No. 18-

IN THE

Supreme Court of the United States

ANTERO RAMOS,

Petitioner,

v.

FIRESTONE BUILDING PRODUCTS COMPANY, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents two questions:

1. If a client is blameless, is a lawyer's gross neglect of the client's case a basis for relief under Federal Rule of Civil Procedure 60(b)(6)? (7-2 circuit split)

2. Should the district court's summary judgment order be vacated?

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JURISDICTION

The court of appeals issued its opinion on September 6, 2018 (App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of Federal Rule of Civil Procedure Rule 60 provides:

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

STATEMENT

A. Rule 60(b) and Attorney Misconduct

Federal Rule of Civil Procedure 60(b) "allows six avenues through which the court may vacate a judgment. Its first five clauses state specific reasons. Its sixth, the residual clause, enables courts 'to vacate judgments whenever such action is appropriate to accomplish justice.'" *Primbs v. United States*, 4 Cl. Ct. 366, 368 (1984) (quoting *Klapprott v. United States,* 335 U.S. 601, 615 (1949)). This petition involves the interplay between 60(b)(1)—which allows a party to seek relief from a judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect"—and the Rule 60(b)(6) residual clause.[1]

One Rule 60 issue that has divided courts for decades is whether Rule 60(b)(6) allows a court to vacate a judgment on the basis of an attorney's misconduct. The Court addressed that issue—albeit only peripherally,

1. Rule 60(b)(1) motions to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect" must be made within one year of the judgment; Rule 60(b)(6) relief may be requested even after one year has passed. Fed. R. Civ. P. 60(b).

through the lens of Rule 60(b)(1)—in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993).

In *Pioneer*, the Court held that Rule 60(b)(1) and Rule 60(b)(6) cover different, mutually-exclusive grounds for relief, "and thus a party who failed to take timely action due to 'excusable neglect' may not seek relief more than a year after the judgment by resorting to subsection (6)." *Id.* Explaining the distinction between the two subsections, the Court stated that, although an attorney's "negligence" during litigation could amount to "excusable neglect" and, thus, render relief under subsection (1) appropriate, to justify relief under subsection (6), a party was required to show that the attorney's acts extended beyond mere negligence—a term of art that the Court coined "extraordinary circumstances." *Id.*

According to the Court, these "extraordinary circumstances"—which must exceed excusable negligect—must also satisfy a secondary requirement: they must suggest "that the party is faultless," and if "a party is partly to blame . . ., relief must be sought within one year under subsection (1) and the party's neglect must be excusable." *Id.* This requirement makes sense because, "'excusable neglect' is understood to encompass situations in which the failure to comply with [a legal requirement] is attributable negligence," whereas when a party fails to act for "reasons beyond his or her control" it is not considered to constitute 'neglect.'" *Id.* at 394.

Post-*Pioneer*, the circuits are divided over whether a lawyer's gross neglect (as opposed to excusable neglect) amounts to an extraordinary circumstance that justifies

relief under Rule 60(b)(6). Specifically, the Second, Third, Fourth, Sixth, Eighth, Ninth, and D.C. circuits agree that the gross neglect of a lawyer is an appropriate basis for relief under Rule 60(b)(6), while the Seventh Circuit and, now, the Eleventh Circuit have reached the opposite conclusion.

This petition arises out of the Eleventh Circuit's decision.

B. Underlying Facts

This case presents the unresolved issue of whether a blameless client, severely prejudiced by his lawyer's gross neglect may obtain relief via Rule 60(b)(6). The petitioner, Antero Ramos sought such relief below. The Eleventh Circuit, however—adopting a position staked out by a minority of circuit courts—concluded that he was not entitled to relief from the mortal sins of his lawyer. The following facts contextualize the Eleventh Circuit's determination of this issue:

Antero was sued by Firestone Building Products Company, LLC, a company related to his former employer; both Firestone and the former employer are under the umbrella of parent company Bridgestone Americas, Inc. (App. 3a). The suit involved allegations of misconduct involving Antero's business activities on behalf of Firestone in Brazil. (App. 3a).

Before these accusations were made, Antero had steadily advanced in the company, promoted in less than a 10-year period to oversee Brazilian, Latin American and Caribbean business operations. (DE 19:3-4).[2] In January 2015, Antero was terminated by Bridgestone America's Brazilian subsidiary. (App. 3a). He then sued that subsidiary in Brazil, alleging wrongful termination and other grounds under Brazilian Law. (App. 3a). In response, Firestone sued Antero in the Southern District of Florida. (App. 3a).

Antero's counsel's principal strategy in the Florida case was to seek dismissal based on *forum non conveniens*—a complex effort in which Antero was personally and deeply involved. (DE 12,19, 35, 70). When the district court ultimately denied that defense, Firestone moved for summary judgment. (App. 4a).

Although trial counsel had pursued the *forum non conveniens* argument, counsel chose to ignore the deadline to respond to the motion for summary judgment without explanation. After 25 days, however, the lawyer moved for a two-week extension of time to respond. (DE 58:1). Despite Antero's active involvement in the *forum non conveniens* proceedings, the same counsel (incredibly) told the district court that Antero's "very limited resources and a language barrier" had prevented the filing of a timely summary judgment response. (DE 58:1). That tale was false, as the misconduct of Ramos' counsel was

2. References to the record refer to the docket entry (DE) and when appropriate to the pinpoint page number and any further identifier when needed as follows: (DE [docket number]:[page number]).

egregious: he had repeatedly misled Ramos regarding the status of his case, repeatedly neglected to comply with court deadlines, failed to serve initial disclosures or any discovery, and failed to respond to Respondent's Motion for Summary Judgment. (DE 79:14, 79-1)

The district court denied the motion, concluding, in the words of the circuit court, that if trial counsel's representations regarding Ramos were "true … it should have become apparent much earlier, considering that the same counsel had worked with Ramos for over a year and had filed major pleadings (including two motions to dismiss for *forum non conveniens*, a declaration from Ramos, and an answer to Plaintiff's amended complaint) long before the reply deadline." (DE 61:1).

Four months after denying the motion for an extension of time to respond to Firestone's summary judgment motion, the district court ruled on the "merits" of the unopposed motion for summary judgment, granting it as to several counts of Firestone's suit. (DE 66). In effect, a default ruling.

Antero's counsel promptly withdrew—a month before the trial date then-fixed by the district court's scheduling order. (DE 77). The district court informed Antero that no trial continuances would be granted so he should expediently acquire new counsel. (DE 82:11-12).

Successor trial counsel appeared 18 days later, immediately filing a motion under Rule 60(b) to set aside the summary judgment order.(DE 79). Successor counsel explained that Antero's previous counsel did not advise him of the summary judgment deadline, nor did

he timely file a response, nor any evidence in the form of an affidavit or otherwise to controvert the Motion for Summary Judgment and the Statement of Uncontested Facts. (DE 79:4).

Instead, as the Rule 60(b) motion explained, Antero's former counsel chose not to meet the deadline to respond to the motion for summary judgment, and, for reasons that remained unexplained, had filed a motion for extension of time to respond to the summary judgment motion nearly one month after the deadline. (DE 79:4). Antero was not informed of that deadline, nor his options for responding to and/or refuting the allegations in the Motion for Summary Judgment and the Statement of Uncontested Facts.

The district court denied his Rule 60(b) motion. (DE 83). Successor trial counsel then withdrew, and Antero was then forced to represent himself at the trial on damages. (DE 85). Ultimately, Firestone filed a Rule 50(a) motion during trial, which was granted, and judgment was entered. (DE 105).

C. The Circuit Court's Decision

Given that Antero's initial trial counsel chose to ignore the deadline to respond to the motion for summary judgment and that the motion for an extension of time to file the response was untimely for reasons that Antero could not explain, the Eleventh Circuit concluded that Antero's justification for his former counsel's neglect was "not so compelling as to require reversal" under Rule 60(b)(1)'s excludable neglect provision. (Citing *Solaroll Shade and Shutter Corp. v. Bio-Energy Sys., Inc.*, 803 F.2d 1130 (11th Cir. 1986)). The Eleventh Circuit then also concluded that, under its precedent, all attorney negligence must

be sought under Rule (b)(1) and, thus, "the district court could not grant relief for attorney negligence under [Rule] (b)(6)."

REASONS FOR GRANTING THE PETITION

I. Rule 60(b)(6)

A. The Courts of Appeals are in Disarray Over Application of Rule 60(b)(6) to Cases Involving Attorney Misconduct

Despite the egregious nature of Antero's trial counsel's actions—and Antero's record of blamelessness[3]—the Eleventh Circuit held that Rule 60(b)(6) could not be used to vacate the judgment obtained under the grossly neglectful eye of his counsel. The Eleventh Circuit's opinion marks the first time that the court has taken a position on whether Rule 60(b)(6) may be used where a party's counsel commits such gross negligence, deepening a division that had already been entrenched for decades. *See Cmty. Dental Services v. Tani*, 282 F.3d 1164, 1169 (9th Cir. 2002) (noting the existence of the circuit split as far back as 2002 and stating that "[w]e join the Third, Sixth, and Federal Circuits in holding that where the client has demonstrated gross negligence on the part of his counsel, a default judgment against the client may be set aside pursuant to Rule 60(b)(6).").

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3. Antero was fully engaged in his attorney's efforts to have the court dismiss the case on *forum non conveniens* grounds. Indeed, the record demonstrates that Ramos provided abundant support to his trial counsel in the course of that challenge, providing much of the evidence that his counsel would ultimately use to pursue dismissal. (DE 19-4; 35:3; 79-1:Exhibit A).

The Eleventh Circuit has now joined the Seventh Circuit in construing Rule 60(b)(6) so narrowly. *See United States v. 7108 W. Grand Ave., Chicago, Ill.*, 15 F.3d 632, 635 (7th Cir. 1994) ("Although none of our cases squarely holds that a lawyer's gross negligence does not justify reinstating a case, we have come right up to the brink. Today we leap. It is unnecessary to ask the district court to determine where on the line from "mere" negligence to intentional misconduct attorney Habib's handling of this litigation falls, because the answer does not make any difference.") (internal citation omitted); *Dickerson v. Bd. of Educ.*, 32 F.3d 1114, 1118 (7th Cir. 1994) (observing that "counsel's negligence, whether gross or otherwise, is never a ground for Rule 60(b) relief"); *Longs v. City of S. Bend*, 201 Fed. Appx. 361, 364 (7th Cir. 2006) ("Rule 60(b)(6) is unavailable when attorney negligence or other attorney misconduct is at issue.").[4]

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4. The First Circuit's position is opaque, but appears to endorse the minority view. *See Capability Group, Inc. v. American Exp. Travel Related Services Co., Inc.*, 658 F.3d 75 (1st Cir. 2011) (In civil cases, inadequate representation is normally a matter to be resolved between the attorney and his client; in unusual circumstances, it could be a basis for relief under Rule 60(b), but at a minimum this would require both incompetent performance that the client could not have forestalled and a showing of likely prejudice.); *KPS & Associates, Inc. v. Designs By FMC, Inc.*, 318 F.3d 1, 16 (1st Cir. 2003) (not addressing the issue on the merits, but noting that "in [the First Circuit] we have consistently "turned a deaf ear to the plea that the sins of the attorney should not be visited upon the client.") (citing *Farm Constr. Servs., Inc. v. Fudge,* 831 F.2d 18, 21 (1st Cir.1987)); *Davila-Alvarez v. Escuela de Medicina Universidad Central del Caribe*, 257 F.3d 58 (1st Cir. 2001) (Plaintiffs whose medical-malpractice action had been dismissed for failure to prosecute after it was removed to the federal court could not show extraordinary circumstances

The other circuits that have addressed the issue have expressly held that there are indeed circumstances under which an attorney's conduct can justify Rule 60(b)(6) relief. There are, however, two distinct camps within those circuits:

First, a group of circuits have, post-*Pioneer,* concluded Rule 60(b)(6) relief may be appropriate where the party's attorney has acted with gross negligence. *See Norris v. Salazar*, 277 F.R.D. 22, 25 (D.D.C. 2011) ("The requisite "extraordinary circumstances" under Rule 60(b)(6) may be found when a faultless plaintiff seeks relief from a final judgment or order due to counsel's ineffective assistance amounting to neglect of the movant's case."); *Ethan Michael Inc. v. Union Tp.*, 392 Fed. Appx. 906, 910 (3d Cir. 2010) (recognizing that an attorneys' gross negligence could, under different circumstances, warrant relief under the "catch-all provision."); *Cmty. Dental Services v. Tani*, 282 F.3d 1164, 1172 (9th Cir. 2002) ("Where, as here, an attorney engages in grossly negligent conduct resulting in such a judgment, the client merits relief under Rule 60(b)(6), and may not be held accountable for his attorney's misconduct."). Other circuits reached the same conclusion earlier, and have not overturned their precedent in the wake of *Pioneer*: *see Fuller v. Quire*, 916 F.2d 358, 361 (6th Cir. 1990) (holding that district court was within its discretion under subdivision of rule allowing relief from judgment for "any other reason justifying relief"); *Smith v. Bounds*, 813 F.2d 1299, 1304-05 (4th Cir. 1987) (holding

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suggesting that they were faultless, and thus could not obtain relief from the judgment on the basis that some "other reason" warranted relief, when both attorneys who represented plaintiffs during the course of the action were far from faultless.)

that an attorney's neglect was so deplorable that it would likely warrant relief under Rule 60(b)(6), but denying relief on different grounds); *Carter v. Albert Einstein Med. Ctr.,* 804 F.2d 805, 806 (3d Cir.1986) (reversing denial of plaintiff's R. 60(b) motion based on plaintiff's counsel's "blatant disregard for explicit [court] orders"); *Boughner v. Sec'y of Health, Ed. & Welfare, U. S.*, 572 F.2d 976, 978 (3d Cir. 1978) ("We reverse, however, on the basis that the motion to vacate should have been granted under Rule 60(b)(6). The conduct of Krehel indicates neglect so gross that it is inexcusable. The reasons advanced for his failure to file opposing documents in a timely fashion are unacceptable."); *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 122 (D.C. Cir. 1977) ("We in this circuit have held that so serious a dereliction by an attorney, when unaccompanied by a similar default by the client, may furnish a basis for relief under Rule 60(b)(6)."); *L.P. Steuart, Inc. v. Matthews,* 329 F.2d 234, 235 (D.C.Cir.1964) (holding that the district court did not abuse its discretion in granting a Rule 60(b)(6) motion based on appellee's former counsel's failure to prosecute).

Second, a smaller group of circuits have taken a more stringent position, holding that 60(b)(6) relief is appropriate only where the attorney has essentially *abandoned* his client. *See Gomez v. City of New York*, 805 F.3d 419, 424 (2d Cir. 2015) ("we have recognized as bases for Rule 60(b) relief an attorney's disappearance or mental illness where the party "tried diligently" to contact his or her attorney. In such cases, we have remanded for evidentiary hearings on the allegations raised in the motions for relief and the parties' diligence in prosecuting their cases.") (internal citation omitted); *Heim v. Comm'r of Internal Revenue*, 872 F.2d 245, 248-

49 (8th Cir. 1989) (holding that the gross negligence of an attorney does not satisfy Rule 60(b)(6) but "leaving his clients unrepresented" would).

B. The 60(b)(6) Question is Important

The split that has materialized among the circuits implicates an important right: a litigant's right of access to the courts. Although this right is treated as almost sacrosanct under most circumstances, when it comes to the propriety of abridging that right based upon a third-party attorney's gross negligence, the litigant's rights—and his or her ability to have a court address their grievances on the merits—depend entirely on where in the country the client resides. While in some circuits, the courts have carved out a common-sense solution that ensure's a litigant's rights are not extinguished by an attorney asleep at the switch, other circuits have determined that judicial efficiency should trump a litigant's rights.

In light of the importance of the right at stake, the circuit split surrounding Rule 60(b)(6) has garnered the attention of several commentators and spurred the publication of multiple law review articles. *See* Stephen White, *The Universal Remedy for Attorney Abandonment: Why Holland v. Florida and Maples v. Thomas Give All Courts the Power to Vacate Civil Judgments Against Abandoned Clients by Way of Rule 60(b)(6)*, 42 Pepp. L. Rev. 155 (2014); Comment, Rule 60(b)(6): *Whether "Tapping the Grand Reservoir of Equitable Power" is Appropriate to Right an Attorney's Wrong*, 88 Marq.L.Rev. 997 (2005).

As one commentator makes clear, the Court's guidance on this issue is not important just because it would allow the Court to reconcile a stark conflict that has spread among the circuits; resolving the Rule 60(b)(6) issue would also allow the Court to decide how its recent attorney-misconduct jurisprudence, which it has issued in the criminal context, applies in the civil arena: "While the Supreme Court has not directly ruled on whether attorney misconduct can satisfy Rule 60(b)(6), it has ruled on attorney misconduct and its effect on clients in the criminal context." White, *supra* at 173.

As that commentator explained, the Court's decisions in *Maples v. Thomas*, 132 S. Ct. 912 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010), illustrate that the Court has recognized—albeit in the criminal context—there are circumstances in which the sins of a client's lawyer should not be visited upon the client. Although the commentator believes these cases should apply directly in the civil context, even if he is wrong one thing is certain: the Court's recognition that there are circumstances under which a client should be relieved from the misconduct of an attorney appears to conflict at a fundamental level with those conflict cases listed above holding that 60(b)(6) relief may never be applied in circumstances arising from attorney misconduct. This apparent conflict with this Court's recent precedent, combined with the unavoidable and irreconcilable conflict that exists among the circuits, illustrates why the Court should grant certiorari and address the Rule 60 issues presented in this case.

II. Summary Judgment Should Be Vacated

As the documents submitted alongside his motion to vacate the district court's summary judgment motion make clear, Antero had ample factual grounds available to oppose and defeat summary judgment; the issues were absolutely in dispute. (DE 79-14, 29-30; 79-1:Exhibit A). If the district court had granted Antero's motion for an extension of time to file a reply to the Plaintiffs' summary judgment motion or had granted his motion to vacate its order granting summary judgment, there thus would have been substantial evidence within the record illustrating why summary judgment was improper. The district court's order granting summary judgment should be vacated.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED SEPTEMBER 6, 2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-13070
Non-Argument Calendar

FIRESTONE BUILDING
PRODUCTS COMPANY, LLC,

Plaintiff-Appellee,

versus

ANTERO RAMOS,

Defendant-Appellant.

September 6, 2018, Decided

Appeal from the United States District Court
for the Southern District of Florida.
D.C. Docket No. 0:15-cv-60946-WJZ.

Before TJOFLAT, NEWSOM, and JULIE CARNES Circuit Judges.

PER CURIAM:

Appendix A

Firestone Building Products Company, LLC (Plaintiff) filed suit against its former employee Antero Ramos for fraud, alleging that he orchestrated a scheme from his Florida office to submit false invoices for sales in Brazil that never occurred in an effort to boost his bonus compensation. In the district court, Ramos moved to dismiss for *forum non conveniens*, filed an untimely motion for an extension of time to respond to Plaintiff's summary judgment motion, submitted a Rule 60(b) motion for relief from the court's summary judgment order, and moved for a trial continuance. The district court denied each motion. Ramos appeals these denials but, because we conclude that the district court did not abuse its discretion, we affirm.

I. BACKGROUND

A. Factual Background

Plaintiff is a limited liability company that sells building materials and products, including roofing and wall products. Plaintiff is headquartered in Indianapolis, Indiana and organized under Indiana law. Plaintiff's parent company, Bridgestone Americas, Inc., is based in Nashville, Tennessee.

In 2006, Ramos began working for Bridgestone America's subsidiary in Brazil. In 2009, Ramos was promoted to work for Plaintiff as the General Manager of Plaintiff's Latin American and Caribbean operations. As part of the promotion, Ramos moved to Fort Lauderdale, Florida and worked out of Plaintiff's office there. As

General Manager, Ramos had authority to transact business on behalf of Plaintiff and oversaw Plaintiff's Brazilian sales and operations (as well as the sales and operations in other Latin American and Caribbean countries). On top of his base salary, Ramos was eligible for bonuses contingent on sales volume, profit, and other factors.

In January 2015, Ramos's supervisor learned that auditors had discovered improprieties in Brazilian sales transactions from December 2014. The auditors found evidence that Ramos had directed his subordinates to create false invoices for roughly $22 million worth of sales that never actually occurred. As a result, Ramos was terminated from his position with Plaintiff. Ramos filed a lawsuit against Bridgestone America's Brazilian subsidiary in Brazil alleging wrongful termination and other claims.

B. Procedural History

In May 2015, Plaintiff filed this lawsuit against Ramos in the Southern District of Florida. Plaintiff's amended complaint alleged, among other things, that Ramos breached his fiduciary duty to the company and engaged in a conspiracy to defraud Plaintiff through a false invoicing scheme in an effort to boost his bonuses. Ramos moved to dismiss for *forum non conveniens*, arguing that Brazil was the more appropriate forum. The district court denied the motion.

Appendix A

On September 6, 2016, Plaintiff moved for summary judgment. Under the district court's scheduling order, Ramos's response was due on September 26. Ramos failed to file a response by the deadline. On October 21, nearly a month after the deadline had passed, Ramos moved for an extension of time to file his reply. The district court denied the motion for an extension. Ruling on Plaintiff's unopposed summary judgment motion, the district court granted summary judgment to Plaintiff on its fraud, conspiracy, and breach of fiduciary duty claims, denied summary judgment on the unjust enrichment, constructive trust, and conversion claims, and reserved the determination of damages for trial. Plaintiff later voluntarily dismissed the claims it had not won summary judgment on.

Damages were still left to be determined. On April 7, 2017, at the pretrial conference, Ramos's counsel moved to withdraw from the case. The district court granted the motion, set a new trial date of May 8, and informed Ramos that the court would not grant future continuances. Ramos's new counsel entered his appearance on April 18 and filed a motion for a trial continuance and a motion under Fed. R. Civ. P. 60(b) to set aside the court's summary judgment order on the grounds that Ramos's original counsel was negligent. The court denied both motions on May 1. On May 3, Ramos's new counsel filed a motion to withdraw due to Ramos's inability to comply with the financial obligations of trial. The court granted the motion and pushed back trial another week to May 15.

At the one-day trial to determine damages, Ramos represented himself *pro se*. At the close of the evidence, the district court granted Plaintiff's oral motion for judgment as a matter of law under Federal Rules of Civil Procedure 50. The court entered final judgment in favor of Plaintiff.

Ramos filed a timely appeal challenging the district court's rulings on the motion to dismiss for *forum non conveniens*, the motion for an extension of time to respond to Plaintiff's summary judgment motion, the Rule 60(b) motion, and the motion for a trial continuance.

II. STANDARD OF REVIEW

We may reverse a district court's *forum non conveniens* determination "only when there has been a clear abuse of discretion." *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100 (11th Cir. 2004) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)). "It is well settled that abuse of discretion review is extremely limited and highly deferential." *Wilson v. Island Seas Invs., Ltd.*, 590 F.3d 1264, 1268 (11th Cir. 2009) (internal quotation marks omitted). We "must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1288 (11th Cir. 2009) (internal quotation marks omitted). "Factual determinations are reviewed for clear error." *Tazoe v. Airbus S.A.S.*, 631 F.3d 1321, 1330 (11th Cir. 2011) (quoting *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1310 (11th Cir. 2001)).

We also review for abuse of discretion the denial of a motion for an extension of time to respond to a summary judgment motion, *Barrett v. Walker County School District*, 872 F.3d 1209, 1230 (11th Cir. 2017), the denial of a Rule 60(b) motion, *Toole v. Baxter Healthcare Corporation*, 235 F.3d 1307, 1316 (11th Cir. 2000), and the denial of a motion for a continuance, *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1296 (11th Cir. 2005).

III. DISCUSSION

A. Motion to Dismiss For *Forum Non Conveniens*

"To obtain dismissal for *forum non conveniens*, '[t]he moving party must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice.'" *GDG Acquisitions, LLC v. Gov't of Belize*, 749 F.3d 1024, 1028 (11th Cir. 2014) (alteration in original) (quoting *Leon*, 251 F.3d at 1310-11). "A plaintiff's choice of forum is entitled to deference, and there is a presumption in favor of a plaintiff's choice of forum, particularly where the plaintiffs are citizens of the United States." *Wilson*, 590 F.3d at 1269. But a plaintiff's forum choice is not dispositive. *Piper Aircraft*, 454 U.S. at 255 n.23. Thus, "[a] defendant invoking forum non conveniens 'bears a heavy burden in opposing the plaintiff's chosen forum.'" *Wilson*, 590 F.3d at 1269 (quoting *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)). To rule for the defendant, the district court must find "positive evidence of unusually

extreme circumstances" and be "thoroughly convinced that material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country." *Aldana*, 578 F.3d at 1293 (internal quotation marks omitted).

The only analysis at issue here is the district court's weighing of the private and public interest factors.[1] "[W]here the [district] court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft*, 454 U.S. at 257. Conversely, "[t]he court abuses its discretion when it fails to balance the relevant factors," or if it "does not weigh the relative advantages of the respective forums but considers only the disadvantages of one." *Wilson*, 590 F.3d at 1269 (quoting *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1308 (11th Cir. 1983)).

The district court did not abuse its discretion in denying Ramos's motion.[2] The private interest factors include:

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1. Plaintiff and Ramos do not dispute that Brazil is an adequate alternative forum and that Plaintiff can reinstate its suit there without inconvenience or prejudice.

2. For this analysis we look only at the amended complaint, because the amended complaint "superseded the former pleadings," meaning that "the original pleadings were abandoned by the amendment" and became "a legal nullity." *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) (alterations adopted) (internal quotation marks omitted). Indeed, Ramos in his briefing before the district court focused on only the allegations of the amended complaint in his motion to dismiss.

> [T]he relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Tazoe, 631 F.3d at 1331 (alteration in original) (quoting *Piper Aircraft*, 454 U.S. at 241 n.6). Although many witnesses and documents were located in Brazil, many were also located in the United States. Any Brazilian documents and witnesses under Plaintiff's control were available to Ramos through standard discovery procedures, and all other evidence located in Brazil was available through compulsory processes under the Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 27, 1438 U.N.T.S. 288, and the Brazilian Code of Civil Procedure. The district court took all of this into consideration—including the costs to Ramos and potential translation burdens—and reasonably concluded that some factors favored a Brazilian forum, but more favored Plaintiff's choice. Although Ramos disagrees with the district court's analysis—namely, Ramos contends that the district court did not give sufficient weight to the costs Ramos faced, gave too much weight to Plaintiff's forum choice,[3] and did not adequately explain how much

3. Ramos argues that Plaintiff should not benefit from the strong presumption that U.S. citizens receive when choosing a United States forum because Plaintiff is part of a multinational entity and regularly conducts business abroad. *See Reid-Walen*

weight it gave to each of the factors—the court conducted the proper analysis and reached a reasonable conclusion based on the facts before it.

So too with the public factors. Those factors include:

> [T]he administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Tazoe, 631 F.3d at 1333 (alteration in original) (internal quotation marks omitted) (quoting *Piper Aircraft*, 454 U.S. at 241 n.6). The district court concluded that the public interest factors weighed strongly in favor of Plaintiff's forum choice. The court found that the United States had a strong local interest because Ramos orchestrated the fraud scheme from his office in Fort Lauderdale and the

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v. Hansen, 933 F.2d 1390, 1395 (8th Cir. 1991) (observing that "[w]hen an American corporation doing extensive foreign business brings an action for injury occurring in a foreign country, many courts have partially discounted the plaintiff's United States citizenship"). Ramos acknowledges, however, that this Court has no binding precedent that establishes that American corporations doing business internationally receive a weaker presumption. And we see no reason to address whether we agree with such a principle, given that it would not alter the outcome here.

injury to Plaintiff was suffered in the United States. For the same reasons, the court concluded that, although the scheme involved some Brazilian actors and transactions, a local jury would not be unfairly burdened by deciding the case. Further, the court identified that Plaintiff's claims arose under Florida law and that Brazilian law and customs were largely inapplicable, so it made more sense for a United States forum to handle the case rather than a Brazilian forum unfamiliar with the governing Florida law. Ramos's only quibble with the district court's analysis is that he contends that the controversy at the heart of this lawsuit lies in Brazil, not the United States, so a Brazilian court has a stronger local interest in deciding the case. But, again, the district court recognized that some conduct occurred in Brazil, but reasonably concluded that the United States had a stronger local interest, and that the other public interest factors weighed in favor of the United States as well.

In sum, the district court considered the relevant public and private interest factors and balanced those factors reasonably. The court did not abuse its discretion in denying Ramos's motion to dismiss for *forum non conveniens*.

B. Motion For An Extension Of Time To File A Reply To Plaintiff's Summary Judgment Motion

The district court also did not abuse its discretion when it denied Ramos's untimely motion for an extension of time to file its reply to Plaintiff's motion for summary

judgment. "District courts have unquestionable authority to control their own dockets," including "broad discretion in deciding how to best to manage the cases before them." *Smith v. Psychiatric Solutions, Inc.*, 750 F.3d 1253, 1262 (11th Cir. 2014) (internal quotation marks omitted); *see also Young v. City of Palm Bay*, 358 F.3d 859, 864 (11th Cir. 2004) ("A district court must be able to exercise its managerial power to maintain control over its docket. . . . to administer effective justice and prevent congestion."). Accordingly, "we have often held that a district court's decision to hold litigants to the clear terms of its scheduling orders is not an abuse of discretion." *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1307 (11th Cir. 2011). Here, the district court denied Ramos's motion for an extension because it was filed twenty-five days after the scheduling order deadline for Ramos's reply. The court observed that Ramos's only explanation for the delay and the need for an extension were Ramos's "very limited resources and a language barrier"—issues that, if true, should have become apparent much earlier, considering that the same counsel had worked with Ramos for over a year and had filed major pleadings (including two motions to dismiss for *forum non conveniens*, a declaration from Ramos, and an answer to Plaintiff's amended complaint) long before the reply deadline. On appeal, Ramos repeats the same excuse and emphasizes the harm from not granting the extension and allowing Ramos to file a reply. But the facts make plain that the district court did not abuse its discretion by denying Ramos's untimely motion and holding him to the scheduling order.

C. Rule 60(b) Motion

Ramos also argues that the district court abused its discretion when it denied Ramos's Rule 60(b) motion for relief from the court's order granting partial summary judgment to Plaintiff. To show that the district court abused its discretion, Ramos "must demonstrate a justification so compelling that the court was required to vacate its order." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993) (quoting *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys.*, 803 F.2d 1130, 1132 (11th Cir. 1986)).

Assuming that Ramos could properly seek relief from the district court's interlocutory summary judgment order under Rule 60(b),[4] the district court did not abuse its discretion by denying such relief. Ramos argues that the district court should have granted relief under Rule 60(b)(1)[5] because Ramos's counsel was negligent about

4. We note that it is not clear that a party can obtain relief from an interlocutory summary judgment order under Rule 60(b), because Rule 60(b) authorizes a district court to grant relief from "a final judgment, order, or proceeding." *See Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 773 F.2d 151, 154 (7th Cir. 1985) (explaining "why Rule 60(b) must be limited to review of orders that are independently 'final decisions' under 28 U.S.C. § 1291"); *see also Mullins v. Nickel Plate Mining Co., Inc.*, 691 F.2d 971, 974 (11th Cir. 1982) ("Rule 60(b) applies only to final judgments."). Because the parties do not raise this issue in their briefing and it is unnecessary for the resolution of this appeal, we do not address it further.

5. Rule 60(b)(1) authorizes a district court to grant relief for "mistake, inadvertence, surprise, or excusable neglect."

informing Ramos of the summary judgment deadline, among other things, while Ramos himself diligently monitored his case. But Ramos's only explanation to the district court for why his counsel failed to file a timely reply was that counsel "chose to ignore the deadline to respond to the Motion for Summary Judgment" and that the motion for an extension was untimely "for reasons that remain unexplained." That justification is not so compelling as to require reversal. *See Solaroll Shade*, 803 F.2d at 1132 ("[A]n attorney's negligent failure to respond to a motion does not constitute excusable neglect.").

Ramos also argues that his counsel's negligence justifies relief under Rule 60(b)(6).[6] But attorney negligence is a grounds for relief under Rule 60(b)(1), not (b)(6). Because (b)(1) and (b)(6) are mutually exclusive, the district court could not grant relief for attorney negligence under (b)(6), *see Cavaliere*, 996 F.2d at 1115; *Solaroll Shade*, 803 F.2d at 1133, and did not abuse its discretion by declining to do so.

D. Motion For A Trial Continuance

Finally, Ramos asserts that the district court should have granted his motion for a trial continuance. "The denial of a request for continuance does not constitute an abuse of discretion unless it is arbitrary and unreasonable and severely prejudices the moving party." *SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017). We consider four factors in this analysis: (1) "the extent of appellant's diligence in

6. Rule 60(b)(6) is the residual subsection and grants relief for "any other reason that justifies relief."

his [or her] efforts to ready his [or her] defense prior to the date set for hearing," (2) "how likely it is that the need for a continuance could have been met if the continuance had been granted," (3) "the extent to which granting the continuance would have inconvenienced the court and the opposing party," and (4) "the extent to which the appellant might have suffered harm as a result of the district court's denial." *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1351 (11th Cir. 2003) (alterations in original) (quoting *Hashwani v. Barbar*, 822 F.2d 1038, 1040 (11th Cir. 1987)).

The district court did not abuse its discretion in denying Ramos's motion. Ramos contends that granting the continuance would have inconvenienced Plaintiff and the district court little and that Ramos was heavily prejudiced because it resulted in his counsel withdrawing. Yet the district court informed Ramos at the pretrial conference that it would not grant a continuance if Ramos chose to obtain new counsel a month before trial. Nevertheless, the court pushed back the trial when Ramos's original counsel withdrew and did so again when his new counsel withdrew. Further, the record does not establish that Ramos's counsel withdrew because of the denial of the continuance. According to the withdrawal motion, Ramos's counsel withdrew because Ramos had been "unable to fully comply with [his financial] obligations thereby making it impossible for the undersigned counsel to continue to effectively represent [Ramos]," so "continued representation . . . present[ed] an unreasonable financial burden" for counsel. The motion does not raise a lack of time or the district court's denial of the

continuance as a reason for counsel's withdrawal, just financial hardship in preparing for and attending trial. Thus, we cannot conclude that denial of the continuance prejudiced Ramos. For the same reason, because Ramos's counsel never cited the need for a continuance or a lack of time as a reason prompting withdrawal, Ramos has failed to show that granting the motion would have solved Ramos's alleged need for a continuance by preventing his counsel from withdrawing. Further, there is no evidence that Ramos had been diligent preparing for trial. At the pretrial conference (with Ramos's original counsel), Ramos submitted no exhibits or witnesses for the joint pretrial statement. And Ramos's motion for a continuance admitted, while laying the blame on Ramos's original counsel, that Ramos had performed no discovery since the lawsuit had begun nearly two years earlier. Taking all of this into account, we hold that the district court did not abuse its discretion in denying Ramos's motion for a continuance.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DECIDED JUNE 19, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60946-CIV-ZLOCH

FIRESTONE BUILDING PRODUCTS COMPANY, LLC,

Plaintiff,

vs.

ANTERO RAMOS,

Defendant.

June 19, 2017, Decided
June 19, 2017, Entered on Docket

ORDER

THIS MATTER came before the Court for a jury trial on May 15, 2017. At the close of evidence, Plaintiff Firestone Building Products Company, LLC ("Firestone") *ore tenus* moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a). The Court has carefully considered said Motion, the entire court file and is otherwise fully advised in the premises. As the Motion is

due to be granted, the Court hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Ramos is the former manager of Firestone's Latin America division. Firestone sued Ramos, alleging that Ramos conspired with Firestone employees and other persons in Brazil to manipulate Firestone's books and records, including booking fictitious sales only later to reverse them, preparing fake invoices, and otherwise overstating Firestone's financial performance in Brazil in order to receive larger performance bonuses.

2. On August 26, 2015, Firestone filed its First Amended Complaint asserting six causes of action against Ramos: fraud (Count 1), conspiracy to commit fraud (Count 2), conversion (Count 3), unjust enrichment (Count 4), breach of fiduciary duty (Count 5), and constructive trust (Count 6).

3. On June 8, 2016, Ramos filed his Answer to the First Amended Complaint. Ramos's Answer does not assert any affirmative defenses or counterclaims.

4. On February 27, 2017, the Court entered its Order granting in part and denying in part Firestone's motion for summary judgment. The Court granted summary judgment in Firestone's favor as to liability on Counts 1 (fraud), 2 (conspiracy to commit fraud), and 5 (breach of fiduciary duty). The Court denied the remainder of Firestone's motion for summary judgment.

5. Regarding Ramos's liability to Firestone on Firestone's claims of fraud, conspiracy to commit fraud, and breach of fiduciary duty, the Court held:

> The facts admitted by Defendant establish his liability for both civil conspiracy and fraud. Specifically, Defendant entered into an agreement with several employees in Plaintiff's Brazil office, whom he supervised, directing them to manipulate or fabricate invoice, inventory, and sales report records. Defendant's submission of those manipulated and fabricated records constitutes false statements of material fact, as well as overt acts in pursuance of the conspiracy. Defendant knew that these records were false and intended that they would induce Plaintiff to compensate Defendant for overstated or false financial performance, as evidenced by his communications with the employees he supervised. Plaintiff relied on these manipulated and fabricated records and suffered injury in numerous ways, including payment of unwarranted bonuses, wasted inventory, damage to Plaintiff's business reputation, and expenses associated with remedying the harm done by Defendant's fraudulent acts. Plaintiff is therefore entitled to summary judgment in its favor on Counts 1 and 2 of the Amended Complaint.

> Plaintiff is likewise entitled to summary judgment in its favor on its claim for breach of fiduciary duty.
>
> ...
>
> It is undisputed that Defendant served as general manager of Plaintiff's Latin America Division, which gave him "authority to transact business on behalf of [Plaintiff] in Latin America and the Caribbean, including Brazil." "That is, Defendant had the authority to negotiate with customers on [Plaintiff]'s behalf, to bind [Plaintiff] to contracts, to perform contracts on [Plaintiff]'s behalf, to issue invoices to customers and to make adjustments to [Plaintiff]'s inventory." As such an agent, Defendant owed a fiduciary duty to Plaintiff, which he breached by participating in a scheme to overstate his division's financial performance in order to obtain unmerited remuneration. Having been harmed by that breach, Plaintiff prevails as a matter of law on its breach of fiduciary duty claim.

DE 66.

6. Firestone subsequently dismissed Counts III, IV, and VI of the First Amended Complaint (DE 17) pursuant to Federal Rule of Civil Procedure 41, and this matter proceeded to jury trial on the only remaining issue — what amount of damages, if any, were caused by Ramos's fraud, conspiracy to commit fraud, and breach of fiduciary duty.

7. The Court commenced a jury trial on May 16, 2017. Firestone called a single witness, Troy Geuther ("Geuther"). Geuther is Firestone's Vice President of International Operations, and Firestone's Latin American division reports to him. Firestone also introduced a number of exhibits into evidence. Ramos cross-examined Geuther, but he did not call any witnesses (including himself), nor did he introduce any documents or other information into evidence.

8. At trial, Firestone identified three categories of damages that it was seeking compensation for: (1) repayment of part of a retention/performance bonus paid to Ramos in March 2014; (2) recovery of amounts paid to Ernst & Young to determine the extent of Ramos's fraud and to correct Firestone's books and records; and (3) recovery of the value of excess inventory Firestone was left with as a result of Ramos's scheme and that Firestone had to scrap because it was damaged or had passed its expiration date.

(a) Retention/Performance Bonus

9. On July 21, 2011, Firestone informed Ramos that he would be eligible to receive the following retention/performance bonuses: (a) $40,000 paid by the end of month, February 2012; (b) $40,000 paid by the end of month, February 2013; and (c) $40,000 paid by the end of month, February 2014. Receipt was conditioned on, among other things, Ramos meeting the terms of a separate Agreement to Repay Bonus Payments.

10. Ramos signed the Agreement to Repay Bonus Payments on November 13, 2011. Pl. Ex. No. 5. Under its terms, Ramos agreed that if he resigned or was terminated for willful misconduct within twelve months of receiving any of those retention/performance bonuses, he would repay the bonus in certain prorated amounts. *Id.* Relevant to Firestone's damages claim, the Agreement to Repay Bonus Payments requires Ramos to repay 25% of a bonus payment if he was terminated for willful misconduct within more than nine but no more than twelve months of receiving the payment. *Id.*

11. Geuther testified that Ramos's fraudulent activity was discovered in early 2015, that Ramos was put on suspension, and that Ramos was terminated for his misconduct in February 2015. On February 11, 2015, Firestone sent Ramos a letter informing him that, following a financial investigation regarding misrepresentation of sales revenue, his employment with Firestone was terminated effective February 13, 2015. Pl. Ex. No. 7.

12. As evidenced by his pay stubs admitted into evidence, Ramos received the third performance/bonus payment of $40,000 on March 14, 2014. Under the terms of the Agreement to Repay Bonus Payments, Ramos was required to repay Firestone 25% of that bonus payment (i.e., $10,000) because Ramos was terminated for willful misconduct more than nine but less than twelve months after receiving the bonus. Geuther testified that Ramos has not repaid Firestone any monies.

13. Ramos did not present any evidence, whether by way of testimony or documentary evidence, relating to the bonus payment, nor did he cross-examine Geuther regarding the bonus payment.

(b) Ernst & Young Invoices

14. Geuther testified that as Firestone discovered the extent of Ramos's fraudulent activities, it took steps to reconcile the false sales invoices with actual sales in Brazil. Geuther testified that the scope of the fraud was so extensive that Firestone had to hire Ernst & Young to audit Firestone's books and records, and that, as part of this audit, Ernst & Young had to look at both Firestone's sales and inventory processes. Ernst & Young is not Firestone's regular auditor, and Geuther testified that the only reason Ernst & Young was retained was to determine the extent of the fraud perpetrated by Ramos and his co-conspirators and to correct Firestone's books and records based on that investigation.

15. Firestone introduced into evidence four invoices from Ernst & Young: (a) an October 8, 2015 invoice of $57,258.00 for services rendered from July 31, 2015 through September 30, 2015; (b) a November 9, 2015 invoice of $30,277.25 for services rendered from September 28, 2015 through October 30, 2015; (c) a December 1, 2015 invoice of $24,498.88 for services rendered from November 3, 2015 through November 30, 2015; and (d) a January 20, 2016 invoice of $21,158.11 for services rendered from December 1, 2015 through December 18, 2015. Pl. Ex. No. 1. The invoices total $133,192.24. *Id.*

16. The invoices are addressed to Jennifer Bowman, Firestone's Vice-President of Finance. Geuther testified that these invoices reflect Ernst & Young's work for examining and assessing the scope of Ramos's fraudulent scheme. He further testified that Firestone paid the invoices.

17. Ramos did not present any evidence, whether by way of testimony or documentary evidence, nor did he elicit any testimony from Geuther during cross-examination, that contradicted or otherwise qualified the evidence introduced by Firestone that Ernst & Young was engaged as a result of Ramos's fraud, that the invoices reflect Ernst & Young's work for Firestone in that engagement, that Ernst & Young billed the amounts listed on the invoices, that the total amount billed was $133,192.24, and that Firestone paid the invoices.

(c) Excess Inventory

18. Geuther testified regarding how the software system used by Firestone's Brazilian operations matched invoices for Brazilian sales with inventory orders for material shipped from the United States. Specifically, when a sales invoice was generated in Brazil, the software system required that a matching inventory delivery order be generated. That inventory delivery order initiated the process by which Firestone materials manufactured in the United States were delivered to Brazil in order to satisfy the sale reflected in the matching sales invoice. Because the software system could not distinguish between an actual invoice and a fraudulent invoice created as part of Ramos's

scheme, Firestone shipped and delivered inventory to Brazil in response to the fraudulent invoices created by Ramos's scheme. This resulted in the accumulation of excess inventory in Brazil that had been shipped from the United States to satisfy what were later discovered to be non-existent sales. Ramos directed that this excess inventory be stored in a remote warehouse that was under his control and/or supervision.

19. Geuther further testified that after Firestone discovered Ramos's fraud, it sent experts to that warehouse to determine what amount of inventory was in excess of what was needed to satisfy actual sales made to Brazilian customers. Firestone introduced into evidence a November 11, 2015 memorandum addressed to the senior management at Firestone stating that the Brazilian inventory balance was $4.6 million while the inventory should have been $825,000, resulting in an excess inventory of $3,775,000. Pl. Ex. No. 8. Geuther testified that this excess inventory resulted from Ramos's fraudulent scheme of generating false sales invoices. On cross-examination, Geuther further testified that all of the excess inventory had been purchased while Ramos was in charge of Firestone's Latin American operations.

20. Of that excess inventory, $298,036.28 was either damaged or had expired. The authors of the memorandum sought permission to scrap the expired and damaged goods, and Geuther testified that Firestone in fact disposed of those goods.

21. Ramos did not present any evidence, whether by way of testimony or documentary evidence, nor did he elicit any testimony from Geuther during cross-examination, that contradicted or otherwise qualified the evidence introduced by Firestone that Ramos's scheme resulted in a buildup of excess inventory in Brazil that was unrelated to actual sales, that some of that excess inventory had to be scrapped because it was damaged or had expired, that the excess inventory that had to be scrapped had a value of $298,036.28, and that Firestone in fact disposed of that excess inventory.

CONCLUSIONS OF LAW

Federal Rule of Civil Procedure 50 provides in relevant part:

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

Fed. R. Civ. P. 50. When considering a Rule 50 motion, the Court:

> considers all the evidence and the inferences drawn therefrom in the light most favorable to the non-moving party. If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the [motion] should be granted. . . . . A mere scintilla of evidence does not create a jury question. Rather, there must be a substantial conflict in evidence to support a jury question.

United States v. One Parcel of Real Estate at 298 N.W. 45th St., Boca Raton, Fla., 804 F. Supp. 319, 323 (S.D. Fla. 1992) (granting plaintiff's motion for directed verdict); *see also Carruthers v. BSA Adver., Inc.*, 357 F.3d 1213, 1215 (11th Cir. 2004) (standard for consideration of Rule 50(a) motion for judgment as a matter of law; affirming district court's grant of motion).

This case arises under the Court's diversity jurisdiction, and the Court therefore applies Florida law to the determination of damages. *Hessen for Use & Benefit of Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 645 (11th Cir. 1990); *see also Global Quest, LLC v. Horizon Yachts, Inc.*, 849 F.3d 1022, 1027 (11th Cir. 2017) (federal court sitting in diversity applies substantive law of forum state). "The normal measure of damages in a tort case is compensatory." *Torres v. Sarasota Cnty Pub. Hosp. Bd.*, 961 So.2d 340, 345 (Fla. 2d DCA 2007) (quotation and

citation omitted). Compensatory damages are meant "to restore the injured party to the position it would have been had the wrong not been committed." *Laney v. Am. Equity Inv. Life Ins. Co.*, 243 F. Supp. 2d 1347, 1354 (M.D. Fla. 2003) (applying Florida law to claims of fraud, negligent misrepresentation, and breach of fiduciary duty). Thus, a plaintiff who proves fraud is entitled to recover "full compensation for the effect of the fraud." *Minotty v. Baudo*, 42 So. 3d 824, 835 (Fla. 4th DCA 2010). A plaintiff who proves civil conspiracy is entitled to recover damages resulting from the underlying civil wrong (in this case fraud). *See Phillip Morris USA, Inc. v. Russo*, 175 So.3d 681, 686 n.9 (Fla. 2015). Finally, a plaintiff who proves breach of fiduciary duty is entitled to recover damages "'flowing from the breach.'" *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1325 (11th Cir. 2012) (*quoting Crusselle v. Mong*, 59 So.3d 1178, 1181 (Fla. 5th DCA 2011)).

As discussed above, Firestone introduced uncontroverted evidence (both testimonial and documentary) that it suffered damages resulting from Ramos's scheme in the amount of $441,228.52. These damages are compensatory damages that Firestone is entitled to recover under Florida law. The jury was not presented with contrary evidence, and certainly not evidence sufficient to create a substantial conflict to support a jury question. When considering all of the evidence and inferences drawn from them in the light most favorable to Ramos, the facts and inferences point overwhelmingly in favor of Firestone such that reasonable people could not arrive at a contrary verdict.

The Court therefore concludes that Firestone is entitled to judgment as a matter of law that it suffered $441,228.52 in damages as a result of Ramos's scheme

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff Firestone Building Products Company, LLC's *ore tenus* Motion For Judgment As A Matter Of Law be and the same is hereby **GRANTED**; and

2. Final judgment will issue by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 19th day of June, 2017.

/s/ William J. Zloch
WILLIAM J. ZLOCH
Sr. United States District Judge

Copies furnished:

All Counsel of Record

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED MAY 1, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60946-CIV-ZLOCH

FIRESTONE BUILDING
PRODUCTS COMPANY, LLC,

Plaintiff,

VS.

ANTERO RAMOS,

Defendant.

ORDER

THIS MATTER is before the Court upon Defendant's Motion For Relief From Summary Judgment Order (DE 79), Defendant's Motion To Continue Trial Date (DE 80), and Defendant's Motion For Leave To Take Depositions And To Serve Discovery On Plaintiff's Witnesses (DE 81) The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

Each of the instant Motions (DE Nos. 79, 80 & 81) requests relief on account of what Defendant characterizes

as the negligence of his former counsel. Defendant's first Motion (DE 79) seeks relief, pursuant to Federal Rule of Civil Procedure 60(b)(6), from the Court's Order (DE 66) granting summary judgment in part in favor of Plaintiff. Although the Eleventh Circuit has not explicitly so held, it appears to recognize that Rule 60(b)(6) may warrant relief where a party has effectively forfeited his case due to his lawyer's *gross* negligence. *See Franqui v. Florida*, 638 F.3d 1368, 1369 n.2 (11th Cir. 2011). But the Court finds that the conduct Defendant has set forth as the basis of this Rule 60 Motion (DE 79) does not rise to the level of gross negligence.[1] The court will therefore deny this Motion (DE 79).

Defendant's remaining Motions (DE Nos. 80 & 81) are premised upon the Court granting the Rule 60 Motion (DE 79) and are thus due to be denied as well. The Court notes, however, that the it previously addressed the issues raised in these remaining Motions (DE Nos. 80 & 81). Specifically, at the pre-trial conference, the Court advised that it would "enter an order specially setting this matter

1. Earlier in this case, Defendant asked that the case be dismissed pursuant to the doctrine of *forum non conveniens*. *See* DE 12. Defendant argued that he "does not have the ability to hail Brazilian witnesses into [the] U.S. or the ability to compel production on Brazilian corporations without going through a complex and expensive legal process *in Brazil* that is far beyond his financial capabilities as a middle-class individual battling a gigantic multi-national corporation." DE 12, at 17. He further urged that "a trial on this complaint in the United States would be an impossibility for Mr. Ramos." *Id.* At least some of the conduct about which Defendant complains, then, appears not to be an act of negligence, but a exercise of strategic choice. *See* DE 79, at 4-5.

for trial so that your new lawyer will know the date that he or she has to be ready for trial because there will not be any further continuance of the matter." DE 82, at 11:25-12:1; *see also id.* at 13:6-9 ("We are simply going to set a trial date so that your new lawyer can make an informed decision as to whether he or she wants to represent you and be ready for trial on that date.") The Court explained to Defendant precisely what that meant. *See id.* at 12:4-14:10. Defendant has not presented a sufficient basis for the Court to reconsider this manner of proceeding.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Defendant's Motion For Relief From Summary Judgment Order (DE 79), Defendant's Motion To Continue Trial Date (DE 80), and Defendant's Motion For Leave To Take Depositions And To Serve Discovery On Plaintiff's Witnesses (DE 81) be and the same are hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 1st day of May, 2017.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, FILED FEBRUARY 28, 2017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60946-CIV-ZLOCH

FIRESTONE BUILDING PRODUCTS COMPANY, LLC,

Plaintiff,

vs.

ANTERO RAMOS,

Defendant.

February 27, 2017, Decided
February 28, 2017, Entered on Docket

ORDER

THIS MATTER is before the Court upon Plaintiff's Motion For Summary Judgment (DE 48). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

By the instant Motion (DE 48) Plaintiff Firestone Building Products Company, LLC's, (hereinafter "Plaintiff") seeks summary judgment in its favor as to

each of the six counts it asserts under Florida law in the Amended Complaint (DE 17). The Court notes that Defendant did not respond to said Motion (DE 48) within the time prescribed by law. This failure is, in itself, grounds for granting the instant Motion by default. *See* S.D. Fla. L.R. 7.1(c). Nevertheless, the Court will resolve the instant Motion (DE 48) on the merits.

Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party seeking summary judgment

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)(quotation omitted). "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case. An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) (*citing Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997)) (further citations

omitted). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). "If the movant succeeds in demonstrating the absence of a material fact, the burden shifts to the non-movant to show the existence of a genuine issue of fact." *Burger King Corp. v. E-Z Eating, 41 Corp.*, 572 F.3d 1306, 1313 (11th Cir. 2009) (*citing Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993)).

The moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing of an essential element of the case to which the non-moving party has the burden of proof. *Celotex Corp.*, 477 U.S. at 322; *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir. 1987). All justifiable inferences are to be drawn in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Plaintiff alleges that Defendant, the former manager of Plaintiff's Latin America division, conspired with employees of Plaintiff and other persons in Brazil to book fictitious sales only later to reverse them, to prepare fake invoices, and to otherwise overstate the division's financial performance in order to receive larger performance bonuses. The Court notes that Defendant does not dispute these facts, which are set forth in Plaintiff's Statement of Uncontested Material Facts (DE 49) and supported by the exhibits, reports, and declarations Plaintiff

submitted in support of its Motion (DE 48). *See* DE Nos. 50-3 through 50-31. "All material facts set forth in the movant's statement filed and supported as required [] will be deemed admitted unless controverted by the opposing party's statement." Local Rule 56.1(b).

Plaintiff seeks summary judgment in its favor as to each Count of the Amended Complaint (DE 17). Those Counts, each flowing from Defendant Antero Ramos's scheme to manipulate Plaintiff's financial records for his own gain, are as follows: (1) fraud, (2) conspiracy to commit fraud, (3) conversion, (4) unjust enrichment, (5) breach of fiduciary duty, and (6) constructive trust. For the reasons that follow, the Court will grant summary judgment as to liability on Plaintiff's claims of fraud, conspiracy to commit fraud, and breach of fiduciary duty. However, the Court will deny Plaintiff's Motion For Summary Judgment (DE 48) with respect to its equitable claims and with respect to its conversion claim.

I. Plaintiff's Fraud and Breach of Fiduciary Duty Claims

On the undisputed record before the Court, Plaintiff is entitled to summary judgment in its favor as to liability on its claims of fraud, conspiracy to commit fraud, and breach of fiduciary duty. Under Florida law, a claim for fraud requires proof of four elements: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury to the party acting in reliance on

the representation." *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010) (*quoting Johnson v. Davis*, 480 So. 2d 625, 627 (Fla. 1985)). A claim for civil conspiracy requires "(1) an agreement between two or more parties; (2) to do an unlawful act or to do a lawful act by unlawful means; (3) the doing of some overt act in pursuance of the conspiracy; and (4) damage to plaintiff as a result of the acts done under the conspiracy." *Philip Morris USA, Inc. v. Russo*, 175 So. 3d 681, 686 (Fla. 2015). However, "a civil conspiracy claims is not an independent cause of action." *Behrman v. Allstate Life Ins. Co.*, 178 F. App'x 862, 863 (11th Cir. 2006). Instead, "[a]n actionable conspiracy requires an actionable underlying tort or wrong." *Posner v. Essex Ins. Co. Ltd.*, 178 F.3d 1209, 1217 (11th Cir. 1999) (citation omitted). The underlying tort supporting Plaintiff's claim for civil conspiracy in Count 2 of the Amended Complaint (DE 17) is the claim for fraud in Count 1.

The facts admitted by Defendant establish his liability for both civil conspiracy and fraud. Specifically, Defendant entered into an agreement with several employees in Plaintiff's Brazil office, whom he supervised, directing them to manipulate or fabricate invoice, inventory, and sales report records. *See* DE 49, at ¶¶ 20-38. Defendant's submission of those manipulated and fabricated records constitutes false statements of material fact, as well as overt acts in pursuance of the conspiracy. Defendant knew that these records were false and intended that they would induce Plaintiff to compensate Defendant for overstated or false financial performance, as evidenced by his communications with the employees he supervised. *See* Decl. Of Marilia Pierrot Rocha, DE 50-3, at ¶¶ 4-9;

Decl. Of Gustavo Iciarte, DE 50-4, at ¶¶ 14-15. Plaintiff relied on these manipulated and fabricated records and suffered injury in numerous ways, including payment of unwarranted bonuses, wasted inventory, damage to Plaintiff's business reputation, and expenses associated with remedying the harm done by Defendant's fraudulent acts. *See* Decl. Of Troy Geuther, DE 50-3, at ¶¶; DE 50-31, at 2-3. Plaintiff is therefore entitled to summary judgment in its favor on Counts 1 and 2 of the Amended Complaint (DE 17).

Plaintiff is likewise entitled to summary judgment in its favor on its claim for breach of fiduciary duty. To prevail on such a claim, Florida law requires proof of "the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff's damages." *Gracey v. Eaker*, 837 So. 2d 348, 354 (Fla. 2002). "To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect the weaker party." *Orlinsky v. Patraka*, 971 So. 2d 796, 800 (Fla. Dist. Ct. App. 2007). Employer-employee relationships, however, are not automatically considered fiduciary relationships. Instead, employees become fiduciaries of their employers when the employer places the employee in a position of trust and confidence, such as when the employee serves as the employer's agent. *Renpak, Inc. v. Oppenheimer*, 104 So. 2d 642, 644 (Fla. Dist. Ct. App. 1958); *see also Heritage Schooner Cruises, Inc. v. Cansler*, Case No. 13-22494, 2013 U.S. Dist. LEXIS 148785, 2013 WL 5636689, * 4 (S.D. Fla. Oct. 16, 2013) ("A fiduciary relationship arises when one

person (a 'principal') manifests assent to another person (an 'agent') such that the agent shall act on the principal's behalf and be subject to the principal's control.").

It is undisputed that Defendant served as general manager of Plaintiff's Latin America Division, which gave him "authority to transact business on behalf of [Plaintiff] in Latin America and the Carribean, including Brazil." Decl. Of Troy Geuther, DE 50-3, at ¶ 5. "That is, Defendant had the authority to negotiate with customers on [Plaintiff]'s behalf, to bind [Plaintiff] to contracts, to perform contracts on [Plaintiff]'s behalf, to issue invoices to customers and to make adjustments to [Plaintiff]'s inventory." *Id.* As such an agent, Defendant owed a fiduciary duty to Plaintiff, which he breached by participating in a scheme to overstate his division's financial performance in order to obtain unmerited remuneration. Having been harmed by that breach, Plaintiff prevails as a matter of law on its breach of fiduciary duty claim.

II. Plaintiff's Equitable Claims

Unlike Plaintiff's fraud and breach of fiduciary duty claims, Plaintiff is not at this time entitled to relief on its equitable claims of constructive trust and unjust enrichment. Florida law follows the well-settled principle that equity will not intervene where there is an adequate remedy at law. *See Zuckerman v. Alex Hofrichter, P.A.*, 630 So. 2d 210, 211 (Fla. Dist. Ct. App. 1993) ("one cannot invoke equity jurisdiction where there is an adequate remedy at law"); *Government of Aruba v. Sanchez*, 216 F. Supp. 2d 1320, 1364 (S.D. Fla. 2002) ("because

a constructive trust is an equitable remedy, it is not available when there is an adequate remedy at law"). Having concluded that Plaintiff prevails as a matter of law with respect to liability on its fraud and breach of fiduciary duty claims, Plaintiff is entitled to a remedy at law. Plaintiff has not argued that an award of damages on those claims would inadequately redress its injury. Indeed, Plaintiff's equitable claims largely restate the harms alleged in its legal claims of fraud and breach of fiduciary duty. Therefore, the Court will deny Plaintiff's Motion For Summary Judgment (DE 17) to the extent that it seeks summary judgment in its favor on the equitable claims of unjust enrichment and constructive trust. *See Muzuco v. Re$ubmitit, LLC*, Case No. 11-62628, 2012 U.S. Dist. LEXIS 110373. 2012 WL 3242013, *8 (S.D. Fla. Aug. 7, 2012) ("a plaintiff may not recover under both legal and equitable theories").[1]

III. Plaintiff's Conversion Claim

Plaintiff also seeks summary judgment in its favor on its claim for conversion. Plaintiff contends that by engaging in a successful scheme to defraud, Defendant is liable for conversion of his salary, performance bonus, and retention bonus.

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1. The Court is cognizant that a plaintiff need not plead the absence of an adequate remedy at law in a claim for unjust enrichment in order to survive a motion to dismiss. *See Williams v. Bear Stearns & Co.*, 725 So. 2d 397, 400 (Fla. Dist. Ct. App. 1998). However, the fact that a party may plead legal and equitable claims alternatively does not mean that a party is entitled an award of both forms of relief.

Generally, a claim for conversion under Florida law requires proof of "the exercise of wrongful dominion or control over property to the detriment of the rights of the actual owner." *Seymour v. Adams*, 638 So. 2d 1044, 1046-47 (Fla. Dist. Ct. App. 1994).

> [An] 'Essential element of a conversion is a wrongful deprivation of property to the owner.' . . . 'The gist of a conversion has been declared to be not the acquisition of the property of the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled. A conversion consists of an act in derogation of the plaintiff's possessory rights, and any wrongful exercise or assumption of authority over another's goods, depriving him of the possession, permanently or for an indefinite time, is a conversion.

Star Fruit Co. v. Eagle Lake Growers, 160 Fla. 130, 33 So. 2d 858, 860 (Fla. 1948) (internal quotations omitted).

"In order to establish a claim for conversion of money under Florida law, a plaintiff must demonstrate, by a preponderance of the evidence: (1) specific and identifiable money; (2) possession or an immediate right to possess that money; [and] (3) an unauthorized act which deprives plaintiff of that money. . . ." *IberiaBank v. Coconut 41, LLC*, 984 F. Supp. 2d 1283, 1308 (M.D. Fla. 2013).[2] "For

2. The Court in *IberiaBank* also stated that "a demand for return of the money and a refusal to do so" is an element of a claim for conversion of money. *IberiaBank*, 984 F. Supp. 2d at 1308. However,

money to be the object of conversion 'there must be an obligation to keep intact or deliver the specific money in question, so that the money can be identified." *Gasparini v. Pordomingo*, 972 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 2008)(*quoting Futch v. Head*, 511 So. 2d 314, 320 (Fla. Dist. Ct. App. 1987)).

To maintain an action for conversion, "a plaintiff must establish possession or an immediate right to possession in the property *at the time of the conversion*." *United States v. Bailey*, 419 F.3d 1208 (11th Cir. 2005) (emphasis added); *see also Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490 (Fla. Dist. Ct. App. 1994). *Bailey* is instructive on this point. There, a criminal defense attorney's clients gave him $2 million in fees for their defense, which the attorney placed into a trust account. *Bailey*, 419 F.3d at 1209. While representing those clients, the criminal defense attorney disbursed nearly all of the funds out of the trust. *Id.* at 1210. The clients had actually given the attorney laundered proceeds of their crimes, which made the funds subject to forfeiture. *Id.* at 1209. Following the clients' conviction, the government obtained a special verdict of forfeiture against the trust; however, because the trust was empty, there were no funds to forfeit. *Id.* at 1210. The government thus filed suit against the criminal defense attorney, asserting claims for conversion and civil theft of the entire $2 million that had been placed in the trust. *Id.*

Plaintiff correctly observes that a demand for return of the allegedly converted property, while evidence of conversion, is not an element of the claim. *See, e.g., Senfeld v. Bank of Nova Scotia Trust Co. (Cayman)*, 450 So. 2d. 1157, 1161 (Fla. Dist. Ct. App. 1984); *Goodrich v. Malowney*, 157 So. 2d 829, 832 (Fla. Dist. Ct. App. 1963).

Appendix D

The government moved for summary judgment, arguing that it was entitled to judgment on its conversion claim because it had an immediate right to possession of the trust funds at the time the criminal defense attorney disbursed them by operation of the relation-back doctrine codified in 21 U.S.C. § 853(c). *Id.* at 1211. The relation-back doctrine creates a legal fiction whereby all right, title, and interest in forfeitable property is deemed to vest in the United States at the time of the acts giving rise to forfeiture. *See United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 113 S. Ct. 1126, 122 L. Ed. 2d 469 (1993); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S. Ct. 2646, 109 S. Ct. 2667, 105 L. Ed. 2d 528 (1989). Forfeiture is thus deemed to take effect at the time of the illicit acts, though a judicial decree is necessary for such retroactive vesting of title to occur. *92 Buena Vista*, 507 U.S. at 125-127. Ultimately, the court rejected the government's position and granted judgment in the criminal defense attorney's favor. *Bailey*, 419 F.3d at 1211. The court reasoned that the government could not satisfy the element of immediate right to possession because "additional judicial proceedings were necessary to reduce its ownership interest to a right of possession." *Id.* at 1217.

Plaintiff has not established that it had an immediate right to possession of the funds it claims were converted, at the time they were allegedly converted. Once Plaintiff paid Defendant the funds it now seeks to recover, it no longer had an immediate right to possess them. Its right to recoup those funds, if any, necessarily requires a judicial determination that Defendant's Defendant's receipt and

retention of those funds was wrongful. In other words, Plaintiff's conversion claim is contingent upon favorable resolution of its fraud or breach of fiduciary claims. As *Bailey* instructs, such a contingent interest is insufficient to give rise to a claim for conversion of money. Therefore, the instant Motion (DE 48) will be denied with respect to Plaintiff's claim for conversion.

IV. Damages

Plaintiff claims that it is entitled to recover as damages the entire amount of Defendant's 2014 salary and performance bonus, as well as a pro rata portion of Defendant's retention bonus. However, Plaintiff does not contend that the entirety of Defendant's work for Plaintiff in 2014 was directed towards advancing his scheme to defraud. Nor does Plaintiff offer any argument as to why it would be entitled to return of the entire amount of Defendant's 2014 salary and performance bonus. Ostensibly, Defendant would be entitled to some compensation for the legitimate work he performed on Plaintiff's behalf, but Plaintiff has not endeavored to differentiate those portions of Defendant's salary and performance bonus attributable to fraud from those portions that are not.

Moreover, Plaintiff contends that it is entitled to recover as damages expenses Plaintiff incurred to remedy the harm caused by Defendant's scheme. For example, Plaintiff seeks damages for payments it made to outside consultants for correction of its books and records. But the record before the Court does not establish the amount Plaintiff expended for such services. Indeed, the expert report Plaintiff submitted with the instant Motion

(DE 48) explicitly excludes any analysis of damages for monies Plaintiff paid to outside consultants to investigate and correct its books and records, and for other losses Plaintiff suffered as a result of Defendant's actions. *See* DE 50-31, at 3. Thus, to the extent that the instant Motion (DE 48) seeks an award damages, the Court must deny said Motion. The amount of Plaintiff's damages therefore remains for a jury's determination.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff's Motion For Summary Judgment (DE 48) be and the same is hereby **GRANTED** in part and **DENIED** in part as follows:

a. To the extent that Plaintiff's Motion For Summary Judgment (DE 48) seeks summary judgment in Plaintiff's favor as to Counts 1, 2, and 5 of the Amended Complaint (DE 17), said Motion be and the same is hereby **GRANTED** as to liability only;

b. Plaintiff's Motion For Summary Judgment (DE 48) is otherwise **DENIED;** and

2. Final Judgment will be entered by separate Order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 27th day of February, 2017.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED OCTOBER 26, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-60946-CIV-ZLOCH

FIRESTONE BUILDING PRODUCTS COMPANY, LLC,

Plaintiff,

vs.

ANTERO RAMOS,

Defendant.

ORDER

THIS MATTER is before the Court upon Defendant's Motion For Extension Of Time To Reply To Plaintiff's Motion For Summary Judgment (DE 58). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

Plaintiff filed its Motion For Summary Judgment (DE 48) on September 6, 2016. Thus, Defendant's response to said Motion was due September 26, 2016. *See* S.D. Fla. L. R. 7.1(c)(1). Defendant did not request more time to file said response until October 21, 2016, or twenty-five days

after the response deadline had passed. Defendant, who is represented by counsel, argues that an extension of time to respond is warranted due to "very limited resources and a language barrier." DE 58. That justification is wholly inadequate. A language barrier between Defendant and his counsel would have been readily apparent at the time those lawyers were retained, at the time they appeared in this case, and certainly at the time Defendant's response to Plaintiff's Motion For Summary Judgment (DE 48) was due. The same follows true for "limited resources," whatever that means. Defendant offers no justification for why he waited forty-five days after Plaintiff filed its Motion For Summary Judgment (DE 48) to request more time to respond.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Defendant's Motion For Extension Of Time To Reply To Plaintiff's Motion For Summary Judgment (DE 58) be and the same is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of October, 2016.

/s/ William J. Zloch
WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
All Counsel of Record

APPENDIX F — FEDERAL RULE OF CIVIL PROCEDURE 60

RULE 60. RELIEF FROM A JUDGMENT OR ORDER

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.