events. *Id.* ¶ 53; Ex. A at § 17. In such excused conditions, the Affected Party would be "excused for such resulting non-performance, hindrance or delay for as long as such Event continues," up to 180 days. The uncontrollable events that may excuse performance include—"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[.]" Compl. ¶ 53; Ex. A at § 17.

Importantly, the "excused performance" exception expressly applies to any "Event [that] relates to [Chemours] ability to *take or pay* for Material." Ex. A. at § 17(B) (emphasis added). Thus, the parties agreed that pay commitments also become excused when an applicable "Event" arises. In either case, if such a situation arises, Chemours "may elect to have an extension to fulfill its obligations under [the Supply Agreement]." *Id*. Moreover, the quantity of material to be delivered for the duration of the Event and the corresponding amount Chemours is obligated to take or pay "is to be proportionately reduced" by Chemours' ability to take. *Id*. at § 17(E).

III. Chemours' Performance Under the Contract Is Excused by COVID-19.

The COVID-19 pandemic spread swiftly and with little warning globally. Despite Iluka's assertion that invoking this cataclysmic event, which has led to the deaths of more than 200,000 people in the United States, and over 1,000,000 people worldwide, is "spurious,"

(Compl. ¶ 1), those who experience the real world know otherwise. The pandemic has disrupted and continues to disrupt many norms of everyday life across the world.[3]

The ore and pigment industries were not immune to this catastrophe. Markets for the purchase of pigments were shuttered. Manufacturing operations, such as those of Chemours pertinent to this matter, were partially idled, some in unprecedented fashion.

One consequence of COVID-19 is a fundamental reconfiguration of the norms by which pigment is bought and sold. The pandemic has had "a devasting effect on the global economy," including the purchase and sale of the pigment products SR Premium is used to manufacture, along with the value of that ore. *See* Compl. ¶ 43. Iluka itself has publicly acknowledged the impact of the pandemic on the markets, the industry, and its own business.[4]

On May 15, 2020, forced to confront this disaster, Chemours notified Iluka that it was excused from taking the May 2020 shipment of SR Premium ores due to COVID-19's "devastating effect on the global economy," noting that its TiO2 customers had reported "a decline in revenues of 20%-50%, which has, in turn, negatively impacted demand for Chemours TiO2 products[.]" Compl. ¶¶ 43, 45. Chemours added that "COVID-19 had 'hindered Chemours' customers' operations around the world and in almost all of Chemours' customers industries, particularly the automotive industry."[5] Well before and even after notifying Iluka of

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[3] *See* COVID-19 Dashboard, Center for Systems Science and Engineering at Johns Hopkins University, available at https://coronavirus.jhu.edu/map.html (last accessed Oct. 2, 2020); *see also* COVID-19 World Map, NEW YORK TIMES, available at https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html (last accessed Oct. 2, 2020). The Court "may take judicial notice of newspaper publications." *Grebow v. City of New York,* 173 Misc. 2d 473, 479, 661 N.Y.S.2d 441, 445 (Sup. Ct. N.Y. Cnty. 1997); *Gomez-Jimenez v. New York Law Sch.,* 36 Misc. 3d 230, 257, 943 N.Y.S.2d 834, 854 (Sup. Ct. N.Y. Cnty.), *aff'd,* 103 A.D.3d 13, 956 N.Y.S.2d 54 (2012) ("The court takes judicial notice, for example, of an article on the front page of the New York Times business Section").

[4] At its April 9, 2020 Annual General Meeting, Iluka withdrew its 2020 guidance amid the uncertainty over the impact and duration of the coronavirus pandemic on global demand and its markets. *See* https://iluka.com/getattachment/cee02f36-a669-4782-bb76-349a12ed65e1/quarterly-review-to-31-march-2020.aspx.

