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 Part 53 (Borrok J.) Mot. Seq. # 003

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Iluka Resources Limited ("Iluka") respectfully submits this memorandum of law in opposition to the Motion to Dismiss ("Mot.") of Defendants Chemours International Operations Sàrl and The Chemours Company Singapore Pte. Ltd. (together, "Chemours").

PRELIMINARY STATEMENT

This dispute arises from Chemours' refusal to honor its obligations under a long-term "take or pay" supply contract with Iluka covering three types of titanium dioxide (TiO_2) feedstock. As a result of Chemours' own business strategy, the contract terms became financially disadvantageous to Chemours for one of the three feedstocks, SR Premium. As a result, Chemours has been attempting (unsuccessfully) to revise the contractual terms relating to SR Premium since 2019—well before the current pandemic. Having failed to reach agreement with Iluka to amend the contract, Chemours improperly declared a *force majeure* event, using COVID-19 as a pretext to delay—or potentially outright avoid—its obligations to Iluka. In response, Iluka spent months negotiating with Chemours attempting to reach a commercially acceptable outcome. Only when it became clear the parties had reached an impasse did Iluka finally commence this proceeding to enforce its rights.

Chemours' motion should be seen for what it is—another attempt by Chemours to delay its obligation to pay Iluka as required by the contract. Chemours does not dispute Iluka has stated a claim for breach of contract, but instead quibbles with Iluka's decision to bring suit rather than engage in further negotiations with Chemours, and questions the form of Iluka's claims seeking remedies for Chemours' future breaches. None of these challenges has merit.

First, Chemours' contention that the Complaint must be dismissed because Iluka did not comply with the allegedly *mandatory* dispute resolution process in the contract is belied by the facially *permissive* nature of that process. Specifically, the contract states that the parties "**may**" choose to trigger the escalated dispute resolution process, but are not required to do so. As

Chemours' motion concedes, neither party triggered that process. Accordingly, Chemours' first argument fails right out of the gate.

Additionally, Chemours' claim that Iluka "jumped the gun" and commenced proceedings without sufficiently "escalating" the dispute is specious. In reality, Iluka's extensive negotiations with Chemours culminated in a call between the companies' Chief Executive Officers, in which Iluka's CEO urged Chemours' CEO to speak with Chemours' external counsel regarding the merits of Chemours' *force majeure* position (or lack thereof), and warned that, absent resolution of the parties' dispute, Iluka would imminently commence litigation. Chemours' CEO agreed he would speak with Chemours' external counsel, and subsequently confirmed to Iluka's CEO that Chemours was confident in its interpretation of the contract. The parties' lengthy negotiations therefore clearly reached an impasse prior to Iluka commencing this litigation. Tellingly, Chemours does not suggest that an additional 30 days of discussions—the most that would be required under the contract's permissive dispute resolution process—would have yielded a different outcome. Accordingly, even if the escalated dispute resolution process applied (which it did not), Iluka's non-compliance should be excused on the basis of futility.

Second, Chemours' argument that Iluka has failed to adequately state a claim for anticipatory breach similarly cannot withstand scrutiny. Chemours has repeatedly and unequivocally told Iluka that it will not take (or pay for) future scheduled shipments while the purported *force majeure* event remains in effect. This is more than sufficient to sustain Iluka's anticipatory breach claim, and Chemours misreads the relevant law in arguing otherwise.

Finally, Chemours errs in arguing that Iluka's claim for declaratory judgment should be dismissed as duplicative of Iluka's breach claims. To the contrary, Iluka's declaratory judgment claim concerns different time periods and different rights and obligations than either of its breach

claims. Granting the declaratory judgment claim may also more efficiently and expeditiously resolve this proceeding or, at least, decrease the risk of future suits occasioned by issues left unresolved by Iluka's breach claims. It is therefore not duplicative, and dismissal is not warranted on that or any other basis.

FACTUAL BACKGROUND

A. Iluka Secures A Long-Term Supply Agreement With Chemours To Justify Opening A New Mine

In the years leading up to 2017, Iluka was considering opening a new mine in Cataby, Western Australia, to mine a large deposit of Ilmenite—a low-grade titanium dioxide feedstock. Dkt. 2, Complaint ("Compl.") ¶20. Iluka planned to process Ilmenite from the Cataby mine to create synthetic rutile—a high-grade titanium dioxide feedstock, used in the manufacture of paint, plastic, paper, and fiber. *Id.* ¶16, 17a. Iluka estimated the Cataby mine would cost AU$270 million (US$215 million) to establish, then have an operational life of approximately eight-and-a-half years, with the possibility of a four year extension. *Id.* ¶20. To secure the demand necessary to justify this significant capital investment, Iluka entered a limited number of large, long-term supply contracts with synthetic rutile consumers—including Chemours, one of its major customers. *Id.* The agreement between Iluka and Chemours was executed on September 1, 2017 (the "Agreement"), and expressly tied to Iluka's decision to invest in and open the Cataby mine. *Id.* ¶21.

