No. 25-

IN THE

Supreme Court of the United States

DAN GIURCA, M.D.,

Petitioner,

v.

MONTEFIORE HEALTH SYSTEM, INC.,
JEFFREY WEISS, M.D. CLAUS VON SCHORN, M.D.
GARY ISHKANIAN, M.D.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **The "Fraud on the Court" Circuit Split:** Whether the United States Court of Appeals for the Second Circuit's restrictive interpretation of "fraud on the court" under Federal Rule of Civil Procedure 60(d)(3)—which strictly limits relief to instances of bribery or fabrication of evidence and categorically excludes the intentional, strategic concealment of dispositive documents by an officer of the court during discovery—creates an untenable conflict with the broader integrity-based standards adopted by the Third, Sixth, and Ninth Circuits, and contravenes this Court's foundational holding in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

2. **The Integrity of Voluntary Dismissals:** Whether a voluntary dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii) constitutes a binding waiver of rights when it was induced by the opposing counsel's fraudulent affirmative representations of full discovery compliance, made while simultaneously withholding "smoking gun" evidence of whistleblower retaliation—specifically, a defamatory "Security Alert" blacklisting campaign—that was only revealed years later through collateral litigation.

3. **The Scope of the Saving Clause:** Whether the "saving clause" of Rule 60(d), preserving the judiciary's inherent power to set aside judgments for fraud, requires a showing that the fraud literally "defiled" the court in a manner that the court itself could not detect (the Second Circuit view), or whether it extends

to egregious misconduct by counsel that prevents the opposing party from fairly presenting their case and renders the judicial machinery an instrument of injustice (the majority view).

PARTIES TO THE PROCEEDING

Petitioner Dan Giurca, M.D. was the plaintiff in the United States District Court for the Southern District of New York and the appellant in the United States Court of Appeals for the Second Circuit.

Respondents Montefiore Health System, Inc., Jeffrey Weiss, M.D., Claus von Schorn, M.D., and Gary Ishkanian, M.D. were the defendants below.

CORPORATE DISCLOSURE STATEMENT

Montefiore Health System, Inc. previously reported that its parent corporation is Montefiore Einstein, Inc. and that said corporation is the only publicly held corporation owning 10% or more of Montefiore Health System, Inc. stock.

RELATED CASES

Giurca v. Montefiore Health System, Inc., et al., No. 18-CV-11505, United States District Court for the Southern District of New York. Judgment entered March 20, 2024.

Giurca v. Montefiore Health System, Inc., et al., No. 24-858, United States Court of Appeals for the Second Circuit. Judgment entered September 17, 2025.

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The opinion and order of the United States District Court for the Southern District of New York (Ramos, J.) denying petitioner's motion to vacate the judgment pursuant to Federal Rule of Civil Procedure 60(d)(3) was entered on March 20, 2024, in case 18-CV-11505 and is reported at 2024 U.S. Dist. LEXIS 51641, 2024 WL 1193574 and is reproduced at App. 7a.

The report and recommendation of the United States Magistrate Judge (Moses, M.J.) recommending denial of the motion was entered on December 21, 2023, in case 18-CV-11505, and is reported at 2023 U.S. Dist. LEXIS 228719, 2023 WL 9102694 and is reproduced at App. 19a.

The order of the United States Court of Appeals for the Second Circuit denying the petition for panel rehearing and rehearing *en banc* was entered on October 22, 2025, in Case No. 24-858, and is unreported and is reproduced at App. 53a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on September 17, 2025. A timely petition for rehearing was denied on October 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 60 provides, *inter alia*:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party . . .
>
> (d) Other Powers to Grant Relief. This rule does not limit a court's power to: . . . (3) set aside a judgment for fraud on the court.

The False Claims Act, 31 U.S.C. § 3730(h), provides relief for any employee who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section."

INTRODUCTION

This petition addresses a fundamental threat to the integrity of the federal civil justice system: the ability of sophisticated institutional litigants to immunize

themselves from liability by intentionally concealing dispositive evidence during discovery, inducing a dismissal based on that concealment, and then relying on the strictures of Rule 60(b)'s one-year limitation period to preserve the fraudulent result.

Petitioner Dr. Dan Giurca, a psychiatrist, brought this action alleging that his employer, Montefiore Health System, retaliated against him for exposing a fraudulent billing scheme involving the systematic plagiarism of patient notes. The retaliation culminated in a defamatory "Security Alert"—a "Wanted" style poster—that Petitioner alleged was disseminated to prospective employers to "blacklist" him.

During discovery, Respondents' counsel represented to the District Court that "not a shred of evidence" existed that this alert was sent outside the hospital walls. Based on this representation, and under threat of monetary sanctions for his own alleged discovery shortcomings, which were actually due to negligence and malpractice by his own prior lawyer Sadowski, Dr. Giurca was forced to voluntarily dismiss his case.

Years later, through collateral litigation against a subsequent employer, the truth emerged. Montefiore employee Cesar Rojas had, in fact, circulated the alert to other hospital networks by texting a photo of the security alert to Rosemary Baczewski at Orange Regional Medical Center on January 11, 2018, and Montefiore's Director of Security Lonnie Trotta had verbally confirmed to Dr. Giurca's subsequent employer that the alert was issued because Dr. Giurca was a whistleblower. This evidence—the "smoking gun" of retaliation and defamation—was in

Respondents' possession the entire time, responsive to specific document requests, and intentionally withheld.

The Second Circuit affirmed the refusal to reopen the case, applying a uniquely narrow interpretation of "fraud on the court" that excludes discovery concealment, no matter how egregious or outcome-determinative. This decision creates a perverse incentive for litigants to hide evidence, secure in the knowledge that if they can maintain the deception for one year, the judgment is unassailable. This Court should grant *certiorari* to restore the *Hazel-Atlas* standard and ensure that the federal courts do not become inadvertent accomplices to fraud.

STATEMENT OF THE CASE

The factual record in this case, reconstructed from the initial proceedings and the subsequent revelations in collateral litigation, reveals a disturbing trajectory of systemic billing fraud, whistleblower retaliation, and a coordinated legal strategy to suppress the evidence of that retaliation.

I. The Underlying Whistleblowing: Systemic Fraud and Patient Safety Violations

Petitioner Dr. Giurca was employed as a psychiatrist at Montefiore's Mount Vernon Hospital. (App. 20a.) During his tenure, he identified a pattern of conduct among his colleagues that implicated both patient safety and the integrity of federal healthcare programs. (App. 20a-21a.) Specifically, Dr. Giurca observed that other psychiatrists, including Respondent Claus Von Schorn, M.D. (his supervisor), were engaging in "plagiarism" of medical records. (App. 22a.)

The alleged scheme involved the copying and pasting of patient histories and psychiatric evaluations from prior visits into the current day's electronic medical record (EMR). By replicating a comprehensive "Initial Psychiatric Evaluation," the physicians could fraudulently "upcode" the patient encounter to CPT Code 90792—a comprehensive psychiatric evaluation with medical services for at least 60 minutes—rather than the appropriate, lower-reimbursement code for a lower-level visit of 15 minutes or less.

Dr. Giurca documented these allegations in contemporaneous emails. (App. 21a.) For example, on August 2, 2016, in an email titled "complaint Von Schorn / plagiarism," Giurca wrote to hospital leadership: "I want to file a complaint against Dr. Von Schorn for plagiarism. (App. 22a.) Not only has he plagiarized my notes many times, but yesterday after I brought this to his attention *via* email, he continued to plagiarize someone else's note . . . Von Schorn's note at 22:24 shows he extensively plagiarized the note done by Dr . . . "

Dr. Giurca did not limit his complaints to internal channels. He made protected disclosures to the New York State Department of Health (DOH) and the Office of Mental Health (OMH) regarding these practices and concurrent patient safety issues. (App. 22a.) These external complaints triggered a DOH site inspection in October 2016. Documents obtained *via* FOIA after the case was closed, confirm that the DOH inspection resulted in a finding of "Immediate Jeopardy"—the most serious citation possible, placing the hospital's Medicare participation at risk.

Crucially, despite Respondents' denials during litigation that they knew nothing of Dr. Giurca's role in these inspections, the temporal proximity and the specific patient files reviewed by the DOH (which matched the patients Dr. Giurca had flagged internally) created a clear inference of knowledge. Montefiore terminated Dr. Giurca's privileges on March 30, 2017 (App. 23a), just 3 days after receiving the March 27, 2017 DOH letter informing the hospital that its Medicaid / Medicare agreement was scheduled for termination, and almost 3 months after Dr. Giurca ended his full time employment at Montefiore circa January 5, 2017.

II. The Retaliatory Campaign: Pretextual Peer Review and the Security Alert

Following his protected disclosures, Respondents initiated a campaign of retaliation designed to force Dr. Giurca out of the institution and destroy his professional reputation. (App. 8a; App. 20a; App. 29a.)

Indeed, Respondents subjected Dr. Giurca to a "Focused Professional Practice Evaluation" (FPPE). (App. 21a.) While ostensibly a quality assurance tool, the record indicates this fraudulent FPPE was weaponized to manufacture a paper trail of "incompetence" against a whistleblower. (App. 21a.) Audio recordings produced by Dr. Giurca (which later became the subject of sanctions against him) capture Respondent Dr. Ishkanian threatening Dr. Giurca with termination based on the FPPE findings. (App. 2a-3a).

The most damaging retaliatory act occurred after Dr. Giurca's separation from employment in January

2017. In April 2017, Montefiore issued Security Alert 2017-008. (App. 21a; App. 24a.) This document featured Dr. Giurca's photograph, labeled him a "Security Threat," and instructed personnel: "If this individual appears on hospital property, please contact Security immediately . . . Do not allow access."

The issuance of such an alert against a physician with no history of violence or criminal behavior is unprecedented and serves as a professional "scarlet letter." (App. 21a.) The core of Dr. Giurca's subsequent lawsuit was that Montefiore did not merely use this alert internally for safety, but disseminated it to other hospitals and potential employers to "blacklist" him from the practice of medicine in the region. (App. 8a; App. 21a.)

III. The Judicial Proceedings: A Strategy of Obstruction and Concealment

Petitioner commenced this action in the Southern District of New York on December 10, 2018, asserting claims under the False Claims Act (retaliation) and state law (defamation, tortious interference). (App. 29a.)

From the outset, the discovery process was characterized by Respondents' obstructionism and the tactical concealment of the two categories of documents most critical to Dr. Giurca's claims: (1) evidence of the internal investigation into his fraud complaints, and (2) evidence of the external dissemination of the Security Alert. (App. 10a; App. 12a.)

Petitioner's discovery demands explicitly requested "all documents . . . relating to plagiarism, failing to give

credit to copied physician notes, or coding claims for Medicaid reimbursement". Respondents represented to the Court that no such plagiarism existed and that no formal investigation had been conducted that substantiated the claims.

However, documents that were either withheld or produced suspiciously late in the litigation revealed the existence of an internal investigation in August 2016. Emails between hospital administrators Sheila McGrath, Mary Scranton, and Theresa Forget—which surfaced only partially in June 2020—confirm active discussions regarding "allegations of other MDs plagiarizing." Specifically, an email from Sheila McGrath on August 18, 2016, refers to "findings" and the intent to share them with Respondent Jeffrey Weiss.

Despite this, Respondents' counsel represented to the Magistrate Judge that Dr. Giurca was engaging in a "fishing expedition" for documents that did not exist, successfully painting the Petitioner as paranoid and litigious. The conclusions and findings of the internal investigation of plagiarism were deliberately concealed during discovery.

However, the suppression of evidence regarding the Security Alert was absolute. (App. 6a; App. 16a.) Petitioner requested "documents showing the dissemination of the security alert" to prove his defamation and blacklisting claims. In response, Respondents produced a single document: the alert itself (Bates stamped "Montefiore 145").

Respondents' counsel affirmatively represented to the District Court that the alert was an internal document

posted only at security offices within Montefiore. (App. 24a.) Counsel argued in briefing that there was "not a shred of evidence that Montefiore knew of [external] documents, possessed them, or had any" communications with third parties regarding Dr. Giurca's security status.

This representation was objectively false. (App. 14a; App. 32a-33a.) As detailed *infra*, Montefiore's own Director of Security had personally emailed the alert to the entire Montefiore network and discussed it with security directors at other hospitals. (App. 5a-6a; App. 14a; App. 32a-33a.) Furthermore, Lonnie Trotta started an internal inquiry once he became aware that the security alert was leaked from Montefiore to Orange Regional Medical Center. Documents regarding this inquiry were also concealed.

IV. The Inducement of Dismissal and the Imposition of Sanctions

The litigation reached a crisis point in August 2020. The Magistrate Judge, accepting Respondents' narrative that they had fully complied with discovery and that Petitioner was harassing them with baseless demands, turned her focus to Petitioner's conduct. (App. 9a.) Specifically, the Court took issue with Petitioner's practice of recording conversations with hospital administrators—a practice Dr. Giurca argued was necessary to document the retaliation, but which the Court viewed as misconduct or potential spoliation (if recordings were not preserved perfectly). (App. 2a-3a; App. 21a; App. 26a).

