

23-0166-cv

United States Court of Appeals *for the* Second Circuit

ADIDAS AMERICA, INC., AN OREGON CORPORATION,
ADIDAS AG, A FOREIGN ENTITY,

Plaintiffs-Appellants,

– v. –

THOM BROWNE, INC., A DELAWARE CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee Thom Browne, Inc., by and through its undersigned counsel of record, makes the following disclosure:

Ermenegildo ZEGNA NV is a publicly held corporation owning 10% or more of Thom Browne, Inc.'s stock.

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JURISDICTIONAL STATEMENT

Thom Browne, Inc. agrees with the Appellants' statement that the District Court and this court have subject matter jurisdiction over this case.

STATEMENT OF THE ISSUES

1. Whether, considering the District Court’s jury instructions as a whole, the District Court properly instructed the jury regarding Appellants’ claim of trademark infringement based on initial interest and post-sale confusion, or whether (as Appellants contend) the District Court “erred by instructing the jury to focus on competition for the same consumers at the point of sale.” (Appellants’ Brief (“Br.”), p. 25).

2. Whether the District Court abused its discretion and committed reversible error when it excluded Appellants’ expert from testifying due to lack of supporting data and proof of methodology, and when it allowed Thom Browne, Inc.’s witness to testify factually regarding third-party use of stripes on clothing.

STATEMENT OF THE CASE

This is an appeal from a Final Judgment entered on January 13, 2023, by Judge Jed S. Rakoff of the United States District Court for the Southern District of New York, dismissing Appellants' complaint in its entirety following an eight-day trial that culminated in a jury verdict that Thom Browne, Inc. was not liable on Appellant's claims of trademark infringement and trademark dilution.

I. FACTUAL BACKGROUND

A. Appellee Thom Browne, Inc.'s Long Use of Its Four-Band and Grosgrain Signatures

Thom Browne, the Chief Creative Officer and Creative Director of Thom Browne, Inc., is a widely recognized and oft-honored American designer of high-end, luxury clothing and accessories. AA-159, 166-167 (Day 5 Tr. 800:20-21, 416:14 – 417:8)¹. Mr. Browne began developing his distinctive clothing line in 2001 (AA-164 (Day 5 Tr. 409:14-16)), and by 2007 Appellee Thom Browne, Inc. offered a full collection of his designer sportswear and tailored clothing. AA-165 (Day 5 Tr. 414:4-12).

Since 2003 or 2004, Thom Browne, Inc. has used a “grosgrain” signature trademark (comprising white-red-white-blue-white bands) on all of its products, “mostly the locker loop on the back, but also too in the ways of reinforcing the

¹ Citations with the prefix “App” refer to the Appellants' appendix. Citations with the prefix “AA” refer to the Appellee's supplemental appendix.

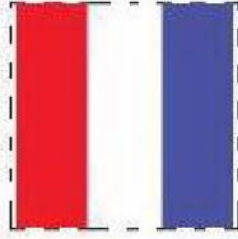
buttonholes and the front plackets of specific items.”² AA-168 (Day 5 Tr. 426:24-25).



AA-266 (DTX0603, page 2)

On June 17, 2014, Thom Browne, Inc. was granted U.S. Trademark Registration No. 4,550,034 for its grosgrain signature mark (as shown below in the drawing from the registration) for “Clothing, namely, coats, jackets, suits, blazers, jumpers, shirts, trousers, pants, sweaters, cardigans, skirts, t-shirts, vests, underwear, neckties, scarves, socks, hats, gloves, belts, footwear, dresses, swimwear, pocket squares, scarves, gloves, hosiery, running shoes, blouses.” AA-250-251 (DTX0131).

² A placket is an opening or a slit in a garment, covering fastenings or giving access to a pocket, or the flap of fabric under such opening.



Also in 2003-2004, Mr. Browne had adopted a horizontal three-band signature on the upper left sleeve and pantleg of certain of his products. In 2007, Thom Browne, Inc. received a demand from adidas³ that it stop using the three-band design, alleging infringement of adidas' "Three-Stripe Mark." Choosing to avoid a direct and costly confrontation with a behemoth like adidas, Thom Browne, Inc. immediately stopped using the three-band design and adopted a horizontal Four-Band signature (as shown immediately below). AA-160-161 (Day 5 Tr. 405:10 – 406:25).



AA-249 (DTX0103, page 9) AA-252(DTX0382)

³ Appellants adidas America, Inc. and adidas AG will also be referred to, collectively, as "adidas."

The horizontal Four-Band signature has appeared on Thom Browne, Inc.’s clothing continuously since that change in 2008—asymmetrically around the left sleeve and/or around the left pantleg of the company’s products. AA-169, 170-171, 172 (Day 5 Tr. 427:19-24, 432:25-433:6, 555:13-15). Thom Browne, Inc. considers that Four-Band signature to be a “key trademark.” AA-173 (Day 5 Tr. 556:16-18).

B. The Long-Delayed Infringement Claims of adidas

After Thom Browne, Inc. responded to adidas’ 2007 demand and changed from a three-band to a Four-Band horizontal design, the company continued to market its full clothing collection – with the grosgrain and Four-Band signatures – without hearing anything further from adidas for the next decade. AA-162-163 (Day 5 Tr. 407:23 – 408:6).

Suddenly in 2018, despite ten years of inaction, adidas asserted that use of the Four-Band signature was infringing on adidas’ undefined “Three-Stripe Mark.”⁴ adidas claimed that Thom Browne, Inc. was encroaching on adidas’s territory—athletic sportswear—despite the fact that Thom Browne, Inc. had been

⁴ Throughout the litigation, adidas refused to define its “Three-Stripe Mark.” The District Court was concerned with adidas’ claim of ownership of all stripes, and required briefing on the issue. AA-95-97; 108-115 (Tr. Day 2, 275:14-277:23, 350:2-357:4); AA-121-133 (Day 4, Tr. 541:16-553:13); AA-47-67 (Dkt. 193). Indeed, at trial, when pressed to define the “Three-Stripe Mark,” adidas’ former in-house counsel, Vanessa Backman, incredulously testified that “the Three-Stripe Mark is the Three-Stripe Mark.” AA-303 (PX1325 at p. 15, Tr. 76:15-16).

selling sweatpants, t-shirts, swimwear and the like featuring its signature marks for years. AA-165 (Day 5 Tr. 414:4-12). Thom Browne, Inc. vigorously denied adidas' claim. Settlement negotiations failed to resolve the dispute.

On June 28, 2021, adidas commenced the subject lawsuit in the U.S. District Court for the Southern District of New York, claiming trademark infringement, dilution, unfair competition, and unfair business practices under federal and state law, based upon adidas' asserted trademark rights in its "Three-Stripe Mark" and Thom Browne, Inc.'s use of its Four-Band and grosgrain signature marks.

II. PROCEDURAL HISTORY

Judge Jed S. Rakoff conducted a jury trial in Manhattan during the first two weeks of January 2023. The eight-day trial included 18 witnesses (five of them expert witnesses) and more than 400 exhibits.

After considering the parties' motions *in limine* and counsels' arguments, the District Court excluded adidas' proposed expert witness, William D'Arienzo, from testifying because his proposed opinions were not based on any reliable methodology. The District Court likewise excluded Thom Browne, Inc.'s expert witness, JoAnne Arbuckle, from offering opinion testimony, but allowed her to provide factual testimony regarding third-party use of stripes on clothing.

Judge Rakoff provided the jury with an extensive set of instructions on the issues of trademark infringement and dilution, directing the jury to consider his instructions as a whole, to focus specifically on adidas' claims of initial interest and post-sale confusion, and to disregard point-of-sale confusion.⁵

On January 12, 2023, the jury returned its verdict, finding no infringement and no dilution. On January 13, 2023, Judge Rakoff entered a judgment in favor of Thom Browne, Inc., dismissing adidas' complaint in its entirety.

This appeal ensued.