[5] In a transparent attempt to distract from the issue of whether Chermours' performance was excused by the impact of COVID-19, Iluka makes numerous allegations on pre-pandemic matters that are wholly irrelevant to this dispute.

these circumstances, Chemours sought dialogue with Iluka in hopes of an amicable, business-oriented resolution.

Iluka responded instead, on June 5, 2020, by issuing a notice of default. *Id.* ¶ 44. Chemours answered by letter dated June 19, 2020, reiterating that it was temporarily excused from performance under the Supply Agreement due 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." *Id.* ¶¶ 45, 47; Ex. B, at 2.[6] Chemours also notified Iluka that it "currently anticipate[d] that [the COVID-19 event] will continue to hinder Chemours's performance through at least the second and third quarters of 2020," during which its "obligations to provide a [shipping] date and take or pay for SR Premium . . . [would be] excused." Compl. ¶ 47; Ex. B, at 2. Chemours provided assurances that it would "continue to monitor and evaluate [COVID-19's] continued impact on Chemours' performance" and would "stand ready to perform all its obligations under the Agreement[.]" Ex. B, at 2.

Again, Chemours sought dialogue. Again, Iluka responded with warfare, this time, on July 24, 2020, with another notice of default. Compl. ¶ 50.

IV. Ilkua Files this Lawsuit Before Satisfying the Mandatory Informal Resolution Procedures that are Conditions Precedent to Bringing Suit.

In the Supply Agreement, the parties, who had been business parties stretching back for years before the Agreement, decided that neither would sue before seeking to resolve matters amicably. Section 16 of the Supply Agreement, entitled "Dispute Resolution/Non-Binding

[6] *See* Letter from Chemours to Iluka dated June 19, 2020, annexed to Chao Aff. at Exhibit B ("Ex. B"). The Court may consider this letter when ruling on its motion to dismiss. *CWCapital Invs. LLC,* 122 N.Y.S.3d at 599.

Mediation/Arbitration[,]" expressly conditions any party's right to commence litigation involving the Agreement on first satisfying certain specified informal resolution procedures:

> CHEMOURS or SUPPLIER may at any time escalate in writing any unresolved dispute ("Dispute") arising out of or relating to this Agreement to a CHEMOURS Executive and a corresponding Executive of SUPPLIER (and any additional agreed-upon designees of the Parties).
>
> ***If*** such Executives do not resolve such dispute within 30 days after receipt of written notice (the "Escalated Negotiation Period"), ***then*** within 15 days after that CHEMOURS and SUPPLIER may agree to resolve any dispute arising out of or relating to this Agreement promptly by confidential non-binding mediation under the then current Conflict Prevention and Resolution Mediation Procedure published by the International Institute for Conflict Prevention and Resolution (such mediation proceeding to be completed within sixty clays) before resorting to arbitration or litigation. Also within such 15 days after the Escalated Negotiation Period, CHEMOURS and SUPPLIER ***shall determine*** whether ***they*** agree to binding arbitration of any dispute that may remain after mediation; alternatively if CHEMOURS and SUPPLIER fail to unanimously agree to refer the Dispute to mediation, CHEMOURS and SUPPLIER may elect to proceed directly to binding arbitration without mediation.
>
> ***
>
> ***If*** CHEMOURS and SUPPLIER do not agree on mediation or arbitration, ***then*** either of them may pursue its rights and remedies under this Agreement.

Ex. A at § 16. (emphasis added).

The parties engaged in discussions throughout April and May 2020. *See* Chao Aff. ¶ 5. Iluka never provided Chemours with formal notice that Iluka intended to escalate a dispute as required by the contract. Chao Aff. ¶ 11; *see* Ex. A at §§ 31A, 31C (requiring all contractual notices to be in writing, and where provided by electronic mail, to be specifically marked on the subject line). To the contrary: in correspondence dated June 24, 2020, Iluka flatly and firmly insisted that these discussions were *not* the "Escalated Negotiation" required by the Agreement

before the filing of suit was permitted. Ex. C, at 1.[7] Iluka never attempted to resolve the dispute, or reach a mutual decision with Chemours on whether to pursue mediation or arbitration, as the Agreement requires. Chao Aff. ¶¶ 4, 11. Instead, Iluka raced to the courthouse.[8]

On August 6, 2020, Iluka filed this action for (1) breach of contract, (2) anticipatory breach of contract, and (3) declaratory judgment. It seeks declaratory relief, liquidated damages for the full contract price of material not taken or paid for, liquidated damages for future shipments, and attorneys' fees. Compl. at 26 ("Prayer for Relief").

