IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

**DEFENDANT THOM BROWNE INC.'S OPENING SUPPLEMENTAL BRIEF RESPONDING TO QUESTIONS POSED BY THE COURT (DKT. 245)**

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**I. Can even an innocent failure to produce documents during discovery constitute "misconduct" within the meaning 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?**

No, the innocent failure to produce documents during discovery cannot constitute "misconduct" within the meaning of Rule 60(b)(3). To obtain the drastic relief of overturning a jury verdict, adidas must prove, by clear and convincing evidence, an affirmative bad act by Thom Browne. *Fleming v. N.Y. Univ.,* 865 F.2d 478, 484 (2d. Cir. 1989) ("Rule 60(b)(3) motion cannot be granted absent clear and convincing evidence of material misrepresentations and cannot serve as an attempt to relitigate the merits."); *see also Jordan v. Paccar*, 97 F.3d 1452, 1996 WL 528950, *8 (6th Cir. 1996) (the proper standard requires the moving party to demonstrate that the non-moving party engaged in at least "deliberate or reckless behavior"); *Nansamba v. N. Shore Med. Ctr., Inc.,* 727 F.3d 33, 40 (1st Cir. 2013) (recognizing that "the moving party must prove the culpable party's culpable misconduct by clear and convincing evidence"). But Thom Browne's failure to produce the Four Emails during discovery was an innocent mistake. And, despite the post-trial discovery permitted by the Court, adidas has not adduced any evidence of conscious wrongdoing—because none exists. Absent such evidence, adidas' motion should be denied.[1].

Neither the legislative history of Rule 60(b)(3) nor the Second Circuit have ascribed any special meaning to the term "misconduct." So, we turn to the plain meaning of the term— namely, "intentional wrongdoing/malfeasance" or "improper behavior/adultery".[2] Under this plain

[1] adidas' motion should be denied for all of the reasons stated in Thom Browne's briefing on the motion, including without limitation that the Four Emails are inadmissible and cumulative, and would not have changed the outcome of the trial under Rule 60(b)(2). Dkt. No. 224 at 22-25. As pertinent here, adidas' motion also should be denied because adidas has not shown that the non-production substantially interfered with the preparation of its case.

[2] Merriam Webster (2014) (available at https://www.merriam-webster.com/dictionary/misconduct) (Last accessed March 12, 2024).

meaning, misconduct does not encompass innocent mistakes, but rather, relates to behavior with some improper intentionality or conscious, bad conduct.

Beyond the plain meaning of "misconduct," the cases adidas relies upon in briefing Rule 60(b)(3) also confirm that intentional or conscious wrongdoing is required for relief. In *Catskill Dev. v. Park Place Ent*, 286 F. Supp.2d 309 (S.D.N.Y. 2003), the attorneys for the parties entered into a stipulation regarding the production of documents obtained during their investigation of the case. Defendant discovered incriminating audio tapes during its investigation, and decided not to produce them based on the prior stipulation. Judge McMahon ruled that the failure to produce the audio tapes constituted "misconduct," finding that the non-production could have been avoided by seeking clarification from opposing counsel as to the scope of the stipulation. While the Court, relying on the oft-cited decision *Anderson v. Cryovac, Inc.,* 862 F.2d 910, 923 (1st Cir. 1988) ("*Anderson*"), discussed *infra*, noted that misconduct need not rise to the level of fraud or misrepresentation, it still requires an affirmative act for which the non-producing party deserves blame. Indeed, in *Catskill* counsel for the defendant knew about the audio tapes and made a conscious, affirmative decision not to produce them. Not so here where Thom Browne did not know about the Four Emails and did not make a conscious decision not to produce them.

In *Catskill,* the court stated that "an accidental failure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of Rule 60(b)(3)." 286 F.Supp.2d at 314 (citing cases). Yet, walking through each of the cited cases in support of that proposition, none found misconduct based on an accidental failure to produce. First, in *Jones v. Aero/Chem Corp.,* 921 F.2d 875, 878–79 (9th Cir. 1990), the district court failed to make findings regarding misconduct, and the Ninth Circuit remanded the case to do so. Citing *Anderson*, discussed *infra*, the Court stated in dicta that misconduct theoretically could constitute "accidental

omissions," but, as the Chief Judge noted in his dissent, "misrepresentation [(and hence misconduct)] still retains at least some requirement of fault." *Id.* at 880. Importantly, the court did not find misconduct based on accidental omissions. Second, in *United States v. One Douglas A–26B Aircraft*, 662 F.2d 1372, 1375 n. 6 (11th Cir. 1981), the motion for a new trial was denied because the movant sought relief unavailable to it (damages). The lower court had found that there was no fraud but made no findings as to "misrepresentation" or "misconduct," so any discussion of misconduct was dicta. Next, in *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1341 (5th Cir.1978), the Court ordered a new trial, finding that the defendant engaged in "misrepresentation or other misconduct" by making a conscious decision not to disclose, prior to trial, a report relating to the design a fuel tank which was alleged to have caused a vehicle accident. Defendant's non-disclosure was deliberate, not innocent and unknown. Third, in *Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.,* 1996 WL 524339, at *2 (S.D.N.Y. Sept. 13, 1996), the movant failed to prove misconduct because it offered no evidence that the non-produced letters were in the non-movant's possession during discovery. There was no finding of misconduct based on innocent acts. Finally, in *Monaghan v. SZS 33 Assocs., L.P.,* 1992 WL 135821, at *4 (S.D.N.Y. June 1, 1992), the court found that the defendant "deliberately avoided" turning over the document at issue and engaged in motion practice to frustrate plaintiff's ability to obtain the document. Again, this case involved conscious decisions not to produce, rather than an innocent mistake.

In one outlier case, *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994), the Court found, after a bench trial, misconduct without ruling as to culpability. In that case, counsel for the non-producing party had possession of an incident report relating to a prior boating accident, but did not produce it, even though it should have. 24 F.3d at 630. The district court made no findings about why the report was not produced. However, unlike here, where Thom Browne's counsel did

not know about the Four Emails, in *Schultz,* counsel knew about the incident report. The Fourth Circuit ordered a new trial under Rule 60(b)(3), holding that the non-production was "misconduct" whether it was inadvertent or intentional, relying on *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983) and *Square Constr. Co. v. Wash. Metro. Area Transit Auth.,* 657 F.2d 68, 71 (4th Cir. 1981). But in *Stridiron*, the non-producing party falsely testified that he had never been married before (698 F.2d at 207), and in *Square Construction* the non-producing party deliberately withheld requested documentary evidence (657 F.2d at 73). Both cases involved conscious, improper conduct—not inadvertent or otherwise innocent conduct. *Schultz* also involved conscious conduct (counsel knew about the report), unlike here (where counsel did not know about the Four Emails). For these reasons, *Schultz* is not persuasive authority with respect to innocent mistakes.

Many cases discussing the meaning of "misconduct" under Rule 60(b)(3) cite the First Circuit's decision in *Anderson*. But that Court's statement that "even accidental omissions" can constitute misconduct should not be expansively read to reach conduct that is not conscious or knowing. In *Anderson* the non-producing party and its counsel admittedly knew about and suppressed a testing report before trial and served misleading and evasive discovery responses necessitating motion practice. Indeed, the Court found that there was "overwhelming evidence" of misconduct, in short, knowing actions for which the non-producing party was held responsible. The non-production was not an "accidental omission," but rather was deliberate. *Anderson* should not be read unduly expansively to reach innocent, unknowing conduct. As the Court acknowledged, Rule 60(b)(3) protects against judgments unfairly obtained by addressing "the need to enforce discovery rules against those who would seek unfair advantage by withholding information." *Id.* at 926. Indeed, the Court acknowledged that the rule protects against the "wrongful secretion of discovery material." *Id.* at 924, n. 10. "Secretion" means "the act of hiding

something."[3] This implicates deliberate conduct, not innocent, unknowing conduct. The Court reasoned that "misconduct" must mean something other than "fraud" or "misrepresentation." *Id.* at 923. However, this does not mean that the term "misconduct" should be so broadly construed as to eliminate the requirement of some intentional, purposeful, or conscious improper act or omission. As the cases demonstrate, a party can withhold a document from production because it genuinely does not believe that the document is responsive,[4] but that conduct is not accidental; nor is it fraud or misrepresentation. As such, interpreting "misconduct" to require intentional or purposeful acts would not be superfluous. Indeed, under the doctrine of *noscitur a sociis*, "misconduct" should be interpreted in conjunction with the other terms with which it lies—"fraud" and "misrepresentation"—and be given a similar connotation, i.e. some odious behavior. *Jordan,* 1996 WL 528950, *7. That "misconduct" need not involve "nefarious intent" also does not mean it should reach conduct that is innocent.[5] *Anderson*, 862 F.2d at 923. "Nefarious" means "evil."[6] Conduct may be intentional or conscious, but not evil, and still within the scope of misconduct which adheres to the intent behind Rule 60(b)(3).

The First Circuit's subsequent decision in *West v. Bell Helicopter Textron*, 803 F.3d 56 (1st Cir. 2015), affirms that "misconduct" requires intentional or conscious behavior. There, the

[3] Merriam Webster (2024), available at https://www.merriam-webster.com/dictionary/secretion (Last accessed March 12, 2024).

[4] Thom Browne has affirmatively represented that the Four Emails were not intentionally withheld as being non-responsive. Dkt. Nos. 224 at 23, n.19.

[5] The *Anderson* Court relied on *Bros. Inc. v. W.E. Grace Mfg. Co.,* 351 F.2d 208 (5th Cir.1965), *cert. denied,* 383 U.S. 936, 86 S.Ct. 1065 (1966), for the proposition that Rule 60 "misconduct may be justified whether there was evil, innocent or careless, purpose." *Anderson,* 862 F.2d at 923. That case, however, did not analyze Rule 60(b)(3), but rather ordered a new trial because the non-disclosed evidence would have led to a different result, which is the standard under Rule 60(b)(2). *Bros.,* 351 F.2d at 211.

[6] Merriam Webster (2024), available at https://www.merriam-webster.com/dictionary/nefarious (Last accessed March 12, 2024).

lower court denied Plaintiff's motion for a new trial on the basis that Plaintiff had not proven, and could not prove, that the failure to disclose a technical bulletin relating to engine failure in a helicopter substantially interfered with his ability to prepare for trial. *Id.* at 66. But the lower court sidestepped the issue of intent, stating that it "'need not and does not decide' whether there was any …. culpability [in withholding discoverable information]." *Id.* The First Circuit disagreed, and remanded for findings on culpability which would affect the burden-shifting inquiry with respect to substantial interference. In so holding, the Court found as follows:

> Thus … there can be no doubt that the defendants failed to produce information not due to oversight, inadvertence, or counsel's own ignorance of its existence. Rather, the decision not to produce the information was a *conscious, deliberate choice*. … [T]he defendants have not presented us with a valid reason for *deliberately withholding* discoverable information. *Id.* at 71-72 (emphasis supplied).

Again, the central inquiry on remand was the nature of and motivation for the defendant's conduct, and the reasons for its deliberate choice to withhold discoverable information. In the present case, as discussed *infra,* Thom Browne's non-production of the Four Emails was devoid of any attempt to conceal evidence. If Thom Browne knew about the Four Emails and wanted to conceal them, it would not have produced them in the UK proceedings. This Court held an evidentiary hearing, and permitted adidas to take depositions. Yet adidas has not adduced any evidence that Thom Browne consciously concealed the Four Emails; rather, an innocent mistake was made.

None of the other cases relied upon by adidas support an interpretation of "misconduct" which encompasses innocent mistakes. *See DiPirro v. U.S.,* 189 FRD 60 (W.D.N.Y. 1999) (plaintiff provided false, misrepresentative testimony); *Madere v. Compass Bank*, 2012 WL 5208538 (W.D. Tx. Oct. 22, 2012) (defendant, in bad faith, employed an overly narrow view of a discovery order to justify non-disclosure of relevant records); *Thomas v. City of New York*, 293 FRD 498 (S.D.N.Y. June 4, 2013) (plaintiff concealed from defendant an agreement to pay for

favorable testimony). Each of these cases involves deliberate, purposeful, or conscious improper action concealing material evidence. Such conduct is not present here.

Indeed, if one applies the canons of statutory construction, it makes sense that Rule 60(b)(3) is intended to address conduct that is deliberate and conscious. Fed. R. Civ. P. 60(b)(2) and 60(b)(3) provide mechanisms for a party to seek a new trial based on new evidence that was not available to it at trial. Under Rule 60(b)(2), a court may order a new trial based on the new evidence if two conditions are met: the moving party was diligent in pursuing the evidence, and the evidence would have changed the outcome of the trial. Regardless of the reason the evidence was not available, whether as a result of innocent mistake or intentional concealment, the movant is entitled to a new trial if it proves, by clear and convincing evidence, that the outcome of the trial would have changed.

Rule 60(b)(3), on the other hand, is more lenient in that it does not require proof that the outcome would have changed. Instead, it provides grounds for a new trial only if the non-producing party engaged in some affirmative malfeasance and thereby substantially interfered with a party's presentation of its case. Under Rule 60(b)(3), it would be unfair to permit a litigant to retain a favorable verdict that was obtained in the face of affirmative, wrongful concealment of evidence. Accordingly, Rule 60(b)(3) requires an affirmative bad act by the non-producing party. To hold otherwise, would conflate Rule 60(b)(2) with Rule 60(b)(3). If the new evidence were not available due to an innocent mistake or omission, as opposed to an affirmative bad act, a movant must meet the higher burden of Rule 60(b)(2) requiring a showing that the outcome of the trial would have changed and cannot resort to Rule 60(b)(3).[7]

[7] For all of the reasons stated in prior briefing, adidas is not entitled to relief under Rule 60(b)(2) either as the Four Emails would not have changed the outcome of the case. Dkt. No. 224 at 10-22.

"The fact that this case has proceeded to a jury trial and resulted in a verdict calls for the highest level of judicial restraint and interference with that verdict is an extraordinary measure."[8] *Thomas*, 293 F.R.D. at 507. Of all of the cases discussed above, only three involved overturning a jury verdict and each involved egregious circumstances of consciously concealing relevant evidence. *See Rozier* (defendant knowingly withheld evidence and lied about knowledge of its existence); *Madere* (defendant knowingly withheld employment records relying on a narrow reading of Court's Order); *Thomas* (plaintiff knowingly concealed agreement to pay for testimony). None of the cases resulted in overturning a jury verdict based on the innocent non-production of information or documents unknown to the non-producing party. adidas has not met its burden of establishing misconduct by clear and convincing evidence.

**II. 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)?**

The Four Emails at issue in adidas' Motion for New Trial were not produced during discovery due to an innocent mistake stemming from a misunderstanding between Thom Browne's counsel and Thom Browne's E-Discovery vendor in this matter, Consilio. As substantiated by the evidence discussed below, there was no deliberate or conscious decision, instruction, or action taken to withhold documents. Thom Browne's counsel was not even aware that the Four Emails existed until they were brought to its attention by UK counsel for Thom Browne in September 2023. *See* Dkt. 224, 235. Nor was there any intent or plan to withhold responsive, non-privileged documents that hit on the agreed upon search terms—not by Thom Browne, not by Thom Browne's

[8] The standard to overturn a jury verdict is even higher than if the case was decided on a motion for summary judgment. *Catskill,* 286 F.Supp.2d at 320-21.

counsel, and not by Consilio. Rather, Thom Browne's counsel [redacted] This occurred despite the reasonable, routine precautions taken during the review process and the well-intentioned efforts of all involved to ensure that all non-privileged, responsive documents were produced during discovery in this case. Dkt. No. 243, Ex. B (Deposition of Claire Schuster) ("Schuster Tr.") at 24:11-17; and 58: 14-16; Dkt. No. 243, Ex. A (Deposition of Quincy Kayton) ("Kayton Tr." at 23:9-16); Evidentiary Hearing Transcript ("EH Tr.") at 65:25-66:4; 91: 8-12.

**A. Thom Browne Utilized Standard ESI Discovery Protocol**

During the process of collecting, reviewing and producing electronically-stored information ("ESI"), including emails, Consilio collected over one million ESI documents from Thom Browne, and applied agreed-upon search terms to narrow the universe of potentially relevant documents. Documents that hit on the terms were then to be reviewed for responsiveness and privilege. Here, two sets of potentially privileged documents were identified: (1) documents that hit on privilege terms, including, for example, the names of lawyers; and (2) documents that hit on the search term "adidas." [redacted] Any documents determined to be privileged would then be added to the

privilege log, and not produced. All other documents that went through the two-tier review process would be produced. *See, e.g.*, Schuster Tr. at 24:11-17 (testifying that [redacted] and 58: 14-16; Kayton Tr. at 23:9-16. This is a procedure routinely used by parties handling complex litigation involving thousands if not millions of electronic documents. As adidas admits, while the process it not perfect, and mistakes are made, it has been generally accepted as the best way to handle ESI production. EH Tr. at 41:10-25 (affirming that the potential for error exists in human and computer-assisted review).

**B. Thom Browne's Counsel's Instruction to Consilio Was Misunderstood**

In this case, the Four Emails were tagged "needs further review" in a mass edit[9] on April 6, 2022 by Ms. Virginia Weeks, an experienced, senior paralegal manager at Thom Browne's counsel's firm. EH at 63:10-17; 91:8-12. As the principal of e-discovery at adidas' outside counsel, Ms. King, testified, "[w]hen a document is tagged 'needs further review,' it is withheld from production until someone can review further for privilege and substance." EH Tr. at 24:4-8. This was exactly what Thom Browne's counsel planned to do. Ms. Weeks testified, "[w]hen documents are tagged 'for further review,' the expectation is that an attorney would handle that further review." *Id.*, 65:25-66:4. Consistent with this general practice, this was Ms. Week's expectation in this litigation. *Id.*, 91: 8-12.

Thom Browne's counsel took efforts to ensure that documents tagged "needs further review" were, in fact, reviewed. Ms. Weeks "gave instructions to Consilio to collect all documents that could be potentially privileged." *Id.*, 71:4-11. Those documents were then supposed to go

[9] Per adidas' counsel's in-house e-discovery principal, "[a] mass edit is when you apply tags or categories to a document without actually looking at [the documents]." EH at 17:19-24. The Four Emails were not individually singled out for tagging as "needs further review."

through multiple layers of review and quality check, including a managed review by Consilio and review by an experienced associate attorney, Claire Schuster. *Id*. Critical here, Ms. Weeks gave instructions to [redacted] EH Tr. at 77:10-15; Dkt. No. 243, Ex. C. (Deposition Transcript of James Kerr) ("Kerr Tr." at 49:15-50:10). [redacted] Dkt. No. 243, Ex. D (TB00530218); Kerr Tr. at 50:11-15; 51:10-52:10. Ms. Weeks understood that "ALL" documents that could be potentially privileged would include all documents tagged "privileged" or "needs further review." EH Tr. at 89:10-22; 91:8-23. Ms. Weeks also "communicated with Claire Schuster" to discuss "that there were documents in the database tagged as 'needs further review.'" *Id*., 78:10-17. Ms. Schuster confirmed that she was going to look at them and believed that she had done so. Schuster Tr. at 78:10-17; 83: 16-21.

Ms. Schuster testified about the typical review process she employed in a privilege review. First, she [redacted] Dkt. No. 243, Ex. B (Deposition Transcript of Claire Schuster) ("Schuster Tr. at 20:21-21:7. Then she would [redacted] *Id*., 21:8-11. Ms. Schuster testified [redacted]

[redacted] *Id.*, 22:8-18; 25:5-18; 31:12-19; 40:3-8; 44:6-11; 57:7-58:5.

After performing her two-step review, Ms. Schuster told Ms. Weeks that she had completed her review of all "needs further review" documents. EH Tr. at 78:10-17; 83: 16-21; Schuster Tr. 25:2-4. Unbeknownst to Ms. Weeks or Ms. Schuster, [redacted] As Mr. Kerr testified, [redacted]." Kerr Tr. at 54:14-55:10. Based on Ms. Weeks' twenty-plus years of experience as a litigation paralegal, documents tagged "needs further review" are included in privilege review, and she had no reason to believe that they would not be included. EH Tr. at 24:4-8, 63:10-64:15; 65:25-66:4; 91: 8-12.

### C. Thom Browne Had No Intent To Withhold the Four Emails, and Did Not Know About Them

As detailed above, the unequivocal testimony from all witnesses demonstrates an absence of any intent to deprive adidas of non-privileged, responsive documents in this litigation. The unequivocal testimony from all witnesses also demonstrates that no one was instructed to withhold the Four Emails from production, and Thom Browne and its counsel made no efforts to conceal responsive documents, including the Four Emails. Ms. Babbit, a paralegal at Thom Browne's counsel involved in the review process, did not receive instructions to withhold responsive non-privileged documents from adidas in the litigation. EH Tr. at 62:5-8. Nor did Ms. Weeks, Ms. Kayton, Ms. Schuster, nor Mr. Kerr. *Id.* at *85*:5-7, 9-12; Kayton Tr. at 85:4-8; Schuster Tr. 58:22;

Kerr Tr. 73:5-74:16. Nor did anyone give an instruction to withhold the Four Emails. EH Tr. at 85:19-86:1; Schuster at Tr. 59:1-7. Rather, the evidence demonstrates that a truly innocent mistake was made despite the reasonable, affirmative precautions taken to avoid just that. As Ms. King conceded, even with the use of computer systems or database for document review, document production is subject to human error. EH Tr. at 41: 9-14, 22-25; 42:13-17. Here that human error led to the inadvertent failure to produce Four Emails and a small number of other documents in an otherwise robust production of 500,000 pages of documents by Thom Browne.

### D. All Evidence Demonstrates A Lack of Culpability Under Any Definition of "Misconduct" Under Rule 60(b)(3)

While the Second Circuit has not ruled on the meaning of "misconduct" in Rule 60(b)(3) (*see* Sec. I, *supra*), Second Circuit law addressing inadvertent failures to produce discovery under Fed. R. Civ. P. 37 and potential wavier of privilege due to inadvertent production of documents provides a helpful analytical corollary.

In the context of failure to produce discovery during litigation, courts in this Circuit have recognized that "failures [to produce discovery] occur along a continuum of fault –ranging from innocence through the degrees of negligence to intentionality." *Reilly v. Natwest Markets Grp. Inc*., 181 F.3d 253, 267–68 (2d Cir. 1999) (quotation omitted). As detailed above, the non-production of the Four Emails was not the result of any conscious or intentional act on the part of Thom Browne or Thom Browne's counsel. *See* Sec. II.A., *supra*. Nor was the inadvertent non-production the result of negligence or gross negligence. "In the discovery context, negligence is a failure to conform to the standard of what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding." *Distefano v. L. Offs. of Barbara H. Katsos, PC*, No. CV112893, 2017 WL 1968278, at *3 (E.D.N.Y. May 11, 2017) (internal quotations and citation omitted). Further still, "'[g]ross negligence has been described as

a failure to exercise even that care which a careless person would use.'" *Id.*; *see Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., L.L.C.*, 685 F.Supp.2d 456, 463-64 (S.D.N.Y. 2010) (abrogated on other grounds by *Chin*, 685 F.3d 135)). Nothing Thom Browne's counsel did here rises to the level of either negligence or gross negligence. Rather, an innocent mistake was made by competent counsel and vendor employing widely used and accepted practices to ensure that responsive, non-privileged electronic documents were produced.

Thom Browne and its counsel acted in conformance with standard practices to meaningfully meet its discovery obligations – collecting over one million documents from the client (EH Tr. at 91:3-6), running agreed upon search terms across those documents (Dkt. No. 225, ¶¶10, 11), engaging a multistep privilege review process including both managed review from Consilio and a second layer of review at Thom Browne's counsel (Dkt. No. 225, ¶11; EH Tr. 68:4-7, 71:4-11), running a search of what it believed to be all documents that needed further review in the discovery database (Dkt. No. 243, Ex. D (TB00530218); EH Tr. at 89:10-22; 91:8-23) and engaging in a two-step quality check of these documents to make sure all non-privileged, responsive documents were produced. Schuster Tr. at 20:21-21:7; 22:8-18; 25:5-18; 31:12-19; 40:3-8; 44:6-11; 57:7-58:5. Despite these efforts, the Four Emails inadvertently were not produced. In light of Thom Browne and its counsel's efforts to meet its discovery obligations, Thom Browne's inadvertent non-production of the Four Emails, as detailed above, falls squarely within innocence on the continuum of discovery failures. *United States v. Davis*, 531 F. App'x 65, 68–69 (2d Cir. 2013) (declining adverse inference instruction where inadvertent failure to produce where there was "no evidence to support a finding of culpability").

Similarly, in the context of inadvertent production of privileged documents and waiver of privilege, courts within this Circuit have performed "a multifactor analysis to judge whether

counsel acted reasonably to safeguard the privilege… (1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify any error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issues of fairness. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 443 (S.D.N.Y. 1995). As detailed above, Thom Browne took multiple precautions to ensure all non-privileged responsive documents were produced to adidas in this litigation. Thom Browne voluntarily produced the Four Emails to adidas shortly after being informed of the inadvertent failure to produce them in the U.S. litigation.

As stated above, the actions taken by Thom Browne and its counsel were reasonable, and evidence no odious conduct, nor any conscious or intentional attempts to conceal. An innocent mistake was made which does not warrant throwing out a jury's verdict. adidas claims the non-production of the Four Emails substantially interfered with the presentation of its case because it was deprived of the opportunity to question witnesses about the Four Emails. Dkt. 221 at 23-24. This does not constitute substantial interference, for all of the reasons detailed in prior briefing. Dkt. No. 224, Sec. IV. A.1, 3. The innocent, non-production of the Four Emails does not support a finding of "exceptional circumstances" that would warrant vacating the jury's time and determination. *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001). Thus, overriding issues of fairness dictate that adidas' motion be denied. *See Datel Holdings Ltd. v. Microsoft Corp.*, No. C-09-05535 EDL, 2011 WL 866993, at *4 (N.D. Cal. Mar. 11, 2011) ("In relatively large productions of electronic information…perfection or anything close based on the clairvoyance of hindsight cannot be the standard; otherwise, the time and expense required to avoid mistakes to safeguard against waiver would be exorbitant, and complex cases could take years to ready for trial.").

Date: March 13, 2024

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