No.: 25-

IN THE

Supreme Court of the United States

CAPITAL SECURITY SYSTEMS, INC.,

Petitioner,

v.

NCR VOYIX CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

DAVID P. REINER, II
Counsel of Record
REINER & REINER, P.A.
9100 So. Dadeland Blvd., Suite 901
Miami, Florida 33156-7815
(305) 670-8282
dpr@reinerslaw.com

Counsel for Petitioner

QUESTION PRESENTED

This case presents a question of national significance regarding the role of equity in federal procedural common law. The question presented is:

- Whether considerations of equity, such as manifest injustice, apply to a federal court's preclusion, or res judicata, analysis.

PARTIES TO THE PROCEEDING

Petitioner is Capital Security Systems, Inc. Petitioner does not have a stock ticker symbol.

Respondent is NCR Voyix Corporation. Respondent's stock ticker symbol is VYX.

RULE 29.6 STATEMENT

There is no parent corporation of Petitioner, Capital Security Systems, Inc., nor is there any publicly held corporation or entity owning 10% or more of Petitioner.

RELATED PROCEEDINGS

- *Gustin v. NCR Corp.*, 19-cv-80291, U.S. District Court for the Southern District of Florida. Judgment entered October 21, 2019.

- *Gustin v. NCR Corp.*, 19-14460, U.S. Court of Appeals for the Eleventh Judicial Circuit. Judgment entered August 26, 2020.

- *Cap. Sec. Sys. Inc. v. NCR Corp.*, 23-cv-04691, U.S. District Court for the Northern District of Georgia. Judgment entered April 2, 2025.

- *Cap. Sec. Sys. Inc. v. NCR Corp.*, 25-11532, U.S. Court of Appeals for the Eleventh Judicial Circuit. Judgment entered February 26, 2026.

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The Opinion of the Eleventh Circuit's decision (Pet. App. 1a-11a) is available at 2026 U.S. App. WL 538086. The District Court's Order on the Appellee's Motion to Dismiss (Pet. App. 12a-37a) is available at 2025 U.S. Dist. WL 1358594. The Opinion of the Eleventh Circuit's decision in the prior action (Pet. App. 38a-42a) is available at 824 Fed.Appx. 875. The district court's Order on the Appellee's Motion to Dismiss in the prior action (Pet. App. 43a-49a) is available at United States District Court for the Southern District of Florida, D.C. Docket No. 9:19-cv-80291-DMM (DE 99).

JURISDICTION

The Eleventh Circuit entered its decision on February 26, 2026. Pet. App. 1a-11a. Upon application (25A1333), Justice Thomas extended the time to file until June 26, 2026. This Court has jurisdiction under 28 U.S.C. §1254.

STATEMENT OF THE CASE

This case involves the application of res judicata to a patent dispute between Petitioner, Capital Security Systems, Inc. ("Capital") and Respondent NCR Voyix Corporation ("NCR").

I. Capital's Patents

Capital's patents were developed by its founder, Robin Gustin ("Gustin"), who leveraged many years of business experience, knowledge, and hard work "in manufacturing and automating systems to create a method for electronically emulating the primary functions of the check cashing process." Ryan T. Holte, *Trolls or Great Inventors: Case Studies of Patent Assertion Entities*, 59 St. Louis U. L.J., at *31 (2014) (cleaned up). "Gustin's solution…centered around automating the cashing of checks through a machine process that included machine recognition of printed and handwritten amounts on checks." *Id.* Gustin's "research focused on components to automate a new type of ATM machine" and on finding recognition software "that could intelligently scan hand printed and cursive field data in order to process the checks in an ATM environment." *Id.* at 31-32.

"From 1995 to 1997, Ms. Gustin worked full time at [Capital] to perfect the designs, systems, and prototype for [Capital's] Super ATM" including partnering with technology companies and experts to build a prototype ATM machine which would incorporate CAR/LAR[1] software engines into an ATM environment. *Id.* at 31. Gustin and Capital achieved prototype completion in 1997, and applied for various patents covering the new technology. *Id.* at 33. From 1997 to 2001, Capital and Gustin pitched their "Super ATM" technology to countless banks and industry leading technology companies, as well as at banking industry events, with little success. *Id.*

After the September 11 terrorist attacks, seeing an opportunity to help increase the tracking of funds to prevent further terrorist attacks, in 2002, Gustin

[1] "CAR" refers to the courtesy amount recognition line on a check, which is the space where the check amount is inscribed in numerical form. "LAR" refers to the legal amount recognition line, which is the space where the check amount is inscribed in words. Pet. App. 3a.

hired a Washington, D.C. law firm to assist with introducing the Super ATM platform to government agencies. *Id.* Related to these efforts and the national security need to track funds, in October 2003, Congress passed legislation known as the Check Clearing for the 21st Century Act (Check 21 Act) that allowed the recipient of an original paper check to create a digital version of the original check and eliminate the need for further handling of the physical document. *Id.* at 33-34; *see* 12 U.S.C. § 5001, *et seq*.

However, in the years that followed, few financial institutions were interested in Capital's Super ATM. Holte, *supra*, at 34. As one prospective licensee put it: "Why should we take a license or buy the Super ATM platform when everyone is infringing?" *Id.* (cleaned up).

II. Relevant Litigation History

In 2014, Capital brought a patent infringement lawsuit against NCR, an ATM seller (the "Patent Action"). Pet. App. 2a. Capital alleged that NCR's ATMs infringed Capital's patents for ATM check imaging technology which could accurately and checks using CAR and LAR technologies NCR brought counterclaims alleging that Capital's patents were invalid. Pet. App. 2a-3a. As the Patent Action proceeded, the district court held a *Markman* hearing[2], after which the district court invalidated

[2] *Markman v. Westview Instruments, Inc.,* 517 U.S. 370, 391 (1996) (establishing that district judges in patent cases should resolve the construction of a patent claim, including key term definitions, before adjudicating a case on the merits). Pet. App. 2a.

certain of Capital's claims and construed several disputed terms in favor of NCR. Pet. App. 3a. During the hearing, the parties made numerous representations to the court concerning the technologies in use by the parties and the industry for secure check cashing, including CAR/LAR technologies. Pet. App. 3a. During the *Markman* hearing NCR made several intentional misrepresentations to the district court concerning the nature of the technology used by NCR's machines. *Id.* Specifically, NCR categorically denied using both CAR and LAR technologies together—which is what Capital's patented technology did—and stated that the technology was not industry standard. *Id.* NCR's stated position at the *Markman* hearing was allegedly the exact opposite of NCR's representatives' testimony to Congress several years earlier regarding the Check 21 Act, when they testified to the use of CAR/LAR technology which, due in part to their testimony, became the codified industry standard. The alleged mismatch between these positions is the core misrepresentation at issue (the "*Markman* Misrepresentation"). Pet. App. 3a-4a.

As the Patent Action progressed, Capital's counsel eventually requested leave to withdraw its representation, which the district court granted. Pet. App. 4a. As Capital did not thereafter obtain new counsel, and thus did not oppose NCR's counterclaims, the district court entered default judgment for NCR, holding that Capital's patents were invalid. *Id.*

On March 4, 2019, just days before the conclusion of the Patent Action, Gustin sued NCR for, among other claims, common law fraud (the "Florida Action"). *Id.* Gustin proceeded *pro se* initially, filing an original complaint followed by four amended complaints before obtaining counsel who filed a fifth amended complaint on her behalf. Pet. App. 4a-5a. The fifth amended complaint added Capital as a plaintiff and alleged that NCR, via the *Markman* Misrepresentation, had intentionally misled the district court in the Patent Action concerning the nature of its technology. Pet. App. 5a. The complaint alleged that NCR concealed its misrepresentation from Capital in the Patent Action by deliberately committing discovery violations, primarily by misclassifying materials as "Highly Confidential" and "Attorney's Eyes Only" to prevent Gustin—who had the technical knowledge to identify the misrepresentations— from reviewing the fraudulent documents, and also by suborning perjured testimony. *Id.* The result of the deception was to "conceal[] the truth about the core functionality" of the technologies used by NCR which were at issue in the Patent Action, causing Capital to lose the Patent Action. *Id.* The district court dismissed the Florida Action with prejudice under Federal Rule of Civil Procedure 12(b)(6) and the Eleventh Circuit affirmed, holding that "[b]ecause Gustin's attorney was 'privy' to the marked records, knowledge of their contents was imputed to Gustin [and Capital]." *Id.*

Three years later, Capital filed this case alleging that NCR committed fraud on the court in the Patent Action. *Id.* The core of Capital's claim in this action is that NCR committed fraud on the court in the Patent Action by committing the *Markman* Misrepresentation. *Id.* This time, Capital alleged that NCR and its attorneys concealed its Congressional testimony regarding the Check 21 Act and the facts underlying it from the court by intentionally "tamper[ing] with the discovery process": proffering "fraudulent testimony," concealing and withholding (or "scrubbing") discoverable materials, and "destroying evidence." Pet. App. 5a-6a.

NCR moved to dismiss Capital's complaint as barred by the doctrine of res judicata and for failure to state a claim for fraud on the court. Pet. App. 6a. The district court agreed and dismissed Capital's complaint with prejudice on both grounds. *Id.* The district court concluded first that res judicata indeed precluded Capital's claims because it could have brought them in the Florida Action; and second, that Capital failed to state a claim because it had not pled facts necessary to establish fraud upon the court. *Id.*

On appeal, the Eleventh Circuit panel issued its Opinion, affirming that Capital's claims were barred by res judicata. Pet. App. 1a-11a.