LEGAL STANDARD

On a motion to dismiss pursuant to CPLR 3211(a)(7), courts "accept the facts as alleged in the complaint as true, accord [the pleader] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory[.]" *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994); *Devore v. Pfizer Inc.,* 58 A.D.3d 138, 143 (1st Dep't 2008). However, allegations that consist of "bare legal conclusions" and factual claims that are "either inherently incredible or flatly contradicted by documentary evidence" are not presumed to be true or accorded such favorable inferences on a motion to dismiss. *Kliebert v. McKoan,* 228 A.D.2d 232, 232 (1st Dep't 1996).

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[7] *See* Email dated June 24, 2020 from Christian Barbier to Min Chao, annexed to Chao Aff. at Exhibit C ("Ex. C"). This Court can consider this exhibit without converting the motion to summary judgment as documentary evidence pursuant to CPLR 3211(a)(1). Evidence qualifies as "documentary" if it is "unambiguous and of undisputed authenticity." *Fontanetta v. John Doe 1,*73 A.D.3d 78, 86 (2d Dep't 2010). "Email correspondence can, in a proper case, suffice as documentary evidence for purposes of CPLR 3211(a)(1)." *Art & Fashion Grp. Corp. v. Cyclops Prod., Inc.,* 120 A.D. 3d 436, 438 (1st Dep't 2014); *Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assocs., Inc.,* 120 A.D.3d 431, 433 (1st Dep't 2014).

[8] Days before this complaint was even filed, Iluka announced to its shareholders that it "has commenced proceedings against Chemours in the Commercial Division of the Supreme Court of the State of New York in respect of Chemours' failure to pay Iluka for scheduled shipments of synthetic rutile in May and July 2020." *See* Iluka, Australian Securities Exchange Notice, Quarterly Review to 30 June 2020, dated July 28, 2020, available at https://www.iluka.com/getattachment/4e0a6fa5-f335-4ec4-bd9c-bbd248da8057/quarterly-review-to-30-june-2020.aspx

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE ILUKA FAILED TO SATISFY THE CONDITIONS PRECEDENT OF TALKING BEFORE SUING.

The Supply Agreement requires a party to try informal dispute resolution before filing suit and sets forth specific conditions that must be met. Iluka blithely ignored these contract requirements when it opted instead to haul off and sue. Failure to satisfy these conditions precedent means this case should be dismissed as premature.

Under New York law, "[a] condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises[.]'" *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690-91 (1995) (citation omitted). In determining whether a covenant is a condition precedent, courts consider the plain language of the provision and must interpret a clause consistent with the parties' "clear intent[,]" which can be discerned from the nature and structure of the agreement. *See IDT Corp. v. Tyco Grp., S.A.R.L.*, 13 N.Y.3d 209, 214 (2009) (contract containing condition precedent must be enforced according to its plain meaning).

In particular, courts construe provisions containing "conventions of condition" such as "'if,' 'on condition that,' 'provided that,' 'in the event that,' and 'subject to,'" as making a condition precedent. *Sohm v. Scholastic Inc.*, 959 F.3d 39, 46 (2d Cir. 2020) (citations omitted); *Israel v. Chabra*, 537 F.3d 86, 93 (2d Cir. 2008) ("Over time, the law has come to recognize and enforce the use of linguistic conventions to create conditions precedent" including "if"). Contract provisions that require a party to "promptly notice and document its claims made under the provisions of the contract governing the substantive rights and liabilities of the parties" are also construed as "conditions precedent to suit or recovery[.]" *A.H.A. Gen. Constr., Inc. v. N.Y.C. Hous. Auth.*, 92 N.Y.2d 20, 30-31 (1998).