On August 12, 2020, the Court imposed joint and several monetary sanctions on Dr. Giurca and his then

lawyer Sadowski. (App. 27a.) Respondents then presented Dr. Giurca with a choice: face the immediate enforcement of significant attorneys' fees or agree to a voluntary dismissal with prejudice. (App. 35a.)

Dr. Giurca's decision to sign the Stipulation of Dismissal on August 25, 2020, was directly induced by the informational asymmetry created by Respondents' fraud. Believing—based on Respondents' certified discovery responses—that he had no documentary evidence to prove the external dissemination of the Security Alert (the *sine qua non* of his defamation claim), and facing financial ruin from the sanctions, he capitulated. (App. 14a.)

V. The Unraveling: Collateral Discovery Reveals the Fraud

The falsity of Respondents' representations regarding the Security Alert was not discovered until after the case was closed, during subsequent litigation against Orange Regional Medical Center (ORMC), Dr. Giurca's subsequent employer. (App. 34a.)

In that separate action, Petitioner deposed Lonnie Trotta, Montefiore's Director of Security. Trotta's sworn testimony dismantled the factual record Respondents had presented to the District Court in this action. (App. 39a-40a.)

Indeed, Trotta testified that he did not merely post the alert internally. He circulated the April 2017 Security Alert *via* email to more than 100 security officers and to numerous sites within the entire "Montefiore network." (App. 37a).

Even more, collateral discovery revealed a precise chain of transmission that linked Montefiore directly to the leadership of ORMC—evidence that would have established liability for defamation and retaliation in the original suit. (App. 32a-34a.)

The concealed chain of communication, which Respondents failed to disclose, began with Step 1 when Lonnie Trotta of Montefiore created and distributed the initial alert. (App. 36a.) Subsequently, in Step 2, a Montefiore/Wakefield security officer transmitted a photograph of this alert to Dr. Cesar Rojas, a physician employed by Montefiore. Continuing the dissemination, Dr. Rojas then proceeded in Step 3 to text the photo to Rosemary Baczewski at ORMC, who in turn, in Step 4, texted it to Miguel Rodrigues, the Director of Security at ORMC. The chain concluded with Step 5, where Rodrigues ultimately emailed the photograph back to Lonnie Trotta at Montefiore, requesting clarification. (App. 24a; App. 32a-33a.)

Most damningly, the collateral discovery revealed that after receiving the email from Rodrigues, Lonnie Trotta had a phone conversation with him. (App. 36a.) In that call, Trotta explicitly linked the Security Alert to Dr. Giurca's whistleblowing. According to the deposition testimony, Trotta told Rodrigues that Dr. Giurca was terminated because he "wrote a letter threatening to expose the way the hospital treats their psych patients." (App. 36a.) Trotta also testified that he started an inquiry to find out how the security alert had been transmitted to ORMC.

This admission—that the "Security Threat" designation was actually pretext for whistleblower

retaliation—was the exact evidence Dr. Giurca needed to prove his FCA retaliation claim. Respondents possessed the emails between Trotta and Rodrigues (Step 5) and surely knew of Trotta's actions. Yet, they produced none of this, listed none of it on a privilege log, and told the Court "not a shred of evidence" existed. (App. 16a.)

VI. The Rule 60 Proceedings and the Decision Below

Armed with this new evidence, Petitioner moved to vacate the voluntary dismissal.

Petitioner first moved under Rule 60(b)(3) (fraud, misrepresentation, or misconduct) on March 5, 2021. (App. 3a.) The District Court denied the motion, largely on procedural grounds regarding timeliness and a failure to appreciate the materiality of the withheld documents.

On June 21, 2023, Petitioner filed a motion under Rule 60(d)(3), asserting "fraud on the court." Petitioner argued that Respondents' counsel's repeated, affirmative misrepresentations to the Magistrate Judge regarding the non-existence of dissemination evidence constituted a fraud that "defiled the court" by corrupting the discovery process and inducing a fraudulent dismissal. (App. 3a-4a.)

The District Court denied the motion. (App. 17a.) Adopting the Magistrate Judge's Report and Recommendation, the Court held that even if Respondents intentionally withheld the emails, such conduct constitutes only "intrinsic fraud" or discovery abuse, which does not rise to the level of "fraud on the court" under Second Circuit precedent. (App. 14a-17a.) The Court emphasized that Dr. Giurca "chose" to settle the case, ignoring the

fact that the choice was made under false pretenses. (App. 12a-13a; App. 17a; App. 51a.)

On October 29, 2025, the Second Circuit affirmed *via* mandate, adhering to its restrictive standard that non-disclosure in discovery is insufficient to warrant equitable relief from judgment after one year.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's "Defilement" Standard for Fraud on the Court Creates a Dangerous Immunity for Discovery Concealment, Conflict with Sister Circuits.

This case exemplifies the urgent need for this Court's intervention to clarify the scope of "fraud on the court" under Federal Rule of Civil Procedure 60(d)(3). The Second Circuit's unduly restrictive "defilement" standard erects an insurmountable barrier to relief for victims of discovery misconduct, even when such fraud by officers of the court fundamentally undermines the judicial process. By affirming the district court's denial, the panel perpetuated a rule that shields intentional concealment of material evidence, conflicting with more equitable approaches in other circuits and eroding public trust in the courts.

A. The Second Circuit's Restrictive Approach.

The Second Circuit has long adhered to a narrow interpretation of fraud on the court, requiring clear and convincing evidence of egregious misconduct that "defiles" the judicial machinery itself, rather than merely affecting

the parties. *See Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972). In this case, the summary order applied this standard rigidly, concluding that Respondents' counsel's concealment of the key email during discovery—despite affirmative misrepresentations about its existence and awareness—did not rise to the level of a repetitive campaign of deceit necessary to warrant relief. The court dismissed the fraud as intrinsic to the merits (*i.e.*, discoverable through due diligence) and sanctionable under Rule 37, ignoring how it prevented Petitioner from fully litigating his claims and tainted the summary judgment proceedings.

This approach creates a dangerous immunity for discovery abuses, particularly when perpetrated by attorneys. It demands proof of a prolonged scheme akin to bribery or jury tampering, while downplaying nondisclosure that strikes at the heart of adversarial fairness. As a result, litigants like Petitioner are left without recourse, even when post-judgment evidence reveals counsel's deceit directly influenced the outcome.

Even the Second Circuit's own case law concedes that the purportedly "absolute" rule is not impregnable when an officer of the court engages in misconduct of the sort alleged here. As this Court has long recognized in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246-47 (1944), fraud perpetrated by attorneys—officers of the court—can warrant equitable relief to preserve judicial integrity. The Second Circuit has echoed this principle, holding that fraud on the court encompasses that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner

its impartial task of adjudging cases. *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *see also Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995) (reiterating Kupferman and emphasizing attorney misconduct's potential to taint proceedings); *Gleason v. Jandrucko*, 860 F.2d 556, 559-60 (2d Cir. 1988) (same).

Yet, in application, this concession is routinely ignored. Despite evidence that Respondents' counsel concealed material evidence and made misrepresentations during discovery—directly hampering Petitioner's ability to present his claims—the courts below demanded a "repetitive campaign" of fraud, ignoring the officer-of-the-court dimension. This gap between stated principle and practice renders the rule indefensible, as it shields attorney misconduct while denying relief in cases like this one, where the fraud substantially impacted the litigation's fairness. *Certiorari* is warranted to resolve this inconsistency and clarify that Rule 60(d)(3) provides meaningful recourse against officer-of-the-court deceit, aligning with *Hazel-Atlas* and preventing the erosion of judicial trust.

This regime of rigidity not only contravenes the equitable purpose of Rule 60(d)(3) but also incentivizes gamesmanship in discovery, undermining the truth-seeking function of the courts.

B. The Conflict with the Third, Sixth, and Ninth Circuits.

In contrast to the Second Circuit, other courts of appeals recognize that the intentional concealment of

material evidence by an officer of the court strikes at the very heart of the judicial process.

In the Ninth Circuit, in *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128 (9th Cir. 1995), the court held that a lawyer's failure to disclose a relevant test video in response to discovery requests, while making misleading representations to the court, constituted fraud on the court. The Ninth Circuit recognized that counsel's participation in the suppression compromised the court's integrity, regardless of whether the judge was personally corrupted.

In the Third Circuit, in *Herring v. United States*, 424 F.3d 384 (3d Cir. 2005), the court acknowledged that egregious misconduct by officers of the court, including intentional concealment, can satisfy the savings clause.

In the Sixth Circuit, in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), the court found fraud on the court where government attorneys withheld exculpatory evidence, emphasizing that officers of the court owe a duty of candor that transcends the adversarial interests of their clients.

The Second Circuit's approach in Giurca is irreconcilable with *Pumphrey*. Had this case been litigated in the Ninth Circuit, the result would likely have been different. This geographic disparity in the integrity of federal judgments warrants this Court's intervention. This circuit split creates forum-dependent outcomes, where litigants in the Second Circuit face a higher bar for relief than elsewhere. *Certiorari* is essential to resolve this disparity and ensure uniform application of Rule 60(d)(3).

II. This Case Presents the Necessary Vehicle to Define "Fraud on the Court" in the Era of E-Discovery and Information Asymmetry.

The "fraud on the court" doctrine traces its lineage to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). In *Hazel-Atlas*, this Court vacated a judgment because a patent attorney ghostwrote an article to influence the court. This Court emphasized that "tampering with the administration of justice" warrants equitable relief without regard to strict time limits.

However, *Hazel-Atlas* involved the fabrication of evidence. The Second Circuit has narrowly cabined *Hazel-Atlas* to its facts, holding that suppression is distinct and less serious. This distinction is intellectually dishonest in the context of modern litigation.

In 1944, discovery was limited. Today, litigation involves terabytes of data. The "truth" of a case—especially in employment and fraud litigation—is often hidden within millions of emails. When a party produces thousands of pages of irrelevant "padding" (as Dr. Giurca alleged) while surgically withholding the ten emails that prove the case, they are manipulating the judicial machinery just as effectively as the attorney in *Hazel-Atlas*. In other words, suppression is the modern fabrication.

Under Federal Rule of Civil Procedure 26(g), an attorney certifies that a discovery response is complete. When Respondents' counsel stood before the Magistrate Judge and argued that Dr. Giurca was on a "fishing expedition" because "no evidence exists," they were

leveraging their status as officers of the court to validate a lie. The District Court relied on that representation to sanction Dr. Giurca and forced his dismissal.

By affirming the decision below, the Second Circuit effectively holds that Rule 26(g) violations, even when fraudulent and outcome-determinative, are not "fraud on the court." This eviscerates the rule and signals to the bar that discovery evasion is a low-risk, high-reward strategy.

III. The Decision Below Eviscerates the Protections of the False Claims Act by Validating "Blacklisting" Tactics.

The legal error below also has profound, ripple effects on the enforcement of the False Claims Act (FCA). The FCA relies on "private attorneys general" (relators) to expose fraud against the government. To protect these individuals, Congress enacted 31 U.S.C. § 3730(h), prohibiting retaliation.

"Blacklisting"—the dissemination of negative information to future employers—is the ultimate weapon against a medical whistleblower. It does not just end a job; it ends a career. The "Security Alert" in this case was the vehicle of blacklisting. It branded Dr. Giurca a "Security Threat," a label that renders a physician unemployable.

Indeed, the evidence concealed by Respondents—specifically, Lonnie Trotta's admission to the ORMC Security Director that Giurca was terminated for "threatening to expose" patient care issues—was the direct proof of retaliatory intent. By hiding this, Respondents made the retaliation claim appear frivolous.

If the Second Circuit's ruling stands, it provides a roadmap for corporate defendants to defeat FCA retaliation claims: first retaliate against the whistleblower (blacklist them). Second, conceal the evidence of the communication (emails/texts). Third, deny the existence of the evidence in court. Fourth, force a dismissal based on "lack of evidence." And fifth, keep the evidence hidden for one year and one day.

Under the Second Circuit's rule, once that year passes, the defendant has absolute immunity. Even if the whistleblower later finds the emails (as Dr. Giurca did), the court will say: "This is not fraud on the court; you should have found it sooner." This creates a safe harbor for fraud that Congress never intended and that this Court should not countenance.

IV. The Finality of Judgments Must Yield to the Integrity of the Courts when Dismissal is Procured by Officer Misconduct.

The courts below emphasized the "finality of judgments" and the fact that Dr. Giurca "chose" to settle. This reasoning rests on a fiction.

Indeed, a coerced "choice" is no waiver and Dr. Giurca's "choice" to dismiss was made under duress. He was facing monetary sanctions he could not afford, imposed by a Court that had been misled by Respondents into believing Giurca was the obstructer. The "consideration" for the dismissal—the waiver of these fees—was the fruit of the fraud. A contract (Stipulation of Dismissal) procured by fraudulent inducement is voidable. To enforce it in the name of "finality" is to enforce the fraud itself.

Equally important is that the court should never be an accomplice, knowing or otherwise to the perversion of justice. As this Court stated in *Hazel-Atlas*, the "public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." 322 U.S. at 246. When a court issues sanctions and accepts a dismissal based on a record fraudulently curated by one party, the court's own authority has been hijacked. The Second Circuit's refusal to correct this—labeling it a "private wrong"—leaves the District Court in the position of having been an unwitting accomplice to the destruction of a whistleblower's career.

