

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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In re:	:	Chapter 11
	:	
IMERYYS TALC AMERICA, INC., <i>et al.</i> , ¹	:	Case No. 19-10289 (LSS)
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Debtors.	:	(Jointly Administered)
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IMERYYS TALC AMERICA, INC., IMERYYS TALC VERMONT, INC. and IMERYYS TALC CANADA INC.,	:	Adv. Pro. No. 19-_____ (LSS)
	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
CYPRUS AMAX MINERALS COMPANY and CYPRUS MINES CORPORATION,	:	
	:	
	:	
Defendants.	:	
	:	
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DEBTORS’ COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Imerys Talc America, Inc. (“**ITA**”) and its affiliated debtors in the above-captioned chapter 11 cases (the “**Chapter 11 Cases**”), as debtors and debtors-in-possession (collectively, the “**Debtors**”) and plaintiffs in the above-captioned adversary proceeding, incorporate the statements contained in (a) the *Declaration of Alexandra Picard in Support of Debtors’ Complaint for Injunctive and Declaratory Relief* (the “**Picard Declaration**”), filed contemporaneously herewith,

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, Georgia 30076.

and (b) the *Declaration of Alexandra Picard, Chief Financial Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Pleadings* [Docket No. 10] (the “**First Day Declaration**”), filed in the main docket for the Chapter 11 Cases, and further state as follows:

INTRODUCTION

1. The Debtors commenced the Chapter 11 Cases to finally and fairly resolve all talc-related claims against them through the consummation of a plan of reorganization that includes the establishment of a trust and channeling injunction pursuant to sections 105 and 524(g) of title 11 of the United States Code (the “**Bankruptcy Code**”). The relief sought by this adversary proceeding is critical to the Debtors’ ability to proceed with and achieve the purpose for which they commenced the Chapter 11 Cases.

2. The Debtors filed this Complaint in an effort to protect their property rights in the proceeds of the Insurance Policies (as defined below) resulting from accrued claims or causes of action against the Insurers (as defined below) relating to Pre-Transfer Talc Liabilities (as defined below) from attempts by Cyprus Amax Minerals Company (“**CAMC**”)² and Cyprus Mines Corporation (“**Cyprus Mines**” and together with CAMC, the “**Defendants**”) to access and deplete such proceeds, which would have the effect of reducing the amounts otherwise available to the Debtors’ creditors, through the trust, to cover talc-related claims.

3. In particular, through this Complaint, the Debtors seek a declaration that (a) ITA owns all rights to the proceeds of the Insurance Policies resulting from accrued claims or causes of action against the Insurers related to Pre-Transfer Talc Liabilities and (b) section 362(a)(3) of

² CAMC’s former parent company, Phelps Dodge Corporation, was acquired by Freeport-McMoRan Copper & Gold, Inc. in 2007. See *Declaration of Matthew O. Talmo in Support of its Emergency Motion for (I) Interim and Final Orders Granting Relief From the Automatic Stay Under Bankruptcy Code § 362(d) to Access Insurance Coverage Under Cyprus Historical Policies or, In the Alternative, (II) Adequate Protection Under Bankruptcy Code §§ 361 and 363(e)* [Docket No. 105] (the “**Talmo Decl.**”), Exhibit C.

the Bankruptcy Code applies to prohibit any effort by the Defendants to access such proceeds, whether for defense costs or for any judgments or other liabilities related to Pre-Transfer Talc Liabilities. In addition, the Debtors seek a preliminary injunction, under section 105(a) of the Bankruptcy Code, enjoining the Defendants from taking any action to access such proceeds. Contemporaneously with the filing of this Complaint, the Debtors are also filing a motion (the “**Motion**”), which requests the injunctive relief sought in this proceeding.

JURISDICTION AND VENUE

4. This adversary proceeding arises in and relates to the Debtors’ Chapter 11 Cases pending before the Court under chapter 11 of the Bankruptcy Code.

5. The Court has jurisdiction to consider this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b) and, pursuant to Rule 9013– 1(f) of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “**Local Rules**”), the Debtors consent to the entry of a final order by the Court in connection with this adversary proceeding to the extent it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments consistent with Article III of the United States Constitution.

6. Venue for this matter is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

BASIS FOR RELIEF

7. The statutory bases for the relief requested herein are sections 105(a) and 362(a)(3) of the Bankruptcy Code.

8. The Debtors have commenced this adversary proceeding pursuant to Rules 7001(7) and (9) of the Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”).

