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United States District Court,
S.D. New York.

GUCCI AMERICA, INC., et al., Plaintiffs,
v.
WEIXING LI, et al., Defendants.

No. 10 Civ. 4974(RJS). | May 18, 2012.

Opinion

MEMORANDUM AND ORDER

RICHARD J. SULLIVAN, District Judge.

***1** Non-party Bank of China ("BOC") asks this Court to reconsider, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, its August 23, 2011 Memorandum and Order ("August 23 Order") directing BOC to comply with the terms of a Rule 45 subpoena and the Court's Preliminary Injunction and Order Authorizing Expediting Discovery, dated July 12, 2010. For the reasons that follow, the Court denies BOC's motion.

I. BACKGROUND

Plaintiffs Gucci America, Inc. and certain of its affiliates bring this trademark infringement action against the owners and operators of a Chinese website dedicated to the sale of imitation handbags and other items. On July 12, 2010, the Court entered a preliminary injunction freezing funds in Defendants' accounts at the Chinese headquarters of BOC. Plaintiffs then sought documents and information relating to Defendants' accounts from BOC, pursuant to Rule 45 of the Federal Rules of Civil Procedure. On August 23, 2011, this Court granted Plaintiff's motion to compel BOC to comply with the Rule 45 subpoena as well as the asset freeze provision of the preliminary injunction and denied BOC's cross-motion to modify the preliminary injunction so as to terminate the provisions that freeze Defendants' assets held by BOC in any of its locations in China. *See Gucci Am., Inc. v. Weixing Li,* No. 10 Civ. 4974(RJS), 2011 WL 6156936, at *1 (S.D.N.Y. Aug. 23, 2011).[1]

On November 30, 2011, BOC filed a motion for reconsideration of the Court's August 23 Order pursuant to Rule 60(b)(2) and (6) of the Federal Rules of Civil Procedure, based principally on a November 3, 2011 letter (the "November 3 Letter") that BOC received from the People's Bank of China ("PBOC") and the China Banking Regulatory Commission ("CBRC"). In the letter, PBOC and CBRC set forth their positions as to, *inter alia,* the application of Chinese bank secrecy laws to disclosures of customer information outside of China, China's commitment to using Hague Convention procedures for document requests, and whether BOC might face sanctions as a result of its compliance with the August 23 Order. (Decl. of Andrew H. Reynard, dated Nov. 30, 2011, Doc. No. 91 ("Reynard Decl."), Ex. I.) The motion was fully briefed as of January 9, 2012.

Subsequently, BOC submitted a letter to the Court, dated February 8, 2012 (the "February 8 Letter"), informing the Court of a recent resolution passed by the American Bar Association's ("ABA") House of Delegates (the "Resolution" or "Resolution 103") and attaching both the resolution and an accompanying report from the ABA's Selection of International Law (the "Report"). By letter dated February 23, 2012, Plaintiffs replied to BOC's February 8 Letter.

II. DISCUSSION

A. BOC's Rule 60(b) Motion is Procedurally Deficient

The Court has little trouble concluding that BOC's Rule 60(b) motion is premature. In pertinent part, the Rule provides:

> On motion and just terms, the court may relieve a party or its legal representative from a *final* judgment, order, or proceeding for the following reasons: … (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59 (b); ... or (6) any other reason that justifies relief.

***2** Fed.R.Civ.P. 60(b) (emphasis added). Thus, there is a threshold "requirement under Rule 60(b) that the reconsidered order or judgment be 'final.' " *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.,* 08 MDL No.1963(RWS), 2011 WL 321142 (S.D.N.Y. Feb. 1, 2011) (citing *Indem. Ins. Co. of N. Am. v. Reisley,* 153 F.2d 296, 299 (2d Cir.1946), *on petition for reh'g); see also; Charter Oak Fire Ins. Co. v. Nat'l Wholesale Liquidators,* No. 99 Civ. 5756(JSR), 2003 WL 22455321, at *1 (S.D.N.Y. Oct. 29, 2009) ("[Rule 60(b)] is inapplicable, as the … [o]rder was not a '*final* ' judgment, order, or proceeding within the meaning of that rule.") (emphasis in original); *Cancel v. Mazzuca,* No. 01 Civ. 3129, 2002 WL 1891395, at *3 (S.D.N.Y. Aug. 15, 2002) (explaining that Rule 60(b) only applies to an order if it is final); *Alvarez v. Am. Airlines,* No. 98 Civ. 1027(MBM), 2000 WL 145746, at *1 (S.D.N.Y. Feb. 8, 2000) (rejecting a Rule 60(b) motion for reconsideration because the order appealed from "remains interlocutory"). An order is considered "final" if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Alvarez,* 2000 WL 145746, at *1 (quoting *Caitlin v. United States,* 324 U.S. 229, 233 (1945)).

