

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

3M COMPANY,

Plaintiff,

v.

Case No.: No. 8:20-cv-1003-T-35CPT

TAC2 GLOBAL LLC,

Defendant.

_____/

**MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW**

Pursuant to Fed. R. Civ. P. 65 and Local Rules 4.05 and 4.06, Plaintiff 3M Company (“Plaintiff” or “3M”) hereby moves for a temporary restraining order (“TRO”) and preliminary injunction (“PI”) enjoining Defendant TAC2 Global, LLC (“Defendant” or “TAC2”) from: (1) using any of the 3M Marks (as defined in Plaintiff’s Complaint) in commerce; (2) holding itself out to consumers and/or the public as an authorized distributor or vendor of 3M-brand products, or holding itself out as having any affiliation, connection, or association with 3M in any way; (3) falsely representing that 3M has increased the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis or that 3M has required or authorized others to increase the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis; and (4) offering to sell any of 3M’s products at a price and/or in a manner that would constitute a violation of § 501.160(2), Florida Statutes. 3M also requests that Defendant be required to file an affidavit detailing and confirming its compliance with the Court’s orders. In support of this Motion, Plaintiff states as follows:

PRELIMINARY STATEMENT

For over a century, 3M has provided state-of-the-art, industry-leading scientific and medical products to consumers worldwide under its famous 3M marks. In light of the COVID-19 pandemic, now, more than ever, consumers are relying on the famous 3M brand to confirm that the 3M product is the same superior quality that consumers have come to expect from 3M. This is especially true with respect to 3M’s numerous industry-leading healthcare products and personal protective equipment (“PPE”), including 3M-brand N95 respirators.

Unfortunately, Defendant is engaging in fraudulent, deceptive, and otherwise wrongful use of 3M’s famous “3M” trademarks to perpetuate a price-gouging scheme on unwitting consumers, including government agencies, during the global COVID-19 pandemic. Through this Motion, 3M seeks to stop this bad actor.

Defendant is not an authorized distributor of any of 3M’s products and it has no right to use 3M’s trademarks. Nonetheless, Defendant reproduced and incorporated 3M’s mark into an email and itemized quote in an attempt to sell counterfeit or non-existent 3M-brand N95 respirators to the Florida Department of Management Services (“DMS”) Emergency Operations Center (“EOC”) at 430% above 3M’s list price. Defendant’s actions strain the limited resources available to combat COVID-19 and constitute price gouging by any measure, including under Section 501.160(2), Florida Statutes.¹

¹ Section 501.160(2), Florida Statutes states, in part:

Upon a declaration of a state of emergency by the Governor, it is unlawful and a violation of § 501.204 for a person or her or his agent or employee to rent or sell or offer to rent or sell at an unconscionable price within the area for which the state of emergency is declared, any essential commodity including, but not limited to, supplies, services, provisions, or equipment that is necessary for consumption or use as a direct result of the emergency.

Governor Ron DeSantis declared a state of emergency on March 9, 2020. *See* Executive Order 20-52.

Defendant's wrongful conduct also has caused justifiable public outrage. By promoting an improper association between 3M's mark, a fraudulent contractual relationship with the 3M manufacturer, and exploitative pricing behavior, Defendant threatens imminent and irreparable harm to 3M's brand. 3M will not tolerate these pandemic profiteers, who seek to deceptively trade off the goodwill of the 3M brand and exploit the surge in demand for 3M-brand products during the COVID-19 global pandemic.

Defendant's conduct must be promptly enjoined to avoid further confusion of, and injury to, consumers, and to avoid irreparable injury and damage to 3M in the absence of such relief.

FACTUAL BACKGROUND

I. 3M Company

3M has grown from humble beginnings in 1902 as a small-scale mining venture in Northern Minnesota to what it is today, namely: an industry-leading provider of scientific, technical, and marketing innovations throughout the world. *See* Declaration of David A. Crist ("Crist Decl.") at ¶ 4. Today, 3M's portfolio includes more than 60,000 goods and services, ranging from household and school supplies, to industrial and manufacturing materials, to medical supplies and equipment. *Id.* at ¶ 5. 3M offers its vast array of goods and services throughout the world under numerous brands, including ACE, POST-IT, SCOTCH, and NEXCARE. *Id.* at ¶ 6. 3M also uses its famous "3M Science. Applied to Life" slogan to promote its goods and services. *Id.* at ¶ 10.

Notwithstanding the widespread goodwill and resounding commercial success enjoyed by these brands, 3M's most famous and widely recognized brand is its eponymous "3M" brand. *Id.* at ¶ 7. The 3M brand is associated with a wide variety of medical devices, supplies, and

PPE, including respirators, stethoscopes, medical tapes, surgical gowns, blankets, bandages and other wound-care products. *Id.* As a result, 3M-branded products are highly visible throughout hospitals, nursing homes, and other facilities where patients, care providers, and procurement officers value and rely upon the high quality and integrity associated with the 3M brand. *Id.* at ¶ 8.

Over the past century, 3M has invested hundreds of millions of dollars in advertising and promoting its 3M-brand products to consumers throughout the world under the standard-character mark “3M” and the inset 3M design mark (together, the “3M Marks”). *Id.* at ¶ 10. 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. *Id.* at ¶ 17. Indeed, products offered under the 3M Marks (including, for example, Plaintiff’s 3M-brand N95 respirator) have enjoyed enormous commercial success and critical acclaim. *Id.* at ¶¶ 11–12.

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”).

Id. at ¶ 13. The ‘329, ‘534, and ‘903 Registrations are valid, in effect, and on the Principal Trademark Register. *See id.* at Exs. 4–8. The ‘329 and ‘534 Registrations are “incontestable” within the meaning of 15 U.S.C. § 1065.² *See id.* at Exs. 5 & 7.