Section 16 of the Supply Agreement, entitled "Dispute Resolution/Non-Binding Mediation/Arbitration[,]" is an escalation clause. It expressly conditions any party's right to commence litigation involving the Agreement on first (i) escalating any dispute to each party's executives by providing formal written notice; (ii) the executives attempting to resolve the dispute for 30 days; and (iii) ***if*** the parties are unable to resolve their dispute, ***then*** within 15 days after that, together making a mutual decision on whether to pursue mediation or arbitration. Ex. A at § 16. It is "only ***if*** [the parties] do not agree on mediation or arbitration, ***then*** either of them may pursue its rights and remedies under this Agreement." *Id.*

The referenced language in Section 16 are express conditions precedent to either contracting party's right to bring litigation. The parties unmistakably manifested their intent to require a conversation before a lawsuit, using the familiar "**if** … **then**" construct that gives rise to enforceable conditions precedent. *See O'Brien & Gere Ltd. v. Nextgen Chem. Processes, Inc.*, 55 A.D. 3d 1408, 1408 (4th Dep't 2008) (requirement of good faith effort to resolve any dispute using ADR procedures was condition precedent to litigation); *see Oppenheimer*, 86 N.Y.2d at 691.

It is undisputed that Iluka has not satisfied these conditions precedent. Iluka is first required to "escalate in writing any unresolved dispute" to Executives of Chemours. Ex. A at § 16. Iluka explicitly acknowledged – indeed, stridently insisted – that it has not complied with this first step as late as June 24, 2020, just six weeks before filing its complaint. Ex. C. At no point since has Iluka provided notice to trigger the Escalated Negotiation Period. Chao Aff. ¶ 11.

The second step is for the Executives at Chemours and Iluka to try to "resolve such dispute within 30 days after receipt of [the] written notice[,]" which is referred to as the

"Escalated Negotiation Period." Ex. A at § 16. In that same communication, Iluka further proclaimed that it has not even triggered Section 16's escalation procedures, much less that any discussions between the parties to date satisfied them. In Iluka's own words:

> Iluka does not view this discussion, or any previous discussions or communications as having triggered the Escalated Negotiation Period under section 16 of the Supply Agreement.

Ex. C.

The third step mandates that if the parties are unable to resolve the dispute, then within "15 days after the Escalated Negotiation Period," Chemours and Iluka (a) may "agree to resolve any dispute…promptly by confidential non-binding mediation…before resorting to arbitration or litigation[,]" (b) "*shall* determine whether *they* agree to binding arbitration of any dispute that may remain after mediation[,]" or (c) if they "fail to unanimously agree to refer the Dispute to mediation, [the parties] may elect to proceed directly to binding arbitration without mediation." Ex. A at § 16. Iluka has never even attempted to reach a mutual decision with Chemours on whether to pursue mediation or arbitration; indeed, the topic of possible mediation or arbitration was never even raised. Chao Aff. ¶¶ 5-9.

Since the parties never even discussed, let alone determined, that they cannot agree on mediation or arbitration, Iluka cannot as a matter of law skip to the fourth step and "pursue its rights and remedies under this Agreement" in litigation. Ex. A at § 16; Chao Aff. ¶ 11.

Iluka jumped the gun. Its filing violated the parties' contract. Iluka's acknowledged failure to satisfy the conditions precedent of Section 16 mandates dismissal.

II. THE CLAIM OF ANTICIPATORY BREACH FAILS BECAUSE CHEMOURS IS IN FACT PERFORMING AND HAS MANIFESTED NO INTENTION TO DO OTHERWISE

Iluka's claim for anticipatory breach is refuted by plaintiff's own admission that Chemours continues to perform under the Supply Agreement.

