

No. 26-

IN THE
Supreme Court of the United States

ADIDAS AMERICA, INC., AND ADIDAS AG,

Petitioners,

v.

THOM BROWNE, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 28, 2026

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QUESTION PRESENTED

Federal Rule of Civil Procedure 60(b)(3) authorizes a court to relieve a party from a final judgment on account of fraud, misrepresentation, or “misconduct by an opposing party.” Five courts of appeals—the First, Fourth, Fifth, Ninth, and Federal Circuits—have agreed that a party’s negligent, inadvertent, or accidental failure to produce discoverable documents can constitute “misconduct” sufficient to support the grant of a new trial under this rule. By contrast, the Tenth Circuit has adopted a narrow view of discovery “misconduct” that applies only where a party acts with an “intent to deceive.”

In this case, the Second Circuit departed from the strong majority consensus. Despite finding that respondent’s failure to produce four smoking-gun emails during discovery was the product of negligence, the Second Circuit deepened the existing circuit split by holding that only actions that are “worse than negligent” can constitute misconduct under Rule 60(b)(3). In so holding, the Second Circuit immunized parties whose negligent failure to meet their discovery obligations does not come to light until after final judgment. This ruling undermines the federal courts’ fundamental commitment to fair adjudication and creates perverse incentives for litigants.

The question presented is:

Whether “misconduct” within the meaning of Federal Rule of Civil Procedure 60(b)(3) is limited to behavior by an opposing party that is “worse than negligent,” or whether a negligent failure to produce discoverable documents may also constitute “misconduct” sufficient to support relief from a final judgment.

PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs-appellants below) are adidas America, Inc., and adidas AG. Respondent (defendant-appellee below) is Thom Browne, Inc. adidas AG has stock ticker symbols ADS (Frankfurt Stock Exchange) and ADDYY (OTC). adidas America, Inc., and Thom Browne, Inc., do not have stock ticker symbols.

CORPORATE DISCLOSURE STATEMENT

adidas America, Inc., is wholly owned by adidas North America, Inc., which is a non-public corporation. adidas North America, Inc., is wholly owned by adidas International BV. adidas International BV is owned by adidas AG (93.97%) and adidas France S.a.r.l. (6.03%). adidas France S.a.r.l. is wholly owned by adidas AG. adidas AG has no parent corporation, and no publicly held corporation owns 10% or more of the stock of adidas AG. adidas AG shares are listed on the regulated market of the Frankfurt Stock Exchange under the ticker symbol ADS. In the United States, adidas AG is represented through a sponsored American Depositary Receipt (ADR) program, with ADRs traded over the counter (OTC) under the ticker symbol ADDYY.

STATEMENT OF RELATED PROCEEDINGS

adidas America, Inc., and adidas AG v. Thom Browne, Inc., No. 21-cv-05615-JSR-RWL (S.D.N.Y.) (judgment entered Jan. 13, 2023).

adidas America, Inc., and adidas AG v. Thom Browne, Inc., No. 23-166 (2d Cir.) (judgment entered May 3, 2024).

adidas America, Inc., and adidas AG v. Thom Browne, Inc., No. 21-cv-05615-JSR-RWL (S.D.N.Y.) (order entered May 3, 2024; order and opinion entered July 29, 2024).

adidas America, Inc., and adidas AG v. Thom Browne, Inc., No. 24-1510 (2d Cir.) (judgment entered Apr. 29, 2026).

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PETITION FOR WRIT OF CERTIORARI

This case concerns a fundamental question about the integrity of the federal discovery system: whether a party that negligently fails to produce critical documents during discovery can retain the benefit of the resulting judgment simply because its failure was not “worse than negligent.” The Second Circuit held yes, deepening a circuit split on the meaning of “misconduct” under Federal Rule of Civil Procedure 60(b)(3) and leaving parties victimized by negligent discovery failures without effective recourse after final judgment.

Petitioners adidas America, Inc., and adidas AG (collectively, “adidas”) sued respondent Thom Browne, Inc., for trademark infringement and related claims under the Lanham Act. adidas alleged that Thom Browne’s “Four-Bar” and “Grosgrain” stripe designs on activewear infringed adidas’s iconic Three-Stripe Mark. Thom Browne countered these allegations by insisting at trial that its stripe designs did not have “anything to do with adidas,” that its employees “never talked about adidas,” and that adidas was improperly seeking to “own all stripes.” The jury returned a verdict for Thom Browne.

While the case was on appeal, adidas learned from documents it received in a parallel foreign proceeding that Thom Browne had failed to produce four smoking-gun internal emails that directly contradicted Thom Browne’s narrative at trial. These emails revealed that Thom Browne’s senior officials, including founder Thom Browne himself, repeatedly acknowledged that the Four-Bar design would “look like Adidas,” would “inevitabl[y]” be “read as adidas stripes,” was “too loud and ‘adidas,’”

was “too much in the spirit of Adidas,” and should not be used “because of adidas.” Far from “never talk[ing] about adidas,” the emails showed that Thom Browne’s leadership was acutely aware of the likely confusion between the parties’ marks—the very issue the jury was asked to decide. Yet the jury never saw the emails before exculpating Thom Browne from liability.

adidas moved for relief from judgment under Rule 60(b)(3). The district court held that the four emails “should have been disclosed during the course of discovery but, through no fault of Adidas, were not.” It also determined that the emails would have provided “useful impeachment” of Thom Browne’s trial witnesses. And it held that a negligent discovery violation could constitute “misconduct” under the rule. But the district court denied relief because it found that Thom Browne’s failure to produce the emails stemmed from a non-negligent miscommunication between counsel and an e-discovery vendor.

The Second Circuit disagreed with the district court. It held that Thom Browne’s failure to produce the emails was, in fact, negligent. But then it held that negligent conduct cannot constitute “misconduct” under Rule 60(b)(3). In the Second Circuit’s view, only behavior that is “worse than negligent” can trigger the rule.

That holding deepens a well-developed circuit split. Five of the seven circuits to address the issue—the First, Fourth, Fifth, Ninth, and Federal Circuits—correctly recognize that a party’s failure to produce requested documents may qualify as “misconduct” under Rule 60(b)(3) even if the failure was not “worse than negligent.”

The Tenth Circuit, meanwhile, demands proof of a deliberate scheme to withhold evidence. And the Second Circuit has now excluded negligence from the rule's reach while declining to identify what heightened mental state would satisfy it. Absent this Court's intervention, the current split of authority guarantees that a party's entitlement to post-judgment relief will turn on geography rather than merit.

The question is both important and recurring. Modern federal cases cannot function without reasonable efforts to produce electronically stored information, and litigants must be held accountable when a lack of care leads to prejudicial discovery mistakes. Sometimes—as happened here—those mistakes surface only after judgment, when collateral litigation, government inquiries, or simple coincidence exposes evidence that should have been disclosed earlier. The Second Circuit's holding leaves a party in this situation without any remedy under Rule 60(b)(3)—regardless of how central the suppressed materials were, how squarely they undermined the prevailing party's case, and how thoroughly their absence distorted the fairness of the proceedings. The Second Circuit's approach also invites complacency in discovery by removing the principal mechanism for correcting judgments procured through negligent nondisclosure, and it transforms civil litigation from “a fair contest with the basic issues and facts disclosed to the fullest practicable extent” into “a game of blind man's buff.” *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

This Court should grant certiorari to resolve the circuit split, ensure the uniform interpretation of a frequently litigated Federal Rule, and restore Rule

60(b)(3)'s role as the ultimate safeguard of fairness in federal civil litigation.

OPINIONS BELOW

The Second Circuit's opinion is reported at 174 F.4th 325 and is reproduced at App. 1a–19a. The district court's opinion and order dated July 29, 2024, is reported at 742 F. Supp. 3d 352 and is reproduced at App. 20a–55a. The district court's order dated May 3, 2024, appears at 2024 WL 2853273 and is reproduced at App. 56a.

JURISDICTION

The Second Circuit issued its opinion on April 29, 2026. On July 9, 2026, Justice Sotomayor extended the deadline to file a petition for certiorari until August 27, 2026. On August 11, 2026, Justice Sotomayor further extended the deadline to file a petition for certiorari until September 28, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure is reproduced at App. 57a.

STATEMENT OF THE CASE

A. adidas sued Thom Browne to protect its Three-Stripe Mark.

adidas is a sportswear manufacturer known worldwide for the Three-Stripe Mark—a design consisting of three stripes applied to footwear, apparel, and accessories. App. 2a. Thom Browne is a luxury apparel company that uses, among its motifs, the “Four-Bar Signature,” consisting of four wide horizontal bars, and the “Grosgrain,” a pattern of red, white, and blue stripes. App. 2a–3a.

Around 2020, Thom Browne expanded its use of the Four-Bar and Grosgrain designs into a new line of activewear—products that, for the first time, competed directly with adidas in the sportswear marketplace. In 2021, adidas sued Thom Browne in the Southern District of New York, asserting claims for trademark infringement, trademark dilution, and unfair competition under the Lanham Act, 15 U.S.C. §§ 1114, 1125, and related state-law claims. App. 3a, 22a. The district court had subject-matter jurisdiction over these claims. *See* 15 U.S.C. § 1121; 28 U.S.C. §§ 1331, 1338, 1367.

The case proceeded to a two-week jury trial. The central issue was the likelihood of consumer confusion between adidas’s Three-Stripe Mark and Thom Browne’s Four-Bar and Grosgrain designs as used on activewear. Thom Browne’s defense rested on the themes that the parties’ marks were “very different,” that “nothing . . . Thom Browne has done in this case has anything to do with adidas,” that the company’s employees “never talked about adidas” or “considered adidas,” and that adidas was

improperly attempting to “own all stripes.” App. 10a–11a, 38a–39a; C.A. App. 99–100, 134, 136. The jury returned a verdict for Thom Browne. App. 3a.

The Second Circuit affirmed. *adidas Am., Inc. v. Thom Browne, Inc.*, No. 23-166, 2024 WL 1953594 (2d Cir. May 3, 2024). That appeal addressed jury-instruction and expert-testimony issues having no bearing on the question presented here.

B. adidas learned after trial that Thom Browne failed to produce four smoking-gun emails.

While the first appeal was pending, Thom Browne produced in a related foreign proceeding four internal emails that it had failed to produce in the New York litigation. App. 3a. These emails contained critical admissions from high-ranking company officials that everyone agrees were covered by adidas’s discovery requests and should have been disclosed. App. 16a–18a, 28a–31a; C.A. App. 150–52, 177, 181–82, 184–85, 207–08, 236–37, 242–43, 253, 255, 260–61. The four emails stated as follows:

Email 1: Emily Maturo, a senior men’s account manager at Thom Browne, wrote to a distributor in Switzerland: “We try to avoid rows of 4 bar armband on the racks so as to not *look like Adidas*.” App. 24a (emphasis added).

Email 2: Thi Wan, the head of menswear at Thom Browne, wrote to Mr. Thom Browne, the company’s founder and chief creative officer, concerning formalwear and accessories for Futbol Club Barcelona (“FCB”): “As

Adidas has such a big presence in the sporting world, *it is inevitable that our 4bar in white be read as adidas stripes*, especially on accessories.” App. 24a (emphasis added).

Email 3: In an exchange involving Kelly Connor (director of brand relations), Tomaso Galli (vice president of marketing and communication), and Browne, Galli stated that FCB “are not comfortable with any four bars, which in their view is *too much in the spirit of Adidas*.” App. 25a (emphasis added).

Email 4: Wan wrote to Browne that the “4bar” might be “too loud and ‘adidas’ in the football context.” Browne responded: “[I] thought . . . [Galli] has already said that *we shouldn’t use the four bar because of adidas* . . . please confirm . . . and then we can proceed.” Wan replied: “You’re right on the 4bar.” App. 25a (emphasis added).

These emails directly contradicted Thom Browne’s trial narrative. Thom Browne told the jury that its marks had nothing to do with adidas, that its marks were “very different” from adidas’s, that confusion between the marks would never occur, and that its employees never discussed adidas. But the emails demonstrate the opposite of these trial arguments: Thom Browne’s senior officials—including Mr. Thom Browne himself—repeatedly discussed adidas and acknowledged that the Four-Bar would “look like Adidas,” “inevitabl[y]” would “be read as adidas stripes,” was “too loud and ‘adidas,’” was “too much in the spirit of Adidas,” and should not be used “because of adidas.” App. 24a–25a.

C. The district court held that the emails “should have been disclosed” but still denied relief under Rule 60(b)(3).

After learning of the unproduced emails, adidas timely moved for relief from judgment based on “misconduct by an opposing party” under Federal Rule of Civil Procedure 60(b)(3).¹ The district court permitted adidas to conduct discovery regarding its motion, including the depositions of two associates at Wolf, Greenfield & Sacks, P.C., Thom Browne’s trial counsel, and a representative of Consilio, Thom Browne’s e-discovery services provider. App. 5a–6a. The district court then held an evidentiary hearing on December 21, 2023, at which two Wolf Greenfield paralegals and an adidas e-discovery specialist testified. App. 26a. On May 3, 2024, the district court issued a “bottom-line” order denying relief. App. 21a, 56a. On July 29, 2024, the district court issued an opinion explaining its prior ruling. App. 20a–55a.

The district court found that Wolf Greenfield collected over 1.4 million documents from designated Thom Browne employees and reduced them to a set of presumptively responsive documents through keyword searches. App. 28a. Wolf Greenfield then used additional search terms to identify potentially privileged documents for attorney review before production. App. 28a–29a. As part of this

1. adidas also sought relief based on newly discovered evidence under Rule 60(b)(2) but does not press that issue here. Because adidas filed its motion when its first appeal was pending, it styled the motion as a request for an indicative ruling under Rule 62.1(a). The district court denied the motion after the Second Circuit’s decision, and both courts below treated the motion as if filed directly under Rule 60(b)(2) and (3). App. 5a, 26a.

process, a Wolf Greenfield paralegal changed the tags on various documents containing the search term “adidas” so that the documents’ responsiveness, privilege, and confidentiality fields all stated “needs further review.” App. 6a. These documents included the four internal emails in which Browne and other company officials discussed adidas and its Three-Stripe Mark. *Id.*

The same Wolf Greenfield paralegal who tagged the “adidas” documents instructed Consilio to create “a saved search for ALL potentially privileged documents that have not already been produced by Thom Browne so that we will have one search to work with when we go to do our privilege review.” App. 29a. Consilio created the requested search, but it defined the search to capture only documents “that are not produced, not coded for responsiveness and not coded for privilege.” *Id.* Because Consilio’s saved search captured only documents with no coding in those fields, the four emails that had been marked as “needs further review” were not captured in the search. App. 6a–7a. Moreover, an associate who conducted a “quality-control” check for documents needing “further review” somehow missed them. App. 17a. This meant the four emails were never reviewed by an attorney and never produced. App. 30a.