III. APPELLANTS' ARGUMENT ON APPEAL

adidas contends that the jury verdict and the District Court judgment should be vacated and the case remanded to the District Court for a new trial based upon an allegedly improper jury instruction regarding adidas' trademark infringement claim, and a purportedly improper exclusion of adidas' expert witness, Mr. D'Arienzo, and allowance of the factual testimony of Ms. Arbuckle on behalf of Thom Browne, Inc.

adidas misstates both the law and the facts. The District Court's instructions were entirely proper and its rulings regarding the expert witnesses were well within the District Court's discretion.

⁵ adidas did not seek judgment as a matter of law under Fed. R. Civ. P. 50.

SUMMARY OF THE ARGUMENT

The District Court did not commit reversible error, either in its instructions to the jury or in its rulings with regard to the two expert witnesses.

A. As to the jury instructions, adidas makes the demonstrably false claim that the District Court “erred by instructing the jury to focus on competition for the same consumers at the point of sale.” (Br., p. 25). In fact, the District Court did *exactly* the opposite. The District Court explicitly instructed the jury that adidas did not claim point-of sale confusion, but rather claimed initial interest and post-sale confusion:

As you heard, adidas does not contend that this confusion occurs at the point-of-sale of Thom Browne products, but rather either presale (such as when consumers first see a product in stores, online, or on social media), or post-sale (as when consumers other than the Thom Browne customers see these customers wearing the accused products). In determining whether consumers, at either of these points in time, are likely to be confused, you may draw on your own common experience.

AA-229-230 (Day 8 Tr. 1410:20-1411:4).

Ignoring that explicit instruction and failing to consider the jury instructions as a whole, adidas, without any support whatsoever, asserts that the jury was misdirected by a single instruction regarding competition for consumers: i.e., “whether the accused products and adidas products compete for the same consumers.” AA-230 (Day 8 Tr. 1411:22-23). However, adidas itself argued that

the parties compete for the same consumers. Its belated assertion that this one instruction amounted to reversible error is patently meritless.

A review of the jury instructions in their entirety, in the context of the trial testimony and arguments of adidas's counsel, confirms that the District Court properly instructed the jury with regard to adidas' claims.⁶

B. As to the District Court's rulings on the two expert witnesses, Judge Rakoff was well within his discretion to preclude the testimony of adidas' expert witness due to both the lack of proper methodology for his proposed testimony, and its irrelevance and redundancy. Judge Rakoff's decision to allow Appellee Thom Browne, Inc.'s witness to testify—but only to facts, not opinions—was also well within his judicial discretion and did not plausibly harm adidas.

ARGUMENT

I. Considered in Their Entirety, the District Court's Jury Instructions Were Proper and Caused No Prejudice to adidas

In its attack on the District Court's jury instructions, adidas asserts that the District Court erroneously directed the jury "to focus on competition for the same consumers at the point of sale." (Br., p. 25). But, as noted first above, adidas completely ignores the District Court's explicit instruction that adidas was *not*

⁶ adidas does not challenge the District Court's instructions regarding adidas' dilution claim.

claiming point-of-sale confusion but was claiming only initial interest and post-sale confusion.

Focusing on a single line in the District Court's extensive jury instructions (AA-218-240 (Day 8 Tr. 1399:19-1421:13)), adidas insists that Judge Rakoff's utterance of that one line ("whether the accused products and adidas products compete for the same consumers") threw the jury off track, undermined adidas' infringement claims, and tainted the jury verdict and the District Court's judgment. adidas' arguments are riddled with missing facts and misstatements of the applicable law.

The District Court's instructions were entirely proper and adidas has not shown and cannot show that any error was made, let alone an error that caused it any harm.

A. adidas Misstates Its Burden on Appeal and This Court's Standard of Review

For nearly 30 years, the Second Circuit has consistently articulated the same standard of review for challenged jury instructions:

We review a claim of error in the district court's jury instructions *de novo*, and will reverse on this basis only if the plaintiffs-appellants can show that in viewing the charge *given as a whole*, they were prejudiced by the error.

Anderson v. Branen, 17 F.3d 552, 556 (2d Cir. 1994) (internal citations omitted) (emphasis added).⁷ In its brief, however, adidas never quotes the entire standard of review. Instead, it omits *two* crucial elements.

First, adidas fails to acknowledge that jury instructions must be considered “as a whole,” not just by selecting a single line outside the context of the rest of the instructions and accompanying arguments. *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973) (“a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge”); *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (“[w]e emphatically do not review a jury charge ‘on the basis of excerpts taken out of context,’ but in its entirety . . . to determine whether considered as a whole, ‘the instructions adequately communicated the essential ideas to the jury’”) (internal citations omitted); *Anderson*, 17 F.3d at 556 (“viewing the charge given as a whole”); *Trademark Rsch. Corp. v. Maxwell Online, Inc.*, 995 F.2d 326 (2d Cir. 1993) (reiterating “taken as a whole” standard and upholding instructions in trademark case).

⁷ adidas itself relies on a nearly identical, more recent recitation of that standard in its Brief. (Br., p. 16 (citing *Murray v. UBS Sec., LLC*, 43 F.4th 254, 262 (2d Cir. 2022) (“We review a claim of error in jury instructions *de novo*, reversing only where appellant can show that, viewing the charge as a whole, there was a prejudicial error.”))).

Second, adidas fails to acknowledge that they, as the *Appellants*, shoulder the burden to show how there was error *and* that the error was prejudicial.

Proper application of the standard of review and proper assignment of the appellate burden of proof on adidas lead to the conclusion that the District Court's instructions were not erroneous and caused no prejudice to adidas.

B. The District Court Properly Instructed the Jury Regarding the Forms of Alleged Confusion Claimed by adidas

1. The Jury Was Specifically Instructed to Consider Initial Interest and Post-Sale Confusion, and to Disregard Point-of-Sale Confusion

As noted above, adidas ignores the Second Circuit's fundamental rule that jury instructions have to be reviewed "as a whole." *E.g.*, *Murray*, 43 F.4th at 262 ("viewing the charge *given as a whole* . . ."); *see* Section I.A, *supra*. From such a review, it is readily apparent that the District Court explicitly instructed the jury to consider **initial interest and post-sale confusion only, and not point-of-sale confusion:**

- "As you heard, adidas does not contend that this confusion occurs at the point-of-sale of Thom Browne products, but rather either presale (such as when consumers first see a product in stores, online, or on social media), or post-sale (as when consumers other than the Thom Browne customers see these customers wearing the accused products)." AA-229-230 (Day 8 Tr. 1410:20–1411:1).
- "Please remember that adidas is only claiming confusion at the pre-sale and post-sale points, and that its survey is limited to post-sale." AA-231 (Day 8 Tr. 1412:6-9).

Consistent with Second Circuit precedent, the District Court admonished the jury that it should not focus on any single instruction, but “should instead consider my instructions as a whole.” AA-220 (Day 8 Tr. 1401:7-9). The District Court went a step further when it reviewed the *Polaroid* factors, pointing out that “no one factor or consideration is conclusive, but each of these factors, as well as any other factors you find relevant, should be weighed in light of the total evidence presented at the trial to determine whether, on balance, a likelihood of confusion exists.” AA-232 (Day 8 Tr. 1413:5-9). adidas never objected to this proper recitation of the law—in fact, it proposed a nearly identical instruction (AA-22-23 (Dkt. 177 at pp. 8-9)), discussed below.

Judge Rakoff’s clear instructions regarding the nature of adidas’ claims—that adidas was not claiming point-of-sale confusion—echoed the arguments made by adidas’ counsel at numerous times during the trial, including in its opening statement⁸ and closing statement.⁹ These arguments were further reinforced by its

⁸ *E.g.*, “Here, adidas alleges only that the use of these designs caused initial interest confusion and post sale confusion.” AA-71 (Day 1 Tr. 30:10-12); “So as you think about the evidence that you hear, please be focused on the initial interest component or the post sale component and don’t worry yourself about someone walking up to a register and thinking they’re buying something they’re not.” AA-72 (Day 1 Tr. 31:21-25).

⁹ *E.g.*, “And as we explained at the opening, and as we will say throughout this closing, adidas is not alleging that someone walks into Thom Browne’s boutique and spends an hour with one of their customer service people and spends \$3,000 on a sweatshirt and walks out thinking they have adidas Our allegation is that in

witness testimony during the trial.¹⁰ *See Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1363 (Fed. Cir. 2004) (“In reviewing jury instructions, the full trial record and the jury instructions in their entirety must be examined because ‘instructions take on meaning from the context of what happened at trial, including how the parties tried the case and their arguments to the jury.’”) (internal citations omitted).

Taking into consideration the jury instructions in their entirety, together with the arguments and testimony at trial, there can be no doubt that the jury was well aware that it would not be considering point-of-sale confusion, but only initial interest and post-sale confusion—just as adidas wanted and argued.

2. adidas Fails to Show that the District Court Gave an Erroneous Instruction Regarding Competition for Consumers

Even if one ignores the entirety of the jury instructions and focuses only on the single line in the jury instructions that adidas asserts was erroneous—“whether

the real world, there are circumstances presale and post sale where confusion is likely.” AA-216 (Day 8 Tr. 1308:12-19); “. . . be thinking about the two places that adidas is alleging likelihood of confusion: Presale and post sale.” AA-217 (Day 8 Tr. 1332:1-3).

¹⁰ *E.g.*, [adidas expert Hal Poret: “Q. What do you mean by post-sale confusion in the context of your survey? A. Confusion that happens after clothing is sold and already out there.” AA-118 (Day 3 Tr. 379:15-18); “. . . we were not testing confusion at the point of sale, we were testing for post-sale confusion.” AA-119 (Day 3 Tr. 387:3-4).

the accused products and adidas products compete for the same consumer” AA-230 (Day 8 Tr. 1411:22-23)—adidas fails to articulate *how* that particular instruction was incorrect. adidas’ arguments boil down to its belief that “competition is not the test in initial-interest and post-sale confusion cases.” (Br., p. 10). So, according to adidas, the District Court erred by uttering the word “compete” in its instruction. (*id.*; *see also, e.g.*, 10-11, 14, and 21). Once again, adidas is wrong.

First, for adidas to now argue that competition for consumers is somehow irrelevant to initial interest and post-sale confusion is contrary to its own arguments and evidence at trial. From the outset of the trial, adidas relied on the parties’ competition for consumers in support of its claim of initial interest confusion:

They are sold in some of the same stores. Thom Browne sells in all these locations. adidas sells in all these locations. Saks and Nordstrom and Bergdorf Goodman would be sort of physical stores. FARFETCH and Net-A-Porter, I was not familiar with these before this case. These are sort of high-end fashiony websites where you can buy products, but both products are sold there, so maybe you’re not talking about point of sale confusion again, but as you think about where they overlap, think about that situation of initial interest of confusion. Is someone in the store likely to see it from a distance and think, “Oh, that must be adidas” because of the stripes.

AA-73-74 (Day 1 Tr. 35:16 – 36: 2). adidas’ witnesses repeatedly testified about competition between the parties. For example: [adidas executive Paul Bowyer] “Q. Mr. Bowyer, does adidas consider Thom Browne to be a competitor? A. We do.”

AA-106 (Day 2 Tr. 328:13-15 [Bowyer] “Q. Now in terms of competition, you believe that anybody who’s buying for consumer’s wallets, their hearts or their minds is a competitor of adidas, correct? A. Correct. AA-117 (Day 3 Tr. 370:6-9); [adidas expert Erich Joachimsthaler] “So in a way adidas competes with . . . Thom Browne and Thom Browne competes for my wallet, the share of my wallet.” AA-134 (Day 4 Tr. 706:2-4).

Second, adidas’ claim that competition for consumers is irrelevant in initial interest and post-sale confusion cases is legally incorrect. adidas relies most heavily on *Lois Sportswear U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867 (2d Cir. 1986)¹¹ for the proposition that “[p]ost-sale cases take a different approach to proximity,” *i.e.*, that post-sale cases do not deal with “competition.” (Br., p. 23). But adidas ignores the fact that *Lois Sportswear* repeatedly discusses the idea of competition between the parties (emphasis added):

- “[T]here can be no dispute that **the parties before us compete** to sell their jeans to the public.” *Id.* at 870.
- “[A]ppellants’ use of the stitching pattern on arguably **competing jeans** at least presents the possibility that consumers will be confused.” *Id.*
- “[T]he Lanham Act was designed to **prevent a competitor** from such a bootstrapping of a trademark owner’s goodwill by the use of a substantially similar mark.” *Id.* at 872.

¹¹ adidas ignores the fact that *Lois Sportswear* did not involve initial interest confusion.

Even in the section of *Lois Sportswear* where the Second Circuit discussed the “proximity of the products” factor, the court sets out an entire scenario where the competition between the parties may allegedly lead to confusion: “Likewise, in the post-sale context a consumer seeing appellants’ jeans on a passer-by might think that the jeans were appellee’s long-awaited entry into the designer jeans market segment. Motivated by this mistaken notion—appellee’s goodwill—the consumer might then buy appellants’ jeans even after discovering his error.” *Id.* at 874. adidas presents this hypothetical as if it supports its argument, but this is actually a scenario where both parties, the higher-end “designer” manufacturer and the lower-cost manufacturer, were competing for the same consumers.

Finally, a fundamental problem for adidas is that it cannot show how its own proposed instruction (set out immediately below) does not suffer from the same (alleged) infirmity as the instruction that the District Court gave regarding competition for consumers (next below).

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 with unrelated or non-proximate products.

AA-214 (Day 7 Tr. 1278:11-20); AA-21 (Dkt. 177 at p. 7, instruction proposed by adidas).

Third, whether the accused products and adidas products compete for the same consumers.

AA-230 (Day 8 Tr. 1411:22-23, instruction given by Judge Rakoff).

The courts have observed that a party who proposes an instruction that is similar to the one adopted by the lower court has little basis to complain. *See Dedjoe v. Esper*, 804 Fed. App'x 1, 4 n.3 (2d Cir. 2020) (“The instruction ultimately issued by the district court was substantially similar to [Appellant’s] proposed instruction”); *Snyder v. New York State Educ. Dep’t*, 486 Fed. App'x 176, 179, 2012 WL 2345397, at *22 (2d Cir., June 21, 2012) (affirming jury instructions, considering, among other things, that the District Court’s instruction “was substantially similar to Appellants’ proposed instruction”); *ING Glob. v. United Parcel Serv. Oasis Supply Corp.*, 757 F.3d 92, 98 (2d Cir. 2014) (“The jury instructions on Georgia law that are at the center of UPS’s appeal were substantively identical to the ones it submitted and which were delivered without objection from UPS.”).

adidas does not even attempt to square its current objections about the word “compete” in the District Court’s instruction (“whether the accused products and adidas products compete for the same consumer” AA-230 (Day 8 Tr. 1411:22-23)) with its own proposed instruction asking the jury to consider the “*competitive proximity of [the] parties’ products*” and whether the products are “*are sold or advertised in similar channels.*” AA-214 (Day 7 Tr. 1278:11-20); AA-21 (Dkt. 177

at p. 7). Nor does it acknowledge its own arguments and its testimony at trial that the parties compete for the same consumers.

In sum, adidas has failed to carry its burden to demonstrate that the District Court's instructions, when considered in their entirety, were improper. Even if this court analyzes in isolation only the District Court's instruction on competition for consumers—without the benefit of the other instructions and trial testimony—this court must conclude that adidas has no basis for complaint, particularly since adidas argued repeatedly during trial that competition for consumers is a factor that the jury must consider.

C. Even Assuming the Single Instruction on Competition for Consumers Was Improper, adidas Has Not Met Its Burden to Show It Was Prejudiced

adidas puts forth two reasons why it was supposedly prejudiced by the District Court's instruction regarding competition for consumers: (1) that the instruction was “central” to the case (Br., p. 26), and (2) that the inclusion of that instruction opened the door for Thom Browne, Inc. to make arguments at trial regarding how the parties compete. (*Id.* at 27).

1. Even if an Instruction Concerned a “Central Issue,” That Does Not Mean Any Error Was “Prejudicial”

adidas does not and cannot cite a single case for the proposition that solely because a particular instruction goes to a “central issue” in a case, any error in the instruction leads to prejudice. (*See* Br., p. 26). Such an argument is directly

contrary to the law that instructions have to be assessed in their entirety (*see* Section I.A, *supra*) and the Second Circuit’s repeated holding that “we generally do not treat any one *Polaroid* factor as dispositive in the likelihood of confusion inquiry.” *See, e.g., Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 46 (2d Cir. 2000). adidas’ argument is also precluded by the District Court’s instructions to which adidas did not object, namely that “no one factor or consideration is conclusive, but each of these factors, as well as any other factors you find relevant, should be weighed in light of the total evidence presented at the trial to determine whether, on balance, a likelihood of confusion exists.” AA-232 (Day 8 Tr. 1413:5-9).

adidas further argues that the “general nature of the verdict makes it impossible to know how the jury performed this balancing.” (Br., p. 26). Beyond this concession that it cannot prove prejudice on this record, adidas simply ignores the fact that *it did not object to the District Court’s general verdict form*, and actually had proposed a general verdict form of its own that was quite similar to the court’s form. AA-15-42 (Dkt. 177) and AA-43-46 (Dkt.178). If adidas had a concern that the District Court’s instruction on “competition for consumers” was going to be prejudicial, it could have requested a more detailed verdict form.

That the District Court did not give the exact instruction that adidas proposed regarding one *Polaroid* factor does not lead to the conclusion that the

jury instructions given were prejudicial, as adidas argues. If that were the case, any error on a “central issue” of any case would be *a priori* prejudicial—effectively eliminating the Second Circuit’s requirement that jury instructions be evaluated as a whole.

2. Thom Browne, Inc.’s Evidence and Argument Were Permissible Even Under adidas’ Proposed Instruction

adidas complains that Thom Browne, Inc. was able to argue about competition “only” because of “the District Court’s incorrect proximity instruction.” (Br., p. 28). That argument falls flat. adidas has not shown and cannot show that *any* of Thom Browne, Inc.’s arguments regarding competition would have been precluded if the District Court had given what adidas viewed as a proper instruction regarding “competitive proximity.”

adidas never objected to any of the arguments made in Thom Browne, Inc.’s opening or closing statements, a point that effectively prohibits adidas from now asserting that such arguments were unfairly prejudicial or improper. *See Marcic v. Reinauer Transp. Companies*, 397 F.3d 120, 124 (2d Cir. 2005) (“Where claimed error was not objected to contemporaneously, appellant faces an even heavier burden. Because the failure to object deprives the trial court of the opportunity to correct the error during trial, we will examine it on appeal only for ‘plain error.’”).

Even putting that effective waiver aside, adidas cannot identify a single argument that Thom Browne, Inc. made that it could not have made under adidas' proposed instruction. For instance, adidas complains in its Brief that:

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.”

(Br. p. 27). adidas chooses to ignore that its own proposed instruction asked the jury to “compare adidas's Three-Stripe Mark products with the accused products and consider how similar the products are”—a comparison that rightfully would include the price of the products as well as their markets. adidas further ignores its own argument about how Thom Browne, Inc. and adidas sell in the same stores and compete for the same consumers. (*See* Section I.B.2, *supra*; *see also* AA-73-74 (Day 1 Tr. 35:16-36:2)). adidas provides no explanation as to how Thom Browne, Inc.'s arguments about the parties operating in “different markets” would not have been permitted under adidas' proposed instruction asking the jury to consider “whether [the accused products] are sold in the same or similar channels” as adidas' “Three-Stripe Mark” products. AA-21 (Dkt. 177 at p. 7, instruction proposed by adidas).

In sum, even if the District Court had adopted adidas' proposed instruction, all of the arguments made by Thom Browne, Inc. that adidas now claims were improper and “prejudicial” would have been relevant and permissible.

* * * *

In sum, adidas has failed to provide any basis for this court to conclude that the District Court's instructions as a whole were improper, or that the single alleged error in the instructions was prejudicial.

II. The District Court's Evidentiary Rulings Were Not an Abuse of Discretion and Do Not Warrant a New Trial

adidas contends that it is entitled to a new trial because the District Court allegedly abused its discretion in making two evidentiary rulings. adidas first argues that the District Court abused its discretion by excluding the expert testimony of adidas' expert witness, William D'Arienzo, even though he admitted on voir dire examination by the District Court that his opinions were not supported by any methodology, but rather were based merely on his review of articles written by fashionistas. Second, adidas argues that the District Court abused its discretion by admitting the factual testimony of Thom Browne, Inc.'s witness, JoAnne Arbuckle, regarding third-party use of stripes on clothing.

adidas is wrong on both counts. The District Court excluded the *expert* testimony of *both* Mr. D'Arienzo and Ms. Arbuckle. The District Court permitted Ms. Arbuckle to testify solely as a *fact* witness. In so ruling, the District Court did not abuse its discretion.

A. The *Daubert* Standard for Expert Testimony

The District Court is vested with broad discretion to act as the gatekeeper with respect to expert testimony. Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993); *Amorgianos v. Amtrak*, 303 F.3d 256, 265 (2d Cir. 2002). A district court's decision to exclude expert testimony is reviewed under the highly deferential abuse of discretion standard. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999). A district court does not abuse its discretion in excluding expert testimony unless its decision was “manifestly erroneous.” *Amorgianos*, 303 F.3d at 265.

However, to the extent that a party raises an argument on appeal that was not preserved in the district court, the exclusion of the witness is reviewed under the plain error standard of review.¹² *United States v. Martinez-Armestica*, 846 F.3d 436, 443 (1st Cir. 2017) (plain error standard applied when the defendant raised objections to an expert's qualifications that were not raised before the district court, and, hence, were not preserved for appeal); *U.S. v. Lombardozzi*, 491 F.3d 61, 72 (2d Cir. 2007) (admission of expert testimony reviewed under plain error standard where defendant failed to preserve issue at trial).

¹² Under either standard of review, abuse of discretion or plain error, the District Court's exclusion of Mr. D'Arienzo's expert testimony was proper for the reasons discussed herein.

B. The District Court’s Exclusion of Mr. D’Arienzo as an Expert Witness

Prior to trial, Thom Browne, Inc. filed a motion *in limine* to exclude the expert testimony of adidas’ fashion marketing expert, Mr. D’Arienzo, on the grounds that he was not qualified to testify as an expert regarding fashion history or fashion design, and that his opinions were subjective and not based on any methodology.¹³ AA-3 (Dkt. 165 at p. 5). *United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) (while an expert may rely upon otherwise inadmissible facts or data in reaching conclusions, the expert must still “form his own opinions by applying his extensive experience *and a reliable methodology* to the inadmissible materials.”) (emphasis added). Mr. D’Arienzo did not satisfy the Second Circuit’s criterion. He reached his opinions by reading the unfounded opinions of others – namely, fashionistas – and parroting those opinions. AA-4-5 (Dkt. 165 at pp. 9-10).

Judge Rakoff, in a preliminary ruling before trial, denied Thom Browne, Inc.’s motion to exclude Mr. D’Arienzo, but he expressed concerns about the

¹³ Thom Browne, Inc. also argued in its motion *in limine* that Mr. D’Arienzo made an impermissible legal conclusion about how adidas’ inconsistent use of its “Three-Stripe Mark” strengthened brand associations. AA-2 (Dkt. 165 at p. 4). This is the **only** opinion that adidas wanted Mr. D’Arienzo to provide at trial. AA-136, 148-149 (Day 4: Tr. 718:8-13; 730:10-731:6). However, Thom Browne, Inc. conceded at trial that the impact of varying executions of the “Three-Stripe Mark” by adidas was no longer an issue in the case, so Mr. D’Arienzo’s opinion on the issue was moot. AA-148-149 (Day 4 Tr. 730:18-731:9).

proposed testimony and made it clear that there would be limits to his testimony. AA-70 (Day 1 Tr. 10:7-13). Judge Rakoff expressly instructed that “counsel should raise *exactly what they, at that point in the case, seek to elicit from him* and we’ll deal with that during a break.” (*Id.*) That is precisely what happened.

