No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LABMD, INC.,

Petitioner,

v.

TIVERSA, INC., a Pennsylvania Corporation,

Respondent.

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

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PETITION FOR A WRIT OF CERTIORARI

JAMES W. HAWKINS
JAMES W. HAWKINS LLC
11339 Musette Circle
Alpharetta, GA 30009
(678) 697-1278
jhawkins@jameswhawkinsllc.com

Counsel for Petitioner

QUESTIONS PRESENTED

Whether a judgment obtained by fraud on a court must be set aside pursuant to *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944) and Fed. R. Civ. P. 60(d)(3) where the party who obtained the judgment perpetrated related frauds on a federal agency and Congress.

Whether *an attorney* must be implicated in his client's fraud on the court in order for a judgment to be set aside pursuant to *Hazel-Atlas* and Fed. R. Civ. P. 60(d)(3).

Whether an attorney who helps his client obtain a judgment by perpetrating a fraud on a court must be *counsel of record* in that court in order for the judgment to be set aside pursuant to *Hazel-Atlas* and Fed. R. Civ. P. 60(d)(3).

Whether an attorney who helps his client obtain a judgment by perpetrating a fraud on a court, who is not counsel of record in that court, must *actively participate in the litigation* in order for the judgment to be set aside pursuant to *Hazel-Atlas* and Fed. R. Civ. P. 60(d)(3).

Whether a fraud on the court must be intentionally false in order to set aside a judgment pursuant to *Hazel-Atlas* and Fed. R. Civ. P. 60(d)(3) or will conduct that is wilfully blind to the truth or is in reckless disregard for the truth suffice.

PARTIES TO THE PROCEEDING

Petitioner states that all parties to this proceeding are contained in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner states that it has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

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Systemic confusion regarding the standards for fraud on the court strikes at the heart of the judicial system and the public's perception of its integrity. Perpetually shifting, conflicting, and overly restrictive definitions of fraud on the court foster an atmosphere that promotes unethical behavior and rewards corruption with impunity. Some courts require that an officer of the court be implicated in order for judgments to be set aside for fraud on the court. Some courts say otherwise. Some courts say wilful blindness or reckless disregard for the truth suffice for fraud on the court while others say intentional fraud must be proved by clear and convincing evidence. The Eleventh Circuit Court of Appeals ("Eleventh Circuit") has held below, for the first time in any Circuit, that not only must an attorney be implicated in his client's fraud to set aside a judgment, but also that that attorney must also be counsel of record or actively participate in the case. In other words, a non-litigating attorney such as corporate counsel can advise his client how to cheat the system without consequence to a judgment obtained by the resulting fraud. This is what happened below but due to the Eleventh Circuit disregarding Tiversa's extensive frauds on the U.S. Government and now having the most restrictive definition of fraud on the court in the country, it is virtually impossible to hold accountable those who perpetrate frauds on courts in the Eleventh Circuit.

The federal district and appellate court decisions in the fraud on the court arena are irreconcilably inconsistent with the plain language of Fed. R. Civ. P. 60(d)(3), with this Court's historic

precedent and with each other. Fraud on the court jurisprudence is in desperate need of this Court's intervention, clarification and guidance.

Petitioner LabMD, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered below on December 7, 2017.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of Georgia ("District Court") finding that Petitioner presented a colorable claim of fraud on the court (Pet. App-2-17) is reported at *LabMD, Inc. v. Tiversa, Inc.*, No. 1:11-CV-4044-LMM, 2016 U.S. Dist. LEXIS 194820 (N.D. Ga. May 12, 2016).

The Opinion of the United States District Court for the Northern District of Georgia Denying Petitioner's Motion for Reconsideration is attached hereto. (Pet. App-18-33).

The Opinion of the Eleventh Circuit (Pet. App-34-40) is reported at *LabMD, Inc. v. Tiversa, Inc.*, 719 F. App'x 878 (11th Cir. 2017).

The Eleventh Circuit's denial of Petitioner's Petition for Rehearing and En Banc is attached hereto. (Pet. App-41-42).

JURISDICTION

The Opinion of the Eleventh Circuit was rendered on December 7, 2017. A timely Petition for En Banc Review was filed on December 28, 2018. The Petition for En Banc Review was denied on April 10, 2018. The Judgment of the Eleventh Circuit was entered on April 18, 2018. On June 28, 2018, Justice Thomas extended the time for filing this Petition to and including September 7, 2018. This Petition for Writ of Certiorari was timely filed on September 7, 2018. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 60. Relief from a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Tiversa, Inc. ("Tiversa"), founded and headquartered in Pittsburgh, Pennsylvania, purports to be a cybersecurity firm. Robert J. Boback ("Boback") was the chief executive officer of Tiversa from its inception in 2004, until March 2016 after the FBI raided Tiversa headquarters in connection with an investigation regarding fraudulent statements Boback made to Congress and the Federal Trade Commission. Those fraudulent statements and other misconduct by Tiversa are at the heart of the dispute between Petitioner and Tiversa.

Petitioner was a small, Atlanta-based medical laboratory that provided cancer detection services to urologists who needed their patients' tissue samples analyzed for prostate and bladder cancer. In February 2008, Tiversa hacked into and took from a LabMD computer in Atlanta a 1,718-page confidential LabMD document containing personal information and personal health information on approximately 9,300 patients (the "1718 File").[1]

In May 2008, Tiversa contacted Petitioner, told Petitioner that it "found" the 1718 File somewhere in cyberspace and offered to remediate the very "leak" caused by Tiversa. When Petitioner refused to buy Tiversa's services, Tiversa reported Petitioner to the Federal Trade Commission along with approximately

[1] Tiversa's theft, possession and distribution of the 1718 File was a violation of 42 U.S.C. § 1320d-6 (criminal violations for obtaining individually identifiable health information relating to an individual and/or disclosing individually identifiable health information to another person).

one hundred other companies that refused to purchase Tiversa's services. Tiversa told the FTC that LabMD had leaked the 1718 File and that Tiversa found the file on peer-to-peer networks on the computers of several known identity thieves. Based on this and other information, the FTC initiated an investigation of LabMD in 2010 and filed an administrative enforcement action against Petitioner in August 2013. *See* Complaint, *In re LabMD, Inc.*, 2013 FTC LEXIS 111 (F.T.C. August 29, 2013).

