IN THE UNITED STATES DISTRICT COURT
FOR THE 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.	Civil Action No. 1:21-cv-05615-JSR-RWL

DEFENDANT THOM BROWNE'S REPLY TO ADIDAS' OPENING SUPPLEMENTAL BRIEF RESPONDING TO QUESTIONS POSED BY THE COURT (DKT. 248)

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I. Reply to Question #1 – Innocent Mistakes Do Not Justify a New Trial

adidas is wrong that an innocent mistake can be misconduct under Rule 60(b)(3). According to adidas, "misconduct" means *all conduct* in not producing documents, and, thus, the "mis" has no meaning. This incorrect interpretation collapses Rule 60(b)(2) and Rule 60(b)(3)—it would not matter if the newly discovered evidence was concealed because of misconduct or not. This interpretation is not only contrary to common sense and the canons of statutory interpretation, but it is not supported by the case law or a plain reading of the rule.

In reaching its conclusion, adidas relies on *dicta* in decisions where a court did ***not*** find misconduct based on an innocent mistake that resulted in the non-production of information. Thom Browne analyzed most of adidas' cited cases in its opening brief, and will not repeat that analysis here. Dkt. 250 at 1-8. However, we note that while *Bros. Inc. v. W.E. Grace Mfg. Co.,* 351 F.2d 208, 211 (5th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), mentions "innocent" purpose, it still relates to *deliberate* conduct—filing of the false affidavit and strenuous arguments as to its importance. Moreover, *Bros.* confirms that conduct with an innocent purpose does not *automatically* guarantee a new trial, as adidas contends. Rather, the court emphasized that Rule 60 relief was warranted in that case because of unique circumstances.[1] *Id.*; *see also Anderson v. Cryovac, Inc.,* 862 F.2d 910, 923 (1st Cir. 1988) (Rule 60 relief may be awarded even if there was a finding of innocent purpose, "*depending upon the circumstances*"). The circumstances in which such drastic relief may be justified are limited, as they should be, especially after a jury verdict. In *Bros.*, there was no doubt that the false affidavit affected the outcome of the summary judgment motion. 351 F.2d at 211. That cannot be said of the Four Emails here, because the Four Emails do

[1] For example, the fact that the dispute had been litigated through multiple courts, and had "occupied the attention of not less than 25 judges in the Fifth, Sixth, and Eighth Circuits," considerably magnified the impact of the false affidavit. *Bros.*, 351 F.2d at 209, n.1.

not even concern the Accused Products. *See* Dkt. 224 at 10-21. adidas has not met its burden of showing unique circumstances to support the grant of a new trial based on an innocent mistake.

Although the First Circuit in *Anderson* quotes this language from *Bros.,* its holding is not based on finding there was an innocent mistake; rather, it was the opposite. Dkt. 250 at 4-5. The non-production in *Anderson* was a **deliberate** decision not to produce; the court found "overwhelming evidence" of misconduct. 862 F.2d at 927. *Jones* and *Schultz* say, in *dicta*, that misconduct can be inadvertent or intentional (not innocent), relying on *Anderson*. But neither case found that the conduct at issue was inadvertent. *West Bell* and *Rembrandt* mention, again in *dicta*, that misconduct can include "accidental omissions" quoting *Anderson*. But neither case finds misconduct based on an innocent mistake. In *West Bell*, the court found that "the decision not to produce the information was a ***conscious, deliberate choice***." 803 F.3d 56, 71 (emphasis added).

Two cases relied on by adidas that were not discussed in Thom Browne's opening submission (Dkt. 250) merit further discussion: *Morgan v. Tincher*, 90 F.4th 172 (4th Cir. 2024) and *Rembrandt Vision Technologies, L.P. v. JJVC*, 818 F.3d 1320 (Fed. Cir. 2016).[2]

Morgan was an action for excessive police force. The defendant failed to disclose a prior lawsuit regarding the use of excessive force, which had facts "strikingly similar to [the] allegations against [defendant]" in the later case. 90 F.4th at 180. The defendant also falsely testified that there was no prior lawsuit. *Id.* at 180-81. The defendant answered an interrogatory directed to past

[2] adidas cites *Aquino v. Alexander Capital, LP,* 2023 WL 2751541 (S.D.N.Y. March 31, 2023), for the proposition that the Advisory Committee could have recommended revising Rule 60(b)(3) to exclude innocent mistakes, but did not do so. Dkt. 248 at 2, n.1. But there would have been no need to amend the rule in response to *dicta* about "innocent purpose" or "inadvertent conduct." Moreover, unlike *Aquino*, none of the cited decisions imposed a particular culpability *requirement*. In *Marinaccio v. Boardman*, 2006 WL 8451659 (N.D.N.Y. June 26, 2006), also cited by adidas, the court denied the motion for relief from summary judgment because the non-produced evidence was cumulative, as is the case here (Dkt. 224 at 20-21), and did not satisfy plaintiff's burden of proving that it was deprived of a full and fair opportunity to litigate its case. Dkt. 224 at 23-24.

excessive force cases before the non-disclosed case was filed, but he never supplemented his responses. The Fourth Circuit held that the defendant had a duty to supplement his interrogatory responses to disclose this information, which was known to him and his attorney. *Id.* at 176. Although the court in *Morgan* ruled that the failure to disclose the prior lawsuit was misconduct "whether the failure was inadvertent or intentional," the facts of that case showed intentionality—the attorney knew about the prior lawsuit but concealed it and the defendant lied about it at trial. These actions indicate a high level of culpability. The Fourth Circuit did not find that the failure to disclose was inadvertent. Those facts starkly differ from the innocent mistake here.

Rembrandt was a patent case, in which defendant's expert had conducted testing that contradicted his proffered opinions. The defendant never produced the results before trial. 818 F.3d at 1323. The expert also gave false testimony which formed the lynchpin of defendant's non-infringement defense. The Federal Circuit found that failing to produce the test results was misconduct, without determining whether the conduct was intentional or accidental, relying on *Anderson*. Defendant argued it was unaware of the test results, but the Court found that argument "strain[ed] credulity" given counsel's closing argument and that defendant requested the testing. *Id.* at 1323 & 1328. Thus, the conduct pointed to intentional, or at a minimum deliberate, conduct. The defendant also admitted that its expert testified falsely, and committed fraud. *Id.* at 1327. There was no finding that the misconduct was an innocent mistake.

II. Reply to Question #2 – Thom Browne Made an Innocent Mistake

With respect to the facts of what happened, adidas crosses the line from zealous advocacy to obfuscation of the undisputed, sworn testimony before this Court that shows despite reasonable, careful attempts to ensure all non-privileged responsive documents that hit on "adidas" were produced, an innocent misunderstanding led to the inadvertent non-production of the Four Emails.

A. All Post-Trial Evidence Establishes that Thom Browne and Thom Browne's Counsel Did Not Deliberately Withhold Emails 1-4.

adidas cites no support for its repeated assertions that Thom Browne's counsel or staff intentionally withheld Emails 1-4. *See, e.g.*, Dkt. 248 ("Br.") at 5 (counsel knew of the contents of Email 1 and "knowing[ly] and deliberate[ly]" failed to produce it); 6 (Ms. Weeks "knew" Email 1 would not be included in the saved search); *id.* (Ms. Weeks acted deliberately); 7 (counsel "deliberately withheld" Emails 1-4); 10 (Ms. Schuster reviewed and decided not to produce Emails 1-4). The lack of evidentiary citations confirms that none of the post-trial evidence supports these spurious allegations of intentional conduct.

adidas misrepresents the testimony, concocting a false narrative that Thom Browne's counsel concealed the Four Emails because of what they said. Not so. For example, adidas asserts that Ms. Weeks "*personally coded Email 1 for responsiveness and privilege*" (emphasis original) but neglects to mention the important fact that that coding was a *mass edit* to a large group of documents that hit on the search term "adidas"[3] (Br. at 6), as Mr. Henn acknowledged during the evidentiary hearing. Evidentiary Hearing Transcript ("EH Tr.") 75:8-11. No document was singled out for special treatment. That action was not misconduct. It was a reasonable and prudent action taken to identify documents that could be privileged even though they did not hit on a privilege term in view of the long-standing dispute between the parties. As such, Ms. Weeks did not "personally" review that specific document on that date, resulting in a tagging change.[4] Rather,

[3] adidas has repeatedly acknowledged the distinction between updates to a single document and a mass edit in Relativity as reflected in the document histories for the Four Emails. EH Tr. at 17:19-24; *see* Dkt. 233-12 (Bethany Decl., Ex. 12) at 5. The update here was a mass edit.

[4] To the extent adidas suggests that Ms. Weeks remembered the specific content of Email 1 when implementing the April 6th mass edit twenty days after "viewing" the document per the document history, Ms. Weeks testified that she did not recall the content of Email 1 (or Emails 2-4). EH Tr. 19:25-20:7; 75:3-7. Ms. Babbit also testified she did not recall the content of Email 1. *Id.*, 54:10-11; 57:19-58:1.

consistent with Ms. King's testimony, Ms. Weeks merely tagged a large group of documents "without actually looking at [them]." *Id*., 17:19-24.

Next, adidas asserts that Ms. Weeks knowingly removed Email 1 from production.[5] Br. at 6. This is categorically untrue as Email 1 was never in a queue for production. It was in a queue, along with other emails in the group to which it belonged, to be reviewed prior to production.[6] On March 15th, Ms. Babbit tagged Email 1 as responsive, but privileged. *Id*., 18:24-19:5. On April 6th, Ms. Weeks, who supervised Ms. Babbit, made a mass edit to a group of documents, including the Four Emails, that changed the tags to "needs further review" to ensure that such documents[7] would be reviewed for potential production. *Id*., 20:5-20; 65:25-66:4; 70:1-10; 91:8-12.

Perhaps most egregious is adidas' assertion that "[a]lthough the Relativity document histories of Emails 1-4 do not reflect that Ms. Schuster reviewed them, her sworn testimony shows that she did." Br. at 7. In so asserting, adidas directly contradicts its own witness' admission and the uncontroverted documentary evidence. Ms. King testified that the Four Emails were not viewed again, printed, or PDF'd for review after Ms. Week's April 6th mass edit, as evidenced by the document histories for each email. EH Tr. 21:8-19; 26:8-14; 36:14-19; 30:24-3; 39:18-21. Thus, it cannot be disputed that Ms. Schuster *did not* review Emails 1-4. adidas postulates that the only other possibility is that Ms. Schuster lied. Br. at 9. But as borne out by the post-trial testimony,

[5] adidas asserts that Thom Browne's counsel has failed to identify an attorney who instructed Ms. Weeks to withhold Emails 1-4 from production. Br. at 8. This is because *no one* instructed anyone to withhold any documents. EH Tr. 62:5-8; 85:5-7, 9-12; Dkt. 243-1 at 85:4-8; Dkt. 243-2 at 58:22; Dkt. 243-3 at 73:5-74:16. Rather, the emails were tagged for further review.

[6] adidas' disingenuously attempts to separate Email 1 from Emails 2-4, suggesting that Email 1 was treated differently because the document history shows that Ms. Babbit and Ms. Weeks viewed it. There is *no evidence* that Email 1 was treated any differently than any other document that was subject to the mass edit of April 6th. Its coding was based on the fact that it hit on the "adidas" search term; it was not based on any other content in the email. EH Tr. 70:1-10.

Ms. Schuster performed her second level review as assigned (EH Tr. 78:10-17; 83: 16-21; Dkt. 243-2 at 20:21-21:7, 21:8-11, 22:8-18; 25:2-18; 31:12-19; 40:3-8; 44:6-11; 57:7-58:5; 78:10-17; 83: 16-21) in a population of documents that inadvertently failed to include Emails 1-4 due to the innocent misunderstanding between Consilio and Thom Browne's counsel. *See,* Dkt. No. 250 at 10-12. That Ms. Schuster may have mistakenly believed that she reviewed all documents tagged "needs further review" does not mean she lied.[8]

B. All Post-Trial Evidence Establishes that Thom Browne and Thom Browne's Counsel Acted Reasonably and Carefully in Producing Non-Privileged, Responsive Emails.

Thom Browne and its counsel followed applicable standards to meet Thom Browne's obligations to meaningfully and fairly participate in discovery. Thom Browne's counsel undertook reasonable and diligent efforts to review the documents it collected from Thom Browne and to produce all non-privileged, responsive documents that hit on search terms. Dkt. 250 at 9-15. Thom Browne and its counsel were not negligent, grossly negligent, or reckless.

adidas' falsely claims no one among Thom Browne's counsel tried to make sure documents coded "needs further review" were reviewed (Br. at 7-10); but this contention is refuted by the testimony. Although adidas asserts that Ms. Kayton testified that [redacted] (Br. at 8), Ms. Kayton actually testified that [redacted]. Dkt. 243-1 at 86:6–87:10. As previously detailed (Dkt. 250 at 9-12), [redacted] EH Tr. 78:10-17; 78:10-17; 83:16-

[8] The saved search that Ms. Schuster reviewed the was titled: "All Potentially Privileged" search. EH Tr. 77:8-10, 86:15-24.

21; Dkt. 243-2 at 20:21-21:7, 21:8-11, 22:8-18; 25:2-18; 31:12-19; 40:3-8; 44:6-11; 57:7-58:5; 78:10-17; 83: 16-21. Ms. Weeks testified that Ms. Schuster told her that she planned to review the documents tagged "needs further review" and then confirmed that she did. EH Tr. 78:10-17. Thus, the evidence confirms that Wolf Greenfield tried to make sure documents tagged "needs further review" were reviewed, and believed that they had been reviewed.

Thom Browne's counsel also adequately supervised document review and production, including the "needs further review" documents. Dkt. 243-2 at 43:21-44:5; EH Tr. 70:1-10. Further, the witnesses testified that regular team meetings, involving both the paralegal staff and the attorneys, were held throughout the e-discovery process. EH Tr. at 89:6-9; Dkt. 243-1 at 33:4-15. There is no basis for adidas' assertion of lack of attorney supervision.

adidas posits that Ms. Weeks ignored Consilio's "clear indication" that the privilege review search would not include documents coded for further review (Br. at 8), but adidas fails to acknowledge that this "clarity" comes only with 20/20 hindsight. Both Ms. Weeks and Mr. Kerr testified that there was a miscommunication and misunderstanding between Thom Browne's counsel and Consilio regarding what documents were to be included in the final, overarching privilege review. Dkt. 243-3 at 54:14-55:10; EH Tr. At 24:4-8, 63:10-64:15; 65:25-66:4; 91: 8-12. Mistakes can happen, even when taking reasonable steps to ensure they do not (EH Tr. 41: 9-14, 22-25; 42:13-17). That is exactly what happened here.

The non-production of the Four Emails was not the result of any intentional act (as adidas alleges) or even of any conscious, deliberate decision not to produce the Four Emails. The overwhelming evidence is that the Four Emails were intended to be reviewed further, and to be produced if they were not privileged. adidas should not be allowed to throw out the jury's hard work and unanimous verdict to use Rule 60 to relitigate a case it lost.

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