

## 3M Files Trademark Suit Over COVID-19 Mask Price-Gouging

By **Bill Donahue**

*Law360 (April 10, 2020, 1:44 PM EDT)* -- 3M is accusing a New Jersey company of violating federal trademark law by reselling the company's N95 masks at drastically increased prices, one of the first major trademark lawsuits stemming directly from the COVID-19 pandemic.

In a complaint filed Friday in Manhattan federal court, 3M claims Performance Supply LLC offered to sell millions of the masks to New York City at a "grossly inflated" cost of more than 500% the actual price.

The lawsuit doesn't claim they were counterfeit products, but that Performance Supply misused the 3M trademark and other confusing tactics to mislead the city into thinking the company — and its prices — were authorized by 3M.

"3M does not — and will not — tolerate individuals or entities deceptively trading off the fame and goodwill of the 3M brand and marks for personal gain," the company wrote. "This is particularly true against those who seek to exploit the surge in demand for 3M-brand products during the COVID-19 global pandemic."

Such price-gouging is illegal under New York state law, but 3M isn't actually suing over that. Instead, it's claiming that such behavior, combined with the use of its name, violated federal and state trademark law.

"The mere association of 3M's valuable brand with such shameless price-gouging harms the brand, not to mention its more serious threat to public health agencies that are under strain in the midst of a worldwide pandemic," the company wrote.

To be clear, the lawsuit only involves accusations about the "3M" trademark. The acronym N95 is merely a technical designator used by multiple companies, not a trademark.

But 3M is the largest American producer of the mask, and has become closely linked to the product as the COVID-19 crisis has grown. Last week, the company had a public clash with President Donald Trump

after he threatened to use federal law to force the company to produce more. According to 3M, more such legal action could be coming as the pandemic unfolds.

"This lawsuit is only one of the many legal tools 3M is using to protect the public," the company wrote in a statement Friday. "3M is also making referrals to law enforcement authorities, taking down websites with fraudulent or counterfeit product offerings, removing false or deceptive social media pages, and sending cease and desist letters as a first step prior to taking further legal action."

Performance sent an offer to New York officials in March, offering to sell 7 million N95 masks for more than \$6 each, according to Friday's complaint. The masks carry a list price of just over \$1.

The letter was crafted to make Performance appear to be an authorized 3M distributor, according to the lawsuit. At one point, the company told New York that "due to the national emergency, acceptance of the purchase order is at the full discretion of 3M and supplies are based upon availability."

The case is one of the first major trademark lawsuits stemming directly from the pandemic. Two days earlier, a company that makes a government-approved test kit called Coronacide sued a "nefarious" company for offering the test without permission.

A representative for Performance Supply could not immediately be located for comment on Friday.

3M is represented by A. John P. Mancini of Mayer Brown LLP.

Counsel information for Performance Supply LLC is not yet available.

The case is 3M Company v. Performance Supply LLC, case number 1:20-cv-02949, in the U.S. District Court for the Southern District of New York.

--Editing by Janice Carter Brown.