A claim of anticipatory breach fails where a plaintiff has not alleged that the purported breaching party "has finally, definitely, and unequivocally communicated to plaintiff its intent not to perform all of its future contractual obligations[.]" *124 Elmwood, LLC v. Elmwood Vill. Charter Sch.*, 28 Misc. 3d 1205(A), at *3, 957 N.Y.S.2d 637 (Sup. Ct. Erie Cnty. 2010). Defendant's "renunciation of the contract must be an unqualified and positive refusal to perform and must go to the whole of the contract." *Gittlitz v. Lewis*, 28 Misc. 2d 712, 713, 212 N.Y.S.2d 219, 220 (Sup. Ct. Nassau Cnty. 1961). "There must be a clear demonstration of an intent not to perform when the time for performance arrives." *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 316 (S.D.N.Y. 1989). The test for anticipatory breach "is an objective one," making dismissal on the pleadings appropriate and common. *Record Club of Am. Inc. v. United Artist Records, Inc.*, 643 F. Supp. 925, 939 (S.D.N.Y. 1986), *vacated on other grounds*, 890 F.2d 1264 (2d Cir. 1989); *see Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347, 803 N.Y.S.2d 14, 15 (2005) (dismissing anticipatory breach claim at the pleadings stage where plaintiff failed to adequately allege any "definite and final communication" by the defendant).[9]

In this case we have the opposite of repudiation, for, according to the complaint itself, Chemours has unequivocally declared its intention *to perform the Supply Agreement*. The complaint makes a great deal of the fact that, even as Chemours exercised its express contractual right to declare excused performance, "[t]hroughout 2020, up to the date of filing this Complaint, the Chemours Subsidiaries have ***continued*** to take and pay for the lower-priced Materials under the Supply Agreement…" Compl. ¶ 52 (emphasis added). The sole basis for Iluka's theory of

[9]Courts may resolve the issue of anticipatory breach as a matter of law where the purported repudiation is in writing. *York Agents, Inc. v. Bethlehem Steel Corp.*, 36 A.D.2d 62, 318 N.Y.S.2d 157, 158–59 (1971), *aff'd*, 29 N.Y.2d 808 (1971); *see also Vision Entm't Worldwide, LLC v. Mary Jane Prods., Inc.*, No. 13 Civ. 4215 (AT), 2014 WL 5369776, at *3 (S.D.N.Y. Oct. 17, 2014); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 112 (2d Cir. 2010).

anticipatory breach – Chemours' declaration letter of June 19, 2020 (Compl. ¶ 69) – confirms this reality and dooms the claim. In that letter, Chemours informed Iluka that "Chemours continues to stand ready to perform all of its obligations under the Agreement, including and consistent with its rights in Section 17, under which its obligations...during the duration of the event [are] excused." Ex. B, at 2. Chemours further offered to continue its dialogue with Iluka regarding the impact of COVID-19 on the Supply Agreement, and "remain[ed] hopeful that a mutually agreeable resolution [could] be reached." *Id.* This is unequivocally ***not*** a final expression of repudiation by Chemours. *See Gittlitz,* 28 Misc. 2d at 713; *see also In re Best Payphones, Inc.,* 432 B.R. 46, 58 (S.D.N.Y. 2010), *aff'd,* 450 F. App'x 8 (2d Cir. 2011); *Briarwood Farms, Inc. v. Toll Bros., Inc.,* 452 F. App'x 59, 61 (2d Cir. 2011).

This leaves only Chemours' assertion of its contractual right to declare excused performance. First, that assertion applies only to Chemours' "2020 second and third quarter obligations," and says nothing about other commitments under the remainder of the Supply Agreement, which extends through December 31, 2022. Compl. ¶ 21; Ex. B, at 2. Further, exercising *a right not to perform* under contractually provided-for circumstances is not breach, much less anticipatory breach. *See, e.g., Phibro Energy, Inc.,* 720 F. Supp. at 316-17 n.5 (plaintiff remains obligated to plead "a clear manifestation of intent communicated in advance of the time for performance that when the time for performance arrives the required performance will not be rendered") (internal quotations and citation omitted); *see also PT Kaltim Prima Coal v. AES Barbers Point, Inc.,* 180 F. Supp. 2d 475, 481 (S.D.N.Y. 2001).

Courts apply a "stringent standard in determining whether the test for repudiation is met[]" and have required "repeated, definite and absolute expressions of an unwillingness to perform[]" before finding an anticipatory breach. *Payphones, Inc.,* 432 B.R. at 56. And an action

for anticipatory breach is inviable where the alleged repudiating communication is qualified, or invites further discussion. *See* Gittlitz, 28 Misc. 2d at 713; *see also* *Payphones, Inc.*, 432 B.R. at 58 (communication inviting further "dialogue" between parties to a contract is not a definite and final expression of repudiation); *see also* *Briarwood Farms, Inc.*, 452 F. App'x at 61 (letter inviting "discussion and negotiation regarding how best" to achieve goals of a contract does not constitute an unequivocal refusal to perform). That is this case. There is no anticipatory breach, as demonstrated by plaintiff's own allegations in the complaint.

Accordingly, Iluka cannot state a claim for anticipatory breach and Count II should be dismissed.

III. THE DECLARATORY JUDGMENT CLAIM SHOULD BE DISMISSED AS DUPLICATIVE AND BECAUSE AN ADEQUATE REMEDY AT LAW EXISTS.

Iluka's third cause of action seeks a declaratory judgment that "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." Compl. ¶ 80. Ikula thus wants this Court to declare Chemours in breach and to have it pay for that breach – precisely what is sought in Iluka's causes of action for breach of contract. This claim is thus defective on its face.

It is well-settled that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract." *Apple Records v. Capitol Records*, 137 A.D.2d 50, 54 (1st Dep't 1988); *Arthur Young & Co. v. Fleischman*, 85 A.D.2d 571 (1st Dep't 1981) (declaratory judgment not proper to declare rights of parties because plaintiff had an adequate remedy in breach of contract); *see also* *James v. Alderton Dock Yards*, 256 N.Y. 298 (1931).

Here, the complaint fails to allege that Iluka has no adequate or alternative remedy at law. That is because it can make no such allegation. Plaintiff's first and second causes of action each

seek damages for breach of contract arising out of Chemours alleged failure to pay for certain shipments of SR Premium. Compl. ¶¶ 62-67; 68-70. The declaratory judgment claim mirrors these breach claims and merely seeks a declaration of the same rights and obligations as will be determined by the Court in deciding the contract claims. In like situations, New York courts regularly and repeatedly dismiss duplicative claims for declaratory judgment. *E.g., Bd. of Mgrs. of 125 N. 10th Condo. v 125North10, LLC,* 51 Misc. 3d 585, 590, 2016 WL 332027 (Sup. Ct. Kings Cnty. Jan. 26, 2016) (granting motion to dismiss declaratory judgment claim as "duplicative" of contract indemnification claim); *Wildenstein v 5H & Co.,* 97 A.D.3d 488, 491 (1st Dep't 2012) (granting motion to dismiss declaratory judgment claim as "duplicative"); *Joseph P. Carroll Ltd. v Ping-Shen,* 140 A.D.3d 544, 545 (1st Dep't 2016) (same), *lv. to appeal denied,* 28 N.Y.3d 914 (2017).

Thus, plaintiff's claim for a declaratory judgment (Count III) should be dismissed

CONCLUSION

For the foregoing reasons, Chemours respectfully requests the entry of an Order granting its motion to dismiss the complaint in all respects, and any other or further relief that the Court may deem just and proper.

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