

**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. # 004

Oral Argument Requested

**MEMORANDUM OF LAW IN SUPPORT OF
THE CHEMOURS DEFENDANTS' ORDER TO SHOW CAUSE
TO COMPEL PRODUCTION OF DOCUMENTS**

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Pursuant to [CPLR 3124](#), defendants Chemours International Operations SARL and The Chemours Company Singapore PTE Ltd. (collectively, “Chemours”) respectfully submit this memorandum of law, along with the Affirmation of Allyson M. McKinstry and annexed exhibits, in support of their Order to Show Cause requiring plaintiff Iluka Resources Limited (“Iluka”) to produce documents regarding the impact of COVID-19 on Iluka, its customers, and the market.

INTRODUCTION

Iluka has asserted a single breach of contract claim that turns on one central question: whether Chemours’ take or pay obligation under the parties’ Supply Agreement was excused because its performance was “prevented, hindered, or delayed” by the COVID-19 pandemic.

Chemours says it was; that the ore and pigment industries were not immune to this catastrophic global pandemic, and evidence of COVID-19’s impact on the market and others in it, as well as to Chemours’ own operations supports their defense.

Iluka says it wasn’t; it challenges the impact of COVID-19 on Chemours’ ability to take or pay, and attempts in its 70-paragraph Amended Complaint to call into question Chemours’ reasons for invoking excused performance by alleging it is “a pretense to get out of obligations they had determined were no longer commercially convenient.” Am. Compl. ¶ 60 and ¶ 8.¹

Regardless of the parties’ differing views as to the merits of Chemours’ defense, it is glaringly clear that *this case is all about COVID-19*. Iluka has nonetheless refused to produce documents in response to eight of Chemours’ requests because, in Iluka’s words, it “fails to see” how the effects of COVID-19 (except on Chemours only) are relevant. Iluka’s position strains credulity; the requested discovery is directly relevant to Chemours’ defense, and squarely put at issue by Iluka itself in its Amended Complaint. This Court should compel production.

¹ Annexed as Exhibit 1 to the Affirmation of Allyson M. McKinstry, dated May 3, 2021 (“McKinstry Aff.”), is a true and correct copy of the Amended Complaint (hereinafter “Am. Compl.”).

THE DOCUMENT REQUESTS AT ISSUE

On January 7, 2021, Chemours served requests for production on Iluka. At issue here are eight requests seeking information related to the impact of COVID-19 on Iluka, its customers, and the market, all of which are pertinent to Iluka's allegations and Chemours' defenses:

- **Request 16:** Documents and communications, including reports, analyses, forecasts and projections concerning any effects of COVID-19 on the Cataby Mine, including effects on operations, personnel, and production, from January 1, 2020 through the present;
- **Request 17:** Documents and communications, including reports, analyses, forecasts and projections, concerning the operations and production of TiO₂ Feedstocks at the Cataby Mine for the years 2021 through 2026, including documents and communications discussing the effects of COVID-19;
- **Request 20:** Documents and communications concerning the effects of COVID-19 on Iluka's operations, including such effects on operations and/or shipping originating from Perth, Australia;
- **Request 21:** Documents and communications, including reports, analyses, forecasts, and projections, concerning the impact of COVID-19 on the production, market(s), and demand for TiO₂ Feedstocks;
- **Request 22:** Documents and communications, including reports, analyses, forecasts, and projections, concerning the impact of COVID-19 on the market(s) for titanium dioxide product;
- **Request 23:** Documents and communications concerning any impact, hinderance, or disruption COVID-19 has had on Iluka customers, including titanium dioxide producers, and their ability to perform under any agreements with Iluka, including any discussions, notices, declarations (formal or informal) of force majeure, excused performance, and/or requests for deferred shipments;
- **Request 24:** Documents and communications concerning any operational changes, modifications, personnel decisions, and/or cost-saving measures implemented or considered by Iluka as a result in whole or in part of COVID-19;
- **Request 30:** Documents and communications concerning the following statements by Iluka's Tom O'Leary: (a) Iluka has made changes to its "operational settings...in response to...uncertain market conditions"; (b) Iluka has experienced "[r]educed sales volumes due to the impact of COVID-19 on markets;" (c) "Key markets" have been "significantly impacted by COVID-19 shutdowns;" (d) Iluka experienced "[w]idespread shutdowns of key industries during Feb-May 2020 due to COVID-19," and (e) A "[d]emand slowdown [for TiO₂ Feedstocks] occurred in 2Q in all end markets due to COVID-19 impacts."

See McKinstry Aff., Ex. 2, annexing Iluka's Responses and Objections to Defendants' First Set of Document Requests, dated January 27, 2021, at 12-16, 18.

Iluka objected to these requests on relevance grounds (*id.*), and in subsequent correspondence has stated that it refuses to produce information related to "the impact of COVID-19 on Iluka, its business, and its customers" without Court order due to relevance and commercial sensitivity. McKinstry Aff., Ex. 3, annexing letter from Iluka's counsel dated April 2, 2021. Iluka claims that only the impact of COVID-19 on Chemours is relevant, and that the effects of the pandemic on the market, on Iluka's other customers, and even on Iluka are not. *Id.*

The parties met and conferred on April 26, at which time Chemours asked Iluka to reconsider and/or clarify its position. On April 30, Iluka proposed that it would produce documents regarding the impact of COVID-19 on the market, *but only if* Chemours withdrew its requests directed at the impact of COVID-19 on Iluka or its customers. McKinstry Aff., Ex. 4, annexing email from Iluka's counsel dated April 30, 2021. Chemours declines to unreasonably narrow its requests to obtain only some of the discovery to which it is entitled.

Chemours seeks an order compelling the production of documents responsive to Request Nos. 16, 17, 20, 21, 22, 23, 24 and 30. In seeking to compel the production of this information, Chemours does not waive and expressly preserves its rights with respect to other discovery disputes that may arise but for which it does not seek court intervention at this time.

LEGAL STANDARD

New York law requires "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof[.]" [CPLR 3101\(a\)](#). The test for determining "material and necessary" is one of "usefulness and reason," with courts employing a liberal construction to "require disclosure . . . of any facts bearing on the

controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity.” [Allen v Crowell-Collier Publ. Co., 21 N.Y.2d 403, 406 \(1968\)](#). “[E]ach request must be evaluated on a case-by-case basis with due regard for the strong policy supporting open disclosure[.]” [Andon v 302-304 Mott Street Assocs., 94 N.Y.2d 740, 747 \(2000\)](#).

ARGUMENT

I. INFORMATION ABOUT COVID-19’S IMPACT ON ILUKA, ITS CUSTOMERS, AND THE MARKET IS RELEVANT TO CHEMOURS’ DEFENSE OF EXCUSED PERFORMANCE.

Iluka’s position that *only* the impact of COVID-19 on Chemours is relevant, is divorced from reality and ignores the claims and defense at issue in this case, which put the impact of COVID-19 on the market and those in it directly at issue.

Chemours invoked its contractual right to excused performance because of the impact of COVID-19 on the market for ores and pigment, which in turn, impacted Chemours’ business and operations, and that of Chemours’ customers, resulting in Chemours’ inability to take or pay for SR premium under the Supply Agreement. *See* [Memorandum Of Law In Support Of The Chemours Defendants Motion To Dismiss](#) (Index No. 653398/2020, NYSCEF No. 23) at 4-6; McKinstry Aff., Ex. 5, annexing Verified Answer and Affirmative Defenses to Amended Complaint, dated April 22, 2021, at ¶ 1. Specifically, the “Excused Performance” provision of the Supply Agreement steps in to excuse either party’s performance where “prevented, hindered or delayed by events or circumstances that are outside the reasonable control of the” party affected by such events. McKinstry Aff., Ex. 6, annexing Supply Agreement, at § 17.

To supports its defense, Chemours must demonstrate that COVID-19 prevented, hindered, or delayed, its performance under the Supply Agreement. Directly relevant to that defense is the impact the pandemic had (and continues to have) on the market, as that is what led to Chemours’ excused performance. *See, e.g.*, Requests 21, 22. Equally relevant is the COVID-

19 market impact on other titanium dioxide producers and Iluka's own operations, because they operate in the same marketplace as Chemours. *See, e.g.*, Requests 16, 17, 20, 23, 24, 30.

Evidence of the market devastation for TiO₂ products, instances of other Iluka customers declaring excused performance or seeking to modify their contractual obligations, and the different ways the pandemic has impacted Iluka and its customers, is all directly relevant to the impact of COVID-19 on the market, and the reasonableness of Chemours' declaration of excused performance.

Iluka's own allegations also put the impact of COVID-19 on Iluka and its customers squarely at issue. In its Amended Complaint, Iluka disputes the reasonableness of Chemours' declaration of excused performance due to the COVID-19 pandemic, raising among other questions:

- Whether COVID-19 did in fact hinder Chemours' ability to take or pay for the ore at issue (Am. Compl. ¶¶ 8, 58-61); and
- Whether Chemours was using COVID-19 as a pretext to escape a business policy (Value Stabilization) that Iluka claims (wrongly) turned out to be less successful than originally predicted (Am. Compl. ¶ 60).

Chemours is thus entitled to discovery on how the market, and others in it were impacted by the pandemic, in order to rebut Iluka's false allegations.

For example, documents reflecting how COVID-19 impacted other customers of Iluka could not only demonstrate the reasonableness of Chemours' position, but also potentially reveal inconsistencies in positions Iluka has taken vis-à-vis its customers. This is especially true if those other customers have contracts containing the same excused performance provision Iluka included in its Supply Agreement with Chemours. Similarly, Iluka's documents reflecting its own COVID-19 experience, and associated market effects, could well contain revealing admissions and information. For instance, an Iluka executive, in discussing market issues, might

have indicated that COVID-19 decimated the market for ores and hindered performance under supply agreements. No one can seriously doubt the relevance of such a statement to this case. Yet, Iluka refuses to produce this very information.

Indeed, Iluka has publicly acknowledged the devastating impact of COVID-19 on the market, even though it conveniently feigns ignorance for purposes of this litigation. As specifically addressed in Request 30, Iluka's CEO Tom O'Leary issued several statements regarding the negative impact of COVID-19 on the market and Iluka itself, which not only support Chemours' position, but render Iluka's litigation stance simply unbelievable:

- Iluka has experienced “[r]educed sales volumes due to the impact of COVID-19 on markets;”
- “Key markets” have been “significantly impacted by COVID-19 shutdowns;”
- Iluka experienced “[w]idespread shutdowns of key industries during Feb-May 2020 due to COVID-19;”
- A “[d]emand slowdown [for TiO₂ Feedstocks] occurred in 2Q in all end markets due to COVID-19 impacts.”

McKinstry Aff., Ex. 2, at 18. Chemours is entitled to discovery on these public statements by Iluka's own CEO, as well as the impact COVID-19 has had on Iluka's customers and operations, to challenge the reasonableness of Iluka's litigation position here.²

The documents sought in Request Nos. 16, 17, 20, 21, 22, 23, 24, and 30 are therefore relevant and necessary to Chemours' defense, and Iluka has no basis to refuse production.

II. “COMMERCIAL SENSITIVITY” IS NOT A VALID BASIS FOR REFUSING DISCLOSURE.

Iluka refuses to produce documents in response to Request Nos. 20, 23, and 24 on the additional basis of “commercial sensitivity.” Commercial sensitivity is not a legitimate basis to

² In addition, the effects of COVID-19 on Iluka's operations is also relevant to whether Iluka had the ability to perform under the contract and mine, ship, or otherwise supply the ore at issue.

refuse to produce documents where, as here, the parties have agreed to enter into a Confidentiality and Protective Order that would afford the necessary protections. See [Pepsi-Cola Bottling Co. of N.Y., Inc. v. N.Y. Pepsi-Cola Distribs. Ass'n, Inc.](#), 172 A.D.3d 540, 540, 101 N.Y.S.3d 27, 28 (2019) (“To the extent the requested information is commercially sensitive, it can adequately be protected by a confidentiality agreement”). As such, Iluka’s purported additional basis for withholding the requested materials is without merit.

CONCLUSION

For the foregoing reasons, Chemours respectfully requests that the Court issue an order directing Iluka to produce documents responsive to Request Nos. 16, 17, 20, 21, 22, 23, 24 and 30, and for any other or further relief that the Court may deem just and proper.

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New York, New York

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