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10/23/2023 4:46 PM
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Calendar, 11
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FILED DATE: 10/23/2023 4:46 PM 2023CH08965

Chancery Division Civil Cover Sheet
General Chancery Section **(12/01/20) CCCH 0623**

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Medline Industries, LP
Plaintiff

v.

National Fire and Marine Insurance Company, et al.
Defendant

Case No: 2023CH08965

CHANCERY DIVISION CIVIL COVER SHEET
GENERAL CHANCERY SECTION

A Chancery Division Civil Cover Sheet - General Chancery Section shall be filed with the initial complaint in all actions filed in the General Chancery Section of Chancery Division. The information contained herein is for administrative purposes only. Please check the box in front of the appropriate category which best characterizes your action being filed.

Only one (1) case type may be checked with this cover sheet.

- 0005 ☐ Administrative Review
- 0001 ☐ Class Action
- 0002 ☑ Declaratory Judgment
- 0004 ☐ Injunction

- 0007 ☐ General Chancery
- 0010 ☐ Accounting
- 0011 ☐ Arbitration
- 0012 ☐ Certiorari
- 0013 ☐ Dissolution of Corporation
- 0014 ☐ Dissolution of Partnership
- 0015 ☐ Equitable Lien
- 0016 ☐ Interpleader
- 0017 ☐ Mandamus
- 0018 ☐ Ne Exeat
- 0019 ☐ Partition
- 0020 ☐ Quiet Title
- 0021 ☐ Quo Warranto
- 0022 ☐ Redemption Rights
- 0023 ☐ Reformation of a Contract
- 0024 ☐ Rescission of a Contract
- 0025 ☐ Specific Performance
- 0026 ☐ Trust Construction
- 0050 ☐ Internet Take Down Action (Compromising Images)

☐ Other (specify) ______________

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Pro Se Only: ☐ I have read and agree to the terms of the Clerk's Clerk's Office Electronic Notice Policy and choose to opt in to electronic notice from the Clerk's office for this case at this email address:

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MEDLINE INDUSTRIES, LP, Plaintiff, v. NATIONAL FIRE AND MARINE INSURANCE COMPANY, and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Defendants.	)	No. 2023CH08965

COMPLAINT

NOW COMES Plaintiff, MEDLINE INDUSTRIES, LP ("Medline"), by its attorneys, and for its Complaint against Defendants NATIONAL FIRE AND MARINE INSURANCE COMPANY ("NFMIC"), and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH ("National Union") (collectively, "Defendants"), states as follows:

NATURE OF THE ACTION

1. This is a declaratory judgment and breach of contract action arising out of the failure of two of Medline's excess insurance carriers, NFMIC and National Union, to provide insurance coverage to Medline for certain underlying lawsuits.

2. Medline is a provider of a wide range of products and services to the healthcare industry. Medline sells many products in sterile format. For example, Medline sells various surgical kits and trays that include all of the gowns, gauze, OR towels, clamps, scalpels, and other items necessary for a particular procedure. Medline performs much of the sterilization itself, using ethylene oxide ("EtO"), the only FDA-approved sterilization method for many of the products Medline sells.

3. Medline has been sued in numerous lawsuits alleging the plaintiffs suffered personal injuries due to their exposure to EtO emanating from Medline's sterilization facility in Waukegan, Illinois ("EtO Litigation").

4. Defendants each issued to Medline excess insurance policies covering policy years 2008 through 2021.

5. The Defendants' excess policies provide coverage for the underlying EtO Litigation.

6. Medline seeks to settle the underlying EtO Litigation.

7. Defendants have refused to honor their indemnity obligations under the Policies or to participate in settlement of the underlying EtO Litigation.

8. This action is for declaratory relief, breach of contract, and bad faith arising out of the Defendants' wrongful refusal to fund settlement of the underlying EtO Litigation.

PARTIES

9. Medline Industries, LP is an Illinois limited partnership with its principal place of business in Northfield, Illinois.

10. Defendant National Fire and Marine Insurance Company is Nebraska corporation with its principal place of business in Omaha, Nebraska.

11. Defendant National Union Fire Insurance Company of Pittsburgh, Pa. is a Pennsylvania corporation with its principal place of business in New York, New York.

JURISDICTION AND VENUE

12. Personal jurisdiction is proper in this court pursuant to 735 ILCS 5/2-209(b)(4) as NFMIC and National Union do business in Illinois and contracted to insure Medline in Illinois.

13. Venue is proper in this court pursuant to 735 ILCS 5/2-101 because part the transaction out of which this action arose occurred in Cook County and all defendants are non-residents of Illinois. In this case, NFMIC and National Union issued policies of insurance to Medline through Aon and Marsh in Cook County, Illinois; the underlying EtO Litigation is pending in the Circuit Court of Cook County; and NFMIC and National Union are non-residents of Illinois.

BACKGROUND

14. Medline is one of the largest and most well-recognized providers of healthcare supplies and services in the country.

15. One facet of Medline's business is to provide sterile surgical instruments used in hospitals and other healthcare facilities. Medline's sterilization facility is located in Waukegan, Illinois (the "Waukegan Facility").

16. Medline began operating the Waukegan Facility on September 29, 2008, when Medline entered an asset purchase agreement with STERIS Corporation (operating as STERIS Isomedix Services, Inc.).

17. In its surgical instrument sterilization process, Medline utilizes Ethylene Oxide, a gas found naturally in the environment. EtO was first used during World War II to extend the shelf life of foods for United States troops overseas. As research evolved, it was discovered that EtO is uniquely suited for surgical instrument sterilization: it does not use heat or gamma radiation and therefore it does cause plastic instruments to break or become brittle, it can reach into small crevices of surgical instruments, and it can penetrate packaging. EtO is the only method currently available to completely and safely sterilize over half of the medical surgical instruments and other

medical devices used throughout the United States. Annually, including Medline's business and beyond, more than 20 billion surgical instruments and other devices are sterilized using EtO.

18. EtO is regulated by the United States Environmental Protection Agency and the Illinois Environmental Protection Agency. Both the EPA and the Illinois EPA have determined that EtO is safe and effective. Both the EPA and the Illinois EPA have set amounts of EtO that Medline is allowed to emit in its business. At all relevant times, Medline has been in possession of, and in compliance with, a permit issued by the Illinois EPA to use and emit EtO.

Medline's Insurance Program

19. National Union issued to Medline first-layer excess policies from 2008 through 2013. The National Union Policies provide $25,000,000 in coverage excess $1,000,000 in primary coverage. The policy numbers are as follows: 6081789, 27471315, 15972405, 25030421, and 13273258. A copy of the 2008-2009 National Union Policy is attached hereto as **Exhibit A**.

20. The insuring agreement of the National Union Policies relevantly provides:

> We will pay on behalf of the **Insured** those sums in excess of the **Retained Limit** that the **Insured** becomes legally obligated to pay as damages by reason of liability imposed by law because of **Bodily Injury, Property Damage** or **Personal Injury and Advertising Injury** to which this insurance applies or because of **Bodily Injury** or **Property Damage** to which this insurance applies assumed by the **Insured** under an **Insured Contract.**
>
> * * *
>
> Coverage under this policy for such **Bodily Injury** or **Property Damage** will follow the terms, definitions, conditions, and exclusions of **Scheduled Underlying Insurance**, subject to the **Policy Period**, Limits of Insurance, premium and all other terms, definitions, conditions and exclusions of this policy. Provided, however, that coverage provided by this policy will be no broader than the coverage provided by **Scheduled Underlying Insurance**.

Exhibit A, at Endorsement No. 5. The pertinent language for the purposes of this lawsuit is identical in each of the National Union Policies. For ease and convenience, Medline has attached only Policy No. 6081789 as an exhibit to this Complaint.

21. NFMIC issued to Medline first layer excess policies from 2013 through 2021. The NFMIC Policies from 2016 through 2021 provide $25,000,000 in coverage excess $1,000,000 in primary coverage. The NFMIC Policies from 2013 through 2016 provide $15,000,000 excess of $1,000,000 in primary coverage. The NFMIC policy numbers are: 42-UMO-100007-01, 42-UMO-100007-02, 42-UMO-100007-03, 42-UMO-100007-04, 42-UMO-100007-05, 42-UMO-100007-06, 42-UMO-100007-07, and 42-UMO-100007-08. A copy of the 2013-2014 NFMIC Policy is attached hereto as **Exhibit B**.

22. The insuring agreement in the NFMIC Policies relevantly provides:

> **A. Insuring Agreement**
>
> 1. We will pay on behalf of the "insured" those sums in excess of the "retained limit" that the "insured" becomes legally obligated to pay as damages because of "bodily injury", "property damage", or "personal and advertising injury" to which this insurance applies or because of "bodily injury" or "property damage" to which this insurance applies assumed by the "insured" under an "insured contract".
>
> * * *
>
> 2. This policy applies, only if:
>
>   a. The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory" and the "bodily injury" or "property damage" occurs during the "policy period"

Exhibit B, p. 1 of 22. The pertinent language for the purposes of this lawsuit is identical in each of the NFMIC Policies. For ease and convenience, Medline has attached only Policy No. 42-UMO-100007-01 as an exhibit to this Complaint.

<u>The EtO Litigation</u>

23. Beginning on August 28, 2019, Medline began to be named as a defendant in a series of lawsuits wherein the plaintiffs alleged they suffered bodily injuries, specifically various types of cancer, as a result of their exposure to EtO which had been emitted from the Waukegan

facility. These plaintiffs allege they developed numerous types of cancers, lived in Waukegan for varying amounts of time, and lived varying distances away from the Waukegan Facility.

24. Numerous EtO lawsuits have been filed against Medline, with the vast majority of the plaintiffs being represented by a single law firm, Edelson PC. These cases are all pending in the Circuit Court of Cook County, Law Division. They have been consolidated for discovery purposes and for pretrial purposes. Medline continues to receive notice of newly filed EtO complaints on a regular basis.

25. Pursuant to court order, the parties selected four initial cases to prepare for bellwether trials. The first of these trials is scheduled to begin on January 22, 2024. Thereafter, additional trials are scheduled for April 1, 2024, June 24, 2024, and September 24, 2024. Throughout the course of 2023, the parties – including Medline and the plaintiffs – have been working diligently to complete discovery. This has proven to be an enormous task given the number of plaintiffs, the broad years of exposure alleged, the compressed timeframe for the completion of discovery, and the intricacies of the science relating to EtO and cancers alleged by plaintiffs.

NFMIC and National Union Deny Medline Insurance Coverage

26. From the outset of the EtO Litigation, Medline's insurers, both primary and excess, have been timely notified of each individual lawsuit as they have been filed.

27. Medline's defense counsel had been regularly updating Medline's carriers on the status of the EtO Litigation as things developed. Early on, there were many delays in the EtO litigation due to discovery stays pending the outcome of Medline's motions to dismiss, the COVID-19 pandemic, multiple judicial re-assignments, and the general administrative hurdles involved in consolidating numerous similar lawsuits. Beginning in the early part of 2023, as the

EtO Litigation accelerated to a frenetic level of activity, Medline began sending 90-day reports to Medline's excess carriers.

28. Medline reported to its excess carriers in April 2023 that a discrete set of seven underlying EtO plaintiffs – represented by the law firm of Romanucci & Blandin, LLC – approached Medline for a possible settlement, and that Medline was working on gathering more information about those plaintiffs.

29. In July 2023, Medline again reported to its excess carriers an updated file of information on the status of the EtO Litigation, including the status of settlement demands, thorough information regarding each individual plaintiff and his or her claims, and reports of defense counsel.

30. In early August 2023, Medline received a demand from the Edelson law firm to settle the EtO Litigation. In recognition of the time and expense required to, in essence, conduct ongoing jury trials for the entirety of 2024 and beyond, Medline and the Edelson law firm decided to mediate the litigation. A first mediation session took place in-person, in Chicago, on September 26, 2023 utilizing retired federal district court judge Layn Phillips and his staff at Phillips ADR.

31. This settlement demand and the proposed mediation was communicated to Medline's excess carriers on August 3, 2023.

32. Rather than rally behind their insured and take the potential for settlement of high stakes litigation seriously, National Union and NFMIC decided to focus solely on their own interests and play transparent games designed to bolster an eventual litigation position against Medline.

33. From the outset, Medline have heard only the incessant refrain from National Union and NFMIC that they just don't have enough information to evaluate the EtO Litigation for settlement.

34. In a concerted effort to quiet the disingenuous complaints concerning their alleged extreme ignorance, Medline provided reams of information about the EtO Litigation, including detailed litigation analyses from defense counsel, and setting up a sharefile site wherein Medline's defense counsel deposited verified facts sheets from each plaintiff who had provided such document to Medline, written discovery, and deposition transcripts. As of September 8, 2023, Defendants had received voluminous pertinent portions of defense counsel's files regarding the EtO Litigation.

35. The mediation proceeded on September 26, 2023. The EtO Litigation was not immediately resolved, but progress was made between Medline and Edelson, setting up a series of additional mediation sessions.

36. Medline and the EtO plaintiffs were not embarking on a journey into uncharted territory. In 2022, a similar set of personal injury cases alleging EtO exposure, *Kamuda v. Sterigenics* and *Fornek v. Sterigenics* proceeded to jury trials in the Circuit Court of Cook County. Sterigenics and its predecessor Griffith Foods also utilized EtO to sterilize medical devices and other products in Lake County, IL. The Sterigenics facility was located in Willowbrook, Illinois.

37. The jury in *Kamuda* rendered a large verdict against Sterigenics. As a result, *Kamuda* received a considerable amount of publicity nationwide. Conversely, the jury in *Fornek* found in favor of Sterigenics. Subsequent to both trials, Sterigenics and the remaining plaintiffs in those cases crafted a settlement structure to resolve the remaining cases. Sterigenics and those

plaintiffs created this settlement structure with the help of the very same mediator Medline and the EtO plaintiffs chose in this case, retired federal judge, Layn Phillips.

38. In Medline's case, representatives of NFMIC and National Union each attended the September 26, 2023, mediation remotely via Zoom. Counsel for NFMIC and National Union attended the mediation live in Chicago.

39. Subsequent negotiations between Medline and the Edelson law firm were complicated by Edelson's continued advertising blitz in the Waukegan vicinity, which yielded numerous new claimants every week.

40. Meanwhile, the first bellwether case, involving a young boy with Leukemia who lives less than a mile from the Waukegan facility, marched inexorably toward trial in January 2024, with a discovery cut-off of October 23, 2023 and the need to produce expert reports that same day.

41. During negotiations between Medline and the EtO Plaintiffs throughout October 2023, Plaintiffs emphasized to Medline and Medline emphasized to its carriers that time was of the essence for settlement. The Circuit Court refused to delay the trial scheduled for January 22, 2024. If the parties could not reach a settlement in the short-term, they would need to turn their attention to completing discovery and preparing for trial.

42. Medline clearly and continually communicated the urgency of the situation to Medline's excess carriers. But, the ever-increasing number of cases, the looming trial of a sympathetic plaintiff, the large verdict in the Sterigenics *Kamuda* case meant nothing to National Union and NFMIC. All they could focus on was their voracious appetite for more information, which by design could never be satisfied.

43. Having yielded up defense counsel's files – and discovery in this case will show how much effort National Union and NFMIC made reviewing them – Medline sought to address

the lack of verified information for the numerous new claimants being added to the EtO Litigation every day by committing to structure any settlement with a verification process on the back end that would require sufficient information from claimants to verify, before being entitled to payment, their diagnosis, the distance from a Medline facility they lived or worked, and the dates they lived or worked there.

44. The end result of multiple mediation sessions was a mediator's proposal for an amount well within National Union's and NFMIC's limits, which Medline and its insurers had to accept or reject by October 20, 2023 at 6 pm Eastern. On October 18, 2023, the Edelson law firm informed Medline that the plaintiffs were accepting the mediator's proposal, which Medline immediately communicated to National Union and NFMIC. Consequently, the settlement within limits proposed by the mediator was available for Medline and its insurers to accept or reject.

45. On October 19, 2023, NFMIC and National Union formally declined to honor their obligations under the Policies and abandoned Medline during this critical juncture in the EtO Litigation. Notably, as excess insurers, National Union and NFMIC had only one job – to fund a reasonable settlement within limits when one became available. In this, they failed miserably.

46. Both insurers have relied on two main arguments to deny Medline the coverage it is owed. First, Defendants assert that Medline's claim is barred from coverage by the pollution exclusion contained within both policies. Second, Defendants assert that they do not have sufficient information with which to evaluate the proposed settlement terms.

47. Moreover, National Union and NFMIC substituted their analysis of Medline's reasonable anticipation of liability in the EtO Litigation for the analysis of defense counsel, who was appointed by the primary insurers. Discovery in this case will show whether they analyzed

the facts provided and brought in their own Cook County, Illinois tort counsel to provide sufficient expertise to overrule counsel actually defending the case.

48. As for the pollution exclusion, the Illinois Supreme Court, the Illinois Appellate Court, and the Federal District Court for the Northern District of Illinois have determined that pollution exclusions such as those found in the NFMIC and National Union policies apply only to "traditional environmental pollution." See, *e.g.*, *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 492-3 (1997). Furthermore, Illinois courts have determined that the typical pollution exclusion is ambiguous as to whether it applies to permitted emissions – the exact same scenario in which we now find ourselves. See, *e.g.*, *Erie Ins. Exch. v. Imperial Marble Corp.*, 2011 IL App (3d) 100380, ¶ 22.

49. Notably, a district court judge in the Northern District of Illinois held on August 3, 2022 that National Union owed Sterigenics a duty to defend the very same EtO lawsuits referenced in ¶ 34 of this Complaint. *Sterigenics, U.S., LLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 619 F.Supp. 3d 852, 869 (N.D. Ill. August 3, 2022). In that opinion, Judge Mary Rowland notes:

> As in *Imperial Marble*, this Court finds that the Pollution Exclusion is ambiguous as to whether emission of EtO under an IEPA permit qualifies as a traditional environmental pollution under the Policies.

Id. at 863.

50. In rejecting Medline's request to fund, NMFIC once again asserted the tired refrain that that it had "inadequate information, a point NFMIC has been making consistently throughout these discussions." Defendant's assertion that they have not received enough information to evaluate the EtO Litigation is without merit. Defendants have been in possession of voluminous contents of defense counsel's file since at least September 8, 2023. Since Medline began preparing for the mediation, all of Defendants' inquiries have been responded to within a day or two, if not

within hours. Furthermore, Defendants have been in direct contact with defense counsel for months.

51. As further evidence of the Defendants' untenable position, Medline's primary insurance carriers having been defending Medline against the EtO Litigation and have tendered 100% of their applicable limits toward settlement.

COUNT I: DECLARATORY JUDGMENT

52. Medline repeats and reasserts the allegations of paragraphs 1-51 as though set forth fully herein.

53. Medline seeks a declaration of the parties' rights and duties under the NFMIC and National Union Policies pursuant to 735 ILCS 5/2-701.

54. An actual justiciable controversy exists between Medline on the one hand and NFMIC and National Union on the other concerning the Defendants' duty to indemnify Medline's claims under the Policies.

55. By letter dated October 19, 2023, NFMIC denied coverage for Medline for settlement of the EtO Litigation.

56. By letter dated October 19, 2023, National Union denied coverage for Medline for settlement of the EtO Litigation.

57. Medline disputes the Defendants' positions and maintains that coverage exists under the NFMIC Policy and National Union Policy, that the pollution exclusions cited by both Defendants do not apply to the permitted emissions involved in Medline's case, that the Defendants have been given ample time and information to evaluate the proposed EtO settlement, and that the EtO settlement is reasonable.

58. All conditions precedent to recovery under the NFMIC Policy and the National Union Policy have been satisfied, waived, or are otherwise inapplicable.

59. This controversy between Medline and Defendants is ripe for review.

WHEREFORE, Medline respectfully requests judgment in its favor and against NFMIC and National Union and seeks a judgment that:

a. NFMIC is obligated to indemnify Medline for the money it pays to settle the EtO Litigation in excess of the NFMIC retention;

b. National Union is obligated to indemnify Medline for the money it pays to settle the EtO Litigation in excess of the National Union retention;

c. The pollution exclusion in the NFMIC Policies do not bar coverage for Medline for the EtO Litigation;

d. The pollution exclusion in the National Union Policies do not bar coverage for Medline for the EtO Litigation;

e. Medline has satisfied all conditions precedent for coverage; and

f. Awards Medline any other declaratory relief that would be just and reasonable under the circumstances.

COUNT II: BREACH OF CONTRACT

60. Medline repeats and reasserts the allegations of paragraphs 1-59 as though set forth fully herein.

61. The NFMIC Policies are valid and enforceable contracts.

62. The National Union Policies are valid and enforceable contracts.

63. Both NFMIC and National Union were paid substantial premiums in exchange for issuing the Policies.

64. Medline has complied with all of the terms of the NFMIC Policies.

65. Medline has complied with all of the terms of the National Union Policies.

66. NFMIC has breached the NFMIC Policies by refusing to fund an available reasonable settlement within limits of the EtO Litigation.

67. National Union has breached the National Union Policies by refusing to fund an available reasonable settlement of the EtO Litigation.

68. NFMIC's breach and National Union's breach have caused Medline to suffer damages.

69. Medline's damages were foreseeable as a direct result of NFMIC's and National Union's wrongful conduct and are the type of damages both Defendants contemplated when they issued their Policies. These damages should be awarded to Medline so that Medline is adequately compensated for NFMIC's and National Union's wrongful conduct.

WHEREFORE, Medline seeks a ruling in its favor and against NFMIC and National Union on Count II that:

a. NFMIC should pay Medline all compensatory damages Medline suffered as a result of NFMIC's breach;

b. National Union should pay Medline all compensatory damages Medline suffered as a result of National Union's breach;

c. NFMIC and National Union should pay pre- and post-judgment interest on Medline's damages;

d. NFMIC and National Union should pay Medline's court costs; and

e. Awards Medline any other relief the court deems just and reasonable under the circumstances.

COUNT III: BAD FAITH

70. Medline repeats and reasserts the allegations of paragraphs 1-69 as though set forth fully herein.

71. NFMIC has acted in bad faith because of its vexatious and unreasonable failure to participate in funding the available and reasonable settlement of the EtO Litigation within limits.

72. National Union has acted in bad faith because of its vexatious and unreasonable failure to participate in funding the available and reasonable settlement of the EtO Litigation within its limits.

73. NFMIC and National Union have acted in bad faith by asserting that the pollution exclusion bars coverage for Medline's permitted emission because that position is directly contrary to (1) Illinois Supreme Court authority holding that the pollution exclusion applies only to traditional environmental pollution, and (2) Illinois Appellate Court and other Illinois authority holding that the pollution exclusion is ambiguous as to permitted emissions.

74. NFMIC and National Union have further acted in bad faith by asserting the pollution exclusion bars coverage for Medline's claim in light of the case law on that subject and the fact that Medline's primary carriers have been defending Medline and have tendered 100% of their policy limits to fund Medline's settlement of the EtO Litigation.

75. NFMIC and National Union have also acted in bad faith by claiming that they do not possess sufficient information to evaluate the underlying EtO Litigation. Defendants were advised of a demand for settlement immediately after it was received by Medline. Defendants were actively involved in the scheduling of the mediation. Defendants are in possession of nearly all of defense counsel's file relating the EtO Litigation and have had this information since at least September 8, 2023. All of Defendants' questions regarding the mediation and defense strategy have been answered within 1-2 days, if not 1-2 hours since Medline began preparing for the mediation. Furthermore, Defendants have had direct contact with defense counsel to whom they have submitted inquiries directly.

76. NFIC and National Union have further acted in bad faith by substituting their judgment for defense counsel's judgment as to whether the mediator's proposal constituted a settlement that was in reasonable anticipation of Medline's liability.

WHEREFORE, Medline seeks a ruling in its favor and against NFMIC and National Union that:

a. NFMIC has acted in bad faith in failing to assist Medline in settling the EtO Litigation;

b. National Union has acted in bad faith in failing to assist Medline in settling the EtO Litigation;

c. Pursuant to 215 ILCS 5/155, Medline is entitled to award of its attorneys' fees, court costs, and all other amounts allowed under § 155; and

d. Awards Medline any other relief the court deems just and reasonable under the circumstances.

Medline demands a trial by jury for all issues so triable.

Dated: October 23, 2023

/s/ John S. Vishneski III

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