The 3M Marks do more than identify 3M as the exclusive source of goods and services offered thereunder. *Id.* at ¶ 17. Indeed, the famous 3M Marks also signify to consumers that the products are of the highest quality and adhere to the strictest quality-control standards. *Id.* at ¶¶ 8–9. Consumers rely on the famous 3M Marks’ ability to signify that products offered are of the same high quality that consumers have come to expect of the 3M brand over the past century. *Id.* at ¶ 8.

Medical professionals and first responders are donning extensive PPE as they place their health and safety on the line in the battle against COVID-19. 3M has and continues to provide our heroes on the front lines with 3M-brand respirators. *See* Declaration of Charles Stobbie (“Stobbie Decl.”) at ¶¶ 6–7. When used appropriately, authentic 3M-brand respirators reduce exposure to airborne biological particles and liquid contamination. *Id.* at ¶ 5. Based on the exponential increase in demand for 3M-brand respirators, 3M invested the necessary capital and resources to double its global annual production of 1.1 billion 3M-brand respirators. *Id.* at ¶ 8. **But 3M has not increased its prices.** *Id.* at ¶ 12.

² Accordingly, the ‘329 and ‘534 Registrations constitute conclusive evidence of: (i) Plaintiff’s ownership of the 3M Marks; (ii) the validity of the 3M Marks; (iii) the validity of the registration of the 3M Marks; and (iv) Plaintiff’s exclusive right to use the 3M Marks throughout the United States for, *inter alia*, respirators. Relatedly, the ‘903 Registration constitutes *prima facie* evidence of: (i) Plaintiff’s ownership of the “3M Science. Applied to Life” slogan; (ii) the validity of the “3M Science. Applied to Life” slogan; (iii) the validity of the registration of the “3M Science. Applied to Life” slogan; and (iv) Plaintiff’s exclusive right to use the “3M Science. Applied to Life” slogan throughout the United States for, *inter alia*, respirators.

Unfortunately, certain third parties do not share 3M's sense of civic responsibility during this time of crisis. Instead, these pandemic profiteers seek to exploit the increased demand for Plaintiff's 3M-brand N95 respirators through a variety of scams, including price gouging, counterfeiting, and accepting money for 3M-brand N95 respirators despite not having the product to sell and/or never intending to deliver the product to the unwitting buyer—in many instances, a public authority, which struggles to address the enormous financial and logistical challenges presented by COVID-19.³

To protect consumers from deception and inferior products and reduce the time wasted by governmental officials on scams, as well as to protect the carefully-curated reputation and goodwill enjoyed by Plaintiff's 3M brand, 3M is working diligently with law enforcement, retail partners, and others to combat unethical and unlawful business practices related to 3M-brand N95 respirators.⁴ *Id.* at ¶¶ 14–16.

II. **Defendant's Unlawful Conduct**

Despite 3M's extensive measures to combat price gouging and counterfeiting of its 3M-brand N95 respirators, these illicit activities continue. Defendant is a prime example of this unlawful behavior, which is damaging to the 3M brand and public health.

³ 3M has obtained temporary restraining orders in a similar case in this District before Judge Mendoza, *see 3M Company v. Gefitico, LLC*, No. 6:20-cv-00648-CEM-GJK as well as in the United States District Court for the Eastern District of California, *see 3M Company v. RX2Live, LLC*, No. 1:20-cv-0523-NONE-SAB. 3M has also obtained a temporary restraining order and a preliminary injunction in a similar case in the United States District Court for the Southern District of New York, *see 3M Company v. Performance Supply, LLC*, Case No. 1:20-cv-02949-LAP, copies of the Orders are attached hereto as **Exhibit A**.

⁴ For example, in late-March 2019, 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. 3M also has attempted to combat price gouging, counterfeiting, and other unlawful conduct during COVID-19 by, among other things, posting the list price for 3M-brand N95 respirators on 3M's website, together with an online form and the number for a "fraud hotline," to help consumers identify and report price gouging and counterfeiting. *Id.* at ¶ 14 & Ex. 4.

On or about April 14, 2020, Defendant sent an email titled *Tac2 Global – N95 Masks and Sanitizer* (the “Email”) to the Logistics Section Support Director (“LSSD”) of the DMS’s EOC.⁵ *Id.* at Ex. 7. In the Email, Defendant falsely claimed to be a distributor of certified 3M-brand, N95 Model 1860 respirators and offered to sell them. *Id.* In the Email, Defendant included an itemized quote (the “Quote”) addressed to the DMS’ Division of State Purchases which offered to sell five to ten million 3M-brand, N95 Model 1860 respirators for \$5.50 each and various sizes of bottled hand sanitizer at highly inflated prices. *See id.* The Quote also contains a reference to the 3M-brand, N95 Model 1860 respirators that Defendant purportedly had for sale in the form “3MTM”. *Id.*

The Quote further contains a series of false and misleading claims involving 3M including that the Defendant had “further contracted to become a distributor of 3M N95 Masks”; that Defendant’s “pricing will remain fixed and transparent to 3M and their agents”; that Defendant had a “contract agreement with the 3M Manufacturer”; and that every mask Defendant would procure would “also be inspected and certified by 3M agents prior to leaving the manufacturing facility, and we are obligated to offer these masks CIF.” *Id.*

The Email also contains a purported certificate from the INSPEC organization that attests to the quality of the masks Defendant is selling (the “Certificate”). *Id.* The Certificate does not show in any way that the masks Defendant offers are affiliated with 3M or safe to use. *Id.* Finally, the Email includes attachments containing specifications of the hand sanitizer and screenshots of Florida business registrations (the “Attachments”). *Id.*

⁵ Due to a scrivener’s error, paragraph 40 of the Complaint identified the date of the Email as March 31, 2020 instead of April 14, 2020. As stated in paragraph 9 of the Complaint and shown in Exhibit G, the Email and Quote were sent on April 14, 2020.