At trial, before adidas called Mr. D’Arienzo to the witness stand, the District Court heard from adidas’ counsel about “exactly what they, at that point in the case, [sought] to elicit from him.” Judge Rakoff then voir-dired Mr. D’Arienzo about his proposed testimony. AA-135-149 (Day 4 Tr. 717:13 - 731:9).

The proffer made by adidas about “exactly what . . . [it] sought to elicit from him” was testimony concerning “what happens when a brand like adidas uses a mark in the varied ways that the court has been seeing, what that does for a brand that has been using the mark like that for a long time and how it increases engagement with consumers.” AA-136, 148 (Day 4 Tr. 718:9-13, 730:14-16 (“the *one thing* that we wanted the jury to hear was his testimony about how different executions [of the “Three-Stripe Mark”] can still being [*sic*] recognized from a branding device.”)) (emphasis added).

When questioned by Judge Rakoff, Mr. D’Arienzo testified that his proposed opinion was based on his belief that consumers will perceive adidas’ playful execution of its “Three-Stripe Mark” as “cool” if a fashionista such as Rihanna posts a picture of it on social media, because she is a trendsetter. AA-144-

145 (Day 4 Tr. 726:5-727:13). adidas admitted that Mr. D’Arienzo did not rely on a consumer survey in reaching that conclusion.¹⁴ AA-136 (Day 4 Tr. 718:17-22). The District Court correctly found that his opinion was not based on any reliable methodology, and that the jurors are themselves capable, “through their ordinary experience, . . . [of] assess[ing] how someone might react to [a celebrity] wearing an adidas shirt.” AA-145 (Day 4 Tr. 727:2-4).

adidas did not offer Mr. D’Arienzo to testify about the other two opinions that were included in his expert report – namely, that “adidas’ clothing and Three-Stripe Mark” are perceived as fashion statements rather than just functional sportswear” or that “the line between luxury brands and sportswear has blurred significantly.” AA-135-136 (Day 4 Tr. 717:23-718:4). Yet in its appeal brief, adidas’ asserts as the sole basis for the District Court’s error, the exclusion of Mr. D’Arienzo’s opinion about blurring (or “convergence”).

Because, as discussed above, adidas did not proffer Mr. D’Arienzo to testify on the issue of blurring at trial—but rather only on the issue of how different executions of the “Three-Stripe Mark” can strengthen the mark—the propriety of

¹⁴ Regardless of whether Mr. D’Arienzo conducted many surveys over the course of his career, he did not conduct one in this case, and he did not reference any such survey in connection with any of his opinions in this case. AA-147-148 (Day 4 Tr. 729:16-730:9)

his exclusion on the issue of “blurring” has not been preserved for appeal. This court should apply a plain error standard of review and affirm on that basis alone. *United States v. Bout*, 651 Fed. App’x 62 (2d Cir. 2016) (finding no plain error to exclude witness where the defendant did not provide a proffer of the witness’ expected testimony); *Negron v. Caleb Brett U.S.A., Inc.*, 212 F.3d 666, 672 (1st Cir. 2000) (“plain error applies only where the error results in a clear miscarriage of justice or seriously affects the fairness, integrity or public reputation of judicial proceedings” and “it is reserved for ‘the most egregious circumstances.’”).

C. The District Court’s Allowance of Factual Testimony by Ms. Arbuckle

Prior to trial, adidas filed a motion *in limine* to exclude the testimony of Thom Browne, Inc.’s fashion expert, JoAnne Arbuckle—a fashion designer and former dean of the world-renowned Fashion Institute of Technology. AA-7-9 (Dkt. 166 at pp. 10-12). The District Court granted that motion in part, excluding Ms. Arbuckle from testifying in rebuttal to Mr. D’Arienzo’s proposed testimony about the blurring between mass market and designer goods. AA-69 (Day 1 Tr. 6:10-15). But the District Court denied adidas’ motion to the extent that Ms. Arbuckle was going to testify factually about third-party use of stripes on clothing.¹⁵ (*Id.*). Before

¹⁵ In its motion *in limine*, adidas argued that Ms. Arbuckle should not be permitted to testify as to third-party use for three reasons: (i) that evidence was related only to aesthetic functionality; (ii) Ms. Arbuckle had no information about the extent of usage of stripes by third parties, and (iii) she was not qualified to testify as to the

Ms. Arbuckle took the stand, adidas renewed its motion to exclude Ms. Arbuckle from testifying *as an expert* about the factual matter, “are there stripes out there.” AA-175-176 (Day 6 Tr. 654:20-655:10). adidas also argued that, to the extent that she would be permitted to testify *as a fact witness*, she should be excluded because “she has no support for the extent of any of this stuff being sold.” AA-176 (Day 6 Tr. 655:3-5). The District Court, however, permitted Ms. Arbuckle to testify with regard to facts that she gathered as a result of her investigation of third-party use of stripes on apparel (not as to the extent of usage by third parties). AA-177 (Day 6 Tr. 713:11-21). adidas then sought clarification from the District Court that Ms. Arbuckle would be permitted to testify only as to facts regarding third-party use, and that she would not be permitted to offer any opinion on the impact of that third-party use. The District Court confirmed, and adidas did not object further. AA-177-178 (Day 6 Tr. 713:25-714:2). Ms. Arbuckle never offered any opinion on the impact of third-party use on any issue in the case.

Consistent with its decision to permit Ms. Arbuckle to testify as to third-party use, the District Court denied adidas’ motion *in limine* (AA-9-11 (Dkt. 166 at

impact of such third-party use on consumers. AA-10-11(Dkt. 166 at pp. 13-14). As for (i) the District Court found that third-party use was relevant to the distinctiveness and the strength of the Three-Stripe Mark (AA-177 (Day 6 Tr. 713:11-15)); Ms. Arbuckle did not testify as to (ii); and the District Court did not permit her to testify as to (iii).

pp. 12-14)) to exclude Thom Browne, Inc.'s evidence regarding third-party use of stripes. AA-69 (Day 1 Tr. 6:16-18). In its briefing on that motion *in limine*, adidas argued that if the third-party use evidence were admitted, Thom Browne, Inc. should not be permitted to argue that adidas did not sue the third parties who were using stripes, and that Thom Browne, Inc. should not be permitted to provide any other context besides what is shown on the face of the screenshots evidencing third-party use of stripes. AA-12 (Dkt. 166 at pg. 18). The District Court's restrictions on Ms. Arbuckle's testimony complied with adidas' request.

Ms. Arbuckle's testimony conformed to the District Court's rulings: she testified only as a fact witness about the results of her investigation of the use of stripes in fashion, both historically and present-day. adidas objected to the exhibits showing third-party use only on the grounds of relevance and hearsay. Fed. R. Evid. 402, 403. (AA-186-210 (Day 6 Tr. 726-750); DX264, 242, 210, 239, 235, 230, 303, 206, 200, 228, 257, 223, 213, 227, 204, 269, 266). Those objections were overruled.

D. The District Court Correctly Applied the *Daubert* Standard in Excluding Mr. D'Arienzo

1. Mr. D'Arienzo's Opinions Were Not Based on Any Methodology

As stated in the Advisory Committee Notes to Rule 702 of the Federal Rules of Evidence, adidas bears the burden of establishing that the pertinent admissibility

requirements as applied to Mr. D'Arienzo were met by a preponderance of the evidence. Advisory Committee Rules, 2000 Amendments to Rule 702, citing, *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). adidas failed to carry that burden.