Production at the Cataby mine began during the second quarter of 2019. *Id.* ¶23. In reliance upon the long-term contracts it had secured with customers like Chemours, Iluka continued to invest in and maintain the Cataby mine. Between December 2017 and the start of production, Iluka spent approximately AU$275 million (US$205 million) developing the mine. *Id.* It will need to spend an additional AU$60 million (US$48 million) to further exploit the

mine over its remaining life, in addition to approximately AU$120-$130 million (US$95-$103 million) a year in operating costs. *Id.*

B. The Agreement Obligates Chemours To "Take or Pay" For Regular Shipments Of Materials

Section 2A of the Agreement is consistent with "take-or-pay" clauses commonly used in fixed-term supply contracts, and provides Chemours' two alternate obligations: "[ILUKA] must sell to CHEMOURS and ***CHEMOURS must purchase, take and pay for, or pay for if not taken***, from [ILUKA]" certain quantities of material. Dkt. 27 §2A (emphasis added). Section 2B further confirms that even if Chemours does not take the designated volume of material, it must nonetheless pay a contractually-mandated price:

> 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.

There are three kinds of material that Chemours is required to "purchase, take and pay for, or pay for if not taken": (1) SR Premium, a high-grade synthetic feedstock; (2) HYTI 90, an intermediate-grade feedstock; and (3) EB Ilmenite, a low-grade feedstock (each individually a "Material," and together, the "Materials"). *Id.* §§2A, 2B. In Section 2C Chemours acknowledged that its obligation to pay for the Materials—even if it chose not to take them—was specifically negotiated and a reasonable estimation of the loss Iluka would suffer if the Materials were 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.

Id. §2C. Under Section 7.2 of the Agreement, the parties agreed to a "Confirmed Shipping Schedule" for each calendar year that breaks the total annual volume of Materials Chemours is

required to take into a series of individual shipments. *Id.* §7.2A–D. At least 14 days before each delivery date, Chemours must provide Iluka with information regarding the ship that it has nominated to take delivery so Iluka can arrange for the Material to be loaded. *Id.* §7.3A. For 2018 and each year thereafter, the price of the Materials is set by a series of schedules and formulas in the Agreement. *Id.* §§4.2, 4.3.

Although the parties agreed Chemours would purchase minimum volumes of Materials each year, the Agreement allowed for certain adjustments "[i]n the event of a reduction in CHEMOURS total global feedstock requirements." *Id.* §2D. However, this reduction option *only* applied to the lower-grade HYTI 90 and EB Ilmenite feedstocks. *Id.* Chemours has no right to reduce the SR Premium it was required to purchase. This was because, unlike the lower-grade HYTI 90 and EB Ilmenite feedstocks, Iluka was producing SR Premium sourced from the new Cataby mine, and had to sell certain minimum volumes to justify its investment in the mine. Compl. ¶¶20-21, 27. In addition, higher-grade feedstocks can always be used in place of lower-grade feedstocks, meaning that Chemours would have the ability to shift the SR Premium to other uses even if its overall feedstock requirements declined.

C. Chemours Attempts Unsuccessfully To Renegotiate Its Obligations In Late 2019 And Early 2020, After Adopting An Unprofitable Business Strategy

In or around 2018, Chemours' decided to adopt a new "Value Stabilization" strategy. *Id.* ¶34. Pursuant to this strategy, Chemours sought to have its customers adopt fixed pricing for Chemours' titanium dioxide products in place of prices that might fluctuate based on market-demand. *Id.* Unfortunately, Chemours' new strategy produced negative results, and Chemours' associated sales for the first quarter of 2019 dropped to $555 million, from $854 million the year before. *Id.* ¶35. Chemours' associated sales for the whole of 2019 also fell to $2.3 billion, from

$3.2 billion the year before. *Id.* Chemours has publicly acknowledged that the declining sales were the result of its "Value Stabilization" strategy. *Id.*

Because of the negative results generated by its business strategy, Chemours began trying to cut costs in the relevent division wherever it could. *Id.* ¶36. One method was switching to cheaper, lower-grade feedstocks rather than more expensive, high-grade feedstocks like SR Premium (the use of which would have facilitated higher rates of production; with the loss of sales, higher rates of production were no longer necessary). *Id.* ¶37. Accordingly, on December 12, 2019, representatives from Chemours' Titanium Technologies division emailed Iluka "asking for Iluka's consideration to reduce [Chemours'] purchase commitment for [SR Premium]," because "our true needs for this ore are lower [than set out in the Agreement], ***in large part due to our commitment towards our Value Stabilization strategy***." *Id*. ¶38 (emphasis added). Chemours never asked to reduce its purchase commitment for the cheaper, lower-grade Materials. *Id.*

Iluka and Chemours engaged in good faith negotiations in 2019 and early 2020 regarding Chemours' request to reduce its purchase commitment for SR Premium. *Id.* ¶39. No agreement was reached, however, and Chemours' commitments under the 2020 Confirmed Shipping Schedule remained unchanged. *Id.*

D. The Parties Engage In Lengthy Negotiations Regarding Chemours' Failure To Take Scheduled Shipments And Spurious Force Majeure Notice

Between at least April and July 2020, Iluka and Chemours' executives spent months negotiating in an attempt to resolve Chemours' refusal to accept shipments of SR Premium as they fell due under the parties' Confirmed Shipping Schedule.

The negotiations began around April 7, when Robert Gibney, Iluka's General Manager of TiO_2 Sales, held a phone call with David DeVoll, the Ores Global Buyer for Chemours'

Titanium Technologies Division. Affidavit of Robert Gibney dated October 19, 2020 ("Gibney Aff.")[1] ¶4. During the call, Mr. DeVoll stated that Chemours wanted to defer or eliminate the 20,000 ton shipment of SR Premium scheduled for May 6. *Id.* Mr. Gibney had a further phone call with Mr. DeVoll on April 15, during which Mr. DeVoll again expressed Chemours' desire to reduce its holdings of SR Premium, including because Chemours "need[ed] to conserve cash during this pandemic crisis." *Id.* ¶5.

In response to Chemours' request, during a phone call on April 24 between Mr. Gibney and Mr. DeVoll, Iluka offered to postpone—until 2021—10,000 tons of the SR Premium that Chemours was obligated to take or pay for in 2020. *Id.* ¶6. On April 28, Mr. Gibney emailed Mr. DeVoll to confirm the terms of the proposal Mr. Gibney had made by phone on April 25. *Id.*

On May 6, Mr. DeVoll replied to Mr. Gibney's email, copying Min Chao, the Director of Minerals Business and Ore Ventures for Chemours. *Id.* ¶7. Mr. DeVoll said that Chemours needed to ask for further consideration. *Id.* Specifically, Chemours wanted Iluka to revise the Agreement to reduce the amount of SR Premium that Chemours was obligated to take in 2020 by 50,000 tons (with 20,000 tons eliminated altogether, and 30,000 tons deferred to later years). *Id.* Mr. Gibney phoned Mr. Devoll the same day to informally convey that Iluka was unable to accept this counter-proposal. *Id.* ¶8.

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[1] The Gibney Affidavit sets out facts that the Court may consider in respect of Chemours' request to dismiss the complaint for failure to comply with any conditions precedent in Section 16 of the Agreement. *See* *Maple Med. Acupuncture, P.C. v. Motor Vehicle Accident Indemnification Corp.*, 15 Misc. 3d 1124(A) (N.Y. Dist. Ct. Apr. 20, 2007) ("Unlike a motion for summary judgment, where the parties must lay bare their proof in evidentiary form, there is no such obligation upon a motion to dismiss pursuant to CPLR § 3211(a)(7). The parties may, nevertheless, 'submit any evidence that could properly be considered on a motion for summary judgment.'") (citations omitted) (quoting CPLR § 3211(c)); *Albert v. Solimon*, 252 A.D.2d 139, 140 (4th Dep't 1998) (affidavits may be used "without converting the motion [to dismiss] to one for summary judgment under CPLR 3212," in particular "where the plaintiff submits affidavits in opposing the motion").

On May 11, 2020, Iluka wrote to Chemours, formally declining Chemours' May 6 proposal. *Id.* ¶9. Iluka reminded Chemours of its obligation to "take delivery of (or pay for, if not taken) 20,000 Metric Tons of SR Premium during May 2020," and noted Chemours had failed to nominate a suitable ship in accordance with the Confirmed Shipping Schedule. Compl. ¶42. Iluka requested that Chemours nominate a suitable vessel "as soon as possible … , and in any event by no later than 15 May 2020." *Id.*

On May 15, Chemours responded to Iluka's letter, stating Chemours was "not at this precise time able to" commit to the May 6 shipment of SR Premium, and noting "the current pandemic has had a devastating effect on the global economy." Compl. ¶43; Gibney Aff. ¶10. In so doing, Chemours cited purported reports from customers of "a decline in revenues of 20%-50%, which has, in turn, negatively impacted demand for Chemours TiO_2 products." Compl. ¶43; Gibney Aff. ¶10.

On June 1, Christian Barbier, Iluka's Head of Sales and Marketing, had a phone call with Mr. Chao to further discuss Chemours' failure to take the May 6 shipment of SR Premium. Gibney Aff. ¶11. Mr. Barbier indicated Iluka may be able to accept an outcome that differed from, but was still close to, the proposal Iluka made on April 24. *Id.* In response, Mr. Chao sent Mr. Barbier and Mr. Gibney an email on June 2 that effectively restated Chemours' May 6 demand, while also setting out an "alternative" reduction proposal "in the event Chemours moves forward with [the] exercise of certain rights that the agreement provides [to] the parties in uncontrollable circumstances." *Id.* ¶12.

In response to Chemours' continued refusal to take the May 6 shipment of SR Premium, coupled with its repeated demands for unreasonable volume reductions and vague threat to declare a force majeure event, Iluka's Chief Executive Officer, Tom O'Leary, held a call with

Bryan Snell, the President of Chemours' Titanium Technologies Division, on June 5. *Id.* ¶13. Chemours once again refused to modify its position. *Id.*.

On June 5, Iluka sent Chemours a "Notice of Default," which memorialized Chemours' failure to take and pay for the May 6 SR Premium. Compl. ¶44; Gibney Aff. ¶14. Iluka noted this failure constituted "a material breach of Chemours' obligations under the Agreement." Compl. ¶44. Iluka gave Chemours 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 Agreement. *Id.*

On June 12, Mr. O'Leary and Mr. Barbier of Iluka and Mr. Snell and Mr. Chao of Chemours had yet another phone call to discuss the parties' ongoing dispute. Gibney Aff. ¶15. Once again, no agreement could be reached. *Id.*

On June 19, Chemours wrote a letter formally responding to Iluka's June 5 notice of default, and contending that Chemours' performance under the Agreement was "excused" under Section 17—the *force majeure* provision—of the Agreement (the "FM Notice"). Compl. ¶45; Gibney Aff. ¶16. That letter 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." Compl. ¶45. Chemours further asserted 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." *Id.*

Chemours' June 19 letter did not explain how COVID-19 had prevented or hindered it from either taking and paying for, or alternatively paying for, the May 6 shipment of SR Premium. *Id.* ¶46. Instead, Chemours asserted that COVID-19 had "hindered *Chemours'*

customers' operations around the world and in almost all of Chemours' customers industries, particularly the automotive industry." *Id.* (emphasis added). Chemours' letter concluded by stating Chemours did not believe it would be able to perform "through at least the second and third quarters of 2020" and that its "obligation[] to provide a [shipping] date and take or pay for SR Premium … is excused." *Id.* ¶47.

On June 23, Iluka responded to Chemours' June 19 letter, noting that Chemours' purported FM Notice was invalid for multiple reasons. Gibney Aff. ¶17. Chemours responded in writing on June 24, explaining why it disagreed with Iluka's contentions. *Id.* ¶18. In reply, on July 14, Iluka's counsel at Quinn Emanuel sent a letter to Chemours reiterating that Chemours was in breach of the Agreement, and explaining in detail why Chemours' arguments to the contrary were meritless. *Id.* ¶19.

The third and fourth shipments of SR Premium in 2020 were for 5,000 metric tons with a Confirmed Shipping Schedule date of July 14, and 13,000 metric tons with a Confirmed Shipping Schedule date of July 16. Compl. ¶¶ 48-49. Again, Iluka stood ready to supply these shipments. *Id.* Again, Chemours failed to nominate the necessary ships to take the shipments. *Id.*

On July 24, Iluka sent Chemours another "Notice of Default" in respect of the July 14 and July 16 shipments of SR Premium. *Id.* ¶50. Iluka emphasized Chemours' failure to take and pay for, or alternatively pay for, the two July shipments in accordance with the Agreement and the Confirmed Shipping Schedule, noting that this constituted "a material breach of Chemours' obligations under the Agreement." *Id.* Iluka further specified that Chemours' payment obligations in respect of the July 14 and July 16 shipments were $5,448,000 and $14,164,800, respectively. *Id.*

On July 24, Iluka's Chief Executive Officer, Mr. O'Leary, spoke directly to the President and CEO of Chemours, Mark Vergnano, regarding the parties' escalating dispute. Gibney Aff. ¶20. Mr. O'Leary warned Mr. Vergnano that Iluka would be filing legal proceedings against Chemours if the parties could not reach agreement, and urged Mr. Vergnano to speak with Chemours' external counsel regarding the merits of Chemours' *force majeure* position. *Id.* Immediately following the call, Mr. O'Leary sent Mr. Vergnano an email thanking him for the call, and emphasizing that, "[g]iven our firms' relationship, [he] was keen that there be no misunderstanding of the commercial and reputational importance of the situation." *Id.* ¶21. On July 25, Mr. Vergnano replied, saying he "was able to get a briefing from our outside Legal counsel," and that, "[b]ased on that briefing, we remain confident in our interpretation of the contract." *Id.* ¶22. Accordingly, by late July, the parties were clearly at an impasse.

E. Neither Party Invokes The Permissive Dispute Resolution Provision In The Agreement

Section 16 of the Agreement—titled "DISPUTE RESOLUTION/NON-BINDING MEDIATION/ARBITRATION"—provides that:

> 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.

Dkt. 27 §16. (emphasis added).

As Chemours acknowledges, Iluka never chose to "escalate in writing any unresolved dispute … to a CHEMOURS Executive and a corresponding Executive of [Iluka]." *See* Mot. 7-8, 10. On the contrary, Iluka explicitly stated to Chemours on June 24, 2020 that:

> 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.

Dkt. 29 at 1.

In response to Iluka's unequivocal statement on June 24 that it was not exercising its right under Section 16 to trigger the permissive dispute resolution process, Chemours could have exercised its own right to do so. It did not.

F. Iluka Commences The Proceedings And Chemours Cuts Off All Communications

In the face of Chemours' continuing nonperformance and repudiation of its obligations, Iluka filed the instant action on July 27, 2020. Thereafter, Chemours made no effort to resolve the parties' dispute. On the contrary, in response to a request from Iluka in September to discuss the status of Chemours' purported *force majeure* event, Chemours insisted that all communications between the parties go through their legal counsel. Gibney Aff. ¶¶24-25.

G. Chemours Fails To Take The September Shipment And Repudiates Its Obligations In Respect Of The November Shipment

Since the Complaint was filed, Chemours has failed to either take or pay for the September 7 shipment of SR Premium. *Id.* ¶23. Moreover, Chemours has unequivocally stated it will neither take nor pay for the upcoming November 17 shipment. *Id.* ¶26 (Oct. 9, 2020 letter

from Chemours' counsel to Iluka, stating that "Chemours will not be taking the shipment of SR Premium that had been originally scheduled … for November 17, 2020" and that "Chemours is excused from this performance").

Throughout 2020, Chemours has continued to take and pay for the lower-priced Materials under the Agreement (*i.e.*, HYTI 90 and EB Ilmenite). Compl. ¶52. Despite the supposed impact of COVID-19, Chemours never invoked Section 2D of the Agreement to reduce its volumes of those Materials "[i]n the event of a reduction in CHEMOURS total global feedstock requirements." Dkt. 27 §2D; *see also* Compl. ¶52.

ARGUMENT

I. THE AGREEMENT PROVIDES NO BASIS TO DISMISS THIS PROCEEDING

Chemours errs (Mot. 9-11) in arguing that any conditions precedent in Section 16 require dismissal of Iluka's Complaint, for two reasons. *First*, Section 16—by its clear and unambiguous terms—provides for a *permissive* rather than a *mandatory* dispute resolution process. Under Section 16, either party "***may***" elect to trigger the process, and if they do, then certain steps must be followed before litigation can be commenced. However, Chemours itself acknowledges that neither party triggered the permissive dispute resolution process prior to Iluka filing suit. *See id.* 7-8, 10-11. *Second*, even if the permissive dispute resolution process had been triggered (it was not), Iluka's non-compliance should be excused. By the time Iluka filed suit in late July, the parties had already engaged in months of fruitless negotiations regarding Chemours' breaches and repudiation. Another 30 days of discussions—which is all Section 16 required before Iluka could commence proceedings—would have been futile, serving only to delay Iluka's ability to enforce its rights. Accordingly, Chemours' request for dismissal should be rejected.

A. The Permissive Dispute Resolution Process Was Never Triggered

Chemours claims that Iluka was "first *required* to 'escalate in writing any unresolved dispute' to Executives of Chemours"—and then engage in a contractually mandated dispute resolution process—before being able to commence litigation. *Id.* 10 (emphasis added). That claim is irreconcilable with the text of the provision. The first paragraph of Section 16—which Chemours conveniently ignores—plainly states that:

> 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).

Dkt. 27 §16. (emphasis added). "'May' is a permissive term." *Novelty Crystal Corp. v. PSA Institutional Partners, L.P.*, 49 A.D.3d 113, 115 (2d Dep't 2008); *see also In re Oneida, Ltd.*, 400 B.R. 384, 391 (Bankr. S.D.N.Y. 2009) ("The word 'may' is usually employed as a permissive or discretionary term."). It is particularly appropriate to interpret "may" as permissive where, as here, the parties have used mandatory language like "shall" elsewhere in the contract.[2] *See New York State Elec. & Gas Corp. v. Aasen*, 157 A.D.2d 965, 967 (3d Dep't 1990) ("A review of the [contract] shows repeated use of the word 'shall' in a mandatory mode with other terms and conditions. The word 'may' provides for a permissive and not a mandatory meaning within the context of the ... agreement.").