Furthermore, the District Court attempted to minimize the misconduct by referring to the withheld evidence as a "lone email." This is a gross trivialization of the record. The "lone email" was the thread that unraveled the entire "Security Alert" distribution network. It led to the discovery of the text messages between Dr. Rojas and Ms. Baczewski, and the conversation between Mr. Trotta and Mr. Rodrigues.

In addition to this pivotal email, Respondents concealed hundreds of documents from the email inboxes of every security officer—more than 100 officers—to whom Lonnie Trotta disseminated the Security Alert *circa* April 2017. These withheld communications concern explanations for the Alert's creation, further illuminating its retaliatory intent and undermining Respondents' discovery denials. Moreover, as early as January 11, 2018, Trotta received a photograph of the Security Alert pinned to a wall at Montefiore's Wakefield campus, prompting an internal inquiry into how the image was leaked to Orange Regional Medical Center (ORMC).

This incident demonstrates Respondents' knowledge of the Alert's external publication well before the litigation commenced in December 2018, yet they concealed multiple emails related to this inquiry throughout discovery. Such pre-litigation awareness amplifies the fraud's scope, as it directly informed counsel's misrepresentations to the court.

In litigation, a single withheld document often constitutes the difference between summary judgment and a jury verdict. The materiality of the evidence, not the quantity, must drive the fraud on the court analysis. *Certiorari* is thus warranted to ensure that Rule 60(d)(3) serves its equitable purpose, vindicating judicial integrity over misplaced finality in cases where fraud has profoundly corrupted the process and silenced a whistleblower.

CONCLUSION

The Second Circuit's decision condones a strategy of discovery evasion that threatens the integrity of the federal civil justice system. By defining "fraud on the court" so narrowly as to exclude the intentional suppression of dispositive evidence by counsel, the court below has created a circuit split, undermined the protections of the False Claims Act, and weakened the ethical obligations of the bar.

This Court should grant the petition to reaffirm that truth is the touchstone of the judicial process, and that judgments procured through the active concealment of evidence by officers of the court cannot stand.

Dated: New Paltz, New York
January 19, 2026

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED SEPTEMBER 17, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of September, two thousand twenty-five.

No. 24-858

DR. DAN GIURCA,

Plaintiff-Appellant,

v.

MONTEFIORE HEALTH SYSTEM, INC., M.D. JEFFREY WEISS, M.D. CLAUS VON SCHORN, M.D. GARY ISHKANIAN,

Defendants-Appellees.

PRESENT:

RICHARD C. WESLEY,
RICHARD J. SULLIVAN,
MICHAEL H. PARK,
Circuit Judges.

Appendix A

SUMMARY ORDER

Appeal from an order of the United States District Court for the Southern District of New York. (Edgardo Ramos, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY **ORDERED, ADJUDGED, AND DECREED** that the March 20, 2024 order of the district court is **AFFIRMED**.

Plaintiff-Appellant Dan Giurca, a medical doctor, appeals from an order of the district court denying his motion under Federal Rule of Civil Procedure 60(d)(3) to reopen his previously dismissed claims against his former employer, Montefiore Health Systems, Inc. ("Montefiore"), and others (collectively, "Defendants") for violations of the federal False Claims Act and New York state law. Giurca contends that the district court overlooked newly discovered evidence revealing that Defendants engaged in fraud on the court. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we reference only as necessary to explain our decision to affirm.

On December 10, 2018, Giurca filed suit against Montefiore and three senior Montefiore physicians, alleging that they unlawfully retaliated against him after he reported malpractice at the hospital. He further alleged that Defendants defamed him and tortiously interfered with his contractual relationship with Orange Regional Medical Center ("ORMC"). In July and August 2020, Defendants filed several letters on the docket advising

the district court that Giurca had engaged in serious misconduct during discovery, including the late production of audio recordings and the improper redaction and alteration of those recordings. As a result, the district court imposed sanctions on Giurca and awarded attorneys' fees and costs to Defendants. On August 25, 2020, before Giurca had paid the discovery sanctions, the parties filed a joint stipulation of dismissal pursuant to Rule 41(a)(1)(A)(ii). The joint stipulation, which Giurca signed, dismissed with prejudice "all claims or causes of action that were or could have been asserted . . . by either party." J. App'x at 279.

On March 5, 2021, Giurca filed a motion pursuant to Rule 60(b)(3) to vacate the dismissal of the case. After leave was granted, Giurca filed that motion, arguing that Montefiore had withheld evidence in order to induce him to voluntarily dismiss his claims. In response, Montefiore served a Rule 11 motion for sanctions, after which Giurca withdrew his motion. Two weeks later, on June 28, 2021, Giurca sought leave to file a new motion to vacate the voluntary dismissal, this time premised on Rule 60(b)(2), based on "newly discovered evidence" produced in a separate action against ORMC. Supp. App'x at 62. The district court denied that request, finding that Giurca had not met the "onerous" burden that Rule 60(b)(2) imposes. *Giurca v. Montefiore Health Sys. Inc.*, No. 18-cv-11505 (ER) (BCM), 2021 U.S. Dist. LEXIS 123828, 2021 WL 2739061, at *4 (S.D.N.Y. July 1, 2021).

On June 21, 2023, Giurca attempted for the third time to vacate the voluntary dismissal and reopen his case, this

time pursuant to Rules 60(d)(3) and 60(b)(6).[1] Once again, Giurca alleged that newly discovered evidence — the same evidence referenced in his previous Rule 60(b)(2) motion — revealed that Montefiore deliberately withheld evidence and committed perjury in the original action, thereby perpetrating a fraud on the court. J. App'x at 1498-1505. A magistrate judge recommended denying this motion, concluding that Giurca had failed to produce clear and convincing evidence that counsel engaged in sufficient misconduct to trigger application of Rule 60 (d)(3), that Rule 60(b)(6) was not available to him because he had already sought relief on grounds covered by Rule 60(b)(2) and Rule 60(b)(3), and "[m]otions made pursuant to subsection (6) must be based upon some reason other than those stated in clauses (1)-(5)." *Id.* at 1682 (internal quotation marks omitted). The district court thereafter adopted the magistrate's report and recommendation. *Id.* at 1756. This appeal followed.

We review a district court's denial of relief under Rule 60(d)(3) for abuse of discretion. *See Marco Destin, Inc. v. Levy*, 111 F.4th 214, 218-19 (2d Cir. 2024). To warrant relief under Rule 60(d)(3), a party must demonstrate a "fraud on the court" that "seriously affect[ed] the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). In doing so, the plaintiff "must prove, by clear and convincing evidence, that the

1. While Giurca sought relief below under Rule 60(b)(6), he raises no arguments on appeal challenging the district court's order denying his Rule 60(b)(6) motion, and has therefore forfeited any challenge to that ruling. *See Revitalizing Auto Cmtys. Env't Response Tr. v. Nat'l Grid USA*, 10 F.4th 87, 100 n.9 (2d Cir. 2021).

defendant interfered with the judicial system's ability to adjudicate impartially and that the acts of the defendant [were] . . . of such a nature as to have prevented the plaintiff from fully and fairly presenting a case or defense." *Mazzei v. The Money Store*, 62 F.4th 88, 93-94 (2d Cir. 2023). Fraud on the court is distinct from fraud on an adverse party, and "embraces only that species of fraud which does[,] or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995) (internal quotation marks omitted); *see also Gleason*, 860 F.2d at 560 (noting that "fraud involving injury to a single litigant" generally will not meet the level of fraud on the court).

We conclude that the district court did not abuse its discretion in denying Giurca's Rule 60(d)(3) motion. Giurca contends that Defendants' counsel committed "fraud on the court" by deliberately concealing material evidence relevant to the case. But almost none of the evidence identified by Giurca was in the possession of Defendants, and the law is clear that Defendants have no obligation to produce evidence not in their "possession, custody, or control." Fed. R. Civ. P. 34(a)(1). At most, Giurca identifies a single email — from ORMC's security officer to Montefiore's director of security requesting information concerning a "flyer about Dr. Giurca" - that was in Defendants' possession and was arguably improperly withheld. J. App'x at 1468. But Giurca has produced no evidence to suggest that Defendants' failure to produce that email was intentional rather than inadvertent.

Clearly, the failure to produce a single email does not constitute a "deliberately planned and carefully executed scheme to defraud" the court. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S. Ct. 997, 88 L. Ed. 1250, 1944 Dec. Comm'r Pat. 675 (1944). While Defendants should have produced the email, Rule 60(d)(3) clearly requires more than simple nondisclosure. *See Gleason*, 860 F.2d at 560 ("fraud involving injury to a single litigant" will generally not meet the level of "fraud on the court.")

* * *

We have considered Giurca's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

/s/ Catherine O'Hagan Wolfe

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED MARCH 20, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

18-cv-11505 (ER) (BCM)

DAN GIURCA,

Plaintiff,

– against –

MONTEFIORE HEALTH SYSTEM, INC., M.D. JEFFREY WEISS, M.D. CLAUS VON SCHORN, AND M.D. GARY ISHKANIAN.,

Defendants.

OPINION & ORDER

RAMOS, D.J.:

Dan Giurca brought this case against Montefiore Health System, Inc. ("Montefiore"), Jeffrey Weiss, Claus Von Schorn, and Gary Ishkanian (collectively, "Defendants"), asserting claims under the federal False Claims Act ("FCA") and related state law claims, including a claim for defamation. Thee case has been closed since August 25, 2020, when the parties filed a stipulation of dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). Since then, Giurca has thrice

attempted to vacate that voluntary dismissal and reopen the case pursuant to Rule 60.

Before the Court is Magistrate Judge Barbara C. Moses' December 21, 2023 Report and Recommendation ("R&R") on the third of those attempts, in which Judge Moses recommended denying the motion to reopen. Doc. 139. For the reasons set forth below, the Court adopts the R&R. Giurca's motion to reopen is DENIED.

I. BACKGROUND

The Court assumes the parties' familiarity with the facts, particularly as Judge Moses thoroughly recounted them in her R&R. The Court summarizes Giurca's allegations only to the extent relevant to the instant motion.

Giurca, a psychiatrist, filed this suit on December 10, 2018 against his former employer, Montefiore, and three senior Montefiore physicians, alleging that he was forced to resign from his position at Montefiore Mount Vernon Hospital and thereafter barred from all Montefiore facilities in retaliation for whistleblowing on alleged patient neglect, Medicaid and Medicare fraud, and malpractice at the hospital. Doc. 139 at 1-2. He further alleges Montefiore then cost him his subsequent job at Orange Regional Medical Center ("ORMC"), which is part of a different hospital network, by creating a "security alert" with his photo, which it posted on the wall of the security office at a Montefiore facility in Wakefield. *Id.* at 2, 4. ORMC's chief of psychiatry saw the photo at the

Wakefield facility, which Giurca alleged damaged his reputation at ORMC and ultimately led to his dismissal from that hospital as well. *Id.* at 4.

Following several discovery disputes in which both sides accused the other of significant discovery misconduct and intentionally withholding relevant discovery, the Court imposed sanctions against Giurca for his discovery misconduct. *Id.* at 4-6. At a conference held on August 12, 2020 to determine the sanctions to impose against Giurca for manipulation and intentional withholding of evidence, the parties made the following representations to Judge Moses regarding the state of discovery:

> THE COURT: With the possible exception of discreet issues which come up at one or more of these depositions, is all document discovery now complete as far as you are concerned, Mr. Sadowski [then counsel for Giurca]?
>
> MR. SADOWSKI: I think there are, as defendants alluded to in a footnote to the correspondence to the Court, there are I believe two documents that defendants have yet to produce that they categorize as elusive.
>
> THE COURT: These are billing sheets, right?
>
> MR. SADOWSKI: Yes, Your Honor.
>
> THE COURT: All right, and those are the only missing documents that you're aware of?

> MR. SADOWSKI: Yes, Your Honor.
>
> THE COURT: All right, Ms. Gambardella [Defendants' counsel]?
>
> MS. GAMBARDELLA: Yes.
>
> THE COURT: Do you concur with that status report regarding discovery?
>
> MS. GAMBARDELLA: I do, with one additional remark, Your Honor, and the reason we categorize them as elusive, is they are aged, they are, we just can't find them, we're going back through servers and possible third party providers to see if we can find them. So there's been no lack of diligence in that regard, but otherwise I concur.

Doc. 96 at 5:12-6:11. Shortly thereafter, on August 25, 2020, the parties filed a stipulation of dismissal with prejudice. Doc. 139 at 7.

