

Nos. 23-166, 23-227

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADIDAS AMERICA, INC., an Oregon corporation,
Plaintiff-Appellant-Cross-Appellee,

and

ADIDAS AG, a foreign entity,
Plaintiff-Appellant-Counter Defendant-Cross-Appellee,

v.

THOM BROWNE, INC., a Delaware corporation,
Defendant-Appellee-Counter Claimant-Cross-Appellant.

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

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CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1, Plaintiffs adidas America, Inc. and adidas AG hereby disclose the following through their undersigned counsel:

adidas America, Inc. is wholly owned by adidas North America, Inc., which is a non-public Delaware corporation.

adidas North America, Inc. 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.

DATED: May 24, 2023

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JURISDICTIONAL STATEMENT

This action involves federal claims for trademark infringement and dilution under the Lanham Act and state claims under analogous New York law. Plaintiffs adidas America, Inc. and adidas AG (collectively, “adidas”) sued Defendant Thom Browne, Inc. (“Thom Browne”) in the United States District Court for the Southern District of New York. App.35.¹ The case proceeded to a jury trial and ended with a verdict for Thom Browne. The District Court entered final judgment on the verdict on January 13, 2023, dismissing the complaint in its entirety. App.176. adidas appealed on February 8, 2023. App.350.

The District Court had subject-matter jurisdiction over adidas’s federal claims under the general federal question statute. 28 U.S.C. § 1331. The District Court had subject-matter jurisdiction over adidas’s transactionally related state-law claims under the supplemental jurisdiction statute. *Id.* § 1367. This Court has appellate jurisdiction over adidas’s appeal from a final judgment under 28 U.S.C. § 1291. adidas’s February 8 notice of appeal was timely filed within 30 days of

¹ All record citations correspond to materials included in the Appellants’ Appendix (“App.”). The verdict, final jury instructions, final judgment, and certain evidentiary rulings also appear in the Special Appendix.

the District Court’s January 13 entry of judgment. *Id.* § 2107(a); Fed. R. App. P. 4(a)(1)(A).

INTRODUCTION

adidas appeals to protect “one of the most famous [trade]marks in the world.” *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 764 (9th Cir. 2018) (Clifton, J., concurring). Its Three-Stripe Mark (the “Mark”) has long appeared on popular activewear sold throughout the United States. Indeed, products bearing the Mark have become so ubiquitous that consumers recognize adidas as “the brand with the three stripes.” But Thom Browne’s recent and confusingly similar marks pose a threat to adidas and its brand. The District Court heightened that threat through a series of erroneous rulings that permitted Thom Browne to escape liability at trial.

First, the District Court’s jury instructions reflect a critical misunderstanding of the showing adidas must make to prevail on its claims. An essential element of trademark infringement is the likelihood of consumer confusion, and this Court has long analyzed the likelihood of confusion by applying the eight “*Polaroid* factors” articulated in *Polaroid v. Polaroid Elecs.*, 287 F.2d 492 (2d Cir. 1961).

Later decisions have clarified the *Polaroid* analysis in two important ways: (1) the likelihood of confusion need not occur at the “point of sale” but can also occur either during the “initial-interest” or “post-sale” phase, and (2) the *Polaroid* factors should be applied flexibly to account for the relevant types of confusion presented by a particular case. Point-of-sale cases involve confusion at the moment an actual purchaser completes a transaction; initial-interest cases involve confusion when a prospective purchaser first becomes interested in a product; and post-sale cases involve confusion among the general public when viewing a purchased product in use.

This Court consistently scrutinizes district court decisions to ensure that analysis of the *Polaroid* factors fits the plaintiff’s theory of confusion. But the District Court flouted that principle here. Despite the fact that adidas did not assert point-of-sale confusion, the District Court’s jury instructions improperly used a point-of-sale standard to describe a key *Polaroid* factor in an initial-interest and post-sale case.

Second, a pair of inconsistent evidentiary rulings regarding the parties’ experts also constitute reversible error. The District Court first determined that a key expert for adidas lacked a valid methodology

under Federal Rule of Evidence 702 because he relied too heavily on decades of experience in the fashion industry to opine about current and historical fashion trends. But the same Advisory Committee that wrote Rule 702 expressly endorsed the experience-based methodology that adidas's expert employed. And adidas's expert did far more than simply invoke his experience; he provided specific examples to support his conclusions and cited a barrage of primary and secondary sources.

The District Court next inexplicably determined that an expert for Thom Browne could rely on a substantially similar, experience-based methodology to testify about current and historical uses of stripes on clothing. The District Court failed to explain how it could allow such testimony when it had just excluded similar testimony proffered by adidas. Additionally, the testimony that Thom Browne's expert ultimately presented was simply a description of stripes in pictures that were shown to the jury. Rule 702 prohibits pedestrian "expert" testimony of this kind because there is no need for special expertise on the subject to "help the trier of fact" understand it.

This Court should vacate the judgment in light of the District Court's prejudicial errors and remand for a new trial.

STATEMENT OF THE ISSUES

1. Whether a new trial is warranted based on erroneous and harmful jury instructions that disregard this Court's repeated directives to tailor the *Polaroid* factors to the plaintiff's theory of confusion, where the District Court gave an instruction about point-of-sale confusion in an initial-interest and post-sale confusion case.

2. Whether a new trial is warranted based on erroneous and harmful evidentiary rulings, where the District Court violated Federal Rule of Evidence 702 by prohibiting adidas's expert from testifying on the basis of his extensive experience in the fashion industry, and where the District Court further violated Rule 702 by simultaneously permitting Thom Browne's expert to offer experience-based testimony on a lay issue that would not help the trier of fact.

