

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

3M COMPANY,

Plaintiff,

-against-

PERFORMANCE SUPPLY, LLC,

Defendant.

Case No.: 1:20-cv-02949 (LAP)(KNF)

Jury Trial Demanded

**DECLARATION OF CHARLES STOBIE
IN SUPPORT OF PLAINTIFF 3M COMPANY'S APPLICATION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, Charles Stobie, pursuant to 28 U.S.C. § 1746 and upon penalty of perjury, declare as follows:

1. I am a resident of the State of Minnesota; over the age of 18; and competent to make this declaration. I could and would testify as to the matters set forth herein, if called upon to do so.

2. I am a Marketing Technologies and Digital Experience Director at 3M. Until very recently, I served as Global Marketing Operations Leader for 3M's Personal Safety Division. The information set forth herein is based on my personal knowledge obtained through the course of my duties at 3M, which include, among other things, 3M's: (i) brand-development and marketing efforts for 3M's Personal Safety Division; (ii) trademark policies; (iii) sales and pricing guidelines; and (iv) efforts to assist in the battle against COVID-19. The information set forth herein is also based on my review of records and documents (including electronic records) maintained in the regular course of 3M's business, and the complaint in this lawsuit.

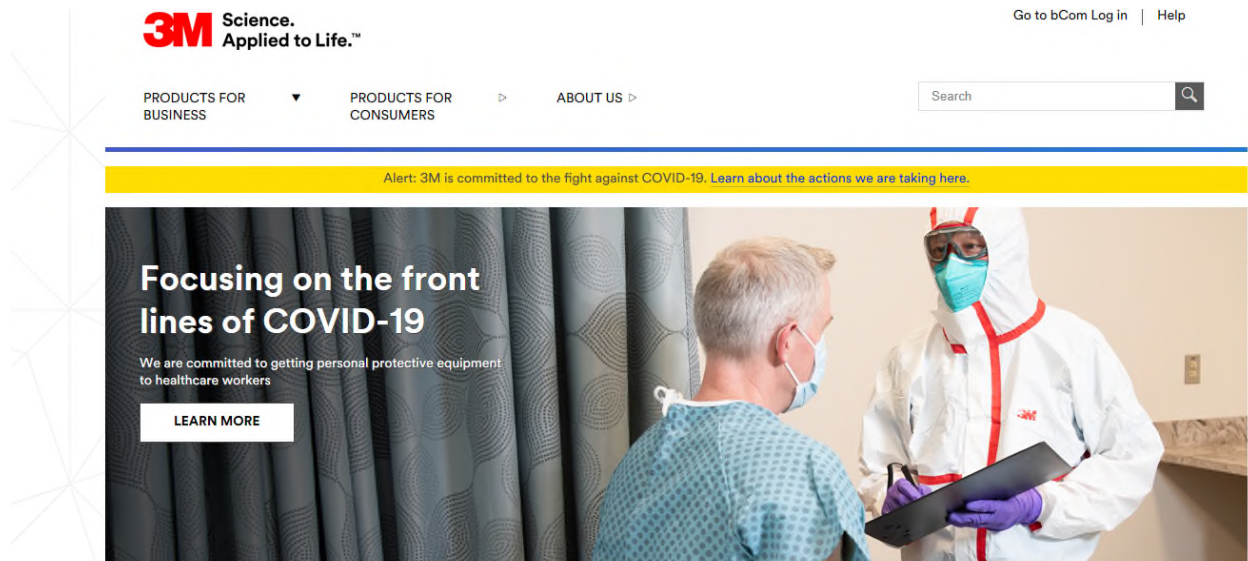
3. I submit this declaration in support of 3M Company's application for a temporary restraining order and preliminary injunction against Defendant Performance Supply, LLC ("Performance Supply") in the above-referenced action.

3M's Efforts In the Battle Against the COVID-19 Public Health Crisis

4. For decades, 3M has been a leading provider of personal protective equipment ("PPE") for healthcare professionals, industry workers and the public. This PPE includes N95 respirators, of which 3M is a leading manufacturer.

5. 3M's N95-rated filtering facepiece respirators have a filtration efficiency of at least 95% against non-oily particles when tested using the U.S. National Institute for Occupational Safety and Health criteria.

6. As a leading provider of PPE, 3M is "committed to getting personal protective equipment to healthcare workers":



7. Among the PPE that 3M is providing to the heroic individuals on the front lines of the battle against COVID-19 are 3M-brand N95 respirators.

8. Since the outbreak of COVID-19 in early 2020, 3M has doubled its global output rate of filtering facepiece respirators, such as N95 respirators, to 1.1 billion per year, to seek to ensure that adequate supply is available to governments and healthcare personnel, as well as to workers in other critical industries, including food, energy and pharmaceutical. See **Exhibit 1** (*3M Outlines Latest Actions on COVID-19 Response*, 3M Company, available at <https://news.3m.com/press-release/company-english/3m-outlines-latest-actions-covid-19-response> (March 31, 2020)).

9. 3M is currently producing 35 million of its 3M-brand N95 respirators each month in the United States. See Ex. 1; see also **Exhibit 2** (*3M and Trump Administration Announce Plan to Import 166.5 million Additional Respirators into the United States Over the Next Three Months*, 3M Company, available at <https://news.3m.com/blog/3m-stories/3m-and-trump-administration-announce-plan-import-1665-million-additional-respirators> (Apr. 6, 2020)). Approximately 90% of these respirators are now distributed for use by healthcare workers. See Ex. 1; see also **Exhibit 3** (*Helping the world respond to COVID-19*, 3M Company, available at https://www.3m.com/3M/en_US/company-us/coronavirus/ (last accessed Apr. 21, 2020)).

10. In the last seven days of March 2020, alone, 3M sent 10 million of its 3M-brand respirators to healthcare facilities around the United States. See Ex. 1. Over the course of the next three months, 3M expects to import 166.5 million of its 3M-brand respirators to the United States. See Ex. 2.

11. To help meet the growing demand for respirators during COVID-19, 3M has invested the resources needed to double its current global production of 1.1 billion 3M-brand filtering facepiece respirators, such as N95 respirators, a year to 2 billion respirators a year within the next 12 months. See Exs. 1, 3.

12. At the same time, 3M has **not** increased the prices that it charges for 3M-brand N95 respirators as a result of the COVID-19 pandemic. *See, e.g.*, Ex. 3 (“We have not increased the prices we charge for 3M respirators in this crisis”).

13. 3M has received public commendation and praise for its contributions to the COVID-19 pandemic response, particularly with respect to its production of 3M-brand N95 respirators. Based on the public commendation and praise, and widespread media coverage of 3M-brand N95 respirators during the COVID-19 pandemic, the public is more aware now than ever that 3M manufactures N95 respirators and other PPE that is essential to helping protect healthcare personnel and workers by reducing exposure to airborne particles including those that may contain biological material such as viruses like COVID-19.

3M’s Efforts to Deter Price Gouging and Counterfeiting in Response to the Pandemic

14. In an effort to thwart third-party price-gouging, counterfeiting, and outright fraud in relation to 3M-brand N95 respirators, 3M has worked closely with law enforcement, retail partners, and others. For example, on March 24, 2020, 3M’s Chief Executive Officer, Mike Roman, sent a letter to U.S. Attorney General William Barr, and the President of the National Governors’ Association, Larry Hogan of Maryland, to offer 3M’s partnership in combatting price-gouging. *See Exhibit 4 (3M Supports Efforts to Curb Pandemic Profiteers*, 3M Company, available at <https://news.3m.com/press-release/company-english/3m-supports-efforts-curb-pandemic-profiteers> (March 24, 2020)).

15. In addition, 3M has (a) posted the single-case U.S. list price for several of its 3M-brand N95 respirators on its website so that customers can more readily identify price-gouging (*see Exhibit 5 (Fraudulent Activity, Price Gouging, and Counterfeit Products*, 3M Company, available at <https://multimedia.3m.com/mws/media/18036700/fraudulent-activity-price-gouging->

and-counterfeit-products.pdf (Apr. 8, 2020)); (b) created a form on its website through which customers can report suspected incidents of price-gouging and counterfeiting (see **Exhibit 6** (*3M COVID-19 Anti-Fraud, Anti-Price Gouging, and Anti-Counterfeiting Reporting*, 3M Company, available at <https://engage.3m.com/covidfraud> (last accessed on Apr. 21, 2020)); and (c) established a fraud “hotline” that customers can call to report suspect incidents of price-gouging and counterfeiting (see Exh. 3 at p. 3 (“Call the fraud hotline.”)).

16. Collectively, the goal of these efforts is to help protect the public from inappropriate, counterfeit, and/or inferior products and outrageous and unwarranted price inflation. 3M also actively investigates and acts on complaints in order to protect the goodwill and reputation of the 3M brand, as well as to protect customers and healthcare workers who rely upon the availability and proven quality of authentic 3M-brand N95 respirators.

Performance Supply’s Misconduct

17. Unfortunately, and notwithstanding 3M’s efforts, opportunistic third parties throughout the United States have sought to exploit the increased demand for the 3M-brand N95 respirators by, upon information and belief, offering to sell them for exorbitant prices, selling counterfeit versions of them, and accepting money for 3M-brand N95 respirators that they do not possess or are not authorized to sell.

18. Defendant Performance Supply is an example of a third party undertaking unlawful actions – in this District – seeking to exploit the 3M brand and prey on unwitting customers and governmental agencies in the midst of the COVID-19 public health emergency.

19. On or about March 30, 2020, on information and belief, Performance Supply sent Ms. Ebony P. Roberson, a Purchasing Agent at New York City’s Office of Citywide Procurement, a Formal Quote, offering to sell seven million purported 3M N95 respirators. See **Exhibit 7**.

Performance Supply stated that it would sell the respirators for \$6.05 per “mask” (respirator) for 2 million 3M Model 8210 respirators and for \$6.35 per “mask” (respirator) for 5 million 3M Model 1860 respirators. *See id.* The prices at which Performance Supply offered to sell New York City the purported 3M-brand N95 respirators are more than *five* times 3M’s list price:

3M Model	3M’s Per-Respirator Single-Case U.S. List Price	Performance Supply’s Per-“Mask” Price	Markup
1860	\$1.27	\$6.35	500%
8210	\$1.02-\$1.31	\$6.05	460-590%

20. In its one-page Formal Quote, Performance Supply reproduced 3M’s marks *nine* times. *See* Ex. 7 at p. 1. Performance Supply also attached to the Formal Quote a 3M Technical Specification Sheet for both Models of 3M-brand N95 respirators that Performance Supply purported to have available for sale. *See id.* at pgs. 2-6. Plaintiff’s famous 3M design mark, and well-known 3M Slogan, prominently appeared in the upper left-hand corner of both Technical Specification Sheets. *Id.* Plaintiff’s famous 3M design mark appeared in the lower left-hand corner of both Technical Specification Sheets. *Id.* Plaintiff’s famous standard-character 3M mark also appeared in the Technical Specification Sheets. *Id.*

21. Based on Performance Supply’s Formal Quote, on information and belief, Ms. Roberson, prepared an “Evaluation Request – Bid Document Review” as part of the City’s quality-assurance measures. *See generally* Ex. 7 at pgs. 14-5. In the Evaluation Request, New York City twice officials identified Performance Supply as a “vendor” of 3M-brand, N95 Model 8210 and 1860 respirators. *See id.* at p. 14. However, the New York City officials were mistaken. Performance Supply is not, and never has been, a 3M authorized distributor, vendor, or representative of Plaintiff’s products. Performance Supply also does not have, and has never had, an association or affiliation with Plaintiff.

22. In the Formal Quote, Performance Supply also stated:

“Due to the national emergency, acceptance of the purchase order is at the full discretion of 3M and supplies are based upon availability. The N95 masks 3M can begin shipping in 2-4 weeks CIF at any of 3M [sic] plants in the USA or 3M Plants Overseas according to their manufacturing schedule. 3M choose the plant. Order may be shipped in whole or in part.” Ex. 7 at p. 1.

23. For purposes of clarity, Performance Supply is not authorized to solicit purchase orders from customers for submission to 3M for approval. Nor is Performance Supply authorized to state how, where, or in what quantity such orders would be filled. The Formal Quote does not accurately describe how 3M fills N95 orders. Indeed, 3M fills orders for its N95 respirators by accepting purchase orders from 3M’s authorized distributors and wholesalers and, to a lesser extent, directly from the government. 3M does not accept purchase orders from unauthorized resellers.

24. Turning back to Performance Supply’s Formal Quote, the same day that Ms. Roberson received it, she contacted Eileen Simmons, a 3M Business Development Manager for government markets, for verification of Performance Supply’s claim. Ms. Simmons advised Ms. Roberson that Performance Supply was not associated with 3M, and so that potential sale was averted. However, there is nothing to prevent Performance Supply from making similar offers to other government or healthcare entities around the United States, causing irreparable harm to the 3M brand and putting the public at risk. Accordingly, 3M commenced this lawsuit against Performance Supply on April 10, 2020.

Performance Supply’s Misconduct Is Causing Immediate and Irreparable Harm to 3M—Especially in This District

25. As widely reported by the media, New York City, unfortunately, has become the epicenter of the COVID-19 outbreak in the United States. Despite 3M’s increased production of respirators, demand still exceeds the supply in hard-hit cities, such as New York City. Thus, city

officials are resorting to extreme measures to procure PPE, including respirators. For example, 3M recently became aware that certain New York City procurement officials are offering to drive unknown distances, late at night, to inspect PPE offered by vendors, including purported 3M-brand N95 respirators. 3M is working to assist these public servants, including those in New York City and other hard-hit cities. *See* Ex. 1.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and that this declaration was executed this 21st day of April, 2020.


Charles Stobbie

CERTIFICATE OF SERVICE

I, A. John P. Mancini, hereby certify that, on April 24, 2020, I filed a true and correct copy of the foregoing document, titled *Declaration of Charles Stobbie in Support of Plaintiff 3M Company's Application for a Temporary Restraining Order and Preliminary Injunction*, using this Court's ECF Filing System. I also certify that, on April 22, 2020, before filing the foregoing document, I arranged for service of a true and correct copy of it on Defendant Performance Supply, LLC via personal service and First Class Mail at:

Performance Supply, LLC
c/o Ronald Romano
3 Westbrook Way
Manalapan, New Jersey 07726

/s/ A. John P. Mancini
A. John P. Mancini

Attorney for Plaintiff 3M Company