On March 5, 2021, six and a half months after the dismissal, Giurca moved to vacate his voluntary dismissal pursuant to Rule 60(b)(3), which permits the Court to relieve a party from a final judgment for "fraud," "misrepresentation," or "misconduct by an opposing party." *Id.* at 9. Repeating allegations of discovery misconduct already made, Giurca alleged that Defendants withheld evidence and perjured themselves at their depositions. *Id.* at 9-10. Defendants served a motion for

Rule 11 sanctions on Giurca pursuant to Rule 11(c)(2)'s safe harbor provision. *Id.* at 10. Giurca withdrew the Rule 60 motion three days prior to the expiration of the safe harbor period. *Id.*

But, two weeks later, on June 28, 2021, Giurca again sought leave to file a vacatur motion, this time pursuant to Rule 60(b)(2), which permits the Court to relieve a party from a final judgment based on "newly discovered evidence." *Id.* at 10. In support of his motion, Giurca submitted emails produced in his parallel litigation against ORMC but which Montefiore never produced in the instant litigation, alleging the emails demonstrated that several witnesses had perjured themselves at their depositions. *Id.* at 10-12. Judge Moses denied the motion on July 1, 2021 on the basis that Giurca failed to meet his heavy burden under Rule 60(b)(2) because a diligent plaintiff would have taken steps to obtain emails from ORMC before voluntarily dismissing the case. *Id.* at 12. She also noted that the emails would not have changed the outcome of the case in any event, given that he had ample other evidence of Montefiore's alleged retaliation, and he chose the outcome for himself through the voluntary dismissal. *Id.* at 12-13. Giurca did not file any objections to Judge Moses' decision, nor seek reconsideration. *Id.* at 13.

But on June 21, 2023, nearly two years later, Giurca again moved to vacate his voluntary dismissal, again arguing that newly discovered evidence showed that deponents committed perjury, and Montefiore deliberately concealed that evidence. *Id.* at 13. Giurca largely attached the same evidence submitted with his second motion, but

his arguments in this instance were pursuant to Rule 60(d)(3), rather than 60(b)(2) or (b)(3), which permits the Court to set aside a judgment for "fraud on the court." *Id.* at 13-15.

Parsing Giurca's voluminous submissions, Judge Moses found that Montefiore had no access to, let alone responsibility to produce, most of the evidence Giurca alleges Montefiore intentionally withheld. *Id.* at 22-23. But there was a single email that should have been produced in discovery but was not ("the Email"). *Id.* at 22. Judge Moses stated that she "does not condone" Montefiore's failure to produce the Email, but "Rule 60(d)(3) 'cannot be read to embrace any conduct of any adverse party of which the court disapproves.'" *Id.* at 23-24 (quoting *Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972)). She noted that the Second Circuit has held that allegations of nondisclosure of discovery evidence or perjury are not bases for vacatur under Rule 60(d)(3) because they are, "at worst, 'a fraud upon a single litigant' rather than 'a fraud upon the Court.'" *Id.* at 24 (collecting cases). Judge Moses further observed that any alleged discovery misconduct "could not have interfered with the [c]ourt's ability to perform its impartial task of adjudging cases because the [c]ourt was never asked to perform that task":

> Giurca did not lose this case at trial, or on a motion for summary judgment, or as a result of any other merits adjudication. Nor was he ever sanctioned under Rule 11. Instead, faced with garden-variety discovery sanctions, he executed a stipulation of dismissal pursuant to

> Rule 41(a)(1)(A)(ii), which required no judicial decision-making. Unsurprisingly, therefore, [Giurca] does not explain how [D]efendants' alleged misconduct affected the [c]ourt's adjudication of this case, as opposed to his own litigation decision-making.

Id. at 24 (internal citations and quotation marks omitted). Accordingly, as "[t]here must be an end to litigation someday," and Giurca made a "free, calculated, [and] deliberate" choice to dismiss his case, Judge Moses denied his motion on December 21, 2023. *Id.* at 25 (citation omitted).

Gircua submitted an objection to Judge Moses' R&R on January 4, 2024 (Doc. 140), to which Defendants filed an opposition on January 18, 2024 (Doc. 141).

II. LEGAL STANDARD

A district court reviewing a magistrate judge's R&R "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Parties may raise "specific," "written" objections to the report and recommendation "[w]ithin fourteen days after being served with a copy." *Id.; see also* Fed. R. Civ. P. 72(b)(2). A district court reviews *de novo* those portions of the report and recommendation to which timely and specific objections are made. 28 U.S.C. § 636(b)(1)(C); *see also United States v. Male Juv.*, 121 F.3d 34, 38 (2d Cir. 1997). The district court may adopt those parts of the report and recommendation to which no party has timely objected,

provided no clear error is apparent from the face of the record. *Lewis v. Zon*, 573 F. Supp. 2d 804, 811 (S.D.N.Y. 2008). The district court will also review the R&R for clear error where a party's objections are "merely perfunctory responses" argued in an attempt to "engage the district court in a rehashing of the same arguments set forth in the original petition." *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) (citations and internal quotation marks omitted).

III. DISCUSSION

Giurca makes only one objection to the R&R: that Judge Moses "trivialized the significance" of the fact that Montefiore's counsel represented to Judge Moses at the August 12, 2020 conference that Montefiore had produced all relevant documents, even though the Email had not been produced. Doc. 140 at 12. Giurca argues that, if he had the Email, he would have had evidence that the security alert was circulated outside Montefiore to support his claim for defamation. *Id.* at 12-13. By failing to produce the Email, claiming that his claims were baseless, and threatening to seek sanctions, Giurca alleges Montefiore committed "attorney-sanctioned conduct [that] may constitute fraud on the court." *Id.* at 13. In other words, Giurca argues that the added fact of Montefiore's counsel's involvement in the withholding of the Email transforms it into a fraud upon the court within the meaning of Rule 60(d)(3). *Id.* at 13-14.[1]

1. The remainder of Giurca's brief rehashes the arguments in his original motion and is therefore reviewable for only clear error, which the Court does not find here. *See Ortiz*, 558 F. Supp. 2d at 451.

Appendix B

Fraud on the court is "fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988). The movant bears the burden of proving fraud upon the court by clear and convincing evidence. *Duka v. Alliance Tri-State Constr., Inc.*, 20-cv-6648 (ER), 2021 U.S. Dist. LEXIS 186975, at *10-11 (S.D.N.Y. Sep. 29, 2021). A party commits fraud on the court when it knowingly acts to "set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense." *Id.* (quoting *McMunn v. Memorial Sloan-Kettering Cancer Ctr.*, 191 F. Supp. 2d 440, 445 (S.D.N.Y. 2002)). It requires more than just a single instance of perjury. *Id.* at *10. Rather, courts in this Circuit generally require a "prolonged and calculated" scheme, "repetitive campaigns," or other similarly lengthy pattern of misbehavior before finding fraud on the court. *Id.* at *12-13 (collecting cases); *see also LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 135 (S.D.N.Y. 2009) (noting that "bribing a judge, tampering with a jury, and hiring an attorney for the purpose of influencing a judge are examples of fraud upon the court," but neither "allegations of nondisclosure during pretrial discovery" nor "[a]fter-discovery evidence of alleged perjury by a witness [or other fabricated evidence] is" enough (alternations in original)), *aff'd* 367 F. App'x 180 (2d Cir. 2010); *Azkour v. Little Rest Twelve*, No. 10-cv-4132 (RJS), 2017 U.S. Dist. LEXIS 65765, 2017 WL 1609125, at *8 (S.D.N.Y. Apr. 28, 2017) (noting that fraud on the court is distinct from fraud on an adverse party).

Giurca's objection to the R&R fails for several reasons. First, fraud upon the court requires intentionality. *See Duka*, 2021 U.S. Dist. LEXIS 186975, at *10-11 (describing fraud upon the court as requiring a party to "act[] knowingly," to "sentiently set in motion some unconscionable scheme," or otherwise "deliberately," "intentionally[,] and repeatedly" act). Giurca has not demonstrated that the failure to produce the Email was intentional rather than inadvertent. At the August 12, 2020 conference—which was held primarily to adjudicate *Giurca's* extensive and intentional discovery misconduct—the Court first asked Giurca's counsel whether document discovery was complete. Doc. 96 at 5:12-6:11. After he indicated that only two documents were outstanding, Defendants' counsel concurred with Giurca's counsel and noted that the outstanding documents were difficult to find despite extensive searches. *Id.* Neither party discussed the production of emails. There is nothing in the record before the Court to suggest that the failure to produce the Email was intentional, as opposed to inadvertent, particularly given the innumerous discovery issues in the case, or that Defendants' counsel had awareness of the Email. That is far from the clear and convincing evidence necessary to show fraud on the court. *See Duka*, 2021 U.S. Dist. LEXIS 186975, at *10-11.

Second, *even if* Defendants' counsel's inaccuracy as to the completion of discovery was intentional, that is still not the "prolonged and calculated" scheme, "repetitive campaigns," or other similarly lengthy pattern of misbehavior necessary for a finding of fraud on the court. 2021 U.S. Dist. LEXIS 186975, [WL] at *12-13. And Giurca has provided no authority that a single misrepresentation—even if by counsel, rather than by

a litigant—is enough for fraud upon the court. A single instance of perjury is not fraud upon the court, *see* 2021 U.S. Dist. LEXIS 186975, [WL] at *10, nor is pretrial discovery nondisclosure during pretrial or fabricated evidence, *LinkCo*, 615 F. Supp. 2d at 135. And the alleged intentional withholding of the Email does not rise to a level like that of "bribing a judge, tampering with a jury, [or] hiring an attorney for the purpose of influencing a judge." *See id.* Accordingly, Giurca has simply failed to show fraud upon the court.

Finally, *even if* the misrepresentation was intentional *and* a single misrepresentation could constitute fraud upon the court, it is nonetheless fatal to Giurca's argument that the case was disposed of based on *his* voluntary dismissal. As Judge Moses noted, any alleged discovery misconduct "could not have interfered with the [c]ourt's ability to perform its impartial task of adjudging cases because the [c]ourt was never asked to perform that task." Doc. 139 at 24. No judicial decision-making was required because Giurca voluntarily dismissed the case. *Id.* at 24-25. At most, the misconduct affected Giurca's litigation decision-making, rather than any court action. *Id.* at 24. But fraud on an adverse party fraud is not the same as fraud upon the court. *Azkour*, 2017 U.S. Dist. LEXIS 65765, 2017 WL 1609125, at *8.

Accordingly, the Court agrees with Judge Moses that Giurca has failed to satisfy his heavy burden to show fraud upon the court and properly denied his motion to reopen.[2]

2. In the conclusion of Defendants' response in opposition to Giurca's objections, they ask that the Court, in addition to adopting the R&R in full, also "enter an Order prohibiting [Giurca] from initiating any attempts to reopen this case without first

IV. CONCLUSION

For the foregoing reasons, Giurca's motion to reopen is DENIED. The Clerk of Court is respectfully directed to terminate the motion (Docs. 135, 140).

It is SO ORDERED.

Dated: March 20, 2024
New York, New York

/s/ Edgardo Ramos
EDGARDO RAMOS, U.S.D.J.

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seeking Court approval [and] award Defendants their costs and disbursements incurred in opposing [Giurca's] baseless motion." Doc. 141 at 23. Those issues were not raised before Judge Moses nor mentioned anywhere in the R&R—which also means Giurca never had an opportunity to respond to the requests. Accordingly, the Court will not decide the requests here.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, FILED DECEMBER 21, 2023

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

18-CV-11505 (ER) (BCM)

DAN GIURCA,

Plaintiff,

-against-

MONTEFIORE HEALTH SYSTEM, INC., *et al.*,

Defendants.

Filed December 21, 2023

REPORT AND RECOMMENDATION TO THE HON. EDGARDO RAMOS

BARBARA MOSES, United States Magistrate Judge.

This case has been closed since August 25, 2020, when the parties filed a stipulation of dismissal with prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii). Since then, plaintiff has made three attempts to vacate that voluntary dismissal and reopen the case pursuant to Rule 60 of the Federal Rules of Civil Procedure. Now before me for

report and recommendation is the third such attempt, in the form of a letter-motion filed on July 7, 2023 (Pl. Ltr.) (Dkt. 135), in which plaintiff seeks relief under Fed. R. Civ. P. 60(b)(6) and (d)(3) on the ground that he can "now demonstrate" that two non-party witnesses gave false testimony during their depositions in 2020. For the reasons that follow, I recommend, respectfully, that the motion be denied.

I. BACKGROUND

A. Plaintiff's Allegations Against Montefiore

Plaintiff Dan Giurca, a psychiatrist, filed this action on December 10, 2018, against his former employer Montefiore Health Systems, Inc. (Montefiore) and three individual Montefiore physicians in senior positions,[1] asserting claims under the federal False Claims Act (FCA) and related state law claims, including a claim for defamation. In broad outline, plaintiff alleged that he was forced to resign from his position at Montefiore Mount Vernon Hospital (Montefiore Mount Vernon) in January 2017, and thereafter "blacklisted" (that is, barred from all Montefiore facilities), in retaliation for his "bringing to light and attempting to correct" multiple instances of "patient neglect," "defraud[ing] the Medicaid and Medicare Programs," and "malpractice" at Montefiore

1. The individual defendants were Dr. Claus von Schorn, the Director of Psychiatry Services at Montefiore Mount Vernon; Dr. Jeffrey Weiss, Vice President of Medical Affairs at Montefiore; and Dr. Gary Ishkanian, Medical Director at Montefiore Mount Vernon. Am. Compl. (Dkt. 35) ¶¶ 6-9.

Mount Vernon. Am. Compl. ¶¶ 69-75. He further alleged that Montefiore cost him his next job, at Orange Regional Medical Center (ORMC), by portraying him as a "security risk" in a manner that came to attention of his ORMC supervisor, damaged his reputation at ORMC, and ultimately led to his dismissal from ORMC. *Id.* ¶¶ 72-75.

Plaintiff's Amended Complaint was lengthy and detailed. His allegations are summarized here only to the extent they are relevant to the pending vacatur motion.

During his tenure at Montefiore, plaintiff made numerous complaints about his co-workers and superiors, including Drs. von Schorn, Ishkanian, Perlmutter, Hussain, Hernandez, Nager, Gao, Chen, Walsh, Scher, Madore, Hong, and Barone. Am. Compl. ¶¶ 15-17, 25-40, 44, 52-54, 66. Many of these complaints were "recorded on email and audio recordings." *Id.* ¶ 20.[2] However, plaintiff alleged, Montefiore failed to act against these doctors. Instead, Dr. Giurca was given an FPPE (which the Court understands to mean a Focused Professional Practice Evaluation) containing "false accusations" about his own professional competence. *Id.* ¶ 43. These false accusations, made on August 1, 2016, were so upsetting that Dr. Giurca became "sick with stress" and took sick leave on August 2, 3, and 4, 2016. *Id.* ¶¶ 45-46.

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2. Dr. Giurca made surreptitious audio recordings of many of his interactions with co-workers and supervisors. Plaintiff had "2 separate voice recorders" for this purpose, and also, on occasion, used one of his cellphones. *See* Sadowski Decl. (Dkt. 93) ¶¶ 37-38; Giurca Decl. (Dkt. 119-1) ¶ 20.

He did not, however, cease his complaints. Instead, while out sick, plaintiff reported that Dr. von Schorn, his direct supervisor, "plagiarized Dr. Giurca's clinical notes," and "accused Dr. [v]on Schorn of fraud for the false information in the plagiarized note." Am. Compl. ¶ 49. After that, von Schorn put Giurca on "a probation plan based on fraudulent charges," *id.*, and on August 24, 2016, Dr. Weiss "threatened termination of [plaintiff's] employment if he continued to complain[.]" *Id.* ¶¶ 50, 67.

Plaintiff continued to complain. At some point "[a]fter August 25, 2016," he sent written complaints to the New York State Office of Mental Health (OMH) and Department of Health (DOH), among other agencies. Amend. Compl. ¶ 67.[3] On September 6, 2016, he reported "several Montefiore psychiatrists" for taking superficial notes. *Id.* ¶ 52. On September 11, 2016, he "reported

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3. In fact, Dr. Giurca wrote to OMH as early as August 11, 2016, reporting that Drs. Walsh and Sher neglected patients and that Drs. von Schorn, Perlmutter, and Hussain "plagiarized" his evaluation notes, "without giving credit to the source." (Dkt. 82-1, at ECF p. 1.) However, Dr. Giurca took pains to conceal this correspondence from Montefiore, writing, "As a whistleblower, due to fear of further retaliation, I prefer that you do not disclose my identity." (*Id.*)

On June 7, 2017, DOH wrote to plaintiff to inform him that it had assessed Montefiore Mount Vernon and that "[n]o regulatory deficiencies were identified specific to the issues raised in your individual complaint." (Dkt. 82-2 at ECF p. 2.) Dr. Giurca later characterized DOH's conclusions as "demonstrably erroneous," and attributed them to defendants having "deliberately concealed" the underlying evidence from DOH. Giurca Decl. ¶ 22.

multiple instances of physicians, Drs. Walsh, Hussain and [v]on Schorn, failing to renew medications[.]" *Id.* ¶ 53. On October 17, 2016, he complained to Dr. von Schorn about Dr. Nager, *id.* ¶ 66, and then complained to Dr. Weiss about Dr. von Schorn's response to his complaint about Dr. Nager (which he had surreptitiously recorded in order to capture von Schorn "downplaying" his concerns). *Id.* ¶¶ 66-67.[4]

Eventually, Dr. Giurca was "forced to resign to avoid dying from complications of high blood pressure" caused by the stress of defendants' retaliatory campaign. Amend. Compl. ¶ 45. On January 6, 2017, he started a new job at ORMC. *Id.* ¶ 72.[5] Two and a half months later, on March 30, 2017, Dr. Weiss formally "terminated Dr. Giurca's moonlighting privileges" at Montefiore, "under the pretext that Dr. Giurca did not show that he had malpractice insurance[.]" *Id.* ¶ 50. According to plaintiff, this too was "in retaliation for his whistleblowing activities." *Id.* ¶ 71.

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4. Additionally, plaintiff complained to Theresa Forget, the Director of Human Resources, and Dr. Steven Safyer, the President of Montefiore, about Dr. von Schorn's response to his complaint about Dr. Nager. Amend. Compl. ¶¶ 69-70. When Forget determined that plaintiff's complaints "were not substantiated," *id.* ¶ 70, Dr. Giurca filed another complaint – against Ms. Forget – accusing her of "covering up the treatment failure as well as the retaliation[.]" *Id.*; *see also* Pl. Ltr. Ex. 20 (Dkt. 135 at ECF p. 120) (suggesting, sarcastically, that Ms. Forget needed treatment for her "apparent hearing impairment," because the audio recording he sent her was "quite clear and blatant").

5. Plaintiff's employment contract (Dkt. 22-2) was with GHVHS Medical Group, P.C. (GHVHS), the physician practice associated with ORMC.

When Montefiore "blacklisted" Dr. Giurca, it created a "security alert" containing his photo. *Id.* ¶ 73.[6] The alert was posted on the wall of the security office at a Montefiore facility in Wakefield. *Id.* On September 26, 2018 (more than a year and a half after plaintiff joined ORMC), Dr. Cesar Rojas, who was ORMC's Chief of Psychiatry, told plaintiff that he had seen the security alert in Wakefield, and asked "what he had done to be exposed on a blacklist." *Id.* ¶¶ 73, 75. Dr. Giurca replied that he had "reported fraudulent practices at Montefiore." *Id.* ¶ 73. Shortly thereafter, on October 4, 2018, Giurca was "terminated without cause" from ORMC. *Id.* ¶ 75.[7]

B. The Dismissal of This Action

Discovery commenced in 2019, under my supervision (*see* Dkt. 47), and generated a series of disputes requiring judicial resolution. The last such dispute was initiated on July 13, 2020 – after general fact discovery closed – by plaintiff, who moved to compel defendants to produce

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6. The security alert identified Dr. Giurca as a "Terminated Associate" and stated that he was "not allowed on any Montefiore property unless he is seeking medical care." (Dkt. 125 at ECF p. 4.) A notice at the bottom of the alert requested anyone who saw Dr. Giurca at a Montefiore facility to "notify Lonnie Trotta," Montefiore's Director of Security, and gave his contact information. (*Id.*)

7. In fact, as discussed below, Dr. Rojas saw the security alert, and discussed it with others at ORMC, in January 2018. Plaintiff did not lose his ORMC job for another nine months – by which time Dr. Rojas had left ORMC and Dr. Ulrick Vieux had become Chief of Psychiatry.

the written findings made by the New York DOH (DOH Findings) after DOH assessed Montefiore Mount Vernon. Plaintiff argued that the DOH Findings might show "whether Defendants had knowledge of Dr. Giurca's complaints to OMH and DOH." (Dkt. 82 at 1.) Defendants opposed the motion, sought an expense award pursuant to Fed. R. Civ. P. 37(a)(5), and cross-moved for additional relief related to Dr. Giurca's failure to produce numerous items of discovery until July 2020, after fact depositions had been completed – including, among other things, the June 7, 2017 letter from DOH and 83 additional surreptitious audio recordings of Montefiore personnel. (Dkt. 86.) As a remedy for the late disclosure, defendants sought a further deposition of Dr. Giurca and a forensic examination of his recording devices, cellphones, and laptop, "to be assured that plaintiff has not withheld any other probative information or documents[.]" (*Id.* at 4.)

On July 29, 2020, I denied plaintiff's motion, ruling that the request was untimely and that, in any event, there was "no reason to believe" that the DOH Findings would shed light on whether defendants "knew or suspected that plaintiff himself had instigated the DOH inspection." (*See* Dkt. 90 at 1-3.) I then scheduled a conference as to defendants' request for an award of expenses and a forensic exam, *id.* at 3-4, and directed the parties to submit additional briefing, including a declaration by plaintiff's attorney, Robert W. Sadowski, "detailing his efforts to ensure that plaintiff timely produced all discoverable documents (including audio recordings)." (*Id.* at 4.)

In his declaration, attorney Sadowski denied that plaintiff intentionally withheld any discoverable items,

but admitted that he was dependent on plaintiff to search his own files and forward potentially discoverable material to counsel, and that plaintiff failed to send him "multiple audio recordings" until July 2020. Sadowski Decl. ¶ 28. In some instances, this was because plaintiff did not previously think they were "vital" or "relevant to retaliation." *Id.* ¶¶ 30, 32. In one instance, Dr. Giurca produced a partial audio recording of a conversation he had with Dr. von Schorn on October 10, 2016, but failed to produce the "second half," which he "had forgotten about." *Id.* ¶ 35.[8] Two of the late-produced audio recordings were discovered on "an old Samsung S2 phone" that Dr. Giurca used in 2016 but did not search until July 2020. *Id.* ¶ 39. Another was found, at the same time, in a "family" folder on Dr. Giurca's laptop which had not previously been searched. *Id.* ¶ 40. As for the June 7, 2017 letter from DOH, Dr. Giurca failed to forward it to counsel until after the depositions because he "did not check every single box that was in [his] attic." *Id.* ¶ 33. Not all of the discovery failures were Dr. Giurca's. Sadowski admitted that nine of the 83 late-produced audio recordings were sent to him in a timely manner but were "inadvertently omitted" from a production that his firm made on July 29, 2019. *Id.* ¶ 43-44.

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8. In their responding letter-brief, filed on August 10, 2020, defendants described an even more troubling episode. After timely producing "a 0:47 long recording which sounded complete," Dr. Giurca produced "a longer recording with a different file name" in July 2020, of which the 0:47 long recording was a "fragment." (Dkt. 94 at 2.) "When asked at his [renewed] deposition why he did not produce the complete recording in 2019, plaintiff said that he trimmed the recording to include only what he believed a jury would need to hear." (*Id.*)

On August 12, 2020, after hearing argument (*see* Dkt. 96), I granted defendants' motion in part, directing plaintiff to turn over his cellphones (but not his laptop) to his attorney, "who shall arrange for a competent information technology (IT) professional to examine the cellphones for any discoverable audio recordings, emails, text messages, or other ESI not yet produced and extract such material for production to defendants, all at plaintiff's expense." 8/12/20 Order (Dkt. 95) ¶ 2. Additionally, I ruled that defendants were "entitled to their reasonable expenses, including attorneys' fees," incurred in "responding to plaintiff's letter-motions," "pressing their own request for discovery sanctions," and "conducting the renewed deposition of plaintiff, which was necessitated by his failure to timely produce audio recordings and other relevant evidence," *id.* ¶ 3, and directed defendants to file their fee application by August 24, 2020. *Id.*

No fee application was filed. Instead, on August 25, 2020, the parties filed a Stipulation of Dismissal with Prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii). (Dkt. 100.) The stipulation was signed by plaintiff personally (as well as by attorney Sadowski), and it dismissed "all claims or causes of action that were or could have been asserted [in this action] by either party." (*Id.*)

C. Plaintiff's Lawsuits Against ORMC

The instant action is not plaintiff's only lawsuit. He has also sued ORMC, several senior ORMC administrators,

three other hospitals,[9] and the estate of his former lawyer.[10] Before recounting plaintiff's efforts to vacate the voluntary dismissal of the instant action, I briefly summarize the relevant features of his litigation against ORMC.

On February 5, 2019, Plaintiff sued ORMC and three senior ORMC administrators in this Court, asserting

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9. On August 19, 2019, plaintiff sued Good Samaritan Hospital (Good Samaritan), Bon Secours Charity Health System (BSCHS), and Westchester Medical Center Health Network (WMC), asserting claims under Title VII of the Civil Rights Act of 1964 and related state claims. Plaintiff alleged that in early 2017 BSCHS (a Catholic hospital) failed to hire him as a "moonlighter" because he objected to its code of conduct, which "he believed to be at odds with his own religious beliefs." Am. Compl. (Dkt. 21) ¶¶ 16-30, *Giurca v. Good Samaritan Hosp.*, No. 7:19-CV-7761 (S.D.N.Y. Feb. 10, 2020). Thereafter, defendants allegedly "blacklisted" Dr. Giurca "from all positions" in the WMC network, in retaliation for his "protected activity" in 2017, *id.* ¶¶ 44, and as a result he was not hired by Good Samaritan in 2018 or WMC in 2019. *Id.* ¶¶ 33-43, 49-54. On March 23, 2021, the Hon. Cathy Seibel, United States District Judge, dismissed all of plaintiff's claims except for his Title VII retaliation claim. On January 18, 2023, after discovery, Judge Seibel granted summary judgment to defendants on the retaliation claim. Op. & Order (Dkt. 104) at 27, *Giurca v. Good Samaritan Hosp.* (Jan. 18, 2023). Plaintiff has appealed that ruling.

10. On December 29, 2022, plaintiff sued the estate of Robert Sadowski for malpractice. In that case, plaintiff alleges that he signed the August 25, 2020 stipulation of dismissal "under coercion and duress" from his late attorney. *See* Ver. Compl. (Doc. 5) ¶¶ 8, 10, *Giurca v. Estate of Sadowski*, Index No. 160500/2023 (N.Y. Supr. Ct., N.Y. Co. June 2, 2023). The case remains pending.

claims under the FCA and related common law claims, including a claim for defamation. Plaintiff alleged that ORMC fired him in retaliation "for his bringing to light and attempting to correct Defendants' violations of the Federal and State False Claims Acts, which resulted in patient harm and abuse and defrauded the Medicaid and Medicare Programs as well as other federally and state-funded programs. Plaintiff also witnessed and reported to Defendants the neglect of patients and malpractice." Second Amend. Compl. (Dkt. 32) ¶ 1, *Giurca v. Orange Reg'l Med. Ctr.*, No. 19-CV-1096 (hereafter *Giurca v. ORMC I* LEXIS 209198.[11] According to plaintiff, it was Dr. Vieux who acted "with all deliberate speed to eliminate Dr. Giurca" and succeeded in doing so on October 4, 2018, just three days after Vieux became Chief of Psychiatry. *Id.* ¶¶ 40, 47. Dr. Vieux acted "in retaliation for [plaintiff's] whistleblowing activity." *Id.* ¶ 69. Moreover, on the day plaintiff was fired, he was "barred from the hospital" and Dr. Vieux "requested [a] security escort to his car," which was "an attempt to further smear Dr. Giurca." *Id.* ¶ 64. Thereafter, ORMC "poisoned Dr. Giurca's opportunity for a position at a major hospital in another County" by suggesting that he was fired "for cause." *Id.* ¶ 49. As a result, plaintiff did not land the new job. *Id.*

On December 4, 2019, the Hon. Louis L. Stanton, United States District Judge, dismissed plaintiff's federal

11. The individual defendants were Dr. Vieux, who succeeded Dr. Rojas as Chief of Psychiatry at ORMC; Jerry Dunlavey, Dr. Giurca's "administrative supervisor" at GHVHS; and Dr. Gerard Galarneau, President of Garnet Health, the successor to GHVHS. Second Amend. Compl. ¶¶ 8-11, *Giurca v. ORMC I*. Plaintiff did not sue Dr. Rojas, who "tried to protect Dr. Giurca." *Id.* ¶ 40.

FCA claim with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6), and declined to exercise supplemental jurisdiction over his state law claims. *See* Mem. & Order (Dkt. 40) at 8, *Giurca v. ORMC I* (Dec. 4, 2019).

On January 2, 2020, Dr. Giurca filed substantially the same case (minus the federal claim), against the same defendants, in state court. There, plaintiff alleged that ORMC fired him in retaliation "for his bringing to light and attempting to correct Defendants' violations of the New York State False Claims Act [NYFCA], which resulted in patient harm and abuse and defrauded the New York State Medicaid Program as well as other government programs." Compl. (Doc. 1) ¶ 1, *Giurca v. Orange Regional Med. Ctr*, Index. No. EF00271-2020 (hereafter *Giurca v. ORMC II*) (N.Y. Supr. Ct., Orange Co. Jan. 2, 2020).

On July 13, 2020, the Hon. Craig Stephen Brown, A.J.S.C., dismissed plaintiff's NYFCA claim, along with some of his common law claims, pursuant to N.Y.C.P.L.R. § 3211(a)(7). *See* Dec. & Order (Doc. 30), *Giurca v. ORMC II* (July 13, 2020). On August 10, 2020, plaintiff served an amended complaint, asserting a retaliation claim under New York Labor Law §§ 740-41, as well as related common law claims, including a claim for defamation. Plaintiff now alleges that ORMC fired him in retaliation "for his bringing to light and attempting to correct Defendants' abuse and harm to patients in a health care facility. Plaintiff witnessed and reported to Defendants the neglect of patients and malpractice[.]" Corr. Amend. Compl. (Doc. 45) ¶¶ 1, 45, *Giurca v. ORMC II* (Aug. 10, 2020). Plaintiff continues to allege that it was Dr. Vieux who engineered

his dismissal from ORMC and ruined his reputation, and that Vieux did so in retaliation for his whistleblowing activity. *Id.* ¶¶ 36, 43, 45, 59-60, 66, 71. *Giurca v. ORMC II* remains pending.

D. First Vacatur Attempt

On March 5, 2021 – six and a half months after dismissing this action – plaintiff retained new counsel and sought leave (which was granted) to move to vacate his voluntary dismissal pursuant to Fed. R. Civ. P. 60(b)(3), which permits the Court, in its discretion, to relieve a party from a final judgment or order on grounds of "fraud," "misrepresentation," or "misconduct by an opposing party." (*See* Dkts. 103, 107.) In his moving papers, filed on May 3 and 4, 2021 (Dkts. 116, 119), plaintiff argued principally that defendants' counsel committed discovery misconduct prior to the voluntary dismissal – including "hiding damaging discoverable evidence" concerning the Giurca security alert – and that the individual defendants perjured themselves at deposition, which "prevented [plaintiff] from fully and fairly presenting his case." Pl. Rule 60(b)(3) Mem. (Dkt. 119-2) at 6, 9, 12-15. Plaintiff made no claim that the alleged discovery misconduct and perjury was unknown to him during the pendency of the case. Rather, he faulted his prior counsel, Sadowski, for "fail[ing] to inform the judge" about it. Pl. Rule 60(b)(3) Mem. at 12. In his lengthy supporting affidavit, Giurca also blamed Sadowski for failing "to fully inform Plaintiff of discovery rules." Giurca Decl. ¶ 19.

On May 24, 2021, defendants served on plaintiff, but did not file, a sanctions motion pursuant to Fed. R. Civ. P.

11. (*See* Dkt. 121.) On June 11, 2021 (three days prior to the expiration of Rule 11(c)(2)'s 21-day safe harbor), plaintiff made a request to withdraw his Rule 60(b)(3) motion (Dkt. 122), which the Court granted. (Dkt. 123.)

E. Second Vacatur Attempt

Two weeks later, on June 28, 2021, plaintiff again sought leave to file a vacatur motion, this time pursuant to Fed. R. Civ. P. 60(b)(2), which permits the Court, in its discretion, to relieve a party from a final judgment or order based on "newly discovered evidence." In his moving letter-brief, plaintiff argued that he had newly-discovered evidence, consisting of emails produced on June 15, 2021 in *Giurca v. ORMC II*, showing that both of his ORMC supervisors – Dr. Rojas and Dr. Vieux – gave "perjurious" testimony in 2020 when they sat for deposition in this action as non-party witnesses. Pl. Rule 60(b)(2) Mtn. (Dkt. 125) at ECF pp. 1-2. Plaintiff attached the newly-discovered emails, *id.* at ECF pp. 3-12, along with a compendium of "Rojas Perjury" and "Vieux Perjury," *id.* at ECF pp. 13-19, in which he listed, by page and line, the statements made by Drs. Rojas and Vieux at deposition that were inconsistent with or undercut by the newly-produced ORMC emails.

The centerpiece of plaintiff's second vacatur attempt was a January 11, 2018 email from Rosemary Baczewski, a senior administrator at ORMC, to Dr. Galarneau and other ORMC-affiliated personnel, including Dr. Rojas, stating that Miguel Rodrigues, a security official at ORMC, contacted Montefiore's head of security regarding "the

picture Dr. Rojas was sent," meaning the Giurca security alert (a copy of which was attached to the email). *See* Pl. Rule 60(b)(2) Mtn. at ECF pp. 3-4. Baczewski continued: "The information in the picture is accurate. The doctor wrote a letter threatening to expose the way the hospital treats the psych patients and working conditions. They didn't renew his 90 day contract and only let security know as a term employee." *Id.* at ECF p. 3. Baczewski concluded by thanking Dr. Rojas "for advising me" and thanking "Miguel for following up with Montefiore." *Id.*

Plaintiff also highlighted an October 3, 2018 email from Dr. Vieux to various ORMC officials (with a "cc" to Dr. Rojas), stating, "I am concerned about my safety with regards to Dr. Giurca," who "has been sending me accusatory emails and has contacted my program coordinator and at least one of the psychiatry residents to my knowledge. He has created a hostile work environment and I was told he has a past from his previous employment." Pl. Rule 60(b)(2) Mtn. at ECF p. 7. Dr. Vieux then asked for "security to escort me to and from the hospital." *Id.*

These emails, plaintiff argued, showed that Dr. Rojas was not telling the truth at numerous points during his 2020 deposition, including when he denied that he asked "the person at [Montefiore] security" for a copy of the Giurca security alert and when he testified that he did not know why the security alert was posted, that he did not remember talking to Dr. Vieux about the security alert, and that seeing the security alert did not "diminish [Dr. Giurca's] standing in [his] eyes." *See* Pl. Rule 60(b)(2) Mtn. at ECF pp. 13-15 ("Rojas Perjury"). Similarly,

plaintiff argued, the new emails showed that Dr. Vieux lied when he testified that he did not know "under what circumstances Dr. Giurca left Montefiore," and when he denied discussing the security alert with Dr. Rojas. *Id.* at ECF pp. 16-17 ("Vieux Perjury"). More generally, plaintiff argued, the new ORMC emails "clearly show that Montefiore told ORMC that plaintiff was a security threat because he was threatening to expose how Montefiore treats psychiatric patients and threatening to call DOH," Pl. Rule 60(b)(2) Mtn. at 1, and thus – if produced during the pendency of this action – would have supported his retaliation and defamation claims against Montefiore. *Id.* Plaintiff added that Montefiore must also have committed discovery misconduct, as it "never produced any record" of the communication between Montefiore's head of security and Rodriguez. *Id.* at 2.

On July 1, 2021, I denied the letter-motion. *Giurca v. Montefiore Health System, Inc.*, 2021 U.S. Dist. LEXIS 123828, 2021 WL 2739061 (S.D.N.Y. July 1, 2021). To succeed on a motion brought under Rule 60(b)(2), the moving party must meet an "onerous" standard which requires him to demonstrate that: "(1) the newly discovered evidence was of facts that existed at the time of trial or other dispositive proceeding, (2) the movant must have been justifiably ignorant of them despite due diligence, (3) the evidence must be admissible and of such importance that it probably would have changed the outcome, and (4) the evidence must not be merely cumulative or impeaching." *United States v. Int'l Bhd. of Teamsters*, 247 F.3d 370, 392 (2d Cir. 2001) (quoting *United States v. IBT*, 179 F.R.D. 444, 447 (S.D.N.Y. 1998)).

Applying this standard, I held that Dr. Giurca could not have been "justifiably ignorant" of the ORMC emails "despite due diligence," because – given his allegation that "Dr. Rojas told others at ORMC" about the security alert, including Dr. Vieux, *see* Amend. Compl. ¶ 75 – a diligent plaintiff would have taken steps to obtain emails from ORMC "before voluntarily dismissing this case." *Giurca v. Montefiore*, 2021 U.S. Dist. LEXIS 123828, 2021 WL 2739061 at *4. "Even more fundamentally," I reasoned, "plaintiff cannot claim that the [ORMC] emails would have 'changed the outcome' of this case because he chose that outcome himself." *Id.* By his own account, plaintiff had ample evidence of Montefiore's alleged retaliation, even without the ORMC emails. *See* Giurca Decl. ¶¶ 9, 13, 20, 24, 25 (listing evidence in hand that "proved" retaliation). Moreover, he was apparently planning a "forensic examination" of various Montefiore email accounts to uncover "concealed evidence." *Id.* ¶ 25. Instead, on August 25, 2020, plaintiff elected "to dismiss his case in its entirety rather than face defendants' Rule 37(a)(5) fee application." *Id.* Consequently, I concluded, plaintiff was not entitled to a "third bite at the apple." *Id.*

Plaintiff did not seek reconsideration of my ruling pursuant to Local Civ. R. 6.3. Nor did he file objections pursuant to Fed. R. Civ. P. 72.