Defendant's use of the 3M mark and invocation of 3M's name in the Quote and the inclusion of the Certificate and Attachments were intended to mislead the EOC into believing that Defendant was an authorized distributor of 3M's products and/or otherwise had an association or affiliation with 3M and its products. *Id.* Under the guise of appearing affiliated with 3M, Defendant attempted to deceive consumers into purchasing masks at highly inflated prices. *Id.* Defendant is not, and never has been, an authorized distributor or vendor of 3M's products. *Id.* Defendant also does not have, and has never had, an association or affiliation with Plaintiff. *Id.* The mere association of 3M's valuable brand with such shameless price gouging harms the 3M brand and seriously threatens the public health agencies that are under strain in the midst of a worldwide pandemic. *See* Crist Decl. at ¶¶ 26–30.

A TRO, followed by a PI, should issue enjoining Defendant from using the 3M Marks to sell counterfeit or non-existent goods to consumers, to maintain the status quo, and to preserve 3M's ability to obtain equitable remedies.

MEMORANDUM OF LAW

I. 3M Is Entitled to TRO, Followed by a Preliminary Injunction

A TRO may be granted, if “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A); M.D. Fla. R. 4.05. “TROs are ‘designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction.’” *United States v. Kaley*, 579 F.3d 1246, 1264 (11th Cir. 2009) (citation omitted).

3M will suffer immediate and irreparable injury if TAC2 is permitted to further use the 3M Marks to sell counterfeit and/or non-existent goods to consumers. A TRO is necessary to prevent Defendant from continuing to fraudulently induce consumers into buying potentially unsafe, counterfeit, and/or non-existent PPE at exorbitant prices during a global pandemic. This unlawful conduct will harm 3M's business reputation and decrease consumer confidence in the quality of 3M products. Moreover, there is a very real harm to 3M (and to the public) should the public be injured by masks that are counterfeit and below 3M's manufacturing and quality control standards. To maintain the status quo, this Court should issue a TRO and PI. Given the Defendant's willingness to mislead procurement officers in seeking to sell protective equipment, 3M also requests that Defendant be required to confirm, under oath, compliance with the Court's orders.

II. 3M Satisfies the Standard for Injunctive Relief

Issuance of a TRO and/or a PI is appropriate where the movant demonstrates the following: (A) substantial likelihood of success on the merits; (B) the TRO or PI is necessary to prevent irreparable injury; (C) the threatened injury outweighs the harm that the TRO or PI would cause to the non-movant; and (D) the TRO or PI would not be adverse to the public interest. *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1035 (11th Cir. 2001). The evidence supports each element for granting a TRO and/or PI.

A. 3M is Substantially Likely to Succeed on the Merits

"To support a preliminary injunction, a district court need not find that the evidence positively guarantees a final verdict in plaintiff's favor." *Levi Strauss & Co.*, 51 F.3d at 985. Instead, this Court is asked to determine, among other factors, whether 3M is substantially

likely to prevail on its claims. 3M is likely to prevail on the merits of its claims under Florida's Unfair and Deceptive Trade Practices Act ("FDUTPA") and the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) as well as corresponding state law claims.

1. Violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA")

A claim for injunctive relief under FDUTPA requires: (a) a deceptive act or unfair practice; and (b) that the party was aggrieved by the act or practice. *See Kelly v. Palmer, Reifler, & Assoc., P.A.*, 681 F.Supp.2d 1356, 1366 (S.D.Fla.2010). Although FDUTPA does not define "deception," FDUTPA is "construed liberally." § 501.202, Fla. Stat. "FDUTPA does not require a plaintiff to prove actual reliance on the alleged conduct." *Cold Stone Creamery, Inc. v. Lenora Foods I, LLC*, 332 F. App'x 565, 567 (11th Cir. 2009). Instead, a plaintiff must prove that "the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances." *Id.* This objective test considers whether deception is probable and "likely to cause injury to a reasonable relying consumer." *Zlotnick v. Premier Sale Grp.*, 480 F.3d 1281, 1284 (11th Cir. 2007). FDUTPA also does not define "aggrieved," but it has been construed to have a broader meaning than "damaged" or "suffered a loss," and Florida courts have adopted a definition of "angry or sad on grounds of perceived unfair treatment." *Ahearn v. Mayo Clinic*, 180 So. 3d 165, 172 (Fla. 1st DCA 2015). Lastly, non-consumers may bring suit under FDUTPA. *See Caribbean Cruise Line, Inc. v. Better Bus. Bureau of Palm Beach Cty., Inc.*, 169 So. 3d 164, 169 (Fla. 4th DCA 2015).

Defendant Engaged in Deceptive and Unfair Trade Practices. Defendant's practices of holding itself out to be an authorized distributor or vendor of 3M products and claiming to have a contract agreement with the 3M Manufacturer, along with its use of the 3M Mark to

instill a false sense of trust in consumers was likely to deceive and cause injury to any reasonably relying consumer. Additionally, the products that Defendant advertised are either counterfeit or non-existent, which further injures consumers that are deceived by Defendant's scams. See Crist Decl. at ¶ 30. Defendant has also engaged in price gouging during a declared State of Emergency in violation of § 501.160, Fla. Stat. Lastly, Defendant has engaged in trademark infringement, trademark dilution, false and deceptive advertising, unfair competition, false endorsement, and false association all of which are likely to deceive consumers acting reasonable in the same circumstances.

3M was Aggrieved by Defendant's Unfair Trade Practices. 3M's brand and reputation have been negatively impacted as a result of the Defendant's actions. See Crist Decl. at ¶¶ 26–30. Defendant has exploited the increased demand for Plaintiff's 3M-brand N95 respirators by offering to sell them for exorbitant prices and selling counterfeit or non-existent versions of them. Consumers that are privy to these kinds of scams have lost trust in the security associated with 3M and its brand. This has negatively impacted 3M's reputation in the global community.