9. No prior request for the relief requested herein has been made to this or any other court.

THE PARTIES

10. Plaintiff/Debtor ITA is a Delaware corporation. Plaintiff/Debtor Imerys Talc Vermont, Inc. (“**ITV**”) is a Vermont corporation. Plaintiff/Debtor Imerys Talc Canada Inc. is a Canadian corporation.

11. On information and belief, Defendant Cyprus Amax Minerals Company is a Delaware corporation. On information and belief, Defendant Cyprus Mines Corporation is a Delaware corporation.

FACTUAL BACKGROUND

The Insurance Policies

12. The relevant insurance policies consist of numerous primary, excess, and umbrella comprehensive general liability insurance policies issued, or otherwise providing coverage, to Cyprus Mines and/or its affiliates or predecessors between 1961 and 1986 (the “**Insurance Policies**”), including, without limitation, those policies listed on Exhibit A to the Picard Declaration.

13. The Debtors’ property rights in the proceeds of the Insurance Policies issued by various insurers (collectively, the “**Insurers**”) stem from that certain Agreement of Transfer and

Assumption (as amended, the “**ATA**”),³ dated June 5, 1992, by and between Cyprus Mines and Cyprus Talc Corporation (“**CTC**”). Pursuant to the ATA, Cyprus Mines agreed to “sell, assign, transfer, convey and deliver” to CTC (currently known as ITA), all of its “right, title, and interest in and to the assets, properties, rights and businesses of every type and description used primarily in or relating primarily to Cyprus [Mines]’ talc business (the ‘Talc Business’), whether real, personal or mixed, tangible or intangible, whether currently in use or idle, fixed or unfixed, accrued, absolute, contingent or otherwise, wherever located” (the “**Transferred Assets**”). (Picard Decl., Exh. B at §2.) The Transferred Assets were defined to include all of the right, title and interest of Cyprus Mines in, among other things, the following assets: (i) all right, title and interest in, to and under all contracts, agreements, leases, licenses, permits, orders, commitments of understandings to which Cyprus Mines was a party or entitled to any right or interest; (ii) all contracts, books, records and other data relating primarily to the Talc Business; (iii) all causes of action and claims of any kind of Cyprus Mines against any other party related primarily to the Talc Business; and (iv) all other assets and rights of the Talc Business as a going concern. (*Id.* at §§2(h), (j), (k), and (l).) In exchange, CTC agreed to assume, perform, pay and discharge “all of the liabilities or obligations, whether known, unknown, contingent or otherwise primarily relating to the Transferred Assets, including, without limitations, liabilities and obligations, whether known, unknown, contingent or otherwise arising out of transactions or events occurring on or prior to the Closing and relating primarily to the Transferred Assets” (collectively, the “**Pre-Transfer Talc Liabilities**”). (*Id.* at §4.) As a result, CTC acquired, and for the reasons described below, ITA

³ The ATA was amended by that certain Amendment to Agreement of Transfer and Assumption dated June 24, 1992 and that certain Second Amendment to Agreement of Transfer and Assumption dated June 30, 1992. (Picard Decl., Exhs. C and D.)

currently owns, all rights to the proceeds of the Insurance Policies resulting from accrued claims or causes of action against the Insurers relating to Pre-Transfer Talc Liabilities.

The Debtors' Corporate History

14. Leading up to the consummation of the ATA, upon information and belief, Cyprus Mines and its subsidiaries engaged in several transactions that resulted in the acquisition of the stock or assets of other talc companies, including, among others, Sierra Talc Company, United Clay Company, American Talc Company, and Resource Processors, Inc. In 1979, Cyprus Mines merged with Amoco CYM Corporation. As a result of this merger, Cyprus Mines became a wholly-owned direct subsidiary of Cyprus Minerals Company (f/k/a Amoco Minerals Company) and an indirect subsidiary of Standard Oil (Indiana). (Picard Decl. ¶10.)

15. In 1989, Cyprus Mines purchased 100% of the stock of Windsor Minerals, Inc. (“**Windsor**”) (currently known as Debtor ITV) from Johnson & Johnson (“**J&J**”). In 1992, Cyprus Mines and its affiliates transferred such stock and all of the other assets in their then existing talc business to a newly-formed subsidiary, CTC, pursuant to the ATA (as described above), resulting in Windsor becoming a wholly-owned subsidiary of CTC. Contemporaneously with the consummation of the ATA, RTZ America, Inc. (later known as Rio Tinto America, Inc.) purchased 100% of the stock of CTC from Cyprus Mines pursuant to a Stock Purchase Agreement dated June 5, 1992, by and between RTZ America, Inc., Cyprus Mines, and Cyprus Minerals Company (the “**SPA**”). CTC subsequently changed its name to Luzenac America, Inc. (First Day Decl. ¶12.)

16. Under the SPA, Cyprus Mines agreed, among other things, to “cooperate and cause such Affiliates to cooperate with Buyer and the Companies [*i.e.* CTC/ITA] in submitting Claims on behalf of Buyer or such Companies under Seller’s Insurance Policies with respect to

such Business Liabilities relating to occurrences prior to the Closing.” (Picard Decl., Exh. E at §7.6.)

17. In 2011, non-debtor affiliate Mircal S.A. entered into an agreement with Rio Tinto America, Inc. to purchase the stock of the Rio Tinto Group’s talc operations, including the stock of Luzenac America, Inc. and Windsor. Pursuant to that stock acquisition, Mircal S.A. exercised its right to cause Imerys Minerals Holding Limited (UK) to acquire the outstanding shares of Luzenac America, Inc. At the same time, Mircal S.A. acquired the stock of Luzenac, Inc., which is now known as Debtor Imerys Talc Canada Inc. (“**ITC**”), from another member of the Rio Tinto Group, QIT Fer & Titane, Inc. (First Day Decl. ¶¶12-13.) Luzenac America, Inc., Windsor, and Luzenac, Inc. – the three Debtors in these Chapter 11 Cases – subsequently changed their names to ITA, ITV, and ITC, respectively.

The Talc Claims

18. At the time of the 2011 acquisition, there were only a few pending claims alleging personal injuries caused by exposure to talc mined, processed, and/or distributed by Cyprus Mines or one or more of the Debtors’ other predecessors (the “**Pending Talc Claims**”). Each of these claims was in the early stages of litigation. (*Id.* at ¶13.) Additional talc-related claims were filed against the Debtors thereafter (collectively with the Pending Talc Claims, the “**Talc Claims**”). Most of the Talc Claims allege exposure to talc prior to the 1992 acquisition of Cyprus Mines’ Talc Business. Although plaintiffs began filing additional cosmetic Talc Claims with an increasing frequency in 2014, the Debtors mounted a vigorous defense against such suits and were successful in dismissing, or settling for *de minimis* amounts, the vast majority of these cases. Nevertheless, the number of cosmetic Talc Claims being filed continued to accelerate rapidly over the following years. (*Id.* at ¶¶32-36.)

19. The vast majority of the Talc Claims that have been asserted against the Debtors to date are based on personal injuries allegedly arising from the plaintiffs' use of body powder products. The Debtors have historically been primary suppliers of cosmetic talc and, therefore, have been routinely named as a co-defendant in litigation related to Talc Claims. As such, although personal care/cosmetic sales constitute only approximately 5% of the Debtors' revenues, approximately 98.6% of the pending Talc Claims allege injuries based on the use of cosmetic products containing talc. (*Id.* at ¶18.)

20. Despite the fact that they only acquired their talc operations in 2011, prior to the Petition Date, the Debtors were facing a substantial number of claims alleging that they are liable for personal injuries caused by exposure to talc mined, processed, and/or distributed by one or more of the Debtors or their predecessors. As of the Petition Date, one or more of the Debtors has been sued by approximately 14,650 claimants alleging Talc Claims. (First Day Decl. ¶9.) Of these cases, one or both of the Defendants have been named as co-defendants in approximately 700. (Picard Decl. ¶15.) Due to the transfer of the Transferred Assets and the Pre-Transfer Talc Liabilities to CTC/ITA pursuant to the ATA, in July 2016, ITA voluntarily accepted CAMC's tender of 46 talc-related asbestos bodily injury lawsuits, subject to certain conditions and reservations. Since July 2016, and until the Petition Date, ITA has largely handled the defense of such Talc Claims, and additional Talc Claims that have been filed against the Defendants, on their behalf. (*Id.* at ¶17.)

21. On February 13, 2019, the date the Chapter 11 Cases were filed, ITA informed CAMC that, in light of the bankruptcy filings, ITA was forced to rescind its prior acceptance of tenders of underlying talc lawsuits from the Defendants and would be unable to accept any new tenders of underlying Talc Claims from the Defendants. (Picard Decl., Exh. I.)

Accordingly, as of February 13, 2019, ITA is no longer defending or paying on behalf of the Defendants in the underlying talc lawsuits, and the Defendants were informed that they would be required to take all actions necessary to assume and pay for their own defense in those actions. In the February 13 letter, ITA also informed CAMC that it was the Debtors' position that neither Defendant has any rights to the proceeds of the Insurance Policies for Pre-Transfer Talc Liabilities and that any attempts to access such proceeds would be a violation of the automatic stay. (*Id.*) On February 28, 2019, the Defendants filed their *Emergency Motion for (I) Interim and Final Orders Granting Relief From the Automatic Stay Under Bankruptcy Code § 362(d) to Use Insurance Coverage Under Cyprus Historical Policies or, In the Alternative, (II) Adequate Protection Under Bankruptcy Code §§ 361 and 363(e)* [Docket No. 104] (the "**Emergency Motion**"). A hearing on the Emergency Motion has been set for March 8, 2019 at 10:00 a.m. (Eastern). The Debtors do not believe that the relief requested in the Emergency Motion is sufficient to resolve the issues raised, and relief sought, in this Complaint.

The Bankruptcy Proceedings

22. On February 13, 2019 (the "**Petition Date**"), the Debtors each filed a voluntary petition in this Court commencing cases for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No trustee or examiner has been requested in the Chapter 11 Cases. On March 5, 2019, an Official Committee of Tort Claimants was appointed by the Office of the United States Trustee [Docket No. 132]. The Chapter 11 Cases are jointly administered for procedural purposes only pursuant to Bankruptcy Rule 1015(b).

23. In coordination with the commencement of the Chapter 11 Cases, Debtor ITC filed an application under the *Companies' Creditors Arrangement Act* in the Ontario Superior Court

of Justice (Commercial List) recognizing the Chapter 11 Cases and the United States as the center of main interest.

24. Given (a) the long standing burden of talc-related litigation that has only worsened over time and is projected to continue for decades more and (b) the Debtors' inability to fully and effectively defend the barrage of lawsuits against them in the tort system, the Debtors, after careful review of the available alternatives, concluded that the commencement of a chapter 11 reorganization utilizing sections 105 and 524(g) of the Bankruptcy Code offered the best alternative under the circumstances to permanently, globally and fairly resolve the Talc Claims. (Picard Decl. ¶20.) The Defendants' attempts to utilize proceeds of the Insurance Policies to cover Talc Claims asserted against them threatens the Debtors' ability to effectuate a chapter 11 plan and to emerge from bankruptcy without unnecessary delay.

NATURE OF RELIEF REQUESTED

25. By this Complaint, the Debtors seek a declaration that (a) ITA owns all rights to the proceeds of the Insurance Policies resulting from accrued claims or causes of action against the Insurers related to Pre-Transfer Talc Liabilities, and (b) section 362(a)(3) of the Bankruptcy Code applies to prohibit any effort by the Defendants to access such proceeds, whether for defense costs or for any judgments or other liabilities related to Pre-Transfer Talc Liabilities. In addition, the Debtors seek a preliminary injunction under section 105(a) of the Bankruptcy Code enjoining the Defendants from taking any action to access such proceeds.

COUNT ONE

(Declaratory Relief Pursuant to Section 362(a)(3) of the Bankruptcy Code)

26. The Debtors repeat and re-allege the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

27. Section 362(a)(3) of the Bankruptcy Code operates automatically to stay, among other actions, “the commencement or continuation . . . of a . . . proceeding against the debtor . . . to obtain possession of . . . or to exercise control over property of the estate.” 11 U.S.C. § 362(a)(3).

28. Section 541 of the Bankruptcy Code defines property of the estate to include “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). This definition includes causes of action that the Debtors could have pursued prior to the Petition Date. If a cause of action is property of the estate, such a claim cannot be brought by a creditor of the estate, but instead must be pursued solely by the estate or a representative of the estate.

29. Pursuant to the ATA, Cyprus Mines transferred and assigned all of its rights, title and interests in and to the Transferred Assets to the entity now known as Debtor ITA – which included all rights to the proceeds of the Insurance Policies resulting from accrued claims or causes of actions against the Insurers related to Pre-Transfer Talc Liabilities. Accordingly, Debtor ITA, as the assignee, is the only party that has the right to pursue and recover such proceeds for Pre-Transfer Talc Liabilities and section 362(a)(3) of the Bankruptcy Code should apply to prevent any effort by the Defendants to access them.

30. Pursuant to the SPA, Cyprus Mines also expressly agreed to cooperate with ITA in submitting claims to the Insurers for Talc Claims. By filing its Emergency Motion and by attempting to access the proceeds of the Insurance Policies for Talc Claims asserted against one or both of the Defendants, Cyprus Mines has breached its obligations under the SPA.

31. WHEREFORE, the Debtors respectfully request that the Court: (a) after notice and a hearing, enter an order and judgment declaring that any effort to access proceeds of the

Insurance Policies resulting from accrued claims or causes of action against the Insurers related to Pre-Transfer Talc Liabilities while the Chapter 11 Cases are pending violates the automatic stay imposed by section 362(a)(3) of the Bankruptcy Code; and (b) grant such other and further relief as the Court may deem proper.

COUNT TWO

(Preliminary Injunctive Relief Pursuant to Section 105 of the Bankruptcy Code)

32. The Debtors repeat and re-allege the allegations contained in the preceding paragraphs of this Complaint as if fully set forth herein.

33. Section 105(a) of the Bankruptcy Code authorizes the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a). Relief under section 105 is particularly appropriate in a chapter 11 case, such as this, where it is necessary to protect the Debtors’ ability to effectively confirm a plan of reorganization and to preserve the property of the Debtors’ estates.

34. Pursuant to sections 362 and 105(a) of the Bankruptcy Code, this Court may enjoin creditor actions against third parties where necessary to prevent harm to the Debtors’ estates or to assure the orderly administration of the Debtors’ chapter 11 proceedings. Thus, this Court has the jurisdiction and authority to enjoin any attempt by the Defendants to access the proceeds of the Insurance Policies resulting from accrued claims or causes of action against the Insurers related to Pre-Transfer Talc Liabilities because such proceeds are property of the Debtors’ estates and any attempts to access such proceeds by the Defendants would unduly interfere with the Chapter 11 Cases.

35. The Debtors are likely to prevail on the merits of their Complaint. As the assignee of the Transferred Assets, ITA is the sole holder of the rights to the proceeds of the

Insurance Policies resulting from accrued claims or causes of actions against the Insurers related to Pre-Transfer Talc Liabilities. As the assignor, Cyprus Mines' rights to the proceeds of the Insurance Policies resulting from accrued claims or causes of actions against the Insurers related to Pre-Transfer Talc Liabilities were extinguished, and neither of the Defendants have standing to assert these assigned claims. The injunctive relief sought by the Debtors is necessary to preserve property of the estate that is essential to the Debtors' reorganization.

36. The Debtors' prospects for a successful reorganization are high. The Chapter 11 Cases were entered into in good faith in an effort to equitably resolve thousands of Talc Claims and the Debtors have sufficient resources to fund the costs of the Chapter 11 Cases as well as a plan of reorganization that includes the creation of a channeling trust pursuant to sections 105 and 524(g) of the Bankruptcy Code. The Debtors' prospects for a successful restructuring, while still at an early stage, weigh in favor of the requested preliminary injunction.

37. In contrast, failure to grant the requested injunction would irreparably harm the Debtors' reorganization efforts by allowing a third party to utilize property of the Debtors' estates that would otherwise be available to fund a trust in furtherance of the Debtors' efforts to effectuate a restructuring plan that will provide for the fair and equitable treatment of all Talc Claims.

38. The likelihood of irreparable harm to the Debtors in the absence of injunctive relief far outweighs any harm to the Defendants. The Defendants will suffer little harm, if any, if the injunctive relief is granted. Any claims the Defendants may have against the Debtors will be preserved and resolved in conjunction with the claims objection process along

with all other claims against the Debtors' estates. In contrast, if the injunctive relief is not granted, the Debtors will likely suffer harm and their restructuring efforts will be threatened by the risk that the Defendants will deplete proceeds of the Insurance Policies that would otherwise be available to satisfy Talc Claims.

39. Finally, the public interest weighs in favor of injunctive relief. There is a strong public interest in a successful chapter 11 reorganization.

40. Accordingly, an injunction barring the Defendants from taking any action to access the proceeds of the Insurance Policies resulting from accrued claims or causes of action against the Insurers related to Pre-Transfer Talc Liabilities is appropriate and essential to preserve the property of the Debtors' estates, and good cause exists for the entry of injunctive relief pursuant to sections 105(a).

41. WHEREFORE, the Debtors respectfully request that the Court: (a) after notice and a hearing, issue a preliminary injunction prohibiting the Defendants from taking any action to access the proceeds of the Insurance Policies resulting from accrued claims or causes of action against the Insurers related to Pre-Transfer Talc Liabilities, pursuant to section 105 of the Bankruptcy Code; and (b) grant such other and further relief as the Court may deem proper.

Dated: March 7, 2019
Wilmington, Delaware

Respectfully submitted,
/s/ Michael J. Merchant

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