

**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 DAVID A. CRIST
IN SUPPORT OF PLAINTIFF 3M COMPANY'S APPLICATION
FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

I, David A. Crist, 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 Vice President and Chief Marketing Officer for the Safety and Industrial Business Group at 3M. 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; (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 Company

4. 3M (then, Minnesota Mining and Manufacturing company) began over 100 years ago as a small-scale mining venture in Northern Minnesota. It has grown into an industry-leading provider of scientific, technical, and marketing innovations throughout the world.

5. 3M's portfolio includes more than 60,000 goods and services, ranging from household and school supplies, to medical devices and equipment. See **Exhibit 1** (*3M History*, 3M Company, available at https://www.3m.com/3M/en_US/company-us/about-3m/history/ (last visited on Apr. 21, 2020)).

The 3M Brand and Marks

6. 3M provides goods and services throughout the world under numerous brands, including well-known brands such as: ACE; POST-IT; SCOTCH; NEXCARE; and more. See **Exhibit 2** (*3M Featured Brands*, 3M Company, available at https://www.3m.com/3M/en_US/company-us/our-brands/ (last visited on Apr. 21, 2020)).

7. 3M's most famous and widely recognized brand is its eponymous "3M" brand. The 3M brand encompasses products and materials for a wide array of medical devices, supplies, and personal protective equipment ("PPE"), including, for example: stethoscopes; medical tapes; surgical gowns; blankets; bandages and other wound-care products; and respirators. See **Exhibit 3** (*3M Medical Products*, 3M Company, available at https://www.3m.com/3M/en_US/company-us/all-3m-products/~/All-3M-Products/Health-Care/Medical/?N=5002385+8707795+8707798+8711017+3294857497&rt=r3 (last accessed on Apr. 21, 2020)).

8. 3M-branded products are highly visible throughout numerous hospitals, nursing homes, and other care facilities where patients, care providers, and procurement officers value and rely on the high quality and integrity associated with the 3M brand.

9. 3M employs strict quality-control standards in manufacturing all of its products, including its products used in the fields of healthcare and worker safety. As a result of this commitment to quality, 3M-brand N95 respirators are highly respected and widely used and recommended by medical workers, public-health officials, and throughout the worker safety market.

10. Over the past century, 3M has invested hundreds of millions of dollars in advertising and promoting its 3M-brand products to customers throughout the world (including its 3M-brand N95 respirators) under the standard-character mark “3M” and the 3M design mark **3M** (together, the “3M Marks”). 3M also uses its famous “3M Science. Applied to Life” slogan (the “3M Slogan”) in connection with the promotion of its goods and services.

11. During this period, 3M’s goods and services offered under its 3M Marks, in particular, have been the subject of widespread, unsolicited media coverage and critical acclaim.

12. Products offered by 3M using its 3M Marks have also enjoyed enormous commercial success (including, without limitation, its range of 3M-brand N95 respirators).

13. To strengthen 3M’s common-law rights in and to its famous 3M Marks, 3M has obtained numerous federal trademark registrations, including, without limitation: (i) U.S. Trademark Reg. No. 3,398,329, which covers the standard-character 3M mark in Int. Classes 9 and 10 for, inter alia, respirators (the “329 Registration”); (ii) U.S. Trademark Reg. No. 2,793,534, which covers the 3M design mark in Int. Classes 1, 5, and 10 for, inter alia, respirators (the “534 Registration”); and (iii) U.S. Trademark Reg. No. 5,469,903, which covers the “3M Science.

Applied to Life” slogan in a number of Int. Classes, including Int. Class 9 for facial masks and respirators (the “‘903 Registration”).

14. I attach hereto as **Exhibit 4** a true and correct copy of the ‘329 Registration. Pursuant to Section 15 of the Lanham Act, namely, 15 U.S.C. § 1065, on April 2 2014, the United States Patent and Trademark Office (the “PTO”) issued a Notice of Acknowledgement of 3M’s Declaration of Incontestability of the ‘329 Registration. *See Exhibit 5.*

15. I attach hereto as **Exhibit 6** a true and correct copy of the ‘534 Registration. Pursuant to Section 15 of the Lanham Act, namely, 15 U.S.C. § 1065, on December 21, 2009, the PTO issued a Notice of Acknowledgement of 3M’s Declaration of Incontestability of the. *See Exhibit 7.*

16. I attach hereto as **Exhibit 8** a true and correct copy of the ‘903 Registration.

17. The general consuming public associates the 3M Marks uniquely with 3M and recognizes them as identifying 3M as the exclusive source of goods and services offered under the 3M Marks. Additionally, 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 protecting healthcare personnel and workers from exposure to airborne particles including viruses like COVID-19.

Performance Supply’s Misconduct

18. Defendant Performance Supply is 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 9.* 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. 9* 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. 9* 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. Additionally, 3M has never licensed its 3M Marks or 3M Slogan to Performance Supply for any purpose. 3M also has never consented to, or authorized or approved, Performance Supply's use of the 3M Marks or 3M Slogan for any purpose.

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. 9 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. By falsely holding itself out as a party that is affiliated with or authorized by 3M to sell 3M-branded respirators, and using 3M's trademarks to advance this false representation of affiliation, Performance Supply is causing immediate, irreparable, and immeasurable harm to 3M's brand and reputation.

26. Performance Supply is price-gouging by offering to sell purported 3M-brand N95 respirators to New York City for upwards of 600% their 3M single-case U.S. list price. Performance Supply's price-gouging activity is particularly harmful to 3M at this unprecedented time. That is because Performance Supply's conduct disrupts the supply of respirators by, among other things, (a) wasting 3M and public resources devoted to identifying fraudulent pricing and inauthentic offers and (b) squandering public and private monies used to pay grossly excessive prices for essential respirators.

27. Performance Supply's conduct is also particularly damaging to the 3M brand's reputation in New York City. When customers and government officials observe price-gouging by third parties, particularly those that hold themselves out as affiliated with or authorized by 3M (as Performance Supply is doing), they will inevitably draw the false impression that this behavior reflects pricing changes by 3M in response to the COVID-19 pandemic. The false impressions are so strong that in this instance, as in others, public officials are complaining to 3M about the unlawful behavior of parties that have no relationship to 3M. These false impressions are harming 3M's reputation and it is unknown how long it may take, if ever, to repair that damage, what measures, if any, will work, and how much those measures may cost. Under the circumstances, it is impossible to measure the resulting damage to 3M.

repair that damage, what measures, if any, will work, and how much those measures may cost. Under the circumstances, it is impossible to measure the resulting damage to 3M.

28. There are already widespread reports of counterfeit, inferior-quality respirators being sold at grossly inflated prices. And, despite having not increased the prices it charges for its 3M-brand N95 respirators, 3M has already been subject to unfounded public criticism in response to third-party price-gouging.

29. The 3M brand is also irreparably and immeasurably harmed by Performance's conduct in that the purported 3M-branded products that Performance Supply is advertising for sale may not exist and/or are counterfeit. In addition to threatening the credibility of the 3M brand, such conduct results in a diversion of critical public resources, which places lives at risk. These resources include the time spent by public officials to pursue false/fraudulent leads and the money spent to purchase products at inflated prices. Additionally, this waste of resources further diminishes the ability of public officials and procurement officers to investigate and identify other counterfeit and inferior quality supplies as buyers are pressured to place large orders swiftly for essential PPE.

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.


David A. Crist

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 David A. Crist 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