The district court held that the emails “should have been disclosed during the course of discovery but, through no fault of Adidas, were not.” App. 31a. It also held that adidas suffered prejudice because the emails were admissible and not merely cumulative or impeaching. App. 31a–33a. The district court found that “there were no other documents introduced at trial containing similar statements by Thom Browne employees.” App. 33a. And

it found that the emails would have provided “useful impeachment of those Thom Browne employees who authorized the statements and testified at trial (notably Mr. Thom Browne himself).” *Id.*

The district court further held that a negligent discovery violation *could* constitute “misconduct.” App. 44a. The court reasoned that “[l]imiting ‘misconduct’ to ‘intentional[] or conscious’ bad acts . . . ignores the critical role that attorneys play in our discovery system.” App. 49a. “Demanding [that] a party affirmatively use reasonable care in complying with its discovery obligations,” the court continued, is “appropriate for the proper functioning of our civil justice system.” App. 50a. And, the court explained, “[i]f only intentional misconduct were penalized, a party’s incentive would be to do the bare minimum in complying with its obligations, in the hope that its lackluster performance would go unnoticed until a wrongful trial result was obtained and it is too late to correct.” *Id.* Finally, the district court reasoned that “permitting Rule 60(b)(3) relief based on a showing of negligence preserves the independent force of the term ‘misconduct.’” *Id.*

The district court nevertheless rejected adidas’s request for relief. It concluded that Thom Browne had not been negligent because the non-production of the four emails resulted from an “understandable mix-up” and because an associate performed a quality-control check (even though that check “ultimately did not identify the four emails”). App. 51a–55a. The district court also rejected adidas’s alternative argument that a non-negligent failure to produce documents can constitute misconduct.

D. The Second Circuit held that Thom Browne’s discovery failure “was negligent” but still affirmed.

On appeal, the Second Circuit concluded that Thom Browne’s failure to produce the relevant emails was, in fact, negligent. It emphasized that “discovery is run largely by attorneys” and “depend[s] upon honesty and fair dealing” among counsel. App. 16a. Even assuming that “the miscommunication between the paralegal and [Consilio was] excusable,” the court of appeals held that the record did not support the district court’s finding that the “associate conducted an adequate quality-control review.” App. 17a–18a.

Specifically, the Second Circuit found that the responsible associate testified that she “endeavored to be careful and review every document that was tagged ‘further review,’” that “it was [her] intent . . . to review every document that was tagged ‘needs further review,’” and that “she believe[d] her actions matched her intent.” App. 17a–18a. Yet the court of appeals noted that no lawyer at the firm ever viewed the four emails marked “needs further review.” App. 18a. Given “the obvious relevance of the emails,” the court of appeals held that “Wolf Greenfield’s failure to review or to produce them was negligent.” *Id.* But the court of appeals further held that “Wolf Greenfield’s actions were no worse than negligent,” because it reviewed potentially responsive documents but simply missed some. *Id.*

The Second Circuit separately considered whether “misconduct” under Rule 60(b)(3) can include negligent discovery violations. The court began with the text of the rule and determined that “misconduct” is susceptible

to multiple meanings. App. 12a. It then consulted the discovery sanctions authorized by Federal Rule of Civil Procedure 37. *Id.* The court noted that under Rule 37(e)(2), the most severe sanctions for failure to preserve electronically stored information—an adverse inference instruction, dismissal, or entry of default judgment—may be imposed only when a party acted with the intent to deprive another party of the use of that information in litigation. *Id.* The court reasoned by analogy that a “severe” remedy like vacatur of a final judgment should also have a heightened culpability requirement for purposes of Rule 60(b)(3). App. 13a.

The court next discussed historical materials, never raised by Thom Browne, that it thought were consistent with this structural analysis. It claimed that, before the adoption of Rule 60(b), courts granting equitable relief from judgments focused on conduct “akin to fraud.” App. 14a. The court further opined based on meeting transcripts of the Advisory Committee on Rules for Civil Procedure from 1945 and 1946 that the Committee drafted Rule 60(b)(3) with intentional acts in mind. *Id.* Applying the canon of *noscitur a sociis*, the court added that “misconduct” should require more than negligence because it appears alongside “fraud” and “misrepresentation.” App. 14a–15a.²

Finally, the court of appeals addressed and rejected adidas’s contrary authority. Although multiple other circuits had held that “misconduct” can include even

2. The Second Circuit declined to determine what specific level of culpability—gross negligence, recklessness, or intent—was required under Rule 60(b)(3). App. 18a n.6.

inadvertent or accidental violations, the Second Circuit dismissed these cases on the ground that “some degree of purposeful culpability was clearly apparent” from the underlying facts. App. 15a. The Second Circuit also rejected one circuit’s reliance on the canon against surplusage. *Id.*

REASONS FOR GRANTING THE PETITION

Certiorari is necessary to resolve a well-developed circuit split. Five circuits have held that even “inadvertent” and “accidental” failures to produce requested documents during discovery can constitute Rule 60(b)(3) “misconduct.” One circuit, by contrast, has held that misconduct requires an “intent to deceive.” The Second Circuit deepened this split when it held that misconduct requires more than negligence.

The question of what constitutes “misconduct” under a frequently litigated Federal Rule is also an important one. Rule 60(b)(3) “focuses on the unfair means by which a judgment or order is procured.” *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001, 1010 (4th Cir. 2014) (en banc). The rule thus serves a critical function in safeguarding the integrity of civil litigation by ensuring that judgments are the product of a fair and equitable process. App. 11a. By raising the bar for relief under Rule 60(b)(3), the Second Circuit’s decision immunizes parties who negligently fail to meet their discovery obligations. This in turn undermines the federal courts’ fundamental commitment to fair adjudication.

Finally, the Second Circuit’s holding is wrong on the merits. The plain meaning of “misconduct,” particularly

when juxtaposed with “fraud” and “misrepresentation,” refutes the Second Circuit’s requirement that only behavior that is “worse than negligent” can constitute misconduct under Rule 60(b)(3). The structure of Rule 60(b) confirms that the Second Circuit erred. And the history on which the Second Circuit relied does not support its holding.

I. The circuits are split on the meaning of “misconduct” in Rule 60(b)(3).

The First, Fourth, Fifth, Ninth, and Federal Circuits have held that negligent, “inadvertent,” or “accidental” discovery omissions can constitute Rule 60(b)(3) “misconduct.”³ By contrast, the Tenth Circuit has imported the “fraud on the court” standard into Rule 60(b)(3), holding that an “intent to deceive” is a prerequisite to relief under the rule. In this case, the Second Circuit departed from the majority consensus by holding that a party’s challenged actions do not constitute misconduct unless they are “worse than negligent.”

The leading case on misconduct in the discovery context is *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988). The misconduct question in *Anderson* arose in a manner similar to the question in this case: during the first appeal in the case, “certain previously

3. The courts of appeals generally agree that a Rule 60(b)(3) movant must prove fraud, misrepresentation, or misconduct by clear and convincing evidence and that the misbehavior interfered with the movant’s ability to fully and fairly present the case. *E.g.*, App. 11a. The Second Circuit pretermitted discussion of these requirements by holding that “worse than negligent” behavior was required to establish misconduct.

undisclosed evidence surfaced,” and the district court found that the evidence should have been produced but was not because of “‘a lapse of judgment’ rather than fraud or deliberate misrepresentation.” *Id.* at 922–23. The First Circuit explained that “[f]ailure to disclose or produce materials requested in discovery can constitute ‘misconduct’ within the purview of [Rule 60(b)(3)].” *Id.* at 923. The court further held that misconduct “does not demand proof of nefarious intent or purpose” and “can cover even accidental omissions.” *Id.* The court explained that “[a]ccidents—at least avoidable ones—should not be immune” from the reach of Rule 60(b)(3), noting that relief may be justified “whether there was evil, innocent or careless, purpose.” *Id.* at 924.

The First Circuit reaffirmed *Anderson* in *West v. Bell Helicopter Textron, Inc.*, 803 F.3d 56 (1st Cir. 2015). The defendant in *West* failed during discovery to produce information related to a defect in a helicopter engine. In assessing the implications of the discovery failure, the First Circuit again held that “failure to make discovery can constitute ‘misconduct’ even when nondisclosure is careless or innocent.” *Id.* at 69.

The Fourth Circuit agrees with the First Circuit. In *Schultz v. Butcher*, 24 F.3d 626 (4th Cir. 1994), the Fourth Circuit noted that, although the plaintiff denied that the document withheld during discovery was “withheld intentionally,” it “was in her attorney’s possession at the time of the request” and “the failure to produce such an important report which contained information helpful to an adversary’s position is not easily excused.” *Id.* at 630. The Fourth Circuit accordingly held that “an adverse party’s failure, either inadvertent or intentional, to

produce such obviously pertinent requested discovery material in its possession is misconduct” under Rule 60(b)(3). *Id.* More recently, in *Morgan v. Tinch*, 90 F.4th 172 (4th Cir. 2024), the court reaffirmed that a party’s “failure to disclose evidence” that was requested during discovery is misconduct “irrespective whether that failure was inadvertent or intentional.” *Id.* at 180.

The Fifth Circuit agrees with the First and Fourth Circuits. In *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978), the Fifth Circuit held that Rule 60(b)(3) applies to “misconduct in withholding information called for by discovery.” *Id.* at 1339. The court found misconduct even though the defendant’s trial attorneys were “personally unaware” of the withheld document, *id.* at 1342 n.10, and even assuming the defendant had a “good faith belie[f]” that the document need not be produced, *id.* at 1342. This ruling tracked an earlier decision—adopted by the First Circuit in *Anderson*—where the Fifth Circuit explained that “the effect [is] the same whether there was evil, innocent or careless, purpose.” *Bros Inc. v. W. E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965).

The Ninth Circuit adopted the same rule. In *Jones v. Aero/Chem Corp.*, 921 F.2d 875 (9th Cir. 1990), the court held that “misconduct” under Rule 60(b)(3) covers “accidental” discovery omissions and “does not demand proof of nefarious intent or purpose.” *Id.* at 879. It then remanded for the district court to determine “under the Rule 60(b)(3) standard” whether “there had been misconduct, either knowing or accidental.” *Id.* Years later, the Ninth Circuit again stated that “misconduct” includes “an accidental failure to produce relevant documents in

response to discovery requests.” *Cal. Sansome Co. v. U.S. Gypsum*, 55 F.3d 1402, 1405 (9th Cir. 1995).

The Federal Circuit followed suit. It held in *Rembrandt Vision Technologies, L.P. v. Johnson & Johnson Vision Care, Inc.*, 818 F.3d 1320 (Fed. Cir. 2016), that “misconduct” under Rule 60(b)(3) “does not demand proof of nefarious intent or purpose” and “cover[s] even *accidental* omissions.” *Id.* at 1328. The court concluded that it “need not determine whether [the party’s] failure to obtain and produce [test] data was intentional or merely accidental” because even accidental omissions qualify as misconduct under the rule. *Id.* at 1329.

Four other circuits have published decisions that are consistent with this view. In *Lonsdorf v. Seefeldt*, 47 F.3d 893 (7th Cir. 1995), the Seventh Circuit held that Rule 60(b)(3) “applies to both intentional and unintentional misrepresentations.” *Id.* at 897. In *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372 (11th Cir. 1981), the Eleventh Circuit similarly suggested that “the term ‘misrepresentation’ as used in Rule 60(b)(3)” extends beyond false statements “made with the intention to deceive.” *Id.* at 1374 & n.6. If Rule 60(b)(3) applies to unintentional “misrepresentations,” surely unintentional “misconduct” can be remedied under that provision as well. Moreover, in *Summers v. Howard University*, 374 F.3d 1188 (D.C. Cir. 2004), the D.C. Circuit cited the First, Fourth, and Fifth Circuits in concluding that “[f]ailure to disclose or produce materials requested in discovery can constitute ‘misconduct.’” *Id.* at 1193 & n.3. The D.C. Circuit never suggested that this principle applied only when the failure was “worse than negligent.” Decades earlier, the Third Circuit likewise held in *Stridiron v.*

Stridiron, 698 F.2d 204 (3d Cir. 1983), that a “[f]ailure to disclose or produce evidence requested in discovery can constitute Rule 60(b)(3) misconduct.” *Id.* at 207. These and other cases have prompted a leading commentator to observe that “both intentional and unintentional misrepresentations and failures to disclose are a sufficient basis for relief” under Rule 60(b)(3). 12 Moore’s Federal Practice—Civil § 60.43 (2026).

Numerous state supreme courts interpreting substantively identical state versions of Rule 60(b)(3) have also held that conduct that is no “worse than negligent” nonetheless warrants a new trial. The Idaho Supreme Court held that misconduct under Idaho Rule of Civil Procedure 60(b)(3) “do[es] not require proof of nefarious intent or purpose but can include negligent and accidental omissions during the course of discovery.” *Robirds v. Robirds*, 499 P.3d 431, 440 (Idaho 2021). The West Virginia Supreme Court held that West Virginia Rule of Civil Procedure 60(b)(3) “permit[s] relief for unintentional, accidental and careless misconduct or misrepresentations as well as intentional ones.” *Phillips v. Stear*, 783 S.E.2d 567, 581 (W. Va. 2016). The Indiana Supreme Court “readily conclude[d] that ‘misconduct’ under Indiana’s Rule 60(B)(3) can include both negligent and intentional violations of Indiana’s discovery rules.” *Outback Steakhouse of Fla., Inc. v. Markley*, 856 N.E.2d 65, 73 (Ind. 2006). And the South Dakota Supreme Court sided with the “majority of courts” in holding that Rule 60(b)(3) misconduct “may be careless, accidental, or even innocent” in the discovery context. *Corcoran v. McCarthy*, 778 N.W.2d 141, 148 (S.D. 2010).

Before the Second Circuit’s decision below, the Tenth Circuit was the only circuit on the other side of the split. In *Zurich North America v. Matrix Service, Inc.*, 426 F.3d 1281 (10th Cir. 2005), the Tenth Circuit acknowledged that other circuits allow Rule 60(b)(3) relief even without proof of an “intent to deceive through a deliberate scheme.” *Id.* at 1290, 1291 n.8. The Tenth Circuit, however, found itself bound by a prior circuit decision that applied the strict fraud-on-the-court standard, which requires evidence of an intent to deceive, in the Rule 60(b)(3) context. *Id.* at 1291–92 (citing *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999)). Accordingly, the Tenth Circuit affirmed the denial of a new trial under Rule 60(b)(3) based on “a failure to produce documents” in the absence of “evidence of intent or a deliberate plan or scheme to interfere with [the opponent’s] case.” *Id.* at 1292.⁴

The Second Circuit joined the Tenth Circuit in rejecting negligence as sufficient. Apart from a brief discussion of *Anderson*, the Second Circuit dismissed the importance of adidas’s out-of-circuit cases because, “in most of these cases, ‘some degree of purposeful culpability was clearly apparent.’” App. 15a (quoting App. 48a). But the Second Circuit’s speculation about the presence of “purposeful culpability” goes beyond what those cases said. And, for many of the cases, the speculation is simply untrue. *See, e.g., Schultz*, 24 F.3d at 630 (ordering new trial based on failure to produce

4. One year after *Zurich*, the Eighth Circuit held in *Smith v. Clarke*, 458 F.3d 720 (8th Cir. 2006), that misrepresentations do not justify relief under Rule 60(b)(3) unless there is “clear and convincing evidence that the misrepresentation was knowing and intentional.” *Id.* at 725. The Eighth Circuit did not address whether the same standard applies to the broader term “misconduct.”

“obviously pertinent requested discovery material” without questioning offender’s assertion that the material “was not withheld intentionally”); *Morgan*, 90 F.4th at 176, 179–80 (same result for offender who contended that failure to supplement discovery response was “simple oversight”); *Rozier*, 573 F.2d at 1342 (finding misconduct while assuming the defendant had a “good faith belie[f]” that the document need not be produced).

In any event, the Second Circuit’s idiosyncratic re-interpretation of the facts in prior cases is beside the point. The circuits favoring adidas have adopted a rule of law that represents binding circuit precedent. *See United States v. Duvall*, 740 F.3d 604, 609 (D.C. Cir. 2013) (Kavanaugh, J., concurring in the denial of rehearing en banc) (explaining that, under vertical stare decisis, “once a rule, test, standard, or interpretation has been adopted,” “that same rule, test, standard, or interpretation must be used by lower courts in later cases”).⁵ As a result, if adidas had filed its Rule 60(b)(3) motion on these facts in at least five other circuits, the outcome would have been different. Certiorari is warranted to curb “the threat to the goal of uniformity of federal procedure posed by the decision below.” *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

5. *See also Sosa v. Martin County*, 57 F.4th 1297, 1301 (11th Cir. 2023) (en banc) (W. Pryor, C.J.) (“If we treated every factual distinction with a precedential decision as necessarily material, the doctrine of precedent would lose most of its function. Judges would be freed from the requirement that they apply the law, so long as they could unearth any factual discrepancy between binding caselaw and the case they wanted to decide a different way.” (citation omitted)).

II. The meaning of “misconduct” is an important and recurring legal question, and this case is an ideal vehicle for addressing that question.

Certiorari is necessary because the question presented is both important and arises frequently in litigation. The federal courts have applied the misconduct prong of Rule 60(b)(3) numerous times in recent years.⁶ And they have often done so in the context of electronic discovery.⁷ That, of course, is the very context of this case.

Contemporary federal litigation routinely involves the collection and review of vast amounts of electronically stored information.⁸ In an era in which document

6. See, e.g., *Jenkins v. Anton*, 922 F.3d 1257, 1270–71 (11th Cir. 2019); *Lyles v. Medtronic Sofamor Danek, USA, Inc.*, 871 F.3d 305, 317 (5th Cir. 2017); *Willis v. Lepine*, 687 F.3d 826, 833–35 (7th Cir. 2012); *Circuitronix, LLC v. Kapoor*, 440 F. Supp. 3d 1345, 1354–58, 1363–64 (S.D. Fla. 2020); *White v. Nat’l Football League*, 129 F. Supp. 3d 683, 690–94 (D. Minn. 2015); *Merix Pharm. Corp. v. Clinical Supplies Mgmt., Inc.*, 106 F. Supp. 3d 927, 932–39 (N.D. Ill. 2015); *Thomas v. City of New York*, 293 F.R.D. 498, 503–07 (S.D.N.Y. 2013); *Ebersole v. Kline-Perry*, 292 F.R.D. 316, 320–23 (E.D. Va. 2013); *Almerfed v. Obama*, 904 F. Supp. 2d 1, 5–6 (D.D.C. 2012); *Halliburton Energy Servs., Inc. v. NL Indus.*, 618 F. Supp. 2d 614, 636–40 (S.D. Tex. 2009); *In re Frazer/Exton Dev., L.P.*, 503 B.R. 620, 637–40 (Bankr. E.D. Pa. 2013).

7. See, e.g., *Jenkins*, 922 F.3d at 1260–61, 1270; *White*, 129 F. Supp. 3d at 686–87, 693–94; *Ebersole*, 292 F.R.D. at 322; *In re Frazer*, 503 B.R. at 638–39.

8. Gökce Akkahve, *The AI and Investigations Paradigm*, FTI Technology (2024), <https://www.ftitechnology.com/resources/blog/the-ai-and-investigations-paradigm-faster-more-precise-defensible>.

production depends on complex chains of collection, processing, search-term application, coding, and review, it is imperative that litigants exercise reasonable care at every step. App. 16a; *see also In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637, 2018 WL 1146371 (N.D. Ill. Jan. 3, 2018); Sedona Conference, *Best Practices, Recommendations & Principles for Addressing Electronic Document Production* (3d ed. 2018).⁹ It is also imperative that a litigant who fails to meet this standard—and thus fails to produce important responsive documents—is held accountable when the failure deprives an opponent of the ability to “fully and fairly” litigate the case. App. 11a.

Sometimes the adverse party is alerted to discovery failures during discovery itself—for example, when a witness testifies in a deposition about a document that has not been produced, or when a produced document mentions another document that was never produced. In such circumstances, Rule 37 provides remedies that compensate the victim-litigant for the discovery violation before judgment. *See Cunningham v. Hamilton County*, 527 U.S. 198, 207–08 (1999); *Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 702 (8th Cir. 2018). But many discovery failures—like that in this case—may come to light only *after* final judgment, when evidence surfaces through parallel proceedings, regulatory investigations, or happenstance. Whether and how the “misconduct” standard in Rule 60(b)(3) applies in such circumstances is critical. Under the Second Circuit’s rule, a party victimized by such a negligent failure has no

9. <https://www.thesedonaconference.org/download-publication?fid=3573>.

recourse under Rule 60(b)(3)—no matter how obviously responsive the withheld documents were, how clearly they contradicted the opponent’s trial narrative, and how plainly the failure prejudiced the other party and prevented a full and fair presentation of its case.

The goal of the legal rules governing e-discovery must be to ensure that lawyers and e-discovery vendors take reasonable care in collecting, reviewing, and producing responsive documents. *See* Fed. R. Civ. P. 37(e) (requiring “reasonable steps” to preserve electronically stored information). Negligence is, by definition, the absence of reasonable care. *See* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 3 (A.L.I. 2010) (“A person acts negligently if the person does not exercise reasonable care under all the circumstances.”); W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 31 (5th ed. 1984) (explaining that the negligence standard requires the actor to exercise “the care which would be exercised by a reasonable and prudent person under the same or similar circumstances”). The Second Circuit’s rule insulates negligent failures from the principal federal mechanism for correcting unfairly procured judgments and thus invites complacency in discovery. It encourages parties to be careless in collecting, processing, and reviewing documents, particularly when an opponent is unlikely to discover omitted documents before final judgment.

These incentives undermine the entire premise of the federal courts’ party-controlled discovery system. Discovery is designed to “make a trial less a game of blind man’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”

Procter & Gamble, 356 U.S. at 682. The discovery rules aim for “parties to obtain the fullest possible knowledge of the issues and facts before trial.” *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). “Discovery is not supposed to be a shell game, where the hidden ball is moved round and round and only revealed after so many false guesses are made and so much money is squandered.” *Lee v. Max Int’l, LLC*, 638 F.3d 1318, 1322 (10th Cir. 2011) (Gorsuch, J.). The discovery rules are instead designed “to enable the parties to discover the true facts and to compel their disclosure wherever they may be found.” *Hickman*, 329 U.S. at 506. Rule 60(b)(3) serves as the ultimate safeguard: when discovery omissions are attributable to one party’s failure to take reasonable care in collecting, processing, reviewing, and producing responsive documents, and when those failures prevent its opponent from presenting its case fully and fairly, the rule authorizes relief from the resulting judgment. The Second Circuit’s holding removes that safeguard for an entire category of discovery failures, permitting parties to retain judgments obtained while critical evidence was hidden through negligent litigation conduct. This Court should grant certiorari to ensure that Rule 60(b)(3) continues to protect the integrity of federal discovery and the fairness of federal adjudication.

Moreover, the Rule 60(b)(3) question in this case comes to the Court in the cleanest possible posture. The standard required for misconduct under the rule was directly raised, thoroughly briefed, and expressly decided in both courts below. The Second Circuit also held unequivocally that Thom Browne’s conduct was negligent. App. 17a–18a. No jurisdictional, procedural, or other obstacles would prevent this Court from reaching the merits.

III. The Second Circuit’s interpretation of “misconduct” is wrong.

The decision below answers an important and recurring question erroneously. Text and context both establish that misconduct under Rule 60(b)(3) can include negligent discovery failures. The Second Circuit’s contrary reasoning is not persuasive.

A. Rule 60(b)(3) does not limit “misconduct” to actions that are “worse than negligent.”

Dictionaries published before, around, and following Rule 60(b)(3)’s adoption define “misconduct” more broadly than the Second Circuit. Nearly every dictionary adidas could locate defines the term to include “unlawful” or “improper behavior.” *Misconduct*, Black’s Law Dictionary (12th ed. 2024) (hereinafter “Black’s”).¹⁰ Many dictionaries also specify that misconduct includes “unlawful conduct on the part of a person concerned in the administration of justice which is prejudicial to the rights of parties,”

10. *See also Misconduct*, Winston Simplified Dictionary (1939) (“improper or wrong behavior”); *Misconduct*, New Century Dictionary (1940) (“improper conduct” or “wrong behavior”); *Misconduct*, Funk & Wagnalls New Practical Standard Dictionary (1946) (“Improper conduct”); *Misconduct*, Webster’s New International Dictionary (2d ed. 1947) (“Wrong or improper conduct”); *Misconduct*, American College Dictionary (1948) (“improper conduct; wrong behavior”); *Misconduct*, Webster’s New Collegiate Dictionary (2d ed. 1953) (“Wrong or improper conduct”); *Misconduct*, Random House Dictionary of the English Language (1966) (“improper conduct; wrong behavior”); *Misconduct*, Ballentine’s Law Dictionary (3d ed. 1969) (“Improper conduct”).

Misconduct, Black’s Law Dictionary (3d ed. 1933), such as conduct contrary to law committed by “a lawyer, witness, or juror,” *Misconduct*, American College Dictionary (1948).¹¹ Other dictionaries add that misconduct encompasses a “transgression of some established and definite rule of action,” *Misconduct*, Ballentine’s Law Dictionary (3d ed. 1969), or the “mismanagement” of official duties, *Misconduct*, Oxford English Dictionary (2024).¹²

Negligent discovery failures check each of these boxes. Civil litigants have “a legal duty to produce” all “relevant, non-privileged evidence” requested by an opponent and proportional to the needs of the case. *Trump v. Vance*, 941 F.3d 631, 641–42 (2d Cir. 2019); *see* Fed. R. Civ. P. 26(b)(1). Failing to discharge this duty with reasonable care is thus an “unlawful” and “improper” violation of a “definite rule.” In fact, it is well established that a court can award *sanctions* for such a violation. *See* Fed. R. Civ. P. 37(c)(1)(A)–(C) (authorizing “appropriate sanctions” for a failure “to provide information or identify a witness” unless the failure is harmless or “substantially justified”); *id.* R. 37(e)(1) (authorizing curative sanctions when “electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it”); *see also Halas v. Consumer Servs., Inc.*,

11. *Accord Misconduct*, Bouvier’s Law Dictionary (Baldwin’s century ed. 1940); *Misconduct*, Random House Dictionary of the English Language (1966).

12. *Accord Misconduct*, New Century Dictionary (1940); *Misconduct*, Funk & Wagnalls New Practical Standard Dictionary (1946); *Misconduct*, Webster’s New International Dictionary (2d ed. 1947).

16 F.3d 161, 164 (7th Cir. 1994) (explaining that “the culpability of a party who fails to comply with a [discovery] order determines only which sanctions the court should impose and not whether any sanctions are appropriate at all”). Under any sensible interpretation of the English language, sanctionable behavior is “misconduct.”

Established examples of misconduct lead to the same conclusion. “Professional misconduct” occurs when a lawyer “violate[s] the Rules of Professional Conduct.” Model Rules of Pro. Conduct r. 8.4(a). “Judicial misconduct” occurs when a judge “has committed a violation of [the Judicial] Code.” Model Code of Jud. Conduct r. 2.15(A). “Juror misconduct” occurs when a juror “violat[es] . . . the court’s charge.” *Misconduct*, Black’s. And “prosecutorial misconduct” occurs when a prosecutor “fail[s] to act” as required, *Prosecutorial Misconduct*, Black’s, even when that failure is “inadverten[t],” *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (holding that prosecutors commit “prosecutorial misconduct” when they fail to disclose exculpatory evidence “either willfully or inadvertently”). Misconduct in none of these circumstances is limited to behavior that is “worse than negligent.”

The inclusion of “misconduct” alongside “fraud” and “misrepresentation” further forecloses the Second Circuit’s narrow interpretation. As the First Circuit explained, misconduct is an “expansive concept” that must extend beyond misrepresentation and fraud for the concept to have independent meaning. *West*, 803 F.3d at 67. The Eleventh Circuit made a similar point when rejecting a narrow reading of misrepresentation that “would render it superfluous” to fraud. *One (1) Douglas A-26B Aircraft*, 662 F.2d at 1374 & n.6.

More to the point: fraud ordinarily requires the “intent to deceive,” *Reilly v. Pinkus*, 338 U.S. 269, 275 (1949); *Merck & Co. v. Reynolds*, 559 U.S. 633, 648–49 (2010), while misrepresentations can either be intentional, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 528–29 (1992), or negligent, *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 114 (2d Cir. 2012); Restatement (Second) of Torts § 552 (A.L.I. 1977). It makes no sense, given the structure of the three terms in Rule 60(b)(3), that fraud must be intentional, misrepresentation can be intentional or negligent, but misconduct must be “worse than negligent.” Contrary to the Second Circuit’s conclusion, App. 14a–15a, the canon of *noscitur a sociis* establishes that misconduct does *not* require “worse than negligent” behavior. See *McDonnell v. United States*, 579 U.S. 550, 568–69 (2016) (“Under the familiar interpretive canon *noscitur a sociis*, a word is known by the company it keeps.”).

The same interpretation follows from the relationship between Rules 60(b)(3) and 60(b)(2). See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (discussing the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme”). Rule 60(b)(2) “aim[s] at correcting an erroneous judgment stemming from the unobtainability of evidence.” *Schultz*, 24 F.3d at 631; *Anderson*, 862 F.2d at 924 n.10. For this reason, Rule 60(b)(2) movants must show that newly discovered evidence “probably would have changed the outcome.” App. 9a; see also *Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for City of Bos.*, 89 F.4th 46, 62 (1st Cir. 2023); *LAJIM, LLC v. Gen. Elec. Co.*, 917 F.3d 933, 950 (7th Cir. 2019); *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A.*

v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1274 (11th Cir. 2014). By contrast, Rule 60(b)(3) focuses not on “erroneous judgments” but on “judgments which were unfairly procured” by the opposing party. *Schultz*, 24 F.3d at 631; *Anderson*, 862 F.2d at 924 n.10. The movant must therefore show that the opposing party’s misconduct prevented a “full and fair” presentation of the case. See *Thomas v. McAuliffe*, 170 F.4th 1057, 1064 (7th Cir. 2026); *Triantos v. Guaetta & Benson, LLC*, 52 F.4th 440, 445 (1st Cir. 2022); *In re Hope 7 Monroe St. Ltd. P’ship*, 743 F.3d 867, 875 (D.C. Cir. 2014). This represents a “more lenient” standard than its 60(b)(2) counterpart. *Schultz*, 24 F.3d at 631.

That distinction matters here. Under the plain language of Rule 60(b), a movant whose opponent’s negligence caused the loss of evidence should be able to proceed under Rule 60(b)(3), while a movant who merely discovers new evidence should bear Rule 60(b)(2)’s heightened burden. If “misconduct” excludes negligence, however, a party denied access to evidence because of an opposing party’s negligent discovery conduct would be forced to proceed under Rule 60(b)(2)—even though the opposing party obtained a judgment “unfairly” in violation of the discovery rules. See *Rozier*, 573 F.2d at 1346 (noting that “selective disclosure of information” undermines “the ‘fair contest’ which the Federal Rules of Civil Procedure are intended to assure”). This Court should not countenance that result, which contravenes the fundamental principle that the discovery rules “are to be accorded a broad and liberal treatment to effectuate their purpose that civil trials in the federal courts no longer need be carried on in the dark.” *Schlagenhauf v. Holder*, 379 U.S. 104, 115 (1964) (citation omitted).

B. The Second Circuit’s reasoning is unpersuasive.

The Second Circuit based its “worse than negligent” holding on two unpersuasive considerations. It first observed that, for failure to preserve electronically stored information under Rule 37, a court can impose “[s]anctions comparable to vacatur of a final judgment” only when a party “inten[ded] to deprive another party of the information’s use.” App. 12a. The Second Circuit reasoned that because “a negligent discovery violation would not support sanctions like dismissal or default judgment under Rule 37, it likewise would not justify the ‘extraordinary judicial relief’ of vacating a final judgment under Rule 60(b)(3).” App. 13a. This analogy breaks down in at least two critical respects.

First, the “most severe” Rule 37 sanctions highlighted by the Second Circuit give the other party victory on a central issue or even the entire case. App. 12a–13a. By contrast, relief under Rule 60(b)(3) does not provide the moving party a win, but only an opportunity to retry the case. The offending party still has an opportunity to prevail—it just must face the evidence it failed to produce before the initial trial.

Second, Rule 37 applies while the case remains pending. This means the district court can ordinarily craft lesser sanctions—including reopening discovery¹³

13. See, e.g., *Koppers Performance Chems., Inc. v. Travelers Indem. Co.*, 593 F. Supp. 3d 247, 251–52 (D.S.C. 2022); *G & E Real Est., Inc. v. Avison Young-Washington, D.C., LLC*, 323 F.R.D. 67, 70–71 (D.D.C. 2017).

or awarding attorney’s fees and costs¹⁴—that provide a complete remedy for a violation of the discovery rules before a trial has occurred. In other words, a court can often use Rule 37 to fully remedy any prejudice from the discovery misconduct without disturbing or commanding a judgment. But Rule 60(b)(3) comes into play only *after* final judgment. In that circumstance, no sanction short of a new trial can possibly remedy the violation; the only available remedy is a new trial. The Second Circuit’s ruling—which exempts negligent misbehavior from Rule 60(b)(3)—therefore encourages carelessness during discovery: if the negligent behavior is discovered only after final judgment, there is nothing the adverse party or the court can do to remedy it.

The Second Circuit also purported to rely on “historical evidence.” It cited a single antebellum case to assert that “[b]efore Rule 60(b), courts focused on the presence or absence of conduct akin to fraud” when discussing relief from judgment. App. 14a (citing *Hungerford v. Sigerson*, 61 U.S. (20 How.) 156, 161 (1857)). And it cited transcripts from meetings in 1945 and 1946 to assert that the Rules Committee drafted Rule 60(b)(3) “with an eye towards intentional wrongful acts.” *Id.* Thom Browne did not cite any of these materials in its appellate briefing. Nor do the conclusions that the Second Circuit gleaned from them withstand scrutiny.

14. See, e.g., *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 269 (D.D.C. 2018); *Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.*, 328 F.R.D. 100, 123–24 (S.D.N.Y. 2018); *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 131–32 (S.D.N.Y. 2007).

Initially, the Second Circuit misunderstood the pre-Federal Rules practice. Equitable vacatur did not require “conduct akin to fraud.” As Chief Justice Marshall explained, equitable vacatur of a judgment was available based on “any fact which clearly proves it to be against conscience to execute a judgment, . . . of which [the movant] might have availed himself at law, but was prevented by fraud *or accident* unmixed with any fault or negligence in himself or his agents.” *Marine Ins. Co. v. Hodgson*, 11 U.S. (7 Cranch) 332, 336 (1813) (emphasis added). Consistent with this statement of the rule, the *Hungerford* case the Second Circuit cited itself explained that “[i]f by accident or fraud [a ‘proper’] defence has been prevented, a court of equity may grant relief.” 61 U.S. (20 How.) at 161.

The Second Circuit’s reliance on the drafting history of Rule 60 fares no better. Although “the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule” in some cases, *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002), there is no authority that *comments by individual Committee members at a meeting* are persuasive to any extent. *Cf. Garcia v. United States*, 469 U.S. 70, 76 (1984) (explaining that, in interpreting statutes, the Court has “eschewed reliance on the passing comments of one Member [of Congress] and casual statements from the floor debates” (citation omitted)). Such comments cannot trump the plain meaning of “misconduct.” *See Berk v. Choy*, 607 U.S. 187, 192 (2026) (“[W]e interpret the Federal Rules the same way we interpret federal laws more generally: by giving them their ‘plain meaning.’”). Nor should they control when the cited material “speak[s] at best indirectly to the precise question here.” *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 481 (2017).

The Second Circuit also mentioned the Advisory Committee Note’s reference to “fraud and the like,” but it treated that phrase as evidence of an intent to limit “misconduct” to fraud-like intentional conduct. App. 14a. Such an interpretation would impermissibly render “misconduct” largely superfluous. *See City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021) (applying “[t]he canon against surplusage”). Although the Second Circuit denied the existence of a surplusage problem, its only example of more-than-negligent misconduct not otherwise subsumed by fraud or misrepresentation involved parties who “fil[e] meritless motions and pleadings to induce delay and cause their opponent to incur needless expenses.” App. 15a & n.5. This conduct would be obvious before judgment and thus would not fall under Rule 60(b)(3). *See, e.g., Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004).

The better reading is that “and the like” signals that Rule 60(b)(3) reaches other forms of unfair litigation conduct, with “misconduct” preserving room for serious discovery failures that prevent a full and fair presentation of the case. Nothing in the Note says that misconduct must be intentional. And the Note’s ambiguous reference to “fraud and the like” cannot override the rule’s plain language. This Court in *Vonn* relied on the Advisory Committee’s Note because it expressed “a clear intent” on the very subject of dispute. 535 U.S. at 64. That is a far cry from the circumstances here, where the Second Circuit relied on roundabout implications and hints in eighty-year-old Advisory Committee materials rather than an express textual limitation.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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September 28, 2026

APPENDIX

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**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT, DATED APRIL 29, 2026**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-1510

ADIDAS AMERICA, INC., ADIDAS AG,

Plaintiffs-Appellants,

v.

THOM BROWNE, INC.,

Defendant-Appellee.

August Term 2025
October 28, 2025, Argued
April 29, 2026, Decided

On Appeal from the United States District Court
for the Southern District of New York.

No. 21-cv-5615
Jed S. Rakoff, *Judge.*

Before: CABRANES, PARK, and ROBINSON, Circuit *Judges.*

PARK, *Circuit Judge:*

Adidas America, Inc., sued Thom Browne, Inc., for
trademark infringement, trademark dilution, and unfair

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competition. A jury found Thom Browne not liable, but adidas later learned that Thom Browne had failed to disclose several relevant emails during discovery. Adidas moved for relief from the final judgment under Federal Rules of Civil Procedure 60(b)(2) and (b)(3), which the district court denied. We agree with the district court that adidas failed to meet its burden under Rule 60(b)(2) to show that the newly discovered evidence probably would have changed the verdict. Moreover, although Thom Browne's failure to disclose the emails was negligent, a negligent discovery violation is not "misconduct" under Rule 60(b)(3), so adidas was not entitled to relief. We thus affirm the order of the district court.

I. BACKGROUND**A. Factual Background**

Adidas is a sportswear manufacturer known for its Three-Stripe Mark:



Adidas's Three-Stripe Mark

Thom Browne is a luxury apparel company that uses, among its motifs, the Four-Bar Signature, which consists of four wide horizontal bars, and the Grosgrain, "a pattern

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of red, white and blue stripes.” *Adidas Am., Inc. v. Thom Browne, Inc.*, 742 F. Supp. 3d 352, 354 (S.D.N.Y. 2024).



Thom Brown’s Grosgrain (left) and Four-Bar Signature

In 2021, adidas sued Thom Browne for trademark infringement, trademark dilution, and unfair competition over its use of the Four-Bar and Grosgrain in a new line of activewear. The case went to trial, and the jury heard from sixteen witnesses and saw over four hundred exhibits before finding Thom Browne not liable on all counts. Adidas then unsuccessfully appealed.¹

While the appeal was pending, Thom Browne produced several new emails in a separate litigation between the two companies in the United Kingdom. The emails included the following:

1. December 2016 email exchange between Emily Maturo, a Senior Men’s Account Manager at Thom Browne and Incorp S.a.L., a distributor in

1. See *Adidas Am., Inc. v. Thom Browne, Inc.*, No. 23-166, 2024 U.S. App. LEXIS 10824, 2024 WL 1953594 (2d Cir. May 3, 2024).

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Switzerland that purchased product from Thom Browne for retail stores in Asia. Discussing the display of Thom Browne's clothes, Maturo states: "We try to avoid rows of 4 bar armband on the racks so as to not look like Adidas. We've therefore removed some styles from your original orders."

2. November 2018 email exchange between Thi Wan, then Thom Browne's Head of Menswear, and Mr. Thom Browne himself. In the exchange, the two discuss design choices for formalwear and accessories that Thom Browne was creating for FC Barcelona ("FCB"), the Spanish soccer (football) club. In the initial email, Wan states: "I wanted to hear your thoughts on the usage of 4bar for FCB dressing for players. I wanted to raise a flag now from me before other teams start bombarding you with this concern. As Adidas has such a big presence in the sporting world, it is inevitable that our 4bar in white be read as adidas stripes, especially on accessories. Or would you also consider RWB?." ²
3. December 2019 email exchange among Kelly Connor, Director of Brand Relations at Thom Browne, Tomaso Galli, Vice President of Marketing and Communication at Thom Browne, and Mr. Thom Browne. The discussion concerns

2. In context, RWB appears to mean "red, white, and blue" stripes.

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the same formalwear and accessories for FCB that were being discussed in Email 2. In the final email in the chain, Galli states, “They [FCB] are not comfortable with any four bars, which in their view is too much in the spirit of Adidas.”

4. August 2019 email exchange between Wan and Browne. The discussion concerns design choices for accessories that Thom Browne was designing for FCB. In his initial email, Wan states: “There is a 4bar range and RWB range in case you feel that 4bar is too loud and ‘adidas’ in the football context.” In response, Browne states: “[I] thought [Galli] has already said that we shouldn’t use the four bar because of adidas ... please confirm with matt and then we can proceed ... maybe it would be safer to just make the rwb stripes bigger and proceed ...” Finally, Wan replies back, “You’re right on the 4bar. We should and will focus on the RWB.”

Id. at 355-56 (cleaned up).

B. Procedural History

After learning of the unproduced emails, adidas moved for a new trial under Federal Rules of Civil Procedure 60(b)(2) and (b)(3). The district court held an evidentiary hearing to determine why the emails were not produced. Two paralegals at Wolf Greenfield—Thom Browne’s law firm—testified. The district court also permitted adidas to depose two Wolf Greenfield associates who worked on

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the case, as well as a representative of Thom Browne's ed-discovery services provider, Consilio.

The district court found that the non-production of the emails resulted from the following events. The parties first agreed that Thom Browne would search the electronically stored information of nine custodians. Wolf Greenfield collected over 1.4 million documents from these custodians, which it reduced to a set of presumptively responsive documents. It then used search terms to identify potentially privileged documents. The documents containing those terms were to be reviewed by counsel before being produced or withheld and listed on Thom Browne's privilege log. A Wolf Greenfield paralegal emailed Consilio with instructions to create "a saved search for ALL potentially privileged documents that have not already been produced by Thom Browne so that we will have one search to work with when we go to do our privilege review." *Adidas*, 742 F. Supp. 3d at 357 (cleaned up). Consilio created the requested search, noting that it had run the search terms across all documents "that are not produced, not coded for responsiveness and not coded for privilege." *Id.* (cleaned up). Wolf Greenfield used that saved search to conduct its privilege review.

A week before emailing Consilio, however, the Wolf Greenfield paralegal had apparently "carried out a mass edit on some subset of documents that hit on the search term 'adidas'—including the four emails here at issue—changing the responsiveness, privilege and confidentiality fields to 'needs further review.'" *Id.* at 358. As a result, those documents were not included in Consilio's saved

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search, which captured only documents with no coding in the responsiveness or privilege fields. They were thus not part of the initial privilege review. They were also not caught in a subsequent “quality control” check, in which a Wolf Greenfield associate was supposed to review all documents marked “needs further review” to ensure nothing slipped through the cracks. *Id.* at 368-69.

The district court ultimately denied adidas’s Rule 60(b) motion. First, it determined that adidas had failed to meet its burden of showing that the emails probably would have changed the verdict under Rule 60(b)(2) because they did not implicate “the central issues in this case as they actually played out at trial.” *Id.* at 361. In particular, the district court noted that the jury was unpersuaded by more direct evidence of consumer confusion that had been presented at trial. Second, the district court determined that a negligent discovery violation is sufficient to constitute “misconduct” under Rule 60(b)(3). But it found that Thom Browne’s counsel did not act negligently in failing to produce the emails, so it did not commit misconduct.

Adidas appeals from the district court’s denial of its Rule 60(b) motion.

II. DISCUSSION

Adidas argues that it was entitled to relief from the jury’s verdict under Rule 60(b)(2) for “newly discovered evidence” or 60(b)(3) for Thom Browne’s “misconduct.” We disagree. Adidas’s argument under Rule 60(b)(2) fails

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because the unproduced emails probably would not have changed the verdict. And its argument under Rule 60(b)(3) fails because “misconduct” does not encompass merely negligent discovery violations like Thom Browne’s. We thus affirm the district court’s denial of adidas’s Rule 60(b) motion.

A. Legal Standards

“We review questions of law de novo and a district court’s [decision on] a Rule 60(b) motion for abuse of discretion. A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Ins. Co. of N. Am. v. Pub. Serv. Mut. Ins. Co.*, 609 F.3d 122, 127 (2d Cir. 2010) (cleaned up). Whether the district court erred in interpreting Rule 60(b)(3) is a question of law, which we review de novo. *Cf. Hayward v. IBI Armored Servs., Inc.*, 954 F.3d 573, 575 (2d Cir. 2020).

“[T]he rule in this circuit has long been to consider [rulings on negligence] *de novo*” because such rulings “are ultimately conclusions of law.” *In re M/V MSC Flaminia*, 72 F.4th 430, 446 (2d Cir. 2023). But “[i]n most cases, negligence determinations turn upon factual findings subject to clear-error review.” *In re Energetic Tank, Inc.*, 110 F.4th 131, 152 (2d Cir. 2024). We will thus disturb a district court’s negligence determination only if it errs in “interpreting applicable law” or clearly errs “in finding material facts.” *Id.* at 152-53.

*Appendix A***B. Rule 60(b)(2)**

Rule 60(b)(2) states that a court may relieve a party from a final judgment for “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” “The movant must demonstrate that (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching.” *United States v. Int’l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (cleaned up).

Only the third factor is at issue here—whether the unproduced emails were “of such importance that [they] probably would have changed the outcome” at trial. *Id.* We discern no abuse of discretion by the district court in denying adidas’s Rule 60(b)(2) motion based on its conclusion that the emails probably would not have changed the verdict.

First, the district court correctly found that the emails do not bear directly on any of the factors for determining whether an allegedly infringing product created a reasonable likelihood of confusion. *See Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).³ Adidas asserts that the emails were admissions

3. Those factors, per the district court’s jury instructions, were: (1) “the strength of adidas’ Three Stripe Mark”; (2) “the

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that confusion was likely, but likelihood of confusion is an objective standard, and the emails reflected executives' *opinions* about likely confusion.

Second, more direct evidence of consumer confusion—such as adidas's consumer survey—did not persuade the jury, so it is unlikely that the emails would have made a difference. The emails were not about the allegedly infringing products or even products in the same Thom Browne collection (*i.e.*, activewear). Rather, they discussed formalwear and accessories, which were not at issue in this case.

Third, the emails did not bear on Thom Browne's main defenses in this case—*i.e.*, its contentions that adidas wanted to “own[] all stripe designs” and that Thom Browne and adidas compete in different markets and sell their products at different price points. *Adidas*, 742 F. Supp. 3d at 361-62. Adidas insists that the emails show that it “did not want to ‘own all stripes,’ but simply address an arrangement of stripes that *Thom Browne*

degree of similarity between adidas' Three Stripe Mark and Thom Browne's use of the Four Bar and/or Grosgrain designs on the Accused products”; (3) “whether the Accused Products and adidas['] products compete for the same consumers”; (4) “whether or not there is evidence that consumers are actually confused about which company offers the Accused Products”; (5) “the quality of the Accused Products relative to adidas' products bearing the Three Stripe Mark”; (6) “the degree of care and attention that an ordinary consumer would use when encountering adidas' and Thom Browne's respective products”; and (7) “whether adidas has shown that Thom Browne acted in bad faith.” *Adidas*, 472 F. Supp. 3d at 359-60.

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officials knew ‘looked like adidas’ and made consumer confusion ‘inevitable.’” Appellant’s Br. at 49 (cleaned up). But Thom Browne responds that it would have made the exact same argument it made at trial, with the exact same result, if Adidas introduced the emails.

The district court had the benefit of observing the trial. It did not err in finding that the newly discovered evidence probably would not have changed the outcome of trial, so adidas was not entitled to relief under Rule 60(b)(2).

C. Rule 60(b)(3)

Rule 60(b)(3) provides that a court may relieve a party from a final judgment for “fraud . . . , misrepresentation, or misconduct by an opposing party.” To prevail under Rule 60(b)(3), a party must prove the opposing party’s misconduct by clear and convincing evidence. *See Fleming v. N.Y. Univ.*, 865 F.2d 478, 484 (2d Cir. 1989). It must also show that the misconduct interfered with its ability to present its case fully and fairly. *See State St. Bank & Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 176 (2d Cir. 2004).

1. *Mental State Required for Misconduct*

This Court has not addressed the meaning of “misconduct” under Rule 60(b)(3) or the level of culpability it requires. Based on the text and structure of the Federal Rules of Civil Procedure and historical evidence, we conclude that “misconduct” does not include a merely negligent discovery violation.

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We begin with the text of the Rule. The term “misconduct” is susceptible to different meanings. *See, e.g., Misconduct*, Black’s Law Dictionary (12th ed. 2024) (defining “misconduct” as a “dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust”); *Misconduct*, Merriam-Webster.com (defining “misconduct” as “mismanagement especially of governmental or military responsibilities”; “intentional wrongdoing”; or “improper behavior”). When a term “takes on different meanings depending on context,” it is proper to “look not only to the word itself, but also to the statute and the surrounding scheme” in interpreting it. *Dubin v. United States*, 599 U.S. 110, 118, 143 S. Ct. 1557, 216 L. Ed. 2d 136 (2023) (cleaned up).

We then turn to context—here, other Federal Rules of Civil Procedure. In particular, Rule 37, which governs discovery sanctions, supports the view that discovery-related “misconduct” involves more than mere negligence. Sanctions comparable to vacatur of a final judgment under Rule 37 require heightened culpability. When a party fails to preserve electronically stored information, for example, the most severe sanctions—an adverse inference instruction, dismissal, or entry of a default judgment—may be imposed only when “the party acted with the intent to deprive another party of the information’s use in the litigation.” Fed. R. Civ. P. 37(e)(2); *see also Societe Internationale pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 212, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) (“Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner’s noncompliance with a pretrial production

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order when it has been established that failure to comply [was not due to] willfulness, bad faith, or any fault of petitioner.”).

As with sanctions under Rule 37, an important reason that “misconduct” under Rule 60(b)(3) requires a higher degree of culpability is the severity of the remedy—*i.e.*, setting aside a final judgment. As we have repeatedly emphasized, “final judgments should not be lightly reopened,” so relief under Rule 60(b) is available only in “exceptional circumstances.” *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) (cleaned up); *see also Terra Firma Invs. (GP) 2 Ltd. v. Citigroup Inc.*, 716 F.3d 296, 298 (2d Cir. 2013) (“Absent fundamental error, we are loath to overturn a jury verdict in a civil case.”). Here, vacating the jury’s verdict would deprive Thom Browne of the benefit of a judgment obtained after trial and appeal, causing it to operate under a cloud of legal liability and forcing it to expend additional resources defending the action again. Although intentional discovery violations may well warrant such harsh consequences, mere negligence does not. Put differently, just as a negligent discovery violation would not support sanctions like dismissal or default judgment under Rule 37, it likewise would not justify the “extraordinary judicial relief” of vacating a final judgment under Rule 60(b)(3). *Nemaizer*, 793 F.2d at 61. If it did, a party could get a new trial for negligent conduct that typically would merit only a modest discovery sanction, like cost-shifting, which would be an anomalous result.⁴

4. Unsurprisingly, district courts considering a new trial as a discovery sanction have viewed it as akin to the more severe remedies authorized under Rule 37. *See, e.g., Health All. Network, Inc. v.*

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Next, historical evidence is consistent with this conclusion. Before Rule 60(b), courts focused on the presence or absence of conduct akin to fraud when discussing an opposing party's wrongdoing as an equitable ground for relief from a judgment. *See, e.g., Hungerford v. Sigerson*, 61 U.S. 156, 161, 15 L. Ed. 869 (1857) ("There is no charge of fraud . . . nor that, by the contrivance or unfairness of the defendant, a remedy was not had at law."). And the Rules Committee's proceedings on Rule 60(b)(3) indicate that it drafted the rule with an eye towards intentional wrongful acts, such as a "deceit practiced on a party." Transcript of Proceedings of Advisory Committee on Rules for Civil Procedure (May 1945), at 517-18; *see also* Transcript of Proceedings of Advisory Committee on Rules for Civil Procedure (March 1946), at 601-02 (noting that Rule 60(b)(3) was meant to deal with "tricks played by one party upon the other"). Given the "incorporation of fraud and the like within the scope of the rule," Fed. R. Civ. P. 60(b) advisory committee's note to 1946 amendment, the most natural understanding of "misconduct" in Rule 60(b)(3) is that—like fraud—it requires more than mere negligence. *See Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 604 (2d Cir. 2021) (noting that the canon of *noscitur a sociis*

Cont'l Cas. Co., 245 F.R.D. 121, 128 (S.D.N.Y. 2007) ("Moreover, a sanction for a discovery violation as severe as granting a new trial requires that the court find willfulness, bad faith, or any fault, and that the opposing party has been seriously prejudiced and that no lesser sanction is sufficient to deter discovery abuses." (cleaned up)); *Mugavero v. Arms Acres, Inc.*, 680 F. Supp. 2d 544, 573-74 (S.D.N.Y. 2010) (declining to grant a new trial as a discovery sanction for a failure to produce documents because the failure was not sufficiently egregious).

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“instructs us to cabin [a potentially ambiguous term] such that its scope aligns with that of its listed companions”).

Finally, the cases adidas cites do not persuade us that “misconduct” includes negligent acts. As the district court recognized, in most of these cases, “some degree of purposeful culpability was clearly apparent.” *Adidas*, 742 F. Supp. 3d at 366 & nn.14-15 (collecting cases). The only case analyzing the meaning of “misconduct” relies exclusively on the canon against surplusage, concluding that “misconduct” cannot require “proof of nefarious intent” because it would otherwise be redundant with “fraud” and “misrepresentation.” *Anderson v. Cryovac*, 862 F.2d 910, 923 (1st Cir. 1988) (cleaned up). But “misconduct” can encompass intentional acts that do not involve “deception or trickery” (*i.e.*, fraud), *Husky Int’l Elecs., Inc. v. Ritz*, 578 U.S. 355, 360, 136 S. Ct. 1581, 194 L. Ed. 2d 655 (2016), or the making of a false or misleading statement (*i.e.*, misrepresentation), *see Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 188-89, 136 S. Ct. 1989, 195 L. Ed. 2d 348 (2016).⁵ So reading “misconduct” to require more than mere negligence does not violate the canon against surplusage.

We thus conclude that a merely negligent discovery violation does not constitute “misconduct” under Rule 60(b)(3).

5. For example, a party may attempt to “defeat [an opponent’s] claim” by filing “meritless motions and pleadings” to induce delay and cause their opponent to incur needless expenses. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 38, 57, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991).

*Appendix A***2. Thom Browne's Discovery Violation Was Not Misconduct**

To obtain relief under Rule 60(b)(3), adidas must show that Thom Browne's non-production of emails was "misconduct." It cannot do so because Thom Browne's discovery violation was only negligent.

In discovery, 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." *Pension Comm. of Univ. of Montr. Pension Plan v. Banc of Am. Secs.*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010), *abrogated on other grounds by Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012); *see also* Dobbs' Law of Torts § 126 (2025 ed.) ("[N]egligence is a failure to exercise care that is reasonable under the circumstances."). Gross negligence is the "failure to exercise even that care which a careless person would use." *Pension Comm.*, 685 F. Supp. 2d at 464 (cleaned up); *see also* Dobbs' Law of Torts § 140 (defining gross negligence as "the failure to use even slight care").

"Discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys," so negligence in discovery is a low bar. *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007). For example, courts have found negligence when counsel possessed an important document but failed to recognize its importance and timely produce it, *see id.* at 130; when a party agreed to gather files from certain custodians but failed to do so, *see Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 419 (S.D.N.Y.

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2010); when a party failed to preserve documents that it had a duty to preserve even if it innocently thought that it did not have such a duty, *see Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003); and when counsel failed to locate and produce a specifically requested document merely because the document was not among “the universe of documents” that counsel deemed “potentially relevant,” *Kortright Cap. Partners LP v. Investcorp Inv. Advisers Ltd.*, 330 F.R.D. 134, 139 (S.D.N.Y. 2019) (cleaned up).

Here, the district court concluded that Wolf Greenfield did not act negligently because (1) it was reasonable for the paralegal to assume that the e-discovery services provider followed her instructions to produce a saved search with all potentially privileged documents and (2) an associate conducted a separate quality-control check to “ensure no other documents fell through the cracks,” which showed that Wolf Greenfield attempted to meet its discovery obligations. *Adidas*, 742 F. Supp. 3d at 368-69. But even assuming the former (*i.e.*, that the miscommunication between the paralegal and the e-discovery services provider is excusable in the context of a complex discovery process), the record simply does not support the latter (*i.e.*, that the associate conducted an adequate quality-control review).

The record indicates that Wolf Greenfield failed to meet its discovery obligations. The associate testified that she “endeavored to be careful and review every document that was tagged ‘further review’”; “*it was [her] intent*, when she was completing the privilege log exercise, to review every document that was tagged

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‘needs further review’”; and “*she believe[d] her actions matched her intent.*” *Id.* (emphases added) (cleaned up). The emails at issue were tagged “needs further review,” but their document histories show that, apart from two Wolf Greenfield paralegals, no one at the firm ever viewed them. Neither the district court nor Thom Browne offers any explanation for that failure. In light of the obvious relevance of the emails, Wolf Greenfield’s failure to review or to produce them was negligent. *See, e.g., In re Sept. 11th*, 243 F.R.D. at 130 (finding “inadvertence,” without more, to be an unsatisfactory explanation for a failure to locate and produce relevant material in counsel’s possession).

Nonetheless, Wolf Greenfield’s actions were no worse than negligent. Courts typically find recklessness or gross negligence when a party fails to take “widely-recognized steps” in complying with its discovery obligations. *Harkabi*, 275 F.R.D. at 419. For instance, courts have found gross negligence when counsel fails to issue a written litigation hold or timely inspect a client’s computers and servers. *See In re NTL, Inc. Secs. Litig.*, 244 F.R.D. 179, 198-99 (S.D.N.Y. 2007) (collecting cases). Here, the record shows that the responsible associate failed to review the four emails at issue, but not that she failed to review *any* of the documents tagged “needs further review.” In other words, Wolf Greenfield took the “widelyrecognized step” of reviewing potentially responsive documents, but apparently missed some. While its performance was negligent, it was not worse than that.⁶

6. Because we conclude that Wolf Greenfield’s actions were no more than negligent, we need not determine the specific level of culpability (*e.g.*, gross negligence or intent) required to support relief under Rule 60(b)(3).

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Because “misconduct” under Rule 60(b)(3) does not encompass merely negligent discovery violations, and Thom Browne’s failure to produce the emails at issue was no more than negligent, adidas is not entitled to relief under Rule 60(b)(3).

III. CONCLUSION

In sum, adidas was not entitled to relief under Rule 60(b)(2) or (b)(3). Under Rule 60(b)(2), the unproduced emails probably would not have changed the verdict, and, under Rule 60(b)(3), Thom Browne’s negligent failure to produce the emails was not misconduct. We thus affirm the district court’s order denying adidas’s Rule 60(b) motion.

20a

**APPENDIX B — OPINION AND ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK,
FILED JULY 29, 2024**

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

21-cv-5615 (JSR)

ADIDAS AMERICA, INC., AND ADIDAS AG,

Plaintiffs,

-v-

THOM BROWNE, INC.,

Defendant.

Filed July 29, 2024

OPINION & ORDER

JED S. RAKOFF, U.S.D.J.

This is a trademark action brought by Adidas America, Inc. and Adidas AG (collectively “Adidas”) against Thom Browne, Inc. (“Thom Browne”). Adidas alleged that Thom Browne’s use of its four bar and grosgrain designs on certain of Thom Browne’s activewear infringed Adidas’s trademarked three-stripe design. The case went to trial in January 2023, and the jury returned a verdict of not liable in favor of Thom Browne. Adidas appealed and the Second Circuit affirmed in May 2024.

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While its appeal was pending, Adidas filed the instant motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b) (2) and 60(b)(3), based upon the intervening discovery of four emails that Thom Browne failed to produce in this case. According to Adidas, these emails show that Thom Browne employees, including Mr. Thom Browne himself, knew that there was a likelihood Thom Browne’s four-bar design could be confused with Adidas’s three stripes.

On May 3, 2024, the Court issued a “bottom-line” Order denying Adidas’s motion. This Opinion sets forth the reasons for that ruling. As explained in more detail below, the Court finds that Adidas has failed to show either that the four emails probably would have changed the outcome of trial as required to obtain relief pursuant to Rule 60(b) (2) or that Thom Browne engaged in “misconduct” in failing to produce the emails as required to obtain relief pursuant to rule 60(b) (3).

I. Background**A. Underlying Litigation & Trial**

The Court assumes familiarity with the background of this long-running litigation and sets forth only those facts necessary to understand the instant motion.¹ In brief, Adidas is a major player in the market for activewear,

1. For additional detail regarding the plaintiff’s claims, see the Court’s summary judgment Opinion, Dkt. 159, and Magistrate Judge Lehrburger’s Report and Recommendation concerning defendant’s motion to dismiss, Dkt. 41, which was adopted by the Court, Dkt. 47.

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known for its signature “Three-Stripe Mark,” which generally consists of three parallel lines of roughly the same width placed in close proximity. In 2021, Adidas brought this action against defendant Thom Browne, asserting claims for trademark infringement, trademark dilution, and unfair competition. Adidas claimed that Thom Browne’s use of its “Four-Bar Signature” design -- generally, four parallel bars -- and Thom Browne’s “Grosgrain” design -- a pattern of red, white and blue stripes -- on certain pieces of Thom Browne’s activewear infringed upon and diluted Adidas’s Three-Stripe Mark.

The products Adidas accused of infringement (the “accused products”) consisted of certain specified pieces of Thom Browne activewear, notably certain sweatpants, hoodies, and running shoes. Adidas expressly disclaimed any allegation that Thom Browne’s other products for which it was more well known, such as Thom Browne’s formalwear, were infringing. *See* Dkt. 225-17 (depicting accused products). While the precise definition of Adidas’s Three-Stripe Mark was a disputed issue throughout the case, it was ultimately defined by the Court in its jury instructions as follows:

adidas’ Three Stripe Mark means its use of three parallel stripes on clothing or shoes in the manner described and exemplified in a number of federal trademark registrations that you can review at Plaintiffs’ Exhibits 181 and 183. It also includes any other use by adidas of three parallel stripes on clothing or shoes that you find gives consumers the same commercial

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impression as any one or more of the registered uses. By this, I mean that you may find that a particular use of three parallel stripes by adidas falls under its Three Stripe Mark - even if it differs in some way from the use of three stripes in any of the federal registrations -- if you find that the use would be perceived in the same way by a reasonable consumer.

Jury Instructions (Dkt. 190) at 14.

A jury trial on Adidas's claims was held on January 3, 2023. During the eight-day trial, the jury heard the testimony of sixteen witnesses and saw the introduction into evidence of over 400 exhibits. After the conclusion of the evidence, the jury deliberated for approximately two hours before returning a verdict on January 12, 2023 of not liable on all counts in favor of Thom Browne. *See* Dkt. 188. Adidas then timely filed a notice of appeal. *See* Dkt. 212. On May 31, 2024, the Second Circuit ruled in favor of Thom Browne and affirmed the jury's verdict. *See* Dkt. 256.

B. Adidas's Motion for New Trial

While Adidas's appeal was pending, Adidas's U.S. counsel was contacted by Adidas's U.K. counsel about certain emails that had been produced by Thom Browne in a somewhat parallel U.K. action, but, as it later became apparent, had not been produced during discovery in the instant case. *See* Henn Decl. (Dkt. 222) 1 1. After some back-and-forth with Thom Browne's U.S. counsel, Thom

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Browne produced to Adidas's U.S. counsel in October 2023 copies of various emails, four of which are the basis for the instant motion and are described below. *See id.* ¶ 5.

Email 1 (Dkt. 222-1) is a December 2016 email exchange between Emily Maturo, a Senior Men's Account Manager at Thom Browne and Incorp S.a.L., a distributor in Switzerland that purchased product from Thom Browne for retail stores in Asia. Bazan Decl. (Dkt. 227) ¶¶ 3-5. Discussing the display of Thom Browne's clothes, Maturo states: "We try to avoid rows of 4 bar armband on the racks so as to not look like Adidas. We've therefore removed some styles from your original orders." (Dkt. 222-1)

Email 2 (Dkts. 222-2, 230-4) is a November 2018 email exchange between Thi Wan, then Thom Browne's Head of Menswear, and Mr. Thom Browne himself. In the exchange, the two discuss design choices for formalwear and accessories that Thom Browne was creating for FC Barcelona ("FCB"), the Spanish soccer (football) club. In the initial email, Wan states: "I wanted to hear your thoughts on the usage of 4bar for FCB dressing for players. I wanted to raise a flag now from me before other teams start bombarding you with this concern. As Adidas has such a big presence in the sporting world, it is inevitable that our 4bar in white be read as adidas stripes, especially on accessories. Or would you also consider RWB? [i.e., a mark built around Mr. Browne's initials]." Dkt. 230-4 (alteration added). Below this, Wan included in his email pictures of various Thom Browne handbags and formalwear under consideration. *See id.* In response, Mr. Browne thanks Wan for the message and says, "Let's

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discuss.” Dkt. 222-2. None of the products depicted in this email includes any of the accused products in the U.S. lawsuit and none was ever ultimately provided to FCB. Bazan Decl. (Dkt. 227) ¶¶ 7-8.

Email 3 (Dkt. 222-3) is a December 2019 email exchange among Kelly Connor, Director of Brand Relations at Thom Browne, Tomaso Galli, Vice President of Marketing and Communication at Thom Browne, and Mr. Thom Browne. The discussion concerns the same formalwear and accessories for FCB that were being discussed in Email 2. In the final email in the chain, Galli states, “They [FCB] are not comfortable with any four bars, which in their view is too much in the spirit of Adidas.” Dkt. 222-3.²

Email 4 (Dkt. 222-4) is an August 2019 email exchange between Wan and Browne. The discussion concerns design choices for accessories that Thom Browne was designing for FCB. In his initial email, Wan states: “There is a 4bar range and RWB range in case you feel that 4bar is too loud and ‘adidas’ in the football context.” Dkt. 222-4. In response, Browne states: “[I] thought [T]omaso [Galli] has already said that we shouldn’t use the four bar because of adidas... please confirm with matt and then we can proceed... maybe it would be safer to just make the rwb stripes bigger and proceed...” *Id.* Finally, Wan replies back, “You’re right on the 4bar. We should and will focus on the RWB.” *Id.*

2. The first few emails in this chain were produced in discovery in the U.S. action, but the version with the final emails --referring to Adidas -- was not. *See* Maldonado Decl. (Dkt. 230) ¶¶ 27-28 & Ex. 5; Henn Decl. (Dkt. 222) ¶ 15 & Ex. 9.

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* * * * *

Based upon the non-production of these four email exchanges, Adidas timely moved on October 19, 2023 for a new trial pursuant to Federal Rule of Civil Procedure 60(b) (2) and 60(b) (3).³ In its moving papers, Adidas argued -- among other things -- that the non-production of the four emails must have been the product of intentional, bad faith conduct on the part of Thom Browne, and that even if the non-production was purely accidental, it still constituted “misconduct” justifying relief pursuant to Rule 60(b) (3). *See* Adidas Mot. (Dkt. 221) at 3-10, 21-22. In opposing this portion of Adidas’s motion, Thom Browne argued that some intentional misconduct was necessary for Rule 60(b) (3) to apply, and that Adidas had failed to show that that the non-production of these emails was intentional. TB Opp. (Dtk. 224) at 9-10, 22-23.

After giving notice to the parties, the Court held an evidentiary hearing on December 21, 2023 to determine the reason why the four emails were not produced. During the hearing, the Court heard testimony from an e-discovery specialist employed by counsel of Adidas, and from two paralegals who worked for Thom Browne’s counsel, the firm of Wolf Greenfield, during the relevant period. *See* Nov. 21, 2023 Minute Entry; Dec. 21, 2023 Hearing Tr. (Dkt. 240). At the conclusion of this hearing, the Court granted Adidas permission to take the deposition of two

3. Because Adidas’s appeal with the Second Circuit was still pending at the time of its initial motion, the relief Adidas sought was technically an “indicative ruling” pursuant to Federal Rule of Civil Procedure Rule 62.1.

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associates who worked at Wolf Greenfield on the Adidas matter, and the deposition of a representative of Thom Browne’s e-discovery vendor, Consilio. *See* Dec. 21, 2023 Hearing Tr. (Dkt. 240), at 97-99.⁴

Following the conclusion of this additional discovery, the Court ordered supplemental briefing on two questions:

1. 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?
2. In light of the additional discovery that the parties have received, why were the four emails that form the basis of Adidas’s motion not produced during discovery, to what degree was Thom Browne (or its counsel) culpable for the failure to produce the emails and does that degree of culpability satisfy the aforementioned “misconduct” standard under Rule 60(b)(3)?

Dkt. 245.

4. Following the hearing, with the Court’s permission Thom Browne also activated its e-discovery database and conducted additional searches to confirm that no other documents went unproduced. The parties have not brought any such documents to the Court’s attention beyond the four emails.

*Appendix B***C. Non-Production of the Four Emails**

Based on the evidentiary hearing and the parties' written submissions, the Court makes the following findings of fact regarding the non-production of the four emails:

During the course of discovery in the U.S., the parties entered into a stipulated order governing the discovery of electronically stored information ("ESI"). *See* Dkt. 34. The ESI Order set forth procedures, whereby the parties would negotiate and agree upon a set of document custodians and search terms that the responding party would use to identify responsive documents. *See id.* ¶¶ 4-5. Prior to production, the ESI Order permitted the responding party to review and withhold documents that it believed to be privileged. *See id.* ¶¶ 4-6.

Consistent with this procedure, the parties agreed that Thom Browne would search the ESI of nine of its custodians. Maldonado Decl. (Dkt. 230) ¶¶ 4-7. With the help of its e-discovery vendor (Consilio), Thom Browne's counsel (Wolf Greenfield), collected over 1.4 million documents from these custodians spanning the years 2005 to 2021. *Id.* ¶ 9. The parties agreed upon a set of search terms and Consilio ran those search terms across the documents that were collected. Wolf Greenfield then oversaw a review of the resulting set of presumptively responsive documents for privilege. *Id.* ¶ 11.

Wolf Greenfield's privilege review began with the creation of a list of search terms intended to identify

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potentially privileged documents, which would then be run across the potentially responsive documents. The plan was that all documents that hit on these terms would then be subjected to a manual review by Wolf Greenfield's attorneys before being either produced or listed on Thom Browne's privilege log and withheld. Among the terms that Wolf Greenfield used in identifying potentially privileged documents was the term "adidas," because of Thom Browne's long-running legal disputes with the company. *See* Hearing Tr. (Dkt. 240) at 70.

To carry out the privilege review, Wolf Greenfield began by creating a so-called "saved search" of all documents that "hit" on these privilege search terms. As part of that process, a Wolf Greenfield paralegal named Virginia Weeks sent an email to Consilio, instructing them to create "a saved search for ALL potentially privileged documents that have not already been produced by Thom Browne so that we will have one search to work with when we go to do our privilege review." Dkt. 244-4, at TB00530219. Joseph Juneau, the lead project manager from Consilio, responded that he had created a saved search titled "All Potentially Privileged" by running the privilege search terms --provided by Ms. Weeks -- across all documents "that are not produced, not coded for responsiveness and not coded for privilege." *Id.* at TB00530218; Kerr Dep. (Dkt. 244-3) at 51-54. Wolf Greenfield and Consilio then used this "All Potentially Privileged" saved search to conduct their privilege review, with reviewers going through each document and either tagging it for production or listing it on the privilege log to be withheld.

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The non-production of the four emails apparently resulted from a misunderstanding between Wolf Greenfield and Consilio in the creation of this “All Potentially Privileged” saved search. Unbeknownst to Consilio, approximately a week earlier Ms. Weeks had carried out a mass edit on some subset of documents that hit on the search term “adidas” -- including the four emails here at issue changing the responsiveness, privilege and confidentiality fields to “needs further review.” Hearing Tr. (Dkt. 240) at 70, 75-76. Some or all of the documents Ms. Weeks tagged in this manner were not included in the “All Potentially Privileged” saved search because, in creating that search, Consilio included only documents “not produced, not coded for responsiveness and not coded for privilege,” and yet Ms. Weeks *had* in effect coded (i.e. tagged) these documents for privilege and responsiveness although also indicating they needed to be reviewed further. Dkt. 244-4, at TB00530218; *see* Kerr Dep. (Dkt. 244-3) at 51-55; Hearing Tr. (Dkt. 240) at 87-88. Because the four emails were not included in the saved search used for the privilege review, they were never reviewed for privilege or otherwise, but nonetheless were withheld from production because they hit on a privilege term. Then, in November 2022, Consilio was instructed to move all non-produced documents to storage. Hearing Tr. (Dkt. 240) at 80-81.

II. Discussion**A. Federal Rule of Civil Procedure 60(b) (2)**

Federal Rule of Civil Procedure 60(b) (2) permits a court to relieve a party of a final judgment upon a finding

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of “newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b).” Fed. R. Civ. P. 60(b) (2). To obtain relief under this rule, “[t]he movant must demonstrate that (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching.” *United States v. Int’l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (quotation omitted).

Here, the first and second requirements of Rule 60(b) (2) are satisfied. The four emails are evidence that was in existence at the time of the trial that should have been disclosed during the course of discovery but, through no fault of Adidas, were not. While Thom Browne argues Adidas was “not diligent in pursuing discovery” in connection with the emails, Thom Browne Opp. (Dkt. 224) at 15, this argument is without merit. The fact that Adidas could have questioned Thom Browne’s witnesses further about the subject matter of these emails, and perhaps discovered their existence that way, is beside the point, because Adidas was under no obligation to do so. Thom Browne does not meaningfully dispute that the four emails fell within the scope of Adidas’s discovery requests.⁵ When the emails were not produced by Thom

5. In a footnote, Thom Browne suggests that these emails were not responsive to Adidas’s discovery requests because those requests were limited to the United States. TB Opp. (Dkt. 224) at 23 n.19.

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Browne, Adidas could reasonably rely on Thom Browne's discovery response and assume that the emails did not exist. The extent to which Thom Browne is to blame for failing to produce the emails is a matter of dispute, but Adidas is certainly not to blame.⁶

Though a closer call, the fourth requirement, that the emails "not be merely cumulative or impeaching," is also satisfied. *Int'l Bhd. of Teamsters*, 247 F.3d at 392.

But Thom Browne's witnesses testified that it was their practice to produce all documents that hit on the responsiveness search terms that were not potentially privileged, without regard to such a limitation, and as Adidas persuasively argues, the FCB deal plainly had a sufficient nexus with the U.S. to make the emails discoverable.

6. In this regard, the Court also finds unpersuasive Thom Browne's assertion of the defense of unclean hands. *See* Thom Browne Sur-Reply (Dkt. 235). To be applicable, the doctrine of unclean hands requires some direct connection between the inequitable conduct and the relief being sought. *See In re A2P SMS Antitrust Litig.*, 972 F. Supp. 2d 465, 484 (S.D.N.Y. 2013) (courts of equity "requir[e] clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation") (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S. Ct. 146, 78 L. Ed. 293, 1934 Dec. Comm'r Pat. 639 (1933)). Here, the only even arguably inequitable conduct by Adidas was the purported violation of the U.K. protective order that occurred when Adidas learned about the four emails. Whether that order was breached is a matter for the U.K. courts to decide, but it has little if any connection to the underlying non-disclosure of the emails that Adidas seeks to remedy through the instant motion.

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Importantly, since there were no other documents introduced at trial containing similar statements by Thom Browne employees, this would, at a minimum, have provided useful impeachment of those Thom Browne employees who authorized the statements and testified at trial (notably Mr. Thom Browne himself) or who might have been called by plaintiffs as adverse witnesses if plaintiffs had known of these emails.

Resolution of the instant motion therefor turns on the third requirement: that the evidence “be admissible and of such importance that it probably would have changed the outcome.” *Id.* The four email exchanges, plainly contain, at least in part, admissible evidence.⁷ However, as explained below, the Court finds that Adidas has not shown the emails are of such importance that they probably would have changed the outcome of trial.

7. Thom Browne argues the four emails are inadmissible hearsay and are “not . . . party admission[s] because adidas has not shown that th[e] statement[s] relates to the Accused Products.” TB Opp. (Dkt. 224) at 19. But all four statements were made by Thom Browne employees “on a matter within the scope of [the employment] relationship and while it existed,” and so are not hearsay. Fed. R. Evid. 801(d)(2)(D). The fact that these statements are not “admissions” is irrelevant. See Wright & Miller, Federal Practice v& Procedure § 6772 (“There is no requirement that statements admitted through Rule 801(d) (2) constitute ‘admissions.’”). To the extent certain emails contain a second layer of hearsay -- namely, the views of FCB representatives -- they are admissible as going to the declarant’s state of mind. And while not directly addressed to the accused products, they still relate to Thom Browne’s understanding of the possibility for confusion of the relevant marks.

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A key question at trial was whether the accused products created a reasonable likelihood of confusion with Adidas's Three-Stripe Mark. This is ultimately an objective standard, which can be informed by the jurors' actual experience and observation. *See Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961). However, the Court instructed the jurors that they should consider the so-called *Polaroid* factors. Jury Instructions (Dkt. 190) at 15. To this end, the instructions listed these *Polaroid* factors relevant in this case as follows:

First, the strength of adidas' Three Stripe Mark. *Second*, the degree of similarity between adidas' Three Stripe Mark and Thom Browne's use of the Four Bar and/or Grosgrain designs on the Accused Products. . . . *Third*, whether the Accused Products and adidas products compete for the same consumers. *Fourth*, whether or not there is evidence that consumers are actually confused about which company offers the Accused Products. . . . *Fifth*, the quality of the Accused Products relative to adidas' products bearing the Three Stripe Mark. . . . *Sixth*, the degree of care and attention that an ordinary consumer would use when encountering adidas' and Thom Browne's respective products. . . . *Seventh*, whether adidas has shown that Thom Browne acted in bad faith.

Jury Instructions (Dkt. 190) at 15-16.

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None of the four emails bears directly on any of these factors. Nonetheless, Adidas argues that the four emails constitute admissions of liability as to the “ultimate question of whether consumers are likely to be confused.” Adidas Mot. (Dkt. 221) at 16-17. Adidas also argues that the four emails are “highly probative” of several of the *Polaroid* factors, including the strength of Adidas’s mark, the degree of similarity between Adidas’s mark and Thom Browne’s design, the proximity of the parties’ products, and ‘most significantly . . . Thom Browne’s bad faith.” *Id.* at 17-19. But these arguments are highly exaggerated.

Email 1 contains the off-hand suggestion by a senior account manager at Thom Brown, Emily Maturo, that, “[w]e try to avoid rows of 4 bar armband on the racks so as to not look like Adidas.” Dkt. 222-1. To try to “not look like Adidas” hardly conveys an opinion that the repeating bars are confusing, let alone a confession of same. Moreover, there is no evidence that this email was referring to the accused products, and in fact the purchaser with whom Ms. Maturo was corresponding was located in Switzerland and purchasing products for Asia, so her remarks concerned an entirely distinct market. To the extent the reference to what “[w]e try” to do can be understood as a suggestion that Maturo was describing a general policy of the company, that inference is rebutted by the absence of any other evidence produced in discovery that such a policy exists. Further, even Adidas admitted that there is no risk of confusion when it comes to Thom Browne’s formalwear, having only alleged infringement with respect to a subset of Thom Browne’s activewear, so the suggestion that “we try to avoid rows of 4 bar

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armband[s],” without any limitation to Thom Browne’s activewear, hardly constitutes an admission of necessary confusion.

Email 3 reflects the views not of Thom Browne employees, but of an FCB employee, Tomasso Galli. The email describes the view of an unnamed individual at FCB that “any four bars . . . is too much in the spirit of Adidas.” Dkt. 222-3. The designs being discussed are for formalwear and accessories, which Adidas does not contend constitute infringement. The fact someone at FCB believed that the design is “too much in the spirit of Adidas” may be well be relevant, but it far from an admission that Thom Browne agreed. Further, there is an obvious distinction between a likelihood of confusion and being “too much in the spirit of Adidas.” In Email 4, Thom Browne suggests that he “thought [T]omaso [Galli] has already said that we shouldn’t use the four bars because of adidas.” Dkt. 222-4. This simply summarizes Browne’s view of the import of Galli’s views expressed in Email 3 and is of doubtful relevance, let alone an alleged admission.

Of the emails, perhaps the only one of more than marginal import is Email 2, in which Thi Wan, then Thom Browne’s Head of Menswear, states, “As Adidas has such a big presence in the sporting world, it is inevitable that our 4bar in white be read as adidas stripes, especially on accessories.” Dkt. 222-1. Even this is not an admission, because, as already noted, the issue is not Mr. Wan’s belief, but what is the objective likelihood of confusion. In any case, Mr. Wan was not discussing any of the accused products, but was instead referring to formalwear and

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accessories (i.e. handbags). Again, Adidas admits that these products did not infringe on its trademark.

As noted, what the jury had to decide was whether, as an objective matter, there was a reasonable likelihood of confusion between Adidas's distinctive arrangement of three stripes and Thom Browne's distinctive arrangement of four bars. Aside from the jurors' visual assessment of the similarity and dissimilarity of the two designs, the central focus at trial was, as one would expect such a case, on the competing testimony of the parties' competing experts. These experts testified about the history of the brands, the historical use of stripes and bars in a wide variety of settings (*e.g.*, on the sleeves of army sergeants), consumers perceptions of various stripe designs, *etc.* There was also a considerable focus on the vastly differing price points of Adidas's and Thom Browne's products and the very different channels through which they are sold. The four email exchanges here at issue would have had little relevance to these central foci. It is true that Adidas also produced evidence of Thom Browne's alleged bad faith, but contrary to Adidas's own assertion, it is doubtful that the four emails would have played a material role in the jury's assessment of that issue.

Indeed, it was essentially undisputed at trial that Thom Browne was aware from early on that Adidas had concerns about anyone else's use of any combination of stripes (even if labeled "bars"), that Adidas had a history of taking highly aggressive actions against any other company that used stripes in their products, and that Thom Browne sought to minimize the risk of a

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confrontation with Adidas but ultimately concluded that their four-bar design could be defended. *See, e.g.*, Trial Tr., at 471:21-23; 472:1-16; 473:21-474:4. The four emails here at issue are consistent with that largely undisputed evidence at trial.

In sum, the four emails, while not irrelevant, hardly seem material to the central issues in this case as they actually played out at trial. It is also worth noting that the jury, by their verdict, plainly indicated that they were not persuaded by the much more directly relevant evidence that Adidas presented. For example, Adidas presented the results of a consumer's survey that Adidas contended showed evidence of actual consumer confusion between Adidas's stripes and Thom Browne's bars. *See* Trial Tr. (Dkt. 198) at 379-405. The survey polled 2,400 consumers in the U.S. and purportedly showed that somewhere between 14% and 38.6% were confused, depending on the product type. *Id.* at 403-404. The four emails now at issue, even when viewed most favorably to Adidas, express the view of a few individuals at Thom Browne and FCB that there was a risk of confusion. By contrast, this survey purported to show that hundreds of consumers were in fact confused. If the jury was willing to believe that there was a risk of confusion between the two marks, the views of these actual consumers would presumably have been far more powerful than the views expressed in the four emails.

Furthermore, the essence of Thom Browne's defense in this case was simply that Adidas's claims amounted to a contention that they owned all stripe designs and that this

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was a masked attempt to monopolized the sportswear market. In his closing statement, Thom Browne's counsel summarized this argument by declaring "this case isn't about confusion. It isn't about competition. It's about whether adidas can own all stripes." Trial Tr. (Dkt. 208) at 1391. Indeed, the Court's perception of the jury "body language" suggests that it was this argument that most likely influenced the jury in Thom Browne's favor. The four emails now at issue say nothing about this argument.

The same is true with respect to the other arguments emphasized by Thom Browne's counsel, such as that Thom Browne's products did not compete with those of Adidas because they had such widely differing price points. *Id.* at 1374-77, 1385-86. Thom Browne also stressed the substantial difference in quality between the two companies' products, and the fact that Thom Browne's activewear is not really meant for sports. Mr. Browne testified that he "would advise not running in [his] running shoes." Trial Tr. (Dkt. 202) at 499. To be sure, Adidas disagreed, claiming that the quality and price-point of the clothes would not have been apparent in the pre-sale and post-sale contexts, which were the only circumstances where Adidas alleged that confusion occurred. But the point for present purposes is that the four emails, if they had been introduced at the trial, would have had little or no bearing on the central dispute in this case as they actually played out at trial. More generally, even though the trial lasted eight days and included the testimony of sixteen witnesses and the introduction of over 400 exhibits, the jury returned a verdict for Thom Browne in approximately two hours. This swift verdict shows that

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the jury was totally unpersuaded by virtually any of the proof or argument Adidas presented at trial, and it is frankly impossible to conclude under these circumstances that these four emails here at issue would have probably tipped the scales in favor.

B. Federal Rule of Civil Procedure 60(b) (3)

Federal Rule of Civil Procedure 60(b) (3) permits a Court to relieve a party of a final judgment in the case of “fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party.” Fed. R. Civ. P. 60(b) (3). To be entitled to relief under this provision, Adidas must show that (1) Thom Browne engaged in “misconduct,” (2) the misconduct “substantially interfer[ed] with [Adidas’s] ability to fully and fairly present its case,” and (3) the “need for substantial justice” outweighs “the value of preserving the finality of judgments” such that a new trial is warranted. *Catskill Dev., L.L.C. v. Park Place Ent. Corp.*, 286 F. Supp. 2d 309, 312, 316 (S.D.N.Y. 2003).

Unlike the Rule 60(b) (2) standard discussed above, which requires a showing that the evidence probably would have changed the outcome of trial, the second element of the test under Rule 60(b)(3) is satisfied where “the concealment precluded inquiry into a plausible theory of liability, denied [the movant] access to evidence that could well have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination.” *TAL Props. of Pomona, LLC v. Vill. of Pomona*, 2019 U.S. Dist. LEXIS 121729, 2019 WL

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3287983, at *9 (S.D.N.Y. July 22, 2019) (quotation omitted). Arguably, the four emails satisfy this second element; but the court does not reach that question because the Court finds that Adidas has failed to satisfy the first element, concerning whether Thom Browne has engaged in misconduct.⁸

1. Legal Standard

While the Second Circuit has never addressed the precise meaning of “misconduct” as used in Rule 60(b) (3), it has held that the moving party, to be entitled to relief, must prove the opposing party’s misconduct by “clear and convincing evidence.” *Fleming v. New York Univ.*, 865 F.2d 478, 484 (2d Cir. 1989).

Adidas argues that “even an innocent failure to produce documents during discovery may constitute ‘misconduct’ under Rule 60(b) (3).” Adidas Supp. Br. (Dkt. 248) at 1. Though on its face, this seems inconsistent with the common meaning of “misconduct,” Adidas’s position is arguably suggested by at least *dicta* in some cases from other Circuits,⁹ and

8. Because, as explained below, the Court finds Adidas has not shown that Thom Browne engaged in misconduct, it follows that Adidas has also failed to satisfy the third element, *i.e.*, that the “need for substantial justice” warrants a new trial. *Catskill*, 286 F. Supp. 2d at 312.

9. See *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988) (stating “misconduct” “can cover even accidental omissions”); *West v. Bell Helicopter Textron, Inc.*, 803 F.3d 56, 67 (1st Cir. 2015) (quoting this portion of *Anderson* with approval); *Schultz v.*

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several courts in this District have adopted a similar view.¹⁰

In response, Thom Browne claims that the First Circuit’s decision in *West v. Bell Helicopter Textron*, 803 F.3d 56 (1st Cir. 2015), “affirms that ‘misconduct’ requires intentional or conscious behavior.” Thom Browne Supp. Br. (Dkt. 250) at 5-6. Thom Browne’s reading of *West* is incorrect. *West* repeatedly cited and quoted *Anderson*

Butcher, 24 F.3d 626, 630-31 (4th Cir. 1994) (“We hold that an adverse party’s failure, either inadvertent or intentional, to produce such obviously pertinent requested discovery material in its possession is misconduct under the meaning of Rule 60(b) (3).”); *Morgan v. Tincher*, 90 F.4th 172, 180 (4th Cir. 2024) (finding “failure to disclose evidence” constituted “misconduct” “irrespective whether that failure was inadvertent or intentional”); *Bros. Inc. v. W.E. Grace Mfg. Co.*, 351 F.2d 208, 211 (5th Cir. 1965) (suggesting Rule 60(b) (3) analysis is “the same whether there was evil, innocent, or careless, purpose.”); *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 879 (9th Cir. 1990) (stating “misconduct” may be “either knowing or accidental”); *Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc.*, 818 F.3d 1320, 1328 (Fed. Cir. 2016) (applying Eleventh Circuit law and stating that “‘misconduct’ does not demand proof of nefarious intent or purpose as a prerequisite to redress.”).

10. See *Thomas*, 293 F.R.D. at 503-04 (suggesting “misconduct” may be “accidental or inadvertent”); *Catskill*, 286 F. Supp. 2d at 314 (“[A]ccidental failure to disclose or produce materials requested in discovery can constitute “misconduct” within the purview of Rule 60(b)(3).”); *Progressive Cas. Ins. Co. v. Liberty Mut. Ins. Co.*, 1996 U.S. Dist. LEXIS 13437, 1996 WL 524339, at *2 (S.D.N.Y. Sept. 13, 1996) (“[Plaintiff] correctly asserts that an adverse party’s inadvertent failure to produce requested discovery material in its possession may constitute misconduct under Rule 60(b)(3).”).

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with approval, including those portions indicating proof of intentional misconduct is not required. *See West*, 803 F.3d at 67 (“[Misconduct] is an expansive concept, as misconduct ‘does not demand proof of nefarious intent or purpose as a prerequisite to redress,’ and the term ‘can cover even accidental omissions.’” (quoting *Anderson*, 862 F.2d at 922-23)).¹¹

However, in *Jordan v. Paccar, Inc.*, the Sixth Circuit disagreed with this view and held that Rule 60(b) (3) “require[s] the moving party to demonstrate that the non-moving party engaged in deliberate or reckless misbehavior.” 1996 U.S. App. LEXIS 25358, 1996 WL 528950, at *8 (6th Cir. 1996).¹² The *Jordan* court believed that “[f]raud cannot be unintentional, and the use of the prefix ‘mis’ in both ‘misrepresentation’ and ‘misconduct’ also suggests that the moving party under the rule must show that the adverse party committed a deliberate

11. While the *West* court did fault the district court for failing to determining the degree of defendants’ culpability, it did so only because that culpability was relevant as to whether “substantial interference” could be presumed or must instead be proven by plaintiff. *See id.* at 71-73. It did not require intentional misconduct for Rule 60(b) (3) to apply.

12. Adidas mischaracterizes this case as requiring only a showing that the non-disclosure resulted from “accidents that should have been avoided.” Adidas Supp. Br. (Dkt. 248) at 3 (quoting *Jordan*, 1996 U.S. App. LEXIS 25358, 1996 WL 528950, at *6). While that language does appear in *Jordan*, elsewhere in the *Jordan* opinion the court clearly specified that the standard it espoused requires proof the non-disclosure was the product of deliberate or reckless conduct. *See Jordan*, 1996 U.S. App. LEXIS 25358, 1996 WL 528950, at *7-8.

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act that adversely impacted the fairness of the relevant legal proceeding in question.” 1996 U.S. App. LEXIS 25358, [WL] at *6. *Jordan* found the applicable canon of statutory interpretation to be *noscitur a sociis* -- the rule that “a word is known by the company it keeps” -- which suggests that “misconduct,” when read with “fraud” and “misrepresentation” requires “some odious behavior on the part of the non-moving party.” 1996 U.S. App. LEXIS 25358, [WL] at *7.

Having considered the relevant authorities, none of which is binding on this Court, the Court finds that a middle approach is appropriate here. In the context of the non-production of electronically stored information, the moving party must show the non-production was at least the product of negligence on the part of the non-producing party for it to constitute “misconduct” within the meaning of Rule 60(b)(3).

In this Court’s view, this conclusion follows from the term “misconduct” itself. The term plainly connotes some form of malfeasance or inappropriate behavior. *See Misconduct*, Black’s Law Dictionary (11th ed. 2019) (defining “misconduct” as “[a] dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust”); *see Anderson*, 862 F.2d at 924 n.10 (“In contrast [to Rule 60(b)(2)], Rule 60(b)(3) focuses not on erroneous judgments as such, but on judgments which were unfairly procured.”).

Federal Rule of Civil Procedure 34 permits a party to “serve on any other party a request within the scope

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of Rule 26(b)” to produce “any designated documents or electronically stored information.” Fed. R. Civ. P. 34. Rule 26(b), in turn, permits a party to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b). Among the key considerations in evaluating whether the requested discovery is proportional is “whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.*

It follows from this fundamental limitation -- that all discovery must be proportional -- that courts do not demand perfection in responding to discovery requests, particularly when it comes to the production of electronically stored information. *See Williams v. NYC Bd. of Elections*, 2024 U.S. Dist. LEXIS 86024, 2024 WL 2125435, at *6 (S.D.N.Y. May 13, 2024) (“Perfection is not the rule, especially with multiple sources of ESI, the tendency for there to be multiple copies of the same email or near-dupes the production of which has no incremental value to the case but exponentially increases the costs of discovery.”); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010) (“In an era where vast amounts of electronic information is available for review . . . [c]ourts cannot and do not expect that any party can meet a standard of perfection.”), *abrogated on other grounds by Chin v. Port Auth. of New York & New Jersey*, 685 F.3d 135 (2d Cir. 2012); *Fed. Hous. Fin. Agency v. HSBC N. Am. Holdings, Inc.*, 2014 U.S. Dist. LEXIS 19156, 2014 WL 584300, at *2 (S.D.N.Y. Feb. 14, 2014) (“[N]o one could

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or should expect perfection from [the electronic discovery] process.”). Courts only require, for example, that a party conduct a “reasonable search” for documents in response to a request, not that they boil the ocean to ensure every potentially responsive item is produced. *Raine Grp. LLC v. Reign Cap., LLC*, 2022 U.S. Dist. LEXIS 31282, 2022 WL 538336, at *1 (S.D.N.Y. Feb. 22, 2022).

The strict liability rule demanded by Adidas is inconsistent with this principle of proportionality. Unlike Rule 60(b)(2), which requires a showing that the non-produced material probably would have changed the outcome at trial, Rule 60(b)(3) may be satisfied where “the concealment precluded inquiry into a plausible theory of liability, denied [the opposing party] access to evidence that could well have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination.” *TAL Properties*, 2019 U.S. Dist. LEXIS 121729, 2019 WL 3287983, at *9. The scope of documents potentially encompassed by this rule is comparatively vast, and it is entirely plausible that even a thorough and diligent search will fail to identify items that satisfy the test. If the innocent non-production of such documents were in every case sufficient to void the results of a trial, the balance of economy and thoroughness struck by the discovery rules would be shattered, as parties would be incentivized to go to inordinate lengths to ensure all conceivably significant material is produced. And while most cases do not go to trial, every party must assume that a trial might take place and conduct their discovery accordingly. Thus, an overly expansive interpretation of Rule 60(b)(3) will have the perverse effect of incentivizing

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inordinate levels of care in a large proportion of cases, for fear that any trial win may be no win at all. This result cannot be correct.

In a similar vein, where a party “fail[s] to timely produce [certain] evidence,” but this failure is discovered before trial, courts may not impose sanctions unless the failure was the product of “a culpable state of mind.” *Valentini v. Citigroup, Inc.*, 2013 U.S. Dist. LEXIS 116473, 2013 WL 4407065, at *2 (S.D.N.Y. Aug. 16, 2013). “The ‘culpable state of mind’ element is satisfied by a showing that ‘a party has breached a discovery obligation . . . through bad faith or gross negligence [or] ordinary negligence.’” *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007) (quoting *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002)).

Just as a party must show at least negligence to obtain sanctions, it makes sense to require a similar showing of at least negligence to demonstrate “misconduct” within the meaning of Rule 60(b)(3). Not only does this align the standards of conduct throughout the various portions of the Rules of Civil Procedure, but also without such a showing, the moving party arguably has not demonstrated that the non-moving party even breached its discovery obligations at all, and, hence, that any misconduct has occurred.¹³ By contrast, the strict liability rule advocated

13. One might argue that the standard to obtain sanctions does not actually define a party’s underlying discovery obligations, or in other words that there is a divergence between the conduct rule and the decision rule. See *Meir Dan-Cohen, Decision Rules*

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by Adidas would create the anomalous result that a party may obtain a new trial based on a showing that would not even entitle them to sanctions during the normal course of litigation, a result fundamentally at odds with the principle that “final judgments should not be lightly reopened.” *Catskill*, 286 F. Supp. 2d at 320 (quoting *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986) (internal quotation marks omitted)).

The Court acknowledges the non-binding authority cited above that runs arguably contrary to this holding, but notes that the suggestion that even innocent non-disclosures may constitute misconduct was dicta in many of those cases, where some degree of purposeful culpability was clearly apparent.¹⁴ In the other cases where a Rule 60(b) (3) motion was granted without an explicit

and Conduct Rules: On Acoustic Separation in Criminal Law, 97 Harv. L. Rev. 625, 627-28 (1984) (explaining distinction between “conduct rules” intended to guide the public’s conduct and “decision rules” addressed to officials applying the law). But even if Rule 37’s culpability requirement defines only when sanctions may be obtained (i.e. defines a decision rule), the Court sees no reason why a similar decision rule should not apply in the Rule 60(b) (3) context.

14. See, e.g., *Anderson*, 862 F.2d at 927-28 (“Appellee’s knowledge of the Report, before trial and in ample time to make disclosure, cannot be gainsaid.”); *Jones*, 921 F.2d at 878-79 (remanding for district court to make findings about existence of misconduct in first instance); *Morgan*, 90 F.4th at 180 (finding defendant engaged in misconduct by failing to update discovery response seeking information about other cases where the defendant had been sued); *Thomas*, 293 F.R.D. at 505-06 (concluding misconduct was intentional).

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finding of culpability, there were nevertheless suggestions in the record that the party engaging in misconduct was aware of the non-produced information or that they likely had acted with at least negligence in failing to produce it, and so the facts of these cases are consistent with this Court's holding, even if their reasoning diverges from it somewhat.¹⁵ And, perhaps most significantly, none of the other cases involved a failure to produce electronically stored information as part of a substantial discovery review process and thus none of the cases implicate the proportionality concerns present in that context.

On the other hand, the Court is equally convinced that a showing of no more than negligence is appropriate. Limiting "misconduct" to "intentional [] or conscious" bad acts, as Thorn Browne requests, TB Supp. Br. (Dkt. 250) at 2, ignores the critical role that attorneys play in our discovery system. "Discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys." *In re Sept. 11th Liab. Ins. Coverage Cases*, 243 F.R.D. 114, 125 (S.D.N.Y. 2007).

15. See, e.g., *Rembrandt Vision Techs., L.P.*, 818 F.3d at 1328 (suggesting argument that party was unaware of test results "strains credulity, given that it provided" its product to the expert who conducted the testing); *Schultz*, 24 F.3d at 629 (suggesting non-producing party was "in possession of" extremely harmful report it failed to disclose); *Bros Inc.*, 351 F.2d at 211 (concluding there was insufficient evidence to find party had engaged in "purposeful misconduct" by submitting and relying on false affidavit but granting Rule 60(b) relief regardless); *Catskill*, 286 F. Supp. 2d at 314 (non-producing party admitted to being aware of evidence, but failed to disclose it based on erroneous interpretation of agreement regarding scope of discovery).

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“If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse.” 1983 Advisory Comm. Note to Rule 26(g). Demanding a party affirmatively use reasonable care in complying with its discovery obligations is therefore appropriate for the proper functioning of our civil justice system. *Cf. Residential Funds Corp.* 306 F.3d at 108 (“The inference is adverse to the destroyer [of documents] not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.” (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 75 (S.D.N.Y. 1991))).

If only intentional misconduct were penalized, a party’s incentive would be to do the bare minimum in complying with its obligations, in the hope that its lackluster performance would go unnoticed until a wrongful trial result was obtained and it is too late to correct. *See Anderson* 862 F.2d at 923 (“[I]t takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial.”). And the problem is compounded by difficulties of proving an adversary’s bad intent after the fact.¹⁶

Furthermore, permitting Rule 60(b)(3) relief based on a showing of negligence preserves the independent force of the term “misconduct.”

16. True, a party still might be able to obtain relief under Rule 60(b)(2) if the non-disclosed evidence is sufficiently probative, but rarely will a court be able to say with confidence that a given piece of evidence “probably would have change the outcome” of a trial.

*Appendix B***2. Application**

It follows that for Adidas to establish Thorn Browne's non-production of the emails constituted "misconduct" within the meaning of Rule 60(b) (3), Adidas must show by clear and convincing evidence that Thorn Browne was obligated to produce the emails and negligently failed to do so. The court finds that Adidas has not satisfied this burden.

As explained *supra* Section I.C., the non-production of the four emails was the product of a miscommunication between Thorn Browne's counsel and its e-discovery vendor. Wolf Greenfield paralegal Virginia Weeks sent an email to Thorn Browne's e-discovery vendor, Consilio, instructing them to create "a saved search for ALL potentially privileged documents that have not already been produced by Thorn Browne so that we will have one search to work with when we go to do our privilege review." Dkt. 244-4, at TB00530219. Consilio then created a saved search titled "All Potentially Privileged" by running privilege search terms across all documents "that are not produced, not coded for responsiveness and not coded for privilege." *Id.* at TB00530218; Kerr Dep. (Dkt. 244-3) at 51-54. The four emails were not included in this "All Potentially Privileged" saved search because unbeknownst to Consilio, Ms. Weeks had previously tagged all (or some) documents hitting on the search term "adidas" as "needs further review." Hearing Tr. at 70, 75-76, 87-88; see Kerr Dep. (Dkt. 244-3) at 51-55. Because the four emails were not included in this saved search, they were never reviewed for privilege and so were never produced.

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As an initial matter, there is no evidence in the record that suggests the non-production of the four emails was intentional or knowing. Each of Thorn Browne's witnesses credibly denied any recollection of seeing the four emails or having ever been instructed to withhold responsive, non-privileged documents. This is confirmed by the Relativity document histories for the four emails. These histories reflect all instances when the four emails were viewed or modified. The histories for Emails 2 through 4, show that the only time a representative from Wolf Greenfield had any interaction with them was when Ms. Weeks carried out a "Mass Edit" on these documents (and presumably others) changing the responsiveness, confidentiality, and privilege coding to "Needs Further Review." *See* Dkts. 242-5, 242-6, 242-8, 242-9, 242-11, 242-12, 242-16, 242-17.¹⁷

The document history for Email 1 is somewhat more complicated. *See* Dkts. 242-2, 242-3. Email 1 was ultimately subject to the same mass edit by Ms. Weeks as the other three emails. However, prior to that edit another Wolf Greenfield paralegal, Cindy Babbit, viewed the document several times, made several mass edits to its responsiveness, privilege, and confidentiality coding, and made one non-mass edit, changing its privilege coding to "Needs Further Review." Ms. Weeks apparently also viewed this document before making her aforementioned mass edit. It is not clear why Ms. Babbit made these edits,

17. According to the e-discovery principal employed by Adidas's own counsel, "[a] mass edit is when you apply tags or categories to a document without actually looking at [the documents]." Hearing Tr. (Dkt. 240) at 17:19-24.

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why Ms. Babbit or Ms. Weeks viewed this document, or how long they viewed it for. At an evidentiary hearing, Ms. Babbit had no recollection of making these changes or viewing the document. Ms. Weeks testified she was instructed by a Wolf Greenfield associate to make the aforementioned mass tag of documents that hit on the Adidas search terms, but she also did not recall viewing the document.

Adidas nonetheless argues that these document histories demonstrate that Ms. Weeks and Ms. Babbit had knowledge of the contents of at least Email 1. *See* Adidas Supp. Br. (Dkt. 24 8) at 5-7. But even assuming these individuals in fact had knowledge of Email 1 -- something both of them denied having any recollection of -- that would not establish any culpable conduct. As paralegals, they cannot reasonably be apprised of all documents produced and in play in the case. And even assuming, *arguendo*, that it might be reasonable to expect them to understand the significance of Email 1, the most they can be expected to do is flag the document for further review by an attorney, which is precisely what happened. Having done so, neither paralegal had any reason to believe the emails would not have been reviewed and produced.

Adidas argues that, even if not knowing, the non-production of the four emails was the product of negligence. In particular, Adidas points out that, in response to Ms. Weeks's request to create the saved search for the privilege review, Consilio told her it had included only documents "not coded for responsiveness and not coded for privilege," and so Weeks and other Wolf

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Greenfield attorneys cc'd on the email were on notice that the four emails -- which Weeks had previously coded -- were not included in the search. *See* Adidas Supp. Reply. (Dkt. 254) at 4-5.

The Court is not convinced this demonstrates negligence. Weeks' instruction that the saved search should include "ALL potentially privileged documents" was quite clear and it was reasonable for her to assume that this would encompass documents that had been tagged as "needs further review." By contrast, the suggestion that only documents "not coded for responsiveness and not coded for privilege" were included is rather vague, and documents "not coded for privilege" could easily be understood as encompassing only documents that had already been determined were in fact privileged. With the benefit of hindsight, this disconnect in understandings is readily apparent, but in the moment, while an extensive discovery review was ongoing, it is not clearly negligent for Weeks to have assumed her unambiguous instruction was understood. An inadvertent but understandable mix-up is not the same as negligence, at least not here.

Furthermore, Adidas has failed to prove by clear and convincing evidence that this further check was conducted in a negligent manner. Claire Schuster, a Wolf Greenfield associate, testified that she was tasked not only with reviewing the "All Potentially Privilege" saved searches created by Consilio, but also with conducting additional independent searches to ensure no other documents fell through the cracks. *See* Schuster Dep. (Dkt. 244-2) at 21-31. This included searching for any documents that were

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tagged as “needs further review.” *See id.* at 40 (testifying that she “endeavored to be careful and review every document that was tagged ‘further review.’”); *see also id.* at 57-58 (testifying that “it was [Schuster’s] intent, when [she] was completing the privilege log exercise, to review every document that was tagged ‘needs further review’” and that she “believe[s] [her] actions matched [her] intent”).

While Schuster’s quality check ultimately did not identify the four emails, *see id.* at 50-52, the very fact that such a check was conducted negates the high burden placed on Adidas to prove negligence with clear and convincing evidence.

III. Conclusion

For the forgoing reasons, the Court reconfirms its “bottom-line” order of May 3, 2024, denying Adidas’s motion for a new trial.

SO ORDERED.

Dated: New York, NY
July 29, 2024

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

**APPENDIX C — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF NEW YORK, FILED MAY 3, 2024**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

21-cv-5615 (JSR)

ADIDAS AMERICA, INC., and ADIDAS AG,

Plaintiffs,

-v-

THOM BROWNE, INC.,

Defendant.

Filed May 3, 2024

ORDER

JED S. RAKOFF, U.S.D.J.

On October 19, 2023, defendants adidas AG and adidas America, Inc. (collectively, “Adidas”) filed a motion for a new trial pursuant to Federal Rule of Civil Procedure 60(b). Upon full consideration of the parties’ various submissions in connection with this motion and the record of the evidentiary hearing held on December 21, 2023, the Court hereby denies Adidas’s motion. An opinion setting forth the reasons for this ruling will be issued in due course, at which time judgment will enter.

SO ORDERED.

Dated: New York, NY
May 3, 2024

/s/ Jed S. Rakoff
JED S. RAKOFF, U.S.D.J.

APPENDIX D — PROVISIONS INVOLVED

Rule 60. Relief from a Judgment or Order

...

(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.