Here, the August 23 Order is by no means a final order. As the Second Circuit explained in *United States v. Construction Products Research, Inc.,* "[t]he general rule is that orders enforcing subpoenas issued in connection with civil and criminal actions … are *not* final 73 F.3d 464, 468 (2d Cir.1996); *cf. Dove, III v. Ail. Capital Corp.,* 963 F.2d 15, 17 (2d Cir.1992) ("A non-party witness ordinarily may not appeal directly from an order compelling discovery but must instead defy the order and be found in contempt in order to obtain review of the court's initial order.").[2] Indeed, BOC has implicitly conceded that the August 23 Order is interlocutory, at least as to the portion granting Plaintiffs' motion to compel, since it specifically requested the Court's permission to take an "interlocutory appeal." (Doc. No. 79 at 3.) Moreover, an order refusing to modify a preliminary injunction is directly appealable under 28 U.S.C. § 1292(a)(1) and is, therefore, interlocutory by definition.[3] *See Scipar, Inc. v. Simses,* 354 F. App'x 560, 562 (2d Cir.2009); *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.,* 71 F.Supp.2d 139, 155 (E.D.N.Y.1999).

BOC correctly argues that a district court nonetheless has the inherent power to provide relief from an interlocutory order that it has entered. (Reply at 5 (citing *Transaero, Inc. v. La Fuerza Aerea Boliviano,* 99 F. 3d 538, 541 (2d Cir.1996).) However, the Court declines to exercise such power because (1) BOC is not entitled to relief from the Court's August 23 Order on the merits, *see infra,* and (2) BOC filed its motion for reconsideration well after the deadline for submitting a motion for reconsideration pursuant to Local Civil Rule 6.3, and the "balance between justice and finality ... would be destroyed if litigants, acting after the deadline for bringing a Rule 6.3 motion has passed, could nonetheless bring such a motion simply by doing it up as a motion for relief from judgment," *Alvarez,* 2000 WL 145746, at *2; *see id.* at *1 n. 2; *see* Local Civil Rule 6.3 ("[A] notice of motion for reconsideration or reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's determination of the original motion."). Therefore, the Court finds that BOC's motion is procedurally deficient.

B. BOC's Rule 60(b) Motion is Also Deficient on the Merits

***3** Moreover, even if BOC's motion *were* properly before the Court, which it is not, the Court would nevertheless deny it on the merits. As an initial matter, although BOC requests relief from the August 23 Order under both Rule 60(b)(2) and Rule 60(b)(6), relief from the latter is foreclosed as a matter of course because Rule 60(b)(6) may only be properly invoked "when the asserted grounds for relief are *not* recognized in clauses (1)(5) of the Rule." *Nemaizer v. Baker,* 793 F.2d 58, 63 (2d Cir.1986) (emphasis added). Here, BOC itself describes the November 3 Letter as "newly-discovered evidence" (Mem. in Supp. at 8), and thus, Rule 60(b)(2), and not Rule 60(b)(6), appropriately governs BOC's motion. *See* Fed.R.Civ.P. 60(b)(2); *see also United States*

v. Int'l Bhd. of Teamsters, 247 F.3d 370, 391–92 (2d Cir.2001) ("Controlling cases have held that if the reasons offered for relief from judgment can be considered in one of the more specific clauses of Rule 60(b), such reasons will not justify relief under Rule 60(b)(6)."); *Am. Civil Liberties Union v. Dep't of Def.,* 406 F.Supp.2d 330, 332 (S.D.N.Y.2005) ("Because the asserted grounds for relief, 'newly discovered evidence,' are recognized in clause two of Rule 60[(b)], relief under clause 6 of Rule 60[(b)] is unavailable...."). Accordingly, the sole remaining issue before the Court is whether relief should be granted under Rule 60(b)(2).

