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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADIDAS AMERICA, INC., an Oregon corporation; and ADIDAS AG, a foreign entity, Plaintiffs, v. THOM BROWNE INC., a Delaware corporation, Defendant.	No. 1:21-cv-05615-JSR

ADIDAS'S RESPONSE TO THE COURT'S FEBRUARY 28 ORDER FOR SUPPLEMENTAL BRIEFING IN CONNECTION WITH ADIDAS'S RULE 60(B) MOTION FOR A NEW TRIAL

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Question 1: Can even an innocent failure to produce documents during discovery constitute "misconduct" within the meaning of Federal Rule of Civil Procedure 60(b)(3), or must the moving party demonstrate some greater degree of culpability, such as negligence, gross negligence, or recklessness?

Yes, even an innocent failure to produce documents during discovery may constitute "misconduct" under Rule 60(b)(3). Nearly every court of appeals, and every court within this District, to address the Court's question has answered it in the affirmative.

In 1965, the Fifth Circuit held in *Bros Inc. v. W. E. Grace Manufacturing Co.* that the Rule 60(b)(3) analysis is "the same whether there was evil, innocent, or careless, purpose." *Id.*, 351 F.2d 208, 211 (5th Cir. 1965). In 1988, the First Circuit cogently explained why even an innocent discovery failure can constitute misconduct, given the rule's inclusion of "fraud" and "misrepresentation" :

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions—elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. *Cf. United States v. One Douglas A–26B Aircraft*, 662 F.2d 1372, 1374-75 n.6 (11th Cir. 1981) (to avoid redundancy, "misrepresentation" in Rule 60(b)(3) must encompass more than false statements made with intent to deceive). We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents—at least avoidable ones—should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." *Bros. Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir. 1965), *cert. denied*, 383 U.S. 936, 86 S.Ct. 1065, 15 L.Ed.2d 852 (1966).

Anderson v. Cryovac, Inc., 862 F.2d 910, 923 (1st Cir. 1988), *aff'd*, 900 F.2d 388 (1st Cir. 1990); *see also West v. Bell Helicopter Textron, Inc.*, 803 F.3d 56, 67 (1st Cir. 2015) (quoting same approvingly).

The Ninth Circuit has similarly held that "misconduct" under Rule 60(b)(3) may be "either knowing or accidental." *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990). The Fourth Circuit recently held (again) that a "failure to disclose evidence, . . . irrespective of whether that failure was inadvertent or intentional, [constitutes] misconduct under Rule 60(b)(3)." *Morgan v. Tincher*, 90 F.4th 172, 180 (4th Cir. 2024) (citing *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994) as holding that "the plaintiff's failure to produce the requested, clearly pertinent discovery material was misconduct under Rule 60(b)(3), irrespective whether that failure was inadvertent or intentional"). And the Federal Circuit has held: "As used in Rule 60(b)(3), 'misconduct' does not demand proof of nefarious intent or purpose as a prerequisite to redress. . . . The term can cover even accidental omissions . . . ." *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 818 F.3d 1320, 1328 (Fed. Cir. 2016) (cleaned up).[1]

At least three courts in this District have held that an "accidental" or "inadvertent" failure to produce requested discovery may constitute "misconduct" under Rule 60(b)(3). *See Thomas v. City of New York*, 293 F.R.D. 498, 503-04 (S.D.N.Y. 2013) (Carter, J.) (holding that "misconduct" may be "accidental or inadvertent"); *Catskill Dev., L.L.C. v. Park Place Entmn't Corp.*, 286 F. Supp. 2d 309, 314 (S.D.N.Y. 2003) (McMahon, J.) ("[E]ven an accidental failure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of Rule 60(b)(3)."); *Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.*, No. 91 CIV.

[1] The Advisory Committee has not hesitated to amend the Federal Rules to clarify culpability requirements, and it has expressly abrogated appellate decisions in doing so. *See, e.g.*, *Aquino by Convergent Distribs. of Texas, LLC v. Alexander Cap., LP*, No. 21-cv-1355 (JSR), 2023 WL 2751541, at *8 (S.D.N.Y. Mar. 31, 2023) (Rakoff, J.) (noting that "the Advisory Committee's notes to the 2015 amendment to Rule 37(e) make clear" that the changes were "meant to reject" a decision by the Second Circuit regarding culpability requirements for spoliation sanctions). The fact that the Advisory Committee has not recommended amending Rule 60(b)(3) following the 1965, 1988, 1990, 1994, 2015, and 2016 appellate decisions discussed here confirms that those decisions correctly interpreted the term "misconduct."

2477 SWK LB, 1996 WL 524339, at *2 (S.D.N.Y. Sept. 13, 1996) ("Progressive correctly asserts that an adverse party's inadvertent failure to produce requested discovery material in its possession may constitute misconduct under Rule 60(b)(3).").

The Sixth Circuit interpreted "misconduct" slightly differently in an unpublished, per curiam opinion from 1996. *See Jordan v. Paccar, Inc.*, 1996 WL 528950, at *6 (6th Cir. 1996). In *Jordan*, the court opined that the term "misconduct" in Rule 60(b)(3) means "questionable behavior affecting the fairness of litigation," which "could reach *accidents that should have been avoided*, for instance a reckless approach to searching one's files for discoverable material." *Id.* (emphasis added); *see also Marinaccio v. Boardman*, 1:02-cv-831 (NPM), 2006 WL 8451659, at *4 (N.D.N.Y. June 26, 2006) ("All that is required is what has been shown, which is that Defendants accidentally failed to comply with Plaintiffs' discovery requests, and such failure was avoidable.").

In summary, nearly every court to address the issue has held that an innocent, inadvertent, or accidental failure to produce requested documents in discovery may qualify as misconduct under Rule 60(b)(3). And the one appellate decision purportedly in disagreement with the great weight of authority nonetheless held that *avoidable* accidents may also qualify—a very low threshold.

As the First Circuit explained in *Anderson*, however, the non-moving party's culpability "is not immaterial." *Anderson*, 862 F.2d at 925. To prevail on a Rule 60(b)(3) "misconduct" motion, the moving party must prove two elements: (1) the non-moving party engaged in misconduct; and (2) the misconduct "substantially interfered with [the moving party's] ability fully and fairly to prepare for, and proceed at, trial." *Id.* at 926. The non-moving party's culpability is not relevant to the first element. *See id.* But, if the non-moving party's withholding

of evidence "was knowing or deliberate," then there is a *presumption* of substantial interference under the second element. *See id.*; *see also Jones*, 921 F.2d at 879 ("Jones may be able to benefit from a presumption of substantial interference if she can demonstrate the misconduct was sufficiently knowing, deliberate or intentional."); *Thomas*, 293 F.R.D. at 504 ("If, however, the misconduct was intentional, 'the movant is entitled to a presumption that the misconduct substantially interfered with the movant's preparation of its case.' (citation omitted)).

The rationale underlying this presumption is the same "evidentiary rationale" underlying an adverse inference in the face of "a party's intentional destruction of evidence": i.e., "the common sense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998).

Thus, absent a showing that the non-moving party's misconduct "was knowing or deliberate," that party's culpability is not relevant to the Rule 60(b)(3) analysis. *See Anderson*, 862 F.2d at 925; *Thomas*, 293 F.R.D. at 504. Placing the non-moving party's conduct on the "continuum of fault—ranging from innocence through the degrees of negligence to intentionality"—therefore is not necessary. *See Reilly v. Natwest Markets Grp. Inc.*, 181 F.3d 253, 267 (2d Cir. 1999) (analyzing adverse inference sanctions).

Question 2: In light of the additional discovery that the parties have received, why were the four emails that form the basis of adidas's motion not produced during discovery, to what degree was Thom Browne (or its counsel) culpable for the failure to produce the emails and does that degree of culpability satisfy the aforementioned 'misconduct' standard under Rule 60(b)(3)?

Post-hearing discovery revealed that Thom Browne's failure to produce Emails 1-4 was intentional, or at the very least, grossly negligent. Thom Browne's misconduct thus easily clears the Sixth Circuit's (incorrect) "avoidable accident" threshold under the first element of Rule

60(b)(3) and likely warrants a presumption of substantial interference under the second element.

Thom Browne's Failure to Produce Email 1 Was Knowing, or at Least Grossly Negligent

Unlike Emails 2-4, Thom Browne's law firm Wolf Greenfield viewed Email 1 several times during the discovery period. Counsel's knowledge of the contents of Email 1 and subsequent failure to produce it shows that counsel's misconduct was knowing and deliberate.

[redacted] ECF 244-1 at 23:9-16. Between March 13 and March 17, 2022, Wolf Greenfield paralegals[2] Virginia Weeks and Cindy Babbit viewed Email 1 several times, despite Wolf Greenfield not typically reviewing any documents for responsiveness. ECF 242-2 at 1-2. Ms. Babbit marked Email 1 as "Responsive" on March 15. *Id.*at 2.

On April 6, Ms. Weeks departed from Wolf Greenfield's document production policy and personally coded all documents containing the word "adidas," including Email 1, as "Needs Further Review" in both the responsiveness and privilege fields in Relativity. ECF 242-2 at 1.

[redacted] ECF 244-4 at 3.

[2] As this Court has held, "The New York Rules of Professional Conduct require lawyers to adequately supervise non-lawyers . . . ." *Meyer v. Kalanick*, 212 F. Supp. 3d 437, 446 (S.D.N.Y. 2016) (Rakoff, J.); *see also* N.Y. Rule of Professional Conduct 5.3(a) ("A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate.")

At the hearing, Ms. Weeks claimed that she intended for Consilio to include in that "saved search" all documents that had been coded "Needs Further Review." Hearing Tr. at 87:2-6. She further testified that Consilio "misunderstood [her] instructions" and that she "did not see a written response" from Consilio. *Id.* at 88:11-14, 89:6-9. Ms. Weeks's emails, produced *after* the hearing, [redacted].

[redacted] *Id.* at 2 (emphasis added). When Ms. Weeks received that April 11 email, she not only knew the contents of Email 1; she knew that *she had personally coded Email 1 for responsiveness and privilege just five days earlier*. Ms. Weeks therefore knew (a) the damning contents of Email 1, (b) that she had removed Email 1 from production, and (c) that Email 1 would not be included in the "saved search" that Consilio created on April 11 to facilitate Wolf Greenfield's "privilege review."

Ms. Weeks's conduct with regard to Email 1 was therefore deliberate, or at the very least, reckless, and her testimony at the hearing was highly misleading.

As to Wolf Greenfield, the partners overseeing discovery in this case were unquestionably "responsible for the actions of non-lawyers acting at [their] direction, and for [their] failure to responsibly supervise them." *In re Sobolevsky*, 430 F. App'x 9, 18 (2d Cir. 2011). Such an egregious "failure to supervise non-lawyer staff constitute[s] sanctionable misconduct . . . ." *Id.*; *see also Benn v. Metro-North Commuter Railroad Co.*, No. 3:18-cv-737 (CSH), 2019 WL 6467348, at *7 (D. Conn. Dec. 2, 2019) ("Plaintiff's counsel's attempt to blame the tardy production of the February 2019 opinions on a paralegal cannot excuse his failure to supervise the discovery process and assure compliance with the deadlines set in this

matter. A lawyer is responsible for supervising the work that he delegates to paralegals or other non-lawyers and remains responsible for their work.").

Thom Browne Knowingly, or With Gross Negligence, Withheld All Four Emails

Like Email 1, Emails 2-4 were coded "Needs Further Review" in the responsiveness and privilege fields by Ms. Weeks on April 6, 2022. But, amazingly, [redacted] ECF 244-2 at 18:20–19:3, 20:9–22:18, 25:5-18, 31:12-19; *see also id.* at 40:3-8 [redacted] *Id.* at 57:7–58:5.

Although the Relativity document histories of Emails 1-4 do not reflect that Ms. Schuster reviewed them, [redacted] post-hearing discovery taken by adidas confirms that Wolf Greenfield's document review and production practices in this case were, at best, grossly negligent.

[redacted] ECF 244-1 at 58:9-16, 86:6–87:10. For her part, Ms. Weeks made an "assumption" that the documents mentioning adidas "would be reviewed either by an attorney or by the manage review team." Hearing Tr. at 91:11-12. But she did nothing to investigate whether her assumption was correct. She did not follow up with any attorneys. And as discussed above, Ms. Weeks also ignored Consilio's clear indication [redacted]

Ms. Weeks's decision to withhold "adidas" documents from production was a very serious action. Because this is a trademark case, documents mentioning adidas or its marks were the most likely to constitute—and as it turns out, actually *did* constitute—"smoking gun" evidence. *See* ECF 221 at 16 (collecting cases in which courts entered judgment as a matter of law based on convincing evidence of bad faith). Given the potential importance of such documents, Wolf Greenfield's partners should have taken special care to supervise Ms. Weeks and ensure that the "adidas" documents were reviewed by an attorney and produced to adidas. [redacted] *See Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees*, 212 F.R.D. 178, 181, 221 (S.D.N.Y. 2003) (Preska, J.) ("Our adversary system relies in large part on the good faith and diligence of counsel," and holding that the Federal Rules require "a coherent and effective system to faithfully and effectively respond to discovery requests"); *see also Markey v. Lapolla Indus., Inc.*, No. CV 12-4622 JS AKT, 2015 WL

5027522, at *19 (E.D.N.Y. Aug. 25, 2015) ("[N]either Attorney Sirotkin nor anyone at MAR made a 'reasonable inquiry' to determine what documents and other discovery Plaintiffs possessed before certifying that the Initial Disclosures were complete"), *adopted*, 2016 WL 324968 (E.D.N.Y. Jan. 26, 2016) ("[T]he fact that MAR forwarded Lapolla's discovery requests to Plaintiffs and that Plaintiffs were 'informed and involved clients' does not absolve MAR of its responsibility to competently supervise discovery").

[redacted] ECF 244-1 at 29:17–30:2, 64:2–65:12. Ms. Weeks testified at the hearing that if a document "was tagged 'needs further review,'" then either "Quincy Kayton or Claire Schuster" was *supposed* to review them. Hearing Tr. at 67:24–68:3; *see also* ECF 244-2 at 18:4-12, 28:8-21. But [redacted] ECF 244-1 at 30:13–31:21. [redacted] *Id.* at 33:4-9.

[redacted] ECF 244-2 at 21:2-11. [redacted] ECF 244-1 at 83:3-6, [redacted] ECF 244-2 at 24:11–25:18; ECF 241-1 at 34:21–35:12. [redacted]

[redacted] ECF 244-3 at 33:12–34:9. [redacted] ECF 241-1 at 17:7-16 (emphasis added).

[redacted] ECF 244-4 at TB00530220; ECF 244-3 at 42:14–43:19. [redacted] ECF 244-3 at 44:6-18.

Post-hearing discovery therefore confirmed that [redacted] and that, in essentially every respect, Wolf Greenfield's partners were at least grossly negligent in supervising document review and production in this case. *See A.V.E.L.A., Inc. v. Estate of Monroe*, 2014 WL 715540, at *3-4 (S.D.N.Y. Feb. 24, 2014) (Francis, M.J.) (holding that counsel's original search for copyright deposit records and belated production was "grossly negligent"); *see also Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 112 (2d Cir. 2002) (counsel's "purposefully sluggish" responses to questions about a failure to produce documents "may well have constituted sanctionable misconduct in their own right").

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Respectfully submitted,

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