**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DISTRICT**

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| MEDLINE INDUSTRIES, INC.<br>Plaintiff, | ) | |
| vs. | ) | Case No. 21-cv-00762 |
| AMWEAR SAFETY PRO INC.,<br>Defendant. | ) | JURY TRIAL DEMANDED |

**COMPLAINT**

Plaintiff, Medline Industries, Inc. ("Medline"), by and through its attorneys, Lynch Thompson LLP, hereby states as follows as its Complaint against Defendant Amwear Safety Pro Inc. ("Amwear"):

**NATURE OF THE ACTION**

1. Medline manufactures and distributes a broad array of products to its customers in the healthcare industry. Among the products Medline both manufactures and distributes is Personal Protective Equipment ("PPE") – equipment intended to protect health care personnel, who work directly with patients, from exposure to bacteria and fluids and to prevent cross-contamination among patients. One such PPE product is the isolation gown – worn by health care personnel who have direct contact with patients, including patients infected by the Covid-19 virus. The design and quality of isolation gowns are critical to ensure that the gowns function as intended to protect both health care professionals and patients and to minimize the spread of infectious disease, including Covid-19, within health care facilities.

2. The need for and importance of proper isolation gowns has increased exponentially as a result of the stringent protocols that health care providers have instituted to address the Covid-

19 pandemic. For example, typical protocols require that providers treating Covid-19 patients don a new isolation gown with each patient visit.

3. This means that after each visit into a patient room, the health care provider must dispose of the current isolation gown and then put on a new gown before entering another patient room. Providers commonly visit multiple patient rooms during a shift, and therefore must repeat this process many times, each time vigilantly replacing the used gown with a new gown. In addition, a Covid-19 patient requiring immediate attention cannot receive any treatment or intervention until the provider can, as quickly as possible, put on a new isolation gown. Thus, it is critical – not only for the safety of the treater, but also for the health of the patient – that health care providers are able to replace the gowns with utmost efficiency.

4. Because of the booming, Covid-19-induced spike in demand, Medline was interested in maximizing its supply of gowns. Thus, when Defendant Amwear approached Medline in the summer of 2020 to offer Medline an opportunity to acquire Amwear branded gowns for distribution to Medline customers, Medline was willing to listen. Medline made clear that it could only purchase the gowns if it could be assured that the products would be of high quality and if Medline could find a customer committed to purchasing the gowns.

5. Amwear assured Medline that the gowns would be of high quality and that Amwear would have control and oversight over their production.

6. Furthermore, Amwear provided sample gowns (the "Design Samples") and Amwear made assurances that the gowns manufactured for Medline would be identical to the Design Samples.

7. Medline shared the Design Samples with a potential customer Medline had identified, who had an interest in purchasing the entire supply of gowns Medline might purchase

from Amwear. Both Medline and Medline's potential customer inspected and approved of the Design Samples. It was only after Medline and its customer had inspected and approved the Design Samples that Medline agreed to purchase gowns from Amwear.

8. After placing its order of gowns from Amwear, Medline received information which caused Medline concern about Amwear's control and oversight of the manufacturing process. Mindful of the unfortunately plentiful stories of providers and health care facilities receiving defective PPE, Medline requested another sample of the gowns that Amwear was having manufactured to fill Medline's purchase orders (the "Production Samples").

9. Unfortunately, the Production Samples did not conform to the Design Samples, but revealed material manufacturing defects. Specifically, the gown sleeves were sewn on inside out and the ties that secure the gown to the wearer were affixed to the inside of the gown rather than the outside. These defects would prevent the gown users from properly donning and securing the gowns, risking potential exposure to both the wearer and the treated patient.

10. Medline immediately notified Amwear of the serious, material defects that meant that the gowns did not conform to the Design Samples or to the terms of the Purchase Orders. After determining that its customer would not accept the gowns as manufactured, and that there was no commercially reasonable method of modifying the gowns, Medline timely notified Amwear of Medline's rejection of and refusal to accept the gowns.

11. Medline now seeks a declaration from the Court that it has properly rejected (or, alternatively, revoked an acceptance of) the gowns produced by Amwear, and also monetary damages occasioned by Amwear's failure to provide conforming goods.

## JURISDICTION AND VENUE

12. This Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a), as Medline seeks a declaratory judgment relating to the Parties' rights and responsibilities under purchase orders in excess of $15,000,000 and seeks recovery of damages in excess of $4,850,000. There is complete diversity between Medline and Amwear, which are citizens of different states as set forth more fully below.

13. This Court has personal jurisdiction over Amwear pursuant to the Medline Supplier Handbook, which Amwear executed and which states, in relevant part, that "Illinois law governs the relationship between Medline and its suppliers. Suppliers [which include Amwear] consent to personal jurisdiction in Illinois and waive formal service of process." (Ex. 1.)

14. Additionally, Amwear has purposely availed itself of an Illinois forum by transacting business with Medline in Illinois.

15. Venue is appropriate in the Northern District of Illinois pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claim occurred within this judicial district.

## PARTIES

16. Medline is an Illinois corporation, with a principal place of business at 3 Lakes Dr., Northfield, IL. Medline is a manufacturer and distributor of medical supplies, providing products, education and support across the continuum of care.

17. Amwear is a California corporation, with a principal place of business at 250 North Benjamin Drive, Corona, California 92879.

## FACTUAL ALLEGATIONS

18. As and for its Paragraph 18, Medline adopts and incorporates Paragraphs 1 through 17 as if fully restated herein.

19. Among the many health care products it offers, Medline distributes disposable medical isolation gowns made with a multi-layer fabric referred to as "SMS" (or, sponbond/meltblown/spunbond) designed to be strong, fluid-resistant and breathable. These isolation gowns are critical in helping to prevent the spread of infectious disease in health care facilities. In particular, health care personnel rely heavily on these single-use SMS isolation gowns for protection while treating and caring for patients, including those affected by Covid-19. For optimal protection, a wearer typically replaces the gown after each visit with a Covid-19 patient. The gowns, therefore, must be prepared and packaged in a way that makes gown changes between patient visits as efficient as possible. Time is of the essence for gown changes.

20. While Medline sells its own Medline-branded isolation gowns to hospital customers, the Covid-19 pandemic created an exponential increase in demand for gowns. The demand for gowns from Medline customers exceeded Medline's supply of branded gowns.

21. In or around August 2020, Amwear approached Medline about the possibility of selling Amwear-branded SMS isolation gowns to Medline for distribution to Medline customers. At that time, Medline was aware of the high demand and corresponding short supply for gowns, but prior to entering into an agreement with Amwear, Medline wanted to be confident that (a) the Amwear gowns would meet Medline's quality standards; and (b) Medline would have a customer who was willing to purchase every Amwear gown that Medline received.

### *Amwear Gives Assurances to Medline Regarding the Quality of the Gowns*

22. As the parties discussed the possibility of an agreement for the purchase of isolation

gowns, Amwear made assurances to Medline relating to the quality of the product which induced Medline to purchase gowns from Amwear.

23. Amwear stated to Medline aware that the gowns would be manufactured at a facility located in China. Medline had no prior dealings with that facility, but Amwear assured Medline that the manufacturer had an affiliation with the owner of Amwear (a representation that Medline later learned was untrue). Amwear further assured Medline that Amwear would maintain control and oversight throughout the production process and that Amwear employees would be present in the factory to ensure that the products were manufactured properly.

24. Throughout the pandemic, there have been reported incidents of health care facilities receiving defective and unsafe PPE, often from upstart facilities looking to cash in on the surging demand. Thus, it was important for Medline to approve a sample before entering into any contract with Amwear to ensure that the Amwear-branded gowns would have the level of quality that Medline customers have come to expect. Medline requested, and Amwear provided, the Design Samples for inspection by Medline and its potential customer. Amwear assured Medline that Amwear would supply gowns to Medline that would be identical to the Design Samples.

25. Upon inspection, Medline found the quality and design of the Design Samples to be acceptable. Medline also presented the Design Samples to a potential customer – a large hospital system ("Customer A") – that was interested in purchasing isolation gowns. Customer A approved of the Design Samples. Medline indicated that it could purchase up to nearly 130,000 cases (almost 13,000,000 gowns), and Customer A indicated that it was willing to purchase that entire quantity of gowns that matched the Design Samples.

26. Medline informed Amwear it was interested in purchasing the gowns. To commence the transaction, Medline provided Amwear with the Medline Supplier Handbook,

which contains terms and conditions to which Medline suppliers must agree. In September 2020, Amwear executed the Supplier Handbook, expressly acknowledging its receipt of the Supplier Handbook and agreement to the terms and conditions contained therein. (Ex. 1.)

27. In addition to the Supplier Handbook, on or around September 29, 2020, Amwear executed a Medline Supplier Quality/Shipping Agreement ("Quality Agreement," Ex. 2.) The Quality Agreement, among other things, provides that Amwear agrees to notify Medline "in advance of any changes in materials, design, manufacturing process, product/material release criteria, manufacturing location or supplier of major raw materials." (*Id.*, p. 2, ¶ 9.)

28. Based on Amwear's assurances and contractual commitments (as described above), Medline submitted two purchase orders to Amwear for SMS isolation gowns: **PO 4513215552**, dated October 15, 2020 ("October PO," Ex. 3); and **PO 4513319037**, dated November 16, 2020 ("November PO," Ex. 4; collectively, the "POs").

29. Pursuant to the October PO, Medline ordered 48,000 cases, each containing 100 gowns, at a price of $130 per case, for a total price of $6,240,000. Pursuant to the November PO, Medline ordered 80,000 additional cases of gowns at a price of $115 per case, for a total price of $9,200,000. Therefore, added together, the price for 128,000 cases (12,800,000 gowns) set forth in the October PO and the November PO is $15,440,000.

***Medline Discovers that the Amwear Gowns are Defective and Non-Conforming***

30. After Medline had placed the November PO, Medline became suspicious that Amwear's assurances of its affiliation with and control over the manufacturing facility producing the gowns might be overstated or untrue. Concerned about the quality of the products, Medline requested a sample of the gowns that were in production. In response, Amwear provided the Production Samples.

31. Upon inspection of the Production Samples, Medline personnel recognized a problematic issue with the quality of the gowns – specifically, the gowns were manufactured inside out, including sleeves and ties. The inside-out production of the gown constituted a complete alteration to the original design. In other words, the Production Samples were materially different from the Design Samples.

32. Isolation gowns produced and packaged like the Production Samples are useless to a health care customer. To don the gown, the wearer would first need to reverse the ties and sleeves. Because isolation gowns are often used in situations where time is of the essence, such as treating trauma patients or the treatment of Covid-19 patients, it is essential that health care providers can don the gowns quickly and easily. The time required to turn each gown right-side in would be detrimental to patient care and not cost effective.

33. Furthermore, addressing the defects could impact the structural integrity of the gowns and leave the health care provider and the patient susceptible to exposure. For example, the act of quickly turning the sleeves inside out could create pressure on the seams and perhaps lead to rips and tears in the material. This is especially true given that health care providers often don isolation gowns to deal with urgent patient issues and are, justifiably, focused on getting to the patient as quickly as possible. And, even after correcting the sleeves, the tie would still be on the wrong side of the gown, requiring still more maneuvering and precluding a proper fit. Moreover, during the adjustment process, pathogens could transfer from the wearer onto what was the inside, but will be the outside, patient-facing side, of the gown and sleeves.

34. Medline immediately – within one day – informed Amwear that the gowns as produced (referred to hereinafter as the "Defective Gowns") were non-conforming.

35. Medline also informed Customer A of the condition of the gowns and provided Customer A with a Production Sample. Customer A indicated that it would not accept any of the Defective Gowns citing concerns for provider and patient safety.

36. Medline made good faith efforts to work with Amwear to find a way to use the Defective Gowns, but Medline was unable to find any customer willing to commit to purchase them, either in their current condition or if they were retooled by the factory. Medline thus informed Amwear that it will not accept the Defective Gowns.

37. By the time that Medline had received, reviewed and rejected the Production Samples, Amwear's manufacturing facilities already had shipped the gowns to a freight forwarder in Shanghai, China for shipment to the United States. Currently, approximately 24 containers of the gowns, representing 31,421 cases and 314,210 unusable, defective gowns, are in transit to the United States, a process that takes approximately 30 days. The remaining approximately 75 containers, 96,579 cases are in port in Oakland, California.

38. Medline has never accepted the Defective Gowns, nor has Medline made any payment to Amwear for the Defective Gowns. However, to date, Amwear refuses to claim possession of the Defective Gowns, despite Medline's clear rejection of these goods. Medline therefore seeks: a declaration that it rejected the Defective Gowns (or, alternatively, that it revoked an acceptance); monetary damages for shipping and storage expenses; and damages for the loss of sales to Customer A.

