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. # 003

REPLY IN SUPPORT OF
THE CHEMOURS DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendants Chemours International Operations SARL and The Chemours Company Singapore PTE Ltd. (collectively, "Chemours") submit this reply in further support of their motion to dismiss the complaint of plaintiff Iluka Resources Limited ("Iluka").[1]

PRELIMINARY STATEMENT

Iluka's opposition to Chemours' motion to dismiss declares proudly: "The Agreement was negotiated and executed by two sophisticated commercial counterparties." Opp. at 15. *Exactly*. Two sophisticated commercial parties, Iluka and (in fact two separate) Chemours entities, negotiated and then executed their Supply Agreement in September 2017. Being sophisticated, they knew exactly what they were doing. They knew that Iluka wanted to sell ore, and that Chemours wanted to buy ore for use in producing certain pigments. They knew that either party could claim "Excused Performance" when:

- "Events" that
- are "outside the reasonable control of the Affected Party,"
- such as "elements of nature,"
- not only "prevented" or "delayed" but even merely "hindered" performance.

They knew that both "take" and "pay" commitments could be excused in such circumstances. They knew that both sides' considerable investments – such as the supposed investment in Iluka's mine in Cataby, Australia made so much of in Iluka's complaint – were entirely subject to this unambiguous possibility of excused performance.

What the parties did *not* know, of course – what even the most "sophisticated" of parties could not have known – is that a pandemic of historic scale and destruction would enter the scene years later, touching every corner of the globe. The parties could not have known that this

[1] Chemours adopts the same abbreviations, conventions, and exhibits used in its moving memorandum ("Chemours Mem."). "Opp." refers to plaintiff's memorandum of law in opposition to Chemours' motion to dismiss [Dkt. 33].

"Event" would fundamentally undo and temporarily shutter the market for Chemours' pigments, and would hobble Chemours' operations as it did those of so many others around the world. Unable to know this, they could not conceivably have meant under the Supply Agreement to allocate the risk resulting from the COVID-19 pandemic to Chemours.

In sum, the world changed with the onset of COVID-19, and so did the Supply Agreement's normal operation. That is what this case is about. And Iluka's points raise in opposition cannot save this case.

First, Iluka glosses over the terms and conditions of the parties' Supply Agreement and reads the term "may" out of context and in a vacuum to try to avoid dismissal based on its undisputed failure to satisfy conditions precedent to bringing suit. But the inclusion of "if/then" and "shall" language, coupled with express limitations on when the parties can bring suit, confirm that the dispute resolution procedures are mandatory. Most of Iluka's authorities do not even involve conditions precedent, let alone support its reading of Section 16 as permissive.

Iluka characterizes Chemours' enforcement of the parties' contractual obligations as "quibbling" and suggests the conditions precedent should be excused because the parties maintain different positions and further negotiations would be "futile." Iluka's claim of futility is inconsistent with its own public statements that it was "continuing to endeavor to negotiate an appropriate commercial outcome." And it is inconsistent with the language of Section 16, which does not permit the parties to file a lawsuit simply because their negotiations were unsuccessful. Rather, Section 16 sets forth specific steps the parties must follow to determine what forum to adjudicate that dispute – mediation, arbitration, and in the event they cannot agree, litigation. The parties never had that discussion; Iluka's claim of futility is purely speculative.

Next, while Iluka includes pages upon pages of factual allegations – indeed, more pages

of allegations than legal analysis – it studiously ignores its own allegation, and supporting documentary evidence, that Chemours *continues to perform* under the Agreement by taking and paying for two out of the three types of titanium dioxide ("TiO2") ores that are supplied under the Agreement. This fact is fatal to Iluka's anticipatory breach claim and renders Iluka unable as a matter of law to state a claim. Iluka's cited authorities on this issue are factually distinguishable on this basis.

