IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
IMERYS TALC AMERICA, INC., *et al.*,[1]	Case No. 19-10289 (LSS)
Debtors	(Jointly Administered)
IMERYS TALC AMERICA, INC. and IMERYS TALC VERMONT, INC.,	Adv. Pro. No. 21-51006
Plaintiffs,	
v.	
JOHNSON & JOHNSON and JOHNSON & JOHNSON CONSUMER INC.,	
Defendants.	

OPENING BRIEF IN SUPPORT OF JOHNSON & JOHNSON'S AND JOHNSON & JOHNSON CONSUMER INC.'S MOTION TO DISMISS THE CLAIMS IN THE ADVERSARY COMPLAINT

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: Imerys Talc America, Inc. (6358), Imerys Talc Vermont, Inc. (9050, and Imerys Talc Canada, Inc. (6748). The Debtors' address is 100 Mansell Court East, Suite 300, Roswell, GA 30076.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

From 1989 to 2011, J&J entered into a series of agreements with Imerys's[2] predecessors. Certain of these agreements included indemnity provisions—some running in favor of Imerys, and others in favor of J&J. Imerys's adversary complaint [A.D.I. 1] (the "**Complaint**" or "**Compl.**"), filed two and a half years into Imerys's bankruptcy and years after the parties executed the agreements, asks the Court to rewrite these provisions by expanding J&J's liability and eliminating Imerys's obligations. The Court should reject Imerys's request and dismiss the Complaint.

First, Imerys's claims of breach of the indemnity provisions in the 2011 Material Purchase Agreement (the "**2011 MPA**"), the 2010 Material Purchase Agreement (the "**2010 MPA**"), the 2001 Talc Supply Agreement (the "**2001 TSA**"), the 1989 Supply Agreement (the "**1989 SA**"), and the 1989 Stock Purchase Agreement (the "**1989 SPA**" and, together with the 1989 SA, the "**1989 Agreements**") are contrary to the plain and unambiguous terms of those agreements. Imerys's breach of contract claims for the 2011 MPA and 2010 MPA fail because the indemnification provisions do not cover the types of consumer talc claims for which Imerys seeks indemnification: The 2010 MPA addresses the handling of Materials at the point of delivery, and the 2011 MPA addresses claims arising from J&J's internal use of talc, not downstream use by consumers. Moreover, both agreements have long ago expired and neither contained survivability clauses extending to the indemnity provisions. The 2001 TSA does not cover Imerys's claim for indemnification for the noncompliance of talc with microbiological standards. The claims allege exposure to asbestos—which is not a microbe—and therefore have nothing to do with microbiological standards. And Imerys's breach of contract claims regarding the 1989 SA fail

[2] The term "J&J" throughout this Motion refers to both Johnson & Johnson and Johnson & Johnson Consumer Inc. And the term "Imerys" throughout this Motion refers to both Imerys Talc America, Inc. ("**ITA**") and Imerys Talc Vermont, Inc. ("**ITV**").

because the 1989 SA does not require J&J to indemnify Imerys if the talc it supplied to J&J was contaminated with asbestos, and the talc claims for which Imerys seeks indemnification allege just that: injury from exposure to asbestos in the talc Imerys provided to J&J. Moreover, as is clear from the allegations in the Complaint, documents referenced in the Complaint, and the record of this case, any indemnification obligations J&J may have once had under the 1989 SA and the 1989 SPA have been nullified by Imerys's own conduct in its bankruptcy proceeding by refusing to cooperate with J&J, blocking J&J from participating and negotiating the settlement of claims, reaching a settlement with the talc claimants in bad faith, and failing to take steps to minimize J&J's potential quantum of liability.

Second, all of the declaratory judgment causes of action for current claims should be dismissed because they are duplicative of the breach of contract claims. And the declaratory judgment causes of action for the future claims should be dismissed because they are not sufficiently ripe, given that there has been no demand or refusal for indemnity for some hypothetical claim that may or may not arise at some later date.[3]

FACTUAL BACKGROUND

A. The Agreements[4]

1. 1989 Stock Purchase Agreement and Supply Agreement

On January 6, 1989, J&J entered into both the 1989 SPA with Cyprus Mines Corporation

---

[3] For the purposes of this Adversary Proceeding, under Bankruptcy Rule 7008, J&J consents to the entry of final orders or judgments by this Court with respect to the causes of action in the Complaint. J&J, however, explicitly preserves its right to a jury trial for any future cases regarding the indemnity agreements brought by any other parties (including the Talc Personal Injury Trust or any successor to Imerys) and for any cases relating to J&J's obligations with respect to any individual payments by Imerys or their successors.

[4] The relevant agreements are attached to the Complaint as Exhibits 1 (1989 SPA), 4 (1989 SA),

("**CMC**"), and the 1989 SA with Windsor Minerals Inc. ("**Windsor**"). The 1989 Agreements are interwoven; the 1989 SPA attached the 1989 SA as an exhibit and required the 1989 SA to be executed before the 1989 SPA transaction could close. *See* 1989 SPA § 8.5. The indemnity obligations in the 1989 SA also overlap the indemnity obligations in the 1989 SPA, with both dealing with indemnification for pre-1989 sales. *See* 1989 SPA § 11.2; 1989 SA § 11.

Under the 1989 SPA, J&J agreed to indemnify CMC for certain claims arising from J&J's sale of talc before 1989. 1989 SPA § 11.2 (providing that J&J will "indemnify and hold harmless" CMC from product liability claims arising out of the sale of talc manufactured by J&J prior to January 6, 1989). The 1989 SPA further provided that in the event CMC sought indemnification from J&J for any claim, CMC "shall promptly" notify J&J in a writing, detailing the amount and basis for the claim. *Id*. § 11.4. If such notice is given, the 1989 SPA provides that J&J has the right to participate in the defense of the claims, and at its option, may elect to assume the defense of the claims. *Id*.[5]

Under the 1989 SA, J&J agreed to "indemnify, defend, and hold harmless" Windsor for product liability claims brought against Windsor, arising out of the sale of cosmetic talc products

---

6 (2001 TSA), 8 (2010 MPA), and 9 (2011 MPA).

[5] Because the 1989 Agreements are interwoven, they were signed on the same day, at the same time, and for the same underlying purpose, and the 1989 SPA could not close unless the 1989 SA was executed, the indemnification procedures of § 11.4 of the 1989 SPA apply with equal force to the 1989 SA. *See Wing v. Cooper*, 37 Vt. 169, 178 (Vt. 1864) ("[W]hen several instruments are executed at one and the same time, between the same parties, and upon the same subject matter, they are to be treated as one instrument and construed together."); *see also Besaw v. Giroux,* 205 A.3d 518, 523 (Vt. 2018) (holding that "where parties execute multiple instruments at the same time for the same purpose . . . we read them together to discern the parties' intent"); *In re MSCP Holdings, Inc.*, 316 B.R. 51, 55 (Bankr. D. Del. 2004) (holding that one of the contracts being attached as an exhibit to the other was evidence that the two contracts were to be construed together).

manufactured by Windsor prior to 1989, as well as for talc it sold to J&J for use in J&J products from 1989-2000. *See* 1989 SA § 11. The 1989 SA, however, did not require J&J to indemnify Windsor "in the event that the Talc delivered to [Windsor] did not conform to the specifications for such Talc then in effect." *Id.* The 1989 SA specifications required, among other things, that the talc Windsor delivered to J&J be asbestos free. *See* 1989 SA, Ex. E at 5 (requiring that the asbestos testing results be "none detected"). While extensive testing conducted by both Imerys and J&J have demonstrated that the talc did not contain asbestos, the underlying lawsuits for which Imerys seeks indemnification allege that the talc Windsor (now ITV) delivered to J&J was contaminated with asbestos. *See* Compl., Ex. 14 at 3 ("Numerous lawsuits have been filed against [Imerys] in various jurisdictions alleging bodily injury as a result of exposure to asbestos and asbestos-containing body powders . . . (the "Asbestos Lawsuits")).

The 1989 Agreements are governed by Vermont law. *See* 1989 SPA § 13.9; 1989 SA § 15(f). The indemnification obligations in the 1989 Agreements survive the termination of the agreements. *Id*. § 8(a); 1989 SPA § 11.2.

2. 2001 Talc Supply Agreement

J&J entered into the 2001 TSA with Luzenac America, Inc. ("**Luzenac**") on April 15, 2001. *See* Compl. ¶ 33. Imerys alleges that Luzenac is now Debtor ITA. *Id*. ¶ 22. Under this agreement, Imerys claims that J&J agreed to indemnify Imerys "for any cost, loss, damage or expense suffered by [Imerys] arising out of the failure of the Products to conform to the microbiological quality standards established therefor[.]" Compl. ¶ 33 (citing 2001 TSA § 7(a)(iii)). Asbestos is not a microbe, and Imerys does not allege that it has faced claims alleging harms arising from microbial contamination. The TSA also distinguishes the microbiological standards from the specifications requiring no asbestos. *See* 2001 TSA, Annex A, § 9.3 (microbiological sampling requirements);

2001 TSA, Annex A, § 2.2 (asbestos – "none detected" requirement).

Under the 2001 TSA, Luzenac agreed to indemnify J&J "for any cost, loss, damage or expense suffered by [J&J] which arises from:" (i) not meeting J&J's provided specifications, or (ii) failing to sample or test products in accordance with the agreement. 2001 TSA §7(a)(i). And Luzenac agreed to "indemnify, defend, and hold harmless" J&J "against all liabilities arising out of any violation by [Luzenac] of any law, ordinance, regulation, or rule or the order of any court or administrative agency." 2001 TSA § 7(a)(iv). The indemnification obligations in the 2001 TSA survive the termination or expiration of the agreement. *Id.* at § 7(b).

3. 2010 Material Purchase Agreement

J&J entered into the 2010 MPA on January 1, 2010 with Luzenac. *See* Compl. ¶ 37. Under the 2010 MPA, J&J agreed to indemnify Luzenac for claims arising out of "handling the Material *at the point of delivery*." *See* 2010 MPA, Attach. D, § 4 (emphasis added). The Complaint, however, is devoid of allegations of any injuries that occurred to any claimant arising out of the handling of Materials at the point of delivery.

The 2010 MPA expired on December 31, 2010. And unlike the 1989 Agreements and the 2001 TSA, it contains no survivability language for the indemnification provision.

4. 2011 Material Purchase Agreement

J&J entered into the 2011 MPA on December 31, 2011 with Luzenac. *See* Compl. ¶ 38. The 2011 MPA requires J&J to indemnify Luzenac for claims brought against Luzenac based on the internal use of materials *by J&J*, not use of materials by consumers of J&J products. *See* 2011 MPA, Attach. D, § 6. The MPA describes the "Buyer" (J&J) as the "End User" and provides that the talc is for the Buyer's "internal use." *See id.* § 9. The indemnity then applies to "third party claims brought against Seller *based on the use of Material by Buyer*," *i.e.*, based on the use of talc

by J&J. 2011 MPA, Attach. D, § 6 (emphasis added). It does not cover the downstream use of the Materials by *third party consumers* after J&J has sold its products to distributors. The 2011 MPA expired on December 31, 2011, and contained no survivability language for the indemnity provision.

B. Historical Relationship Between The Parties

CMC purchased J&J's talc business (*i.e.*, J&J's stock in Windsor) through the 1989 SPA. *See* Compl. ¶ 21. Imerys contends that CMC transferred all of its assets and liabilities in its talc business (including the stock in Windsor) to Cyprus Talc Corporation ("**CTC**") under a 1992 Asset Transfer Agreement (the "**1992 ATA**"). *Id*. ¶ 22. CMC then sold all of CTC's stock to RTZ America, making RTZ America the new owner of CTC (later renamed Luzenac America, Inc.) and indirectly the new owner of Windsor. *Id.* RTZ changed its name to Rio Tinto and remained the owner of the talc business for the next 19 years. In 2011, Rio Tinto sold its talc business, including its stock in the former CTC and Windsor, to Mircal SA, the parent of Imerys SA. *Id*. ¶ 23. Imerys claims that the former CTC (Luzenac America, Inc.) is now Debtor ITA, and the former Windsor is now Debtor ITV. *Id.* Imerys further claims that, as part of this 2011 transfer, Imerys obtained the contractual rights to indemnification under the 1989 Agreements, the 2001 TSA, the 2010 MPA, and the 2011 MPA. *Id*. ¶ 39.[6]

[6] Imerys claims that J&J has "admitted" that the contractual right to indemnification under the 1989 SPA was transferred to ITA in 1992 under the 1992 ATA. *See* Compl. ¶ 32. The record shows otherwise. J&J stated in its Motion to Dismiss in the Cyprus Adversary Proceeding that CTC became the new owner of any indemnity rights under the 1989 Agreements; J&J did *not* concede that Imerys later obtained such rights. Nor could it make such a concession. J&J had no involvement in how Rio Tinto handled or managed the assets of its businesses during the nineteen years it owned the talc business, and J&J had no involvement in the transfers that took place when Imerys acquired the talc business in 2011. For purposes of this motion, though, the Court does not need to decide this issue.

C. History Of Indemnification Negotiations

Imerys first demanded indemnification from J&J in 2015. *See* Compl., Ex. 11. J&J objected to that demand because some of the claims had been filed over *six years* prior and had *already reached verdict,* yet Imerys neither gave J&J notice of those claims nor the opportunity to defend them or participate in settlement decisions relating to them, in breach of its obligations as indemnitee.[7] *Id*. at Ex. 12. J&J also explained that because the tort claims included "unfounded allegations regarding the independent conduct of Johnson & Johnson, Imerys, and others," J&J did not believe that the demand was appropriate. *Id*. Importantly, J&J *never* explicitly stated that it refused to indemnify Imerys. Rather, J&J made clear that it would "continue to evaluate the appropriateness of the demand as the talc/ovarian cancer litigation develops." *Id*.

As the talc litigation developed, J&J did just that. From 2015 to the day Imerys filed for bankruptcy on February 13, 2019, J&J monitored the talc litigation, engaged Imerys in numerous conversations, including in-person meetings and correspondence, and exchanged various proposals with Imerys in an attempt to resolve the disputes regarding the parties' obligations under the various indemnity agreements. *See* Compl. ¶¶ 5; 48-52.[8] The parties even participated in two mediation sessions in 2018, *see id*. ¶ 52, but ultimately could not reach agreement on the scope of the alleged indemnification obligations and the allocation of the costs among the parties. At the core of the dispute between Imerys and J&J was the fact that Imerys continuously demanded

[7] This late notice breached the indemnity agreements by failing to provide the prompt and specific notice outlined in § 11.4 of the 1989 SPA, and took away J&J's ability to exercise its right to defend, settle, try, or otherwise be involved in resolving the underlying claims. *See infra* fn. 30.

[8] At the same time, J&J and Imerys also worked together in the joint defense of the claims against them in the tort system.

indemnification for 100% of the product liability claims filed against it, but J&J repeatedly explained that the indemnification obligations are not unconditional, and only provide for indemnification under certain circumstances and for certain years. Because Imerys refused to accept this reality, the parties were unable to reach an agreement.