F. Third Vacatur Attempt

Plaintiff's third attempt to vacate his voluntary dismissal – which takes the form of a 9-page letter-motion, with 22 exhibits – was initially filed on June 21, 2023 (in

two pieces, with pages out of order, *see* Dkts. 128, 129), and was refiled, at the Court's direction, on July 7, 2023 (in one piece, in better order).[12] Represented by yet another lawyer, plaintiff argues that newly-discovered evidence gives him the "ability to now demonstrate" that Dr. Rojas and Dr. Vieux "gave perjurious sworn testimony during discovery in this matter," Pl. Ltr. at 1, and that Montefiore and its lawyers deliberately concealed that evidence. *Id.*

In his new motion, plaintiff once again attaches the January 11, 2018 email from Rosemary Baczewski describing the contact between ORMC security official Rodrigues and his Montefiore counterpart. Pl. Ltr. Ex. 4 (Dkt. 135 at ECF p. 29). Additionally, he attaches evidence corroborating that contact, including: (i) a January 11, 2018 email from Rodrigues to Lonnie Trotta, Montefiore's Chief of Security, asking Trotta to "give me a call" concerning "your flyer about Dr. Giurca," Pl. Ltr. Ex. 6 (Dkt. 135 at ECF p. 40); (ii) a text message from Rodrigues to Baczewski later that same day, stating that Rodrigues "spoke to the security director" and learned that Giurca "wrote a letter threatening to expose the way the hospital treats psych patients," *id.* Ex. 3 (Dkt. 135 at

12. Plaintiff initially sought "leave to file" another vacatur motion. (Dkt. 128 at 1.) However, when I directed plaintiff to refile his letter-motion and its exhibits "in proper order," I also advised the parties that "in light of the degree of detail already presented" and "the repetitive nature of plaintiff's vacatur motions," the Court would "construe the June 21, 2023 letter-motion as plaintiff's motion for vacatur pursuant to Rule 60(b)(6) and (d)(3)." (Dkt. 133 at 5.) On June 29, 2023, the district judge referred the motion to me for report and recommendation. (Dkt. 131.)

ECF p. 26); and (iii) deposition testimony from Rodrigues (testifying as a party witness in *Giurca v. ORMC II*) and Trotta (testifying as a non-party witness) confirming that these communications took place. *See id.* Ex. 7 (Dkt. 135 at ECF p. 49) (Trotta); *id.* Ex. 11 (Dkt. 135 at ECF pp. 70-75) (Rodrigues).

Similarly, plaintiff once again attaches Dr. Vieux's October 3, 2018 email, in which Vieux stated that he "was told" that Dr. Giurca "has a past from his previous employment." Pl. Ltr. Ex. 16 (Dkt. 135 at ECF p. 89). Additionally, he attaches corroborating evidence in the form of Dr. Vieux's party deposition testimony in *Giurca v. ORMC II*. *See id.* Ex. 17 (Dkt. 135 at ECF pp. 91-100).[13]

This evidence, plaintiff argues, demonstrates that Dr. Rojas "lied under oath" during his non-party deposition in this action (by testifying that he only communicated about the Montefiore security alert with two others at ORMC, when in fact, he also "communicated about the security alert to Dr. Vieux, . . . who orchestrated plaintiff's termination"); that Dr. Vieux "also committed perjury" during his deposition (by "falsely stating that he knew nothing about the Montefiore security alert" in October

13. Dr. Vieux's deposition was taken on March 31, 2022 – more than a year before plaintiff filed the instant motion. At deposition, when the witness was shown his October 3, 2018 email, he testified that what he knew in October 2018 was that "there was a picture of [Dr. Giurca] at Montefiore," in the "security office." Pl. Ltr. Ex. 17 (Dkt. 135 at ECF pp. 94-95.). He knew that because "Dr. Rojas had told me" (*id.* at ECF p. 95), but he could not recall when that conversation occurred. (*Id.* at ECF p. 96.)

2018); that Montefiore "concealed available evidence related to the dissemination of the security alert to third parties"; and that the "totality of the evidence now obtained from discovery and depositions in the ORMC case paints a very clear picture proving defamation and retaliation in the Montefiore federal whistleblower case." Pl. Ltr. at 2, 6, 9.

Although plaintiff's arguments are strikingly similar to those he made in 2021 – and he relies in part upon the same emails that supported his second vacatur attempt – the present motion is not based on Rule 60(b)(2) or (b)(3). Those provisions are unavailable to plaintiff, because vacatur motions based upon newly-discovered evidence or fraud by an opposing party or its counsel must be filed no more than one year after entry of the challenged judgment or order. Fed. R. Civ. P. 60(c)(1). Instead, plaintiff now invokes Rule 60(b)(6), which permits the district court to relieve a party from a final judgment or order based on "any other reason that justifies relief," and Rule 60(d)(3), which permits the court to set aside a judgment for fraud "on the court." Pl. Mtn. at 1. Relief under these provisions is warranted, plaintiff contends, because "[t]he *sine qua non* for Plaintiff dismissing this case on August 25, 2020 was the false narrative that was deliberately created by Montefiore and its agent Cesar Rojas, as well as the perjury committed by Ulrick Vieux." *Id.* at 9.[14]

14. Dr. Rojas, as noted above, was Chief of Psychiatry at ORMC until late September 2018, *see* Amend. Compl. ¶ 75, and while in that position "tried to protect Dr. Giurca." Second Amend. Compl. ¶ 40, *Giurca v. ORMC I*. There is no evidence that Dr. Rojas ever held a staff position at Montefiore. He was represented by

Appendix C

In their opposition letter-brief (Def. Opp. Ltr.) (Dkt. 136), defendants point out that plaintiff has now given two different reasons for his decision to dismiss this action on August 25, 2020. Def. Opp. Ltr. at 1. In this Court, he blames it on perjury by Dr. Rojas and Dr. Vieux. Pl. Mtn. at 9. But in his malpractice case against the Sadowski estate, plaintiff alleges that he dismissed this case because his then-attorney "materially misrepresented facts" to him, "so that sanctions wouldn't be charged by the Court." Ver. Compl. ¶ 10, *Giurca v. Estate of Sadowski*. Additionally, defendants argue that: (i) plaintiff's motion is untimely because it is "predicated on supposedly 'newly' discovered evidence and fraud," and is thus, in substance, made pursuant to Rule 60(b)(2) and (b)(3), both of which are subject to the one-year time limit, *see* Def. Opp. Ltr. at 2; and (ii) timing aside, the motion should be denied because "it rests on nothing truly new," as evidenced by plaintiff's reliance on discovery that was available to him in 2021, and thus fails to meet the Rule 60(b)(6), standard, which requires the movant to come forward with "highly convincing evidence" of "extraordinary circumstances." *Id.* at 2-3.

In his reply letter, plaintiff argues that he has "satisfied the 'extraordinary circumstances' and 'highly convincing evidence' standards" because was unable to take Trotta's deposition until January 2023, at which

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ORMC's counsel at deposition. Nonetheless, plaintiff now describes Dr. Rojas as an "agent of Montefiore," because once a month he took a per diem ("moonlighting") shift at the Montefiore Wakefield campus – which is where he saw the Giurca security alert. *See* Pl. Mtn. Ex. 5 (Dkt. 135 at ECF p. 34) (Rojas).

point Trotta "confirmed" that he "had substantive contact concerning the security alert with Miguel Rodrigues" of ORMC. Pl. Reply Ltr. (Dkt. 132) at 2.[15] Plaintiff reiterates that he was "forced" to dismiss this action "because of the misrepresentations by Dr. Rojas," *id.* at 2-3, but now – armed with the evidence obtained in *Giurca v. ORMC II* – can "prove both his retaliation and defamation claims[.]" *Id.* at 3.

At the Court's request (*see* Dkt. 133 at 5-6), plaintiff filed a supplemental letter-brief on July 21, 2023 (Pl. Supp. Ltr.) (Dkt. 137), addressing defendants' contention that his new motion is barred by the one-year limitation on motions made pursuant to Rules 60(b)(2) and (b)(3). In that letter, plaintiff makes no further effort to advocate for relief under Rule 60(b)(6). Instead, he relies on Rule 60(d)(3), arguing that defendants and their counsel perpetrated a "fraud upon the court" by "withholding critical evidence" while pursuing discovery sanctions against plaintiff for doing the same thing. Pl. Supp. Ltr. at 2, 3.[16] In their

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15. In his moving letter-brief, plaintiff claimed that Montefiore "deliberately delayed" the Trotta deposition, knowing that his testimony "could expose the deliberate concealment of evidence in the Montefiore case." Pl. Ltr. at 7. Defendants countered that the delay was unavoidable, because Trotta fell down a set of concrete stairs, requiring "multiple surgeries and months of physical therapy." Def. Opp. Ltr. at 2. In his reply letter, plaintiff backs off somewhat, writing, "Whether [defendants' counsel] intentionally delayed Mr. Trotta's testimony or not, the fact remains that he was first produced for deposition in January 2023[.]" Pl. Reply Ltr. at 2.

16. Plaintiff also claims that defendants "used threats of Rule 11 sanctions as a sword to compel plaintiff to surrender

own supplemental letter-brief, filed on July 28, 2023, defendants emphasize that "fraud upon the court, as distinguished from fraud directed to an adverse party, is limited to fraud seriously compromising the integrity of the normal process of adjudication." (Dkt. 138 at 2) (citing *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972)).

II. LEGAL STANDARDS

"Very high among the interests in our jurisprudential system is that of finality of judgments." *U.S. v. Cirami*, 563 F.2d 26, 33 (2d Cir. 1977). "Litigants, courts, and the public have a significant stake in assuming that final judgments remain final." *Mazzei v. The Money Store*, 62 F.4th 88, 95 (2d Cir. 2023). For this reason, among others, "Rule 60(b) motions are disfavored and reserved for exceptional cases." *Simon v. United States*, 2020 U.S. Dist. LEXIS 29070, 2020 WL 832887, at *3 (S.D.N.Y. Feb. 20, 2020); *accord Crawford v. Franklin Credit Mgmt.*, 2013 U.S. Dist. LEXIS 84477, 2013 WL 2951957, at *1 (S.D.N.Y. June 14, 2013) (quoting *Canale v. Manco*

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his claims." Pl. Supp. Ltr. at 3. However, this allegation is made only in a lawyer's letter, signed by a lawyer who was not retained until 2023. Moreover, the sanctions order that preceded plaintiff's voluntary dismissal was premised on Rule 37(a)(5) and "the Court's inherent power to sanction discovery conduct," 8/12/20 Order at 1, *not* Rule 11. Thus, the only sanction that plaintiff could reasonably anticipate, at the time he signed the Stipulation of Dismissal, was an award of defendants' fees and expenses incurred in the last round of motion practice and in conducting his renewed deposition. *See id.* at 2.

Power Sports, LLC, 2010 U.S. Dist. LEXIS 69652, 2010 WL 2771871, at *2 (S.D.N.Y. July 13, 2010)). "Since [Rule] 60(b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986); *see also Hoffenberg v. United States*, 2010 U.S. Dist. LEXIS 40495, 2010 WL 1685558, at *4 (S.D.N.Y. Apr. 26, 2010) ("Relief under Rule 60(b) is only warranted if the [moving party] presents 'highly convincing' evidence that demonstrates 'extraordinary circumstances' justifying relief." (citations omitted)).

Where, as here, the judgment sought to be vacated resulted from "an agreed-upon disposition," rather than a trial or other judicially-imposed determination, the burden on the party seeking relief is even heavier. *Nemaizer*, 793 F.2d at 63. As the Second Circuit has noted, "Rule 60 does 'not allow district courts to indulge a party's discontent over the effects of its bargain,' such as where the party has made a 'deliberate, strategic choice to settle.'" *United Airlines, Inc. v. Brien*, 588 F.3d 158, 176 (2d Cir. 2009) (quoting *Andrulonis v. United States*, 26 F.3d 1224, 1235 (2d Cir. 1994)).

Rule 60(b) motions made more than one year after entry of the order at issue face additional barriers. The "catchall" provision of Rule 60(b)(6) is "properly invoked only when there are extraordinary circumstances justifying relief, when the judgment may work an extreme and undue hardship, and when the asserted grounds for relief are not recognized in clauses (1)-(5) of the Rule." *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970

F.3d 133, 143 (2d Cir. 2020) (cleaned up); *see also Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) ("Rule 60(b)(6) only applies if the reasons offered for relief from judgment are not covered under the more specific provisions of Rule 60(b)(1)-(5)."); *First Fid. Bank. N.A. v. Gov't of Antigua & Barbuda-Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989) ("Litigants may not use [subsection (6)] simply to circumvent the time limits of other provisions of Rule 60(b).").

Rule 60(d)(3) is part of the "savings clause" added to Rule 60 as part of the 1946 amendments. *See* Fed. R. Civ. P. 60, advisory comm. note to 1946 amend. The purpose of the amendment was to clarify that, while fraud is "an express ground for relief by motion" (subject to a one-year time limit), it may also be "urged as a basis for relief by independent action insofar as established doctrine permits." *Id.* Thus, relief from a final judgment may be "obtained at any time by way of an *independent action* to set aside a judgment for 'fraud upon the court.'" *Gleason v. Jandrucko*, 860 F.2d 556, 558 (2d Cir. 1988).

"A party seeking relief under Rule 60(d)(3) bears a formidable burden." *United States v. Ohle*, 2015 U.S. Dist. LEXIS 173886, 2015 WL 9647534, at *1 (S.D.N.Y. Dec. 30, 2015). Although both Rule 60(b)(3) and the savings clause now codified at Rule 60(d)(3) "provide for relief from a judgment on the basis of fraud, the type of fraud necessary to sustain an independent action attacking the finality of a judgment is narrower in scope than that which is sufficient for relief by timely motion." *Gleason*, 860 F.2d at 558; *accord LinkCo, Inc. v. Naoyuki Akikusa*, 367 F.