2. Trademark Infringement Claims under Federal and Florida Law

The analysis for trademark infringement is the same under Florida and federal law.⁶ To prevail on a trademark infringement claim, a plaintiff must demonstrate: (a) that its mark has priority; (b) that defendant used its mark in commerce; and (c) that the defendant's mark is likely to cause consumer confusion. *PetMed Express, Inc. v. MedPets.Com, Inc.*, 336 F. Supp.

⁶ See, e.g., *See Fla. Int'l Univ. Bd. of Trustees v. Fla. Nat. Univ., Inc.*, 91 F. Supp. 3d 1265, 1288 (S.D. Fla. 2015).

2d 1213, 1218 (S.D. Fla. 2004). As detailed below, 3M is likely to prevail on the merits of its trademark infringement claim.

First, the 3M Marks have priority. 3M exclusively owns of each of the federally-registered 3M Marks and has the exclusive right to use each of the 3M Marks in the United States commerce for, *inter alia*, advertising, promoting, offering for sale, and selling Plaintiff's 3M-brand N95 respirators. *See* Crist Decl. at ¶¶ 13–16. Moreover, 3M's exclusive rights to each of the 3M Marks predate any rights that Defendant could establish in and to any mark that consists of "3M" in whole and/or in part. *See id.* 3M has not consented to the use of its famous 3M Marks by Defendant. *See id.* at ¶ 20.

Second, Defendant clearly used 3M's Mark and name to advertise, promote, and offer to sell counterfeit and/or non-existent products in connection with the sale and advertising of its goods, which constitutes "use in commerce" under 15 U.S.C. § 1114(1)(a).⁷ Indeed, Defendant offered to sell millions of 3M-brand, N95 Model 1860 respirators to the DMS' EOC. *See id.* at ¶¶ 19–21. To promote its efforts, Defendant sent an Email with an itemized Quote, which used the 3M Mark. *See id.* at ¶ 19.

Third, Defendant's use of the 3M Mark is likely to cause consumer confusion. Courts in the Eleventh Circuit consider seven factors to determine whether likelihood of consumer confusion exists: (1) type of mark; (2) similarity of mark; (3) similarity of the products the marks represent; (4) similarity of the parties' trade channels and customers; (5) similarity of

⁷ *See N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1218–19 (11th Cir. 2008) (stating that "[i]n deciding whether [Defendant] has made an infringing 'use,' we focus on the plain language of § 1114(1)(a), which...requires a 'use in commerce ... of a registered mark in connection with the sale...or advertising of any goods,'" and finding that Defendant's use of Plaintiff's two trademarks as part of its effort to promote and advertise its products constituted use in commerce under the plain meaning of 15 U.S.C. § 1114(1)(a)).

advertising media; (6) the defendant's intent; and (7) actual confusion. *Fla. Int'l Univ. Bd. of Trustees*, 91 F. Supp. 3d at 1274. Of these factors, the type of mark and evidence of actual confusion are considered the most important. *Id.* at 1274 (citation omitted).⁸

Type of Mark. Classifying a mark determines its strength. *Frehling Enterprises, Inc. v. Int'l Select Grp., Inc.*, 192 F.3d 1330, 1335 (11th Cir. 1999). There are four types of marks: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary. *Id.* An arbitrary mark is the strongest of the marks and is defined as “a word or phrase that bears no relationship to the product.” *Id.* 3M's Marks are arbitrary as they bear no relationship to the products 3M sells. Further, if a mark is incontestable, its strength is enhanced.⁹ *Id.* 3M uses its marks exclusively and its '329 and '534 Registrations are “incontestable” within the meaning of 15 U.S.C. § 1065. Thus, 3M's marks are undoubtedly strong.

Similarity of Marks. When analyzing the similarity of the marks, a court compares the marks and considers the overall impressions that the marks create, including the sounds, appearance, and manner in which they are used. *Frehling*, 192 F.3d at 1335. Here, Defendant used a very similar version of 3M's Marks, “3M™”. Defendant did not add text or other images to the marks to render them dissimilar or reduce the likelihood that consumers would confuse the two marks. Defendant, albeit fraudulently, also used the mark in the manner it is used by 3M: for the sale of 3M-branded PPE. *See* Crist Decl. at ¶¶ 19–21.

⁸ Nonetheless, likelihood of confusion should not be determined “by merely analyzing whether a majority of the subsidiary factors indicates that such a likelihood exists ... [r]ather, a court must evaluate the weight to be accorded the individual factors and then make its ultimate decision.” *Id.*

⁹ A mark is incontestable if it has been registered for five years with the Patent & Trademark Office (“PTO”), its holder has filed the affidavit required by 15 U.S.C. § 1065(3) with the PTO, and the PTO has accordingly declared the mark incontestable.

Similarity of the Goods. “This factor requires a determination as to whether the products are the kind that the public attributes to a single source, not whether or not the purchasing public can readily distinguish between the products of the respective parties.” *Frehling*, 192 F.3d at 1338. Here, the masks that Defendant advertised were similar in both function and design to those sold by 3M. Although the Defendant’s masks were either counterfeit or non-existent, the masks advertised were meant to resemble that of the 3M brand in function, design, and style.

Similarity of the Parties’ Retail Outlets (Trade Channels) and Customers. “This factor takes into consideration where, how, and to whom the parties’ products are sold.” *Frehling*, 192 F.3d at 1339. 3M offers its vast array of goods and services throughout the world under numerous brands. During the COVID-19 pandemic, 3M-brand N95 respirators have been in high demand and have been sold to a large customer base, including government agencies. *See* Stobbie Decl. at ¶¶ 11, 26. Defendant advertised its counterfeit or non-existent respirators as being 3M-brand N95 respirators to the DMS’ EOC—a government agency. *See id.* at ¶ 19. Clearly, 3M’s customer base undoubtedly overlaps with customers Defendant seeks to secure. Further, Defendant sought to exploit the increased demand for 3M-brand respirators during the COVID-19 pandemic, and it capitalized on 3M’s consumers to do so.