STATEMENT OF THE CASE

This is a trademark case about adidas's famous Three-Stripe Mark. adidas has long defended that Mark and became concerned when Thom Browne began marketing and selling activewear featuring parallel stripes that bore a confusingly similar resemblance to the Mark. Unable to reach a resolution, adidas sued Thom Browne for

trademark infringement and related claims under the Lanham Act and state law. The case proceeded to trial in the Southern District of New York under the direction of the Honorable Jed S. Rakoff. The jury returned a verdict for Thom Browne on all pending claims, and Judge Rakoff entered judgment on the verdict. adidas now appeals from the District Court's final judgment. The District Court's Opinion and Order on summary judgment contains a helpful recitation of the pre-trial litigation but does not address any of the legal issues underlying adidas's appeal. *See* App.96; *adidas Am., Inc. v. Thom Browne, Inc.*, No. 21-cv-5615 (JSR), 2022 WL 17736799 (S.D.N.Y. Dec. 16, 2022). Those issues were resolved from the bench at trial.

A. adidas sued Thom Browne to protect its famous Three-Stripe Mark and minimize consumer confusion.

adidas's Three-Stripe Mark is "unquestionably famous." *adidas Am., Inc. v. Skechers USA, Inc.*, 149 F. Supp. 3d 1222, 1247 (D. Or. 2016), *aff'd in relevant part*, 890 F.3d 747 (9th Cir. 2018). It is also "one of adidas's most valuable" and enduring assets. App.97. adidas has displayed the Mark on activewear in the United States for more than 70 years. App.97, 208, 212–13. And it currently devotes "hundreds of millions of dollars per year" to advertising and promotion. App.97.

These efforts generate more than a billion dollars in annual U.S. sales and have earned adidas a reputation among consumers and the media as “[t]he famous brand with the three stripes.” App.194.

Consistent with the tremendous importance of the Three-Stripe Mark to the adidas brand, adidas regularly polices the marketplace and takes action against infringers using confusingly similar iterations of two, three, or four parallel stripes on activewear. adidas thus approached fashion designer Thom Browne in 2007 when adidas discovered that Thom Browne was selling clothing with three parallel stripes, which it called a “Three-Bar Signature.” App.99–100. Thom Browne promptly agreed to cease use of three parallel stripes. App.100.

Sometime after the parties’ 2007 negotiations, Thom Browne began to sell apparel with four parallel stripes and then expanded into athletic-styled activewear and footwear. App.100–01. adidas objected to this development. App.101–02. But adidas’s objection did nothing to deter Thom Browne’s use of four stripes or its encroachment into the activewear market. In fact, Thom Browne accelerated its encroachment by introducing a new “compression running category” of clothing branded as “proper athletic wear” featuring the four-stripe design.

App.259–60, 266. Compounding matters, Thom Browne routinely promoted its four-stripe compression apparel using models that simultaneously wore adidas shoes bearing the Three-Stripe Mark:



App.300.

Forced to resort to litigation, adidas sued Thom Browne “for trademark infringement, dilution, unfair competition, and unfair

business practices” under the Lanham Act and analogous state laws. App.38 ¶ 6. adidas alleged that Thom Browne had used “confusingly similar imitations of adidas’s Three-Stripe Mark” in ways that were “likely to deceive, confuse, and mislead” consumers. App.51–52 ¶¶ 39, 44–45. adidas requested monetary damages, disgorgement of profits, and a permanent injunction barring Thom Browne from “distributing, marketing, or selling apparel and footwear using or bearing confusingly similar imitations of the adidas Three-Stripe Mark.” App.38–39 ¶ 6.

Thom Browne responded with a counterclaim that the District Court dismissed and a pair of dispositive motions that the District Court denied. *See generally* App.62–66, 89–91, 94–97. By the time the case reached trial, adidas had refined its claims to focus solely on the likelihood of consumer confusion during the “initial-interest” and “post-sale” phases, rather than a “point-of-sale” focus on potential confusion at the moment of purchase. In both the Opening Statement and Closing Argument, counsel for adidas made clear that adidas was not asserting point-of-sale confusion. App.181–82 (Day 1 Tr. 30:2–31:25); App.319 (Day 8 Tr. 1308:1–19).

B. The District Court issued multiple rulings improperly favoring Thom Browne at trial.

Thom Browne’s trial strategy depended in large part on two main arguments. One contended that consumer confusion was not likely because “the parties operate in different markets” at “different price points” and therefore “do not compete.” App.185 (Day 1 Tr. 62:1–25); App.322, 324, 326, 332–35 (Day 8 Tr. 1355:15–16, 1357:12–16, 1359:12–13, 1374:1–1377:4). Another asserted that Thom Browne’s striped products were permissible because adidas “does not own stripes.” App.322 (Day 8 Tr. 1355:12–19). Three key rulings facilitated Thom Browne’s ability to make these arguments.

First, the District Court overruled adidas’s objection to a jury instruction involving one of the critical “*Polaroid* factors” used by courts and juries in this Circuit to assess the likelihood of consumer confusion. When the District Court proposed an instruction describing the third *Polaroid* factor as “whether the accused products and adidas products compete for the same consumers,” App.342 (Day 8 Tr. 1411:22–23), adidas objected and countered that competition is not the test in initial-interest and post-sale confusion cases, App.305–06 (Day 7 Tr. 1278:5–1279:10). The District Court nevertheless retained its “compete for the

same consumers” instruction without explanation. App.306, 310–11 (Day 7 Trial Tr. 1279:11–12, 1283:15–1284:1); App.167. This paved the way for Thom Browne’s arguments about the purported lack of competition between the parties.

Second, the District Court excluded the testimony of adidas’s expert Dr. William D’Arienzo. Among other topics, adidas had planned to rely on Dr. D’Arienzo for the proposition “that the line between luxury brands and sportswear has blurred significantly” in recent years—thereby rebutting Thom Browne’s argument that adidas and Thom Browne occupied different markets targeting different consumers. App.230 (Day 4 Tr. 718:1–2); *supra* at 10. The District Court did not doubt Dr. D’Arienzo’s extensive expertise regarding trends in the fashion industry. App.229 (Day 4 Tr. 717:19–22). But it held that Dr. D’Arienzo could not testify about those trends because he “does not appear to base his . . . opinions[] on any methodology.” *Id.*

Notwithstanding the pages of detail and dozens of sources cited in his expert report, App.364–83 ¶¶ 30–67, the District Court characterized Dr. D’Arienzo’s testimony as simply “saying I’ve been around this stuff a long time and here [are] my thoughts,” App.230 (Day 4 Tr. 718:23–24).

Third, the District Court admitted the testimony of Thom Browne’s parallel expert Ms. Joanne Arbuckle—whose expertise mirrored Dr. D’Arienzo’s and who covered a similar set of topics. The District Court had previously ruled that Ms. Arbuckle could “testify as to the existence of . . . striped products being in the marketplace.” App.278 (Day 6 Tr. 654:17–19). But given the intervening exclusion of Dr. D’Arienzo for lack of a valid expert methodology, adidas contended that the District Court should reject Ms. Arbuckle’s methodology of “go[ing] on the Internet and pull[ing] pictures of stripes” for the same reason. App.278 (Day 6 Tr. 654:5–10, 20–24).

Thom Browne responded that Ms. Arbuckle was qualified to testify because she “has extensive experience in fashion history.” App.280 (Day 6 Tr. 656:6–7). And the District Court agreed—even though it had rejected the exact same experience-based argument made by adidas in support of Dr. D’Arienzo. App.284 (Day 6 Tr. 713:11–15); *supra* at 11. The District Court also rejected an argument that Ms. Arbuckle’s testimony addressed a “purely . . . factual issue” for which an expert was not helpful or necessary—even though the District Court confined Ms. Arbuckle’s role to identifying stripes in various images as

they appeared “on the screen” without “explain[ing] what the meaning is.” App.278, 288–89 (Day 6 Tr. 654:22–24, 728:22–729:5). Thom Browne later cited Ms. Arbuckle’s testimony about the ubiquity of stripes at closing argument to remind the jury that “adidas does not own stripes.” App.322, 329 (Day 8 Tr. 1355:12–19, 1371:14–16).

C. The jury returned a verdict for Thom Browne.

The eight-day jury trial concluded with a general verdict finding Thom Browne “not liable” on adidas’s claims. App.151. The District Court entered judgment on the verdict on January 13, 2023, App.176, and adidas timely appealed four weeks later, App.350.

SUMMARY OF THE ARGUMENT

The jury’s verdict in favor of Thom Browne reflects two fundamental errors, both of which warrant a new trial.

First, the District Court erroneously instructed the jury. This Court has held for decades now that trademark plaintiffs may demonstrate the required “likelihood of confusion” by reference to (1) initial-interest confusion, (2) point-of-sale confusion, or (3) post-sale confusion. This Court has also held for decades that the *Polaroid* factors

designed to measure likelihood of confusion should be applied flexibly depending on the theory of confusion presented in a particular case.

The District Court ignored these principles. Its rigid instruction that the jury should consider whether adidas and Thom Browne “compete for the same consumers” comes from point-of-sale cases, while adidas focused solely on initial-interest and post-sale confusion where competition between the parties is irrelevant. The District Court should have modified its *Polaroid* instruction to address the specific types of confusion being asserted by adidas. Its failure to do so caused material prejudice to adidas. Much of Thom Browne’s trial strategy focused on developing an argument that adidas and Thom Browne “did not compete”—an argument that Thom Browne could not have leveraged if the jury had been properly instructed.

Second, the District Court erroneously ruled on expert testimony. Its categorical exclusion of adidas’s fashion-industry expert Dr. D’Arienzo turns on a fundamental misunderstanding about the reliability requirements imposed by Federal Rule of Evidence 702. Contrary to the District Court’s conclusion, Dr. D’Arienzo properly opined based on a valid methodology when he applied his extensive

experience in the fashion industry to recount observations about emerging trends. The Advisory Committee itself has recognized the viability of experience-based methodologies, as have courts across the country. Nor did Dr. D'Arienzo simply point to his experience and stop the analysis there. He specifically chronicled multiple developments over the course of several decades leading to his conclusions, and he cited dozens of primary and secondary sources. It is hard to imagine what more Dr. D'Arienzo could have done to assure the District Court that his methods were sound.

The District Court's simultaneous admission of expert testimony from Thom Browne's fashion-industry expert, Ms. Arbuckle, only underscores its evidentiary errors. Thom Browne offered the exact same experience-based arguments in defending Ms. Arbuckle that adidas offered in defending Dr. D'Arienzo. The District Court's decision to approve Ms. Arbuckle's methodology while rejecting Dr. D'Arienzo's is irreconcilable. Additionally, Ms. Arbuckle's testimony about historical uses of stripes does not "help the trier of fact." Anyone can identify stripes in a photograph as Ms. Arbuckle did, yet Thom Browne still got the credibility benefits of telling the jury that her "expertise" supported

its claims. The District Court’s decision to admit Ms. Arbuckle as an expert violates Rule 702.

ARGUMENT

I. The District Court’s jury instructions require a new trial.

This Court “review[s] a claim of error in jury instructions *de novo*” and requires a new trial for all “erroneous” instructions unless “the court is convinced that the error did not influence the jury’s verdict.” *Murray v. UBS Sec., LLC*, 43 F.4th 254, 262 (2d Cir. 2022) (quoting *Warren v. Pataki*, 823 F.3d 125, 137 (2d Cir. 2016)), *cert. granted on other grounds*, No. 22-660 (U.S. May 1, 2023). The District Court here erroneously instructed the jury regarding a key *Polaroid* factor over adidas’s objections. There can be little doubt that the District Court’s critical error influenced the jury. This Court should therefore “vacate the jury’s verdict and remand to the district court for a new trial.” *Id.* at 263.

A. The District Court erroneously instructed the jury.

To prevail on its trademark and unfair competition claims, adidas must establish that Thom Browne’s conduct creates a “likelihood of confusion” as to the relationship between adidas and Thom Browne or the source or sponsorship of adidas’s goods. *Car-Freshner Corp. v. Am.*

Covers, LLC, 980 F.3d 314, 326 (2d Cir. 2020). The likelihood of confusion analysis turns on eight factors derived from this Court’s *Polaroid* decision. *Id.* at 326–27.² And the *Polaroid* factors apply differently depending on the type of consumer confusion a plaintiff has alleged. See *Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 537 n.2 (2d Cir. 2005) (distinguishing between “*point-of-sale* confusion,” “*initial interest* confusion,” and “*post-sale* confusion”). The District Court failed to account for this fundamental principle and incorrectly instructed the jury as a result.

1. This Court has repeatedly cautioned that trial courts should adapt the *Polaroid* factors to initial-interest and post-sale cases.

Most trademark cases involve the possibility of consumer confusion at the “point of sale.” *Hermes Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000). As the name implies, the

² See *Polaroid*, 287 F.2d at 495 (discussing (i) the strength of the senior user’s mark; (ii) the similarity of the parties’ marks; (iii) the proximity of their products; (iv) the likelihood that the senior user will bridge any gap separating the parties’ current markets; (v) the existence of actual consumer confusion; (vi) whether the junior user acted in bad faith in adopting its mark; (vii) the quality of the junior user’s products; and (viii) the sophistication of the relevant consumer group).

trademark plaintiffs in such cases allege that consumers are likely to be confused by a defendant's mark at the moment of purchase. *Id.*

But “point of sale confusion does not mark the outer boundaries of trademark infringement.” 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:5 (5th ed., updated Mar. 2023). Rather, this Court and the “vast majority” of others have held that initial-interest and post-sale confusion are also actionable. *Id.* Initial-interest confusion involves confusion that generates initial interest in a product or service, even if a sale never materializes. *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 260 (2d Cir. 1987); 4 McCarthy, *supra* § 23:6. For example, a consumer may encounter a social media post depicting an infringing product and be confused as to its source, even though further investigation or shopping corrects that initial confusion. Post-sale confusion, on the other hand, involves confusion that arises when non-purchasers see a mark in use after purchase, even if the purchasers themselves were not confused. *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 872–73 (2d Cir. 1986); 4 McCarthy, *supra* § 23:7. For example, a passerby may see someone wearing the infringing product while jogging through Central

Park and be confused as to its source, even though the wearer who purchased the item knew that it came from the defendant. Both theories reflect the Lanham Act's general focus on protecting the public. *Syntex Lab'ys, Inc. v. Norwich Pharm. Co.*, 437 F.2d 566, 568 (2d Cir. 1971).

The *Polaroid* factors, which this Court adopted in a point-of-sale case, must of course be adapted to these alternative forms of actionable confusion. As the *Lois Sportswear* Court explained decades ago, “each factor must be evaluated in the context of how it bears on the ultimate question of likelihood of confusion.” 799 F.2d at 872. It is therefore “critical” for trial courts to “determine just what type of actionable confusion . . . is presented” and to apply the *Polaroid* factors “with an eye toward” the relevant type(s). *Id.* at 872–73.

Failure to follow this directive is “legally erroneous.” In *Malletier*, for example, this Court held that a district court inappropriately “focus[ed] on the likelihood that customers would be confused when viewing the [parties'] bags simultaneously” because “serial viewing [was] the appropriate focus given the market conditions and [the plaintiff's] claims of initial-interest and post-sale confusion.” 426 F.3d at

537–39. In *Hermes International*, this Court similarly held that a district court “erred in finding no harm to the public” because “it failed to properly consider the issue of post-sale confusion.” 219 F.3d at 108–09; *see also Payless Shoesource, Inc. v. Reebok Int’l Ltd.*, 998 F.2d 985, 989 (Fed. Cir. 1993) (citing this Court’s precedent to support holding that district court “abused its discretion in failing to adequately consider the extent of . . . post-sale confusion”). The District Court made the same mistake here.

2. The District Court’s *Polaroid* instructions misstate the standard for an initial-interest and post-sale case.

adidas expressly stated that its claims addressed only “initial interest and post-sale confusion.” App.181–82 (Day 1 Tr. 30:2–31:25); App.306 (Day 7 Tr. 1279:3–4); App.319 (Day 8 Tr. 1308:1–19). It thus asked for the jury instructions on the *Polaroid* factors to reflect the “type of actionable confusion” at issue. App.305–06 (Day 7 Tr. 1278:5–1279:10); *Lois Sportswear*, 799 F.2d at 872. Nevertheless, the District Court’s instruction on the pivotal “proximity” *Polaroid* factor failed that requirement. *See Car-Freshner Corp.*, 980 F.3d at 327 (describing third *Polaroid* factor as the proximity of the parties’ products); *Mobil Oil*, 818

F.2d at 258 (noting the “first three *Polaroid* factors [are] perhaps the most significant in determining the likelihood of confusion”).

The jury instructions tersely summarized the proximity inquiry as “whether the accused products and adidas products compete for the same consumers.” App.342 (Day 8 Tr. 1411:22–23); App.167. adidas objected to that instruction at the charge conference because the District Court’s focus on competition comes from inapposite point-of-sale cases. While “competition is pertinent [when] talking about a purchaser who is going to buy a product and might accidentally pick up the wrong one because they’re on the same shelf,” a much more nuanced instruction is required in initial-interest and post-sale cases where the potentially confused consumer is not the purchaser and confusion itself does not happen at the point of purchase. App.305–06 (Day 7 Tr. 1278:24–1279:10). adidas thus requested a proximity instruction³ that

³ The entirety of adidas’s requested proximity instruction reads: “Third, you should consider the competitive proximity of [the] parties’ products. In other words, you should compare adidas’s Three-Stripe Mark products with the accused products and consider how similar the products are, whether they are sold in the same or similar channels, and whether they are promoted through similar advertising media. Products that are similar or that are sold or advertised in similar channels are more likely to be confused than those used in connection

looked beyond competition for the same consumers to broader considerations like “how similar the products are” and whether consumers are “likely to encounter” them in similar contexts. App.305–06 (Day 7 Tr. 1278:13–15, 1279:3–10).⁴

A comparison of the proximity standard articulated in this Court’s point-of-sale and post-sale cases confirms the District Court’s erroneous focus on competition. The point-of-sale formulation generally examines “the competitive distance between the products” or services and looks to differentiating features like “function and price.” *Arrow Fastener Co. v. Stanley Works*, 59 F.3d 384, 396 (2d Cir. 1995); *see also Brennan’s, Inc. v. Brennan’s Rest. L.L.C.*, 360 F.3d 125, 134 (2d Cir. 2004) (inquiring whether parties’ restaurants “have an overlapping client base that creates a potential for confusion” and finding “close market proximity since both are upscale restaurants”); *Joules Ltd. v. Macy’s Merch. Grp.*,

with unrelated or non-proximate products.” App.305 (Day 7 Tr. 1278:11–20).

⁴ Even in point-of-sale cases, moreover, “direct competition between the products is not a prerequisite to relief.” *Mobil Oil*, 818 F.2d at 257–58 (clarifying proximity factor); *accord E.A. Sween Co. v. A & M Deli Express Inc.*, 787 F. App’x 780, 785 (2d Cir. 2019) (per curiam). The District Court’s unqualified instruction regarding competition “for the same consumers” erroneously suggests otherwise.

Inc., 695 F. App'x 633, 636–37 (2d Cir. 2017) (per curiam) (determining “competitive proximity” by comparing, *inter alia*, the “quality and price” of clothing items).

Post-sale cases take a different approach to proximity, as demonstrated by the seminal *Lois Sportswear* decision. Much like adidas’s lawsuit against Thom Browne, the plaintiff in *Lois Sportswear* sued a high-end clothing company for trademark infringement. *See* 799 F.2d at 869–70. The defendant responded that there was insufficient “proximity of the products” under *Polaroid* because it sold “designer jeans . . . to a different market segment” than the plaintiff—the same argument deemed appropriate in the point-of-sale cases discussed above. *Id.* at 874; *supra* at 22–23. But this Court in *Lois Sportswear* rejected that argument based on the “post-sale context” of the case. 799 F.2d at 874. Even assuming that the two jeans occupied “different segments of the jeans market” at different price points, “a consumer seeing [the defendant’s] jeans on a passer-by might think that the jeans were [the plaintiff’s] long-awaited entry into the designer jeans market segment.” *Id.* So even without competing for the same consumers, the fact that “[b]oth products [were] jeans” using a similar mark still

sufficed to establish proximity. *Id.* The District Court therefore committed legal error by instructing the jury that competition “for the same consumers” was dispositive of the proximity inquiry here. App.167.

District courts in the Circuit have long adhered to *Lois Sportswear*. As a recent Southern District of New York decision observed, “[c]ourts in this Circuit regularly hold that differences in geographic distribution, market position, audience appeal, and price point have ‘little or no bearing’ on a likelihood of confusion” in the “context of post-sale confusion.” *Diesel S.p.A. v. Diesel Power Gear, LLC*, No. 1:19-cv-9308-MKV, 2022 WL 956223, at *10 (S.D.N.Y. Mar. 30, 2022) (quoting *Coty Inc. v. Excell Brands, LLC*, 277 F. Supp. 3d 425, 448 (S.D.N.Y. 2017)). “This is because in the post-sale context, ‘the target selling market is of decreased importance,’ and instead it is the confusion that exists among the general viewing public that matters.” *Id.* (quoting *Gucci Am., Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 248 (S.D.N.Y. 2012)).

Courts elsewhere have likewise held that the proximity analysis works differently in point-of-sale and post-sale cases. *See, e.g., Payless*

Shoesource, 998 F.2d at 989–90 (noting factors like “different prices” and “market channels” are “immaterial to the issue whether actionable confusion is likely to occur *after* the marked product has entered the public arena”); *Vans, Inc. v. Walmart, Inc.*, No. 8:21-cv-01876-DOC-KES, 2022 WL 1601530, at *8 (C.D. Cal. Mar. 31, 2022) (similar). The District Court erred by equating proximity with competition in a post-sale case.

Although not necessary to demonstrate the District Court’s error, many of the foregoing observations about post-sale cases apply equally to initial-interest cases. Plaintiffs alleging initial-interest confusion focus on the moment of “initial customer interest,” which often precedes familiarity or concern with the plaintiff’s and defendant’s relative prices and target markets. 4 *McCarthy*, *supra* § 23:6. Even when “later investigation reveal[s]” this information and the prospective customer decides not to purchase the product as a result, initial-interest confusion remains actionable without an “actual sale.” *Id.* These principles confirm that the District Court erred by instructing the jury to focus on competition for the same consumers at the point of sale.

B. The District Court’s instructional error was harmful.

“An erroneous instruction requires a new trial unless the error is harmless and an error is harmless only if the court is convinced that the error did not influence the jury’s verdict.” *Murray*, 43 F.4th at 262 (quoting *Warren*, 823 F.3d at 137). The District Court’s flawed proximity instruction amounts to harmful error for at least two reasons.

First, the proximity instruction goes to a central issue in the case. The District Court informed the jury that (1) likelihood of confusion constitutes one “of the essential elements that adidas must prove” to prevail on its infringement claim, App.340–41 (Day 8 Tr. 1409:6–15, 1410:16–20); (2) likelihood of confusion turns on the *Polaroid* factors, App.342 (Day 8 Tr. 1411:2–5); (3) one of the *Polaroid* factors is proximity, App.342 (Day 8 Tr. 1411:22–23); and (4) each *Polaroid* factor “should be weighed in light of the total evidence presented at the trial to determine whether, on balance, a likelihood of confusion exists,” App.344 (Day 8 Tr. 1413:4–9). The general nature of the verdict makes it impossible to know just how the jury performed this balancing in finding Thom Browne “[n]ot liable.” App.151. So it is likewise impossible to “convincing[ly]” conclude that an accurate proximity

instruction would not have “influence[d] the jury’s verdict.” *Murray*, 43 F.4th at 262.

Multiple cases vacating district court judgments based on similar errors—including misapplication of a single *Polaroid* factor—confirm the need for a new trial. *See Malletier*, 426 F.3d at 537–40 (vacating denial of preliminary injunction where district court misapplied the “similarity of the marks” factor in the post-sale context); *Hermes Int’l*, 219 F.3d at 108, 110–11 (reversing grant of summary judgment where district court “failed to properly consider the issue of post-sale confusion”). This Court’s observation that proximity constitutes one of “the most significant” *Polaroid* factors further highlights the harm inherent in the District Court’s mistake. *Mobil Oil*, 818 F.2d at 258.

Second, Thom Browne repeatedly sought to influence the jury by emphasizing the District Court’s erroneous point-of-sale version of proximity. Thom Browne told the jury in its opening statement that “the parties are worlds apart and they don’t compete” because they “operate in different markets” at “different price points.” App.185–86 (Day 1 Tr. 62:1–25, 63:23–24). It returned to those themes throughout trial and at closing, asserting again that the parties “do not compete”

because “Thom Browne is a luxury designer” who would not “want to be associated with a performance active-wear company like adidas” and because “the parties’ products are [sold at] vastly different price points.” App.322, 324, 326, 332–35 (Day 8 Tr. 1355:15–16, 1357:12–16, 1359:12–13, 1374:1–1377:4). Binding precedent forecloses these arguments in a post-sale and initial-interest case like this one. *See supra* at 16–25. But the District Court’s incorrect proximity instruction gave Thom Browne room to make them. This harmful error warrants a new trial.

II. The District Court’s evidentiary rulings also require a new trial.

Federal Rule of Evidence 702 authorizes expert testimony from any “witness who is qualified as an expert by knowledge, skill, experience, training, or education” if (1) the testimony “will help the trier of fact to understand the evidence or to determine a fact in issue,” (2) “the testimony is based on sufficient facts or data,” (3) “the testimony is the product of reliable principles and methods,” and (4) “the expert has reliably applied the principles and methods to the facts of the case.”

The District Court departed from Rule 702 in at least two ways. First, it categorically excluded testimony from adidas’s expert Dr.

William D’Arienzo based on a flawed understanding of the “reliable principles and methods” requirement. Second, it admitted testimony from Thom Browne’s witness Ms. Joanne Arbuckle that would not “help the trier of fact.” These determinations amount to an “abuse of discretion” under the applicable standard of review, which recognizes “that such abuse occurs when a judge’s discretionary ruling is based on an error of law.” *Sarkees v. E. I. DuPont de Nemours & Co.*, 15 F.4th 584, 588 (2d Cir. 2021) (citation omitted). The District Court’s erroneous and harmful evidentiary rulings independently require a new trial. See *United States v. Zhong*, 26 F.4th 536, 555–58 (2d Cir. 2022) (vacating Rule 702 ruling and granting new trial).

A. The District Court erroneously excluded Dr. D’Arienzo’s testimony based on a misinterpretation of Rule 702.

adidas commissioned fashion-industry expert Dr. William D’Arienzo to opine on various issues, including the recent convergence of luxury clothing and sportswear in the fashion industry. App.229–30 (Day 4 Tr. 717:23–718:4); App.357–58 ¶ 13.⁵ Dr. D’Arienzo’s proffered

⁵ adidas also asked Dr. D’Arienzo to opine on the purely aesthetic, non-functional nature of the Three-Stripe Mark and on the role of creative experimentation with that Mark in strengthening adidas’s brand.

testimony on the convergence issue was critical for adidas given Thom Browne’s trial strategy of insisting that purported differences between Thom Browne and adidas products (and between Thom Browne and adidas consumers) minimized the likelihood of consumer confusion. *See supra* at 10, 27–28. But the District Court excluded the testimony in a decision that finds no support in fact or law.

It cannot seriously be disputed that Dr. D’Arienzo “qualifie[s] as an expert by knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. Indeed, the District Court declined to exclude Dr. D’Arienzo’s testimony on this ground. *Compare* App.131–34, *with* App.229 (Day 4 Tr. 717:19–22). And for good reason. Dr. D’Arienzo has “spent decades working in the fashion industry.” App.355 ¶ 1. He serves as a U.S. market entry advisor for many major luxury fashion companies in Europe. App.356 ¶ 6. He authored a textbook on luxury “Brand Management Strategies” used in courses at twelve colleges and universities. App.355 ¶ 2. And he has “closely studied, written about,

App.383–97 ¶¶ 68–98. The District Court’s pre-trial dismissal of Thom Browne’s counterclaim for aesthetic functionality mooted the functionality issue. *See* App.85 ¶¶ 24–25; App.89–90, 140. And a concession from Thom Browne at trial mooted the issue about the effect of creative experimentations. *See* App.242–43 (Day 4 Tr. 730:10–731:9).

and lectured on trends in the fashion industry” for “many years.”

App.357 ¶ 10. Any argument that Dr. D’Arienzo lacks the expertise required under Rule 702 would fail.

Notwithstanding his qualifications, the District Court excluded Dr. D’Arienzo’s testimony because he “does not appear to base his . . . opinions[] on any methodology.” App.229 (Day 4 Tr. 717:19–22). The District Court offered very little specific analysis to support that conclusion, opting instead for a general analogy to experts “who had devoted their life to studying baseball” and had identified “[t]he greatest player in the history” of the sport based solely on their experience and without reference to any metric like “batting average” or “home runs.” App.232–33 (Day 4 Tr. 720:11–721:1). According to the District Court, Dr. D’Arienzo was “just saying I’ve been around this stuff a long time and here [are] my thoughts.” App.230 (Day 4 Tr. 718:23–24).

This reasoning has three fundamental problems. *First*, the District Court’s apparent conclusion that experience cannot satisfy Rule 702’s “reliable principles and methods” requirement constitutes a reversible “error of law.” *Sarkees*, 15 F.4th at 588. Courts, scholars, and

the Advisory Committee itself have each recognized as much. As the Committee Notes to the 2000 amendment responsible for the “principles and methods” language make clear, “[n]othing in this amendment is intended to suggest that experience alone . . . may not provide a sufficient foundation for expert testimony.” Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendments (hereinafter “Rule 702 Notes”); *see also Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999) (noting experts can properly base their testimony “upon professional studies or personal experience”); *United States v. Martinez-Armestica*, 846 F.3d 436, 444 (1st Cir. 2017) (noting “experience is the predominant” and sometimes “sole” basis “for a great deal of reliable expert testimony” in “certain fields”).

The Committee Notes further explain that “the terms ‘principles’ and ‘methods’” extend beyond “scientific knowledge” and should “be evaluated by reference to other standard principles attendant to the particular area of expertise.” Rule 702 Notes; *accord Kumho Tire*, 526 U.S. at 150–52. Thus, “when a law enforcement agent testifies regarding the use of code words in a drug transaction,” the “method used by the agent is *the application of extensive experience* to analyze

the meaning of the conversations.” Rule 702 Notes (emphasis added). A regime rejecting experience as a valid methodology would undermine the “fluid” *Daubert* inquiry that “must be tied to the facts of a particular case” and would contradict “the liberal admissibility standards of the federal rules.” *Amorgianos v. Nat’l R.R. Passenger Corp.*, 303 F.3d 256, 266–67 (2d Cir. 2002).

Second, Dr. D’Arienzo’s opinions about the growing overlap between high fashion and sportswear are much more than a collection of “thoughts” after “be[ing] around this stuff a long time.” App.230 (Day 4 Tr. 718:23–24). Far from asking the jury or the District Court to blindly trust his experience, Dr. D’Arienzo explained in detail how he arrived at his conclusions. He highlighted “[t]he intersection of sportswear, streetwear, and high fashion through collaborations.” App.364–73 ¶¶ 30–45 (adidas and Yohji Yamamoto; adidas and Alexander Wang; adidas and Palace; adidas and Gucci; adidas and Prada; Thom Browne and Samsung; Thom Browne and Infiniti; H&M and Karl Lagerfeld; Louis Vuitton and Supreme; and Gigi Hadid and Tommy Hilfiger, just to name a few). He tracked the relative frequency of those collaborations over time. *See* App.364–66, 368–69, 374 ¶¶ 30–

34, 40–41, 48–49. He chronicled Thom Browne’s “recent expan[sion] into athleisure” products like “running shorts” and “compression tights.” App.375–79 ¶¶ 50–61. And he cited dozens upon dozens of articles and secondary sources supporting his analysis of recent trends. App.364–74 ¶¶ 31–48 nn.7–46.

Such level of detail more than suffices for purposes of Rule 702. *See Martinez-Armestica*, 846 F.3d at 444–45 (rejecting argument that expert failed to demonstrate “the reliability of his methods” where expert “use[d] his specialized knowledge of the features of various brands and models of firearms to choose a gun that was similar to one featured in a photo” and where accuracy of expert’s conclusion “could be ascertained by examining the strength of the background from which he derived his expertise”); *cf. United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002) (finding insufficiently reliable principles and methods where expert relied on “casual, sporadic observations”). Indeed, there is no better way to analyze trends in the fashion industry than to observe developments in the industry over time. The straightforward nature of this method underscores, not undermines, its reliability. *See Kumho Tire*, 526 U.S. at 152 (noting trial courts can and should “avoid

unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for granted”).

Third, the District Court permitted Thom Browne to introduce expert testimony based on the same methodology for which it criticized adidas. When asked to explain the methodology underlying Ms. Joanne Arbuckle’s testimony about the use of stripes “as an historical matter in numerous situations,” counsel for Thom Browne simply stated that “Ms. Arbuckle has extensive experience in fashion history.” App.280, 284 (Day 6 Tr. 656:6–7, 713:11–13). adidas flagged the incongruity of admitting such testimony considering the District Court’s earlier exclusion of Dr. D’Arienzo. App.278–79 (Day 6 Tr. 654:4–655:10). But the District Court allowed Ms. Arbuckle to testify as an expert anyway. App.284 (Day 6 Tr. 713:11–15); App.338 (Day 8 Tr. 1407:18–24); App.163. There is no rational explanation for the District Court’s decision to exclude adidas’s expert and yet admit Thom Browne’s expert on the same grounds.

B. The District Court erroneously admitted Ms. Arbuckle’s “expert” descriptions of stripes shown to the jury as unhelpful to the trier of fact.

Apart from its inexplicably inconsistent treatment of the parties’ experts on reliability grounds, the District Court further erred by permitting Ms. Arbuckle to testify on an issue where expert testimony would not “help the trier of fact.” Fed. R. Evid. 702. The District Court limited the scope of Ms. Arbuckle’s testimony to “the appearance of [stripes] as an historical matter in numerous situations.” App.284 (Day 6 Tr. 713:12–13, 22–24). And it enforced that limitation by directing Ms. Arbuckle to “just describe” various pictures of stripes “on the screen” without “explain[ing] what the meaning is.” App.288–89 (Day 6 Tr. 728:22–729:5). adidas properly objected to this inappropriate use of an expert because experts have no business offering “purely . . . factual” testimony on a pedestrian issue like whether “there [are] stripes out there.” App.278 (Day 6 Tr. 654:20–24).

This Court recently reaffirmed that trial courts “commit manifest error by admitting expert testimony where the subject matter of the expert’s testimony is not beyond the ken of the average juror.” *Zhong*, 26 F.4th at 555 (quoting *United States v. Amuso*, 21 F.3d 1251, 1263 (2d

Cir. 1994)). The District Court also recognized this principle, questioning whether expert testimony proffered by adidas was necessary because “[e]veryday consumers” could grasp the issue on their own. App.239–40 (Day 4 Tr. 727:24–728:4). But the District Court again applied a more lenient standard to Thom Browne when it allowed Ms. Arbuckle to describe pictures shown to the jury. The unhelpful, unremarkable, and non-expert nature of Ms. Arbuckle’s testimony shows this was error. *See Zhong*, 26 F.4th at 555 (deeming expert testimony “improper when the untrained layman would be qualified” to intelligently determine the issue “without enlightenment from those having a specialized understanding” (quotation marks omitted)); *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989) (holding that testimony about the unsafe “condition of [a] railroad platform” and the disorienting effect of “look[ing] at an oncoming train at night” was “neither scientific nor in any way beyond the jury’s ken”).

C. The District Court’s evidentiary errors were harmful.

As with the jury instructions, the District Court’s erroneous evidentiary rulings entitle adidas “to a new trial [unless] those errors were ‘harmless.’” *Zhong*, 26 F.4th at 558. “[A]n evidentiary error is

harmless only if [the Court] can conclude with fair assurance that the wrongly excluded or admitted evidence would not have or did not substantially influence the jury.” *Id.* (quotation marks omitted). Applying that standard here, the District Court’s exclusion of Dr. D’Arienzo’s testimony and admission of Ms. Arbuckle’s testimony imposed harm.

First, the subject matters addressed by the two experts “formed a central component of the . . . case.” *Id.* adidas has already described Thom Browne’s extensive reliance on arguments that consumer confusion is unlikely given purported differences between the parties’ products and target consumers—a theme that Thom Browne emphasized in its opening and closing statements and throughout trial. *See supra* at 10, 27–28. Dr. D’Arienzo’s proffered testimony about the growing “intersection of sportswear, streetwear, and high fashion” would have rebutted those arguments. *See, e.g.*, App.379 ¶ 61 (opining that “while consumers may have seen Thom Browne and adidas as operating in distinct markets in the 2000s, the same can no longer be said”). And while adidas did its best to highlight the convergence of luxury clothing and sportswear using other evidence, there is simply no

substitute for the observations of a qualified expert intimately familiar with trends in the fashion industry. Indeed, the District Court never denied that Dr. D'Arienzo's testimony on this topic would have "help[ed] the trier of fact." Fed. R. Evid. 702; App.229 (Day 4 Tr. 717:19–22).

Ms. Arbuckle's testimony about the history and ubiquity of stripes also involved a central issue in the case. As the first lines of its closing argument make clear, Thom Browne's principal argument at trial was that "adidas does not own stripes."⁶ App.322 (Day 8 Tr. 1355:12–13); *cf.* *Zhong*, 26 F.4th at 558–59 (finding harmful error where fact introduced via inadmissible expert testimony was "quite literally the first thing mentioned in the government's opening statement" (quoting *United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018))). Thom Browne relied on Ms. Arbuckle's testimony to support that argument. *See* App.329 (Day 8 Tr. 1371:14–16) ("Now, you did hear testimony from Ms.

⁶ The full first paragraph of Thom Browne's closing statement reads: "Ladies and gentlemen of the jury, adidas does not own stripes. Remember that as you consider the evidence, as you consider your verdict. Adidas does not own stripes. And that's what this case is about. It's not about competition. These parties do not compete. It's not about diluting the adidas brand. You haven't seen any evidence of dilution of adidas' brand. This question is about does adidas own stripes, and adidas does not own stripes." App.322 (Day 8 Tr. 1355:12–19).

Joanne Arbuckle, former dean at [Fashion Institute of Technology], and she went through . . . the history of the use of stripes on clothing.”). And while the pedestrian nature of Ms. Arbuckle’s testimony differed from D’Arienzo’s in that it did *not* “help the trier of fact,” *see supra* at 36–37, that did not stop Thom Browne from using her testimony to “influence the jury.” *Zhong*, 26 F.4th at 558.

Second, and relatedly, the District Court’s differential treatment of the parties’ experts deprived adidas of a critical opportunity afforded to Thom Browne. The substantial influence that experts can have on juries has long been documented by the Advisory Committee and others. *See* Rule 702 Notes (encouraging a “practice that prohibits the use of the term ‘expert’ by both the parties and the court at trial” to “ensure[] that trial courts do not inadvertently put their stamp of authority on a witness’s opinion and protect[] against the jury’s being overwhelmed by the so-called experts” (quotation marks omitted)). The District Court permitted Thom Browne to leverage the purported expertise of Ms. Arbuckle in front of the jury, supplemented by gratuitous comments *from the District Court itself* about her qualifications. *See* App.293–94 (Day 6 Tr. 733:19–734:11). But the

District Court denied adidas the same opportunity to leverage the expertise of Dr. D'Arienzo—even though he and Ms. Arbuckle shared many of the same credentials and relied on similar methodologies. The District Court's harmful and inconsistent evidentiary rulings make it impossible to “conclude with fair assurance” that the exclusion of Dr. D'Arienzo and the admission of Ms. Arbuckle did not influence the jury. *Zhong*, 26 F.4th at 558.

CONCLUSION

This Court should vacate the judgment below and remand to the District Court for a new trial.

Respectfully submitted this 24th day of May, 2023.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i) and Second Circuit Rule 28.1.1(a) because it contains 7,864 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Century Schoolbook 14-point font.
3. This brief has been scanned for viruses and is virus free.

DATED: May 24, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2023, I electronically filed **APPELLANTS' PRINCIPAL BRIEF** with the Clerk of Court using the CM/ECF System. Counsel for all parties are registered CM/ECF users and will be served with the foregoing document by the Court's CM/ECF System.

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