

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

3M COMPANY,

Plaintiff,

-against-

PERFORMANCE SUPPLY, LLC,

Defendant.

Case No.:

Jury Trial Demand

COMPLAINT

Plaintiff 3M Company (“Plaintiff” or “3M”), by and through its undersigned attorneys, as and for its Complaint against Defendant Performance Supply, LLC (“Defendant”), hereby alleges as follows based on knowledge of its own actions, and on information and belief as to all other matters:

NATURE OF THE ACTION

1. This lawsuit concerns Defendant’s use of Plaintiff’s famous “3M” trademarks to perpetrate a false and deceptive price-gouging scheme on unwitting consumers, including agencies of government, during the global COVID-19 pandemic.

2. Throughout its history, 3M has been providing state-of-art, industry-leading scientific and medical products to consumers throughout the world under its famous 3M marks. Based on this longstanding, continuous use, consumers associate the 3M marks uniquely with 3M. Now, more than ever, consumers are also relying on the famous 3M marks to indicate that the products offered thereunder are of the same superior quality that consumers have come to expect over the past century. This is especially true with respect to 3M’s numerous industry-leading healthcare products and personal protective equipment (“PPE”), including Plaintiff’s 3M-brand N95 respirators.

3. Healthcare professionals and other first responders are heroically placing their health and safety on the line to battle COVID-19. To assist in the battle against COVID-19, 3M is supplying healthcare workers and other first responders with 3M-brand N95 respirators. For example, in the last week of March 2020, 3M supplied healthcare workers throughout the United States with 10 million of its 3M-brand N95 respirators. 3M also recently announced that it will import 166.5 million of its 3M-brand N95 respirators into the United States in the next three months to supplement its US production, and has invested the capital and resources necessary to double its current annual global production of 1.1 billion respirators. In response to the COVID-19 outbreak and surge in need for N95 respirators, 3M has doubled its global output rate to nearly 100 million respirators per month, and it expects to produce around 50 million respirators per month in the United States by June 2020.

4. The demand for 3M-branded respirators has grown exponentially in response to the pandemic, and 3M has been committed to seeking to meet this demand while keeping its respirators priced fairly. 3M has not increased the prices that it charges for 3M respirators as a result of the COVID-19 outbreak.

5. Unfortunately, any number of wrongdoers seek to exploit the current public health emergency and prey on innocent parties through a variety of scams involving 3M N95 respirators and other products in high demand. These scams include unlawful price-gouging, fake offers, counterfeiting, and other unfair and deceptive practices—all of which undercut the integrity of the marketplace and constitute an ongoing threat to public health and safety.

6. In response to fraudulent activity, price-gouging and counterfeiting related to N95 respirator masks that has spiked in the marketplace in response to the pandemic, 3M is taking an active role in combating these activities. 3M's actions include working with law enforcement

authorities around the world, including the U.S. Attorney General, state Attorneys General and local authorities, and creating a “3M COVID-19 Fraud hotline” for the United States and Canada that end users and purchasers of 3M products can call for information to help detect fraud and avoid counterfeit products. 3M is also publishing information on its website to help inform the purchasing public about 3M’s prices and products so that they can avoid fraud. Further information about 3M’s efforts is set forth in the 3M press release and publication attached hereto as **Exhibits 1 and 2**. This Complaint is another part of these efforts.

7. Despite 3M’s extensive efforts during COVID-19, unsavory characters continue their quests to take advantage of healthcare workers, first responders, and others in a time of need and trade off the fame of the 3M brand and marks. Defendant is a prime example of this unlawful behavior.

8. On or about March 30, 2020, Defendant sent a Formal Quote to New York City’s Office of Citywide Procurement, offering to sell millions of Plaintiff’s 3M-brand N95 respirator masks at a grossly inflated aggregate price of approximately \$45 million. Defendant is not an authorized distributor of any of Plaintiff’s products and has no rights to use Plaintiff’s famous 3M marks. Nonetheless, to confuse and deceive New York City officials into believing that Defendant was an authorized distributor of Plaintiff’s products, Defendant reproduced the famous 3M marks throughout the Formal Quote, and attached to it Technical Specification Sheets that prominently feature Plaintiff’s famous 3M marks. The Formal Quote itself also sought to confuse its recipient by referring to the St. Paul, Minnesota headquarters of 3M as opposed to Defendant’s New Jersey headquarters, as well as repeatedly referring to the offer’s acceptance being at 3M’s discretion—implying, falsely, that the Formal Quote came from 3M. Defendant’s scheme worked. Indeed, as part of the Citywide Procurement Office’s quality-assurance measures, officials prepared a Bid

Evaluation Request, wherein they mistakenly identified Defendant as a “vendor” of 3M-brand N95 respirators—twice. Compounding Defendant’s bad acts, the prices at which it offered to sell 3M-brand N95 respirators to New York City’s Procurement Office were 500%-600% *above* 3M’s list price. This offer constituted extreme price-gouging by any measure, including under New York State’s statutory provision (NEW YORK GENERAL BUSINESS LAW § 396-r). Not only does such price-gouging further strain the limited resources available to combat COVID-19, but such conduct justifiably has caused public outrage, which threatens imminent and irreparable harm to 3M’s brand as Defendant and similar pandemic profiteers promote an improper association between 3M’s marks and exploitative pricing behavior.

9. 3M does not – and will not – tolerate individuals or entities deceptively trading off the fame and goodwill of the 3M brand and marks for personal gain. This is particularly true against those who seek to exploit the surge in demand for 3M-brand products during the COVID-19 global pandemic, which already has claimed tens of thousands of lives worldwide and more than 5,000 lives in New York State alone.

10. Accordingly, to further protect governmental actors and consumers from confusion and mistake, to reduce the amount of time and energy that government officials are forced to waste interacting with such schemes, as well as to forestall any further diminution to the 3M brand and marks’ reputation, fame, and goodwill, Plaintiff brings this lawsuit against Defendant for federal and state trademark infringement, unfair competition, false association, false endorsement, false designation of origin, trademark dilution, false advertising, and deceptive acts and practices. Plaintiff also seeks preliminary and permanent injunctive relief. As described below, any damages, costs, or fees recovered by Plaintiff will be donated to charitable COVID-19 relief efforts.

THE PARTIES

11. Plaintiff 3M Company is a Delaware corporation, with a principal place of business and corporate headquarters located at 3M Center, St. Paul, Minnesota 55144.

12. On information and belief, Defendant Performance Supply, LLC is a New Jersey limited liability company, with a principal place of business at 3 Westbrook Way, Manalapan, New Jersey 07726.

JURISDICTION AND VENUE

13. The claims for trademark infringement, unfair competition, false association, false endorsement, false designation of origin, trademark dilution, and false advertising, respectively, asserted in Counts I - IV, *infra*, arise under the Trademark Act of 1946 (as amended; the “Lanham Act”), namely, 15 U.S.C. §§ 1051 *et seq.* Accordingly, this Court has original and subject-matter jurisdiction over Counts I – IV pursuant to 28 U.S.C. §§ 1331, 1338(a), and 15 U.S.C § 1121(a).

14. The claims for deceptive acts and practices, false advertising, dilution, trademark infringement and unfair competition, respectively, asserted in Counts V - IX, *infra*, arise under New York statutory and common law, and are so related to the federal claims asserted in Counts I - IV, *infra*, that they form part of the same case or controversy. Accordingly, this Court has supplemental jurisdiction over Counts V - IX pursuant to 28 U.S.C. §§ 1338(b) and 1367(a).

15. Defendant has purposefully availed itself of the privilege of transacting business in this District. Defendant has also committed and intentionally directed tortious acts towards residents and governmental agencies in this District. For example, Defendant recently used Plaintiff’s famous 3M marks as part of a price-gouging scheme to deceive New York City officials located in this District into believing that Defendant was authorized by 3M to sell millions of 3M-brand N95 respirator masks for an aggregate price of roughly \$45 million—

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