

**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 (JLR)(JW)

Jury Trial Demanded

**MEMORANDUM OF LAW
IN SUPPORT OF PLAINTIFF 3M COMPANY'S MOTION
FOR DEFAULT JUDGMENT AND PERMANENT INJUNCTION**

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I. PRELIMINARY STATEMENT

In 2020, the world faced the largest public health crisis in modern history, and sadly New York City was the epicenter of the crisis. The rapid and exponential growth in the number of COVID-19 cases in the United States around that time placed increased pressure on healthcare personnel to treat patients, regardless of access to proper personal protective equipment (“PPE”). 3M’s PPE products, including 3M-brand N95 respirators, were in immediate need to protect medical professionals, first responders, and others working on the front lines of the crisis. As a leading provider of PPE, 3M is committed to getting its PPE in the hands of those who needed it most in these unprecedented times. To meet the growing demand, 3M ramped up respirator production, but the demand exceeded the supply, especially in virus hotspots like New York City.

Defendant used this particular time of desperation to fabricate false associations with 3M and trade off of 3M’s famous brand and goodwill for self-gain—all at the immeasurable expense of 3M, but more importantly at the expense of healthcare workers, first responders, and the public at-large. Here, Defendant falsely portrayed an affiliation with and authorization by 3M to sell 3M-brand respirators, and in doing so offered 3M-brand N95 respirators to New York City’s Office of Citywide Procurement at inflated prices. However, Defendant is not, and has never been, an authorized distributor, agent, broker, or vendor of 3M products, has no right to use 3M’s famous 3M marks, and has no authority to make offers or solicit orders on 3M’s behalf. Defendant’s exploitation of a global health disaster to confuse and deceive government officials into believing that Defendant is an authorized representative of 3M’s products—and offering those products for sale at inflated prices—threatens irreparable harm to 3M’s brand and to those desperately in need of PPE, including healthcare workers working on the front lines of COVID-19.

The damage to the famous 3M brand and its associated goodwill as a result of Defendant’s unlawful conduct is ongoing, immeasurable and irreparable, and has the potential to define the 3M

brand in the eyes of consumers for years to come. Indeed, Defendant's offer to sell 3M-brand N95 respirators supposedly subject to "acceptance...at the full discretion of 3M" at a price that is 400-600% higher than 3M's list price gives the false impression that 3M inflated its prices and condoned price-gouging in the midst of a national emergency. This is not, and has never been the case, and is antithetical to 3M's organizational mission and values. As a result of the foregoing, on May 5, 2020, the court granted a preliminary injunction in favor of 3M.

On June 24, 2020, 3M notified the Court that the United States Attorneys' Office for the Southern District of New York brought a three-count criminal Complaint against Defendant's principal, Mr. Ronald Romano, in a proceeding stylized *U.S.A. v. Romano*, Case No. 1:20-cr-00585-ALC (S.D.N.Y. 2020) against Defendant's president, based on the same conduct 3M alleged against Defendant in this proceeding. This action was deferred pending the criminal proceeding until September 29, 2022, when 3M notified the Court that Defendant pled guilty to one count of Conspiracy to Violate the Defense Production Act.

To date, Defendant has neither appeared in this lawsuit nor responded to the Complaint despite 3M duly serving Defendant with the Summons and Complaint, as well as notices related to the TRO and PI. Defendant's default leaves 3M without any assurance that Defendant will cease its unlawful conduct or any safeguard against future unlawful conduct by Defendant. 3M seeks to resolve this lawsuit via the entry of a default judgment and permanent injunction against Defendant. As discussed herein, both are warranted.

II. STATEMENT OF FACTS

A. COVID-19 and the National Emergency

In 2020, the world saw an outbreak of a highly contagious virus, known as COVID-19, creating an international state of emergency. *See* Dkt. No. 23, ¶12. At the time of Defendant's infringement, guidelines recommend that healthcare personnel wear respiratory protection, like

3M's N95 respirator, when interacting with infected patients in order to minimize the workers' risk of exposure to the virus. Dkt. No. 23, ¶13. According to the Center for Disease Control and Prevention, illnesses resulting from exposure "range[] from very mild (including some with no reported symptoms) to severe, including illness resulting in death." *See id.*, ¶12. N95 respirators can prevent virus-carrying particles from reaching the wearer when appropriately selected, fitted, and worn over the mouth and nose. *See* Dkt. No. 14, ¶5. 3M-branded N95 respirators are one of three respirator levels that meet the National Institute of Occupational Safety and Health standards for minimum filtration efficiency levels as prescribed by regulation 42 C.F.R. Part 84. *Id.*

B. The Parties and the Products

1. 3M, and its Famous Brand and Trademarks

For decades, 3M has been a leading provider of personal protective equipment for healthcare professionals, industry workers and the public. *See* Dkt. No. 14, ¶4. 3M is a leading manufacturer of N95 respirators (*id.*), and has sold N95 respirators in the United States under the 3M brand name for decades. *See* Dkt. No. 15, ¶10. Since the outbreak began, the public has become familiar with 3M as a manufacturer of the N95 respirators and other equipment essential to protecting healthcare personnel and workers from exposure to airborne particles, including viruses like COVID-19. *See* Dkt. No. 14, ¶13 & Dkt. No. 15, ¶17.

Over the past century, 3M invested hundreds of millions of dollars in advertising, promoting, offering for sale, and selling its vast array of goods and services under its standard-character mark "3M" and inset 3M design mark (together, the "3M Marks"):

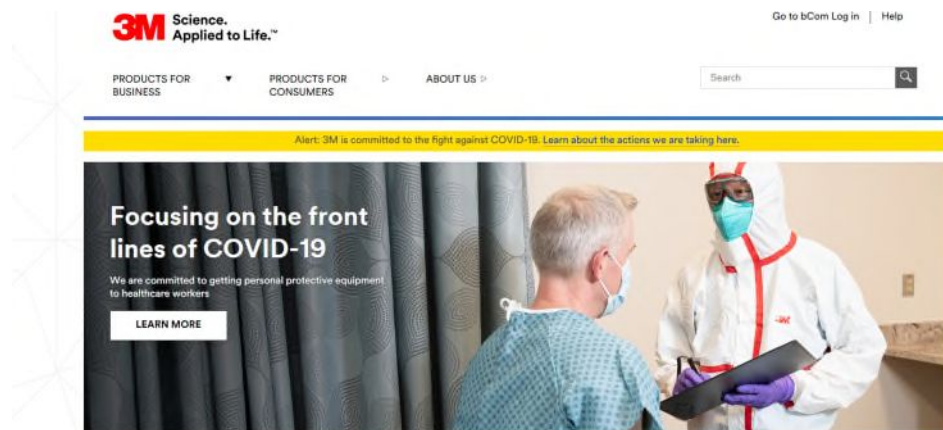


Dkt. No. 23, ¶17. 3M also uses its famous "3M Science. Applied to Life" slogan (the "3M Slogan") in connection with the promotion of its goods and services. *Id.*

