

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ALBANY

STATE OF NEW YORK,

Plaintiff,

VERIFIED COMPLAINT

-against-

THREAD COUNSEL INC.
d/b/a LAWS OF MOTION,

Defendant.

Plaintiff, State of New York, by its attorney, Letitia James, Attorney General of the State of New York, as and for its verified complaint, states and alleges as follows:

1. Plaintiff is the sovereign State of New York with its principal place of business at the Capitol, City of Albany, County of Albany, State of New York, 12224, acting at all times herein relevant by and through its executive agency, the New York State Department of Health (“DOH”), with a principal place of business in the City of Albany, County of Albany, State of New York, 12224.

2. The mission of the DOH is to protect, improve and promote the health and productivity of all New Yorkers.

3. Defendant Thread Counsel Inc. is a corporation authorized to do business in the State of New York, with an office for the conduct of business located at 500 7th Avenue, New York, New York 10018 and, at all times herein relevant, was doing business as Laws of Motion (“LOM”).

4. On January 30, 2020, the World Health Organization designated the novel coronavirus, COVID-19, outbreak as a Public Health Emergency of International Concern.

5. On January 31, 2020, then United States Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the entire United States to aid the nation's healthcare community in responding to COVID-19.

6. On March 7, 2020, pursuant to Executive Order 202, then New York Governor Andrew Cuomo declared a Disaster Emergency in the State of New York due to "...travel-related and community contact transmission of COVID-19..." within the State.

7. Due to the rise in hospitalization of New York citizens infected with COVID-19, Plaintiff sought to purchase certain gowns, which were necessary for use in hospitals treating COVID-19 patients.

8. On or about March 31, 2020, Defendant's CEO, Carly Bigi ("Bigi"), submitted a proposal to Plaintiff to sell Class I non-surgical gowns without specifying the degree of liquid barrier protection as defined by national standards adopted by the Food and Drug Administration ("FDA").

9. Plaintiff communicated to Bigi the need for gowns with Level 3 liquid barrier protection.

10. Bigi responded that Defendant could provide large numbers of gowns to meet Plaintiff's needs.

11. By email dated April 3, 2020, Bigi provided Plaintiff with Defendant's Invoice and Letter of Guarantee, both dated April 2, 2020, for the sale of 1,400,000 surgical gowns, in compliance with Class II FDA standards and consistent with ANSI/AAMI PB70 Level 3 liquid barrier protection, at a cost of \$11 per unit, inclusive of shipping, for a total cost of \$15,400,000.00, with \$7,700,000.00 payable on signature of the contract and \$7,700,000.00 payable on delivery, with an extended preferential option of up to 2,600,000 surgical gowns in

total. A copy of Defendant's "April 2 Invoice" is attached hereto as Exhibit "A." A copy of Defendant's "April 2 Letter of Guarantee" is attached hereto as Exhibit "B."

12. Plaintiff agreed to purchase the specified surgical gowns and, on April 3, 2020, issued purchase order DOH01-0000036083 for the purchase of 1,400,000 Class II FDA and ANSI/AAMI PB70 Level 3 surgical gowns at a cost of \$15,400,000.00, delivery to be completed by May 18, 2020. A copy of the "April 3 Purchase Order" is attached hereto as Exhibit "C."

13. The April 3 Purchase Order incorporated by reference Appendix A, "Standard Clauses for New York State Contracts," and Appendix B, "Additional Standard Terms (Covid-19 Related Transactions)." A copy of Appendix A is attached hereto as Exhibit "D." A copy of Appendix B is attached hereto as Exhibit "E."

14. The April 2 Invoice, April 2 Letter of Guarantee, April 3 Purchase Order, Appendix A, and Appendix B together form the first contract between the Parties (the "April 3 Contract").

15. Pursuant to the April 2 Letter of Guarantee, Defendant expressly warranted and guaranteed, among other things, that the 1.4 million surgical gowns to be provided, and the additional surgical gowns to be provided pursuant to the extended preferential option, if exercised by Plaintiff, would be in compliance with Class II FDA standards and ANSI/AAMI PB70 Level 3 liquid barrier protection.

16. Pursuant to Appendix B, Defendant expressly warranted, among other things, that the surgical gowns to be provided conformed with all specifications and performance capabilities and standards as stipulated in the April 3 Contract.

17. On April 3, 2020, by electronic wire transfer, Plaintiff prepaid Defendant \$7,700,000.00 in full performance of its obligations under the April 3 Contract.

18. Plaintiff subsequently indicated to Defendant that it wished to exercise its preferential option to purchase an additional 1,000,000 surgical gowns.

19. On April 18, 2020, Defendant issued an invoice to Plaintiff for the additional surgical gowns, at a cost of \$11,000,000.00, and requested 75% prepayment in the amount of \$8,250,000.00, with the remainder due upon delivery. A copy of Defendant's "April 18 Invoice" is attached hereto as Exhibit "F."

20. On April 20, 2020, Plaintiff exercised its preferential option, pursuant to which Defendant agreed to provide an additional 1,000,000 surgical gowns at a cost of \$11,000,000.00, for delivery by May 10, 2020, by issuing purchase order DOH01-0000036355. The purchase order incorporated by reference the Plaintiff's standard Appendix A and Appendix B referenced above. A copy of the "April 20 Purchase Order" is attached hereto as Exhibit "G".

21. The April 18 Invoice, April 20 Purchase Order, Appendix A, Appendix B and April 2 Letter of Guarantee form the second contract between the parties ("April 20 Contract").

22. On April 20, 2020, by electronic wire transfer, Plaintiff fully performed under the April 20 Contract and prepaid \$8,250,000.00 for the additional surgical gowns.

23. The April 3 Contract and the April 20 Contract will hereinafter sometimes be referred to collectively as "the Contracts."

24. Between April 16, 2020 and June 4, 2020, Defendant delivered a total of 2,358,210 gowns, consisting of multiple shipments to Plaintiff's warehouses in Montgomery, Newburgh, Oriskany, and Guilderland Center, New York.

25. By both telephone call and email on June 1, 2020, Plaintiff notified Defendant that DOH inspectors had raised concerns about the quality of the gowns that had been delivered, including that the fabric did not appear to be consistent with the Level 3 fabric required by the Contracts. Plaintiff also notified Defendant that the DOH inspectors were still assessing the full extent and nature of the problems they observed and were observing in the gowns.

26. On June 3, 2020, Plaintiff informed Defendant that, although DOH inspectors were still assessing the problematic gowns, it was clear that the defects they had already detected, which included problems with cuff elasticity, closure of the gowns which did not allow for overlap, and fabric that was not at all protective, rendered the gowns unusable for their intended purpose.

27. DOH inspectors determined that Defendant had delivered at least seventeen different types of gowns, all of which were defective and unusable.

28. By letter dated June 12, 2020, Plaintiff demanded that Defendants reclaim all of the approximately 1,900,000 surgical gowns still in Plaintiff's inventory and immediately issue replacements that conformed with the contract specifications, or refund Plaintiff's money, no later than July 13, 2020.

29. Defendant refused to either reclaim the surgical gowns in Plaintiff's inventory and issue replacements or to refund Plaintiff's money.

30. Plaintiff subsequently arranged to have all seventeen types of gowns tested by an independent testing company, Nelson Laboratories ("Nelson Labs").

31. On or about August 24, 2020, Nelson Labs confirmed that all seventeen types of gowns tested failed to meet the required Level 3 standards and that sixteen of the seventeen types

of gowns did not even meet Level 1 standards with respect to liquid barrier protection and were therefore not usable for any medical purpose.

32. On August 28, 2020, the FDA issued a public notice warning and alerting medical providers not to use any surgical gowns sold by Defendant, citing issues of poor quality, particularly with respect to their level of fluid barrier protection.

33. By email on September 2, 2020, the Nelson Lab data was shared with Defendant's counsel.

34. On September 17, 2020, Defendant issued an urgent medical device recall with respect to surgical gowns that they had distributed in New York State between April 16 and June 3, 2020. A copy of Defendant's recall notice is attached hereto as Exhibit "H."

35. The gowns provided by Defendants were defective and inadequate and failed to comply with the contract specifications in that, among other things, they were not in compliance with Class II FDA standards with ANSI/AAMI PB70 Level 3 liquid barrier protection, did not have adequate cuff elasticity, did not close properly, and most did not even meet Level 1 standards with respect to flammability.

36. The surgical gowns provided by Defendant are not suitable or usable for any purpose.

37. Defendant has failed to provide surgical gowns that comply with the contract specifications.

38. By correspondence dated March 1, 2021, Plaintiff notified Defendant that, pursuant to section 18 of the State Finance Law, Defendant would become liable for collection

fees if the principal amount of the debt was not paid in full within 90 days of Defendant's presumed receipt of such notice.

39. Defendant has failed to refund Plaintiff's money.

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

40. Plaintiff repeats and re-alleges the allegations contained in paragraphs "1" through "39" above, as if fully set forth herein.

41. Defendant has breached the Contracts with Plaintiff by failing to deliver 2,400,000 class II FDA and ANSI/AAMI PB70 Level 3 surgical gowns.

42. Plaintiff has sustained damages as a direct result of Defendant's breach of contract.

43. By reason of the foregoing, Plaintiff is entitled to recover from Defendant \$15,950,000.00, with interest at the rate of nine percent per annum from May 22, 2020.

SECOND CAUSE OF ACTION: BREACH OF EXPRESS WARRANTY

44. Plaintiff repeats and re-alleges the allegations contained in paragraphs "1" through "43" above, as if fully set forth herein.

45. Pursuant to the April 2 Letter of Guarantee, Defendant expressly warranted that it would provide surgical gowns in compliance with Class II FDA standards and consistent with ANSI/AAMI PB70 Level 3 liquid barrier protection.

46. Pursuant to Appendix B of the Contracts, Defendant expressly warranted, among other things, that its products would be made of qualified materials, conform to all specifications, performance capabilities, and standards, as stipulated in the Contracts, satisfy all product standards and specifications, and have all applicable FDA approvals.

47. Defendant has breached its express warranties.

48. By reason of the foregoing, Plaintiff is entitled to recover from Defendant \$15,950,000.00, with interest at the rate of nine percent per annum from May 22, 2020.

THIRD CAUSE OF ACTION: BREACH OF IMPLIED WARRANTIES

49. Plaintiff repeats and re-alleges the allegations contained in paragraphs “1” through “48” above, as if fully set forth herein.

50. Defendant impliedly warranted that its products would be fit and suitable for their intended purposes.

51. Defendant has breached the implied warranty as its products were neither fit nor suitable for their intended purposes.

52. Plaintiff has sustained damages as a direct result of Defendant’s breach of the implied warranty that its products would be fit and suitable for their intended purposes.

53. By reason of the foregoing, Plaintiff is entitled to recover from Defendant \$15,950,000.00, with interest at the rate of nine percent per annum from May 22, 2020.

FOURTH CAUSE OF ACTION: UNJUST ENRICHMENT

54. Plaintiff repeats and re-alleges the allegations contained in paragraphs “1” through “53” above, as if fully set forth herein.

55. Defendant has been unjustly enriched.

56. In equity and good conscience, Defendant should not be permitted to keep the money it received from Plaintiff pursuant to the Contracts.

57. Plaintiff has sustained damages as a direct result of the unjust enrichment of Defendant.

58. By reason of the foregoing, Plaintiff is entitled to recover from Defendant \$15,950,000.00, with interest at the rate of nine percent per annum from May 22, 2020.

FIFTH CAUSE OF ACTION: MISAPPROPRIATION OF PUBLIC FUNDS

59. Plaintiff repeats and re-alleges the allegations contained in paragraphs “1” through “58” above, as if fully set forth herein.

60. Defendant has misappropriated public funds.

61. Plaintiff has sustained damages as a direct result of Defendant’s misappropriation of public funds.

62. By reason of the foregoing, Plaintiff is entitled to recover from Defendant \$15,950,000.00, with interest at the rate of nine percent per annum from May 22, 2020.

SIXTH CAUSE OF ACTION: MONIES HAD AND RECEIVED

63. Plaintiff repeats and re-alleges the allegations contained in paragraphs “1” through “62” above, as if fully set forth herein.

64. Defendant has retained money due and owing to Plaintiff.

65. Plaintiff has sustained damages as a direct result of Defendant retaining money that is due and owing to Plaintiff.

66. By reason of the foregoing, Plaintiff is entitled to recover from Defendant \$15,950,000.00, with interest at the rate of nine percent per annum from May 22, 2020.

SEVENTH CAUSE OF ACTION: STATE FINANCE LAW

67. Plaintiff repeats and re-alleges the allegations contained in paragraphs “1” through “66” above, as if fully set forth herein.

68. On March 1, 2021, Plaintiff notified Defendant that, pursuant to section 18 of the State Finance Law, Defendant would become liable for collection fees in the amount of 22% of the outstanding debt if the principal amount of the debt was not paid in full within 90 days of Defendant’s presumed receipt of such notice.

69. Because Defendant failed to pay the debt in full within 90 days of Defendant’s presumed receipt of the notice, Defendant is liable to Plaintiff for a 22% collection fee, pursuant to section 18 of the State Finance Law, in the amount of \$3,509,000.00.

WHEREFORE, Plaintiff requests judgment in its favor against Defendant in the principal sum of \$15,950,000.00, with interest at the rate of nine percent from May 22, 2020, a 22% collection fee pursuant to Section 18 of the New York State Finance Law in the amount of \$3,509,000.00, the costs and disbursements of this action, and such other, further and different relief as the Court deems appropriate.

Dated: October 8, 2021
Albany, New York

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