This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Origins and Authority of Federal Procedural Common Law Warrant Re-Examination of Preclusion Principles

"There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). However even "[b]efore Erie R. Co. v. Tompkins it was recognized by this Court that, apart from the full faith and credit clause, a judgment duly rendered in one court will be recognized as res judicata in a suit between the same parties in a federal court." *Heiser v.*

Woodruff, 372 U.S. 726, 733 (1946) (compiling cases). Since *Erie*, "[i]t has been held in non-diversity cases …that the federal courts will apply their own rule of res judicata." *Id.*

Thus, despite Erie's simple pronouncement, a large body of federal *procedural* common law remains in force today – "common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations." Amy C. Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 814-15 (2008). "While the sources of and limits upon federal court power to develop substantive common law have received serious and sustained scholarly attention, the sources of and limits upon federal court power to develop procedural common law have been almost entirely overlooked." *Id.* at 815.

In particular, "…preclusion is the one [procedural common law doctrine] whose status as 'procedural' is most open to doubt." *Id.* at 831 (reflecting on *Semtek International v. Lockheed Martin*, 531 U.S. 497 (2001) which wavered between characterizing preclusion as procedural and substantive). As was the case here, to Petitioner's extreme detriment, "preclusion, like so many ostensibly procedural doctrines, has substantive effects." Barrett, *supra*, at 831; see *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (*stressing* that res judicata is "not a mere matter of practice or procedure" but a "rule of fundamental and substantial justice"). "As it stands, it is fair to say that the rules of preclusion are well understood, but the courts' authority to make them is not." *Id.* at 832.

In recent times, the Court has urged the re-examination of judicial doctrines which, despite widespread modern adoption, are not clearly founded in a particular source of federal court authority. See, e.g., *Keathley v. Buddy Ayers Const., Inc.*, 608 U.S. ----, 2026 WL 1686028, at *7 (June 11, 2026) (Thomas, J., concurring) (doctrine of judicial estoppel). This case urges such re-examination with respect to equity's inclusion in, or exclusion from, federal preclusion principles.

II. Federal Procedural Common Law Develops in Response to Emerging Consensus in the Common Law

The body of federal procedural common law "reflects a longstanding practice in the federal courts of permitting flexibility and creativity to stand alongside uniform doctrines mediated by tradition and consensus." Barrett, *supra*, at 819. Changes in its development have historically been "responses to emerging consensus about the need for a new approach" rather than unilateral or abrupt changes. Barrett, *supra*, at 886.

The abandonment of preclusion's mutuality requirement, for example, was simply a "response[] to emergent consensus about the need for change" rather than an abrupt departure from traditional principles. *Id.* at 818; see *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 327 (1971) (reflecting that "the court-produced doctrine of mutuality of estoppel is undergoing fundamental change in the common-law tradition" and that "an increasing number of courts have rejected the principle as unsound"). The Court in *Blonder-Tongue*, while noting that such emergent trends were not before the Court for "wholesale approval or rejection[,]" acknowledged that "they counsel us to re-examine whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid." *Blonder-Tongue*, 402 U.S. at 327.

"Similarly, in introducing a federal forum non conveniens doctrine, the Supreme Court imported a doctrine that had become well rooted in state practice." Barrett, *supra*, at 886; *Gulf Oil v. Gilbert*, 330 U.S. 501, 508-09 (1947). (describing forum non conveniens as a common law doctrine); *id.* at 505 n.4 (asserting that "[t]he doctrine did not originate in federal but in state courts"); *id.* at 507 (observing that "[t]he federal law contains no...express criteria to guide the district court in exercising [the forum non conveniens] power" but that "the common law [has] worked out techniques and criteria for dealing with it").

Should the Court re-examine the role of equity in preclusion cases, the Court should be guided by the common law.

III. Equitable Considerations Should Guide the Preclusion Analysis under Federal Procedural Common Law

Given the Court's prior pronouncements in decisions such as *Moitie*, and its progeny, the Eleventh Circuit Opinion's res judicata analysis herein disregarded numerous arguments raised by Capital which were premised upon equitable considerations[3] – a policy which should be re-examined not only due to the origins and authority regarding federal procedural common law, (Section I, *supra*), but also due to the development of equity in federal law post-*Erie*.

The role of equity in federal law, post-*Erie*, remains at odds with its use in the modern common law. Indeed, commentators have noted that "[a]fter Erie, one might have expected a retreat from federal courts' commitment to traditional equitable principles ....because[, as] they are neither constitutional nor statutory, federal equitable principles appear to lack the required grounding in a source of positive law." Andrea Olson, *Resolving Equity's Erie Problem*, 56 Ariz. St. L.J. 289, 315 (2024). "However, just seven years after *Erie*, *York* reasserted federal equity's traditional guardrails and indicated that they should apply even in the face of contrary state law principles." *Id.* at 316 (citing *Guar. Tr. Co. v. York*, 326 U.S. 99, 105–06 (1945)). Despite *Erie*'s seemingly simple pronouncement rejecting the existence of a federal common law, the Court in *York* nevertheless reaffirmed that "[e]quitable relief in a federal court…must be within the traditional scope of equity as historically evolved in the English Court of Chancery" and "[t]hat a State may authorize its courts to give equitable relief unhampered by any or all such

[3] Capital C.A. Br. 11 ("fraudulent misrepresentations prevented this Court from reach fair and correct decisions"), and 21 (Gustin lacked standing to assert the claims, could not have done so "fairly or effectively – on [Capital's] behalf – without counsel," and had "no fair, reasonable chance of reaching the merits"); Capital C.A. Reply Br. 23 (the proper res judicata analysis requires fairness considerations).

restrictions cannot remove these fetters from the federal courts." 326 U.S. at 105–06. "Several commentators termed this principle the 'equitable remedial rights doctrine.'" Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. Rev. 217, 220 (2018). Commentators have criticized this federal conception of equity as "anachronistic, rooted in a pre-Erie framework." *Id.* "Neither the U.S. Constitution, federal law, nor the Federal Rules of Civil Procedure authorizes federal courts to craft and apply a uniform body of equitable principles, including equitable remedial principles, to all claims that come before them, regardless of the source of law from which a claim arises." *Id.*

There is undoubtably a need for change in the federal court's application of equity in general, though commentators' proposed solutions may differ. Olson, *supra*, at 359; Morley, *supra*, at 275.

IV. The Role of Equity in Preclusion Cases Should be Clarified

Federal courts have grappled with the role of equity in preclusion cases, the scope of which should be clarified. See, e.g., *Bankers Mtg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970) (applying res judicata requires that the party previously "had a fair opportunity to make his claim"); *Thompson v. Schweiker*, 665 F.2d 936, 940 (9th Cir. 1982) (application of res judicata "must be tempered by fairness and equity"); *Flaherty v. Lang, et al.*, 199 F.3d 607, 616 (2d Cir. 1999) (declining to apply res judicata to preclude certain of the plaintiff's claims based on the circumstances of the case and plaintiff's pro se status, noting that the court might have been "less hesitant to apply the doctrine of res judicata" had the plaintiff been represented by counsel).

The Court may be guided by Florida law which has long recognized a manifest injustice exception to application of the principals of res judicata as well as collateral estoppel. *Universal Constr. Co. v. City of Ft. Lauderdale*, 68 So.2d 366 (Fla. 1953); *deCancino v. E. Airlines, Inc.*, 283 So.2d 97 (Fla. 1973); *State v. McBride*, 848 So.2d 287 (Fla. 2003). While acknowledging the salutary principles of res judicata, Florida and its courts have declared a greater "interest[] in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation" cautioning that "the doctrine of res judicata should not be so rigidly applied as to defeat the ends of justice." *Universal Constr.*, 68 So.2d at 369.

As a result of the rule's establishment in Florida jurisprudence, the Eleventh Circuit has regularly confronted manifest injustice arguments in its application of res judicata. See, e.g. *Griswold v. County of Hillsborough*, 598 F.3d 1289, 1294 (11th Cir. 2010) ("Even if a manifest injustice exception were to exist, the application of res judicata would not be unjust in this case."); *Seminole Tribe of Florida v. Biegalski*, 757 Fed.Appx. 851, 862 (11th Cir. 2018) ("Assuming a manifest-injustice exception exists, we agree with the district court that there is nothing unjust about the application of claim preclusion in this case."). Such an equitable exception, if adopted in federal procedural common law, does not erode or reject the salutary principles of res judicata, as evidenced by the dicta in *Griswold* and *Biegalski*, but affords courts much needed "flexibility and creativity"

(Barrett, *supra*, at 819) in ensuring fair and equitable outcomes.

Capital urges the Court re-examine and clarify the role of equity in a federal court's application of preclusion (or res judicata).

CONCLUSION

Post-*Erie*, the judicial branch's authority for the development of federal procedural common law is not clearly founded. Historically, developments in federal procedural common law have responded to emerging consensus in the common law. Further, the federal court system's retention of traditional equitable principles following *Erie* has drawn criticism from commentators, suggesting the need for change. Preclusion principles, as suggested by this case, may find guidance for such change in the common law, such as the manifest injustice exception recognized by Florida law.

A large portion of the modern financial industry is founded upon a technological process which Capital developed over many years and at no small expense. As a result of fraud, in court and in congressional testimony, Capital has been deprived of its intellectual property without consideration of the substantial inequity and manifest injustice.

Petitioner respectfully requests that certiorari be granted.