Finally, Iluka cannot overcome well-settled law dismissing claims for declaratory relief where, as here, they are duplicative of other claims and an adequate remedy exists at law. Iluka's attempt to draw a distinction between its claims for breach and declaratory relief based on the shipments at issue, is a meaningless distinction. This Court has to determine the same rights, obligations, and issues for all claims. The cases Iluka relies on are procedurally and factually distinguishable and have no bearing on this issue.

Respectfully, this case should be dismissed.

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE ILUKA FAILED TO SATISFY THE CONDITIONS PRECEDENT TO BRINGING SUIT.

Iluka does not deny that it failed to honor the elaborate "talk before sue" requirements of Section 16. It also does not, and cannot, deny that Section 16 contains the classic "if … then" phraseology of conditions precedent to suit discussed often under longstanding New York law. *See* Supply Agreement at § 16 ("If CHEMOURS and SUPPLIER do not agree on mediation or arbitration, then either of them may pursue its rights and remedies under this Agreement.").[2]

[2] The Supply Agreement is attached as Exhibit A [Dkt. 27] to the Affidavit of Min Chao [Dkt. 26], accompanying Chemours' moving memorandum.

Instead, Iluka now says (a) that Section 16 is permissive, not mandatory, and (b) that obeying Section 16 would have been futile.

To the first point: were Iluka correct, then these two "sophisticated commercial counterparties" (Opp. at 15) spent a great deal of time and space in their contract achieving nothing. Parties can always talk if they want to, they don't need a contract to give them this right. Iluka cannot explain why the parties spent over *eight paragraphs* of their heavily negotiated contract on an idle gesture. Contract terms are not read to be superfluous; Iluka's reading would do just that. *See* *Gittens v. State Univ. of New York,* 125 A.D.3d 473, 474, 4 N.Y.S.3d 155, 156 (1st Dep't 2015) ("It is a cardinal rule of construction that courts should 'adopt an interpretation that renders no portion of the contract meaningless'"); *Wallace v. 600 Partners Co.*, 205 A.D.2d 202, 206, 618 N.Y.S.2d 298, 301 (1st Dep't 1994), *aff'd*, 86 N.Y.2d 543, 658 N.E.2d 715 (1995) (same).

Iluka's interpretation of Section 16 as permissive would also render the final sentence of Section 16 meaningless. That sentence states: "Notwithstanding the above, either Party may petition any Court having jurisdiction for equitable relief at any time without notice." Supply Agreement at § 16. There would be no reason for the parties to carve out an action for equitable relief to be brought "at any time without notice" if all disputes, as Iluka now suggests, can be "brought at any time without notice." In New York, the contract reading that "gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect.'" *Galli v. Metz,* 973 F.2d 145, 149 (2d Cir. 1992) (internal quotations and citations omitted).

This leaves only Section 16's use of the term "may," with Iluka arguing that "may" must mean permissive. But words in a contract must not be read in isolation. By its plain language,

placement and structure, "may" in this context refers to timing: not to *whether* the parties must talk before suing, but *when* they are free to escalate disputes for informal dispute resolution. The language provides that the parties "may at any time escalate in writing any unresolved dispute[.]" Supply Agreement at § 16. As the adjacent word "time" suggests, this is a timing provision. It encourages amicable, "Executive"-level discussions "at any time" before launching lawsuits so as to avoid premature and possibly needless filings – like this one. *Id*. This is especially evident given the indisputably mandatory – "shall" – language of Section 16 that Iluka now overlooks. *Id.* (within "15 days after the Escalated Negotiation Period," the parties "*shall* determine whether *they* agree to binding arbitration of any dispute that may remain after mediation.") (emphasis added). Iluka's contrary reading of "may" warps text and robs Section 16 of meaning or purpose.