During this period, 3M's goods and services offered under its 3M Marks have been the subject of widespread, unsolicited media coverage and critical acclaim. *Id.*, ¶18. Goods and services offered under 3M Marks also enjoy enormous commercial success, with annual revenues exceeding hundreds of millions of dollars. *Id.* To protect its rights over the 3M Marks, 3M obtained federal trademark registrations for these marks, including, but not limited to, U.S. Trademark Reg. Nos.: (i) 3,398,329, covering the standard-character 3M mark for International Classes 9 and 10 for, *inter alia*, respirators (the “‘329 Registration”), (ii) 2,793,534, which covers the 3M design mark in, *inter alia*, International Class 10 for respirators (the “‘534 Registration”), and (iii) 5,469,903, which covers the 3M Slogan in a number of Int. Classes, including Int. Class 9 for facial masks and respirators (the “‘903 Registration”). Dkt. No. 23, ¶19. The ‘329, ‘534, and ‘903 Registrations are valid, in effect, and on the Principal Trademark Register. *See id.* The ‘329 and ‘534 Registrations are “incontestable” within the meaning of 15 U.S.C. § 1065. *See id.*, ¶20.

2. 3M's Production and Sale of N95 Respirators During COVID-19

3M is proudly “on the front lines of COVID-19”:



3M is providing the heroic individuals on the front lines of the battle against COVID-19 with 3M-brand N95 respirators, which “are considered the gold standard by medical workers and public-health officials.” Dkt. No. 23, ¶21. Since the outbreak of COVID-19, 3M has doubled its global output rate of respirators (including N95 respirators) to 1.1 billion per year to ensure that

an adequate supply of its respirators is available to governments and healthcare personnel. *Id.* ¶24. 3M has also invested the necessary capital and resources to double its current global production of 1.1 billion 3M-brand N95 respirators per year to 2 billion per year. *See id.*

3. Defendant and its Purported Business

Defendant purportedly operates out of Englishtown, New Jersey. Dkt. No. 23, ¶30. Defendant does not appear to have any website or social media. *Id.* Defendant's president, Mr. Ronald Romano, appears to sell vehicles as his primary business. *Id.*

4. Defendant's False and Deceptive Formal Quote to New York City

Defendant is not, and has never been, a licensed or authorized distributor, agent, or representative of 3M-branded N95 respirators. Dkt. No. 23, ¶31. Yet, on or about March 30, 2020, Defendant 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 3M-brand N95 respirators. *Id.* Defendant stated that it would sell the respirators for \$6.05 per mask for 2 million 3M 8210 respirators and for \$6.35 per mask for 5 million 3M 1860 respirators. *See id.* As shown below, Defendant's mark-up over 3M's listed prices at the time was more than five times as much:

3M Model	3M's Per-Mask Price	Defendant's Per-Mask Price	Markup
1860	\$1.27	\$6.35	500%
8210	\$1.02-\$1.31	\$6.05	460-590%

In its one-page Formal Quote, Defendant reproduced 3M's marks *nine times* and referenced 3M's headquarters in St. Paul, Minnesota, seeking to imply a connection that does not exist. Dkt. No. 23, ¶32. Defendant also attached to the Formal Quote a 3M Technical Specification Sheet for both Models of 3M-brand N95 respirators that Defendant offered for sale. *See id.* 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 also 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.*

Based on Defendant’s Formal Quote, Ms. Roberson prepared an “Evaluation Request – Bid Document Review” as part of the City’s quality-assurance measures. Dkt. No. 23, ¶33. In the Evaluation Request, New York City officials twice identified Defendant as a “vendor” of 3M-brand, N95 Model 8210 and 1860 respirators. *Id.* However, the New York City officials were mistaken. Defendant is not, and never has been, an authorized distributor, vendor, or representative of 3M’s products. Defendant also does not have, and has never had, an association or affiliation with 3M. *Id.* Defendant’s Formal Quote is permeated with false, misleading, and/or deceptive statements. For example, in the Formal Quote, Defendant 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 chooses the plant.*** Order may be shipped in whole or in part.

Dkt. No. 23, ¶35.

Defendant is not authorized to solicit purchase orders from customers for submission to 3M for approval. Dkt. No. 23, ¶35. Nor is Defendant authorized to state how, where, or in what quantity such orders would be filled. *Id.* The Formal Quote does not accurately describe how 3M fills N95 orders. *Id.*, ¶36.

The same day that Ms. Roberson received the Formal Quote, she contacted Eileen Simmons, a 3M Business Development Manager for government markets, for verification of Defendant’s claim. Dkt. No. 23, ¶37. Ms. Simmons informed Ms. Roberson that Defendant was not associated with 3M, and so that potential sale was averted. *Id.* However, there is nothing to

prevent Defendant 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. *Id.*

3M commenced this action against Defendant on April 10, 2020, asserting claims under federal and New York law for trademark infringement, unfair competition, false endorsement, false association, false designation of origin, false advertising, and deceptive acts and practices. *See* Dkt. No. 1 (as re-filed at Dkt. No. 9). The Summons issued on April 13, 2020 and 3M duly served the Defendant with the Summons and Complaint on April 14, 2020. *See* Dkt. No. 18.

On April 24, 2020, 3M filed an application (the “Application”) for a temporary restraining order and preliminary injunction against Defendant. *See* Dkt. No. 12. In support of 3M’s Application, it submitted: (i) a Memorandum of Law; (ii) the Declaration of Charles Stobbie; (iii) the Declaration of David A. Crist; and (iv) the Declaration of A. John P. Mancini, Esq.. *See* Dkt. Nos. 13-16. 3M served all of the aforementioned documents on Mr. Romano on April 22, 2020 before filing them on April 24, 2020. *See* Dkt. Nos. 13-16. In the Application, 3M sought an Order, pursuant to FED. R. CIV. P. 65(a), that directed Defendant to show cause (the “Order to Show Cause”) why this Court should not preliminarily enjoin Defendant, its agents, servants, employees, officers, attorneys, and all persons and entities in active concert or participation with any of them, from engaging in any of the following acts and conduct during the pendency of this lawsuit:

- a. using the “3M” trademarks (the “3M Marks,” as defined in the Application), the slogan “3M. Science Applied to Life” (the “3M Slogan”), and any other word, name, symbol, device, or combination thereof that is confusingly similar to the 3M Marks and/or the 3M Slogan, for, on, and/or in connection with the manufacture, distribution, advertising, promoting, offering for sale, and/or sale of any goods or services, including, without limitation, Plaintiff’s 3M-brand N95 respirators, during the pendency of this action, and
- b. engaging in any false, misleading, and/or deceptive conduct in connection with 3M and its products, including, without limitation, representing itself as being an authorized distributor, vendor, agent, representative, retailer, and/or licensee of 3M and/or any of 3M’s products (including, without limitation, 3M-brand N95

respirators); falsely representing to have an association or affiliation with, sponsorship by, and/or connection with, 3M and/or any of 3M's products; falsely representing that 3M has increased the price(s) of its 3M-brand N95 respirators; and offering to sell any of 3M's products at a price and/or in a manner that would constitute a violation of GBL § 369-R.

See Dkt. No. 12, ¶¶1(a)-(b).

In the Application, 3M also sought an Order, pursuant to FED. R. CIV. P. 65(b), seeking a TRO and requesting substantially identical relief, from the date of this Court's granting of 3M's Application, through and including the Date of the Show Cause Hearing. *See* Dkt. No. 12, ¶2.

On April 24, 2020, the Court granted 3M's Application for the Order to Show Cause in its entirety. *See* Dkt. No. 17. Pursuant to the Order to Show Cause, 3M duly served Mr. Romano with the aforementioned documents via personal service on April 24, 2020 at 5:20 pm. *See* Dkt. No. 19. On May 5, the Court entered its Findings of Fact and Conclusions of Law in connection with 3M's Application, and granted a preliminary injunction in favor of 3M. *See* Dkt. No. 23.

On June 24, 2020, 3M notified the court that on May 21, 2020, the United States Attorney's Office for the Southern District of New York ("USAO") initiated a three-count criminal Complaint against Defendant's principal in a proceeding stylized *U.S.A. v. Romano*, Case No. 1:20-cr-00585-ALC (S.D.N.Y. 2020) (the "Criminal Proceeding"). *See* Dkt. No. 28. In the Criminal Proceeding, the USAO charged Defendant's principal, Mr. Ronald Romano, with, *inter alia*, conspiracy to violate the Defense Production Act, attempt and conspiracy to commit wire fraud, and fraud by wire, radio or television. *See* Criminal Proceeding Dkt. No. 9. On December 17, 2021 the Court entered an order deferring this action until completion of the Criminal Proceeding before further prosecution of the civil claims in connection with this action. Dkt. No. 31.

On May 31, 2022, in the Criminal Proceeding, Mr. Romano pled guilty to one count of Conspiracy to Violate the Defense Production Act. Criminal Proceeding Dkt. No. 63. During that hearing, after being sworn to state the truth, Mr. Romano admitted the following:

THE COURT: What is it you did that makes you guilty of that crime?

THE DEFENDANT: In early 2020, at the outset of the COVID-19 pandemic and at a time when the city and state governments were in need of a reliable supply of masks, I and others agreed to attempt to procure and resell at a profit this important personal protective equipment, or PPE. One part of our agreement included an attempt to obtain large quantities of scarce resources, mainly face masks, to sell to New York City. I understood at the time that we were attempting to acquire resources that were in short supply and were needed by the city and its hospitals.

As president of the company on March 31, 2020, I submitted proposals for prices for respirators that were much higher than market rates. At that time I understood that I falsified references, and prices submitted were higher than 3M list prices. I knew this was unlawful.

Though I am grateful that the city of New York never purchased these masks, I deeply regret my actions and apologize to the Court and the United States government for this conduct.

Criminal Proceeding Dkt. No. 63, at Tr. 15:3-20.

On November 29, 2022 the Clerk entered a Certificate of Default. Dkt. No. 39. On December 12, 2022, the Court directed 3M to file with the Court: (1) Proposed Findings of Fact and Conclusions of Law; (2) an Inquest Memorandum of Law, accompanied by supporting Affidavits and Exhibits; and (3) a Permanent Injunction Memorandum of Law. Dkt. No. 42.

III. LEGAL STANDARDS

3M seeks a default judgment, and conversion of the preliminary injunction into a permanent injunction.

A. Default Judgment

“In determining whether to grant a motion for default judgment, a court within this district considers three factors: (1) whether the defendant’s default was willful; (2) whether defendant has a meritorious defense to plaintiff’s claims; and (3) the level of prejudice the non-defaulting party would suffer as a result of the denial of the motion for default judgment.” *Nespresso USA, Inc. v. Africa America Coffee Trading Co. LLC*, 2016 WL 3162118, at *2 (S.D.N.Y. June 2, 2016)

(entering default judgment in trademark case). “Once the Court finds that these factors favor the plaintiff” (*Nespresso USA, Inc.*, 2016 WL 3162118, at *2), the “Court must follow a two-step procedure for the entry of judgment against a party who fails to defend: (1) the entry of default, and (2) the entry of a default judgment.” *Mattel, Inc. v. www.fisher-price.online*, 2022 WL 2801022, at *2 (S.D.N.Y. July 18, 2022) (entering default judgment, permanent injunction in trademark case).

B. Permanent Injunction

Under the Lanham Act, a district court has authority to grant injunctive relief to prevent further violations of a plaintiff’s trademarks. *See* 15 U.S.C. § 1116. A district court also has the authority to grant a permanent injunction on a motion for default judgment. *See, e.g., Kelly Toys Holdings, LLC v. alialialiLL Store*, 2022 WL 1948311, at *12 (S.D.N.Y. May 19, 2022) (entering permanent injunction against defaulting defendant in trademark case); *Moonbug Ent. Ltd. v. A20688*, 2022 WL 1239586, at *2 (S.D.N.Y. Apr. 26, 2022) (granting permanent injunction after default by counterfeiters of plaintiff’s trademarks).

A court should issue a permanent injunction “when a plaintiff has succeeded on the merits and has demonstrated that (1) it suffered irreparable harm; (2) that remedies available at law are inadequate to compensate for that injury; (3) that the balance of hardships between the parties warrants such a remedy; and (4) that the public interest would not be disserved by the issuance of an injunction.” *Diageo N. Am., Inc. v. W.J. Deutsch & Sons Ltd.*, 2022 WL 4093752, at *10 (S.D.N.Y. Sept. 7, 2022); *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

IV. LEGAL ANALYSIS

A default judgment is appropriate because Defendant’s default indicates that it is likely to continue threatening 3M’s carefully curated brand in the absence of a default judgment. A permanent injunction likewise is appropriate because: (i) 3M demonstrated actual success on the

merits based on Defendant's default, as well as the evidence that 3M has presented in support of its claims; (ii) 3M is entitled to a presumption of irreparable harm under the TMA, which Defendant has not rebutted, and because 3M can demonstrate actual irreparable harm in the form of damage to the quality of its goods and its reputation/goodwill; (iii) 3M has no adequate remedy at law; (iv) the balance of equities favors issuing a permanent injunction; and (v) entering a permanent injunction against Defendant would serve the public's interest in avoiding confusion about the source and quality of goods and services during the COVID-19 global pandemic.

A. The Entry of a Default Judgment Against Defendant is Appropriate

Each of the three default-judgment factors favor 3M. Defendant's failure to appear in this case and respond to the Complaint or any other notice it received from 3M (i) "indicates willful default," and (ii) prevents this Court from determining whether Defendant "might be able to present any meritorious defense to [3M's] claims." *Nespresso USA, Inc.*, 2016 WL 3162118, at *2 n.3. 3M also would suffer prejudice in the absence of a default judgment in the form of "impaired reputation, brand dilution, goodwill lost, and the destruction of the inherent value of the [3M] Marks." *Off-White LLC v. anogar-32*, 2022 WL 846755, at *2 (S.D.N.Y. Mar. 22, 2022) (entering default judgment, permanent injunction in trademark case).

3M also satisfied the two-step procedure for obtaining a default judgment. The first step "simply formalizes a judicial recognition that a defendant has, through its failure to defend the action, admitted liability to the plaintiff." *Mattel, Inc.*, 2022 WL 2801022, at *2. 3M satisfied the first step by obtaining the Certificate of Default from the Clerk of this Court.

Under the second step, "the Court must determine whether allegations against the defaulting party are well-pleaded" under the familiar standards of *Iqbal* and *Twombly*. *Mattel, Inc.*, 2022 WL 2801022, at *2. Given that 3M's allegations satisfied the *higher* burden of obtaining the preliminary injunction issued in this lawsuit, 3M's allegations pass muster under *Iqbal*, and

Twombly. See *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 165 (2d Cir. 2020) (establishing a “likelihood of success” on the merits for purposes of a preliminary injunction is a “heavier burden” than establishing plausibility under *Iqbal* and *Twombly*). But even in the absence of the preliminary injunction, 3M’s allegations plausibly establish Defendant’s liability.

3M’s federal and state trademark infringement and unfair competition claims have two elements, that: “(i) [the] 3M Marks and Slogan are valid and entitled to protection, and (ii) Defendant is using the famous 3M Marks and Slogan in a manner that is likely to create consumer confusion.” *3M Co. v. Performance Supply, LLC*, 458 F. Supp. 3d 181, 192 (S.D.N.Y. 2020). Because 3M’s federal trademark registrations are incontestable and/or on the Principal Trademark Register, the 3M Marks are valid. See *id.* at 193. All of the *Polaroid* factors (which assess likelihood of confusion) tip decidedly in 3M’s favor given that Defendant jeopardized the reputation of the 3M brand and caused actual confusion by reproducing the 3M Marks *in toto* to create the false impression that it had the authorization to sell products associated with the 3M brand and Marks. See *id.* at 193-96. 3M established its claim for Lanham Act false advertising given that Defendant made false representations, which caused actual deception. See *id.* at 196-97. 3M also established its claims under NY G.B.L. §§ 349 and 350 because Defendant’s conduct “presents a substantial threat to public health and safety.” *Id.*

B. The Entry of a Permanent Injunction Against Defendant Likewise is Appropriate

1. 3M Has Established Actual Success on the Merits of its Claims

3M established success on the merits of all of its claims via Defendant’s default. See, e.g., *Pitbull Productions, Inc. v. Universal Netmedia, Inc.*, 2007 WL 3287368, at *6 (S.D.N.Y. Nov. 7, 2007) (entering default judgment, permanent injunction in trademark case; “[b]ecause the

defendants' default constitutes an admission of liability, Pitbull has established success on the merits"). Independent of Defendant's default, 3M prevailed on the merits of its claims.

a. 3M's Trademark Claims

As stated *supra*, for 3M to prevail on its federal and state claims for trademark infringement and unfair competition (collectively, the "Trademark Claims"), 3M has to satisfy two elements, namely: (i) that its 3M Marks and 3M Slogan are valid and entitled to protection, and (ii) Defendant is using the famous 3M Marks and/or 3M Slogan in a manner that is likely to create consumer confusion. *See Lexington Mgmt. Corp. v. Lexington Capital Partners*, 10 F. Supp. 2d 271, 277 (S.D.N.Y. 1998) (holding that the same standard governs Section 32 and 43(a)(1)(A) claims); *Avela, Inc. v. Estate of Marilyn Monroe, LLC*, 131 F. Supp. 3d 196, 209 (S.D.N.Y. 2015).

i. 3M Established the Validity of its 3M Marks and 3M Slogan

3M's incontestable '329 and '534 Registrations constitute *conclusive* evidence of 3M's ownership, and the validity of the 3M Marks. *See* 15 U.S.C. § 1115(b); *accord* 15 U.S.C. § 1065; *Lexington Mgmt. Corp.*, 10 F. Supp. 2d at 277-78. 3M's '903 Registration constitutes *prima facie* evidence of 3M's ownership, and the validity of the 3M Slogan. *See* 15 U.S.C. § 1115(a). Accordingly, 3M established the first element of its Claims: ownership of a valid trademark.

ii. 3M Established That Defendant's Use of the 3M Marks and Slogan is Likely to Cause Confusion as to Source and/or Quality

"The likelihood-of-confusion prong turns on whether ordinary consumers are likely to be misled or confused as to the source of the product in question because of the entrance in the marketplace of [the junior user's] mark." *Guthrie Healthcare System v. ContextMedia, Inc.*, 826 F.3d 27, 37 (2d Cir. 2016). To determine whether a likelihood of confusion exists, courts in this Circuit use the eight "*Polaroid*" factors, namely: "1) the strength of the plaintiff's mark; 2) the

degree of similarity between marks; 3) the proximity of the products or services; 4) the likelihood that the senior user will ‘bridge the gap’ into the junior user’s product or service line; 5) evidence of actual confusion between the marks; 6) whether the defendant adopted the mark in good faith; 7) the quality of defendant’s products or services; and 8) the sophistication of the parties’ customers.” *Lexington Mgmt. Corp.*, 10 F. Supp. 2d at 278 (referencing *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961)). As demonstrated herein, 3M established that the balance of relevant *Polaroid* factors weighs overwhelmingly in its favor.

b. The First *Polaroid* Factor: the 3M Marks and Slogan are Strong

“The strength of a mark refers to its distinctiveness, that is to say, the mark’s ability to identify goods sold under it as coming from one particular source.” *Streetwise Maps, Inc. v. VanDam, Inc.*, 159 F.3d 739, 743 (2d Cir. 1998). Courts measure a mark’s distinctiveness in two ways, namely: (i) conceptual strength (*i.e.*, “inherent distinctiveness”), and (ii) commercial strength (*i.e.*, “acquired distinctiveness”). *See id.* at 743-44.

i. The 3M Marks are Conceptually Strong

To determine a mark’s conceptual strength, courts use “Judge Friendly’s familiar test for the inherent distinctiveness of trademarks in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11 (2d Cir. 1976).” *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 377 (2d Cir. 1997). “The *Abercrombie* test classifies verbal marks into four categories which run in a continuum: (1) generic, (2) descriptive, (3) suggestive, and (4) arbitrary or fanciful.” *Id.*

Here, “3M” is not a word; rather, it is a term that Plaintiff coined to identify and distinguish itself as the source of high-quality goods and services offered under the 3M brand, including its N95 respirators. Accordingly, the 3M Marks are fanciful and, thus, inherently distinctive when used for respirators. *Lane Capital Mgmt., Inc. v. Lane Capital Mgmt., Inc.*, 192 F.3d 337, 344 (2d

Cir. 1999) (“[A] fanciful mark is not a real word at all, but is invented for its use as a mark.”); *Landscape Forms, Inc.*, 113 F.3d at 377 (“[F]anciful trademarks are inherently distinctive [...]”).

ii. The 3M Marks are Commercially Strong and Famous

A mark is commercially strong if it has acquired “secondary meaning,” *i.e.*: “in the minds of the public, the primary significance of [the mark] [...] is to identify the source of the product rather than the product itself.” *Christian Louboutin, S.A. v. Yves Saint Laurent America Holdings, Inc.*, 696 F.3d 206, 216 (2d Cir. 2012).

The 3M Marks acquired secondary meaning as a matter of law because the 3M Marks are incontestable. *See Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 294 F.3d 383, 391 (2d Cir. 2002) (“Because FSLC continually maintained its registration of the mark, FSLC’s mark is incontestable and, as a matter of law, it has acquired secondary meaning.”).

3M also independently established that its 3M Marks and 3M Slogan acquired secondary meaning. 3M has invested millions of dollars in advertising, marketing, and promoting goods and services under the 3M Marks and 3M Slogan; goods sold under the 3M Marks and 3M Slogan, including 3M-brand N95 respirators, generate hundreds of millions of dollars in annual revenue; the 3M Marks and 3M Slogan are recognized and well-known in households around the U.S.; and 3M has been the exclusive source of goods and services offered under the 3M Marks and 3M Slogan for several decades. Dkt. No. 23, ¶¶17-18.

Several courts throughout the country have held that the foregoing establishes the commercial strength of the 3M Marks. *See, e.g., 3M Co. v. Christian Investments LLC*, 2012 WL 6561732, at *8 (E.D. Va. July 12, 2012) (“Plaintiff has used the 3M mark since 1906, it offers more than 50,000 products and services in a wide variety of fields and markets under the 3M mark, the 3M mark is distinctive and distinguishes the source of plaintiff’s products and services [...]”).

Based on the foregoing, the first *Polaroid* factor favors 3M.

c. The Second *Polaroid* Factor: Defendant Reproduced the 3M Marks and Slogan in Their Entirety

Defendant reproduced the 3M Marks and Slogan in their entirety in the Formal Quote and Technical Specification Sheets. Dkt. No. 23, ¶32. Accordingly, the second *Polaroid* factor favors 3M. *See Cadbury Beverages, Inc. v. Cott Corp.*, 73 F.3d 474, 480 (2d Cir. 1996) (“For the purpose of considering the question of the similarity of the marks, the district court correctly determined that as a matter of law these marks [*i.e.*, “COTT” v. “COTT”] are identical.”).

d. The Third *Polaroid* Factor: Defendant Purported to Sell the Same Products that 3M is Widely Known for Selling

It is commonplace knowledge that 3M manufactures N95 respirators. Dkt. No. 23, ¶16. Defendant’s offering of N95 respirators under the 3M Marks heightens the likelihood of consumers confusing the source of products from Defendant as originating from 3M. *See Guthrie Healthcare Sys.*, 826 F.3d at 39 (under the third *Polaroid* factor, courts consider “the subject matter of the commerce in which the two parties engage [...]”; finding a likelihood of confusion because, among other things, both parties provides healthcare-related goods and services); *Virgin Enterprises Ltd. v. Nawab*, 335 F.3d 141, 150 (2d Cir. 2005) (“[T]he closer the secondary user’s goods are to those the consumer has seen marketed under the prior user’s brand, the more likely that the consumer will mistakenly assume a common source.”). Thus, the third *Polaroid* factor favors 3M.

e. The Fourth *Polaroid* Factor: There is No “Gap” to Bridge

The fourth *Polaroid* “factor addresses the question of whether the two companies are likely to compete directly in the same market.” *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 239-40 (S.D.N.Y. 2012). When, as here, the parties’ goods are the same, this *Polaroid* factor is irrelevant because there is no gap to bridge. *See, e.g., Lexington Furniture Indus., Inc. v. Lexington Co., AB*, 2022 WL 13848274, at *3 (S.D.N.Y. Oct. 24, 2022) (granting permanent

injunction; both parties sold “home textiles, bedding, towels, pillows, and pillowcases, which directly compete”).

f. The Fifth *Polaroid* Factor: Defendant Actually Confused New York City Officials into Identifying Him as a 3M “Vendor”

Here, actual confusion is demonstrated by Ms. Roberson’s March 30 Evaluation Request, wherein New York City officials mistakenly identified Defendant as a “vendor” of 3M-brand N95 respirators. Dkt. No. 23, ¶¶33-34. Accordingly, the fifth *Polaroid* factor favors 3M. *See Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 259 (2d Cir. 1987) (“[S]ome evidence of actual confusion, the fifth *Polaroid* factor, further buttresses the finding of a likelihood of confusion.”).

g. The Sixth *Polaroid* Factor: Defendant Used the 3M Marks in Bad Faith

“A defendant’s good faith—or lack thereof—in adopting its mark is highly consequential among the *Polaroid* factors.” *Louis Vuitton Malletier v. Sunny Merchandise*, 97 F. Supp. 3d 485, 496 (S.D.N.Y. 2015). To be sure, “where the second-comer has adopted its mark in bad faith, the equitable balance is tipped significantly in favor of a finding of infringement. Courts have found a presumption of likelihood of confusion in such circumstances.” *Id.* Moreover, “‘actual or constructive knowledge’ of the prior user’s mark or dress may indicate an absence of good faith or bad faith.” *Heritage of Pride, Inc. v. Matinee of NYC*, 2014 WL 12783866, *11 (S.D.N.Y. June 20, 2014). Here, Defendant had both knowledge of 3M’s marks and a bad faith intent.

Prior to COVID-19, 3M’s federal trademark registrations placed Defendant on constructive notice of 3M’s rights in and to the 3M Marks. *See* 15 U.S.C. § 1072 (“Registration of a mark on the principal register [...] [constitutes] constructive notice of the registrant’s claim of ownership thereof.”). Subsequent to COVID-19, 3M’s manufacture and sale of 3M-brand N95 respirators has become common household knowledge. *See* Dkt. Nos. 14, ¶13; 14-4.

Accordingly, there is no question that Defendant adopted the 3M Marks with actual knowledge of 3M's rights therein. Thus, there is likewise no question that Defendant uses the 3M Marks to exploit the Marks' widespread fame and goodwill. This is textbook bad faith. *See Louis Vuitton Malletier*, 97 F. Supp. 3d at 496 (explaining that the sixth *Polaroid* factor "is an equitable inquiry which seeks to answer the overarching question of whether defendant adopted its mark with the intention of capitalizing on plaintiff's reputation and goodwill").

Based on the foregoing, the sixth *Polaroid* factor favors 3M. *See Paddington Corp. v. Attiki Importers & Distrib.*, 996 F.2d 577, 586-87 (2d Cir. 1993) (when actual or constructive knowledge "is accompanied by similarities so strong that it seems plain that deliberate copying has occurred, we have upheld findings of bad faith").

h. The Seventh *Polaroid* Factor: Defendant's Use of the 3M Marks Irreparably Jeopardizes the Reputation of the 3M Brand

The seventh *Polaroid* factor concerns "whether the senior user's reputation could be jeopardized by virtue of the fact that the junior user's product is of inferior quality." *Louis Vuitton Malletier*, 97 F. Supp. 3d at 497-98. As discussed, that is precisely what will happen to carefully curated 3M brand if Defendant continues using the 3M Marks to create the false impression that it is an authorized representative of 3M products and/or in connection with unlawful price-gouging. Accordingly, the seventh *Polaroid* factor favors 3M. *See Henegan Const. Co., Inc. v. Heneghan Contracting Corp.*, 2002 WL 1300252, at *8 (S.D.N.Y. June 12, 2002) ("The fact that the plaintiff has maintained high-quality services for so many years makes it more likely that it would be damaged if its reputation were placed beyond its control."); *Cache, Inc. v. M.Z. Berger & Co.*, 2001 WL 38283, at *12 (S.D.N.Y. Jan. 16, 2001) (explaining that defendants' use of infringing name leaves plaintiff's reputation in the hands of defendant).

i. The Eighth *Polaroid* Factor: in the Height of COVID-19, Normally Prudent Purchasers Made Rash Purchasing Decisions

The eighth and final *Polaroid* factor concerns “the sophistication of the consumers and the degree of care likely to be exercised in purchasing the product.” *Coty Inc. v. Excell Brands, LLC*, 277 F. Supp. 3d 425, 456 (S.D.N.Y. 2017). In the current pandemic, purchasers of N95 respirators are government entities and hospitals and healthcare providers. *See, e.g.*, Dkt. No. 14, ¶25. These customers are generally sophisticated and prone to exercise high degrees of care; however, the current state of emergency has stymied the ability of customers to take the time and conduct the diligence necessary to show extensive care. For example, around the same time period, to obtain purported 3M-brand N95 respirators as quickly as possible, one New York City procurement official offered to drive an unknown distance, late at night, to inspect the respirators. *See id.* Accordingly, in this unique environment, the eighth *Polaroid* factor favors 3M.

j. All of the *Polaroid* Factors Strongly Favor 3M

In sum, each of the relevant *Polaroid* factors strongly favor 3M. This “powerful showing of a likelihood of confusion” (*Guthrie Healthcare Sys.*, 826 F.3d at 46), combined with the overwhelming strength and validity of the 3M Marks, Defendant’s bad faith, and Defendant’s default, establish that 3M succeeded on the merits of its Trademark Claims.

2. 3M’s False Advertising Claim

“To prevail on a Lanham Act false advertising claim, a plaintiff must establish that the challenged message is (1) either literally or impliedly false, (2) material, (3) placed in interstate commerce, and (4) the cause of actual or likely injury to the plaintiff.” *Church & Dwight v. SPD Swiss Precision Diagnostics*, 843 F.3d 48, 65 (2d Cir. 2016) (entering permanent injunction).

In the Formal Quote, Defendant made detailed factual representations concerning the nature of 3M’s business operations. *See* Dkt. No. 23, ¶34. For example, Defendant represented that, “[d]ue to the national emergency, acceptance of the purchase order is at the full discretion of 3M.” *Id.* Defendant further represented in the Formal Quote that 3M allegedly ships its products

CIF, and that 3M will determine the production site for the order. *Id.* However, these representations are false on their face. *See id.* ¶¶35-36; *see also Church & Dwight Co., Inc.*, 843 F.3d at 65 (“A plaintiff may establish falsity in two different ways. To establish literal falsity, a plaintiff must show that the advertisement either makes an express statement that is false or a statement is false by necessary implication, meaning that the advertisement’s words or images, considered in context, necessarily and unambiguously imply a false message.”).

Given the level of specificity in these representations in the Formal Quote, they also are likely to – and, in fact, *did* – deceive a reasonable consumer into believing that Defendant is an authorized distributor of 3M products and/or has an association or affiliation with 3M. Sadly, in this case, Defendant’s Formal Quote actually misled and deceived experienced buyers in the Procurement Office of one of the world’s largest cities into believing that Defendant was an authorized “vendor” of approximately \$45 million-worth of 3M-brand N95 respirators. *See id.* ¶¶31-37. This deception and reliance, combined with the literally false nature of Defendant’s representations in the Formal Quote, establish the materiality of those representations and the injury they caused to 3M’s reputation. *See Church & Dwight Co., Inc.*, 843 F.3d at 70-72; *see also Merck Eprova AG v. Gnosis S.p.A.*, 760 F.3d 247, 259 (2d Cir. 2014).

Based on the foregoing, 3M succeeded on its claim under Section 43(a)(1)(B) of the Lanham Act for false advertising.

3. 3M’s Claims for Deceptive Acts and Practices, and False Advertising, Under GBL §§ 349, 350

3M also prevailed on its New York claims for deceptive acts and practices, and false advertising. GBL § 349 makes unlawful “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York. GBL § 350 prohibits “[f]alse advertising in the conduct of any business.” To prevail on a claim under either of these sections, a

plaintiff must establish (1) that the defendant engaged in an act or practice that is deceptive or misleading in a material respect and (ii) that the plaintiff suffered injury as a result thereof. *See Ortho Pharmaceutical Corporation v. Cosprophar, Inc.*, 32 F.3d 690, 697 (2d Cir. 1994).

Moreover, in addition to creating confusion about the source and quality of the purported 3M-brand N95 respirators that Defendant attempted to sell, Defendant's conduct diverted critical public resources, which places lives at risk. *See* Dkt. No. 15, ¶29. These resources include the time spent by public officials to pursue false/fraudulent leads and the money spent to purchase products at inflated prices. *Id.* 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. *Id.*

Accordingly, because Defendant's trademark infringement, unfair competition, and false advertising presents a substantial threat to public health and safety, 3M also prevailed on the merits of claims for deceptive acts and practices, and false advertising, under GBL §§ 349, 350. *See Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 265 (2d Cir. 1995) (GBL § 349 claim stated where defendant provided false information to regulatory agency tasked with protecting public health and safety and defendant's dissemination of false information "was detrimental to the public interest"); *In re Houbigant Inc.*, 914 F. Supp. 964, 983-84 (S.D.N.Y. 1995) (GBL §§ 349, 350 claims stated where defendants were part "of an unlawful scheme" to, *inter alia*, "deceive customers as to the source and origin of the products" at issue).

C. 3M Will Continue to Suffer Irreparable Harm Absent a Permanent Injunction

Following a finding of trademark infringement, under the Trademark Modernization Act ("TMA"), a plaintiff seeking a permanent injunction "shall be entitled to a rebuttable presumption of irreparable harm[.]" 15 U.S.C. § 1116(a). Regardless, courts have issued permanent injunctions "where intellectual property rights holders have shown a potential loss of goodwill and control

over their trademarks.” *Kelly Toys Holdings*, 2022 WL 1948311, at *11; *see U.S. Polo Ass’n v. PRL USA Holdings, Inc.*, 800 F. Supp. 2d 515 (S.D.N.Y. 2011) (granting request for permanent injunction and finding irreparable harm where likelihood of confusion as to source and likelihood of injury to reputation and goodwill were shown); *Really Good Stuff, LLC v. BAP Investors, L.C.*, 813 F. App’x 39, 44 (2d Cir. 2020) (“The loss of reputation and goodwill constitutes irreparable harm.”).

Here, in addition to the TMA’s un rebutted statutory presumption affording 3M a presumption of irreparable harm, Defendant’s conduct irreparably harmed 3M in two respects, namely: (i) quality and (ii) reputation. Given such injury to 3M’s goodwill and reputation, monetary damages alone are inadequate to compensate 3M.

The 3M brand and Marks are synonymous with superior quality. This is not a coincidence. For more than a century, 3M invested hundreds of millions of dollars in advertising and marketing products under its 3M Marks and 3M Slogan. Dkt. No. 23, ¶17. 3M also implements rigorous quality-control standards to ensure that all products offered under its famous 3M Marks and 3M Slogan are consistent and of the highest quality. Dkt. No. 15, ¶9.

However, 3M cannot control whether the products that Defendant is offering for sale and/or selling outside of its authorized trade channels adhere to 3M’s rigorous quality-control standards. *See* Dkt. No. 15, ¶¶28-29. This constitutes irreparable harm. *See El Greco Leather Prods. Co., Inc. v. Shoe World*, 806 F.2d 392, 395 (2d Cir. 1986) (“One of the most valuable and important protections afforded by the Lanham Act is the right to control the quality of the goods manufactured and sold under the holder’s trademark.”); *Mister Softee, Inc. v. Tsirkos*, 2015 WL 7458619, *5 (S.D.N.Y. Nov. 23, 2015) (finding irreparable harm because “Plaintiffs have no actual control over the quality of Defendant’s products or services”).

Defendant also used the 3M Marks to create the false impression that it is authorized to solicit large orders for 3M-brand N95 respirators at inflated prices on 3M's behalf during the COVID-19 global pandemic. No amount of money could repair the damage to 3M's brand and reputation if it is associated with price-gouging at the expense of healthcare workers and other first responders in the midst of the COVID-19 crisis. *See* Dkt. No. 15, ¶¶25-27. This too constitutes irreparable harm. *Kelly Toys Holdings*, 2022 WL 1948311, at *11.

Based on the foregoing, 3M has established irreparable harm.

D. Remedies at Law are Inadequate to Compensate 3M for the Damage to its Goodwill and Reputation

“The first and second factors in the *eBay* test often blend together, and in each case, ‘the court must actually consider the injury the plaintiff [has] suffere[ed] . . . , paying particular attention to whether the “remedies available at law, such as monetary damages, are inadequate to compensate for that injury.” ’ ” *Lexington Furniture Indus., Inc.*, 2022 WL 13848274, at *11. 3M's careful efforts to curate its branding are undercut by the confusion caused by Defendant's actions. Dkt. No. 23, ¶¶15-29 & ¶¶30-37. Accordingly, 3M is likely to be irreparably injured in the absence of a permanent injunction because 3M would lose control over its reputation and goodwill, and such reputation harm cannot be easily quantified or remedied through money damages alone. *See U.S. Polo Ass'n*, 800 F. Supp. 2d at 541-42.

Showing that there is no adequate remedy at law “is satisfied where the record contains no assurance against defendant's continued violation of plaintiff's rights.” *Montblanc-Simplo GMBH v. Colibri Corp.*, 692 F. Supp. 2d 245, 259 (E.D.N.Y. 2010). Permanent injunctions are typically granted when there is “a threat of continuing violations.” *Tiffany (NJ) LLC v. Dong*, 2013 WL 4046380, at *7 (S.D.N.Y. Aug. 9, 2013). Where “the defendant defaults, a court may infer that the

defendant is willing to, or may continue its infringement.” *Kelly Toys Holdings*, 2022 WL 2072567, at *12. Such an inference is warranted here.

E. The Balance of Hardships Tips Decidedly in 3M’s Favor

It would not be a “hardship” for Defendant to continue to refrain from engaging in unlawful activities related to 3M’s brand (which constitute, *inter alia*, trademark infringement, false association, and price-gouging). This is especially true given that Defendant sells products unrelated to 3M’s brand (*e.g.*, vehicles and automobiles), and could continue doing so under a permanent injunction. Dkt. No. 23, ¶30; *see WpIX, Inc. v. lyl, Inc.*, 691 F.3d 275, 287 (2d Cir. 2012) (“[I]t is axiomatic that an infringer [...] cannot complain about the loss of ability to offer its infringing products”; “[t]he balance of hardships, therefore, clearly tips in plaintiffs’ favor.”); *see also Kelly Toys Holdings*, 2022 WL 1948311, at *8 (“[T]he balance of hardships overwhelmingly favors Plaintiff since it has suffered and will continue to suffer irreparable harm to its business, profits, goodwill and reputation as a result of Defendants’ willful infringement of the” plaintiff’s trademarks); *Church & Dwight Co., Inc.*, 843 F.3d at 72 (“Especially in view of the district court’s findings that Defendant was intentionally deceptive in its advertising, we cannot say that the relief ordered by the district court [granting a permanent injunction] went beyond curing the effects of the harm caused by Defendant’s falsity.”).

F. Issuing a Permanent Injunction Would Serve the Public Interest of Avoiding Confusion and Protecting Healthcare Workers and Critical Infrastructure Operations from the Risk of Ongoing Confusion

During the height of the COVID-19 pandemic, consumers and government officials, including those in New York City, lacked the time and resources they would have in normal purchasing environments to ensure that sellers are who they purport to be (*e.g.*, authorized distributors of 3M-brand products), and that products are what sellers claim they are (*e.g.*, genuine 3M-brand products). Accordingly, when the public sees purported 3M-brand N95 respirators

available for sale, they rely on the 3M Marks and 3M Slogan associated with the 3M brand to indicate that the respirators offered are genuine and adhere to the 3M brand's rigorous standards.

Granting a permanent injunction would serve the public interest by guarding it against ongoing confusion by Defendant. "[T]he public has an interest in not being deceived—in being assured that the mark it associates with a product is not attached to good of unknown origin and quality." *Mattel, Inc. v. 1622758984*, 2020 WL 2832812, at *5 (S.D.N.Y. May 31, 2020) (entering permanent injunction) (quoting *N.Y.C. Triathlon, LLC v. Triathlon Club, Inc.*, 704 F. Supp. 2d 305, 344 (S.D.N.Y. 2010)).

Defendant sought to exploit the time when consumers made rapid purchasing decisions during the height of COVID-19 in the United States by falsely representing itself as an authorized distributor of 3M-brand products, and offering to sell those products at exorbitantly high prices. Dkt. No. 23, ¶¶31-32. Not only is this unlawful conduct likely to confuse and deceive the public about the source and quality of purported 3M-brand products offered under the 3M Marks and 3M Slogan, but also it creates a false purchasing environment materially different from, and irreparably harmful to, the carefully curated 3M brand and customer experience.

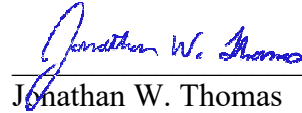
Accordingly, unless this Court permanently restrains and enjoins Defendant's unlawful conduct, the public will continue suffering harm in the form of confusion and deception about the source and quality of the purported 3M-brand N95 respirators that Defendant offered to sell for exorbitantly high prices.

V. CONCLUSION

Based on the foregoing, 3M respectfully requests that this Court grant the enclosed [Proposed] Final Default Judgment and Permanent Injunction, which permanently enjoins Defendant's use of the 3M Marks and Slogan. 3M also respectfully requests any further relief the Court deems just and equitable.

Dated: January 12, 2023
New York, New York

MAYER BROWN LLP



Jonathan W. Thomas

A. John P. Mancini

Andrew J. Calica

Jordan Sagalowsky

Daniel M. Rosales

1221 Avenue of the Americas

New York, New York 10020-1001

Tel.: (212) 506-2500

Email: JWThomas@mayerbrown.com

Email: JMancini@mayerbrown.com

Email: ACalica@mayerbrown.com

Email: JSagalowsky@mayerbrown.com

Email : DRosales@mayerbrown.com

Carmin R. Zarlenga (*pro hac vice*)

1999 K Street, NW

Washington, D.C. 20006

Tel.: (202) 263-3000

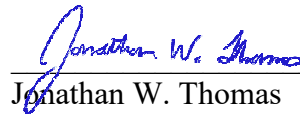
Email: CZarlenga@mayerbrown.com

Attorneys for Plaintiff 3M Company

CERTIFICATE OF SERVICE

I, Jonathan W. Thomas, hereby certify that, on January 12, 2023, I filed a true and correct copy of the foregoing document, titled *Memorandum of Law in Support of Plaintiff 3M Company's Motion for Default Judgment and Permanent Injunction*, using this Court's ECF Filing System. I also certify that, on January 12, 2023, 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


Jonathan W. Thomas

Attorney for Plaintiff 3M Company