## COUNT I

(*Declaration that Rejection of Goods is Valid and Effective under 810 ILCS 5/2-602 or, in the alternative, Declaration that Revocation of Acceptance of Goods is Valid and Effective under 810 ILCS 5/2-608)*

39. As and for its Paragraph 39, Medline adopts and incorporates Paragraphs 1 through 38 as if fully restated herein.

40. The Defective Gowns are non-conforming in that they contain a major defect in design which substantially impairs the value of the gowns to Medline. Indeed, Medline is unable to sell the Defective Gowns to Customer A or to any other of its customers, due to the unusable inside-out design of the gowns.

41. Amwear had Medline's instructions and knew that Medline expected the gowns to match the Design Samples and comply with Medline's specifications. Amwear did not, as required by the Quality Agreement, notify Medline "in advance of any changes in …design" related to the isolation gowns that Medline ordered from Amwear. (Ex. 2, p. 2, ¶ 9.)

42. By the time Medline first learned of the non-conformance, when it inspected the Design Sample, 75 containers of the Defective Gowns were in transit across the ocean. Despite efforts to stop the shipment, the additional 24 containers sailed thereafter.

43. The shipped Defective Gowns were sent to a freight forwarder in Shanghai to be transported to the United States. At this stage, it would be commercially unreasonable to expect Medline to have discovered the concealed defect stemming from the design change in the gowns. Freight forwarders might be expected to examine the shipping containers for visible signs of damage. It is not expected, nor would it be commercially reasonable, for a freight forwarder to open and inspect products such as the isolation gowns for design defects or to assess whether there has been a design change in goods.

44. Once Medline learned of the defects in the Defective Gowns and their failure to conform to the Design Samples, Medline clearly and promptly – within one day – informed Amwear. Although Medline made good faith efforts to work with Amwear, as soon as Medline realized there was no value to the Defective Gowns – either as is or as re-tooled – Medline notified Amwear of its rejection of the goods without delay.

45. As such, Medline properly rejected the whole lot of Defective Gowns pursuant to 810 ILCS 5/2-602.

46. Alternatively, if Medline took any action that can be deemed as "acceptance," it did so because Medline relied on Amwear's assurances that the gowns would be identical in quality and design to the gowns presented as the Design Samples.

47. Therefore for, in the event that Medline can be deemed to have accepted the Defective Gowns, Medline properly revoked its acceptance pursuant to 810 ILCS 5/2-608 when it informed Amwear that the Defective Gowns did not conform to the quality and design of the Design Samples.

**WHEREFORE**, Medline prays for (1) a declaration that Medline made a valid rejection of the gowns under 810 ILCS 5/2-602, or, alternatively, that Medline made a valid revocation of acceptance under 810 ILCS 5/2-608 and in either alternative is not obligated to pay Amwear for the Defective Gowns ; (2) such other and further relief as this Court deems equitable and just.

**COUNT II**

(*Breach of Contract)(in the alternative to Counts III-V)*

48. As and for its Paragraph 48, Medline adopts and incorporates Paragraphs 1 through 38 as if fully restated herein.

49. The POs constituted valid and enforceable contracts.

50. Prior to Amwear's breach, Medline complied with all of the obligations that the POs required of it and did not breach.

51. Amwear breached the POs by failing to provide isolation gowns complying with Medline's specifications. Specifically, the gowns that Amwear attempted to provide to Medline contained material defects and were not in compliance with the design and quality of the Design Samples.

52. As a result of Amwear's breach of the POs, Medline has been damaged.

53. Medline has incurred freight and shipping charges of $204,530; demurrage and detention charges at the port of $39,250, as well as lost revenue of approximately $4,606,295 from its lost ability to supply Customer A with the isolation gowns.

54. Until Amwear takes possession of the gowns, Medline will continue to incur damages related to the transportation and storage of the gowns.

**WHEREFORE**, Medline prays for (1) an award of monetary damages in an amount to be determined at trial, which it believes will exceed $4,850,075; (2) such other and further relief as this Court deems equitable and just.

**COUNT III**

(*Breach of Express Warranty) (in the alternative to Counts II, and IV-V)*

55. As and for its Paragraph 55, Medline adopts and incorporates Paragraphs 1 through 38 as if fully restated herein.

56. By presenting the Design Samples to Medline, Amwear made an express warranty under 810 ILCS 5/2-313 that the goods delivered to Medline would conform to the specifications of the Design Samples.

57. The assurances by Amwear that the gowns would conform to the Design Samples formed the basis of the bargain between Amwear and Medline.

58. Once Medline learned that the gowns produced were defective, Medline notified Amwear within a reasonable time that the gowns did not conform with the Design Samples and were therefore defective.

59. As a result of Amwear's breach of warranty, the gowns were not worth the price set forth in the POs, and instead have no value. Additionally, Medline has incurred shipping and storage expenses, as well as lost revenue from being unable to supply Customer A with gowns.

60. Medline has incurred freight and shipping charges of $204,530; demurrage and detention charges at the port of $39,250, as well as lost revenue of approximately $4,606,295 from its lost ability to supply Customer A with the isolation gowns.

61. Until Amwear takes possession of the gowns, Medline will continue to incur damages related to the transportation and storage of the gowns

**WHEREFORE**, Medline prays for (1) monetary damages in an amount to be determined at trial, believed to be excess of $4,850,075; (2) such other and further relief as this Court deems equitable and just.

**COUNT IV**

(*Breach of Warranty of Merchantability) (in the alternative to Counts II-III and V)*

62. As and for its Paragraph 62, Medline adopts and incorporates Paragraphs 1 through 38 as if fully restated herein.

63. Amwear was at all times relevant to this Complaint (and still is) in the business of manufacturing medical supplies, such as the isolation gowns at issue in this Complaint.

64. The Defective Gowns were not produced in the same quality as isolation gowns acceptable in the industry, were not fit for the ordinary purposes for which such gowns are used and were therefore not merchantable.

65. Once Medline learned that the gowns produced were defective, Medline notified Amwear within a reasonable time that the gowns did not conform with the Design Samples and were defective.

66. As a result of Amwear's breach of warranty, the gowns were not worth the price set forth in the POs, and instead have no value. Additionally, Medline has incurred shipping and storage expenses, as well as lost revenue from being unable to supply Customer A with gowns.

67. Medline has incurred freight and shipping charges of $204,530; demurrage and detention charges at the port of $39,250, as well as lost revenue of approximately $4,606,295 from its lost ability to supply Customer A with the isolation gowns.

68. Until Amwear takes possession of the gowns, Medline will continue to incur damages related to the transportation and storage of the gowns

**WHEREFORE**, Medline prays for (1) monetary damages in an amount to be determined at trial, believed to be $4,850,075; (2) such other and further relief as this Court deems equitable and just.

**COUNT V**

(*Breach of Warranty of Fitness for a Particular Purpose) (in the alternative to Counts II-IV)*

69. As and for its Paragraph 69, Medline adopts and incorporates Paragraphs 1 through 38 as if fully restated herein.

70. In October and November 2020, Medline issued two purchase orders for isolation gowns from Amwear.

71. At the time Medline submitted the POs, Amwear knew or had reason to know that Medline intended to distribute the isolation gowns for the particular purpose of having the gowns used by health care personnel in the health care industry.

72. Medline justifiably relied on Amwear's skill and judgment to provide gowns which conform with standards of the health care industry.

73. The Defective Gowns, however, are not fit for the particular purpose of supplying health care personnel with proper PPE.

74. Once Medline discovered that the gowns are defective, Medline notified Amwear within a reasonable time that the Defective Gowns are not suitable for their purpose.

75. As a result of Amwear's breach of warranty, the gowns are not worth the price set forth in the POs, and instead have no value.

76. Medline has incurred freight and shipping charges of $204,530; demurrage and detention charges at the port of $39,250, as well as lost revenue of approximately $4,606,295 from its lost ability to supply Customer A with the isolation gowns.

77. Until Amwear takes possession of the gowns, Medline will continue to incur damages related to the transportation and storage of the gowns

78. **WHEREFORE**, Medline prays for (1) monetary damages in an amount to be determined at trial, believed to exceed $4,850,075; (2) such other and further relief as this Court deems equitable and just.

**JURY DEMAND**

**PLAINTIFF DEMANDS A TRIAL BY JURY FOR ALL COUNTS SO TRIABLE**

Date: February 10, 2021

Respectfully submitted,

Medline Industries, Inc.

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