Then, when Imerys filed for bankruptcy, it abruptly halted all discussions with J&J. Instead, Imerys began negotiating a plan of reorganization (the "**Plan**") its parent company, Imerys S.A. (the "**Parent**"), the Tort Claimants' Committee (the "**TCC**"), and Future Claims Representative (the "**FCR**"). Imerys excluded J&J from these negotiations, breaching their duties of good faith, fair dealing, and cooperation to J&J as its indemnitor.[9] Additionally, Imerys entered into a secret agreement with the TCC and FCR, which would allow the TCC and FCR to pursue estate claims directly against J&J.[10]

For months after Imerys's chapter 11 filing, J&J sought to continue its discussions and negotiations with Imerys. Imerys, though, either ignored J&J's requests or rejected them outright, in a clear breach of their duty as an indemnitee to cooperate with their indemnitor, J&J. For example, in April 2019, J&J sought to discuss with Imerys the filing of a motion to consolidate 2400 talc cases in the District of Delaware to better manage the talc litigation, *see* Compl. ¶ 63; but Imerys refused to support the motion. Then, in June 2019, J&J asked Imerys to voluntarily give J&J documents relating to the analysis of Imerys's liability exposure and Imerys's

---

[9] *See infra* § I(d).

[10] *See Letter to the Honorable Laurie Selber Silverstein* [D.I. 3267] (March 27, 2021), Ex. A (email from Imerys's counsel stating that Imerys agrees "that the [TCC] as estate representative (subject to the rights of the FCR to participate) has derivative standing to commence on behalf of the estates any affirmative litigation against J&J.").

negotiations with the TCC and FCR. Imerys, in breach of their duties to cooperate, *see infra* § I(d), refused, forcing J&J to seek formal discovery. *See Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion [For] an Order Pursuant to Bankruptcy Rule 2004* (June 26, 2019) [D.I. 750] (the "**2004 Motion**"). Imerys opposed J&J's motion, [D.I. 784] and the Court denied it as premature. *See* July 24, 2019 Hr'g Tr. [D.I. 883] at 89:9-11; 90:8-9.

On November 1, 2019, attempting to exercise its rights under § 11.4 of the 1989 SPA, J&J sent Imerys a letter offering to assume the defense of all talc claims alleging exposure to J&J products prior to April 15, 2001. *See* Compl. ¶ 66. After over a month passed with no response, J&J sent a second letter on December 3, 2019, expressing concern over Imerys's unexplained silence.[11] Imerys responded on December 12, 2019—telling J&J that it did *not* want to engage with J&J, preferring instead to continue negotiating with just the TCC and FCR. *See* Compl. ¶ 67. When J&J continued to ask to have discussions about the indemnity issues, Imerys refused to engage in any discussions with J&J without both the TCC and FCR being present.[12] Imerys's later Plan filings also revealed that at the same time Imerys refused to cooperate (or even negotiate) with J&J, its Plan includes yet another cooperation agreement with the claimants, *see* Plan Supplement [D.I. 2900] (Feb. 5, 2021), Ex. 8 ("Cooperation Agreement") [D.I. 2900-8]. Thus, while Imerys was affirmatively refusing to cooperate with J&J in breach of their duties as indemnitee, Imerys was going out of its way to cooperate with the TCC and FCR.

---

[11] *See Johnson & Johnson's Motion Pursuant To 11 U.S.C. § 362(d)(1), Fed. R. Bankr. P. 4001, And Local Bankruptcy Rule 4001-1 For Entry Of Order Modifying Automatic Stay To Permit J&J To Send Notice Assuming Defense Of Certain Talc Claims And To Implement Talc Litigation Protocol* (March 20, 2020) [D.I. 1567] ("J&J Lift Stay Motion"), [D.I. 1567-1] at Ex. G.

[12] *See* J&J Lift Stay Motion, [D.I. 1567-1] at Ex. J.

J&J then filed a motion to lift the automatic stay to permit claims to proceed against Imerys in the tort system, defended and indemnified by J&J.[13] Imerys objected to the motion on the basis that letting J&J indemnify the claims now would disrupt its Plan process.[14] After filing the motion, J&J continued to try to resolve the indemnity issues with Imerys, the TCC and FCR,[15] but could not reach an agreement.[16]

These actions by Imerys—blocking J&J's ability to obtain information about Imerys's discussion with the TCC and FCR; blocking J&J from any meaningful involvement in the discussions regarding Imerys's Plan; and blocking J&J from being able to assume the defense of the underlying claims so it could mount a defense to such claims—breached Imerys's duty of cooperation with its indemnitor, J&J. By shutting J&J out of settlement negotiations, Imerys also breached its indemnity obligations by depriving J&J, the only party with any incentive to minimize claim values, of the opportunity to push back against the TCC's and FCR's inflated claim values included in the Trust Distribution Procedures (the "**TDP**").

---

[13] *See generally* J&J Lift Stay Motion.

[14] *See Debtors Objection to Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion Pursuant to 11 U.S.C. § 362(d)(1), Fed. R. Bank. P. 4001, and Local Bankruptcy Rule 4001-1 For Entry of Order Modifying Automatic Stay to Permit J&J to Send Notice Assuming Defense of Certain Talc Claims and to Implement Talc Litigation Protocol* (May 19, 2020) [D.I. 1731] at 26-27 ("The Talc Litigation Protocol would also severely disrupt reorganization efforts by undermining many months of negotiations between the Debtors, the TCC, and the FCR and imposing major logistical burdens, including by requiring the Debtors' unlimited cooperation in the defense of thousands of lawsuits.").

[15] *See Notice of Filing of Alternative Proposed Order Pursuant to 11 U.S.C. §§ 105(a) And Fed. R. Bankr. P. 4001, And Local Rule 4001-1, Modifying Automatic Stay To (I) Permit J&J To Send Notice Assuming Defense Of Certain Talc Claims And (II) Permit Certain Talc Litigation Claims Against Debtors To Proceed In Tort System*, (Sept. 23, 2020) [D.I. 2247].

[16] The Court ultimately denied J&J's Lift Stay Motion on procedural grounds. *See* Compl. ¶¶ 74, 77.

On May 15, 2020, Imerys filed a proposed plan of reorganization [D.I. 1714], which memorialized the very fears that J&J had been raising from the beginning of the bankruptcy proceedings: a plan based on a settlement with the TCC and FCR that would give them the sole right to draft the TDPs,[17] including the claim values and eligibility criteria, without any oversight by Imerys.[18] Essentially, Imerys handed the TCC and FCR a blank check, on the belief that J&J would be the ultimate payor, and gave them the power to write in whatever amount they desired. This materially increased the risk of liability of Imerys's indemnitor, J&J, and constituted a breach of Imerys's duty of good faith and fair dealing as indemnitee. *See infra* § I(d).

Moreover, the TDP—written by and for the benefit of the claimants' representatives (the TCC and FCR)—provides claimants with the ability to pursue their claims nominally against Imerys in the tort system, but do not require the Trust (which will stand in the shoes of Imerys post-confirmation) "to defend any such claim in the tort system." *See* TDP § 2.3(b). In practice, this will force J&J to defend the claims brought against Imerys in the tort system because if J&J chooses not to—as is J&J's right under Section 11.4 of the 1989 SPA—the claims would proceed to a default judgment, as there will be no entity defending against the claims. This is yet another clear increase of J&J's risk of liability—something that Imerys could (and, in fact, are required to

---

[17] *See Notice of Filing of Further Revised Plan Exhibits (Trust Distribution Procedures and Talc Personal Injury Agreement* (Jan. 22, 2021) [D.I. 2828].

[18] Under Section 1.1.242 of the Tenth Amended Plan [D.I. 4099], Imerys only had "consultation rights as to the form and substance of" the TDP, while the TCC and FCR drafted the documents. And the fee applications filed on the docket by the TCC and FCR show that the TCC and FCR drafted the TDP without involvement of Imerys. *See, e.g.*, Robinson & Cole Fee Applications August 2019, September 2019, October 2019, December 2019, January 2020 and March 2020, [D.I. 1077, 1217, 1262, 1519, 1738]; Young Conaway Fee Applications August 2019, September 2019, October 2019, March 2020, [D.I. 1065, 1183, 1270, 1655].

as an indemnitee) minimize. *See infra* § I(d).

ARGUMENT

I. Imerys's Breach Of Contract Claims (Causes Of Action 8-12) Should Be Dismissed Because They Fail To State A Claim Upon Which Relief Can Be Granted.[19]

Causes of Action 8 through 12 should be dismissed because under the plain and unambiguous terms of the agreements, Imerys is not entitled to relief. *See, e.g., Milton Reg'l Sewer Auth. v. Travelers Cas. & Sur. Co. of Am.*, 648 F. App'x 215, 218 (3d Cir. 2016) (holding that the district court properly dismissed the complaint under Rule 12(b)(6) because the plaintiffs did not have a right to relief under the relevant contract).

a. Imerys Has Failed To State A Claim With Regard To Cause Of Action 12.

In Cause of Action 12, Imerys claims that J&J breached the 2011 MPA by failing to indemnify, defend, and hold harmless Imerys. *See* Compl. ¶ 149. This cause of action should be dismissed for two reasons.

First, the 2011 MPA expired by its terms on December 31, 2011. Unlike the prior

[19] The 1989 Agreements are subject to a valid and enforceable forum selection clause. *See* 1989 SPA § 13.9. While J&J is not asserting in this Motion that the causes of action relating to the 1989 Agreements should be dismissed due to this forum selection clause, J&J reserves its right to assert such arguments in any future cases brought by other parties claiming a right to indemnification under the 1989 Agreements. Similarly, the 2001 TSA and the 2011 MPA are subject to valid and enforceable arbitration provisions. *See* 2001 TSA at 15; 2011 MPA, Attach. D, § 14. While J&J is not asserting in this Motion that the causes of action relating to those agreements should be dismissed and compelled to arbitration, J&J reserves its right to assert such arguments in any future cases brought by other parties claiming a right to indemnification under them.

agreements entered into by the same parties, the 2011 MPA did not include a provision indicating that the indemnification obligation would survive the expiration of the agreement. *Compare* 1989 SPA § 11.2 (providing that the indemnification obligation survives the termination of the agreement), 1989 SA § 8(a) (same), *and* 2001 TSA § 7(b) (same) *with* 2011 MPA (no survival language). The fact that the parties had included such a provision in earlier agreements makes clear that they knew such a provision *could* be included, and instead *chose* not to include it. *See VKK Corp. v. NFL*, 244 F.3d 114, 130 (2d Cir. 2001) (holding that, under the doctrine of *expressio unius est exclusion alterius*, sophisticated commercial actors could have included certain terms into a contract had they intended them to be included, and the omission of such terms indicated an intentional omission); *Pandora Distribution LLC v. Ottawa OH, LLC*, No. 3:12-cv-2858, 2019 U.S. Dist. LEXIS 192028, at *20-21 (N.D. Ohio Nov. 5, 2019) ("If the parties wanted to provide for the survival of this [indemnification] provision beyond the termination of the agreement, they could have done so."); *Playboy Enters. Int'l, Inc. v. Meredith Corp.*, No. 651903/2020, 2020 WL 7646950, at *7 (N.Y. Sup. Ct. N.Y. Cty. Dec. 23, 2020) (holding that if the parties had intended to "leave such a long tail of [indemnification] liability . . . they could have said so.").[20] Because there is no survivability language in the agreement, and the agreement expired on December 31, 2011, J&J no longer owes any indemnification under the 2011 MPA. *See Nitterhouse Concrete*

[20] The contractual recordkeeping requirements under both the 2011 MPA and the 2010 MPA support this reading of the expiration of the indemnity provisions in both agreements: They required J&J to keep "complete records and books of account for all purposes of Material covered by the Agreement" for a certain period of time after the end of the calendar year to which they pertain. *See* 2011 MPA, Attach. A (requiring J&J to keep such materials for a period of 1 year); 2010 MPA, Attach. A (requiring J&J to keep such materials for a period of 4 years). Keeping such records for a short, set period of time is sensible if the indemnity obligation expires at or near the end of the contract term, but not if the indemnity obligation is to survive indefinitely.

Prods. v. Glass Molders, Pottery, Plastics & Allied Workers Int'l Union, 763 F. App'x 164, 168 (3d Cir. 2019) (affirming the district court's conclusion that the indemnification provisions did not cover withdrawal liability incurred after the termination of the agreements because there was no explicit language indicating that the liability extended beyond the expiration of the agreements.).[21]

Second, nothing in the 2011 MPA even requires J&J to indemnify Imerys for the underlying talc claims at issue. The first indemnification provision in the 2011 MPA only requires J&J to provide indemnification for claims arising out of "handling the Material *at the point of delivery*." 2011 MPA, Attach. D, § 4 (emphasis added). The Complaint, though, does not allege that any claims have been filed against Imerys for injuries arising out of the handling of materials at the point of delivery. The second indemnification provision in the 2011 MPA merely requires J&J to indemnify "for any third party claims brought against [Imerys] based on the *use of Material by Buyer*," that is, based on the use of talc by J&J, not the use of the products by ordinary consumers. 2011 MPA, Attach. D, § 6 (emphasis added). If the parties had intended to impose an indemnity obligation relating to the use of the materials by downstream third-party consumers,

[21] In a recent decision, a federal district court held that an indemnification obligation survived the contract's expiration. *See Cottman Ave PRP Grp. v. AMEC Foster Wheeler Envtl. Infrastructure Inc.*, 439 F. Supp. 3d 407, 434-35 (E.D. Pa. 2020). There, the court looked to the broad language of that agreement which provided that the obligation extended to "any and all claims, losses, damages, liability, costs or actions arising out of or resulting from Defendant's negligence in the performance of the work under the Contracts." *Id*. at 436-37 (emphasis removed) (citation omitted). The court concluded that this language "unambiguously indicate[d]" that the provision was not limited to claims arising during the course of the contracts. *Id*. But this case is distinguishable. In both the 2011 MPA and the 2010 MPA, the relevant language is far narrower and provides that "Buyer assumes all risk of handling the Material at the point of delivery and Buyer agrees to indemnify Seller for claims by it or by third parties *arising from such handling*." 2011 MPA, Attach. D, § 4; 2010 MPA, Attach. D, § 4 (emphasis added). Contrary to the language in *Cottman*, this language is not open-ended and instead properly understood to have expired when the agreement terminated and J&J would no longer be handling the described Materials during the course of the contract.

they would have said so. They would not have limited the obligation to claims involving the use by J&J itself.[22]

The Complaint does not allege that Imerys has faced any claims arising from J&J's own internal use of the talc under the 2011 MPA. Rather, the underlying claims are based on the use of talc *by ordinary consumers* after J&J has already finished using the product and has sold it to distributors (and in turn along to consumers). Cause of Action 12 therefore should be dismissed.

b. Imerys Has Failed To State A Claim With Regard To Cause Of Action 11.

Cause of Action 11 should be dismissed for the same reasons as Cause of Action 12—the 2010 MPA expired on its terms and contains no survivability language. And the indemnity provision referencing the handling of Material at the point of delivery (2010 MPA, Attach. D, § 4) does not cover the claims asserted against Imerys for which it has sought indemnification. *See supra* § I(a).

c. Imerys Has Failed To State A Claim With Regard To Cause Of Action 10.

In Cause of Action 10, Imerys claims that J&J breached the 2001 TSA by failing to indemnify, defend, and hold harmless Imerys. *See* Compl. ¶ 139. But the 2001 TSA does not require J&J to indemnify for *anything* outside of the talc's nonconformance with "microbiological

---

[22] Interpreting this indemnification provision in the 2011 MPA to be limited to J&J's internal use (for example, for injury to J&J workers) is consistent with a later provision in the contract, which describes J&J as the "End User" and states that the contract contemplates J&J's "internal use" of the talc. *See* 2011 MPA, Attach. D, § 9. This interpretation is also consistent with its overall placement in the contract: whereas the indemnity provisions in prior agreements are prominent and detailed, the 2011 MPA and the 2010 MPA are basically form contracts and their indemnity provisions are a single sentence in fine-print boilerplate language at the very end. Moreover, the fact that the indemnification provisions in the 2011 MPA and 2010 MPA cover only "Seller" and not affiliates (*see* 2011 MPA, Attach. D., § 6; 2010 MPA, Attach. D., § 4) further demonstrates the narrow scope of the indemnification provisions in these agreements, as the prior agreements explicitly covered both Seller and affiliates. *See* 1989 SPA § 11.2; 1989 SA § 11.

quality standards." 2001 TSA § 7(a)(iii). And the Complaint does not contain any factual allegations regarding injuries to claimants in the underlying talc claims because the talc delivered by Imerys did not conform with microbiological quality standards. Nor does the Complaint contain any allegations that the talc delivered to J&J did not comply with the microbiological quality standards. While there are allegations in the complaint about asbestos in talc (*see, generally, e.g.*, Compl., Ex. 14) asbestos is not a microbe. Asbestos is a mineral. And the 2001 TSA reflects the point by distinguishing between a specification requiring no asbestos in talc, and an independent and distinct set of microbiological standards. *See* 2001 TSA, Annex A, § 9.3 (microbiological sampling requirements); 2001 TSA, Annex A, § 2.2 (asbestos – "none detected" requirement). Therefore, because Imerys cannot point to *any* factual allegations that would state a claim for relief for Imerys's right to indemnification because of microbiological contamination of talc, cause of action 10 should be dismissed.

d. Imerys Has Failed To State A Claim With Regard To Cause Of Action 9.

In Cause of Action 9, Imerys claims that J&J breached the 1989 SA by failing to indemnify, defend, and hold harmless Imerys. *See* Compl. ¶ 134. But Imerys's claim fails for two reasons.

First, the 1989 SA does not require J&J to indemnify Imerys if it delivered talc that did not conform to the agreed upon specifications, including that the talc not be contaminated with asbestos. *See supra*, § A(1). Here, the underlying claims for which Imerys seeks indemnification allege injury to claimants from asbestos in talc. *See, e.g.,* Compl., Ex. 14 at 3 ("Numerous lawsuits have been filed against [Imerys] in various jurisdictions alleging bodily injury as a result of exposure to asbestos and asbestos-containing body powders"). And these the claims are being

resolved as part of the Tenth Amended Plan under section 524(g) of the Bankruptcy Code[23] without Imerys challenging the claims of asbestos in the talc. Thus, based on the plain language of the indemnification provision in the 1989 SA, J&J does not have an obligation to indemnify Imerys for such asbestos claims.

Second, the allegations in the Complaint, as well as the documents Imerys attach and cite, and the record in Imerys's bankruptcy,[24] show that Imerys's own conduct in making unrealistic demands for indemnity, failing to comply with its good faith obligations as an indemnitee, and failing to cooperate with its indemnitor (J&J), has extinguished any indemnity obligations that J&J may have owed Imerys under the 1989 SA.

It is axiomatic that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *See* Restatement (Second) of Contracts § 205 (1981); *see also Sutton v. Vt. Reg'l Ctr.*, 238 A.3d 608, 631 (Vt. 2020) (noting that the covenant of good faith and fair dealing "is implied in every contract"). And when an indemnitee engages in bad faith conduct, increasing the risk of liability for its indemnitor, the indemnitor's

---

[23] Section 524(g) injunctions can *only* be used for asbestos claims. *See* 524(g)(2)(B)(i)(I) (requiring 524(g) injunction "to be implemented in connection with a trust that . . . is to assume the liabilities of a debtor which at the time of entry of the order for relief has been named as a defendant in personal injury, wrongful death, or property-damage actions seeking recovery for damages allegedly caused by the presence of, or exposure to, asbestos or asbestos-containing products"); *see also In re N. Am. Refractories Co.*, No. 02-20198, 2007 Bankr. LEXIS 4721, at *76 (Bankr. W.D. Pa. Nov. 13, 2007).

[24] When deciding a motion to dismiss, a court may consider not only the allegations in the complaint, but also the documents that are attached to or submitted with the complaint, any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, and items appearing in the record of the case. *See Ocimum Biosolutions (India) Ltd. v. LG Corp.*, 2021 U.S. Dist. LEXIS 45742, at *9-10 (D. Del. March 11, 2021) (citing *Siwulec v. J.M. Adjustment Servs., LLC*, 465 F. App'x 200, 202 (3d Cir. 2012)).

indemnification obligation may be discharged. *See, e.g., First Jersey Nat'l Bank v. Dome Petroleum, Ltd.*, 723 F.2d 335, 342 (3d Cir. 1983) (noting that "[i]f an indemnitee is responsible for putting the indemnitor in such a precarious position, the indemnification may be discharged."); *see also Congoleum Corp. v. Ace Am. Ins. Co.*, No. Mid-L-8908-01, 2007 N.J. Super. Unpub. LEXIS 3000, at *13 (N.J. Super. Ct. Law Div., May 18, 2007) (holding that an insurer was not obligated to indemnify a settlement with asbestos claimants as part of a pre-packaged bankruptcy because the settlement was collusive and harmful to insurers' interests); *Unisys Corp. v. Legal Counsel, Inc.*, 768 F. Supp. 6, 8 (D.D.C. 1991) ("It is well established that any act on the part of an indemnitee which materially increases the risk, or prejudices the rights of an indemnitor, will discharge the indemnitor under a contract of indemnification."); *Hiern v. St. Paul-Mercury Indem. Co.*, 262 F.2d 526, 529 (5th Cir. 1959) ("[A]ny act on the part of an indemnitee which materially increases the risk, or prejudices the rights, of the indemnitor, will discharge the indemnitor under the contract of indemnity.") (citation omitted).

Here, the Complaint and the record shows that Imerys has failed to act in good faith, and its actions have increased J&J's potential exposure in breach of Imerys's duties as an indemnitee. First, as explained *supra* § C, J&J's negotiations with Imerys pre-petition failed because of Imerys's continued and unsupported claims that it was entitled to indemnification from J&J for all of its losses arising out of claims asserted against it arising out of the sale of talc or talc-containing products by J&J (Imerys concedes its demands in its Complaint, *see, e.g.*, Compl. ¶¶44, 46). And when J&J pointed out it only owed indemnification for certain years, and under certain conditions—negotiations broke down and Imerys shifted gears: filing for bankruptcy and abandoning all efforts of acting in good faith.

In a clear breach of its duty of good faith, Imerys entered into a settlement that allowed the

TCC and FCR to write the provisions of the TDP solely for the benefit of underlying tort claimants, without any negotiation or oversight by Imerys. *See supra* fn. 18. The TDP also provide claimants the ability to pursue their claims nominally against Imerys in the tort system, but do not require the Trust "to defend any such claim in the tort system." TDP § 2.3(b). This will force J&J to defend those claims, or risk a default judgment it may have to indemnify, because otherwise there will be no entity defending against the claims. *See supra* § C. The result is a clear increase of J&J's risk of liability[25]—something that Imerys could (and, in fact, is required to) minimize.[26]

Imerys has also failed to cooperate with J&J, as required under the 1989 Agreements. *See* 1989 SPA § 11.4 (providing that J&J has the right to elect to assume the defense of claims, hire "counsel reasonably satisfactory to [Imerys]," and have "reasonable control over the decision to try, settle, compromise or otherwise terminate such lawsuit"); § 13.5 (providing that the parties "agree to do all things and to take all actions . . . reasonably necessary or appropriate to carry out the purposes of" the agreement);[27] *see also* 14 Steven Plitt, et al., *Couch on Insurance* § 199:30 (3d ed. 2021) ("*Couch on Insurance*") (noting that courts may imply a requirement to cooperate from these express provisions and their broader context). As described *supra* § C, Imerys has also continually thwarted J&J's attempts to get involved in Imerys's negotiation and settlement discussions with the TCC and FCR, or even to get basic information about these discussions.

---

[25] It would also alter J&J's rights under the 1989 SPA. Under the 1989 SPA J&J has the *option* to *elect* to defend claims brought against Imerys, not an obligation. *See* 1989 SPA § 11.4 (providing that J&J "may elect . . . to assume the defense").

[26] *See, e.g., Am. Export Isbrandtsen Lines, Inc. v. United States*, 390 F. Supp. 63, 69 (S.D.N.Y. 1975) (holding that a party seeking indemnification is obligated to take reasonable measures to protect the interests of the party from whom it seeks indemnification, and the failure to do so may result in the discharge of the obligation to indemnify).

[27] This provision is equally applicable to the 1989 SA. *See supra* fn. 5.

Moreover, after filing for bankruptcy, Imerys denied J&J its right to participate meaningfully in or take over the defense of the talc claims. *Id*.

This lack of cooperation has prejudiced J&J by blocking J&J's ability to obtain information about Imerys's discussions with the TCC and FCR; blocking J&J from any meaningful involvement in the discussions regarding Imerys's Plan; and blocking J&J from being able to assume the defense of the underlying claims so that it could mount a defense to those claims.[28] *See Smith v. Nationwide Mut. Ins. Co.,* 830 A.2d 108, 112 (Vt. 2003) (holding that an insured's failure to cooperate with its insurer will relieve the insurer of its coverage obligations if the noncooperation has precluded the insurer from presenting a credible defense to the underlying claim). Additionally, by shutting J&J out of the negotiations, Imerys deprived J&J—their indemnitor, and the only party with incentive to minimize claim values—of the opportunity to push back against the inflated values. These actions are clearly inconsistent with an indemnitee's duties, including the duties to minimize exposure and cooperate with their indemnitor. *See Meridian Eng'g Co. v. United States*, 122 Fed. Cl. 381, 400 (2015) (noting that implied in every contract is the duty of good faith and fair dealing, which includes both "the duty not to hinder and the duty to cooperate.") (citation omitted), *aff'd in part, vacated in part on other grounds*, 855 F.3d 1531 (2018).

And, while Imerys affirmatively *refused* to cooperate with J&J, it *did* cooperate with the

[28] Imerys even refused to provide J&J with assurances that they would make available documents and witnesses post-confirmation to aid J&J in the defense of the claims against Imerys in the tort system. *See* TCC Response to J&J Lift Stay Motion [D.I. 1976], at Ex. A. (eliminating from J&J's Revised Proposed Order the language codifying an indemnitee's duty to cooperate by providing access to documents and witnesses). This is particularly egregious, given that Imerys *did* enter into a cooperation agreement with the TCC and FCR. *See* Cooperation Agreement. It would be impossible for J&J to defend cases against Imerys without documents and witnesses.

TCC and FCR—creating a chapter 11 plan of reorganization, including a settlement with the TCC and FCR that would impose liability on J&J in direct violation of Imerys's duties as an indemnitee.[29] *See* Couch on Insurance § 199:24 ("It has been held that an insured's conduct is sufficient in establishing a willful and intentional failure to cooperate [when] . . . [t]he insured, by collusive conduct, appeared to be conspiring to assist claimant, rather than assisting insurer, in its defense."); *see also Hurston v. Ga. Farm Bureau Mut. Ins. Co.*, 148 Ga. App. 324, 325 (1978) (holding that the cooperation clause of a liability policy will be deemed to be violated if the insured, by collusive conduct, "appears to be assisting claimant in maintenance of his suit rather than insurer.") (citation omitted). Indeed, Imerys refused to even speak to J&J without the TCC and FCR being present. *See* J&J Lift Stay Motion, Ex. J. Imerys even memorialized its cooperation with the claimants in a cooperation agreement. *See generally* Cooperation Agreement.

Given these actions, Imerys has breached its duty as indemnitee of good faith and fair dealing, and has failed to take any steps—let alone the requisite steps—to minimize its indemnitor's risk of liability. And Imerys has breached its duty to cooperate, which is required of an indemnitee generally and is explicitly required under the 1989 Agreements.[30] Accordingly, any

---

[29] To be sure, as set forth *supra* § C, instead of negotiating at arms' length with the TCC and FCR to reach settlement numbers that were reasonable in light of Imerys's continued belief that the underlying tort claims are meritless and Imerys's success in defending against such claims, Imerys gave control over setting the claims values to the TCC and FCR, allowing them to handpick whatever number they wished to represent the value of the claims—no doubt because it is Imerys's belief that J&J would be the ultimate payor. *See, e.g.,* First Day Declaration of Debtors' Chief Financial Officer, Alexandra Picard [D.I. 10] (Feb. 13, 2019) at ¶ 38 (Debtors asserting that "the Talc Claims related to the Debtors' sale of talc to J&J are subject to uncapped indemnity rights against J&J under various stock purchase and supply agreements.").

[30] For the claims that have arisen post-petition, and future claims that have not yet arisen at all, Imerys has also failed to "promptly notify" J&J in a detailed writing of the claims for which it is seeking indemnification, or give J&J the ability to take over the defense of such claims, but has instead reached a global settlement of these claims. *See* 1989 SPA § 11.4; *see also supra* fn. 5;

indemnification obligation that J&J may have had under the 1989 SA has been nullified, Imerys cannot state a claim for breach of the 1989 SA, and Cause of Action 9 should be dismissed.

e. Imerys Has Failed To State A Claim With Regard To Cause Of Action 8.

In Cause of Action 8, Imerys claims that J&J breached the 1989 SPA by failing to indemnify, defend, and hold harmless Imerys. *See* Compl. ¶ 129. But for the same reasons discussed above, Imerys's own conduct as an indemnitee has nullified any possible indemnification obligations that J&J could have had under the 1989 SPA. Therefore, Imerys cannot show that J&J breached the 1989 SPA, and Cause of Action 8 should be dismissed. [31]

II. All Of The Declaratory Judgment Causes Of Action Should Be Dismissed Because They Are Duplicative Of The Breach Of Contract Claims And The Future Claims Are Not Ripe.

a. The Declaratory Judgment Actions For Current Claims Are Duplicative Of The Breach Of Contract Causes Of Action And Should Be Dismissed.[32]

"Courts generally decline granting declaratory relief when the claim for declaratory judgment is entirely duplicative of another claim in the cause of action." *LM Gen. Ins. Co. v. LeBrun*, 470 F. Supp. 3d 440, 455 (E.D. Pa. 2020) (citation omitted) (granting motion to dismiss,

---

Wash. Gaslight Co. v. District of Columbia, 161 U.S. 316, 329 (1895) (holding that a judgment rendered against an indemnitee is binding on the indemnitor "provided notice be given to the latter, and full opportunity be afforded him to defend the action"). Accordingly, J&J has no obligation to indemnify any of those claims. *See Lawless v. TA Assocs., L.P.*, No. A-1463-14T1, 2015 WL 9263869, at *6 (N.J. Sup. Ct. App. Ct. Dec. 21, 2015) (holding that "failure to provide timely notice" was "fatal to a claim of indemnification" under a merger agreement where the indemnitee "did not provide the [indemnitors] with notice of the six-year-old . . . action until one month before the action settled").

[31] These same defenses also apply to Imerys's breach of contract claims for the 2001 TSA, the 2010 MPA, and the 2011 MPA.

[32] Even if the Court declines to dismiss the declaratory judgment action claims as duplicative, it should still dismiss them for the same reasons it should dismiss their corresponding breach of contract claims. *See supra* § I.

in relevant part regarding the duplicative declaratory judgment action claims); *Mladenov v. Wegmans Food Markets, Inc.*, 124 F. Supp. 3d 360, 379 (D.N.J. 2015) (granting motion to dismiss declaratory judgment clams that were "redundant" of plaintiff's other claims). And courts in the Third Circuit regularly dismiss declaratory judgment actions when they "bear complete identity of factual and legal issues with another claim being adjudicated by the parties." *JJCK, LLC v. Project Lifesaver Int'l*, No. 10-930-LTS, 2011 WL 2610371, at *6 (D. Del. July 1, 2011) (granting motion to dismiss duplicative declaratory judgment action claims) (citation omitted); *see also Christiana Care Health Servs., Inc. v. PMSLIC Ins. Co.*, No. 14-1420-RGA, 2015 WL 6675537, at *5-6 (D. Del. Nov. 2, 2015) (granting motion to dismiss the declaratory judgment action claims, finding that "[a]ll of the factual and legal issues relevant to the declaration [plaintiff] are before the Court as a result of its breach of contract and bad faith breach of contract claims. . . . Thus, a declaratory judgment would serve no useful purpose.").[33]

The claims in Causes of Action 1, 2, 4, 6, and 7 seeking declaratory judgments that J&J owes indemnification for current claims that have been asserted against Imerys, should be dismissed because they involve the same factual and legal issues as their breach of contract claim counter parts in Causes of Action 8, 9, 10, 11, and 12. For example, the factual allegations

[33] While district courts have discretion to preside over declaratory judgment claims, *see, e.g., State Auto Insurance Companies v. Summy*, 234 F.3d 131, 134 (3d Cir. 2000), and some courts have exercised this discretion by declining to dismiss duplicative declaratory judgment claims, *see, e.g., In re Zohar III, Corp.*, No. 18-10512, 2021 WL 2495146, at *29 (Bankr. D. Del. June 18, 2021), this Court should exercise its discretion to dismiss the duplicative declaratory judgment claims. Indeed, courts are encouraged to dismiss such duplicative claims "when doing so would promote judicial economy by avoiding duplicative and piecemeal litigation." *Summy*, 234 F.3d at 135. Dismissal would serve judicial economy because whether this Court resolves the breach of contract claims in favor of J&J or Imerys, the corresponding declaratory judgment claims for present claims would necessarily be resolved.

supporting Cause of Action 1 are materially identical to the factual allegations supporting Cause of Action 8. *Compare* Compl. ¶¶ 78-85 (alleging that the 1989 SPA requires J&J to indemnify Imerys for losses associated with claims asserting exposure to J&J's talc-containing products manufactured and distributed prior to January 6, 1989; that Imerys has incurred significant expense in defending against and settling such claims; and that J&J has previously refused to indemnify Imerys) *with id.* ¶¶ 126-28 (same). Thus, Imerys's declaratory relief sought in the first Cause of Action—a determination that J&J is "obligated to defend and indemnify ITA under the 1989 SPA," *id.* ¶ 85—would necessarily be resolved by the Court's determination of Imerys's eighth Cause of Action—that J&J breached the 1989 SPA by refusing to indemnify ITA under the 1989 SPA, *id.* ¶ 129.

Similarly, the claims in Cause of Action 2 relating to the 1989 SA are identical to the claims in Cause of Action 9. *Compare* Compl. ¶¶ 87-93 (alleging that under the 1989 SA, J&J owes indemnity for claims relating to J&J-talc products manufactured and distributed before January 6, 1989 and between January 6, 1989 and December 30, 2000 and that Imerys has already suffered losses due to their defense and settlement of claims that J&J has refused to indemnify) *with id.* ¶¶ 130-34 (same). Thus, Imerys's request for a judicial determination that J&J is obligated to defend and indemnify Imerys under the 1989 SA for this category of claims, *see id.* ¶ 93, would also be resolved by this Court's decision on the 1989 SA breach of contract cause of action. *See id.* ¶¶ 133-34.

With respect to the 2001 TSA, the factual allegations in Cause of Action 4 are identical to the factual allegations in Cause of Action 10. *Compare* Compl. ¶¶ 100-05 (alleging that the 2001 TSA requires J&J to indemnify Imerys for any losses associated with Imerys's talc failing to conform to microbiological quality standards between April 16, 2001 and December 31, 2006 and

that J&J has refused to indemnify Imerys for such claims) *with id.* ¶¶ 135-39 (same). Accordingly, resolving Imerys's breach of contract Cause of Action that asserts J&J has breached the 2001 TSA for failing to indemnify ITA for J&J's talc products manufactured and distributed between April 16, 2001 and December 31, 2006, *see id.* ¶ 137, will also resolve Imerys's Cause of Action seeking a judicial declaration that J&J must indemnify ITA under the 2001 TSA, *see id.* ¶ 105.

The factual allegations in Cause of Action 6 relating to the 2010 MPA are also identical to the Cause of Action 11. *Compare id.* ¶¶ 113-18 (alleging that J&J owes Imerys indemnity under the 2010 MPA for "all risk of handling the talc at the point of delivery" and owes Imerys indemnity for claims by "third parties arising from such handling" and that J&J has denied such indemnity) *with id.* ¶¶ 140-44 (same). And once again, the Court's ruling on whether J&J breached the 2010 SA for failing to indemnify ITA for "lawsuits alleging harm caused by exposure to J&J's talc-containing products manufactured and distributed between January 1, 2010 through December 31, 2010," *see id.* ¶ 144, would necessarily resolve the declaratory judgment Cause of Action that seeks a declaration that J&J is obligated to indemnify ITA under the 2010 MPA for Talc Personal Injury Claims "arising out of exposure to J&J's talc-containing products manufactured and distributed between January 1, 2010 through December 31, 2010," *id.* ¶ 118.

Finally, the factual allegations in Cause of Action 7 are identical to those in Cause of Action 12. *Compare* Compl. ¶¶ 119-24 (alleging that under the 2011 MPA J&J owes indemnity for third-party claims based on J&J's use of talc for losses incurred due to lawsuits alleging harm caused by J&J's talc-containing products manufactured and distributed between January 1, 2011 through December 31, 2011 and that J&J has refused to indemnify Imerys for such claims) *with id.* ¶¶ 145-49 (same). And a determination on whether "J&J has breached the 2011 Supply Agreement by failing to indemnity, defend, and hold harmless ITA" for such claims would necessarily resolve

any "judicial declaration that [J&J] is obligated to defend and indemnity ITA under the 2011 [MPA] . . . [for] Talc Personal Injury Claims arising out of exposure to J&J's talc-containing products manufactured and distributed between January 1, 2011 through December 31, 2011," *id.* ¶ 124.

b. The Declaratory Judgment Actions For Future Claims Should Be Dismissed Because There Is Insufficient Adversity And Ripeness.

The claims in Causes of Action 1, 2, 4, 6, and 7, seeking a declaratory judgment that J&J *will* owe indemnification to Imerys for *future claims* should be dismissed because Imerys cannot show they are ripe for adjudication. The same is true for Causes of Action 3 and 5, seeking declaratory judgments that Imerys *will not* owe indemnification to J&J for *future claims* asserted against it.[34]

Under the Declaratory Judgment Act, a federal court has the discretion to exercise its power to render a declaratory judgment when an action is ripe for adjudication. *See* 28 U.S.C. § 2201. In *Aetna Life Insurance Co. of Hartford v. Haworth,* the Supreme Court found that in order for a case to be ripe, "the controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests[.]" 300 U.S. 227, 240-41 (1937). The controversy must be a "real and substantial controversy" that can be given relief of a "conclusive character," not an "opinion advising what the law would be upon a hypothetical set of facts." *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 912 F.2d 643, 647 (3d Cir. 1990) (citations omitted). The question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between

[34] Cause of Action 3 also seeks a declaratory judgment that Imerys does not owe indemnification to J&J for current claims. J&J, however, has never made an indemnification demand on Imerys under the 1989 SA. Thus, the lack of adversity between the parties for any current claims also requires the dismissal of Cause of Action 3 for those claims.

parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* The Third Circuit, interpreting the Supreme Court's test, requires courts to examine (i) the adversity of the interests of the parties; (ii) the conclusiveness of the judicial judgment; and (iii) the practical help, or utility, of that judgment. *See id.; see also Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 540 (3d Cir. 2017). Imerys's declaratory judgment requests in Causes of Action 1, 2, 3, 4, 5, 6, and 7 regarding any future claims fail to meet any of these factors.

First, in order to have sufficient adversity, the defendant must have denied liability for the damages requested for a claim that actually exists. *See Step-Saver,* 912 F.2d at 647-48 (finding a declaratory action was not appropriate because it would not order the "defendants to pay unless and until [plaintiff] is found liable elsewhere," and defendants had not yet refused to indemnify plaintiffs for damages for the hypothetical future claim).[35] "[W]ithout that denial, the parties' interests are insufficiently adverse," and there is "nothing to adjudicate." *Id.* Courts have found this even when future claims are anticipated, and the possible specific plaintiffs could be identified. *See Fairfield Henry, LLC v. Phila. Indem. Ins. Co.*, 2014 U.S. Dist. LEXIS 32534, at *2-3 (E.D. Pa. Mar. 13, 2014) (finding that while plaintiff anticipated seventy-one individual tenants would

[35] Moreover, the court found that the requested declaration would render defendants liable based on judgments in the underlying suits, which was problematic as there were several plausible causes for the malfunctioning of the product, some which would make defendants liable, and some which would not. *Id.* at 648; *see also Emerson Elec. Co. v. Rego Co.*, 1992 U.S. Dist. LEXIS 15103, at *19 (N.D. Ill. Oct. 5, 1992) (granting summary judgment for future claims, noting that a myriad of facts could influence a personal injury plaintiff's right to recover, and so it would be impossible to be certain whether plaintiffs would ever be required to pay any judgment for which defendants would be liable as indemnitors). Similarly, here, the various agreements provide for indemnity only with respect to specific claims in specific years under specific circumstances, and those circumstances vary from year to year and agreement to agreement.

file lawsuits, plaintiff was still not entitled to a declaratory judgment on the issue of whether the defendant had a duty to defend and indemnify in those lawsuits or any hypothetical future lawsuits). Such abstract liability cannot be the basis for a definite and concrete controversy and the court cannot issue a declaratory judgment in abstract terms. *Emerson Elec. Co.,* No. 90 C. 3343, 1992 U.S. Dist. LEXIS 15103, at *19-20 (N.D. Ill. Oct. 5, 1992); *see also Westport Ins. Corp. v. Howell*, No. 05-351, 2005 U.S. Dist. LEXIS 8733, at *4-5 (E.D. Pa. May 10, 2005) (finding that the parties' interests were not adverse because no payment had been made on the underlying claim in that case). Without a reasonable apprehension of liability in an existing, pending case, as opposed to a hypothetical set of facts, no case or controversy exists within the meaning of Article III of the Constitution. *Emerson Elec. Co.*, 1992 U.S. Dist. LEXIS 15103, at *20.

Imerys asks this Court to issue a declaratory judgment about *theoretical future claims,* but it is not clear how many claims may be filed in the future, whether such claims will be valid, whether such claims would fall under any of the J&J Agreements, or why they will fall within the parameters of any indemnity obligations.[36] This Court, therefore, cannot render a finding with respect to potential future claimants with hypothetical future demands, and should not issue any judgment. *See Fairfield Henry, LLC,* 2014 U.S. Dist. LEXIS 32534, at *50; s*ee also Invensys Inc. v. Am. Mfg. Corp.,* 2005 U.S. Dist. LEXIS 3961, at *10 (E.D. Pa. 2005) ("…claims for

[36] Further, with respect to any given claim, J&J may have defenses that impact its indemnity obligations. For example, J&J may have defenses that claimants have failed to prove that their exposure took place during a period that even implicates J&J's indemnification obligations. Without an opportunity for the Court to hear such defenses, which will depend on the facts surrounding a particular claim, a court cannot determine liability for an underlying claim before it exists. *See Fairfield Henry*, 2014 U.S. Dist. LEXIS 32534, at *50.

indemnification arise only when the party seeking indemnity has made a payment on the underlying claim.") (citation omitted); *Mass Elec. Constr. Co. v. Siemens Bldg. Techs. Inc.,* No. 09-01-138-JOH, 2010 Del. Super. LEXIS 409, at *24-25 (Del. Sup. Ct. Sept. 28, 2010) ("The duty to indemnify arises only when the insured is found to be liable for damages covered by the policy.") (citation omitted).

Second, declaratory judgment with respect to the future claims is not appropriate because this Court cannot render a judgment that would provide specific relief of a conclusive character about nonexistent claims. In determining whether an order would be conclusive, courts look to whether the "issues are purely legal (as against factual)" and whether "further factual development would be useful." *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333, 342 n.9 (3d Cir. 2001). Courts are clear: "A declaratory judgment granted in the absence of a concrete set of facts would itself be a 'contingency,' and applying it to actual controversies which subsequently arise would be an 'exercise in futility.'" *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 412 (3d Cir. 1996) (quoting *Step-Saver Data,* 912 F.2d at 648). Thus, "conclusiveness" is shorthand for whether a declaratory judgment would determine the parties' rights as opposed to serving as an advisory opinion. For example, in *Step-Saver* the court found that where the declaration requested would provide no conclusiveness because the declaration itself would be a contingency, (*i.e.,* defendants are liable *if*...), and it would not change nor clarify the legal status of the parties, such declaration would be inappropriate. *Step-Saver*, 912 F.2d at 648. The parties would be left to argue whether the liability for which the court declared the defendants responsible was the same liability as proven later in the underlying trial. *Id.*

Here, any declaratory judgment is necessarily contingent because it depends on the possibility that future claims may be filed, that those claims are of the type that fall under one of

the indemnity agreements, and that J&J does not have meritorious claim specific defenses. Thus, the judgment requested is a contingency on its face, and would not provide any conclusiveness to the parties.

Finally, Imerys fails to show that any declaratory judgment could render the requisite practical utility. In examining this factor, courts look to "whether the parties' plans of action are likely to be affected by a declaratory judgment," and consider the hardship to the parties of withholding judgment. *NE Hub Partners,* 239 F.3d at 344-45 (citations omitted). Imerys has not shown that "[p]resent harms will flow from the threat of future action." *Energy Partners, Ltd. v. Stone Energy Corp.,* No. 2402-N, 2006 Del. Ch. LEXIS 182, at *27-28 (Del. Ch. Oct. 11, 2006). Rather, any possible harm here is necessarily "contingent," because it "requires the occurrence of some future event before the action's factual predicate is complete"—*i.e.,* it requires a claim to materialize, and Imerys to pay that claim. *Id.* Thus, the controversy is not ripe. *Id.* And, where a declaration would "merely do what established [laws] already do," a declaratory judgment would not offer any practical utility. *Step-Saver,* 912 F.2d at 650. Therefore, the declaratory relief sought in Causes of Action 1, 2, 3 4, 5, 6, and 7 with respect to non-existent hypothetical future claims that may or may not be filed at some unspecified future time should be denied.

III. The Cause Of Action Seeking Attorneys' Fees And Costs Should Be Dismissed Because Imerys's Complaint Is Meritless.

Because all of the causes of action in the Complaint must be dismissed as a matter of law, Imerys is not entitled to attorneys' fees and costs and Cause of Action 13 should be dismissed.

CONCLUSION

For all the above reasons, the Court should dismiss the Complaint.

Dated: September 21, 2021
Wilmington, Delaware

/s/ *Patrick A. Jackson*

FAEGRE DRINKER BIDDLE & REATH LLP
Patrick A. Jackson (Del. Bar No. 4976)
222 Delaware Ave., Suite 1410
Wilmington, Delaware 19801
Telephone: (302) 467-4200
Facsimile: (302) 467-4201
patrick.jackson@faegredrinker.com

-and-

WEIL, GOTSHAL & MANGES LLP
Diane P. Sullivan (admitted *pro hac vice*)
Gary T. Holtzer (admitted *pro hac vice*)
Ronit J. Berkovich (admitted *pro hac vice*)
Theodore E. Tsekerides (admitted *pro hac vice*)
Konrad L. Cailteux (admitted *pro hac vice*)
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Johnson & Johnson and Johnson & Johnson Consumer Inc.