Chemours focuses almost exclusively on the second and third paragraphs of Section 16. *See* Mot. 7 (emphasizing "if … then" and "shall" terms); 10-11 (same). But these paragraphs apply if—and only if—the permissive dispute resolution process in paragraph one of Section 16

[2] For example, Section 16 provides that (1) the parties "*may*" escalate a dispute in writing; (2) if the parties enter the Escalated Negotiation Period and do not resolve their dispute before it ends, then they "*may*" decide whether to mediate; (3) if the parties decide to mediate, they "*shall*" decide whether to arbitrate any disputes remaining after mediation; but (4) if the parties do not decide to mediate, then they "*may*" decide whether to proceed straight to arbitration. Dkt. 27 §16.

has been invoked. Accordingly, as Chemours' own authorities make clear, the dispute resolution process in Section 16 is voluntary and ***cannot*** be a condition precedent to litigation. *See id*. 9 (citing *IDT Corp. v. Tyco Grp.*, 13 N.Y.3d 209, 214 (2009) ("[C]onditions precedent describe acts or events which ***must*** occur.") (emphasis added); *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995) (same)).[3]

The Agreement was negotiated and executed by two sophisticated commercial counterparties. If they had wanted to make it mandatory that the parties engage in an "Escalated Negotiation Period"—during which possible mediation or arbitration would be discussed—before commencing litigation, they could have done so. However, they did not. Rather, they agreed upon a permissive dispute resolution mechanism that gives either party the right to trigger an Escalated Negotiation Period, but does not require them to do so, and does not provide that the occurrence of an Escalated Negotiation Period is a condition precedent to litigation. In these circumstances, courts regularly decline to interpret a dispute resolution provision as mandatory.[4]

As Chemours acknowledges, neither party chose to exercise its discretionary right under Section 16 to trigger an Escalated Negotiation Period. *See* Mot. 7-8, 10-11. Accordingly, the

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[3] Numerous other authorities confirm that a dispute resolution clause the parties "may" choose to exercise will *not* be a condition precedent to suit. *See*, *e.g.*, *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 298 F. Supp. 2d 1, 5 (D.D.C. 2002) (use of the word "may" in the contract "ma[d]e the parties' participation in dispute resolution optional, not mandatory"); *Shook of West Virginia, Inc. v. York City Sewer Auth.*, 756 F. Supp. 848, 851-852 (M.D. Pa. 1991) ("[L]anguage in a contract not clearly identified as a condition precedent is presumed not to be one. Nowhere can this principle be more important than in construing a provision that would divest a party of the right to have a court hear its claims.") (citations omitted).

[4] *See*, *e.g.*, *Milligan v. GEICO Gen. Ins. Co.*, 2017 WL 9939046, at *9 (E.D.N.Y. July 14, 2017) ("[T]here is nothing here that suggests that this provision, little more than an alternative dispute resolution mechanism, was intended as anything other than a voluntary process."); *Mirkin v. XOOM Energy, LLC*, 342 F. Supp. 3d 320, 325–26 (E.D.N.Y. 2018) (finding that "the dispute-resolution clause of the agreement does not impose a mandatory exhaustion requirement upon [Defendant's] customers," but rather "set[s] forth a voluntary pre-suit procedure that a customer may invoke at her discretion"), *rev'd on other grounds Mirkin v. XOOM Energy, LLC*, 931 F.3d 173, 176 (2d Cir. 2019).

Court need proceed no further. Chemours' motion to dismiss for failure to comply with the dispute resolution process in Section 16 should be denied.

B. Alternatively, Compliance With The Dispute Resolution Process Should Be Excused On The Basis Of Futility

Even if the parties had triggered an Escalated Negotiation Period under Section 16 (which they did not), Iluka's failure to comply with the procedural requirements of Section 16 before commencing suit should nevertheless be excused on the basis of futility. Under New York law, "where it becomes clear that one party will not live up to a contract, the aggrieved party is relieved from the performance of futile acts or conditions precedent." *Sunshine Steak, Salad & Seafood, Inc. v. W.I.M. Realty, Inc.*, 135 A.D.2d 891, 892 (3d Dep't 1987). That is precisely the case here.

Section 16 does not obligate Iluka to mediate any dispute with Chemours. Nor does it obligate Iluka to arbitrate any dispute. At most, if invoked, Section 16 would obligate Iluka executives to engage in discussions with Chemours executives over a 30-day period to try and resolve the "Dispute," after which Iluka would be free to commence litigation.

As detailed above, *see supra* 7–11, prior to filing this litigation, Iluka engaged in months of intensive negotiations with Chemours regarding Chemours' refusal to take or pay for shipments of SR Premium. These negotiations—both written and telephonic—involved the most senior executives at Iluka and Chemours, up to and including the companies' respective CEOs. By late July, both sides understood one another's commercial and legal positions, and how much distance remained between them.

In this context, it would have been futile for the parties to enter an Escalated Negotiation Period, especially given that Iluka had no interest in either mediating or arbitrating its dispute

with Chemours (and was under no obligation to do so).[5] Another 30 days of discussions would only have further delayed Iluka's right to enforce the Agreement. In this situation, even if the dispute resolution process in Section 16 was applicable, Iluka should be excused from complying with it on grounds of futility. *See* *City of New York v. Tavern on the Green Int'l LLC*, 351 F. Supp. 3d 680, 692–93 (S.D.N.Y. 2018) (excusing failure to comply with notice and cure period requirement where defendant had made it clear it had no intention of changing its position).

II. ILUKA HAS STATED A VALID ANTICIPATORY BREACH CLAIM

Chemours argues Iluka's anticipatory breach claim must be dismissed because (1) Chemours never unequivocally communicated its intent not to perform; and (2) even if it had, it was merely "exercising *a right not to perform* under contractually provided-for circumstances," which "is not a breach." *See* Mot. 11-14. These arguments are meritless.

First, Iluka has adequately pled 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, which Chemours stated would "continue … through at least the second and third quarters of 2020." *See*, *e.g.*, Compl. ¶¶45-47, 68-70. The message in Chemours' June 19 letter is clear: (1) Chemours "write[s] to confirm [its] position that its performance of the contractual obligations identified in [Iluka's June 5 letter]"—*i.e.*, Chemours' obligation to take or pay for the May 6 SR Premium shipment—"is excused under Section 17 of the Agreement"; (2) Chemours "provide[s] notice … that Chemours elects an extension to fulfill its 2020 second and third quarter obligations under Section 2B of the Agreement with respect to SR Premium"; and (3) "[Chemours'] obligations[] to … take or pay for SR Premium during the duration of the Event is excused." Dkt. 28 at 1-2. There is nothing equivocal about these statements. Chemours was

[5] If the parties have decided to "escalate in writing any unresolved dispute," and Iluka decides "no" to mediation or arbitration, then it is free—without more—to "pursue its rights and remedies." Dkt. 27 §16.

telling Iluka, in no uncertain terms, that it would neither take nor pay for shipments of SR Premium for so long as the *force majeure* Event continued—*i.e.*, at least through the second and third quarters of 2020.[6]

Conduct identical to Chemours' has been recognized as giving rise to anticipatory repudiation. In *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, the defendant sent a telex on October 9, 1981 "stating that it was 'declar[ing] force majeure,' [and] that it would 'not make any payments under the contract until the event of force majeure abates.'" 782 F.2d 314, 317 (2d Cir. 1985) (first alteration in original). It subsequently sent another telex on October 13 "reaffirm[ing] [the defendant's] unwillingness to pay until the abatement of the claimed force majeure." *Id.* The Second Circuit, applying New York law, held that:

> ***[Defendant's] earlier refusal to pay on the grounds of force majeure constituted an anticipatory breach of the contract***. As early as October 9 [defendant] declared its intention to refrain from payment until the event of force majeure abated, and it restated these sentiments repeatedly thereafter, even though it was beyond its rights in so insisting.

Id. at 321. In light of *Phillips*, Iluka has sufficiently pled unequivocal statements by Chemours to sustain an anticipatory breach claim.[7]

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[6] Chemours' statement (in closing) that it "remained hopeful that a mutually agreeable resolution [could] be reached" does not alter the unequivocal nature of its prior repudiatory statements. Read in context, Chemours' clear message is that it would withdraw its FM Notice if Iluka agreed to amend the Agreement to reduce the amount of SR Premium Chemours was required to take. A refusal to perform absent an agreement to change the terms of the parties' contract constitutes anticipatory repudiation. *See Sunshine Steak*, 135 A.D.2d at 892 (landlord's statement that if new contract "provisions are not acceptable, I suggest we terminate our arrangement" constituted anticipatory repudiation).

[7] Chemours incorrectly maintains (Mot. 13) that "exercising a right not to perform under contractually provided-for circumstances is not breach, much less anticipatory breach." The cases it relies upon do not support this assertion. *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl* stands for the unexceptional proposition that the mere invocation of a *force majeure* provision is insufficient to give rise to an anticipatory breach claim unless accompanied by a "a clear manifestation of intent" not to perform. 720 F. Supp. 312, 317 n.5 (S.D.N.Y. 1989). Likewise, in *PT Kaltim Prima Coal v. AES Barbers Point, Inc.*, the court found that the party declaring *force majeure* did not repudiate because the party had indicated the event would abate prior to the time of performance, and in fact stood ready to perform when that time arrived. 180 F. Supp. 2d 475, 484 (S.D.N.Y. 2001). Both cases are clearly distinguishable from Chemours' alleged conduct in this proceeding.

Second, Chemours cannot seek to dismiss Iluka's anticipatory breach claim by asserting that it validly invoked the *force majeure* provision. Whether Chemours' repudiation is actually excused by Section 17 is a highly fact-intensive issue that cannot be resolved in Chemours' favor on a motion to dismiss. To dismiss Iluka's claims on this basis, the Court would need to determine, at a minimum, that: (1) the COVID-19 pandemic falls within the "events or circumstances" listed in Section 17(A); (2) the pandemic "prevented, hindered or delayed" Chemours' ability to take or pay for SR Premium as of the date of the May 6 shipment; (3) Chemours' June 19 FM Notice described the Event "in reasonable detail"; (4) the pandemic continued to prevent, hinder or delay Chemours' ability to take or pay for SR Premium on each of the scheduled shipment dates since May 6; and (5) that Chemours has, since May 6, been "diligently and in good faith attempting to promptly recommence performance." Dkt. 27 §17(A). These determinations are impossible without a developed factual record, and Chemours' suggestion they provide a basis for dismissal at the pleading stage should be rejected. *See, e.g.*, *Constellation Energy Servs. of New York, Inc. v. New Water St. Corp.*, 146 A.D.3d 557, 559 (1st Dep't 2017) (refusing dismissal "because defendant has not shown that the force majeure clause would be an absolute defense," and because associated unresolved factual issue was "not suitable for determination on a motion to dismiss").[8]

Accordingly, Chemours' motion to dismiss Iluka's anticipatory breach claim should also be denied.

[8] Chemours makes reference (Mot. 5) to several facts relating to the COVID-19 pandemic, and suggests the Court take judicial notice of them. But the parties do not dispute the pandemic; as stated above, they dispute whether it and several other facts excuse Chemours from its contractual obligations as anticipated by Section 17. Judicial notice cannot fill these gaps. *See*, *e.g.*, *Weinberg v. Hillbrae Builders, Inc.*, 396 N.Y.S.2d 9, 10 (1st Dep't 1977) (court may "not take judicial notice of a 'fact' which was controverted"); *Aristy-Farer v. State*, 40 N.Y.S.3d 7, 17 (1st Dep't 2016) (declining to take judicial notice of facts "outside the record … and not readily comprehensible without the assistance of explanatory expert guidance, which has not been provided").

III. ILUKA'S DECLARATORY JUDGMENT CLAIM IS WARRANTED

Finally, Chemours errs (Mot. 14-15) in arguing that Iluka's claim for declaratory judgment is duplicative of its breach of contract causes of action. To prevail here, Chemours would have to establish Iluka's "cause of action for declaratory judgment simply parallels [Iluka's] breach of contract claim and merely seeks a declaration of the same rights and obligations." *Kings Infiniti Inc. v. Zurich Am. Ins. Co.*, 43 Misc. 3d 1207(A) (Sup. Ct. Kings Cty. Sept. 3, 2014) (citing *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 54 (1st Dep't 1988). Chemours cannot meet this standard.

As an initial matter, Iluka's declaratory judgment claim (Count III) 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. *See* Compl. ¶¶66, 76. The use of declaratory judgment to resolve the parties' rights and obligations for future shipments of SR Premium is in keeping with "[t]he general purpose of the declaratory judgment," which "is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present *or prospective* obligations." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931) (emphasis added). Nor can Chemours claim that Iluka's declaratory judgment claim (Count III) is duplicative of its anticipatory breach of contract claim (Count II), given that, according to Chemours, the declaratory judgment claim "applies only to Chemours' '2020 second and third quarter obligations,' and says nothing about other commitments under the remainder of the … Agreement." Mot. 13.

The practical necessity of Iluka's declaratory judgment claim is highlighted by the fundamental disconnect between Chemours' arguments in support of its motion to dismiss and Chemours' ongoing conduct. On its motion, Chemours argues that it never unequivocally

repudiated the September shipment of SR Premium, and that it has similarly not repudiated its obligations with respect to any future shipments. *See* Mot. 11-14. Therefore—according to Chemours—the only shipments in respect of which Iluka has stated a claim are the May and July shipments. However, in reality, Chemours has failed to take or pay for the September shipment since the Complaint was filed, and unequivocally stated that it will not take the upcoming November shipment. *See supra* at 13. Given the ever-evolving nature of Chemours' breaches and anticipatory breaches of the Agreement, the only way to efficiently and effectively address the parties' dispute with respect to future shipments of SR Premium is via declaratory judgment.[9] *See* *Davis Const. Corp. v. Suffolk Cty.*, 112 Misc. 2d 652, 656 (Sup. Ct. Suffolk Cty. 1982) ("[A] declaratory judgment action may be maintained notwithstanding the availability of another remedy where such remedy is not as adequate or effective."); *see also* *New York Pub. Interest Research Grp., Inc. v. Carey*, 42 N.Y.2d 527, 531 (1977) (declaratory relief is appropriate where the declaration "will have the immediate and practical effect of influencing [defendants'] conduct")

Accordingly, Chemours' request to dismiss Iluka's declaratory judgment claim should also be denied.

CONCLUSION

For the foregoing reasons, Iluka respectfully requests that Chemours' motion to dismiss be denied in its entirety.

[9] If Chemours' arguments are credited, Iluka would be left in the intolerable position of needing to continually amend its Complaint to address each new breach and anticipatory breach.

Dated: New York, New York
October 19, 2020

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CERTIFICATION OF COMPLIANCE

This brief complies with the word-count limit of Rule 17 of the Commercial Division of the Supreme Court of the State of new York because it contains 6,949 words (based on the Microsoft Word word-count function), excluding the parts of the brief exempted by Commercial Division Rule 17.

Dated: New York, New York
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