A party seeking relief from judgment under Rule 60(b)(2) "has an onerous standard to meet." *Int'l Bhd. of Teamsters,* 247 F.3d at 392. Namely, the movant bears the burden of proving that:

> (1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant [was] justifiably ignorant of them despite due diligence, (3) the evidence [is] admissible and of such importance that it probably would have changed the outcome, and (4) the evidence [is not] merely cumulative or impeaching.

Id. (citation omitted).

Here, BOC has failed to demonstrate that the November 3 Letter is "newly discovered evidence" pursuant to the first prong of this test. BOC concedes that "the [November 3 Letter] did not exist at the time of the August 23 Order (and could not, therefore, have been discovered in the exercise of reasonable diligence)." (Mem. in Supp. at 8 n. 7.) Nonetheless, it argues that it meets the first prong of the test because "the facts underlying [the letter] … clearly did exist at that time." (*Id.*) Plaintiff's argument, however, is not supported by case law within this Circuit. For instance, in *Frankel v. ICD Holdings S.A.,* the court explained that a post-judgment financial report was not "newly discovered evidence" because "all of the material facts in the new … report were in existence at the time the original motion was litigated." 939 F.Supp. 1124, 1127 (S.D.N.Y.1996); *see also Kurzweil v. Philip Morris Cos., Inc.,* Nos. 94 Civ. 2373(MBM), 94 Civ. 2546(MBM), 1997 WL 167043, at *5 (S.D.N.Y. Apr. 9, 1997) (explaining that evidence created after the original order "is not newly *discovered* evidence that was in existence at the time of the order; it is simply new evidence"). BOC argues that *Frankel* is distinguishable because there the movant "simply offered … a report from the *same entity* that had previously submitted reports to the court containing the same information," whereas here different entities—PBOC and CBRC—submitted the purported "newly discovered evidence." (Reply at 8 n. 10.) However, such an argument creates a hollow distinction, as BOC cites no authority indicating that evidence from a different entity may be "newly discovered" whereas evidence from the same entity may not.

***4** BOC has also failed to indicate why, if the facts underlying the November 3 Letter did in fact "clearly … exist" at the time of the August 23 Order (Reply at 7 n. 8), it could not have simply asked PBOC or CBRC to submit their opinions as to Plaintiffs' then-pending motion prior to the issuance of the August 23 Order. Such a failure cuts against BOC's ability to demonstrate "due diligence" pursuant to the second prong of the Rule 60 (b)(2) standard. *See Boule v. Hutton,* 170 F.Supp.2d 441, 445 (S.D.N.Y .2001) (denying a motion for reconsideration under Rule 60(b) where movants failed to demonstrate the required due diligence in attempting to obtain the affirmations, submitted post-judgment, prior to judgment).

Furthermore, as to the last two prongs of the standard, BOC has failed to demonstrate that the November 3 Letter is "non-cumulative" or that it "probably would have changed the outcome" of the August 23 Order. *See Int'l Bhd. of Teamsters,* 247 F.3d at 392. Although it is true that the November 3 Letter represents "the first and only definitive expression *by* China of its interest in this matter" (Reply at 7 (emphasis in original)), that fact alone does not render the opinions expressed therein non-cumulative. Indeed, the letter repeats opinions substantially similar to those expressed in declarations before the Court prior to its August 23 Order, such as the opinions that: (1) Chinese law prohibits banks from disclosing customer information to persons or entities outside of China absent customer consent (Reynard Decl. Ex. I at 2; *see* Decl. of Zhipan Wu, dated Dec. 22, 2010, Doc. No. 37 ("Wu Decl."), ¶¶ 12–13, 16; Decl. of James V. Feinerman, dated Apr. 28, 2011, Doc. No. 67 ("Feinerman Decl."), ¶¶ 2426); (2) China is committed to ensuring that requests for evidence pursuant to the Hague Convention are dealt with in a reasonable time (Reynard Decl. Ex. I at 2–3; *see* Wu Decl. ¶ 32; Feinerman Decl. ¶ 28); (3) China prohibits "any disclosure of information" or the freezing or turning over "of assets in violation of Chinese law" (Reynard Decl. Ex. I at 3; *see* Wu Decl. ¶¶ 1416; and (4) China has a material interest in "strictly enforcing" its bank secrecy laws to "effectively protect the information of bank clients" and to ensure "client confidence in the banking system" (Reynard Decl. Ex. I at 2; *see* Wu Decl. ¶ 11; Feinerman Decl. ¶ 22).

In any event, the only purported "evidence" that could possibly be considered non-cumulative would still not have "changed the outcome" of the August 23 Order. In the November 3 Letter, PBOC and CBRC indicated that they "have already issued a severe warning to the bank and … are conducting further investigation to

evaluate the severity of the infraction and determine the appropriate sanctions." (Reynard Decl. Ex. I at 3.) However, because neither PBOC nor CBRC has actually imposed sanctions or even made an actual determination as to whether BOC will *face* any sanctions aside from a "severe warning," nothing changes the Court's conclusion that BOC's "representation of the liability that it faces ... [is] unduly speculative." *See Gucci Am.,* 2011 WL 6156936, at *11.

***5** Similarly, neither the Resolution nor the Report, referenced in BOC's February 8 letter, alters the Court's analysis in its August 23 Order or even discusses either the Lanham Act or the issue of counterfeit goods entering the United States. The Resolution in particular recommends that only "where possible in the context of the proceedings before [it]," a court should "consider and respect, as appropriate, ... [foreign] privacy laws." *See* Resolution 103. The Resolution is thus consistent with this Court's analysis in its August 23 Order, in which the Court cited the Supreme Court's decision in *Societe Rationale Industrielle Aerospatiale v. U.S. District Court for Southern District of Iowa,* 482 U.S. 522 (1987), for the proposition that "determining whether notions of international comity require a party to utilize [Hague] Convention procedures is a fact-intensive inquiry requiring 'scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.' " *Gucci Am.,* 2011 WL 6156936, at *7 (quoting *Aerospatiale,* 482 U.S. at 544). The Court clearly considered and balanced such interests, including the fact that "China undoubtedly has an interest in enforcing its bank secrecy laws." *Id.* at *10. Nevertheless, the Court noted that " 'American courts are not required to adhere blindly to the directives of [foreign blocking statutes],' " *id.* (quoting *Aerospatiale,* 482 U.S. at 544 n. 29), and concluded that "the United States itself has a powerful interest in enforcing the acts of Congress, especially those, such as the Lanham Act, that are designed to protect intellectual property rights and prevent consumer confusion," *id.* at *11. Put simply, BOC has failed to demonstrate that any of its purported "newly discovered evidence" "probably would have changed the outcome" of the Court's August 23 Order. *See Int'l Bhd. of Teamsters,* 247 F.3d at 392. Indeed, the Court can say with confidence that it would not have.

Accordingly, even were the Court to find that BOC's motion were properly before the Court—which it does not BOC would still fail to meet its burden under Rule 60(b)(2).

III. CONCLUSION

For the aforementioned reasons, BOC's motion for reconsideration is DENIED. The Clerk of the Court is respectfully directed to terminate the motion located at Doc. No. 88.

SO ORDERED.

Footnotes	
1	The Court assumes the parties' full familiarity with both the facts of this case, *see Gucci America,* 2011 WL 6156936, at *l–3, and the August 23 Order itself.
2	BOC unconvincingly argues that *Construction Products Research* is inapposite because the decision did not involve a motion pursuant to Rule 60(b) (Reply at 4); however, the mere fact that the decision did not involve such a motion does not somehow negate the Second Circuit's conclusion that orders enforcing subpoenas in cases such as the case at bar are interlocutory, *see* 73 F.3d at 468.
3	Although BOC filed a notice of appeal with the Second Circuit regarding the Court's denial of its motion to modify the preliminary injunction, this Court retains jurisdiction to deny BOC's motion for reconsideration. *See* Fed.R.Civ.P. 62.1(a)(2); *BFI Grp. Divino Corp. v. JSC Russian Aluminum,* 298 F. App'x 87, 93 n. 4 (2d Cir.2008).
4	Although BOC argues in a single footnote that the Court is not foreclosed from considering its motion under Rule 60(b)(6) because it has invoked that provision "in the alternative" (Reply at 9 n. 14), it cites to no case for the proposition that an argument in the alternative should alter the Court's analysis, and it all but ignores the fact that in *American Civil Liberties Union,* the Court rejected Rule 60(b)(6) as a stated ground for relief where plaintiffs, like BOC here, moved pursuant to *both* Rule 60(b)(2) and Rule 60(b)(6). *See* 406 F.Supp.2d at 332.

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