

**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

**VERIFIED ANSWER AND  
AFFIRMATIVE DEFENSES  
TO AMENDED COMPLAINT**

Chemours International Operations Sarl and the Chemours Company Singapore PTE LTD (“Defendants”) answer, including their affirmative defenses, to the Amended Complaint with these general limitations. Throughout, Defendants respond for themselves and not for “The Chemours Company,” which is not party to this action. Defendants deny all allegations not expressly admitted.

**NATURE OF THE ACTION**

1. Defendants deny the factual allegations in Paragraph 1. This action arises from a brazen race to the courthouse by a party, Iluka, who seems unwilling to realize what the rest of the world does: that the COVID-19 pandemic wreaked havoc, including on the mining and ore industries, and gave cause for Defendants to declare its contractual right to Excused Performance under the parties’ Supply Agreement. With respect to the allegations in Paragraph 1 that contain legal conclusions, no response is required. To the extent a response is required, Defendants deny those allegations.

2. Defendants admit that The Chemours Company is the parent company of Defendants and that, colloquially speaking, it was founded as a spinoff of DuPont in 2015.

Defendants deny the allegations pertaining to The Chemours Company, which is a holding company; but admit that certain subsidiaries of The Chemours Company are producers of titanium dioxide products that are sold to paint, plastics and paper manufacturers, among others. Defendants lack sufficient information to form a believe as to the remaining allegations in Paragraph 2, and therefore deny them.

3. Defendants admit that the parties entered into a Supply Agreement and that Iluka has a mine in Cataby, Australia. Defendants lack sufficient information to form a belief as to the truth of the remaining allegations asserted in Paragraph 3, and therefore deny them. Defendants admit that this document is making use of a currency exchange rate as alleged in footnote 1.

4. Defendants state the Supply Agreement is a written agreement that speaks for itself, respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof, and otherwise deny the allegations in Paragraph 4. Defendants further state that Paragraph 4 is a partial and incomplete recitation of the Supply Agreement's provisions, omitting, among others, the Excused Performance provision that the parties freely bargained for and which renders this lawsuit invalid.

5. Defendants lack sufficient information to form a belief as to the truth of the allegations asserted in Paragraph 5 given their multiple undefined terms, among other ambiguities, and therefore deny the allegations.

6. Defendants deny the allegations pertaining to The Chemours Company, which is a non-party holding company and does not have a "Titanium Technologies division." Defendants admit that certain subsidiaries of The Chemours Company instituted a value stabilization model in 2018, and deny Plaintiff's characterization of the model. Defendants further admit that representatives of The Chemours Company FC's Titanium Technologies business unit had

discussions with Iluka over renegotiating certain parts of the Supply Agreement in or around 2019 that are not relevant to the claim at issue. Defendants lack sufficient information to form a believe as to the truth of all remaining allegations asserted in Paragraph 6, and therefore deny them.

7. Defendants admit that they did not take delivery of SR premium deliveries in May 2020, July 2020, September 2020 and November 2020 and that they appropriately asserted that their performance was excused under bargained-for provisions of the Supply Agreement. Defendants further state the Supply Agreement is a written agreement that speaks for itself, and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. Defendants deny the remaining allegations in Paragraph 7.

8. To the extent the allegations in Paragraph 8 state legal conclusions, no response is required. What Paragraph 8 calls “clear” is not the case, for Defendants’ excuse of performance is valid. To the extent a response is required, Defendants deny the allegations in Paragraph 8 and state the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. Defendants deny all factual allegations in Paragraph 8, if any.

9. The allegations in Paragraph 9 state legal conclusions to which no response is required. Defendants deny that Iluka is entitled to any award for any damages on any cause of action.

### **PARTIES**

10. Defendants lack sufficient information to form a belief as to the truth of the allegations asserted in Paragraph 10, and therefore deny the allegations.

11. Defendants admit the allegations in Paragraph 11.

12. Defendants admit the allegations in Paragraph 12.

13. Defendants admit that they are subsidiaries of The Chemours Company and that The Chemours Company has its headquarters in Wilmington, Delaware, and deny that there is a “Titanium Technologies division” within “Chemours” as defined in Paragraph 13. Defendants further admit that The Chemours Company was, colloquially speaking, spun off from DuPont in 2015. Defendants deny the remaining allegations of Paragraph 13.

### **JURISDICTION AND VENUE**

14. The allegations in Paragraph 14 state legal conclusions to which no response is required. To the extent a response is required, Defendants state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

15. The allegations in Paragraph 15 state legal conclusions to which no response is required. To the extent a response is required, Defendants state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

### **FACTUAL BACKGROUND**

16. Defendants admit as a general matter Paragraph 16’s description of titanium dioxide, but lack sufficient information to form a belief as to the truth of the allegations as to particulars such as percent of use and therefore deny those allegations.

17. Defendants deny that there is a “Titanium Technologies division” within “Chemours” as defined in Paragraph 13, but admit that certain subsidiaries of The Chemours Company have processing facilities at the locations referenced. Defendants further admit, generally, the descriptions of the types of feedstocks and TiO<sub>2</sub> content as described, and further state that the percentages described are just one of many ways to differentiate feedstocks and that other differentiating factors include impurities and particle size distribution.

18. Defendants admit the allegations in Paragraph 18.

19. Defendants admit that certain facilities operated by Chemours subsidiaries can utilize multiple grades of feedstock and deny the categorical assertion that they may “switch” among feedstocks. Defendants admit that cost, availability, and customer demand are some of the factors to consider when choosing feedstocks, but deny that these are the only factors considered as there are multiple limitations to feedstock flexibility at each production facility and for each production line. Defendants deny the remaining allegations in Paragraph 19.

20. Defendants lack sufficient information to form a belief as to the truth of the allegations asserted in Paragraph 20, and therefore deny them.

21. Defendants admit the allegations in Paragraph 21 and footnote 2 that the Supply Agreement was entered in September 2017 with an initial term of four months, but was extended for a month, and then was extended to December 31, 2022. Defendants further state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

22. Defendants admit that on or about December 15, 2017, Iluka informed a representative of The Chemours Company FC’s Titanium Technologies business unit of a decision to extend the Supply Agreement to December 31, 2022, and admit that the Supply Agreement contains certain rights of extension as partially set forth in Paragraph 22. Defendants lack sufficient information to form a belief as to the allegations about Iluka’s board of directors, and therefore deny the allegations. Defendants further state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. Defendants deny the remaining allegations in Paragraph 22 and footnote 3.

23. Defendants lack sufficient information to form a belief as to the truth of the allegations asserted in Paragraph 23, and therefore deny them.

24. Defendants admit that “take or pay” contracts are relatively common in the natural resources sector, and that some have characteristics of the sort described in Paragraph 24. Defendants lack sufficient information to form a belief as to the truth of the remaining allegations asserted in Paragraph 24, and therefore deny them.

25. Defendants admit that the Supply Agreement contains the quoted language in Paragraph 25. Defendants note that Paragraph 25 conveniently omits reference to the Excused Performance provisions of the Supply Agreement, which expressly condition the take and the pay provisions. Defendants further state the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

26. Defendants admit that the ores referenced in Paragraph 26 are feedstocks of various grades, and state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

27. Defendants admit that the Supply Agreement was a negotiated agreement, including negotiation of the Excused Performance provision that validates Defendants’ conduct at issue in this case. Defendants state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. Defendants deny the remaining allegations in Paragraph 27.

28. Defendants state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. Defendants further state that Paragraph 28’s selective references to the Supply

Agreement overlook crucial provisions, including that the “take” and the “pay” options are expressly conditioned by the Agreement’s bargained-for Excused Performance provision.

Defendants deny the remaining allegations in Paragraph 28.

29. Defendants admit that the Supply Agreement contains the quoted language in Paragraph 29. Defendants further state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

30. Defendants admit that the Supply Agreement contains the quoted language in Paragraph 30. Defendants further state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

31. Defendants deny Plaintiff’s characterization of the Supply Agreement in Paragraph 31, and state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

32. Defendants admit that a shipping schedule was set prior to 2020 as set forth in Paragraph 32, but state that their performance with respect to that schedule was excused pursuant to Section 17 of the Supply Agreement. Defendants admit the allegations in footnote 5 that an amendment was made in or about January 2019 on terms stated in that amendment. Defendants further state that the Supply Agreement, and any written communications like shipping schedules that the Supply Agreement contemplates, are documents that speak for themselves and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

33. Defendants deny Plaintiff’s characterization of the Supply Agreement in Paragraph 33, and state that the Supply Agreement, and any written communications like

shipping information that the Supply Agreement contemplates, are written documents that speak for themselves and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. Defendants lack sufficient information to form a belief as to the truth of the remaining allegations asserted in Paragraph 33, and therefore deny the allegations.

34. Defendants deny that there is a “Titanium Technologies division” within “Chemours” as defined in Paragraph 13, Defendants admit that a value stabilization program was instituted in or around 2018 by certain subsidiaries of The Chemours Company, and further state that the presentation and call transcript are written materials which speak for themselves. Defendants further deny Plaintiff’s partial and selective characterization of those materials and communications and deny the remaining allegations of Paragraph 34.

35. Defendants deny that there is a “Titanium Technologies division” within “Chemours” as defined in Paragraph 13, Defendants admit that a value stabilization program was instituted in or around 2018 by certain subsidiaries of The Chemours Company, and further state that the press releases and news articles referenced in Paragraph 35 and footnotes 9 to 11 are written materials that speak for themselves. Defendants further deny Plaintiff’s partial and selective characterization of those materials and communications and deny the remaining allegations of Paragraph 35.

36. Defendants deny that there is a “Titanium Technologies division” within “Chemours” as defined in Paragraph 13. Defendants state that the news article referenced in Paragraph 36 and footnote 12 is a written document that speaks for itself, and deny Plaintiff’s characterization of it. Defendants deny the remaining allegations in Paragraph 36.

37. Defendants deny the allegations of Paragraph 37.

38. Defendants admit that representatives of The Chemours Company FC’s Titanium Technologies business unit sent an e-mail to Iluka on or about December 12, 2019, which



contained the language quoted in this paragraph, and states that the e-mail speaks for itself, denies Plaintiff's characterization of it, and asserts that the quoted language is out of context.

39. Defendants admit that representatives of The Chemours Company FC's Titanium Technologies business unit had discussions with Iluka in late 2019, but lack sufficient information to form a belief as to the truth of the allegation that Iluka negotiated in good faith, and therefore deny that allegation. Defendants further admit that an agreement was not reached, but deny the remaining allegations in Paragraph 39.

40. Defendants admit the allegations in Paragraph 40.

41. Defendants lack sufficient information to form a belief as to the truth of the allegation that Iluka stood ready to supply this shipment, and therefore deny this allegation. Defendants admit the remaining allegations in Paragraph 41.

42. Defendants admit that Iluka sent a letter dated May 11, 2020, and that Paragraph 42 partially describes that letter. Defendants state that Iluka's May 11, 2020 letter is a written document that speaks for itself, and deny Plaintiff's characterization of it.

43. Defendants admit that representatives for them sent a letter to Iluka dated May 15, 2020, and that Paragraph 43 partially describes that letter. Defendants state that the May 15, 2020 letter is a written document that speaks for itself, and deny Plaintiff's characterization of it.

44. Defendants admit that Iluka sent a communication that Iluka labeled a "Notice of Default" dated June 5, 2020, and that Paragraph 44 partially describes that communication. Defendants state that the June 5, 2020 letter is a written document that speaks for itself, and deny Plaintiff's characterization of it.

45. Defendants admit that individuals in The Chemours Company FC's Titanium Technologies business unit sent Iluka a letter dated June 19, 2020, and that Paragraph 45 partially describes the content of that letter. Defendants state that the letter is a written document

that speaks for itself, and deny Plaintiff's characterization of it. Defendants deny the remaining allegations in Paragraph 45.

46. Defendants deny the factual allegations in Paragraph 46. To the extent the allegations in Paragraph 46 state legal conclusions, no response is required. To the extent a response is required, Defendants state that the June 19, 2020 letter is a written document that speaks for itself, and deny Plaintiff's characterization of it.

47. Defendants admit that the language quoted in Paragraph 47 was included in the June 19, 2020 letter. Defendants state that the June 19, 2020 letter is a written document that speaks for itself, and deny Plaintiff's characterization of it.

48. Defendants lack sufficient information to form a belief as to the truth of the allegation that Iluka stood ready to supply the shipment described, and therefore deny the allegation. Defendants admit that they did not nominate a ship as described in Paragraph 48.

49. Defendants lack sufficient information to form a belief as to the truth of the allegation that Iluka stood ready to supply the shipment described, and therefore deny the allegation. Defendants admit that they did not nominate a ship as described in Paragraph 49.

50. Defendants admit Iluka sent a communication dated July 24, 2020, that Iluka labeled "Notice of Default." Defendants further state that the communication is a written document that speaks for itself, and deny Plaintiff's characterization of it. Defendants deny the allegations and assertions in the July 24, 2020 letter.

51. Defendants lack sufficient information to form a belief as to the truth of the allegation that Iluka stood ready to supply the shipment described, and therefore deny the allegation. Defendants further state that the June 19, 2020 letter is a written document that speaks for itself, and deny Plaintiff's characterization of it. Defendants further admit that they did not

nominate a ship as described in Paragraph 51. Defendants deny the remaining allegations in Paragraph 51.

52. Defendants admit that they did not nominate a ship as described in Paragraph 52. Defendants deny the remaining allegations in Paragraph 52.

53. Defendants admit that they continued to take material under the Supply Agreement throughout 2020, and further state that they were expressly permitted to do so under the Supply Agreement's Excused Performance provision. Defendants deny Plaintiff's characterization in Paragraph 53 of the parties' rights and obligations under the Supply Agreement, and state that the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

54. Defendants admit that the Supply Agreement contains the language quoted in Paragraph 54 but deny that this provision "is a *force majeure* clause" as alleged. Defendants further state the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

55. Defendants admit that the June 19, 2020 letter to Iluka properly invoked Section 17 to excuse their performance. The remaining allegations in Paragraph 55 contain legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 55.

56. Defendants admit that the June 19, 2020 letter to Iluka properly invoked Section 17 to excuse their performance. Defendants further admit that Section 17 contains, in part, the quoted language in Paragraph 56. Defendants state the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and

legal effect thereof. The remaining allegations in Paragraph 56 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations.

57. Defendants admit that the June 19, 2020 letter to Iluka properly invoked Section 17 to excuse their performance. Defendants deny the factual allegations in Paragraph 57.

Defendants state the Supply Agreement is a written agreement that speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof. The remaining allegations in Paragraph 57 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 57.

58. Defendants deny the allegations in Paragraph 58. Defendants further state that the referenced and partially quoted 10-Q form is a written document that speaks for itself, and deny Plaintiff's selective and partial characterization of it. As to the legal allegations and conclusions in Paragraph 58, no response is required. To the extent a response is required, Defendants deny those allegations and conclusions.

59. Defendants admit that some of the referenced statements described in Paragraph 59 were made, and state that the earnings presentation and news announcement are written documents that speak for themselves, and deny Plaintiff's partial and selective characterization of them. Defendants deny the remaining allegations in Paragraph 59.

60. Defendants deny the allegations in Paragraph 60.

61. Defendants deny the factual allegations in Paragraph 61. As to the legal allegations and conclusions in Paragraph 61, no response is required. To the extent a response is required, Defendants deny those allegations and conclusions. Defendants further state that the Supply Agreement is a written agreement which speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

62. Defendants admit that representatives of The Chemours Company FC's Titanium Technologies business unit sent Iluka a letter dated June 19, 2020 that properly invoked Section 17 of the Supply Agreement to excuse Defendants' performance. Defendants deny the remaining factual allegations in Paragraph 62. As to the legal allegations and conclusions in Paragraph 62, no response is required. To the extent a response is required, Defendants deny those allegations and conclusions. Defendants further state that the Supply Agreement is a written agreement which speaks for itself and respectfully refer the Court to the Supply Agreement for the terms and legal effect thereof.

**CAUSES OF ACTION**

**COUNT I:  
BREACH OF CONTRACT**

63. Defendants repeat and incorporate in full their responses to each allegation in Paragraphs 1 through 62.

64. The allegations in Paragraph 64 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 64.

65. The allegations in Paragraph 65 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 65.

66. The allegations in Paragraph 66 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 66.

67. The allegations in Paragraph 67 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 67.

68. The allegations in Paragraph 68 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 68.

69. The allegations in Paragraph 69 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 69.

70. The allegations in Paragraph 70 state legal conclusions to which no response is required. To the extent a response is required, Defendants deny the allegations in Paragraph 70, and assert that Plaintiff suffered no injury as stated or otherwise, and Plaintiff is not entitled to any relief.

**ANSWER TO PRAYER FOR RELIEF**

Defendants deny the allegations in the Prayer for Relief, including the “Wherefore” clause, that Plaintiffs are entitled to any form or any amount of relief. In addition, Defendants deny that any legal or contractual basis exists for Plaintiff’s claim for its legal fees and disbursements incurred in this action.

**ANSWER TO JURY DEMAND**

Defendants demand a trial by jury on any and all issues so triable.

### **AFFIRMATIVE DEFENSES**

Defendants assert the following affirmative defenses. By stating the following defenses, Defendants do not assert or admit that any of Plaintiff's allegations are true, or that Defendants bear the burden of proving a particular defense.

#### **First Affirmative Defense**

The Complaint fails, in whole or in part, to state a claim upon which relief can be granted.

#### **Second Affirmative Defense**

The Complaint is barred, in whole or in part, because Defendants have not breached any legal duty or obligation owed Plaintiff.

#### **Third Affirmative Defense**

The Complaint is invalid given the Excused Performance provision contained in the Supply Agreement.

#### **Fourth Affirmative Defense**

Defendants have acted consistently with their legally enforceable obligations under the Supply Agreement.

#### **Fifth Affirmative Defense**

Plaintiff has failed to allege, and cannot prove, that it fulfilled all of its necessary obligations under the Supply Agreement.

#### **Sixth Affirmative Defense**

Due to the COVID-19 global pandemic, Defendants' performance was excused under common law doctrines of commercial impracticability and/or frustration of purpose.

**Seventh Affirmative Defense**

The Complaint is barred, in whole or in part, under the doctrines of waiver, estoppel, laches, or unclean hands.

**Eighth Affirmative Defense**

Section 2(B) of the Supply Agreement is an unenforceable liquidated damages provision that acts as a penalty.

**Ninth Affirmative Defense**

The Complaint is barred, in whole or in part, because any alleged damages were not caused by Defendants, but by circumstances for which Defendants are not legally responsible.

**Tenth Affirmative Defense**

Plaintiff's claims fail in whole or in part because Plaintiff's damages, if any, were not the legal result of any alleged wrongful conduct on the part of Defendants.

**Eleventh Affirmative Defense**

Defendants deny that they have engaged in the conduct attributed to it in the Complaint and deny that they have any liability to Plaintiff for damages. However, if it is determined that Defendants are otherwise liable to Plaintiff, damages are barred, in whole or in part, by Plaintiff's failure to mitigate damages.

**Twelfth Affirmative Defense**

Plaintiff has no right to recovery attorneys' fees and disbursements.

**Thirteenth Affirmative Defense**

Defendants reserves the right to assert additional affirmative defenses at such time and to such extent as warranted by discovery and developments in this case.



New York, New York  
April 22, 2021

**CROWELL & MORING LLP**

By: /s/ Allyson M. McKinstry

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Chemours Company Singapore PTE Ltd.*

**VERIFICATION PURSUANT TO CPLR 3020(d)**

ALLYSON M. MCKINSTRY states pursuant to CPLR 2106 and under penalty of perjury as follows:

I am an attorney duly admitted to practice before the Courts of the State of New York, and I am not a party to this action. I reside in the State of New York, and I am regularly employed by the law firm of Crowell & Moring LLP with offices in the County of New York. Crowell & Moring LLP represents all of the defendants in the above-captioned action. None of the defendants are located within the county in which my office is located.

I have read the foregoing Answer and know the contents thereof. Based upon information and records supplied to my office by defendants, the statements made in the foregoing Answer are true to my knowledge and/or information, except to the matters therein stated upon information and belief, and as to those matters, I believe them to be true.

Dated: New York, New York  
April 22, 2021



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Allyson M. McKinstry