Petitioner believed that Tiversa had hacked into and taken the 1718 File directly from a LabMD computer. On October 19, 2011, Petitioner sued Tiversa in the Fulton County Superior Court in Atlanta for Tiversa's conversion of the 1718 File and related causes of action. The case was removed to the District Court on November 23, 2011. Tiversa was represented in the litigation by Pepper Hamilton LLC partners John Hansberry, Tiversa's counsel of record, and Eric Kline, Tiversa's outside general counsel.[2] Kline was not counsel of record in the District Court and is not a litigator.

Kline was Boback's long-time friend, business partner and personal lawyer. He had been Tiversa's outside general counsel since the company's inception. Kline was involved in the day-to-day operations of Tiversa. He even helped Tiversa solicit business from Petitioner.

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[2] Tiversa's counsel admitted in related litigation in the Western District of Pennsylvania that Kline "represented Tiversa in the action that was filed against Tiversa by Petitioner in the Northern District of Georgia." Tiversa now disputes this fact.

On November 30, 2011, Tiversa filed a motion to dismiss this case for lack of personal jurisdiction ("Tiversa's Motion to Dismiss"). Tiversa's Motion to Dismiss was supported by a declaration from Boback (the "Boback Declaration"), wherein Boback declared, under penalty of perjury, that "Tiversa does not regularly solicit business in Georgia" and that "Neither Tiversa nor any of its employees or agents have ever conducted any business in Georgia, engaged in a persistent course of conduct in Georgia or derived any revenue from the rendition of services in Georgia, and particularly in any way related to the allegations of LabMD, Inc. ("LabMD") in the Complaint." The District Court granted Tiversa's Motion to Dismiss and the Eleventh Circuit affirmed that ruling. *LabMD, Inc. v. Tiversa, Inc.*, 509 F. App'x 842 (11th Cir. 2013).

Five years later Petitioner would learn in other litigation that the Boback Declaration was fraudulent when Petitioner discovered that (1) Tiversa hacked files and solicited business from at least five (5) other companies in Georgia (*i.e.*, Papa John's Pizza, Coca-Cola, Georgia Music Educators Assoc., Logisticare Solutions and Franklin's Budget Car Sales); (2) Tiversa and Boback attended and solicited business at an FBI-LEEDA conference in Atlanta on March 29-31, 2010 – a year and a half before Tiversa filed the Boback Declaration; (3) Boback was a featured speaker on the last day of the Atlanta conference; (4) Tiversa collected at least thirteen (13) business cards from prospective Georgia customers at the conference; (5) while in Atlanta, Boback met with Natasha Curry, an anchor at HLN (formerly Headline News), to press CNN to air a promotional piece for Tiversa; (6) Tiversa Advisory Board Member Wesley Clark solicited

business for Tiversa at the Masters Golf Tournament in Augusta, Georgia in April 2009; and (7) Tiversa Advisory Board Member Howard Schmidt solicited business for Tiversa during a May 2006 presentation he made at Georgia Tech in Atlanta. Tiversa has never denied these facts or given any explanation for Boback's fraudulent declaration.

Pepper Hamilton attorneys assisted Tiversa in the preparation of Boback's Declaration. They falsely asserted the following in Tiversa's briefs filed in the District Court and in the Eleventh Circuit:

> As set forth in Tiversa's prior brief and the accompanying Boback Declaration, Tiversa's only solicitation of business to date in the state of Georgia consists of the one phone call and eight emails to LabMD described in the Complaint. These nine contacts to one potential customer over a two month period over two and half years ago cannot reasonably be deemed regular solicitation of business in the state of Georgia.
>
> Tiversa's only contact with Georgia is one phone call and eight emails placed to LabMD during the period of May through July 2008.
>
> Tiversa has no customers and conducts no business in Georgia, and its only effort ever to solicit business in Georgia – consisting of one phone call and eight emails to LabMD during a two-month period over four years ago – does not constitute "regularly" soliciting business.
>
> Tiversa did not target or direct its activities at the State of Georgia. Instead, it downloaded a publicly available file from a P2P file sharing

> network without knowledge of the file's location.
>
> Here, it is undisputed that Tiversa did not hack any computers, did not somehow target LabMD or even know where LabMD and its servers (if it even had servers) were located when it downloaded the 1,718 File.

In the District Court's August 15, 2012 Order, the court accepted as true and relied upon the fraudulent Boback Declaration and the false representations of the Pepper Hamilton attorneys as its basis for granting Tiversa's Motion to Dismiss:

> Tiversa avers that it has no customers in Georgia, does not provide any services in Georgia, and has derived no revenue from business activities in Georgia. Tiversa argues that one telephone contact and eight email contacts do not rise to the level of "regularly" soliciting business in Georgia. The court agrees. These limited contacts between Tiversa and LabMD – one telephone call and eight emails – are insufficient to establish that Tiversa regularly solicits business in Georgia. The word "regular" is defined as "recurring, attending, or functioning at fixed or uniform intervals." WEBSTER'S NEW COLLEGIATE DICTIONARY 992 (9th ed. 1990). It implies a pattern of behavior. There is no evidence of any pattern of Tiversa soliciting business from Georgia businesses and residents. There is no evidence that Tiversa contacts Georgia businesses and residents every few weeks or months or even once a year to attract new clients.

LabMD, Inc. v. Tiversa, Inc., No. 1:11-cv-04044-JOF, 2012 U.S. Dist. LEXIS 190853, at *10-12 (N.D. Ga. Aug. 15, 2012).

In Petitioner's appeal of the August 15, 2012 ruling, the Eleventh Circuit also accepted as true and relied upon the fraudulent Boback Declaration and the false representations of the Pepper Hamilton attorneys as its basis for affirming the District Court's August 15, 2012 ruling:

> Tiversa's contact with Georgia consisted of one phone call and nine emails to LabMD. Such contact is not enough under Georgia law to subject Tiversa to personal jurisdiction in Georgia courts. See Gust, 257 Ga. at 130; ETS Payphone, 236 Ga. App. at 715-16.
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> * * *
>
> And, although Tiversa's business involves the global searching of computer networks, this circumstance alone is also not enough to establish personal jurisdiction.

LabMD, Inc. v. Tiversa, Inc., 509 Fed. App'x 842, 845 (11th Cir. 2013).

Tiversa's fraud on the court was not discovered for several years. In August 2013, the U.S. House of Representatives Committee on Oversight and Government Reform launched an extensive investigation into Tiversa and its relationship with the FTC. The Committee's investigation was prompted by Michael J. Daugherty, Petitioner's chief executive officer. Daugherty was concerned about both the relationship between the FTC and Tiversa and the veracity of information Tiversa provided to

the FTC. With the help of a whistleblower and former Tiversa employee, the Committee unearthed and exposed massive frauds committed by Tiversa. *See* Staff of H. Comm. On Oversight and Gov't Reform, 113th Cong., Tiversa, Inc.: White Knight or High-Tech Protection Racket (2015) (the "OGR Report").[3] In its 99-page report, the Committee staff disclosed the following:

> Several years ago, Tiversa CEO Robert Boback began perpetrating a scheme in which at least one Tiversa employee manipulated documents legitimately found on the peer-to-peer network to show that the documents had spread throughout the peer-to-peer network. For example, Tiversa downloaded a file that computer A shared on a peer-to-peer network. The file could be copied and the metadata easily manipulated thoroughly [sic] widely-accessible computer software programs to make it appear that it had been downloaded by computers B, C, and D, and thus spread throughout the peer-to-peer network. Tiversa relied on the manipulated documents to create a need for their "remediation" services and to grow the company's reputation through press statements and manipulation of media contacts. Boback told media contacts that certain documents, including sensitive government documents, spread throughout the peer-to-peer network when in fact they had not.

[3] The OGR Report is an exhibit in the record below. It is available for review at https://www.databreaches.net/wpcontent/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf.

> According to a whistleblower, Tiversa not only provided the manipulated information to its clients, but in some instances also provided false documents to various entities of the United States government, including the Congress and several agencies. Not only is this unethical, but it is illegal to give false information to the United States government. It is also illegal to obstruct a congressional investigation by providing false information to a congressional committee.

OGR Report at 6. The Committee Staff further found that Tiversa withheld documents and Boback repeatedly failed to provide honest, forthright responses to questions under oath. The Committee Staff reported, for example, that (1) "Tiversa routinely provided falsified information to federal government agencies;" (2) "Boback provided false testimony about fabricated documents to the U.S. House of Representatives;" (3) "one Tiversa employee, under the direction of Boback, provided intentionally false information to the United States government on more than one occasion;" (4) "Tiversa withheld from the FTC a series of documents that are inconsistent with testimony company officials provided under oath;" (5) "Tiversa appears to have provided intentionally false information to this Committee and numerous other federal departments and agencies;" and (6) "Tiversa's failure to produce numerous relevant documents to the Commission demonstrates a lack of good faith in the manner in which the company has responded to subpoenas from both the FTC and the Committee. It also calls into question Tiversa's credibility as a source of information for the FTC." OGR Report at 78.

On May 5, 2015, the whistleblower testified under criminal immunity in the FTC's enforcement action against LabMD that, as a Tiversa employee, he hacked into and took the 1718 File from a LabMD computer in Atlanta, Georgia, and that Tiversa never found the 1718 File anywhere else.[4] The whistleblower's testimony directly refutes the 2011 statements by Pepper Hamilton attorneys that "it is undisputed that Tiversa did not hack any computers, did not somehow target LabMD or even know where LabMD and its servers were located when it downloaded the 1,718 File."

After the whistleblower revealed Tiversa's fabricated evidence and false testimony in the enforcement action, the FTC had no evidence that the 1718 File ever left Petitioner's computer (other than Tiversa's theft) and that there was no actual or likely harm to consumers. As a result, on November 13, 2016, Chief Administrative Law Judge Michael D. Chappell dismissed the FTC's complaint finding, *inter alia*, that "the record in this case contains no evidence that any consumer whose Personal Information has been maintained by LabMD had suffered any harm as a result of LabMD's alleged failure to employ "reasonable" data security for its computer networks," and "fundamental fairness dictates that demonstrating actual or likely substantial consumer injury under Section 5(n) requires proof of more than the hypothetical or theoretical harm that has been submitted by the government in this case." Initial Decision, *In re LabMD Inc.*, 2015 FTC LEXIS 272 (F.T.C. November 13, 2015), vacated by Opinion of the

[4] A transcript of the whistleblower's testimony is in the record below.

Commission, (July 29, 2016), *rev'd sub nom*., *LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018). In other words, Tiversa's false testimony and fabricated evidence in the FTC caused a substantial waste of public resources.

Tiversa's general counsel Eric Kline is no stranger to deceit either. Petitioner learned from discovery in the enforcement action that in 2009, in furtherance of another one of Tiversa's frauds, Kline helped Tiversa create a sham organization known as The Privacy Institute. This company was used by Tiversa to funnel documents to the FTC for its use against Petitioner and other potential customers that refused Tiversa's services. *See* OGR Report at 54, 58 and 72. Kline set up The Privacy Institute to avoid any connection with Tiversa. Neither Tiversa's nor Boback's nor any affiliated entity's name is found anywhere in the incorporation documents; the company was organized as a non-profit corporation; the purpose of the organization was falsely stated as "pursuing regulatory, legislative and judicial activities in furtherance of individual privacy rights;" one of Boback's friends, Brian J. Tarquinio, was the only director and officer of the company; the address of the company was misleadingly stated to be 1 Regency Court, Marlton, NJ, 08053, the address for Boback's uncle; and David M. Speers (a paralegal in Morgan Lewis and Bockius, where Kline was a partner at that time) is listed as the organizer.

Documents Kline produced to the FTC through The Privacy Institute and other documents later produced by Tiversa are further evidence of Tiversa's fraud on the court. Specifically, the documents reveal, contrary to Boback's Declaration, that (1) Tiversa had

solicited business from at least five (5) other business in Georgia with the same shakedown scheme it tried on LabMD;[5] (2) Tiversa hacked the 1718 File directly from a LabMD computer in Atlanta, Georgia;[6] and (3) the 1718 File had never spread through cyberspace. The District Court assumed that Kline reviewed these documents, was aware of their contents and knew that Tiversa had more contacts with the state of Georgia than his client would later represent to the District Court and the Eleventh Circuit. *LabMD, Inc. v. Tiversa, Inc.*, No. 1:11-cv-4044-LMM, 2016 U.S. Dist. LEXIS 194820, at *13 (N.D. Ga. May 12, 2016); Pet. App-12.

Although Petitioner recently prevailed against the FTC in the Eleventh Circuit Court of Appeals, *LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018), Petitioner ceased operations in January 2014 due to the costs of the FTC investigation and litigation. *See LabMD, Inc. v. FTC*, 678 F. App'x 816, 819 (11th Cir. 2016).

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[5] "Documents produced to the Committee show that in an effort to generate business, Tiversa repeatedly sought to coerce companies to purchase its services. Tiversa's methods have ranged from contacting a company about a leak but failing to provide anywhere close to full information, to referring nearly 100 companies to the FTC." OGR Report at 67.

[6] "Thus, according to this report, Tiversa had only downloaded the LabMD file from one source in Atlanta, Georgia by August 2008. This contradicts Boback's testimony that Tiversa first downloaded the LabMD file from an IP address in San Diego, California. If Tiversa had in fact downloaded the LabMD file from a San Diego IP address in February 2008, then that fact should be included in this 2008 forensic report. It is not." OGR Report at 75.

Because Tiversa had fraudulently escaped the jurisdiction of the courts in Georgia, Petitioner was compelled to file suit against Tiversa in Pittsburgh, Pennsylvania, Tiversa's hometown, where, in January 2015, Petitioner sued Tiversa for Federal RICO and other claims in federal court. The claims were based, *inter alia*, on the whistleblower's disclosure that Boback and Tiversa made numerous false statements to the FTC to entice the FTC to investigate and then prosecute Petitioner. On January 8, 2016, the Pittsburgh federal court granted Tiversa's Rule 12(b)(6) motion to dismiss all of Petitioner's claims on statute of limitations grounds. The court refused to equitably toll the statutes of limitations for the time Petitioner spent litigating against Tiversa in Georgia. *LabMD, Inc. v. Tiversa Holding Corp.*, Civil Action No. 2:15-cv-92, 2016 U.S. Dist. LEXIS 21250 (W.D. Pa. Feb. 22, 2016). In other words, Tiversa successfully avoided any liability for harming Petitioner by defrauding two federal courts in Georgia.

Immediately after the January 8, 2016 ruling, Petitioner's counsel scoured thousands of documents from the FTC's enforcement action against Petitioner as well as transcripts of hearings in related litigation to look for any evidence that might disprove Tiversa's statements to the District Court and the Eleventh Circuit that it never solicited business in Georgia. This search led to Petitioner's discovery of Tiversa's extensive solicitations of business in Georgia and other materials establishing that the Boback Declaration was a fraud on the court.

On January 29, 2016, Petitioner filed in the District Court below a Motion to Reopen Case, a Rule

60(d)(3) Motion for Relief from Judgment and a Motion for Discovery in Aid of Plaintiff's Rule 60(d)(3) Motion for Relief from Judgment ("Fraud on the Court Motions"). In addition to submitting the evidence described above, Petitioner submitted a transcript from a hearing in the Western District of Pennsylvania where Tiversa's counsel admitted that Kline "represented Tiversa in the action that was filed against Tiversa by Petitioner in the Northern District of Georgia." In response, Tiversa submitted no declaration from Kline or any other evidence to refute this fact. Instead, Tiversa's attorney claimed in a brief filed in the District Court that his admission was a mistake. The District Court allowed no discovery on this issue and accepted Tiversa's unsworn assertion at face value.[7]

Evidence submitted by Petitioner in support of its Fraud on the Court Motions led the District Court to find that Petitioner had presented a colorable claim of fraud on the court. "Based on the foregoing analysis of LabMD's Rule 60(d)(3) Motion, the Court finds that LabMD has demonstrated *some evidence* of possible fraud." *LabMD, Inc.*, U.S. Dist. LEXIS 194820, at *18 (emphasis in original). The District Court, however, severely limited discovery, allowing Petitioner only ten interrogatories and requiring that they be directed solely to John Hansberry, Tiversa's counsel of record. The District Court refused to permit any meaningful investigation of the fraud perpetrated on the court.

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[7] Unsworn statements in briefs are not evidence. *Travaglio v. Am. Express Co.*, 735 F.3d 1266, 1269 (11th Cir. 2013); *See also Jordan v. Paccar, Inc.*, No. 95-3478, 1996 U.S. App. LEXIS 25358 (6th Cir. Sep. 17, 1996) (district court erred in determining fraud on the court by taking defendant's assertions at face value).

The court permitted no discovery from or about Kline based on the legally erroneous belief that Kline's participation in his client's fraud on the court was irrelevant because, according to the court, Kline was not "an officer of *this* Court." *Id.* at *13 (emphasis added). The court denied all of Petitioner's other requests for discovery (*i.e.,* subpoenas duces tecum and depositions) to investigate Boback, Tiversa and other key participants in the fraud. The District Court also denied Petitioner's motion to appoint a Special Master to investigate Tiversa's fraud on the court and to address crime-fraud exceptions to the attorney-client privilege asserted by Tiversa. Several months later, the District Court narrowed Petitioner's discovery to just three interrogatories.

B. The District Court Proceedings

This lawsuit began on October 19, 2011, when Petitioner filed its complaint against Tiversa and other defendants in the Superior Court of Fulton County, Georgia. The complaint included counts for conversion, violations of the Computer Fraud and Abuse Act (18 U.S.C. § 1030) and other claims.

The state court action was removed to the District Court on November 23, 2011.

On November 30, 2011, Tiversa filed a Motion to Dismiss Plaintiff's Complaint. The motion was based on Fed. R. Civ. P. 12(b)(2).

On December 1, 2011, Tiversa filed a declaration by Robert J. Boback, Tiversa's chief executive officer, in support of its Rule 12(b)(2) motion ("Tiversa's Motion to Dismiss").

The District Court granted Tiversa's Motion to Dismiss on August 15, 2012.

Petitioner discovered Tiversa's fraud on the court in January 2016. On January 29, 2016, Petitioner filed a Motion to Reopen Case, a Rule 60(d)(3) Motion for Relief from Judgment and a Motion for Discovery in Aid of Plaintiff's Rule 60(d)(3) Motion for Relief from Judgment.

On May 12, 2016, the District Court denied Petitioner's Rule 60(d)(3) motion (with the right to refile). The District Court granted Petitioner's Motion for Discovery, in part, allowing Petitioner to serve just ten (10) written interrogatories on Pepper Hamilton partner John Hansberry, Tiversa's counsel of record. The District Court denied Petitioner any other discovery.

On September 6, 2016, Petitioner filed a Motion for Appointment of Special Master. The District Court denied this motion on November 10, 2016.

On November 10, 2016, the District Court ordered that Hansberry need only respond to three (3) of the ten (10) interrogatories Petitioner served upon him.

Petitioner filed a Motion for Reconsideration on January 20, 2017, wherein Petitioner requested reconsideration of the District Court's refusal to allow Petitioner any meaningful discovery.

Petitioner filed a Motion for Jurisdiction-Related Discovery on January 22, 2017, to address the District Court's stated concern that it may not have personal jurisdiction over Tiversa. On March 20, 2017, the District Court denied Petitioner's Motion for Jurisdiction-Related Discovery and Motion for Reconsideration.

Petitioner filed a timely Notice of Appeal on March 21, 2017.

C. The Appellate Court Proceedings

On February 2, 2013, a panel of the Eleventh Circuit affirmed the District Court's grant of Tiversa's Motion to Dismiss.

On December 7, 2017, a panel of the Eleventh Circuit affirmed the District Court's denial of Petitioner's Rule 60(d)(3) Motion for Relief from Judgment and the District Court's denial, in part, of Petitioner's Motion for Discovery in Aid of Plaintiff's Rule 60(d)(3) Motion for Relief from Judgment.

On December 28, 2017, Petitioner filed a Petition for En Banc Review.

On April 10, 2018, the Eleventh Circuit denied Petitioner's Petition for En Banc Review.

REASONS FOR GRANTING CERTIORARI

I. Review Is Warranted Because All Circuits Have Imposed Overly Restrictive Requirements for Setting Aside Judgments Resulting From Fraud On The Court.

The seminal case on setting aside judgments for fraud on the court is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944), overruled on other grounds by *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17 (1976). In *Hazel-Atlas*, the Court held that the one-term rule then in effect does not bar a court from setting aside a judgment obtained by fraud on the court. *Id.* at 245. There is "a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to

demand a departure from rigid adherence to the term rule." *Id.* at 244. When a judgment is "manifestly unconscionable," the courts are empowered to set judgments aside "without hesitation." *Id.* at 245.

To be sure, *Hazel-Atlas* was "not simply a case of a judgment obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." *Id.* at 245. Instead, the facts showed "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Id.* "Hartford's fraud, hidden for years but now admitted, had its genesis in the plan to publish an article for the deliberate purpose of deceiving the Patent Office. The plan was executed, and the article was put to fraudulent use in the Patent Office, contrary to law." *Id.* at 250.

The *Hazel-Atlas* Court specifically rejected the notion that finality was more important than equitable solutions for hardship cases:

> Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired.

Id. at 248. In fact, instead of favoring a policy of finality of judgments, the Court ruled, "The Circuit Court on the record [t]here presented had both the *duty* and the power to vacate its own judgment and to

give the District Court appropriate directions." *Id*. at 249-250 (emphasis added).

Finality is an important principle in the law, and one that the Courts have long touted for good reason. In many circumstances finality is, in fact, a more important concept and desired good than getting the individual merits of a particular case exactly right. But as this Court made clear 74 years ago in *Hazel-Atlas*, finality is not and should not be more valuable than ensuring that the parties to court proceedings do not perpetrate fraud on the courts and on the other litigants. This Court properly recognized that the actual and potential harm from failing to properly curtail fraud on the court, wherever it is found, is a harm far greater than lack of finality in these circumstances.

Today, the lessons of *Hazel-Atlas* are lost in the lower courts' morass of inconsistent and improper application of the fraud on the court definitions and standards. As a result, this area of the law is so confused and inconsistent as to be rendered almost useless. It is most unfortunate that this state of the law has worked to the advantage of those who perpetrate fraud on the court. The Circuits have strayed from *Hazel-Atlas* by defining fraud on the court so narrowly that in the 74 years since *Hazel-Atlas* there appears to be only *one* reported decision where a Circuit Court upheld a district court ruling setting aside a judgment for fraud on the court. *See Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980). As a result, there is a dearth of reported district court cases where judgments have been set aside for fraud on the court. Rare examples include *Eastern Fin. Corp. v. JSC Alchevsk Iron & Steel Works*, 258 F.R.D.

76 (S.D.N.Y. 2008); *Southerland v. Cnty. of Oakland*, 77 F.R.D. 727, 728 (E.D. Mich. 1978), *aff'd*, 628 F.2d 978 (6th Cir. 1980. Certainly there have been more than a handful of "manifestly unconscionable" judgments in the federal courts in the last 74 years.

The Circuits' obstacles for proving fraud on the court have become so strict that trial courts rarely investigate the frauds perpetrated upon them and, as illustrated in this case, rarely permit discovery to uncover those who cheat, defile the courts and thwart justice. This is not healthy. "Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice…." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). "Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." *Id.*

II. Review Is Warranted To Resolve Conflicts In The Circuits Regarding The Definition Of Fraud On The Court In Fed. R. Civ. P. 60(d)(3) And *Hazel-Atlas*.

Since *Hazel-Atlas*, courts have struggled to define fraud on the court. *See*, *e.g.*, *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 48 n.5 (1st Cir. 1995). ("The cases have struggled, usually without great success, to provide a useful definition of 'fraud on the court.'"); *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, etc.*, 675 F.2d 1349, 1356 (4th Cir. 1982)) ("The federal courts that have struggled with the definition of 'fraud on the court' in the context of Rule 60(b) have found such a definition elusive"); *United States v. Stonehill*, 660 F.3d 415, 444 (9th Cir.

2011) ("We have struggled to define the conduct that constitutes fraud on the court.").

The struggle to define fraud on the court has led the Circuit Courts to render conflicting definitions of fraud on the court. The courts have come to very different results applying different standards. Both litigants and lower courts lack the appropriate guidance needed to yield the needed consistency in applying this standard.

Several circuits have adopted the following definition from Professor Moore:

> 'Fraud upon the court' should, we believe, embrace only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudicating cases that are presented for adjudication.[8]

See, *e.g.*, *Hadges v. Yonkers Racing Corp.*, 48 F.3d 1320, 1325 (2d Cir. 1995); *V.I. Hous. Auth. v. David*, 823 F.2d 764, 767 (3d Cir. 1987); *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989); *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993); *Kenner v. Commissioner*, 387 F.2d 689, 691 (7th Cir. 1968); *Weese v. Schukman*, 98 F.3d 542, 553 (10th Cir. 1996); *Zakrzewski v. McDonough*, 490 F.3d 1264, 1267 (11th Cir. 2007); *Broyhill Furniture Indus. v. Craftmaster Furniture Corp.*, 12 F.3d 1080, 1085 (Fed. Cir. 1993).

Although Professor Moore's definition includes two scenarios – frauds which defile the court and

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[8] 7 J. Moore, Federal Practice, § 60.33.

frauds perpetrated by officers of the court, every Circuit except the Fourth and Ninth, as discussed below, ignore the word "or" in his definition. As noted above, the only requirement in *Hazel-Atlas* for setting a judgment aside is that the judgment be "manifestly unconscionable." *Id.* at 245. Indeed, this is a broad concept, but if the Court wanted to impose the requirements we now see in the Circuits, it would have either done so in *Hazel-Atlas* or in another case since *Hazel-Atlas*.

The Eleventh Circuit's failure to follow *Hazel-Atlas* is indicated in the fact that the Court did not even cite the decision. The District Court cited *Hazel-Atlas*, but only for the proposition that a "motion based upon fraud on the court is not barred by laches or unclean hands, and there is no time limitation for setting aside a judgment." *LabMD, Inc.*, U.S. Dist. LEXIS 194820, at *5; Pet. App-5.

The Eleventh Circuit ruling needs to be reviewed because the court failed to apply this Court's "manifestly unconscionable" standard in *Hazel-Atlas*.

A. The Circuit Courts Are In Conflict Regarding the Necessary *Mens Rea* for Establishing Fraud on the Court.

The Sixth Circuit is the only Circuit where conduct that is "wilfully blind to the truth" or "is in reckless disregard for the truth" will establish the necessary *mens rea* for fraud on the court. *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001) (*quoting Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993). Specifically, the elements of Rule 60 fraud on the court in the Sixth Circuit include conduct:

(1) On the part of an officer of the court;

(2) That is directed to the "judicial machinery" itself;

(3) That is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth;

(4) That is a positive averment or is concealment when one is under a duty to disclose;

(5) That deceives the court.

Id. In *Demjanjuk,* the Circuit Court, in vacating the judgment of the district court, stated as follows:

> Thus, we hold that the OSI attorneys acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly. This was fraud on the court in the circumstances of this case where, by recklessly assuming Demjanjuk's guilt, they failed to observe their obligation to produce exculpatory materials requested by Demjanjuk.

Id. at 354.

No other Circuit Court has recognized that wilful blindness or reckless disregard for the truth would be sufficient to set aside a judgment for fraud on the court. The Sixth Circuit is correct in doing so because conduct that is wilfully blind or that recklessly disregards the truth satisfies the "manifestly unconscionable" standard in *Hazel-Atlas*.

This Court should accept this Petition to resolve the Circuit split regarding the requisite *mens rea* necessary to establish fraud on the court.

B. Broader Definitions Of Fraud On The Court in the Fourth and Ninth Circuits Conflict With Every Other Circuit.

The Fourth and the Ninth Circuits have refused to require that fraud on the court be perpetrated by an "officer of the court." The Fourth Circuit correctly interprets *Hazel-Atlas* as imposing no requirement that an officer of the court be involved in the fraud:

> It may be well to dispel at the outset the notion that proof of bribery of a judge or juror or of fraud perpetrated by other officers of the court is an essential element of fraud on a court. To be sure, this wrongdoing would be a badge of such fraud, but the opinion in Hazel-Atlas did not rely on this type of misconduct. Commentators have suggested that involvement of an attorney is an essential component of fraud on the court when misconduct of other officers of the court is not established. *The Supreme Court, however, neither predicated its decision in Hazel-Atlas on the narrow ground of an attorney's involvement in the litigant's fraud, nor did it identify this as an element of fraud on the court. Consequently, a civil judgment may be set aside because of a litigant's fraud on the court though no wrongdoing is ascribed to an attorney or other officer of the court.*

Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters, etc., 675 F.2d 1349, 1362-63 (4th Cir. 1982) (citations omitted) (emphasis added).

Like the Fourth Circuit, the Ninth Circuit has refused to require attorney involvement by an attorney or other officer of the court to constitute fraud on the court. *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971); *cf. Glenwood Farms, Inc. v. O'Connor*, 666 F. Supp. 2d 154, 177 n.18 (D. Me. 2009) ("To the extent *Toscano* does not require the involvement of an officer of the court, and binding First Circuit authority does, the Court declines to follow it.").

Eleventh Circuit law conflicts with Fourth and Ninth Circuit law in its requirement that an attorney be implicated in order to set aside a judgment for fraud on the court. *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) ("Generally speaking, 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, will constitute a fraud on the court.") (quoting *United States v. International Telephone & Telegraph Corp.*, 349 F. Supp. 22, 29 (D.Conn.1972 *aff'd without opinion*, 410 U.S. 919, 93 S. Ct. 1363, 35 L. Ed. 2d 582 (1973)).

The Eleventh Circuit ruling needs to be reviewed in order for this Court to resolve whether an attorney must be implicated in his client's fraud in order for a judgment to be set aside for fraud on the court.

C. Eleventh Circuit Law Conflicts With Every Other Circuit By Allowing Parties To Use Non-Litigating Attorneys To Perpetrate Frauds on The Courts.

In this case, the District Court and the Eleventh Circuit restricted the fraud on the court definition even more so than the overly restrictive Circuits that require that fraud on the court be perpetrated by an officer of the court. The District Court required and the Eleventh Circuit affirmed not only that an attorney be implicated in order to establish fraud on the court but also that said attorney be either an officer of *that* court or actively participate in the litigation. *LabMD, Inc.*, U.S. Dist. LEXIS 194820, at *13; Pet. App-12 ("LabMD fails to prove that an officer of *this* Court was involved in the alleged fraud.") (emphasis added.)

The District Court's finding that "LabMD offers no such evidence of Kline's participation," *Id.* at *14; Pet. App-13 is belied by Tiversa's admission, in the record, that Kline "represented Tiversa in the action that was filed against Tiversa by LabMD in the Northern District of Georgia." *Id.* at *15; Pet. App-14. Nevertheless, the Eleventh Circuit endorsed the District Court's novel propositions. "The district court, thus, limited post-judgment discovery to the pertinent issue before it: whether Mr. Hansberry [Tiversa's counsel of record] had actual knowledge of Tiversa's contacts with Georgia and mispresented intentionally that information to the court." *LabMD, Inc. v. Tiversa, Inc.*, 719 F. App'x 878, 881 (11th Cir. 2017); Pet. App-39.

There is certainly no requirement in *Hazel-Atlas* that fraud on the court be perpetrated by an *attorney of record*. Indeed, in *Hazel-Atlas*, the attorney who wrote the fraudulent article, had it published and submitted it to the Patent Office was R.F. Hatch, an attorney in the patent department at Hartford. *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 137 F.2d 764, 766 and 768 (3d Cir. 1943). Hatch was not counsel of record in the Circuit Court where the underlying fraud on the court occurred. *See Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 59 F.2d 399 (3d Cir. 1932) (listing counsel of record).

The District Court and Eleventh Circuit rulings on these points conflict with the law in every other circuit and would, if endorsed, lead to absurd results. There is no authority for the proposition that the attorney implicated in his client's fraud *must* be counsel of record or must actively participate in the litigation. The unacceptable consequence of the Eleventh Circuit's decision below would be that a party, like Tiversa, can bypass its counsel of record, like Hansberry, and call upon a non-litigating attorney, like Kline, for help in perpetrating a fraud on the court without fear that the fraudulently-obtained judgment, like the judgment below, will ever be set aside. Allowing a party to insulate itself from the consequences of its own fraud merely by controlling which attorneys it involves in the fraud and which ones it keeps in the dark vitiates the very purpose for setting aside judgments obtained by fraud on the court.

If an attorney must be implicated in his client's fraud in order to set a judgment aside for fraud on the Court, the Eleventh Circuit decision needs to be

reviewed for this Court to resolve whether the attorney must be counsel of record or actively participate in the case.

III. Review Is Warranted Because Limitations Imposed In Every Circuit Violate The Plain Language in Rule 60(d)(3) That "This Rule Does Not Limit A Court's Power To . . . Set Aside A Judgment For Fraud On The Court."

Fed. R. Civ. P. 60 imposes no requirement that an attorney or other officer of the court be implicated in a party's fraud on the court in order to set aside a judgment. Indeed, the plain language of Rule 60(d)(3) provides that "This rule does not limit a court's power to…set aside a judgment for fraud on the court." As shown in the cases discussed above, however, each Circuit has grafted insurmountable restrictions and conditions on the Rule so much so that in the 74 years since *Hazel-Atlas,* there appears to be only *one* reported decision where a Circuit Court upheld a district court ruling setting aside a judgment for fraud on the court. *See Southerland v. Irons*, 628 F.2d 978 (6th Cir. 1980). It is no surprise then that there is a dearth of reported district court cases where judgments have been set aside for fraud on the court. The Circuits' definitions of fraud on the court coupled with the corresponding clear and convincing standard for proving fraud is simply too difficult to meet.

Because of their fundamental misunderstanding about and misapplication of the fraud on the court standard in *Hazel-Atlas*, trial

courts rarely investigate[9] and, as below, rarely permit discovery to uncover those who cheat, defile the courts and thwart justice. "Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice." *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). "Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process." *Id.*

Tiversa's frauds on the U.S. Government are more egregious, extensive and harmful to the public than the frauds in *Hazel-Atlas,* yet the courts below imposed limitations not found in *Hazel-Atlas* and refused to permit any meaningful investigation of the frauds imposed on them. The *Hazel-Atlas* Court instructed that "The Circuit Court on the record [t]here presented had both the *duty* and the power to vacate its own judgment and to give the District Court appropriate directions." 322 U.S. at 249-250 (emphasis added). "The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Prods. Co. v. Root Ref. Co.,* 328 U.S. 575, 580 (1946). "The power to unearth such a fraud is the power to unearth it effectively." *Id.* Three interrogatories will never unearth such a fraud effectively. The real travesty of justice here is that a party that has defiled not only two federal courts but also a U.S. government agency and Congress succeeded at manipulating the judiciary

[9] It is a court's *duty* to investigate fraud on the court. *Hertz v. United States*, 18 F.2d 52, 55 (8th Cir. 1927).

to its advantage at extreme expense to the U.S. Government as well as Petitioner.

The Eleventh Circuit decision needs to be reviewed for this Court to resolve whether the lower courts may impose limitations on Rule 60(d)(3).

IV. Review Is Warranted Because *Hazel-Atlas* Holds That A Corresponding Fraud On Other Branches Of The U.S. Government, Like Tiversa's, Renders A Judgment Obtained By Fraud On The Court "Manifestly Unconscionable."

In *Hazel-Atlas*, the Court determined that the judgment Hartford obtained was "manifestly unconscionable" because the facts showed "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." 322 U.S. at 245. Here, similarly, Tiversa not only defrauded the courts but also defrauded other federal entities (*e.g.,* the FTC and Congress). Tiversa's frauds, however, are worse than those in *Hazel-Atlas*.

Evidence in the record below establishes that Tiversa's fraud on the District Court and the Eleventh Circuit was part of an overall scheme to commit crimes[10] and defraud the U.S. Government for Tiversa's commercial gain and Boback's personal gratification of revenge.[11] "Tiversa routinely provided

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[10] *See*, *e.g.*, 42 U.S.C. § 1320d-6.

[11] The ALJ noted in his Initial Decision that "Boback was motivated to retaliate against LabMD for LabMD's refusal to purchase remediation services from Tiversa." Initial Decision, *In re LabMD Inc.*, 2015 FTC LEXIS 272 *70 (F.T.C. November 13, 2015.

falsified information to federal government agencies." OGR Report at 5. In addition, "Tiversa used the FTC in further pursuing the company's coercive business practices." OGR Report at 67. In late 2009, for example, Tiversa obtained nonpublic knowledge that the FTC intended to pursue regulatory actions against many companies on Tiversa's list of companies that allegedly leaked personal, confidential or classified files. OGR Report at 62. "Tiversa maneuvered to position itself to profit from the FTC's actions." *Id.*

Other evidence in the record shows that Tiversa claimed to have gathered and stored a substantial amount of classified information.[12] OGR Report at 4. In one example, Tiversa downloaded blueprints for Marine One, the president's helicopter, and claimed in a highly publicized story that it located those plans on a computer in Iran. OGR Report at 16-18. The OGR Committee learned from a whistleblower that a portion of Tiversa's story was a fraud. Tiversa downloaded the plans from the computer of a defense contractor. *Id*. In the midst of an NCIS investigation into the matter, Tiversa hired Tim Hall, an individual at NCIS who investigated the Marine One leak. OGR Report at 17.

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[12] "Tiversa's co-founder claims the company is in possession of a greater quantity of sensitive and classified information than NSA-leaker Edward Snowden." OGR Report at 4. To escape liability for taking, possessing and distributing such information, Tiversa falsely claims that it had a right to take the material because it was "publicly available" on peer-to-peer networks. Tiversa's theft of Petitioner's 1718 File and false claim that it found the file spreading through cyberspace is a prototypical example of this pretense.

The Eleventh Circuit itself (in a separate case with a different panel than this case) recognized Tiversa's manipulation of and fraud on the FTC where, in oral argument, the court observed that "the aroma that comes out of the investigation of this case is that Traversa [sic] was shaking down private industry with the help of the FTC," and further acknowledged Tiversa's "falsifications to the Commission."[13]

Tiversa's download, retention and distribution of Petitioner's 1718 File was a violation of 42 U.S.C. § 1320d-6 (criminal violations for obtaining individually identifiable health information relating to an individual and/or disclosing individually identifiable health information to another person). Tiversa capitalized on this crime by making false representations and fabricating evidence about where it found the file to instigate an FTC investigation and then fuel an administrative enforcement action against Petitioner that would involve a trial and an appeal to the Eleventh Circuit where Petitioner ultimately prevailed. *LabMD, Inc. v. FTC*, 891 F.3d 1286 (11th Cir. 2018). In other words, Tiversa engaged in a massive "deliberately planned and carefully executed scheme to defraud not only the [U.S. Government] but the [district court and the] Circuit Court of Appeals." *See Hazel-Atlas*, 322 U.S. at 245. In addition to defrauding numerous departments and agencies of the U.S. Government and diverting and wasting a considerable amount of

[13] As of September 7, 2018, an audio recording of the oral argument in the referenced appeal was available at http://www.ca11.uscourts.gov/oral-argument-recordings. The observations quoted above are found between 23:18 and 25:30.

federal resources, Tiversa and its counsel have undermined the institutional integrity of the federal courts, violated the sanctity of the judicial process and, so far, have escaped responsibility for any of these egregious acts.

In extreme contrast to the documented and manifest injustice of Tiversa's extensive and systematic deceit on the U.S. Government and the attention given by the FTC and Congress to Tiversa's fraudulent testimony and fabrication of evidence that are at the heart of the case below, the District Court permitted Petitioner, a cancer detection laboratory destroyed by Tiversa's frauds, just three interrogatories to investigate and prove a colorable claim of fraud on the court. This, and the fact that the Eleventh Circuit affirmed the District Court, are vivid examples of why this Court should grant certiorari to (1) provide a uniform definition of Rule 60(d)(3) fraud on the court; (2) direct the federal judiciary that fraud on the court shall not be tolerated and that colorable claims of fraud on the court deserve meaningful investigations; (3) remind *all* members of the bar that their duty to prevent their clients from perpetrating frauds on the courts is paramount; and (4) preserve the integrity of the judicial system.

The District Court and the Eleventh Circuit failed to take any of Tiversa's crimes or frauds on the U.S. Government into account in their analyses of fraud on the court here. The Eleventh Circuit decision needs to be reviewed for this Court to resolve whether corresponding frauds in other branches of the U.S. government must be considered in the determination of whether a judgment obtained by fraud on the court is "manifestly unconscionable."

CONCLUSION

For the reasons set forth above, this Court should grant the petition for certiorari.

Respectfully submitted,

JAMES W. HAWKINS
JAMES W. HAWKINS LLC
11339 Musette Circle
Alpharetta, GA 30009
(678) 697-1278
jhawkins@jameswhawkinsllc.com

Counsel for Petitioner