Respectfully Submitted,

DAVID P. REINER, II
Counsel of Record
REINER & REINER, P.A.
9100 So. Dadeland Blvd., Suite 901
Miami, Florida 33156-7815
(305) 670-8282
dpr@reinerslaw.com

Counsel for Petitioner

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED FEBRUARY 26, 2026

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 25-11532
Non-Argument Calendar

CAPITAL SECURITY SYSTEMS, INC.,

Plaintiff-Appellant,

v.

NCR CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia.
D.C. Docket No. 1:23-cv-04691-TCB.

Before ROSENBAUM, BRANCH, and GRANT, Circuit Judges.

PER CURIAM:

The issue before us in this appeal is whether Capital Security Systems, Inc.'s ("Capital") fraud on the court claim in the action below shares a common core of operative fact with its claim for common law fraud in a previous action, such that *res judicata* bars its current claim. The district court thought so and dismissed Capital's complaint with prejudice. We agree. Although Capital argues that its previous common law fraud claim is factually and legally different from its current fraud on the court claim, the disputes in both actions concern the same underlying course of alleged wrongdoing. Namely, Capital asserts that during a lawsuit involving a patent claim it previously brought against NCR Corporation ("NCR"), NCR manipulated discovery, concealed evidence, and misled the court during a *Markman*[1] hearing, all for the purpose of defeating Capital's lawsuit. Thus, because the other three elements of the test for *res judicata* are met, we affirm the district court's dismissal.[2]

I. BACKGROUND

In 2014, Capital brought a patent infringement lawsuit against NCR, an ATM seller (the "Patent Action"). *See* Complaint, *Cap. Sec. Sys., Inc. v. NCR Corp.*, No. 14-cv-1516 (N.D. Ga. May 19, 2014). Capital alleged that NCR's ATMs infringed Capital's patents for ATM check imaging technology which could accurately and securely cash

1. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 391, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996) (establishing that district judges in patent cases should resolve the construction of a patent claim, including key term definitions, before adjudicating a case on the merits).

2. Capital also raised another issue on appeal—the district court's imposition of sanctions against its attorneys—but we dismissed that issue on jurisdictional grounds. Simply put, Capital was not sanctioned, its attorneys were, and thus Capital lacks standing to appeal.

checks using CAR and LAR technologies.[3] NCR brought counterclaims alleging that Capital's patents were invalid.

As the Patent Action proceeded, the district court held a *Markman* hearing, after which the district court invalidated certain of Capital's claims and construed several disputed terms in favor of NCR.[4] As the *Markman* hearing is the basis for so much that follows, we will describe it in some detail here. During the hearing, the parties made numerous representations to the court concerning the technologies in use by the parties and the industry for secure check cashing, including CAR/LAR technologies. To the best of our understanding, Capital (and sometimes its principal, Robin Gustin) allege that during the *Markman* hearing NCR made several intentional misrepresentations to the district court concerning the nature of the technology used by NCR's machines. Specifically, Capital alleges that NCR categorically denied using both CAR and LAR technologies together—which is what Capital's patented technology did—and stated that the technology was not industry standard. NCR's stated position at the *Markman* hearing was allegedly the exact opposite of NCR's representatives' testimony to Congress several years earlier, when they testified to the use of CAR/LAR

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3. "CAR" refers to the courtesy amount recognition line on a check, which is the space where the check amount is inscribed in numerical form. "LAR" refers to the legal amount recognition line, which is the space where the check amount is inscribed in words.

4. Capital appealed the district court's *Markman* rulings to the Federal Circuit, which partially affirmed the district court and remanded for further proceedings. *See Cap. Sec. Sys., Inc. v. NCR Corp.*, 714 F. App'x 1017 (Fed. Cir. 2018).

technology which, due in part to their testimony, became the codified industry standard. The alleged mismatch between these positions is the core misrepresentation that Capital has consistently complained of (the "*Markman* Misrepresentation"), although its theories of the legal significance of the *Markman* Misrepresentation have evolved significantly from one action to the next.

As the Patent Action progressed, Capital's counsel eventually requested leave to withdraw its representation, which the district court granted. As Capital did not thereafter obtain new counsel, and thus did not oppose NCR's counterclaims, the district court entered default judgment for NCR, holding that Capital's patents were invalid.

Notably, after Capital's counsel withdrew but before the district court's entry of judgment, Capital's CEO, Robin Gustin, filed a *pro se* motion to "HEAR THE TRUTH UNDER Making False Statements" with the district court. The threadbare motion attempted to identify to the district court the *Markman* Misrepresentation, but contained only conclusory argument followed by quotes and links to YouTube videos. The court rejected the motion because Gustin, a non-attorney, filed it on a corporation's behalf.

On March 4, 2019, just days before the conclusion of the Patent Action, Gustin sued NCR for, among other claims, common law fraud (the "Florida Action"). *See* Complaint, *Gustin v. NCR Corp.*, No. 19-cv-80291 (S.D. Fla. Mar. 4, 2019). Gustin proceeded *pro se* initially, filing an original complaint followed by four amended complaints before obtaining counsel who filed a fifth amended complaint on her behalf. The fifth amended complaint added Capital as a plaintiff and alleged that NCR, via the *Markman* Misrepresentation, had intentionally misled the district court in the Patent Action concerning the nature of its technology. The complaint alleged that NCR concealed its misrepresentation from Capital in the Patent Action by deliberately committing discovery violations, primarily by misclassifying materials as "Highly Confidential" and "Attorney's Eyes Only" to prevent Gustin—who had the technical knowledge to identify the misrepresentations—from reviewing the fraudulent documents, and also by suborning perjured testimony. The alleged result of the deception was to "conceal[] the truth about the core functionality" of the technologies used by NCR which were at issue in the Patent Action, causing Capital to lose the Patent Action. The district court dismissed the Florida Action with prejudice under Federal Rule of Civil Procedure 12(b)(6) and we affirmed, holding that "[b]ecause Gustin's attorney was 'privy' to the marked records, knowledge of their contents was imputed to Gustin [and Capital]." *Gustin v. Nicoll*, 824 F. App'x 875, 878 (11th Cir. 2020).

Three years after we affirmed the district court in *Gustin*, Capital filed this case alleging that NCR committed fraud on the court in the Patent Action. The core of Capital's claim in this action is that NCR committed fraud on the court in the Patent Action by committing the *Markman* Misrepresentation. This time, Capital alleged that NCR and its attorneys concealed its Congressional testimony and the facts underlying it from the court by intentionally "tamper[ing] with the discovery process": proffering "fraudulent testimony," concealing and withholding (or "scrubbing") discoverable materials, and "destroying evidence."

NCR moved to dismiss Capital's complaint as barred by the doctrine of *res judicata* and for failure to state a claim for fraud on the court. The district court agreed and dismissed Capital's complaint with prejudice on both grounds. The district court concluded first that *res judicata* indeed precluded Capital's claims because it could have brought them in the Florida Action; and second, that Capital failed to state a claim because it had not pled facts necessary to establish fraud upon the court.

This appeal timely followed.

II. DISCUSSION

We review *de novo* a district court's dismissal of a complaint under rule 12(b)(6). *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003).

The *res judicata* doctrine bars the filing of claims that were previously raised, or could have been previously raised, in an earlier proceeding. *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999). The doctrine requires that parties "must assert all claims for relief concerning the same subject matter in one lawsuit, *Starship Enters. of Atlanta, Inc. v. Coweta Cnty., Ga.*, 708 F.3d 1243, 1254 (11th Cir. 2013), to ensure that "[o]nce a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Comm'r v. Sunnen*, 333 U.S. 591, 598, 68 S. Ct. 715, 92 L. Ed. 898 (1948). *Res judicata* will bar a subsequent action if a "prior decision (1) was rendered by a court of competent jurisdiction; (2) was final; (3) involved the same parties or their privies; and (4) involved the same causes of action." *Rodemaker v. City of Valdosta Bd. of Educ.*, 110 F.4th 1318, 1324 (11th Cir. 2024). Here, only the fourth element is in dispute because the district court rendered a final judgment in the Florida Action which involved the same parties: Capital was a plaintiff in both the Florida Action and the current one, and NCR was the sole defendant in both.

"Determining whether two cases involve the same cause of action for the purposes of *res judicata* is an inquiry concerned with the substance, and not the form, of the two proceedings." *Id.* at 1329 (alteration adopted) (quotation omitted). As such, the focus of our analysis is on whether the previous and current causes of action share "the same nucleus of operative fact, or [are] based on the same factual predicate." *Israel Disc. Bank Ltd. v. Entin*, 951 F.2d 311, 315 (11th Cir. 1992). Causes of action share the same nucleus of operative fact if "the same facts are involved in both cases, so that the present claim could have been effectively litigated with the prior one." *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 893 (11th Cir. 2013) (quotation omitted). Crucially, *res judicata* sweeps in claims that the parties did not bring, but could have brought, in a previous action. *Nevada v. United States*, 463 U.S. 110, 130, 103 S. Ct. 2906, 77 L. Ed. 2d 509 (1983) (explaining that *res judicata* applies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose" (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L. Ed. 195 (1876))).

Here, Capital could have brought its fraud on the court claim in the Florida Action because the same core of operative fact to support its current claim was present and pled in the Florida Action. Both actions concern the same allegedly fraudulent core of operative fact—the *Markman* Misrepresentation—as the basis for both its Florida Action complaint and the complaint below: (1) NCR argued to the district court in the Patent Action that certain technology did not exist, was not industry standard, and was not used by NCR, but (2) NCR knew that the technology *did* exist because NCR earlier had testified to Congress that the technology existed and it became the codified industry standard, and (3) to conceal its falsehood from Capital and from the district court in the Patent Action, NCR committed numerous intentional, fraudulent acts. Knowing these facts when it filed the Florida Action for common law fraud, Capital had all the information necessary to identify and bring its current fraud on the court action. In other words, its fraud on the court claim in this case "could have been effectively litigated with the prior one." *Lobo*, 704 F.3d at 893.

Capital resists our conclusion with several arguments, of which none are persuasive. First, Capital argues that "the Florida action did not consider a 'fraud on the court' claim, but rather only 'common law fraud.'" This distinction is irrelevant. "*Res judicata* applies not only to the exact legal theories advanced in the prior case, but to all legal theories and claims arising out of the same nucleus of operative facts." *Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993). Thus, Capital's choice of legal theory under which to proceed—here, fraud on the court; there, common law fraud—is beside the point, which is to examine "the substance, and not the form, of the two proceedings." *Rodemaker*, 110 F.4th at 1329 (alteration adopted) (quotation omitted). As Capital had all the factual ingredients before it in the Florida Action to craft its fraud on the court argument, *res judicata* bars Capital from asserting it here.

Second, Capital argues that it "never before had any fair opportunity to make its claim for fraud on the court, for many reasons." The first reason for its lack of "fair opportunity" is that it "neither possess[ed] nor reasonably appreciate[d] the factual basis for the [fraud on the court] claim." But as explained above, what matters is that Capital had all the relevant facts when it filed the Florida Action, not whether Capital drew all the correct legal conclusions from the facts.[5] Thus, the argument that Capital did not "appreciate" its claim is irrelevant.

The third reason Capital offers for its alleged lack of "fair opportunity" is that it had "an inability to timely

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5. We note that Capital's argument is further undermined by the existence of Gustin's own rejected *pro se* motion in the Patent Action—filed *before* the Florida Action—which alleged the same fraud directed at the district court as is at issue here.

amend its complaint in the patent infringement action" to bring the fraud on the court claim. That it was unable to amend its complaint may be true, but, again, it is irrelevant because the Florida Action is what bars the claims in this case, not the Patent Action. Less than a year after judgment was entered in the Patent Case, Gustin brought the Florida Action (which Capital later joined as a plaintiff), once again alleging the same facts at issue here. That Capital perhaps failed to investigate sooner did not deny it a "fair opportunity to make its claim." *See Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1271 (11th Cir. 2002) (holding that a plaintiff's failure to investigate its claims in a timely manner did not obviate *res judicata*).

Finally, Capital argues that previous "court orders stopp[ed] well short of addressing the merits of related (but not the same) claims." This argument is both incorrect and irrelevant. The district court's dismissal of Capital's complaint in the Florida Action on the merits for failure to state a claim was a decision on the merits. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981) (holding that a "dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a judgment on the merits" in the *res judicata* context) (quotation omitted); *see Gustin v. Nicoll*, 824 F. App'x 875, 878 (11th Cir. 2020) (affirming the district court's dismissal of Capital's complaint for failure to state a claim). And in any event, whether a previous court addressed the merits of Capital's claim for fraud on the court matters not for *res judicata* purposes because the inquiry turns only on whether the previous court *could have* done so had Capital properly raised the claim. *Wesch*, 6 F.3d at 1471 ("*Res judicata* applies . . . to all legal theories and claims arising out of the same nucleus of operative facts.") In other words, the *res judicata* doctrine's very nature is to bar "related (but not the same) claims" even where the previous court did not "address[] the merits" of those related claims.

III. CONCLUSION

The doctrine of *res judicata* bars Capital's fraud on the court claim because it could have been brought in a previous action, and therefore the district court's judgment is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED APRIL 2, 2025

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF GEORGIA, ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:23-cv-4691-TCB

CAPITAL SECURITY SYSTEMS, INC.,

Plaintiff,

v.

NCR CORPORATION,

Defendant.

ORDER

This case comes before the Court on Defendant NCR Voyix Corporation's[1] ("NCR") motion [16] to dismiss and motion [23] for sanctions.

1. The Court notes that Plaintiff Capital Security Systems, Inc. misnamed Defendant NCR Voyix Corporation as "NCR Corporation" in its amended complaint. *See* [16] at n.1.

Appendix B

I. Background

A. Underlying Action

In 2014, Plaintiff Capital Security Systems, Inc. ("CSS") filed a patent infringement action (the "Underlying Action") against NCR in this Court, asserting infringement of four patents. *See Cap. Sec. Sys., Inc. v. NCR Corp.*, No. 1:14-cv-1516 (N.D. Ga. 2014). The patents related to advanced automated teller machines ("ATMs") that automated the process for dispensing cash in exchange for deposited checks. One of the four patents involved a method for automating the check-cashing process using certain image-based technologies, including CAR and LAR technologies.[2]

NCR sold ATMs to financial institutions. CSS claimed that NCR's ATM models infringed its patents. NCR counterclaimed that CSS's asserted patents were unenforceable due to CSS's inequitable conduct in patent prosecution and/or invalid due to obviousness pursuant to 35 U.S.C. § 103.

In 2016, the Hon. William S. Duffey, Sr. held a *Markman* hearing, after which he entered an order invalidating certain claims and construing certain

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2. "CAR" refers to the courtesy amount recognition line on a check, which is the portion of a check where the amount is written numerically. "LAR" refers to the legal amount recognition line, which is the portion of a check where the amount is written out in words. Opinion and Order at 4, *Cap. Sec. Sys.*, No. 1:14-cv-1516 (N.D. Ga. June 28, 2016).

disputed terms in the patents. Ultimately, Judge Duffey entered judgment for NCR, finding non-infringement of the patents.

Also in 2016, CSS moved for entry of a judgment of non-infringement of the patents so it could appeal the *Markman* order, and stipulated that NCR did not infringe certain patents under Judge Duffey's claim construction. Judge Duffey granted CSS's motion. Thereafter, CSS appealed to the Federal Circuit, which affirmed the non-infringement ruling but reversed the determination of other disputed terms and remanded the case.

In 2017, Judge Duffey granted NCR's motion for summary judgment in part with respect to its indefiniteness arguments.

In 2018, the case was reassigned to the undersigned, and CSS's counsel withdrew its representation. CSS never obtained new counsel. As a result, CSS did not offer a defense against NCR's counterclaims.

In 2019, the Court granted NCR's motion for default judgment on NCR's remaining counterclaims and held that the patents at issue were invalid.

B. Procedural History

On October 13, 2023, CSS filed this case, in which it alleges that NCR engaged in fraud on this Court in the Underlying Action.

On November 21, NCR filed a motion [9] to dismiss for failure to state a claim, in which it argued that CSS's complaint must be dismissed because its fraud-on-the-court claim was barred by res judicata and because the allegations were insufficient to state a viable claim.

On December 5, CSS filed a response [10] arguing that res judicata did not apply to its fraud-on-the-court claim, which it alleges was sufficiently pled. CSS asked the Court to allow it to amend its complaint if the Court concluded that it had not presented sufficient factual allegations in its complaint.

On January 30, 2024, the Court denied NCR's motion to dismiss without prejudice in order to allow CSS to amend its complaint. *See* [14]. The Court stated that the facts tended to favor NCR, but it granted CSS leave to amend its complaint because CSS alleged it could present "additional factual allegations supporting its claim[.]" [10] at 9.

On February 20, CSS filed its amended complaint [15] "for fraud on this Court during the prior action . . . including under Fed. R. Civ. P. 60." [15] at ¶ 1.

On March 5, NCR filed a motion [16] to dismiss the amended complaint. On October 30, NCR filed a motion [23] for sanctions under Rule 11.

II. Motion to Dismiss

A. Legal Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (per curiam) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)).

To survive a 12(b)(6) motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*).

The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324-25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011) (citation omitted), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Accordingly, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

B. Discussion

NCR argues that CSS's fraud-on-the-court claim is barred by res judicata, and that, in any event, CSS has failed to state claim for fraud on the court so its amended complaint should be dismissed.

1. Res Judicata

a. Legal Standard

"Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999) (citation omitted). The doctrine seeks to bar a "plaintiff from relitigating the same claim against the same defendant." *Akanthos Cap. Mgmt., LLC v. Atlanticus Holdings Corp.*, 734 F.3d 1269, 1271 (11th Cir. 2013) (per curiam).

The purpose of res judicata is to give "finality to parties who have already litigated a claim" and to promote "judicial economy[,]" as well as to "bar[] claims that could have been litigated." *In re Atlanta Retail, Inc.*, 456 F.3d 1277, 1284 (11th Cir. 2006) (citation omitted).

Thus, "[o]ne must assert all claims for relief concerning the same subject matter in one lawsuit and any claims for relief concerning the same subject matter which are not raised will be res judicata." *Bryant v. Joseph T. Ryerson & Son Inc.*, No. 1:20-cv-3902-LMM-JKL, 2020 U.S. Dist. LEXIS 256090, 2020 WL 10066392, at *4 (N.D. Ga. Nov. 13, 2020) (quoting *Harris v. Deutsche Bank Nat'l Tr. Co.*, 338 Ga. App. 838, 792 S.E.2d 111, 114 (Ga. Ct. App. 2016)), *report and recommendation adopted*, No. 1:20-cv-3902-LMM, 2021 WL 2471048 (N.D. Ga. Jan. 29, 2021); *see also Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011) ("Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel."

(quoting *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 598, 68 S. Ct. 715, 92 L. Ed. 898 (1948))).