App'x 180, 182 (2d Cir. 2010) (summary order); *King v. First Am. Investigations, Inc.*, 287 F.3d 91, 95 (2d Cir. 2002). Rule 60(d)(3) "embraces only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995) (cleaned up); *see also Gleason*, 860 F.2d at 559 ("'[F]raud upon the court' as distinguished from fraud on an adverse party is limited to fraud which seriously affects the integrity of the normal process of adjudication."). Thus, a plaintiff seeking relief under Rule 60(d)(3) "must prove, by clear and convincing evidence, that the defendant interfered with the judicial system's ability to adjudicate impartially and that the acts of the defendant must have been of such a nature as to have prevented the plaintiff from fully and fairly presenting a case or defense." *Mazzei*, 62 F.4th at 93-94.

It is well-settled that "[a]fter-discovered evidence of alleged perjury by a witness is simply not sufficient for a finding of 'fraud upon the court.'" *Gleason*, 860 F.2d at 559; *see also Ullman-Briggs, Inc. v. Deerfield Housewares, Inc.*, 100 F.3d 942 (2d Cir. 1996) (claim that two witnesses engaged in a "conspiracy to commit perjury" was insufficient for Rule 60(d)(3) relief). "Similarly, allegations of nondisclosure during pretrial discovery do not constitute grounds for an independent action under [Rule 60(d)(3)]." *Gleason*, 860 F.2d at 559-60. This is so because discovery misconduct, including the withholding of material evidence, "suggest[s] nothing

more than a fraud upon a single litigant . . . rather than a fraud upon the Court and therefore cannot proceed under Rule 60(d)(3)." *LinkCo, Inc. v. Akikusa*, 615 F. Supp. 2d 130, 136 (S.D.N.Y. 2009) (holding that neither "obstruction of discovery" nor "witness perjury" is grounds for setting aside a judgment under Rule 60(d)(3)), *aff'd*, 367 F. App'x 180 (2d Cir. 2010); *see also Kupferman*, 459 F.2d at 1080-81 (affirming denial of vacatur motion even though adverse party failed to disclose a release that was "so material to the defense" that "[i]f this had been a criminal case," the nondisclosure "would almost certainly have afforded ground for collateral attack").

Nor may a plaintiff obtain relief under Rule 60(d)(3) if "the alleged fraud could have been redressed in the underlying action." *Mazzei*, 62 F.4th at 94. In *Mazzei*, the Second Circuit rejected plaintiff's Rule 60(d)(3) claim in part because, "had Mazzei exercised the required diligence in the prior action and explored avenues of proof available to him, either the alleged falsity of defendants' misstatements would have been uncovered, or he would have been able to offer proof at trial from alternate sources." *Id.*; *see also Gleason*, 860 F.2d at 560 (the aggrieved party "must be able to show that there was no 'opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action.'") (quoting *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 702 n.2 (2d Cir. 1972)); *Marco Destin, Inc. v. Levy*, 2023 U.S. Dist. LEXIS 150883, 2023 WL 5530364, at *4-6 (S.D.N.Y. Aug. 28, 2023) (denying relief where plaintiff "had every opportunity in the Underlying Action to use the tools available in the adversarial process" to uncover

the truth, notwithstanding that its adversary lied under oath and "purposefully withheld" key evidence). Where, as here, the movant voluntarily abandoned those tools, he will not be heard later "to complain that he was denied the opportunity to uncover the alleged fraud." *Gleason*, 860 F.2d at 559.

III. DISCUSSION

A. Rule 60(b)(6)

Defendants are correct that plaintiff's third vacatur motion "falls squarely within the scope of Subsections (2) and (3)" of Rule 60(b), *see* Def. Opp. Ltr. at 2, and therefore that plaintiff cannot pursue relief under Rule 60(b)(6), which is reserved for circumstances "not covered under the more specific provisions of Rule 60(b)(1)-(5)." *Warren*, 219 F.3d at 114. Although plaintiff has gathered some additional evidence since 2021, the gist of his attack has not changed. He describes his new motion as predicated upon the "deliberate concealment of material evidence" by defendants and upon new evidence, "recently obtained," that would allow him to demonstrate that Drs. Rojas and Vieux testified untruthfully and would help him prove his FCA and defamation claims. Pl. Ltr. at 1-2. To the extent the present motion is brought pursuant to Rule 60(b), therefore, it plainly seeks relief on the grounds covered by subsection (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)") and subsection (3) ("fraud . . . , misrepresentation, or misconduct by an opposing party").

Motions made pursuant to subsection (6) "must be based upon some reason other than those stated in clauses (1)-(5)." *Brien*, 588 F.3d at 175; *see also Tapper v. Hearn*, 833 F.3d 166, 172 (2d Cir. 2016) ("Rule 60(b)(6) applies only 'when the asserted grounds for relief are not recognized in clauses (1)-(5) of the Rule[.]'") (quoting *Nemaizer*, 793 F.2d at 63). Plaintiff has not articulated any such reason. Therefore, he cannot hope to "circumvent the one-year limitation applicable to claims under clauses (1)-(3) by invoking the residual clause (6)[.]" *Reign v. United States*, 2022 U.S. Dist. LEXIS 175170, 2022 WL 4485275, at *1 (S.D.N.Y. Sept. 27, 2022).

B. Rule 60(d)(3)

Plaintiff's motion also fails the test of Rule 60(d)(3). Assuming, *arguendo*, that a plaintiff can pursue relief under Rule 60(d)(3) by making a motion in the original action (rather than by filing an independent action, *see Gleason*, 860 F.2d at 558), a plaintiff seeking relief under the savings clause must present "clear and convincing evidence," *Mazzei*, 762 F.4th at 93, of "'fraud upon the court' as distinguished from fraud on an adverse party," *Gleason*, 860 F.2d at 559; that is, "fraud which seriously affects the integrity of the normal process of adjudication." *Id.* Plaintiff cannot meet that standard.

To begin with, as to most of the misconduct that plaintiff attributes to Montefiore and its counsel, he has failed to present "clear and convincing evidence" – or any evidence – that the alleged misconduct occurred. To be sure, the January 11, 2018 email from Rodrigues to

Trotta (Pl. Ltr. Ex. 6) should have been produced in party discovery. It was sent to a Montefiore.org email address and requested information concerning "your flyer about Dr. Giurca." It was therefore responsive to at least one of plaintiff's document requests,[17] and likely would have been identified had Montefiore conducted an adequate electronic search of Trotta's email account. However, all of the other "newly-produced" emails and text messages upon which plaintiff relies were internal ORMC documents. There is no evidence that Montefiore knew about them, and no colorable argument that Montefiore was responsible for producing them.

Nor is there any non-frivolous argument that Montefiore was required to disclose the conduct of Dr. Rojas (or was responsible for his deposition testimony) on the theory that his once-a-month per diem shift at its Wakefield facility made him an "agent" of Montefiore. Pl. Ltr. at 2, 5, 9. When Dr. Rojas saw the Giurca security alert in January 2018, and brought it to the attention of Ms. Baczewski, he was the Chief of Psychiatry at ORMC, and Baczewski was his ORMC supervisor. *See* Pl. Ltr. Ex. 5 (Dkt. 135 at ECF p. 37) (Rojas). By the time he testified in this action (as a non-party) in January 2020, he was also a defendant, along with ORMC itself, in *Giurca v. ORMC II*. If and to the extent that Dr. Rojas gave false deposition testimony, therefore, plaintiff cannot attribute

17. Plaintiff requested, among other things, "documents and communications relating to Plaintiff being a security risk." Pl. Ltr. Ex. 18 (Dkt. 135 at ECF p. 112.) Defendants responded that they would produce documents "relating to relating to the posting of Plaintiff's photo in the Wakefield location's security office[.]" *Id.*

that misconduct to Montefiore. The same is true for Dr. Vieux, who – as plaintiff admits – was not employed by Montefiore. Pl. Ltr. at 1.

Unlike Drs. Rojas and Vieux, Mr. Trotta was an agent of Montefiore, and was represented at deposition by Montefiore's counsel. Notably, however, plaintiff does not claim that Trotta testified falsely. To the contrary: plaintiff accepts that Trotta testified truthfully, but speculates that Montefiore contrived to delay his testimony in *Giurca v. ORMC II* "for more than one year," until January 2023, because it could "expose the deliberate concealment of evidence in the Montefiore case." Pl. Ltr. at 7. Not only is this charge unsupported by any evidence; it is undercut by Trotta's testimony, at deposition, that he was "out for ten months." Pl. Ltr. Ex. 8 (Dkt. 135 at ECF p. 58) (Trotta).[18]

The Court does not condone Montefiore's failure to produce the January 11, 2018 email from Rodrigues to Trotta. However, as Judge Friendly explained in *Kupferman*, 459 F.2d at 1078, Rule 60(d)(3) "cannot be read to embrace any conduct of an adverse party of which the court disapproves; to do so would render meaningless the one-year limitation on motions under [Rule] 60(b)(3)." The Court of Appeals has been clear that allegations of nondisclosure of evidence during pretrial discovery are

18. Even if Montefiore intentionally delayed Trotta's non-party deposition in *Giurca v. ORMC II* from 2022 to 2023, that misconduct could not have influenced Dr. Giurca's decision – made in August 2020 – to dismiss his claims in this action. It is thus difficult to understand how the scheduling of the Trotta deposition could retroactively furnish grounds for vacating that dismissal.

not grounds for vacatur under Rule 60(d)(3), *see Esposito v. New York*, 698 F. App'x 624, 626 (2d Cir. 2017) (summary order); *Gleason*, 860 F.2d at 559-60, because that species of misconduct suggests, at worst, "a fraud upon a single litigant" rather than "a fraud upon the Court." *LinkCo*, 615 F. Supp. 2d at 136. The same is true of perjury allegations. *See Gleason*, 860 F.2d at 560 ("[N]either perjury nor nondisclosure, by itself, amounts to anything more than fraud involving injury to a single litigant.").

In this case, the misconduct of which Dr. Giurca complains could not have interfered with the Court's ability to perform its "impartial task of adjudging cases," *Hadges*, 48 F.3d at 1325, because the Court was never asked to perform that task. Dr. Giurca did not lose this case at trial, or on a motion for summary judgment, or as a result of any other merits adjudication. Nor was he ever sanctioned under Rule 11. Instead, faced with garden-variety discovery sanctions, he executed a stipulation of dismissal pursuant to Rule 41(a)(1)(A)(ii), which required no judicial decision-making. *See Guarnero-Ruiz v. 36-03 Food, LLC*, 2017 U.S. Dist. LEXIS 216069, 2017 WL 7049543, at *8 (E.D.N.Y. Dec. 11, 2017) (recognizing "the self-executing nature of a Rule 41(a)(1)(A)(ii) stipulation"). Unsurprisingly, therefore, plaintiff does not explain how defendants' alleged misconduct affected the Court's adjudication of this case, as opposed to his own litigation decision-making.

It was of course Dr. Giurca's right to dismiss his claims in this action based on his assessment (or his counsel's) of the risks and benefits of proceeding with the litigation.

However, having declined the opportunity to "use the tools available in the adversarial process" to pursue his claims, *Marco Destin*, 2023 U.S. Dist. LEXIS 150883, 2023 WL 5530364, at *6, he cannot expect this Court to relieve him of the consequences of his strategic decision, three years later, on the grounds that defendants committed discovery misconduct and non-party witnesses lied at deposition.

Nor can he expect the Court to grant his alternative request, made at the end of his supplemental letter-brief, for an "evidentiary hearing" (preceded by "additional discovery"), at which he can "present more fully" his "evidence of 'fraud on the court.'" Pl. Supp. Ltr. at 3. He has identified no such evidence. Moreover, plaintiff points to no authority, and I have found none, permitting the Court to reopen the case – and burden defendants with additional discovery and an evidentiary hearing – in order to determine whether to reopen the case.

IV. CONCLUSION

"There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackermann v. United* States, 340 U.S. 193, 198, 71 S. Ct. 209, 95 L. Ed. 207 (1950). Dr. Giurca made a "free, calculated, [and] deliberate" choice to dismiss his case, in its entirety, in 2020. *Giurca*, 2021 U.S. Dist. LEXIS 123828, 2021 WL 2739061, at *3. Because he has not shown the "exceptional circumstances" required for relief under Rule 60(b)(6), *Nemaizer*, 793 F.2d at 61, and cannot bear the "formidable burden" required for relief

under Rule 60(d)(3), *Ohle*, 2015 U.S. Dist. LEXIS 173886, 2015 WL 9647534, at *1, his third vacatur motion should be DENIED, and this case should remain closed.

Dated: New York, New York
December 21, 2023

/s/ Barbara Moses
BARBARA MOSES
United States
Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED OCTOBER 22, 2025

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of October, two thousand twenty-five.

Docket No: 24-858

DR. DAN GIURCA,

Plaintiff-Appellant,

v.

MONTEFIORE HEALTH SYSTEM, INC., M.D. JEFFREY WEISS, M.D. CLAUS VON SCHORN, M.D. GARY ISHKANIAN,

Defendants-Appellees.

Filed October 22, 2025

ORDER

Appellant, Dan Giurca, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the

request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe