

3M Wins Its First NY Injunction Over COVID-19 Price-Gouging

By Frank G. Runyeon

Law360, New York (May 4, 2020, 6:10 PM EDT) -- A Manhattan federal judge on Monday granted 3M a preliminary injunction against a New Jersey outfit accused of violating federal trademark law and grossly inflating the price of N95 protective masks amid the COVID-19 pandemic.

U.S. District Judge Loretta A. Preska ruled in favor of the maker of the medical-grade respirators after 3M Co. claimed that Performance Supply LLC would cause lasting damage if it were allowed to offer N95 masks at four to six times their actual cost, as it had done in offering the masks to a New York City agency, while implying that 3M approved the price hike.

In her order, Judge Preska banned Performance Supply from using 3M's name to sell or market its products or to pose as its authorized distributor, vendor or other business partner. The decision marks the first injunction for 3M against an unauthorized reseller alleged to be price-gouging desperate customers — it has 10 such lawsuits pending.

"We're very happy with the result and we hope it's the first of many," said 3M's in-house senior litigation counsel William Childs, before pausing to consider an even better alternative. "Well, we hope that people will stop doing it."

As of Monday morning, court records indicated that Performance Supply had been served papers but had not filed any replies or entered a counsel of record. Several calls to company president Ron Romano were not answered.

The judge also entered an extensive finding of fact alongside her Monday injunction order, confirming allegations that 3M originally brought against the company in April.

Performance Supply attempted to fool New York city procurement officers into buying "seven million of 3M's N95 respirators for 500% more than 3M's list price" using 3M's distinctive red-letter logo, the judge found, leading those city workers to believe that the supply company was authorized to send out formal bids on 3M's behalf, which it is not.

"It is no surprise that defendant actually confused New York city procurement officials into believing that defendant was an authorized vendor of 3M brand N95 respirators," Judge Preska reasoned, setting up her rationale for enjoining the supplier from using 3M's name. Performance Supply "is trading off the widespread commercial recognition and goodwill" of 3M by using its branding to sell the trademark N95 masks, she said in her decision.

Thankfully, said 3M counsel at Mayer Brown LLP to Law360 on Monday, the city did not ultimately place the order, which would have up-charged the municipality at the center of the pandemic by \$30 million. It is unclear what, if any, supply of N95 masks Performance Supply has on hand, the attorney added.

"The public has an interest in avoiding confusion about the source and quality of goods and services," Judge Preska said in her ruling. "This is especially true during the global COVID-19 pandemic" when government officials are relying on the quality of the 3M brand.

Counsel information for Performance Supply was not immediately available on Monday.

3M is represented by Carmine R. Zarlenga, A. John P. Mancini, Andrew J. Calica, Jordan Sagalowsky, Jonathan W. Thomas, Richard F. Bulger, Richard M. Assmus and Kristine M. Young of Mayer Brown LLP.

The case is 3M Co. 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 Adam LoBelia.