The District Court excluded Mr. D'Arienzo's proffered testimony because it lacked "a consistent and reliable methodology." AA-137 (Day 4: Tr. 719:18-23). adidas wrongly argues that exclusion of Mr. D'Arienzo's testimony was an abuse of discretion because it allegedly was based on an error of law, purportedly since a non-scientific expert does not need to employ a methodology. (Br., p. 38).

adidas maintains that, in his expert report, Mr. D'Arienzo "explained in detail how he arrived at his conclusions" (Br., p. 33), citing articles about collaborations of adidas, Thom Browne, Inc., and third parties. That argument fails because adidas offers no explanation of how Mr. D'Arienzo applied any methodology to those articles to arrive at his opinion. When he was questioned by Judge Rakoff during trial (AA-135-149 (Day 4 Tr. 717-31)), neither Mr. D'Arienzo nor adidas' counsel described or explained any methodology that he employed in reaching his conclusions.

adidas claims that the District Court permitted Ms. Arbuckle to testify as an expert even though she allegedly employed the "same methodology" as Mr. D'Arienzo. (Br., p. 35). However, there is neither incongruity nor prejudice to

adidas because Ms. Arbuckle was NOT permitted to testify as an expert on any issue.

2. Experience Alone Does Not Supplant the Need for a Reliable Methodology

The District Court did not err in excluding Mr. D’Arienzo on the ground that his opinion was not based on any methodology. Applicable case law – including the cases relied upon by adidas – makes it clear that an expert’s testimony must be tied to reliable principles and methods. Fed. R. Evid. 702 (*see* Committee Notes, “reliable principles and methods” remain relevant when applied to testimony based on technical and other specialized knowledge as opposed to scientific knowledge). While the Committee Notes state that experience alone may provide a sufficient foundation for expert testimony, the expert still must explain his methodology in detail. *See, e.g., United States v. Jones*, 107 F.3d 1147, 1160-61 (6th Cir. 1997) (district court did not err in its evidentiary ruling allowing testimony of handwriting expert because he explained his methodology in detail); *Alaimo v. 3M Co.*, 306 Fed. App’x. 704, 705 (2d Cir. 2009) (nurse’s opinion not admissible expert opinion because she relied only on her experience, and she failed to explain the methodology for arriving at her conclusion).

To support its argument that the District Court relied on an error of law, adidas cites *Sarkees v. E.I. Dupont De Nemours & Co.*, 15 F.4th 584 (2d Cir. 2021). (Br., p. 31). However, *Sarkees* does not stand for the proposition that

experience alone can substitute for a reliable methodology. *Sarkees* was an action alleging that the plaintiff's bladder cancer was caused by exposure to a chemical at defendant's work site. Plaintiff's expert concluded that a chemical in defendant's product was the specific cause of plaintiff's bladder cancer. *Sarkees* was brought in federal district court, and so the admission of expert testimony was governed by the federal rules and case law. The Second Circuit held that the district court abused its discretion in excluding the expert because the district court relied on state tort law as a basis for exclusion, rather than federal law. That was an error of law.

Applying federal law, the Second Circuit in *Sarkees* reviewed the record to determine if the expert testimony was admissible. The expert relied on multiple epidemiological studies and government reports relating bladder cancer to exposure to the chemical at issue. The expert also conducted a personal inspection of the work site where the exposure allegedly occurred. She then "applied the methodology of differential etiology and . . . causation criteria" to reach her conclusion. *Sarkees*, 15 F.4th at 591. Her opinion was thus based on a reliable methodology, not experience alone. The Second Circuit therefore held that her

opinion was admissible. Mr. D'Arienzo, by contrast, followed no methodology.¹⁶

He just parroted the opinions of fashionistas that he read in the media.

adidas also relies on *Kumho Tire* for the proposition that an expert's testimony can be based on personal experience with no methodology. (Br., p. 32).

Kumho Tire does not so hold. Rather, it fully supports the District Court's exclusion of Mr. D'Arienzo.

In *Kumho Tire*, the Supreme Court held that the *Daubert* analysis applies not only to scientific experts, but also to skill- or experience-based experts, like Mr. D'Arienzo. After reviewing the transcript in some detail and considering the respondents' defense of the expert's methodology, the district court had determined that the expert testimony was not reliable. The district court did not question the expert's qualifications, but "it excluded the testimony because, despite those qualifications, it initially doubted, and then found unreliable, the methodology employed by the expert." 526 U.S. at 153. The Supreme Court found that the district court's doubts were reasonable. Thus, *Kumho Tire* does not hold that experience alone can substitute for a proper methodology.

¹⁶ In this case, the District Court permitted adidas' other branding expert, Dr. Joachimsthaler, to provide his opinions regarding the application of various scientific branding studies to the facts of this case using various methodologies.

Here, as in *Kumho Tire*, the District Court did not question Mr. D'Arienzo's qualifications. It initially denied the motion to exclude Mr. D'Arienzo but expressed concerns about the scope of his testimony. AA-70 (Day 1 Tr. 10:7-12). The District Court advised the parties that it would revisit Mr. D'Arienzo's proffered testimony when the witness was called, and it did so. Judge Rakoff questioned Mr. D'Arienzo on his methodology, outside the presence of the jury. AA-135-149 (Day 4 Tr. 717:13 - 731:9). Mr. D'Arienzo could not identify any methodology that he used. Instead, he stated that he just read articles by fashionistas and reached conclusions based on the opinions of the fashionistas – who, of course, were not qualified as experts. Consequently, he was excluded. Just as in *Kumho Tire*, there was no evidence that other experts used Mr. D'Arienzo's approach, nor did he provide any references to articles that validated his approach. 526 U.S. at 157.

In *Kumho Tire*, the Supreme Court emphasized and reinforced the broad discretion accorded a district court in determining the admissibility of expert testimony. It validated the district court's decision to use "other proceedings . . . needed to investigate reliability," as the District Court did in this case. 526 U.S. at 152. In *Kumho Tire*, the district court considered the *Daubert* factors and found that none indicated that the expert opinion was reliable; the parties did not identify any other factors that supported admissibility. The same holds true here: adidas

was provided the opportunity to identify factors that supported the admissibility of Mr. D'Arienzo's proposed opinion, but it failed to do so. AA-135-149 (*See* Day 4 Tr. 717-731).

Adidas also incorrectly relies on *United States v. Martinez-Armestica* for its assertion that experience alone may be the sole basis for expert testimony. (Br., p. 32). In *Martinez-Armestica*, an expert experienced in identifying firearms used that experience to identify photographs of firearms. The expert described not only his extensive experience, but also the methodology he used to identify firearms. 846 F.3d at 441-42. By contrast, Mr. D'Arienzo did not identify any methodology that he employed.

Adidas next turns to *Amorgianos v. Amtrak*, a case involving a painter who sued Amtrak for exposure to chemicals contained in paints, thinners and primers. There, the Second Circuit did not solely consider the expert's experience, but rather emphasized that the court "must focus on the principles and methodology employed by the expert." 303 F.3d at 266. If the methodology is inadequate to support the conclusions reached (or is non-existent), *Daubert* and Fed. R. Evid. 702 mandate exclusion. *Id.* In *Amorgianos*, the expert failed to apply his stated methodology reliably to the facts of the case.¹⁷ The Second Circuit ruled that the

¹⁷ The plaintiff's expert in *Amorgianos* testified that the evaporation rate of a solvent from paint depended on variables that he did not include in his calculations

district court did not abuse its discretion in excluding his opinion. *Amorgianos* supports the exclusion of Mr. D'Arienzo's testimony because he was unable to describe any methodology underlying his proposed opinions.

As is clear, all of the cases relied upon by adidas actually support the exclusion of Mr. D'Arienzo's testimony as unsupported by a reliable methodology.

3. Mr. D'Arienzo's Reliance on Third-Party Articles Does Not Constitute an Acceptable Methodology

adidas suggests that Mr. D'Arienzo's review of secondary sources regarding collaborations between luxury designers and sportswear companies constitutes a methodology. (Br., pp. 33-34). It does not. Mr. D'Arienzo cites articles about collaborations, but he does not point to anything that supports his opinions about the impact that those collaborations have on consumers. App. 364-73 ¶¶ 30-45 (citing articles by fashionistas); ¶42 (stating merely his conclusions regarding the impact of collaborations on consumers without explaining how he arrived at his opinion). The sources relied upon by Mr. D'Arienzo are nothing more than articles by fashionistas in fashion publications, expounding on their thoughts about collaborations. (*Id.*) Although an expert may rely on hearsay in reaching an opinion, he may not simply quote opinions of others that he reads in published

about the plaintiff's exposure to the chemical substance at issue. *Amorgianos*, 303 F.3d at 268-69.

articles. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (“a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony”); *Wi-LAN Inc. v. Sharp Elecs. Corp.*, 992 F.3d 1366, 1375 (Fed. Cir. 2021), citing *United States v. Tomasian*, 784 F.2d 782, 786 (7th Cir. 1986) (expert did not plan to offer his own opinion but, instead, planned to repeat the out-of-court opinion of another person).

Mr. D’Arienzo failed to describe or explain any methodology that he employed with respect to his analysis of these articles regarding the effect of brand collaborations, his determination of their veracity and import, and his reasoning as to why they provide a basis for any reliable conclusions. As in *Kumho Tire*, Mr. D’Arienzo did not cite to any generally recognizable support for his reliance on such articles to draw conclusions about consumer behavior, and he did not identify any other experts that use his approach. 526 U.S. at 157. Indeed, the District Court correctly held that Mr. D’Arienzo was not qualified to testify as to consumer behavior. AA-147 (Day 4 Tr. 729:8). Mr. D’Arienzo’s purported expertise was in marketing, not consumer behavior. *See also United States v. Glenn*, 312 F.3d 58, 67 (2d Cir. 2002) (witness’ opinion must be based on reliable principles or methods).

The District Court correctly determined that the jurors could form their own conclusions about the evidence regarding celebrities and collaborations, based on their everyday experience. *United States v. Zhong*, 26 F. 4th 535, 555 (2d Cir. 2022) (a district court should not allow an expert to testify as to matters “not beyond the ken of the average juror” (quoting *United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir. 1994))).

And so, adidas has not met its burden to establish an abuse of discretion in the exclusion of Mr. D’Arienzo’s expert testimony.

E. The District Court Did Not Abuse Its Discretion in Admitting Ms. Arbuckle’s Factual Testimony

Applying the wrong criteria for admissibility of *expert* testimony (i.e., *Daubert* and its progeny), adidas asserts that the District Court abused its discretion in admitting the *factual* testimony of Ms. Arbuckle.¹⁸ (Br., pp. 36-37). The District Court granted adidas’ motion *in limine* to exclude Ms. Arbuckle from testifying *as an expert*. As discussed in Section II.C, *supra*, however, the District Court permitted Ms. Arbuckle to testify *as a fact witness* within limitations requested by adidas. This was proper. *See, e.g., Sutton v. Massachusetts Mut. Life Ins. Co.*, No. 18-CV-1273 (VSB), 2020 WL 5765693, *3 (S.D.N.Y. Sept. 27,

¹⁸ Of course, the *Daubert* standard does not apply to Ms. Arbuckle’s factual testimony.

2020) (“Having credentials and qualifications to be an expert witness does not preclude that witness from testifying as a fact witness.”).

adidas objected to Ms. Arbuckle’s testimony as an expert witness (Br., p. 36). As to her factual testimony, adidas initially objected because she admittedly had no information about third-party sales. AA-175-176 (Day 6 Tr. 654:25 – 655:5). However, with the assurance that Ms. Arbuckle would not testify beyond the face of the documents, adidas voiced no further objection to her testimony as a *fact* witness. AA-177-178 (Day 6 Tr. 713:2 – 714:1).

adidas’ reliance on several cases analyzing the admission of expert testimony and applying them to the testimony of Ms. Arbuckle, is misplaced.¹⁹ In *United States v. Zhong*, the Second Circuit held an expert should not have been permitted to testify as to certain facts that were “highly prejudicial and, at best, minimally relevant.” 26 F.4th at 544. *Zhong* is inapposite here because Ms. Arbuckle did not testify as to any irrelevant, highly prejudicial facts. The facts

¹⁹ In *Andrews v. Metro N.C.R. Co.*, 882 F.2d 705 (2d Cir. 1989), relied upon by adidas, the plaintiff was drunk, walked on train tracks, and was struck by a Metro North train. He sued Metro North. The Second Circuit held that the district court erred in admitting expert testimony because the expert was permitted to testify as to the conditions of the railroad platform, but the jury did not need specialized expertise to assess the condition of the platform. Similarly, his testimony about the reasonableness of defendant’s conduct in walking on the tracks was not necessary. Here, Ms. Arbuckle offered no expert opinions. She testified only as to historical facts, not as to percipient conditions. Therefore, *Andrews* is inapplicable.

concerning third-party use of stripes were highly relevant to the distinctiveness and strength of adidas' "Three-Stripe Mark," but Ms. Arbuckle did not opine as an expert on the issues of distinctiveness or strength. Her qualifications to testify as to historical and contemporaneous facts are beyond question. The jury was entitled to give whatever weight it wanted to the facts regarding third-party use.

Although adidas complained at trial that Ms. Arbuckle had no knowledge of the extent of sales of third-party products, it was free to explore that deficiency on cross-examination (which it elected not to do) or to argue that deficiency to the jury. Any such arguments would go to the weight of Ms. Arbuckle's testimony, not to its admissibility. *RVC Floor Decor, Ltd. v. Floor & Decor Outlets of Am., Inc.*, No. 18-CV-6449 (JS)(ARL), 2023 WL 2843935, *5 (E.D.N.Y. Apr. 7, 2023) (rejecting "Plaintiff's argument that, to be admissible, Defendant must first prove that the third-party marks were 'actually used by third parties, that they were well promoted or that they were recognized by consumers . . .'""). Since Ms. Arbuckle's testimony was limited to the results of her factual investigation of third-party use of stripes in fashion, the District Court did not abuse its discretion in admitting her factual testimony.

F. The District Court's Evidentiary Rulings Do Not Necessitate a New Trial

For all of the foregoing reasons, the District Court's exclusion of Mr. D'Arienzo's expert testimony and its admission of Ms. Arbuckle's fact testimony

was not an abuse of discretion. In any event, even if this court finds that either or both of the evidentiary rulings constitute an abuse of discretion, adidas is not entitled to a new trial because the rulings were harmless. *Zhong*, 26 F.4th at 558 (“a defendant ordinarily is not entitled to a new trial if . . . [evidentiary] errors were ‘harmless, i.e., . . . unimportant in relation to everything else the jury considered on the issue in question.’”). *Tesser v. Bd. of Educ. Of City Sch. Dist. Of City of New York*, 370 F.3d 314, 319 (2d Cir. 2004) (appellant bears burden to show that evidentiary error was not harmless; appellee does not bear the burden to show that it was harmless); *Constantino v. David M. Herzog*, 203 F.3d 164, 174 (2d Cir. 2000) (evidentiary error was harmless where appellants did not cite any specific prejudice). Here, neither ruling substantially influenced the jury. *Id.*

adidas argues that the issue of convergence of the luxury clothing and sportswear industry, about which Mr. D’Arienzo would have testified, was “critical for adidas” (Br., p. 30), but Mr. D’Arienzo was not proffered to testify on that issue. (*See* Section II.B, *supra*). Even if he had been permitted to testify at trial, Mr. D’Arienzo likely would not have been allowed to testify as to convergence. For that reason alone, adidas is not entitled to a new trial based on his exclusion.

Even if Mr. D’Arienzo had testified as to convergence, it should be noted that, in response to Thom Browne, Inc.’s motion *in limine* to exclude Mr. D’Arienzo, adidas argued that Mr. D’Arienzo’s proposed testimony on

convergence was relevant to the issues of encroachment/laches and likelihood of confusion.²⁰ AA-14 (Dkt. 173 at p. 6). During trial, the District Court ruled that laches would be decided by the court and took that issue away from the jury. AA-212 (Day 7 Tr. 1259:6-8). Exclusion of Mr. D'Arienzo's testimony as to laches thus had no effect on the jury's verdict because the issue was never before the jury.

With respect to the issue of likelihood of confusion, Mr. D'Arienzo's testimony about "blurring" or convergence would have been redundant at best. Ample evidence was presented to the jury regarding the so-called convergence of luxury clothing and sportswear²¹ to enable the jury to reach its own conclusions as to whether consumers would be confused by a luxury brand like Thom Browne, Inc. using four horizontal bands asymmetrically and a sportswear brand like adidas

²⁰ adidas had taken the position at the beginning of trial that Thom Browne, Inc. expanded its product offerings to encroach on adidas' athletic product offerings, which relates to laches. (Br., p. 7). adidas made this argument in an effort to excuse its ten-year delay in taking legal action against Thom Browne, Inc.

²¹ adidas admits that it presented other evidence on convergence (Br., p. 38), but complains that expert evidence would have bolstered its factual evidence. However, it is improper to use an expert solely to bolster facts. *Lombardozzi*, 491 F.3d at 77 ("expert testimony may not be used to bolster the credibility of fact witnesses"). adidas never proposed that the District Court permit Mr. D'Arienzo to testify as a fact witness. Further, while adidas asserts that the District Court did not affirmatively state that Mr. D'Arienzo's testimony would not have helped the trier of fact (Br., p. 39), the District Court never stated that Mr. D'Arienzo's testimony would have helped the jury. To the contrary, the District Court held that Mr. D'Arienzo's proposed opinion testimony was within the ken of the average juror. AA-145 (Day 4 Tr. 727:2-9.)

using three vertical stripes symmetrically. Multiple witnesses testified concerning collaborations between luxury designers and sportswear manufacturers, including the following:

- Chris Murphy, adidas' Vice President of Brand Marketing for adidas North America (AA-75-76 (Day 1 Tr. 131:19-132:4); AA-78-95, 98 (Day 2 Tr. 200:2-203:12; 261:5-13; 262:11-263:24; 263:25-273:21; 281:5-10).
- Paul Bowyer, Vice President of Originals Partner Brands (Collaborations) and Basketball (AA-99-106 (Day 2 Tr. 303:4-18; 321:11-24; 323:2-10; 323:11-327:1; 327:3-328:11)).
- Dr. Joachimsthaler, adidas' expert on branding (AA-150-157 (Day 4 Tr. 732:9-739:2)).

Pointedly, adidas' witness, Mr. Bowyer, testified about convergence as follows:

Q. Mr. Bowyer, does adidas consider Thom Browne to be a competitor?

A. We do.

Q. Why?

A. There's been a shift in the marketplace where there's a trend for at leisure or leisure, and that means that many fashion brands are starting to create product in the same categories and spaces that we do: Running products, more casual Lifestyle product, gray molle fabrication product, for example. As you can see, we have a rich history in this space, but there's a convergence and cross-pollination of brands starting to compete in this space. So I would say yes, based on we have similar products, we have similar price points, and we sell in very similar points of distribution, and the Thom Browne product bears four stripes, and we have three stripes.

AA-106-107 (Day 2 Tr. 328:13-329:2).

The testimony of these witnesses included identification of luxury brands that collaborated with sportswear companies, examples of social media posts and discussions of high price points and product sales at the same high-end retailers, overlapping channels of trade, etc. That testimony is directly related to the topic of “the growing overlap between high fashion and sportswear.” (Br., p. 33). Any testimony by Mr. D'Arienzo on this topic would have been superfluous, and so it cannot be said that the jury's verdict was impacted by the exclusion of Mr. D'Arienzo's testimony.

With respect to evidence of third-party use, aside from Ms. Arbuckle's testimony, the record includes many examples of other third-party uses of stripes on clothing, including, most notably, the vintage varsity sweaters that inspired Thom Browne. AA-241-245 (DTX72); AA-247 (DTX93 at p. 19); AA-268-270 (PX37 at pp. 11, 43, 62); AA-272 (PX192 at p. 20); AA-274 (PX194 at p. 6); AA-275-301 (PX197). Jurors could also rely upon their commonsense knowledge of clothing and footwear to conclude that companies besides adidas use stripes on clothing and footwear. And adidas put on substantial counterevidence about the strength of its “Three-Stripe Mark,” including two days of testimony from its primary fact witnesses, Messrs. Murphy and Bowyer. adidas simply cannot demonstrate that the jury was improperly swayed by Ms. Arbuckle's testimony,

and that the jury would have reached a different conclusion on the ultimate issue of likelihood of confusion if she had not been permitted to testify.

Finally, adidas argues that a new trial is warranted because the District Court unfairly permitted Thom Browne, Inc. to leverage Ms. Arbuckle's experience before the jury, but deprived adidas the ability to do the same with Mr. D'Arienzo. (Br., p. 40). As an initial matter, any argument by adidas that Ms. Arbuckle's testimony as a fact witness was buttressed by the District Court's identification of Ms. Arbuckle as a witness with "specialized knowledge" was waived for at least two reasons: (1) adidas did not object to any questions about Ms. Arbuckle's qualifications during her examination at trial (AA-179-185 (Day 6 Tr. 715-721); AA-213 (Day 7 Tr. 1267:1-11)); and (2) adidas did not object to the admission of Ms. Arbuckle's *curriculum vitae* into evidence (AA-185 (Day 6 Tr. 721:3-14); AA-253-264 (DTX404)). Both of these failures to object occurred after adidas was put on notice that Ms. Arbuckle would be testifying as a fact witness.

Even if Ms. Arbuckle had testified as an "expert," the subject matter of her testimony differed from the proposed subject matter of Mr. D'Arienzo's testimony. adidas is comparing apples to oranges. Ms. Arbuckle testified about the *facts* regarding third-party use of stripes. adidas asserts that Mr. D'Arienzo would have testified about *opinions* concerning the impact of the convergence of luxury and sportswear. The District Court granted adidas' motion *in limine* to preclude Ms.

Arbuckle from testifying about convergence or blurring. AA-69 (Day 1 Tr. 6:13-15).

adidas cites no authority for the proposition that a new trial is warranted merely because a district court permits one side to present expert testimony but excludes the other side's expert. *In re Puda Coal Sec. Inc., Litig.*, 30 F. Supp. 3d 230, 257 (S.D.N.Y. 2014), *aff'd sub nom. Querub v. Hong Kong*, 649 Fed. App'x 55 (2d Cir. 2016) ("However, as in many cases in which one side's expert is excluded and another's is not, the preclusion of one party's expert does not result in the automatic preclusion of the adverse party's expert on similar topics."). Such a proposition would be illogical and contrary to binding precedent governing the admissibility of expert testimony. Each expert's testimony and opinions must be considered on its own. Moreover, this argument about inequity is undercut by adidas' own argument that Mr. D'Arienzo should have been permitted to testify about blurring, even though the District Court excluded Ms. Arbuckle's rebuttal opinions on the very same topic.

For all of the foregoing reasons, adidas has not established that it is entitled to a new trial, even assuming *arguendo* that an evidentiary error was made.

CONCLUSION

The District Court properly instructed the jury with respect to adidas' claim of trademark infringement. The District Court specifically directed the jury to focus on initial interest and post-sale confusion, and to disregard point-of-sale confusion, just as adidas proposed.

The District Court acted well within its discretion in excluding the proposed expert testimony of Mr. D'Arienzo because of the lack of any methodology on which the testimony was based. And the District Court's allowance of the factual testimony of Ms. Arbuckle was likewise well within the District Court's discretion.

Therefore, the judgment of the District Court must be affirmed.

Respectfully submitted,

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