Iluka's authorities do not suggest a different result. Most do not involve the issue of whether a provision is a condition precedent.[3] Others stand for the unremarkable proposition that "may" is a permissive term – but only when this makes sense when read in the context of the contract. *New York State Elec. & Gas Corp. v. Aasen*, 157 A.D.2d 965, 967 (3d Dep't 1990). None of those cases found language similar to the provisions in Section 16 to be permissive.[4]

[3] *Novelty Crystal Corp. v. PSA Institutional Partners, L.P.*, 49 A.D.3d 113, 115 (2d Dep't 2008); *In re Oneida, Ltd.*, 400 B.R. 384, 391 (Bankr. S.D.N.Y. 2009), aff'd sub nom. *Peter J. Solomon Co., L.P. v. Oneida Ltd.*, 2010 WL 234827 (S.D.N.Y. Jan. 22, 2010); *New York State Elec. & Gas Corp. v. Aasen*, 157 A.D.2d 965, 967 (3d Dep't 1990).

[4] Iluka cites non-binding authorities involving materially different language. Opp. at 15, n.3. In *Bombardier Corp. v. National R.R. Passenger Corp.*, 298 F. Supp. 2d 1, 5 (D.D.C. 2002), the terms "may" and "or" were contained in the sentence providing for whether the parties could pursue claims in court, whereas here, the "if/then" construct is used in the sentence conditioning when the parties can bring suit. The provision in *Shook of West Virginia, Inc. v. York City Sewer Authority*, 756 F. Supp. 848, 853–54 (M.D. Pa. 1991), did not include an "if/then" construct or any other "express language precluding arbitration or litigation" absent satisfaction of certain requirements.

And tellingly, the cases where courts "decline[d] to interpret a dispute resolution provision as mandatory" were all *contracts of adhesion* – not negotiated by "sophisticated commercial counterparties" as here. Opp. at 15, n. 4 citing *Milligan v. GEICO Gen. Ins. Co.*, CV 16-240 (JMA) (GRB), 2017 WL 9939046, at *9 (E.D.N.Y. July 14, 2017) (insurance contract between consumer and insurance company); and *Mirkin v. XOOM Energy, LLC*, 342 F. Supp. 3d 320 (E.D.N.Y. 2018) (applying North Carolina law involving dispute regarding consumer sales agreement).

Finally, Iluka asks to be forgiven for its failure to honor Section 16 because discussions "would have been futile[.]" Opp. at 16. Yet this is not what Iluka told the world. In its press releases Iulka assured investors and others that Iluka was "continuing to endeavor to negotiate an appropriate commercial outcome." Iluka's Australian Securities Exchange Notice dated June 26, 2020.[5] Note that Iluka did not say talks would be futile; it said it was "continuing to endeavor…." Surely Iluka was telling the truth to its investors, and the world, when it said this.

Iluka's explanations are all to no avail. This suit is premature, and the parties should be expected to honor Section 16 before burdening a court with their disputes.

II. CHEMOURS' CONTINUED PERFORMANCE UNDER THE SUPPLY AGREEMENT DOOMS ILUKA'S CLAIM OF ANTICIPATORY BREACH.

Iluka concedes that its anticipatory breach claim fails as a matter of law if Chemours has not "unequivocally" communicated its intent not to perform under the Supply Agreement. Opp. at 17; *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). Iluka also does not dispute – instead it studiously

[5] Press Release, Iluka, Australian Securities Exchange Notice, Reduction of 2020 Synthetic Rutile Off-Take Volumes (June 26, 2020), https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02248440-6A983977?access_token=83ff96335c2d45a094df02a206a39ff4.

ignores – its own admissions and documentary evidence that Chemours ***continues to perform*** under the Supply Agreement by, among other things, taking and paying "for the lower-priced Materials under the Supply Agreement[.]" Compl. ¶ 52; Chemours Mem. at 12-13. This dooms Iluka's anticipatory breach claim as a matter of law. *See, e.g.*, *124 Elmwood, LLC,* 28 Misc. 3d 1205(A), at *3 (granting motion to dismiss anticipatory breach claim where defendant "continues to perform" contractual obligations).

None of Iluka's attempts to salvage this claim have merit. First, Iluka selectively parses Chemours' June 19, 2020 notice letter to argue that "Chemours unequivocally communicated its intent not to take or pay for any shipments of SR Premium falling due during the purported *force majeure* event[.]" Opp. at 17. The Supply Agreement is not limited to SR Premium; there are three types of TiO2 ores supplied under that Agreement. And it is undisputed that Chemours has continued to take or pay two of them. Compl. ¶¶ 4, 17, 21, 52; Chemours Mem. at 12-13. This is the polar opposite of repudiation: a contracting party actually performing is not repudiating. To be actionable, an alleged repudiation "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). That is not the case here.

Iluka also ignores the rest of Chemours' letter, which states that Chemours remains "ready to perform all of its obligations under the Agreement, including and consistent with its rights in Section 17," and offers to continue negotiations in hopes of a "mutually agreeable resolution." Letter from Chemours to Iluka dated June 19, 2020 at 2.[6] Courts have rejected anticipatory breach claims where, as here, Chemours remains willing to perform and offers to

[6] The Letter from Chemours to Iluka dated June 19, 2020 is attached as Exhibit B [Dkt. 28] to the Affidavit of Min Chao [Dkt. 26], accompanying Chemours' moving memorandum.

continue the parties' dialogue. *See, e.g.*, *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) (invitation to continue negotiations does not constitute breach).[7] Iluka simply does not and cannot allege that Chemours' has ever "finally, definitely, and unequivocally communicated...its intent not to perform all of its future contractual obligations" because Chemours never did. *124 Elmwood, LLC*, 28 Misc. 3d 1205(A), at *3.

Iluka's case law does not advance its position. Iluka leans hard on *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, to suggest that Chemours anticipatorily breached the Supply Agreement merely by the exercise of its contractual right to declare excused performance. Opp. at 18 (citing 782 F.2d 314, 317 (2d Cir. 1985)). That is not New York law. The court in *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl* distinguished *Philips* on its facts and rejected the very same argument advanced by Iluka:

> Plaintiff cites *Phillips*... for the proposition that "the nonperformance of a party who wrongly invokes a *force majeure* clause constitutes an anticipatory breach...." However, *Phillips* does not stand for the proposition that every improper invocation of *force majeure* constitutes an anticipatory breach. Rather, the buyer in *Phillips* was found to have met an essential requirement of anticipatory repudiation: the buyer was found to have demonstrated a 'positive and unequivocal' intention to repudiate.

720 F. Supp. 312, 316-17 n.5 (S.D.N.Y. 1989) (emphasis in original). The contract at issue in *Philips* provided for a *single* shipment of goods that the purchasing party refused to take. 782 F.2d 314, 315-16. By unequivocally rejecting the entirety of a one-time shipment of goods, the court found the breaching party in *Philips* repudiated the entire contract. Again, that is not the case here.

[7] *Sunshine Steak, Salad & Seafood v. W.I.M. Realty*, (Opp. at 18, n. 6), is distinguishable on these facts. 135 A.D.2d 891, 892 (3d Dep't 1987).

Iluka argues in a footnote that *Phibro*, 720 F. Supp. 312, and *PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, 180 F. Supp. 2d 475 (S.D.N.Y. 2001) are "clearly distinguishable" from the case at bar. Opp. at 18, n.7. Both cases, however, address the very question presented here: whether a party's assertion that certain of its contractual obligations are excused constitutes anticipatory breach where that party continues to perform its other obligations under the contract and has not made any "clear manifestation of intent" to not perform. *Phibro*, 720 F. Supp. 317 n.5; *PT Kalim*, 180 F. Supp. 2d 481 n.4. The courts in both those cases found it does not. *See id.* The same result follows here.

In a last ditch-effort, Iluka suggests that this Court cannot resolve the repudiation issue without fully adjudicating "the force majeure provision," which, says Iluka, requires "a developed factual record[.]" Opp. at 19. Setting aside that there is no "force majeure provision" in this contract – Chemours legitimately excused performance under an "Excused Performance" clause – the only relevant facts are known, pleaded in Iluka's complaint, corroborated in documentary evidence, and not in dispute: 1) Chemours continues to perform, and 2) Chemours has not "unequivocally" announced or manifested an intent to cease performance. This is a pleading defect that cannot be cured, and courts regularly dismiss claims on this basis at the pleadings stage. *See* Chemours Mem. at 11-12 (citing *Jacobs Private Equity, LLC v. 450 Park LLC*, 22 A.D.3d 347, 347, 803 N.Y.S.2d 14, 15 (1st Dep't 2005) (dismissing anticipatory breach claim at the pleadings stage where plaintiff failed to adequately allege any "definite and final communication" by the defendant)).

Chemours respectfully requests that this Court similarly dismiss Iluka's anticipatory breach claim here.

III. THE DECLARATORY JUDGMENT CLAIM SHOULD BE DISMISSED AS DUPLICATIVE AND AS SEEKING AN ADVISORY OPINION.

Iluka says its declaratory judgment claim is "clearly not duplicative of its breach of contract claim (Count I), because the latter applies only to the May 6, July 14, and July 16, 2020 shipments of SR Premium, whereas the former applies to all future shipments of SR Premium under the Agreement." Opp. at 20. This argument misses the point.

Read generously, Iluka's declaratory judgment count (Count III) has two components. The first component speaks to the three shipments listed above. *See* Compl. ¶¶ 72-73. As to those, Iluka does not dispute that these are *precisely the same subject* of Iluka's breach of contract count (Count I). *Id*. ¶¶ 64-67. Thus, at least this element of Count III should be dismissed as duplicative. *See, e.g.*, *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); *Wildenstein v 5H&Co. Inc.*, 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).

The second component is at least arguably future-looking, speaking as it does, cryptically, of "future shipments…." Opp. at 20. But there can no declaratory judgment issued as to these futuristic references. Whether performance might be excused down the road under this contract – for either party – will turn on facts and circumstances then existing. Has an "Event" occurred per Section 17? Could that "Event" be "prevented by reasonable precautions"? Has the noticing party acted "diligently and in good faith attempting to promptly recommence performance in whole or in part"? These, and other contract elements, are intensely fact-laden considerations, which cannot be resolved today in wholesale fashion by some declaratory fiat –

even more so since liability under the Supply Agreement is determined *on an invoice-by-invoice basis*. Supply Agreement at § 9. At most, the declaratory judgment Iluka seeks here would be an advisory opinion – of unexplained scope, dimension, and utility – which New York courts will not entertain. *See New York Pub. Interest Rsch. Grp. v Carey*, 42 N.Y.2d 527, 531 (1977) ("[C]ourts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event that may or may not come to pass.") (internal quotations and citation omitted).

Finally, Iluka cloaks its plea for declaratory relief in notions of efficiency – suggesting that such relief is the "only way to efficiently and effectively address the parties' dispute[.]" Opp. at 21. Efficiency is not a legal doctrine, and does not overcome New York law's concerns over duplication of claims and whether an adequate remedy at law already exists (which, here, it does).[8] At any rate, the efficient way to proceed here – after requiring Iluka to honor the informal dispute resolution mandate of Section 16 – is to resolve the matters actually ripe and before the court, those being fully stated in Iluka's breach of contract claim and fully disputed by Chemours.

[8] Iluka posits that absent a claim for declaratory relief it would be faced with "needing to continually amend its Complaint to address each new breach and anticipatory breach." Opp. at 21, n. 9. Parties regularly amend pleadings to conform to the evidence before trial. In fact, the September 7 shipment that forms the basis of its anticipatory breach claim is already moot. Compl. ¶¶ 69-70.

CONCLUSION

Chemours respectfully requests 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.

November 2, 2020
New York, New York

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