Res judicata applies if "(1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with them, are identical in both suits; and (4) the same cause of action is involved in both cases." *Ragsdale*, 193 F.3d at 1238.

b. Previous Actions

NCR asserts res judicata based on final judgments in the Underlying Action and in an action filed by CSS's CEO, Robin Gustin, against NCR in the Southern District of Florida in 2019.[3]

Regarding the Underlying Action, NCR argues that the first three elements have been met: a final judgment was entered in this Court in the Underlying Action between it and CSS.

3. A party may raise res judicata in a Rule 12(b)(6) motion to dismiss "where the defense's existence can be judged on the face of the complaint . . . 'or that the record of the prior case be received in evidence.'" *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir. 1982) (quoting *Guam Inv. Co. v. Cent. Bldg., Inc.*, 288 F.2d 19, 24 (9th Cir. 1961)). "In making this determination, [the Court] may . . . take judicial notice of state and federal court records of prior proceedings." *Harrell v. Bank of Am., N.A.*, 813 F. App'x 397, 400 (11th Cir. 2020) (per curiam) (citing *United States ex rel. Osheroff v. Humana, Inc.*, 776 F.3d 805, 811-12 & n.4 (11th Cir. 2015)).

As for the fourth element, NCR maintains that CSS's claim in the amended complaint arises out of the same nucleus of operative fact as the claims in the Underlying Action.

In its amended complaint, CSS asserts that NCR's counsel committed fraud on the court in the Underlying Action by proffering fraudulent testimony during the *Markman* hearing, which the Court relied on in making its ruling against CSS.

First, CSS contends that during the *Markman* hearing NCR's counsel told Judge Duffey that certain check fraud-prevention technology known as "CAR/LAR mismatch technology" did not exist. CSS argues that this representation by NCR was false. Specifically, CSS alleges that in 2003 Joseph K. Kniceley, vice president of the Americas region for NCR's payment solution business, testified before the U.S. House of Representatives Subcommittee on Financial Services and Consumer Credit on the topic of the Check 21 Act and confirmed the existence of this technology.

Second, CSS argues that NCR featured the CAR/LAR mismatch technology in videos it published in 2010, but that prior to the commencement of the Underlying Action, NCR and its counsel removed these videos from the internet. CSS also alleges that NCR and its counsel manually scrubbed any mention of the existence of this technology from NCR's products and brochures in an attempt to cover up the fact that NCR had used this technology before 2014.

Finally, CSS claims that NCR misrepresented the deposition testimony of its employees in an attempt to demonstrate that the technology did not exist. CSS also alleges that NCR misrepresented the use of ParaScript products, which provided the CAR/LAR functionality to NCR.

Thus, CSS claims that NCR ultimately "intended to defraud the Court of the true facts." [15] ¶ 23. CSS maintains that NCR and its counsel knew that the testimony proffered by NCR's counsel during the *Markman* hearing was false yet presented it to the Court, thereby breaching a duty of honesty to both CSS and the Court by "concealing and withholding evidence." *Id.* ¶ 40. CSS claims that NCR's alleged misrepresentations caused it to lose its patent infringement case and to suffer damages, including the invalidation of its patents. CSS asserts that it is entitled to monetary relief. It further avers that NCR's misrepresentations "sullied this [C]ourt and harmed the integrity of the judicial process." *Id.* ¶ 47.

In its motion to dismiss, NCR argues that the 2016 *Markman* hearing transcript shows that CSS made the same arguments regarding NCR's misrepresentations that it now presents in its amended complaint. NCR argues that during the *Markman* hearing, CSS's counsel discussed CAR, LAR, the Check 21 legislation, and one NCR video that CSS now argues NCR removed from the internet.

Regarding its position on its 2003 congressional testimony, NCR contends that any information about this testimony has been available to CSS since 2003, so CSS had the opportunity to confront NCR's witnesses about it in the Underlying Action.[4]

NCR also points to the Florida suit filed by Gustin against NCR in 2019, which bars CSS from bringing this action now.

Specifically, NCR argues that res judicata applies because CSS's allegations that NCR withheld the depositions of its employees under a stipulated protective order and misrepresented the use of ParaScript products were subjects of the Florida case. NCR argues that some of the same allegations that CSS now makes in its amended complaint were made in the Florida case, which was dismissed with prejudice and later affirmed by the Eleventh Circuit. *See Gustin v. Nicoll*, 824 F. App'x 875 (11th Cir. 2020) (per curiam).

NCR asserts that while the Florida complaint alleged common law fraud, it relied on the same arguments CSS makes now, including that NCR argued at the *Markman* hearing that certain technology did not exist, that NCR

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4. NCR also argues that in 2016, two years after the *Markman* hearing, Gustin filed a "Motion to Hear the Truth Under Making False Statements" in the Underlying Action, in which she alleged that NCR's attorney made false statements to mislead the Court in order to invalidate its patents. However, Judge Duffey denied that motion, finding that its merits were not considered and that denial was appropriate because Gustin could not, in her pro se capacity, represent CSS. Opinion and Order at 2, *Cap. Sec. Sys.*, Case No. 1:14-cv-1516 (N.D. Ga. June 12, 2018).

presented Judge Duffey with testimony that contradicted its testimony before Congress in 2003, and that NCR misrepresented the use of certain ParaScript products.

CSS responds that res judicata does not apply because it could not have filed its fraud-on-the-court claim in the Underlying Action. It argues that the Court in the Underlying Action set a deadline of July 30, 2014, for any pleading amendments and that it did not learn of the alleged fraud until 2016, when the alleged fraud began to unfold. [27] at 3. CSS also argues that the Florida action does not implicate res judicata because that action "did not allege, involve, or examine any scheme or plan by NCR or its counsel to defraud the court." [17] at 5.

c. Discussion

It is undisputed that the first three elements for res judicata are present. The only question today is whether the fourth element—that the same cause of action is involved in both cases—has been established.

"[C]ases involve the same cause of action for purposes of res judicata if the present case arises out of the same nucleus of operative fact, or is based on the same factual predicate, as a former action." *Israel Disc. Bank Ltd. v. Entin*, 951 F.2d 311, 315 (11th Cir. 1992) (quotation omitted).

"The test for a common nucleus of operative fact is whether the same facts are involved in both cases, so that the present claim could have been effectively litigated with the prior one." *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 893 (11th Cir. 2013) (quotation omitted). "[C]laims that 'could have been brought' are claims in existence at the time the original complaint is filed or claims *actually* asserted by supplemental pleadings *or otherwise* in the earlier action." *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1357 (11th Cir. 1998) (quoting *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992)).

The Court finds that even if CSS could not have brought a claim for fraud-on-the-court in the Underlying Action because that claim was not in existence at the time it filed its complaint there,[5] CSS's fraud-on-the-court claim "could have been brought" in the Florida action. Gustin[6] filed her complaint against NCR in the Florida

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5. The Court notes that the proper course would have been for CSS to bring a motion under Federal Rule of Civil Procedure 60 for relief from a judgment or order *after* the conclusion of the Underlying Action. *See* Fed. R. Civ. P. 60(c)(1) ("A motion under Rule 60(b) must be made within a reasonable time—and for [fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party] no more than a year after the entry of the judgment or order or the date of the proceeding."). The Underlying Action concluded in 2019. CSS had until 2020 to bring a motion for relief from the judgment against it.

6. The Court finds that the third element—that the parties are the same or in privity in both suits—for res judicata is satisfied. Gustin was the named plaintiff in the Florida action. She is the CEO of CSS. "Corporate officers and directors are generally in privity with their corporation for purposes of res judicata." *Henry v. Norcross*, No. 1:16-cv-3008-ELR-JSA, 2016 WL 9558939, at *8 (N.D. Ga. Nov. 14, 2016), *adopted by* 2017 WL 3836125 (N.D. Ga. Jan. 4, 2017).

action in 2019, after the conclusion of the Underlying Action and well after CSS was made aware of the alleged misrepresentations by NCR in the 2003 testimony before Congress and during the 2016 *Markman* hearing.

Further, contrary to CSS's argument that the Florida action only alleged common law fraud, not fraud on the court, it makes no difference that the claims in that case are not identical to the claim in this case.[7] The relevant inquiry is whether the fraud-on-the-court claim *could* have been brought when Gustin filed her complaint against NCR in the Florida action, the answer to which is a resounding yes.

The Court finds that CSS's claim for fraud on the court is barred by res judicata.

2. Fraud on the Court

As an additional basis for dismissal, NCR argues that CSS fails to state a claim upon which relief can be granted.

Federal Rule of Civil Procedure 60(d)(1) "preserves a court's historical equity power to 'entertain an independent action to relieve a party from a judgment, order, or proceeding.'" *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1359 (11th Cir. 2014) (quoting Fed. R. Civ. P. 60(d)(1)). The elements of an independent action under Rule 60(d)(1) are:

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7. The Court emphasizes that the facts upon which Gustin relied in the Florida case are the same as or substantially similar to the facts she alleges in her amended complaint in this case.

> (1) a judgment which ought not, in equity and good conscience, . . . be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of defendant; and (5) the absence of any remedy at law.

Travelers Indem. Co. v. Gore, 761 F.2d 1549, 1551 (11th Cir. 1985) (per curiam) (quotation omitted).

The Eleventh Circuit has defined fraud on the court as "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 that are presented for adjudication." *Id.* (quotation omitted). This includes "only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (quotation omitted).

Fraud on the court is narrowly construed and is found only in exceptional cases "where the fraud vitiates the court's ability to reach an impartial disposition of the case before it." *Davenport Recycling Assocs. v. Comm'r of Internal Revenue*, 220 F.3d 1255, 1262 (11th Cir. 2000) (citation omitted).

Fraud-on-the-court claims are rarely successful because they "must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision, preventing the opposing party from fully and fairly presenting his case." *Id.* (quotation omitted).

Rule 60(d)(3) provides that a court can "set aside a judgment for fraud on the court." To show fraud on the court under Rule 60(d)(3), the movant must show "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." *LabMD, Inc. v. Tiversa, Inc.*, No. 1:11-cv-4044, 2016 WL 3695381, at *2 (N.D. Ga. May 13, 2016) (quotation and citations omitted), *aff'd per curiam*, 719 F. App'x 878 (11th Cir. 2017).

NCR moves to dismiss CSS's amended complaint because its allegations do not state a claim for fraud on the court.

First, NCR argues that CSS's allegation that NCR withheld documents in the Underlying Action is, at most, an injury to a single litigant, rather than an interference with the judicial machinery.

Second, NCR maintains that CSS's allegation that NCR removed videos from the internet as part of a scheme to cover up relevant facts in the Underlying Action is, at most, a discovery violation—not a deliberate scheme to subvert the judicial process. NCR argues that the issues in this case concern two parties and do not threaten a public injury.

CSS disagrees, arguing that this independent action is based on the actions of NRC and its counsel in the Underlying Action, in which they concealed documents that should have been produced and that would have altered the ruling of non-infringement of CSS's patents in that case.

CSS also maintains that NCR's actions constitute a "concerted fraud to keep CSS[] ignorant and deprive CSS[] of the opportunity to rectify the fraud during the original action." [17] at 8. CSS emphasizes that the crux of its fraud claim is that "NCR and its counsel purposefully concealed[ed] documents, intentionally or recklessly presented[ed] false testimony, and scrubb[ed] and conceal[ed] its own adverse admissions." *Id.* at 9. It contends that these actions demonstrate a concerted scheme to defraud both CSS and the integrity of the judicial process. It suggests that as a result of these actions, both CSS and this Court were harmed.[8]

The Court agrees with NCR that the allegations in CSS's amended complaint do not rise to the level of fraud on the court. At most, what CSS has alleged, when taken as true, constitutes fraud between parties, which is not actionable as fraud on the court. *See Rozier*, 573 F.2d at 1338 ("Less egregious misconduct, such as nondisclosure

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8. CSS requests leave to amend its complaint a second time if the Court concludes that it has not presented sufficient factual allegations in its complaint to support its fraud-on-the-court claim. CSS has had two opportunities to state a plausible claim for fraud on the court, and it has failed to do so. The Court finds that a second amendment is not warranted, and, in any event, would be futile.

to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." (quotation omitted)). Fraud between parties does not suffice as fraud on the court. *Id.*

CSS has not alleged that NCR engaged in the "most egregious misconduct," like bribery of the Court or fabrication of evidence, that would meet the high standard needed to allege fraud on the court. *Id.* (quotation omitted).

Further, a fraud-on-the-court claim "must be established by clear and convincing evidence." *Booker v. Dugger*, 825 F.2d 281, 283 (11th Cir. 1987). "[C]onclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief" will not suffice. *Id.* at 283-84 (alteration in original) (quotation omitted). CSS fails to provide clear and convincing evidence of the existence of a fraud. Instead, its amended complaint is rife with conclusory allegations.

For example, CSS avers that it is "informed and believes, and upon such information and belief alleges . . . NCR and/or its attorneys manually 'scrubbed' the mention of any usage of [the technology at issue]" to perpetrate a fraud. [15] ¶¶ 27. Regarding NCR's alleged removal of allegedly relevant videos from the internet, CSS states that it is "unaware of the exact date of removal of these videos" but nonetheless concludes that because of this action, it is "informed and believes . . . that NCR and its attorneys schemed to cover up" facts relevant to their fraud claim. *Id.* ¶¶ 28-29. Even CSS's allegation that NCR and its counsel “intentionally schemed to falsify and tamper with the discovery process, including through offering inconsistent testimony, concealing and withholding relevant and important evidence, and destroying evidence that would harm NCR’s defense of the then-pending case, thereby interfering with and harming this Court,” is based on “information and belief.” *Id.* ¶ 33. Such conclusory allegations fail to meet the high bar required to sustain a viable claim of fraud on the court.

Further, while CSS explains how it has been harmed financially through the loss of its patents, it does not sufficiently allege how the alleged fraud negatively affected the Court such that the “judicial machinery cannot perform in the usual manner its impartial task of adjudging cases.” *Gore*, 761 F.2d at 1551 (quotation omitted). Indeed, its allegations, at most, suggest discovery-dispute violations.

Moreover, the Court agrees with NCR that CSS’s allegations of fraud appear to be a back-door attempt to have this Court revisit the merits of its substantive claims which were adjudicated in the Underlying Action. A party “cannot use an independent action as a vehicle for the relitigation of issues.” *Id.* at 1552.

For all the reasons above, the Court will grant NCR’s motion [16] to dismiss.

III. Motion for Sanctions

NCR has also filed a motion for sanctions under Rule 11 against CSS and its counsel, Stephen M. Lobbin, and his law firm, SML Avvocati P.C., and Samuel S. Woodhouse, and his law firm, The Woodhouse Law Firm, LLC.

NCR argues that sanctions are warranted because CSS's fraud-on-the-court claim is frivolous and its own factual allegations demonstrate that there is no possible evidentiary support for its claim. NCR maintains that because CSS has not offered anything new in support of its claim against NCR, "the applicability of the res judicata doctrine to [CSS's] claim was, or should have been, obvious to [CSS's] counsel with even a cursory examination of the relevant law at the time the original Complaint was filed." [23] at 6-7. NCR also argues that sanctions are appropriate because CSS asserted its fraud claim in an improper attempt to relitigate the Underlying Action. NCR certified that it served its motion for Rule 11 sanctions more than twenty-one days[9] before the motion was filed, but that CSS failed to withdraw the amended complaint. *Id.* at 14.

As a sanction, NCR requests $31,720.70 in attorney's fees jointly and severally from CSS and its counsel.

CSS responds that NCR's motion fails for several reasons. First, CSS argues that the high Rule 11 standard "could never be satisfied here." [24] at 2. Second, CSS argues that the motion is premature because the Court

9. Federal Rule of Civil Procedure 11(c)(2) provides that a motion for sanctions must be served, but it must not be filed "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets."

has not ruled on NCR's motion to dismiss. Third, CSS argues that it has requested leave to amend its complaint a second time if necessary. Finally, CSS argues that it has not filed its fraud-on-the-court claim in bad faith or for an improper purpose.[10]

"In general, Rule 11 is violated, and sanctions are warranted, when a party files a pleading, motion, or paper that (1) is filed in bad faith or for an improper purpose . . . ; (2) is based on a legal theory that has no reasonable chance of success and that cannot be advanced as a reasonable argument to change existing law . . . ; or (3) has no reasonable factual basis . . . ." *Tacoronte v. Cohen*, 654 F. App'x 445, 449 (11th Cir. 2016) (per curiam) (citing Fed. R. Civ. P. 11(b)(1)-(3)).

The purpose of imposing sanctions pursuant to Rule 11 is to "reduce frivolous claims, defenses, or motions, and to deter costly meritless maneuvers." *Massengale v. Ray*, 267 F.3d 1298, 1302 (11th Cir. 2001) (per curiam) (quotation

10. CSS requests "an opportunity to appear before this Court for a hearing on this motion, and provide relevant testimony under oath" if the Court "has any doubt about the good faith—and lack of the required subjective bad faith—of CSS[] and its undersigned counsel." [24] at 6 n.5. Having reviewed the arguments of the parties, the Court finds that NCR's motion [23] for sanctions can be resolved without a hearing. *See Cook-Benjamin v. MHM Corr. Servs., Inc.*, 571 F. App'x 944, 949 (11th Cir. 2014) (per curiam) ("[A] district court [is] not required to hold a hearing prior to imposing sanctions where, as here, counsel was given an opportunity to respond to the Rule 11 allegations.") (citing *Donaldson v. Clark*, 819 F.2d 1551, 1560 (11th Cir. 1987) (en banc))). Therefore, CSS's request for a hearing is denied.

omitted); *see also Homecare CRM, LLC v. Adam Grp., Inc. of Middle Tenn.*, 952 F. Supp. 2d 1373, 1384 (N.D. Ga. 2013) (finding that the primary objective of Rule 11 is to "give a litigant pause to stop, think, and investigate more carefully before filing papers, thereby streamlining the administration and procedure of the federal courts" (quotation omitted)).

In cases where a party has moved for Rule 11 sanctions, the "objective standard for testing conduct under Rule 11 is 'reasonableness under the circumstances' and 'what was reasonable to believe at the time' the pleading was submitted." *Baker v. Alderman*, 158 F.3d 516, 524 (11th Cir. 1998). The Eleventh Circuit requires a two-step inquiry: "(1) whether the party's claims are objectively frivolous; and (2) whether the person who signed the pleadings should have been aware that they were frivolous." *Id.*

Rule 11(b) sanctions are warranted when a party files a pleading in bad faith for an improper purpose. Fed. R. Civ. P. 11(b)(1). "Improper purpose may be shown by excessive persistence in pursuing a claim . . . in the face of repeated adverse rulings . . . ." *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1448 (11th Cir. 1998) (quotation omitted), *overruled on other grounds by Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876 (11th Cir. 2023).

Thus, "[w]hen a court is confronted with a motion for sanctions under Rule 11 . . . it must first determine whether the party's claim is objectively frivolous, in view of the law or facts, and then, if it is, whether the person signing the document should have been aware that it was frivolous." *In re Mroz*, 65 F.3d 1567, 1573 (11th Cir. 1995) (citing *Jones v. Int'l Riding Helmets, Ltd.*, 49 F.3d 692, 695 (11th Cir. 1995)).

In practical terms, "sanctions are warranted when the claimant exhibits a deliberate indifference to obvious facts[;] [however] they are not warranted when the claimant's evidence is merely weak but appears sufficient, after a reasonable inquiry, to support a claim under existing law." *Baker*, 158 F.3d at 524 (internal quotations omitted).

Having carefully reviewed the record, the Court finds that CSS and its counsel violated Rule 11 by filing the amended complaint with no reasonable chance of success given that any legally cognizable claim for fraud on the court could have been adjudicated by the court in the Florida action. *See Thomas v. Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989) ("A plaintiff may be sanctioned under Rule 11 for filing claims barred by res judicata." (citations omitted)).

As discussed in detail above, CSS's only claim is barred by the doctrine of res judicata and, in any event, CSS has failed to state a claim for fraud on the court. Had CSS's counsel made a reasonable inquiry into the law, they would have realized that CSS could not now bring that claim or have the Court reconsider its prior ruling in the Underlying Action. Sanctions are appropriate for the filing of the amended complaint in bad faith or for an improper purpose, like to relitigate claims. *See* Fed. R. Civ. P. 11(b)(1).

Rule 11(b)(2) provides that by presenting to the Court a pleading an attorney representing a party certifies that the claims asserted therein "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." There was no plausible basis for CSS to continue asserting its fraud-on-the-court claim against NCR after being informed by NCR through its motion for sanctions that it was meritless. This claim was based upon a legal theory that had no chance of success under existing law, and there are no reasonable arguments for modifying existing law or for establishing new law. The Court finds that based on these facts, CSS has violated Rule 11(b)(2). CSS's fraud-on-the-court claim is objectively frivolous, and as the person who signed the pleadings, its counsel "should have been aware that they were frivolous." *Baker*, 158 F.3d at 524.

Rule 11 also provides, in relevant part, that when presenting a pleading to the court, a party must certify "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that "the allegations and factual contentions have evidentiary support." Fed. R. Civ. P. 11(b)(3). Under this rule, an attorney must make a reasonable inquiry into the facts and relevant legal authority before filing an action. *In re Mroz*, 65 F.3d at 1573. Rule 11 is violated where "the complaint has absolutely no chance of success under existing precedent." *Nance v. Ricoh Elecs.*, *Inc.*, No. 1:06-cv-2396-RWS, 2008 U.S. Dist. LEXIS 116816, 2008 WL 4767746, at *2 (N.D. Ga. Oct. 27, 2008) (quotation omitted), *aff'd*, 407 F. App'x 404 (11th Cir. 2011). "[A] complaint is factually groundless and merits sanctions where the plaintiff has absolutely no evidence to support its allegations." *Cairobe v. Zwicker & Assocs., P.C.*, No. 1:23-cv-486-CAP-JKL, 2024 U.S. Dist. LEXIS 204577, 2024 WL 4720381, at *5 (N.D. Ga. Sept. 27, 2024) (quotation omitted).

The record suggests that CSS's counsel failed to conduct a reasonable inquiry into the facts in pursuit of CSS's frivolous claim. The allegations in its amended complaint do not rise to the standard required to sufficiently allege a fraud-on-the-court claim. It also appears from the filings in this case that CSS's counsel failed to make a reasonable inquiry into the law, which would have informed them that CSS's claim fails as a matter of law.

Regarding appropriate sanctions in this case, sanctions may include "an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4).

"An *attorney* may be sanctioned when a pleading suffers any of these defects. However, district courts are forbidden from imposing monetary sanctions on a *party* for a violation of Rule 11(b)(2), i.e., when a pleading advances a legal theory that is unwarranted under existing law or a nonfrivolous extension of existing law." *Tacoronte*, 654 F. App'x at 449 (citations omitted).

Because CSS is represented by counsel, and because the Court is imposing sanctions under Rule 11(b)(2), the Court imposes sanctions against Stephen M. Lobbin and his law firm, SML Avvocati P.C., and Samuel S. Woodhouse, and his law firm, The Woodhouse Law Firm, LLC. *See* Fed. R. Civ. P. 11(c)(1) ("Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.").

IV. Conclusion

Accordingly, NCR's motion [16] to dismiss is **GRANTED**. As a sanction for failing to conduct a reasonable inquiry before filing a paper with the Court, NCR's motion [23] for sanctions is **GRANTED**. SML Avvocati P.C. and The Woodhouse Law Firm are ordered to pay Robbins Alloy Belinfante Littlefield LLC's reasonable attorney's fees and litigation expenses incurred in defending against CSS's claim. For all fees awarded herein, NCR is directed to present evidence of its attorney's fees and costs within seven days of the date of entry of this Order. CSS will have ten days from the date of that filing within which to respond to the fee request. NCR shall have seven days to reply.

IT IS SO ORDERED this 2nd day of April, 2025.

/s/ Timothy C. Batten, Sr.
Timothy C. Batten, Sr.
Chief United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED AUGUST 26, 2020

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14460
Non-Argument Calendar

ROBIN GUSTIN, CAPITAL
SECURITY SYSTEMS INC.,

Plaintiffs-Appellants,

v

BRUCE NICOLL, NCR CORPORATION
SOLUTIONS ARCHITECT, *et al.*,

Defendants,

NCR CORPORATION, PARASCRIPT LLC,

Defendants-Appellees.

Appeal from the United States District
Court for the Southern District of Florida. D.C.
Docket No. 9:19-cv-80291-DMM.

August 26, 2020, Decided;
August 26, 2020, Filed

Before WILLIAM PRYOR, Chief Judge, WILSON and BRANCH, Circuit Judges.

PER CURIAM:

Robin Gustin and her company, Capital Security Systems Incorporated, appeal the dismissal of their fifth amended complaint against NCR Corporation and Parascript LLC. Gustin complained that NCR and Parascript violated her federal right to a trial by jury under the Seventh Amendment during a previous lawsuit. *See* 42 U.S.C. § 1983. Gustin also complained that NCR and Parascript committed fraud under Florida law. NCR and Parascript moved to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6). The district court dismissed Gustin's fifth amended complaint with prejudice on the ground that further amendment would be futile. We affirm.

Gustin retained counsel to file her fifth amended complaint after NCR and Parascript moved to dismiss her *pro se* fourth amended complaint. *See id.* NCR and Parascript argued that Gustin failed to allege how they conspired to violate her federal right to trial by jury and that the claim failed as a matter of law because NCR is a private entity. NCR also argued that Gustin failed to plausibly allege a claim of common-law fraud.

To determine whether Gustin's fifth amended complaint states a claim, we accept its allegations and the contents of its attachments as true and view them in the light most favorable to her. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993); *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019). Gustin alleges that, in 2014, Capital Security sued NCR for patent infringement, and NCR counterclaimed, as the inventor, to invalidate the patents. During discovery, NCR filed some records that it marked "Highly Confidential" and "For Attorney's Eyes Only," and the senior vice president for Parascript submitted a declaration that authenticated some of the records. Gustin's "attorney was privy to the 'Highly Confidential' documents," but Gustin, who is "'thoroughly knowledgeable' about the technical aspects of the patent, was not able to study the[] documents and determine their effect on her case." After five years of litigation, the district court invalidated Gustin's patents. Later, Gustin inspected the records submitted by NCR and determined that they were publicly accessible.

Gustin complained that NCR and Parascript "depriv[ed] [her] of her right to a trial as stated in Amendment 7 of the United States Constitution," *see* 42 U.S.C. § 1983, and that they committed "common law fraud" in violation of Florida law. She alleged that the companies "prevented her from pursuing her lawsuit with full knowledge of all the evidence at her disposal" by "concealing evidence critical to her case" against NCR through "deceptively label[ing]" records as "Highly Confidential." She also alleged that she was unaware that NCR and Parascript had falsely labeled as confidential "evidence necessary to litigate her case with a reasonable probability of success" and that the fraud divested her of patents that constituted "all of the assets of her company."

The district court dismissed Gustin's complaint. It ruled that Gustin did "not allege . . . that NCR performs any public function or is closely intertwined in the with the state in any regard" as required "to support a finding that either NCR or Parascript are capable of violating [her] constitutional rights." *See* 42 U.S.C. § 1983. The district court also ruled that Gustin failed to plead, as required to state a state-law claim for fraud, that she was damaged or "deprived of any information" because she alleged that "her lawyer saw the documents, which under the principles of agency law, amounts to [her] seeing the documents."

The district court did not err by dismissing Gustin's fifth amended complaint. The fifth amended complaint lacks "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotation marks omitted). Gustin does not dispute that she failed to allege facts from which the district court could plausibly infer that NCR and Parascript acted "under of color of state law" to deprive her of a right guaranteed under the Constitution. *See Arrington v. Cobb Cnty.*, 139 F.3d 865, 872 (11th Cir. 1998). Gustin does not even mention, much less discuss the merits of, her federal claim in her brief. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Gustin's complaint fails to allege that she was damaged due to lack of access to the records that NCR marked as "confidential." In Florida, "lawyers . . . are always agents of their clients," *Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 295 (Fla. Dist. Ct. App. 2007) (quoting *Lipsig v. Ramlawi*, 760 So. 2d 170, 186 (Fla. Dist. Ct. App. 2000)), and "knowledge of the agent constitutes knowledge of the principal as long as the agent received such knowledge while acting within the scope of his authority," *id.* (quoting *Ruotal Corp., N.W., Inc. v. Ottati*, 391 So. 2d 308, 309 (Fla. Dist. Ct. App. 1980)). Because Gustin's attorney was "privy" to the marked records, knowledge of their contents was imputed to Gustin. That Gustin "did not know of the [contents of the records] . . . is immaterial" because the fault, if any, lies with her attorney for "fail[ing] to act for her . . . ." *See id.* (quoting *Griffith v. Investment Co.*, 92 Fla. 781, 110 So. 271, 271-72 (Fla. 1926)).

Gustin argues that the district court should have given her another opportunity to amend her complaint, but the district court was not required *sua sponte* to allow Gustin to file a sixth amended complaint when she was represented by counsel who never requested leave to amend nor moved to amend the fifth amended complaint. *See Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002). And the district court was not required to give Gustin an opportunity to amend when amendment would have been futile. *See Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007).

We **AFFIRM** the dismissal of Gustin's fifth amended complaint.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FLORIDA, FILED OCTOBER 21, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-80291-CV-MIDDLEBROOKS

ROBIN GUSTIN AND CAPITAL
SECURITY SYSTEMS INC,

Plaintiff,

v.

NCR CORPORATION AND P ARASCRIPT LLC,

Defendant.

ORDER ON MOTION TO DISMISS

THIS CAUSE comes before the Court upon a Motion to Dismiss filed by Defendant NCR Corporation ("NCR") on August 28, 2019. (DE 86). On September 6, 2019, Defendant Parascript LLC ("Parascript") joined NCR's Motion and offered additional support for NCR's arguments in favor of dismissal. (DE 90). Plaintiff Robin Gustin[1] ("Ms. Gustin") responded to NCR's Motion on September 11, 2019. (DE 93). NCR replied on September 18, 2019. (DE 96). Ms. Gustin and Capital Security

1. It is unclear why Plaintiff CSS did not join Plaintiff Gustin in responding to this motion.

Systems Inc. ("CSS") (collectively "Plaintiffs") responded to Parascript's Motion on September 20, 2019. (DE 97). Parascript replied on September 27, 2019. (DE 98). For the following reasons, NCR and Parascript's (collectively "Defendants") Motions are granted.

BACKGROUND

Defendants allege that Plaintiffs violated their Seventh Amendment right to a speedy trial and committed common law fraud by restricting access to certain documents in a prior litigation.

On May 19, 2014, CSS sued NCR and others for patent infringement. (Fifth Amended Complaint "FAC" ¶ 22). It appears that Ms. Gustin is the sole shareholder for CSS,[2] and that Parascript is a subsidiary of one of the named parties in the patent litigation.[3]

Ultimately, CSS was unsuccessful in this lawsuit and lost its patents. (FAC ¶ 46-47). Plaintiffs allege that

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2. While Plaintiffs do not allege this relationship in their Fifth Amended Complaint, they refer to Gustin as "sole shareholder Gustin" in their response to Defendant's Motion to Dismiss. (DE 93 at 8).

3. In the patent litigation, "Capital Security Systems Inc. (CSSI) sued NCR Corporation, SunTrust Bank, Capital One Bank and ABNB Credit Union and its subsidiaries for patent infringement." (F AC 122). Plaintiffs allege throughout that Parascript was a party to this litigation and therefore it appears that Parascript was a subsidiary or otherwise related to one of the named parties.

CSS lost because certain documents were designated "Highly Confidential" and for "Attorney's Eyes Only." (FAC ¶ 44-46). Therefore, Ms. Gustin, who is "thoroughly knowledgable" about the technical aspects of the patent, was not able to study these documents and determine their effect on her case. (FAC ¶ 40). Plaintiffs were represented by counsel and do not dispute that counsel was able to see the documents. (FAC ¶ 46).

LEGAL STANDARD FOR MOTION TO DISMISS

A motion to dismiss under Rule l2(b)(6) challenges the legal sufficiency of the allegations in a complaint. *See* Fed. R. Civ. P. 12(b)(6). In assessing legal sufficiency, the Court is bound to apply the pleading standard articulated in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) *and Ashcroftv. Iqbal,* 556 U.S. 662,678 (2009). That is, the complaint "must ... contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass'n v. Cigna Corp.,* 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Twombly,* 550 U.S. at 570). "Dismissal is therefore permitted when on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action." *Glover v. Liggett Grp., Inc.,* 459 F.3d 1304, 1308 (11th Cir. 2006) (internal quotations omitted) (citing *Marshall Cnty. Bd. of Educ. v. Marshall Cnty. Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir. 1993)).

When reviewing a motion to dismiss, a court must construe plaintiff's complaint in the light most favorable to plaintiff and assume the truth of plaintiffs factual allegations. *See Erickson v. Pardus,* 551 U.S. 89, 93 (2007); *Christopher v. Harbury,* 536 U.S. 403, 406 (2002); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.,* 116 F.3d 1364, 1369 (11th Cir. 1997). However, pleadings that "are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal,* 556 U.S. at 678; *see also Sinaltrainal v. Coca-Cola Co.,* 578 F.3d 1252, 1260 (11th Cir. 2009) (stating that an unwarranted deduction of fact is not considered true for purposes of determining whether a claim is legally sufficient).

DISCUSSION

1. Seventh Amendment Claim

It is a fundamental tenant of Constitutional law that "the conduct of private parties lies beyond the Constitution's scope in most instances." *Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 614 (1991). The narrow exceptions to this rule occur when the exercise of a right has "its source in state authority" or when the action took place with "significant assistance of the government." *Id.*

Plaintiff argues that because NCR is a public corporation, it can violate Plaintiffs constitutional rights. (DE 93 at 7-8). Plaintiff does not allege in its Fifth Amended Complaint that NCR performs any public function or is closely intertwined with the state in any regard. Therefore, Plaintiff does not allege facts sufficient to support a finding that either NCR or Parascript are capable of violating Plaintiff's constitutional rights.

2. Common Law Fraud

Once hired, a lawyer is the agent of his or her client. *See e.g., Damren v. Fla.*, 776 F.3d 816, 821 (11th Cir. 2015). "It is axiomatic that knowledge of the agent constitutes knowledge of the principal as long as the agent received such knowledge while acting within the scope of his authority." *Ruotal Corp., N W. v. Ottati,* 391 So. 2d 308, 309 (Fla. Dist. Ct. App. 1980). Essentially, a lawyer's act of behalf of the client *is* an act of the client. *Griffith v. Inv. Co.,* 92 Fla. 781, 783 (1926) ("It is a well-settled principle of law that an attorney acting within the scope of his authority represents his client and his acts of omission as well as commission are to be regarded as the acts of the person he represents."). For example, in *Griffith v. Investment Company,* the Florida Supreme Court held that when information was conveyed to a lawyer, it was "immaterial" whether that information had also been conveyed to the client. *Id.*

Here Plaintiffs concede that their "attorney was privy to the 'Highly Confidential' documents." (FAC ¶ 46). Further, Plaintiffs do not allege that their lawyer acted wrongfully or in any way failed to represent their interests. They allege only that because Defendants "deprived Ms. Gustin of discovering said evidence, Plaintiff was deprived of her right to a fair trial." (FAC ¶ 46).

Under Florida law, common law fraud requires:

> (1) a false statement of fact; (2) known by the person making the statement to be false at the time it was made; (3) made for the purpose of inducing another to act in reliance thereon; (4) action by the other person in reliance on the correctness of the statement; and (5) resulting damage to the other person.

Gandy v. Trans World Computer Tech. Grp., 787 So. 2d 116, 118 (Fla. Dist. Ct. App. 2001). Even assuming that the first four elements have been met, the fifth has not. Plaintiffs were not deprived of any information because their lawyer saw the documents, which, under the principals of agency law, amounts to Plaintiffs seeing the documents. Therefore, Plaintiff was not damaged.

CONCLUSION

In granting leave for Ms. Gustin to amend her Complaint for the fifth time, I noted that "Plaintiff who is now represented by counsel, filed the previous four complaints while representing herself. Plaintiff's proposed Fifth Amended Complaint is more cogent than Plaintiff's previous pleadings, and will allow the Parties and the Court to clarify the issues properly before the Court in this lawsuit." (DE 81). Plaintiff's Fifth Amended Complaint was indeed filed with the assistance of counsel and over the course of 15 pages clearly lays out the facts and law supporting Plaintiffs' claims for relief. As previously discussed, Plaintiffs still fail to state claims upon which relief can be granted. Therefore, I find that further amendment would be unhelpful. Based upon the foregoing, and after careful consideration of Plaintiffs' Fifth Amended Complaint (DE 82) and the applicable laws pertaining to the claims at issue, it is hereby

ORDERED AND ADJUDGED that

(1) The Defendants' Motions to Dismiss (DE 86; DE 90) are **GRANTED.**

(2) The above-styled action is **DISMISSED WITH PREJUDICE.**

(3) The Clerk of Court shall **CLOSE THIS CASE and DENY** all pending motions **AS MOOT.**

SIGNED in Chambers at West Palm Beach, Florida, this 21 day of October, 2019.

/s/ Donald M. Middlebrooks
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE