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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 REPLY WITH REGARD TO
THE COURT'S FEBRUARY 28 ORDER FOR SUPPLEMENTAL BRIEFING

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Thom Browne's position boils down to two arguments: (1) this Court should ignore sixty years of authority holding that "misconduct" under Rule 60(b)(3) includes unintentional conduct and mistakes; and (2) because *paralegals* intentionally withheld the Four Emails from production and no *lawyer* conducted any "further review," no misconduct occurred. The Court should reject both of these flawed propositions and grant adidas's motion for a new trial.

1. The Overwhelming Weight of Authority Holds that "Misconduct" Under Rule 60(b)(3) Does Not Require Intentional Wrongdoing.

On the very first page of its supplemental brief, Thom Browne contends that its "failure to produce the Four Emails during discovery was an innocent mistake." ECF 250 at 1. But even if Thom Browne were correct that the mistake was "innocent" (it was not), such a failure to produce requested documents still constitutes "misconduct" under Rule 60(b)(3). *See Catskill Dev., L.L.C. v. Park Place Entmn't Corp.*, 286 F. Supp. 2d 309, 315 (S.D.N.Y. 2003); *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 818 F.3d 1320, 1328 (Fed. Cir. 2016); *West v. Bell Helicopter Textron, Inc.*, 803 F.3d 56, 67 (1st Cir. 2015); *Bros Inc. v. W. E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir. 1965).

Faced with decades of precedent, Thom Browne resorts to distinguishing cases on their facts—often misconstruing them. ECF 250 at 2. For example, Thom Browne begins with *Catskill* but neglects to bring to the Court's attention Judge McMahon's ultimate finding: "I conclude that the failure to produce *was the product of a mistake* on Mr. Carpinello's part." *Id.*, 286 F. Supp. at 315 (emphasis added). After crying "dicta" in the face of several other cases, Thom Browne next identifies "one outlier case," *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994). But *Schultz* is no outlier in "hold[ing] that an adverse party's failure, either inadvertent or intentional, to produce such obviously pertinent requested discovery material in its possession is misconduct under the meaning of Rule 60(b)(3)." *Id.* at 630. adidas has already brought to the Court's attention numerous

decisions reaching the same conclusion. In addition, courts across the country repeatedly have granted Rule 60(b)(3) motions based on inadvertent misconduct:

- **Second Circuit**: *Catskill*, 286 F. Supp. 2d at 315; *Marinaccio v. Boardman*, 2006 WL 8451659, at *4 (N.D.N.Y. June 26, 2006) ("mistakes were made"); *Judith Ripka Creations, Inc. v. Rubinoff Imports, Inc.*, 2004 WL 1609338, at *4 (S.D.N.Y. July 16, 2004); *DiPirro v. United States*, 189 F.R.D. 60, 66 (W.D.N.Y. 1999).
- **Fourth Circuit**: *Morgan v. Tincher*, 90 F.4th 172, 180 (4th Cir. 2024) ("irrespective whether that failure was inadvertent or intentional"); *Ebersole v. Kline-Perry*, 292 F.R.D. 316, 322 (E.D. Va. 2013).
- **Seventh Circuit**: *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) ("Fed. R. Civ. P. 60(b)(3) applies to both intentional and unintentional misrepresentations.").
- **Ninth Circuit**: *CLS Prod., LLC v. ConTech Int'l, LLC*, 2015 WL 1825449, at *6 (D. Or. Apr. 22, 2015); *Intel Corp. v. Advanced Micro Devices, Inc.*, 1993 WL 135953, at *4 (N.D. Cal. Apr. 15, 1993) ("an avoidable, accidental omission which is the equivalent of 'misconduct'").
- **Eleventh Circuit**: *Scott v. United States*, 81 F. Supp. 3d 1326, 1339 (M.D. Fla. 2015) ("the nondisclosure was unintentional").
- **Federal Circuit**: *Rembrandt*, 818 F.3d 1320 ("even an accidental omission qualifies").
- **State Supreme Courts**: *Phillips v. Stear*, 236 W. Va. 702, 712 (2016); *Corcoran v. McCarthy*, 778 N.W.2d 141, 148 (S.D. 2010); *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006).[1]

Thom Browne's invocation of the higher standard of Rule 60(b)(2)—i.e., outcome-

[1] Even using the narrowest interpretation of "misconduct" that any court has offered—the Sixth Circuit's "avoidable accident" standard—it is undeniable that Thom Browne's counsel engaged in misconduct.

determinative vs. substantial interference—misses the point. At issue here is a *party's* failure to produce *requested discovery* that was in its possession. A party has "an obvious duty to produce all discoverable documents in [its] possession." *Ali v. Dainese USA, Inc.*, 577 F. Supp. 3d 205, 221 (S.D.N.Y. 2021). The failure to do so—whether intentional or not—is a dereliction of that duty. Such misconduct, even if inadvertent, justifies a standard lower than Rule 60(b)(2), which applies to evidence *from any source* and need not implicate the opposing party's conduct at all.

2. Thom Browne's Counsel Was At Least Grossly Negligent.

In an effort to identify a scapegoat to excuse its misconduct, Thom Browne points an accusatory finger at everyone else involved in the process—paralegals, vendors, and former associates—but in the end, Thom Browne's law firm grossly mismanaged[2] the document review process, shirking legal and ethical duties, and causing severe prejudice to adidas. Thom Browne's supplemental filing makes at least four misleading assertions in this regard.

First, Thom Browne repeatedly alleges that "Thom Browne" and its "counsel" "did not know about the Four Emails." ECF 250 at 2, 4, 8 ("counsel was not even aware"), 12 ("Thom Browne . . . Did Not Know About Them"). In fact, numerous Thom Browne employees, including Mr. Thom Browne himself and the company's CEO, had actual knowledge of the Four Emails because they had sent or received them. As to whether "counsel" was aware of the Four Emails, Thom Browne appears to be drawing a distinction between what its *paralegals* knew and what its *lawyers* knew. But such a distinction flouts the New York Rules of Professional Conduct and should be rejected. *See Meyer v. Kalanick*, 212 F. Supp. 3d 437, 446 (S.D.N.Y. 2016) (Rakoff, J.); *Benn v. Metro-North Commuter Railroad Co.*, No. 3:18-cv-737 (CSH), 2019 WL 6467348, at *7

[2] Thom Browne urges the Court to rely on a dictionary definition of "misconduct," but curiously cites only the second and third definitions listed by Merriam-Webster. ECF 250 at 1 n.2. The *first* definition of "misconduct" in that dictionary is "mismanagement."

(D. Conn. Dec. 2, 2019) ("A lawyer is responsible for supervising the work that he delegates to paralegals . . . and remains responsible for their work.").

Wolf Greenfield's document review team (comprised of two paralegals) repeatedly viewed Email 1 before withholding it from production. Ms. Babbit reviewed Email 1 on March 13, again on March 15 (when she coded the document "Responsive"), and again on March 16. ECF 242-2 at 2-3. Ms. Weeks reviewed Email 1 on March 15, again on March 16, and yet again on March 17. *Id.* Counsel therefore had ample *actual* knowledge of at least Email 1. As to Emails 2-4, counsel unquestionably had constructive knowledge of them. *See Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (misconduct may be found if a party is "charged with knowledge" of "the missing document" and "did not divulge it"); *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 928 (1st Cir. 1988) ("Beatrice knew, or was charged with knowledge, of the Report"); *Shamis v. Ambassador Factors Corp.*, 34 F. Supp. 2d 879, 894 (S.D.N.Y. 1999) ("[A] party is charged with knowledge of . . . the contents of its available records.").

It was only two weeks after Ms. Babbit and Ms. Weeks reviewed the contents of Email 1 (Mr. Thom Browne stating "we shouldn't use the four bar because of adidas") *six times* that Ms. Weeks and Quincy Kayton decided that all documents referencing "adidas" needed to be pulled from production. ECF 242-2 at 1. Thom Browne's after-the-fact excuse that this was a "privilege" exercise strains credulity.

Second, Thom Browne blames its vendor, Consilio, arguing that Ms. Weeks told Consilio "to include all potentially privileged documents in a saved search" but, purportedly "[u]nbeknownst to Thom Browne's counsel, Consilio did not" do so. ECF 250 at 9. In fact,

[redacted]

[redacted] ECF 244-4 at 1. Ms. Weeks personally coded Emails 1-4 for responsiveness and for privilege. ECF 242-2 at 1; 242-5 at 1; 242-8 at 1; 242-11 at 1. Wolf Greenfield therefore *knew* that Consilio did not include the "adidas" documents in the saved search. At best, Wolf Greenfield recklessly [redacted] and then failed to do any quality checks.

Third, Thom Browne incredibly asserts that its "counsel took efforts to ensure that documents tagged 'needs further review' were, in fact, reviewed." ECF 250 at 10; *id.* at 9 (claiming "reasonable, routine precautions taken during the review process"); *id.* at 13 ("reasonable, affirmative precautions"). In support of this assertion, Thom Browne cites *only* (1) Ms. Weeks's request to Consilio and (2) the testimony of associate Claire Schuster. *Id.* at 10-12. As discussed above, Ms. Weeks undertook zero efforts to ensure that the "Needs Further Review" documents were actually reviewed; she apparently did not even read Consilio's response to her request. Hearing Tr. 89:4-9. As to Ms. Schuster, her testimony [redacted].

[redacted] ECF 244-2 at 20:9-17, 23:7-14. [redacted] *Id.* at 28:12-21. [redacted] *Id.*

at 24:11–25:4 (emphasis added). [redacted] *Id.* at 22:8-13, 25:5-19.

[redacted] ECF 244-1 at 30:13–31:21, 33:4-9. This is an admission of gross negligence because, according to Ms. Weeks, it was Ms. Kayton who encouraged Ms. Weeks to withhold "adidas" documents from production by marking them "Needs Further Review" in the first instance. Hearing Tr. 70:11–71:3.

Thus, Wolf Greenfield's partners undertook *zero* "efforts to ensure that documents tagged 'needs further review' were, in fact, reviewed." ECF 250 at 10. The only effort *potentially* taken was [redacted] But, the Relativity document histories show that Ms. Schuster never opened *any* of the Four Emails. ECF 242-2, 242-8, 242-11, 242-16. When asked, [redacted] ECF 244-2 at 44:15-18.

The only possible conclusions that can be drawn from the evidence before the Court are: [redacted] The former possibility reflects intentional misconduct. The latter reflects gross negligence—misconduct that no partner at Wolf Greenfield ever would have noticed because no partner actually oversaw the document review in any meaningful way, nor did they put

in place any procedures to make sure responsive documents did not fall through the cracks. *See Herman v. City of New York*, 334 F.R.D. 377, 388 (E.D.N.Y. 2020) (defendants were "grossly negligent" by failing to follow "[b]asic fundamental precepts of civil discovery," including "reviewing document production to confirm that documents that should be part of a file are in fact part of the production; [and] confirming that 'usual practices' and assumptions about documents are applicable to the present case"); *Kortright Cap. Partners LP v. Investcorp Investment Advisers Ltd.*, 330 F.R.D. 134, 139 (S.D.N.Y. 2019) (Pauley, J.) (party was "negligent" even though responsive document was "not part of the universe of documents that [the party] and its counsel deemed to be 'potentially relevant'" and could not be found by searching that universe); *Scalera v. Electrograph Sys., Inc.*, 262 F.R.D. 162, 178 (E.D.N.Y. 2009) (party's "omissions and ineffective communication" regarding document preservation "constitute[d] negligence").

Fourth, Thom Browne states that as part of its "protocol," documents "that hit on the terms were then to be reviewed for responsiveness. . . ." ECF 250 at 13. [redacted] ECF 244-1 at 23:2-16. The fact that Thom Browne's counsel deliberately pulled four devastating documents mentioning "adidas" [redacted] is damning proof of their misconduct.

Conclusion

Thom Browne's failure to produce the Four Emails easily constitutes "misconduct" under any court's interpretation of the term, and for all of the reasons provided in adidas's prior memoranda, adidas is entitled to a new trial under Rules 60(b)(2) and 60(b)(3).

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Respectfully submitted,

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