Similarity of Advertising Media. “[T]he standard is whether there is likely to be significant enough overlap in the readership of the publications in which the parties advertise that a possibility of confusion could result.” *Frehling*, 192 F.3d at 1340. 3M advertises in print media, including magazines, newspapers, catalogs, and direct mailings as well as through electronic publications, including its website, and makes offers to certain consumers via email.

Defendant used email to advertise its products. Although the parties do not use the exact same channels of advertising, Defendant intentionally targeted consumers interested in buying 3M-brand respirators. To that end, many of the same consumers would be exposed to the same advertisements, and by derivation, the 3M Marks. There would be significant overlap in the readership of 3M's advertisements and the readership of Defendant's offers.

Defendant's Intent. When a defendant adopts a plaintiff's mark with the intention of deriving a benefit from the plaintiff's business reputation, this fact alone justifies the inference of a confusing similarity. *Frehling*, 192 F.3d at 1340. Defendant sought to exploit the increased demand for 3M-brand respirators during the COVID-19 pandemic through using the 3M mark to sell counterfeit or non-existent goods at exorbitant prices. Defendant used the 3M Mark to deceive and instill false confidence in consumers to get them to purchase its counterfeit or non-existent goods.

Actual Confusion. Evidence of actual confusion is the best evidence of a likelihood of confusion. *Frehling*, 192 F.3d at 1340. In this case, Defendant's use of the 3M Mark caused actual confusion, and indeed caused the DMS' EOC to contact 3M because of Defendant's use of the 3M Mark. See Crist Decl. at ¶ 25.

3. Florida and Federal Dilution Claims

The standard for establishing a trademark dilution claim under Florida law is essentially the same as that of trademark dilution under the Lanham Act. *Fla. Int'l Univ. Bd. of Trustees*, 91 F. Supp. 3d at 1286. To prevail on a dilution claim, the plaintiff must show that: (a) the plaintiff's mark is famous; (b) the defendant used the plaintiff's mark after the plaintiff's mark became famous; (c) the defendant's use was commercial and in commerce; and (d) the

defendant's use of the mark has likely caused dilution. *Id.* 3M is likely to prevail on the merits of its trademark dilution claim.

First, Plaintiff's Mark is famous. "To be 'famous' in the context of a trademark dilution claim, the mark must have a degree of distinctiveness and strength beyond that needed to serve as a trademark; it must be truly prominent and renowned." *Id.* 3M has invested significant time, energy and money in advertising and promoting its 3M-brand products to consumers throughout the world under the standard-character mark "3M" and the inset 3M design mark. *See* Crist Decl. at ¶ 10. Products offered under Plaintiff's 3M Marks have enjoyed enormous commercial success (including, without limitation, its 3M-brand N95 respirators) and have regularly been the subject of widespread, unsolicited media coverage and critical acclaim. *See id.* at ¶¶ 11–12. Accordingly, the 3M Marks have become prominent, renowned, and famous among the general consuming public in the United States.

Second, Defendant used the 3M Mark after the 3M Marks became famous. Defendant used the 3M Mark on or about April 14, 2020. *See* Crist Decl. at ¶¶ 19–21. This date occurred long after the 3M Mark became famous and over a century after 3M's inception. **Third**, Defendant's use of the 3M Mark was commercial and in commerce. The arguments set forth in Section II.A(2) above apply with equal force and effect to the determination of whether Defendant's use was commercial and in commerce; therefore, 3M incorporates the arguments in Section II.A(2) as though fully set forth herein. **Fourth**, Defendant's use of the 3M Mark has likely caused dilution. In determining whether a mark is likely to cause dilution, this Court may consider all relevant factors, including: (i) the degree of similarity between the mark and the famous mark; (ii) the degree of inherent or acquired distinctiveness of the famous mark;

(iii) the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (iv) the degree of recognition of the famous mark; (v) whether the user of the mark intended to create an association with the famous mark; and (vi) any actual association between the mark and the famous mark. *Fla. Int'l Univ. Bd. of Trustees*, 91 F. Supp. 3d at 1287.

Defendant imitated the 3M Mark in the Quote to the DMS' EOC. In fact, Defendant used a mark very similar to the 3M Mark. As established, the 3M Mark is distinct and unique to the 3M brand. The Mark is not associated with any other brand, and could not be mistaken for representing any company other than 3M. The 3M Mark's distinctiveness is both inherent and acquired. Moreover, 3M has not consented to any other brand or company using its Mark. 3M's Mark is exclusively for 3M-brand products.

Defendant used the 3M Mark to mislead the DMS' EOC into believing that Defendant was an authorized distributor of 3M's products and/or otherwise had an association or affiliation with 3M and its products. Defendant is not, and never has been, an authorized distributor or vendor of 3M's products or had, an association or affiliation with 3M. Defendant also never had a contractual relationship with the 3M Manufacturer. Finally, as Defendant specifically used a mark similar to 3M's Mark, there is high association between the mark Defendant used and the famous 3M Mark.

4. Common Law and Federal Unfair Competition Claim

The elements of a claim for unfair competition are the same under Florida and federal law. *Fla. Int'l Univ. Bd. of Trustees*, 91 F. Supp. 3d at 1288. To prevail on a claim for unfair competition, a "plaintiff must show: (a) that the plaintiff had enforceable trademark rights in the mark or name; and (b) that the defendant made unauthorized use of it such that consumers

were likely to confuse the two.” *TracFone Wireless, Inc. v. Adams*, 98 F. Supp. 3d 1243, 1257 (S.D. Fla. 2015) (citation omitted). The legal standard for unfair competition under both the Lanham Act and the common law has been held to be essentially the same as the standard for trademark infringement. *Fla. Int’l Univ. Bd. of Trustees*, 91 F. Supp. 3d at 1284-85. Courts therefore apply the same seven-factor “likelihood of confusion” test brought under 15 USC § 1125(a). *Id.* The arguments set forth in Section II.A(2) above apply with equal force and effect to the determination of whether 3M had enforceable trademark rights in the 3M Marks; therefore, 3M incorporates the arguments in Section II.A(2) as though fully set forth herein. Moreover, Defendant used the 3M Mark in the Email and Quote to the DMS’ EOC in order to advertise, offer to sell, and/or promote counterfeit or non-existent 3M-brand N95 respirators without 3M’s consent. *See* Crist Decl. at ¶ 22. As Defendant used a mark extremely similar to the 3M Mark, consumers of the Defendant’s “products” were highly likely to confuse the products Defendant advertised with authentic 3M-brand products.

5. Federal False Advertising Claim

To prevail on a false advertising claim under the Lanham Act, a plaintiff must establish that: (a) the defendant’s advertisements were false or misleading; (b) the advertisements deceived, or had the capacity to deceive, consumers; (c) the deception had a material effect on purchasing decisions; (d) the misrepresented product or service affects interstate commerce; and (e) the plaintiff has been injured as a result of the false advertising. *Appjigger GmbH v. BLU Prod., Inc.*, No. 15-22313-CIV, 2016 WL 4119720, at *4 (S.D. Fla. Mar. 7, 2016).

The Defendant’s Advertisements were False or Misleading. Defendant’s Quote and Email to the DMS’ EOC were false and misleading in several ways. *First*, in the Email,

Defendant purported to be a recently contracted authorized distributor of 3M's products that otherwise had association or affiliation with 3M and its products. *See* Crist Decl. at ¶ 19. Defendant is not, and never has been, an authorized distributor or vendor of 3M's products or associated or affiliated with 3M. *Id.* at ¶¶ 22, 24. **Second**, in the Email, Defendant purported to have a contractual relationship with the 3M Manufacturer. Defendant does not have, and has never had, said contractual relationship with the 3M Manufacturer. *Id.* at ¶ 22. **Third**, Defendant used a mark similar to 3M's famous standard-character 3M mark in the Quote. *Id.* at ¶ 19. This is misleading as neither Defendant nor its counterfeit or non-existent products are associated or affiliated with 3M. *Id.* at ¶ 22. **Fourth**, Defendant's Quote made several false statements, including, but not limited to the following:

- a. That the Defendant had "further contracted to become a distributor of 3M N95 Masks.";
- b. That Defendant's "pricing will remain fixed and transparent to 3M and their agents.";
- c. That Defendant had a "contract agreement with the 3M Manufacturer"; and
- d. "Every mask we [Defendant] procure will also be inspected and certified by 3M agents prior to leaving the manufacturing facility, and we are obligated to offer these masks CIF."

Id. at ¶ 20.

The Advertisements had the Capacity to Deceive Consumers. Defendant used the famous 3M Mark in its advertisement and targeted a member of a government agency committed to battling COVID-19 to sell counterfeit or non-existent 3M-brand N95 respirators. *Id.* at ¶¶ 18–21. Defendant also held itself out to be an authorized distributor or vendor of 3M products. *Id.* at ¶¶ 19, 22. Given the current high demand for PPE, specifically 3M-brand N95 respirators, and 3M's reputation for producing uniquely high quality products to its consumers, Defendant's unlawful behavior certainly had the capacity to deceive unwitting consumers

seeking authentic 3M products and in fact confused the DMS' EOC who contacted 3M to confirm any relationship between Defendant and 3M.

The Deception had a Material Effect on Purchasing Decisions. Based on 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. Given the high demand for 3M-brand N95 masks, consumers rely on the famous 3M Marks to indicate the safety and high quality of the products they purchase. Use of the 3M Marks in advertisements has caused consumers to make purchasing decisions that they would not have absent the association with the 3M brand.

The Misrepresented Product Affects Interstate Commerce. 3M sells its products throughout the United States and globally. Now more than ever, consumers across the United States are buying 3M-brand N95 respirators. The sale of these respirators undoubtedly affects interstate commerce.

3M has been Injured as a Result of the False Advertising. The arguments set forth in Section II.A(2) above apply with equal force and effect to the determination of whether 3M had enforceable trademark rights in the 3M Marks; therefore, 3M incorporates the arguments in Section II.A(2) as though fully set forth herein.

6. Federal False Endorsement, False Association, and False Designation of Origin Claims

“To establish a prima facie case under § 1125(a), a plaintiff must show: (a) that the plaintiff had enforceable trademark rights in [a] mark or name; and (b) that the defendant made unauthorized use of it ‘such that consumers were likely to confuse the two.’ *Gatewood v.*

Frency's Corp., Inc., No. 8:16-CV-340-T-36AAS, 2017 WL 4861352, at *9 (M.D. Fla. Sept. 19, 2017); *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012).

Plaintiff Had Enforceable Trademark Rights in the Mark or Name. The arguments set forth in Section II.A(2) above apply with equal force and effect to the determination of whether 3M had enforceable trademark rights in the 3M Marks; therefore, 3M incorporates the arguments in Section II.A(2) as though fully set forth herein.

Defendant Made Unauthorized use of the Mark such that Consumers Were Likely to Confuse the Two. The arguments set forth in Section II.A(2) above apply with equal force and effect to the determination of whether Defendant made unauthorized use of the 3M Mark such that consumers would confuse the two; therefore, 3M incorporates the arguments in Section II.A(2) as though fully set forth herein.

B. 3M Has Suffered and Will Continue to Suffer Irreparable Injury in the Absence of a TRO and PI

Without injunctive relief, 3M will suffer irreparable injury because Defendant will continue to use 3M's trademark to fraudulently induce consumers into buying counterfeit and/or non-existent, exorbitantly-priced PPE. Given the current pandemic, the public is relying on the high standards associated with the 3M brand now, more than ever, to indicate that the respirators offered for sale are, in fact, genuine and adhere to the 3M brand's rigorous standards. Defendant, and others, are seeking to exploit this fact during a time the public is making hurried purchasing decisions. By falsely representing itself as an authorized distributor of 3M-brand products, as well as offering to sell those products at exorbitantly high prices, Defendant is confusing and deceiving the public about the source and quality of purported 3M-brand products offered under the 3M Marks. Furthermore, Defendant has caused irreparable

harm to 3M's goodwill by falsely stating that 3M has raised its prices. *See* Crist Decl. at ¶¶ 27, 29. The continued sales and/or attempted sales of these counterfeit and non-existent masks will harm 3M's business reputation. *See id.* at ¶¶ 26-30; *see also Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 986 (11th Cir. 1995) (finding that the continued sale of thousands of counterfeit jeans by the defendant would damage plaintiff's business reputation and decrease its legitimate sales); *see also HomeVestors of Am., Inc. v. Bay Area Hauling, LLC*, No. 8:18-CV-1377-T-36AAS, 2019 WL 5394189, at *6 (M.D. Fla. Sept. 10, 2019) (finding injunctive relief to be warranted when the plaintiff plausibly alleged the defendant used plaintiff's protected marks without consent "in a manner likely to cause confusion amongst customers").

Accordingly, unless this Court restrains and enjoins Defendant's unlawful conduct—immediately through the issuance of a TRO—the Defendant will still be able to harm the public in the form of confusion and deception about the source and quality of the purported 3M-brand respirators that Defendant is offering to sell for exorbitantly high prices.

C. The Threatened Injuries to 3M Outweigh Any Damage a TRO and PI May Cause Defendant

The threatened injuries to 3M, discussed above, are both severe and irreversible. By contrast, Defendant will suffer no legitimate harm from being prevented from further using the 3M Mark to sell non-existent and/or counterfeit products to the public at outrageous prices. *See Laboratorios Roldan, C. por A. v. Tex Int'l, Inc.*, 902 F. Supp. 1555, 1571 (S.D. Fla. 1995) (holding that the defendant had "no legitimate interest in the continued use of [plaintiff's] mark."). Accordingly, the balance of interests in this case weighs heavily in favor of 3M. The

prohibition of Defendant's unlawful use of 3M's Mark is a small burden when weighed against the total denial of justice for 3M and the lack of protection for its customers.

D. The Issuance of a TRO and a PI is not Adverse to the Public Interest

Finally, the public has an interest in preventing Defendant's unlawful activities, including advertising counterfeit or non-existent goods and committing trademark infringement that has led to consumer confusion. *See Davidoff & CIE, S.A. v. PLD Int'l Corp.*, 263 F.3d 1297, 1304 (11th Cir. 2001) ("[P]ublic interest is served by preventing consumer confusion in the marketplace.").¹⁰

Moreover, given the current pandemic and the vital nature of the product at issue, a TRO and/or PI would actually benefit the public interest. The distribution and use of respirators that are counterfeit and below 3M's standards of manufacturing and quality control, but contain 3M marks, would undermine efforts to control the pandemic. These counterfeit masks would not provide the expected protection to the public and would endanger the public on a massive scale.

¹⁰ *PODS Enterprises, LLC v. U-Haul Int'l, Inc.*, 126 F. Supp. 3d 1263, 1287 (M.D. Fla. 2015) ("In trademark infringement cases, the public interest ordinarily favors the issuance of injunctions to avoid consumer confusion."); *Gaffigan v. Does 1-10*, 689 F. Supp. 2d 1332, 1341 (S.D. Fla. 2010) (where the court agreed that the issuance of a preliminary injunction was in the best interest of the general public because the public had an interest in not being misled as to the origin, source, or sponsorship of trademarked products after defendants directly defrauded the consuming public by passing off their goods as genuine goods and falsely identified Plaintiffs as the origin of such goods); *N. Atl. Operating Co., Inc. v. Hammad Enterprises Inc.*, No. 19-CV-60200, 2019 WL 1468524, at *2 (S.D. Fla. Feb. 11, 2019) ("[T]he public interest favors issuance of the preliminary injunction to protect Plaintiffs' trademark interests and protect the public from being defrauded by the palming off of counterfeit goods as Plaintiffs' genuine goods."); *Maurer Rides USA, Inc. v. Beijing Shibaolia Amusement Equip. Co., Ltd.*, No. 6:10-CV-1718-ORL-37, 2012 WL 2469981, at *6 (M.D. Fla. May 30, 2012).

III. 3M SHOULD NOT BE REQUIRED TO POST BOND.

Due to Defendant's abhorrent and unlawful activity, 3M respectfully submits that it should not be required to post bond if preliminary injunctive relief is granted.¹¹

If the Court declines to waive the bond in this action, 3M respectfully submits that a bond no greater than \$10,000.00 will be sufficient to safeguard the interests of the Defendant.

CONCLUSION AND PRAYER FOR RELIEF

Based upon 3M's strong showing on each of the factors considered in granting preliminary relief, 3M respectfully requests that a temporary restraining order and a preliminary injunction be granted until a full trial on this matter can be scheduled, enjoining Defendant from the following:

1. Using any of the 3M Marks in commerce;
2. Holding itself out to consumers and/or the public as an authorized distributor or vendor of 3M-brand products, or holding itself out as having any affiliation, connection, or association with 3M in any way;
3. Falsely representing that 3M has increased the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis or that 3M has required or authorized others to increase the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis; and

¹¹ Although Federal Rule of Civil Procedure 65(c) requires a plaintiff to post a security bond if temporary relief is ordered, this Court has discretion to waive that requirement. See Fed. R. Civ. P. 65(c). "[T]he amount of security required by [Rule 65(c)] is a matter within the discretion of the trial court, and the court may elect to require no security at all." *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005) (internal quotations omitted); see also *Carillon Importers, Ltd. v. Frank Pesce Intern. Group Ltd.*, 112 F.3d 1125, 1126–27 (11th Cir. 1997) ("The amount of an injunction bond is within the sound discretion of the district court."). Furthermore, where, as here, a plaintiff makes a strong showing of likelihood of success on the merits, waiver of the bond requirement is especially appropriate. See *Baldree v. Cargill, Inc.*, 758 F. Supp. 704, 707 (M.D. Fla. 1990).

4. Offering to sell any of 3M's products at a price and/or in a manner that would constitute a violation of § 501.160(2), Florida Statutes.

5. 3M further requests that Defendant be required to file, within seven days of the Court's order, a sworn statement detailing its compliance with the terms above and identifying all people and entities to whom Defendant made such representations since the pandemic declaration.

RULE 65(b)(1)(B) CERTIFICATION

I hereby certify that no efforts were made to give notice to Defendant of this Motion for Temporary Restraining Order; and, for the reasons stated above, no such notice should be required.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01(j), 3M requests oral argument with respect to the motion for preliminary injunction and believes one hour shall be sufficient.

Dated: May 6, 2020

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

3M COMPANY,

Plaintiff,

v.

Case No.: No. 8:20-cv-1003-T-35CPT

TAC2 GLOBAL LLC,

Defendant.

_____ /

**ORDER GRANTING PLAINTIFF 3M COMPANY’S MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY
INJUNCTION**

THIS CAUSE is before the Court upon Plaintiff 3M Company’s (“Plaintiff” or “3M”) Motion for Temporary Restraining Order (“TRO”) and Preliminary Injunction (the “Motion”).

On May __, 2020, Plaintiff 3M Company filed the Motion, seeking to enjoin Defendant TAC2 Global, LLC (“Defendant” or “TAC2 Global”) from (1) using any of the 3M Marks (as defined in Plaintiff’s Complaint) in commerce; (2) holding itself out to consumers and/or the public as an authorized distributor or vendor of 3M-brand products, or holding itself out as having any affiliation, connection, or association with 3M in any way; (3) falsely representing that 3M has increased the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis or that 3M has required or authorized others to increase the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis; and (4) offering to sell any of 3M’s products at a price and/or in a manner that would constitute a violation of § 501.160(2), Florida Statutes. 3M further requested that Defendant be required to file

an affidavit detailing and confirming its compliance with the Court's orders. The Court has considered the Motion, memorandum of law, and verified declarations and is otherwise fully advised in the premises. The Court concludes that the issuance of a TRO is warranted.

To obtain a TRO, a movant must show: (1) a substantial likelihood of success on the merits; (2) that the preliminary injunction or TRO is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm the preliminary injunction or TRO would cause the other litigants; and (4) that the preliminary injunction or TRO would not be adverse to the public interest. *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1035 (11th Cir. 2001). Under Federal Rule of Civil Procedure 65(b)(1), the Court may enter a TRO without notice to the adverse party or its attorney only if (1) specific facts in the affidavit clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (2) the movant's attorney certifies in writing any efforts made to give notice and why such notice should not be required. Plaintiff has met these requirements.

Plaintiff has demonstrated a likelihood of success on the merits of its claims under the Lanham Act 15 U.S.C. § 1125(a)(1)(B) as well as its state law claims for dilution, trademark infringement, and unfair competition, and Florida's Unfair and Deceptive Trade Practices Act ("FDUTPA"). Defendant would irreparably harm Plaintiff by continuing its use of Plaintiff's trademarks for the sale of counterfeit or non-existent 3M-brand products. Because the continued infringement upon Plaintiff's trademarks causes irreparable harm, Plaintiff has demonstrated that without a temporary restraining order it will suffer immediate and irreparable injury before Defendant can be heard in opposition to the

Motion. The harm to Plaintiff is not outweighed by any interest to the public. To the contrary, it is in the public interest to temporarily restrain Defendant from using Plaintiff's trademarks to sell, or attempt to sell, counterfeit and non-existent 3M-brand products at exorbitant prices during the height of a global pandemic.

Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff's Motion for Temporary Restraining Order is GRANTED as follows:

1. Defendant and all persons acting on behalf of TAC2 Global are hereby temporarily restrained from using any of the 3M Marks, as defined in the Motion, in commerce.

2. Defendant and all persons acting on behalf of TAC2 Global are hereby temporarily restrained from holding themselves out to consumers and/or the public as authorized distributors or vendors of 3M-brand products, or holding themselves out as having any affiliation, connection, or association with 3M in any way.

3. Defendant and all persons acting on behalf of TAC2 Global are hereby temporarily restrained from falsely representing that 3M has increased the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis or that 3M has required or authorized others to increase the prices of 3M-brand N95 respirators as a result of the COVID-19 crisis.

4. Defendant and all persons acting on behalf of TAC2 Global are hereby temporarily restrained from offering to sell any of 3M's products at a price and/or in a manner that would constitute a violation of § 501.160(2), Florida Statutes.

5. Defendant is also required to file, within seven days of this order, a sworn statement detailing its compliance with the terms above and identifying all people and entities to whom Defendant made such representations since the pandemic declaration.

6. This TRO will remain in effect for 14 days from the time of this order, or until this Court may rule on Plaintiff's Motion for Preliminary Injunction, whichever is sooner. This Court may, however, for good cause, extend that period of time. TAC2 Global may also consent to an extension of this restraining order.

7. The bond requirement is waived. No measurable costs or damages are imposed on TAC2 Global.

8. Plaintiff's Motion for Preliminary Injunction is referred to Magistrate Judge Christopher P. Tuite to conduct a hearing and issue a Report and Recommendation. The hearing will be held _____ in the United States Courthouse, Courtroom 12B, Sam M. Gibbons United States Courthouse, 801 North Florida Avenue, Tampa, Florida 33602 or by other means as directed by Magistrate Judge Tuite.

9. Plaintiff is directed to immediately serve TAC2 Global with a copy of this Order.

DONE and ORDERED this ____ day of May, 2020 at ____am/pm.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE