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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APPENDIX

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APPENDIX A

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

LABMD, INC.	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:11-CV-4044-LLM
	:	
TIVERSA, INC.,	:	
TRUSTEES OF	:	
DARTMOUTH	:	
COLLEGE, and	:	
M. ERIC JOHNSON,	:	
	:	
Defendants.	:	

ORDER

This matter comes before the Court on Plaintiff's Rule 60(d)(3) Motion for Relief from Judgment [33] and Motion for Discovery [34].[14] After a review of the record and due consideration, the Court enters the following Order.

[14] Plaintiff's Motions do not pertain to Defendants Trustees of Dartmouth College or M. Eric Johnson.

I. BACKGROUND

Defendant Tiversa, Inc. ("Tiversa") provides peer-to-peer file monitoring and data breach remediation services to corporations, government agencies, and individuals using technology to scan for and protect against data exposure. Dkt. No. [1-1] at 5-6. In 2008, Tiversa downloaded a 1,718-page document that was created and stored by Plaintiff LabMD, Inc. ("LabMD"). That document ("1718 File" or "File") included personally identifiable information ("PII") and protected health information ("PHI") such as the Social Security numbers, insurance information, and treatment codes of LabMD patients. Id. at 12. Tiversa's CEO, Robert Boback, called LabMD to inform it of the File's discovery and to solicit business from LabMD. Id. at 17-18. Boback claimed the File was discovered on a peer-to-peer file sharing network and downloaded from an unknown source, the identity of which could be discovered by engaging Tiversa's professional services. Id. at 18-19. Over the next few months, Tiversa sent several emails to LabMD to solicit its business, offering to provide investigation and remediation services. Id. at 19-24. LabMD did not engage Tiversa's services, and ultimately sued Tiversa for violations of the Computer Fraud and Abuse Act and Georgia law. Id. at 25- 32.

LabMD initiated this action in the Superior Court of Fulton County, Georgia on October 19, 2011, id. at 2, and it was subsequently removed to this Court. Dkt. No. [1]. LabMD alleged Tiversa intentionally searched the internet and computer networks for files containing PII and PHI, and intentionally accessed LabMD's computers and networks to download the 1718 File without

authorization. Dkt. No. [1-1] at 16, 25. According to LabMD, Tiversa was subject to personal jurisdiction in Georgia under subsections (2) and/or (3) of the Georgia long-arm statute, which permits the exercise of jurisdiction over a nonresident defendant if it:

> (1) Commits a tortious act or omission within this state . . .;
>
> (2) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

O.C.G.A. § 9-10-91.

In November 2011, Tiversa moved to dismiss for lack of personal jurisdiction arguing the download of the 1718 File occurred in Pennsylvania, not Georgia, and that it had not engaged in any other acts or omissions in Georgia, conducted any business in Georgia, or in any way availed itself of jurisdiction in Georgia. Dkt. No. [5] at 1. In support of its motion, Tiversa submitted the Declaration of Mr. Boback ("Boback Declaration") attesting to Tiversa's lack of contact with Georgia. Dkt. No. [8-1]. Relying in part on this declaration, the Court found that the Georgia long-arm statute was not satisfied because, under subsection (2), the tortious act did not occur within Georgia since the file was downloaded from Pennsylvania, and under subsection (3), Tiversa did not regularly conduct or solicit business in Georgia. Dkt. No. [23-1]. On August 15, 2012, the Court granted Tiversa's motion and dismissed the case

without prejudice. Id. The Eleventh Circuit affirmed that decision in an opinion dated February 5, 2013. Dkt. No. [29].

Since that time, LabMD claims it has discovered evidence that Mr. Boback's Declaration, Tiversa's motion to dismiss, and Tiversa's appellate briefing contained false statements regarding Tiversa's contacts with Georgia and the circumstances surrounding the download of the 1718 File. Dkt. No. [33-1] at 3-5. LabMD moved to reopen this case, which the Court granted, and now seeks relief from the judgment pursuant to Federal Rule of Civil Procedure 60(d)(3), alleging Tiversa committed fraud on this Court and the Eleventh Circuit. Id. LabMD also seeks discovery in aid of its Rule 60(d)(3) motion. Dkt. No. [34].

II. LEGAL STANDARDS

A federal court's power to investigate whether a judgment was obtained by fraud on the court is an inherent and broad power. Univ. Oil Prods. Co. v. Root Refining Co., 328 U.S. 575, 580 (1946). Federal Rule of Civil Procedure 60, which provides avenues for relief from judgment, places no limitations on the court's power to "set aside a judgment for fraud on the court." FED. R. CIV. P. 60(d)(3). 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. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 245-46 (1944) abrogated on other grounds by Std. Oil. Co. v. United States, 429 U.S. 17, 18 n.2 (1976); 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2870, at 575 (3d ed. 2012) (citing Martina Theatre Corp. v. Schine Chain Theatres, Inc., 278 F.2d 798,

801 (2d Cir. 1960)).

The "fraud on the court" referenced in Rule 60(d)(3) is distinct from fraud between the parties, subject to Rule 60(b)(3), in that the latter does not threaten public injury and therefore requires a lower standard to prove. S.E.C. v. ESM Grp., Inc., 835 F.2d 270, 273 (11th Cir. 1988) (quoting Travelers Indemnity Co. v. Gore, 761 F.2d 1549, 1552 (11th Cir. 1985) (per curiam)). Rather, "fraud on the court" is defined as:

> Embracing only that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication, and relief should be denied in the absence of such conduct.

Id. at 273 (quoting Gore, 761 F.2d at 1551). 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. C.I.R., 220 F.3d 1255, 1262 (11th Cir. 2000). 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) (citations omitted). Conduct such as "nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." Id.

To show fraud on the court under Rule 60(d)(3),

the majority of circuits have held that 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." Herring v. United States, 424 F.3d 384, 386 (3d Cir. 2005); United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002); Cobell v. Norton, 334 F.3d 1128, 1150 (D.C. Cir. 2003); United States v. MacDonald, No. 97-7297, 1998 WL 637184, at *4 (4th Cir. Sept. 8, 1998). The Sixth Circuit, however, has held that fraud on the court may be either "intentionally false, willfully blind to the truth, or in reckless disregard of the truth." Rodriguez v. Schwartz, 465 F. App'x 504, 509 (6th Cir. 2012).

Regardless of which elements are required to prove fraud on the court, they "must be supported by clear, unequivocal and convincing evidence. Booker v. Dugger, 825 F.2d 281, 283 (11th Cir. 1987). "Conclusory 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 284.

If the Court does not determine that LabMD has met its burden to establish fraud on the court under Rule 60(d)(3), LabMD then requests that the Court allow discovery to further explore its fraud claims. Although the Eleventh Circuit has not addressed post-judgment discovery in the context of Rule 60(d)(3), other circuits have held that courts may permit discovery to unearth evidence of fraud on the court. Such discovery has only been permitted where there is at least some showing of fraud. Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1 (1st Cir. 1999) (requiring "some showing that a fraud actually has occurred"); Pearson v. First NH Mortg. Corp., 200

F.3d 30, 35 (1st Cir. 1999) (holding the court has the discretion to permit discovery proceedings "once the record evidence demonstrates a 'colorable' claim of fraud").

III. ANALYSIS

LabMD argues Tiversa committed fraud on this Court and the Eleventh Circuit through its motion to dismiss and appellate brief. Specifically, LabMD contends the Boback Declaration supporting Tiversa's motion to dismiss contained two false statements ("Boback Statements"): (1) "Tiversa does not regularly solicit business in Georgia," and (2) "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." Dkt. No. [33-1] at ¶¶ 22-23 (quoting Dkt. No. [8-1] ¶¶ 10, 15). LabMD also alleges Tiversa's attorneys from the law firm of Pepper Hamilton, Eric Kline and John Hansberry ("Pepper Hamilton Attorneys"), made false statements in Tiversa's reply brief in support of its motion to dismiss and in its appellate brief. Id. ¶¶ 30-33. In the reply brief, LabMD takes issue with two statements ("Pepper Hamilton Statements"): (1) "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," and (2) "Here, 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." Id. ¶¶ 30-31 (quoting Dkt. No. [19] at 6, 8 n.4). LabMD complains of similar statements in Tiversa's

appellate brief. Id. ¶ 32.

LabMD alleges the Boback Statements and the Pepper Hamilton Statements were known by the Pepper Hamilton Attorneys to be false at the time they were made and were intended to mislead the Courts. Id. ¶¶ 17-18, 26, 33. LabMD contends that at the time the Boback and Pepper Hamilton Statements were made to the Court, "Kline knew that Tiversa had substantially more business solicitations, contacts and conduct in the State of Georgia than the one phone call and handful of emails referenced." Id. at 4. Further, LabMD argues that a Tiversa employee did hack into a LabMD computer to download the 1718 File, quickly confirmed that the computer he hacked was located in Atlanta, and subsequently downloaded 18 other files from LabMD's computer. Id. at 5.

Tiversa responds that LabMD's allegations are unsupported by the evidence. Dkt. No. [41] at 29-38. But even if LabMD could support these allegations with evidence, Tiversa asserts that the alleged conduct is insufficient to constitute fraud on the Court. Id. at 48-50. Finally, Tiversa argues that even if LabMD could show fraud on the court, it would be harmless error because this Court still would not have personal jurisdiction over Tiversa. Dkt. No. [41] at 50-55.

LabMD claims it has proof that the Pepper Hamilton Attorneys knew the Boback Statements and the Pepper Hamilton Statements were false at the time they were made. In 2009, Eric Kline incorporated a company known as The Privacy Institute on Tiversa's behalf and at Tiversa's direction. Dkt. No. [33-1] ¶ 36. The Privacy Institute was set up to conceal its connection with Tiversa. Id. ¶ 37. Mr.

Kline represented The Privacy Institute as outside counsel from its inception until its dissolution in 2013. Id. ¶¶ 38-39. Specifically, Mr. Kline represented The Privacy Institute and Tiversa in various dealings with the Federal Trade Commission ("FTC"), including a civil investigative demand served on Tiversa by the FTC. Id. ¶¶ 40-41. Tiversa produced documents to the FTC through The Privacy Institute. Id. ¶ 42. LabMD believes Mr. Kline reviewed and was fully aware of the contents of all documents produced by The Privacy Institute to the FTC in 2009, including Exhibits J and K. Id. ¶ 43.

According to LabMD, Exhibit J is a spreadsheet containing a list of companies that Tiversa reported to the FTC for allegedly allowing PII and PHI to be available on peer-to-peer networks (the "List"). Id. ¶ 44. The List was compiled by Tiversa from Incident Record Forms Tiversa created for the purpose of soliciting business from those companies, among others. Id. ¶ 45. The List contains the names of at least six companies located in Georgia, their current locations, and the dates Tiversa created the Incident Record Forms for each company. Id. ¶ 46. The only companies included on the List were those that (1) refused to do business with Tiversa in response to its solicitations, and (2) Tiversa intended to solicit business from again after those companies received warning letters from the FTC. Id. ¶ 47. Tiversa actively solicited business from all six Georgia companies in 2008 or 2009, before it sent the List to the FTC. Id. ¶ 48. After the FTC received the List, it publicized its findings, contacted every company, opened investigations for several of them, and prosecuted at least two of the companies, including LabMD. Id. ¶ 49. LabMD believes Tiversa actively

solicited business from the other five Georgia companies in 2009 and 2010, after the FTC sent warning letters to them. Id. ¶ 50.

Exhibit K is another document produced to the FTC by Tiversa through The Privacy Institute in 2009. Id. ¶ 53. According to LabMD, this document shows that at the time Tiversa filed its motion to dismiss, it knew that on February 25, 2008, it downloaded the 1718 File directly from a LabMD computer with an IP address of 64.190.82.42. Id. That IP address is located in Atlanta, Georgia. Id.

LabMD also points to other evidence that the Boback Statements and the Pepper Hamilton Statements were false. A former Tiversa employee, Richard Wallace, testified under oath[15] in another action that he located the 1718 File in Atlanta and downloaded it, then used a browse host function to cause LabMD's computer to show him other files, and proceeded to download those files from LabMD's computer as well. Dkt. No. [33-14] at 1372-73. Mr. Wallace testified that Mr. Boback instructed him to make it appear as though the 1718 File was found in locations other than Georgia. Id. at 1369-70. Mr. Wallace also testified that the List was the master list Tiversa used to cold-call people, and that Mr. Boback contacted a lot of the people on the List after turning it over to the FTC. Id. at 1452-53.

"To prove fraud on the court under Rule 60(d)(3), the movant must show "(1) an intentional

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[15] Tiversa argues that Mr. Wallace's testimony is inadmissible hearsay. Dkt. No. [41] at 41-42. The Court need not address this issue since it is declining to grant LabMD's Rule 60(d)(3) Motion.

fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) in fact deceives the court." Herring, 424 F.3d at 386.

The evidence presented suggests that the Boback Statements and the Pepper Hamilton Statements could be false, and that Mr. Boback may have known that Tiversa had more contacts with Georgia than it disclosed. But it is not enough that the statements are false; there must be "egregious misconduct . . . or the fabrication of evidence by a party *in which an attorney is implicated*." Rozier, 573 F.2d at 1338 (emphasis added). To prove fraud on the court, LabMD must show that *Tiversa's counsel knew* that the Boback Statements and the Pepper Hamilton Statements were false. Id.

Even if the Court assumes that (1) Exhibits J and K are evidence that Tiversa had more contacts with Georgia than it represented to this Court, (2) Mr. Kline reviewed Exhibits J and K as part of the Privacy Institute's production of documents to the FTC, and (3) Mr. Kline understood those documents to evidence Tiversa's contacts with Georgia,[16]the Court still cannot conclude that LabMD has shown, by clear and convincing evidence, "an intentional fraud . . . by an officer of the court." Id. LabMD fails to prove that an officer of this Court was involved in the alleged fraud.

LabMD acknowledges that Tiversa's counsel of record in this action was John Hansberry, an attorney in the Pittsburgh office of Pepper Hamilton. Id. ¶ 17.

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[16] The Court acknowledges Tiversa's argument that the evidence does not support these assumptions. Dkt. No. [41] at 44-48. But because the Court denies LabMD's Rule 60(d)(3) Motion on other grounds, it need not address these issues.

However, LabMD argues that Eric Kline, of the same office, also represented Tiversa in this case "although not as counsel of record." Id. ¶ 18. LabMD cites to the transcript of a hearing in a related case in the Western District of Pennsylvania, arguing that Tiversa's current attorney, Jarrod Shaw, admitted that both Mr. Kline and Mr. Hansberry represented Tiversa in this action. Id. at 11-12. LabMD also notes that "[u]nder the law of partnerships, knowledge and actions of one partner are imputed to all others." Id. at 12 n.11 (citing Henkels & McCoy, Inc. v. Adochio, No. 94-3958, 1997 WL 5268, at *6 (E.D. Pa. Jan. 6, 1997)).

Tiversa responds that Mr. Kline did not represent Tiversa in this case, and that Mr. Shaw misspoke when he stated as much in the Western District of Pennsylvania hearing. Dkt. No. [41] at 46-47. According to Tiversa, Mr. Kline never entered an appearance in this matter, and has never appeared in this Court or any other court in the Eleventh Circuit. Id. Further, Tiversa argues that an attorney is only an "officer of the court" if he actually participates in the litigation, and LabMD offers no such evidence of Mr. Kline's participation. Id. at 47 (citing Van de Kamp v. Goldstein, 555 U.S. 335, 342 (2009)).

LabMD replies that if Mr. Shaw's disclosure of Mr. Kline's involvement in this action was truly a mistake, he would have filed a declaration or affidavit from Mr. Kline. Dkt. No. [45] at 9. The failure to do so, LabMD contends, shows that Mr. Kline represented Tiversa in this action. Id. Further, LabMD notes that Tiversa did not respond to its argument that Mr. Kline's knowledge is imputed to Mr. Hansberry. Id. LabMD argues that discovery is needed to determine

whether Mr. Hansberry had actual knowledge, in addition to his imputed knowledge, of Tiversa's contacts with Georgia. Id.

In the hearing held in the Western District of Pennsylvania on July 21, 2014, that court asked Mr. Shaw, "Who was involved previously for Pepper [Hamilton]?" Dkt. No. [33-5] at 2. Mr. Shaw responded "Eric Kline, Your Honor, and John Hansberry represented Tiversa in the action that was filed against Tiversa by LabMD in the Northern District of Georgia." Id. The court then asked if "[t]hey were out of the Philly office?" and Mr. Shaw answered "John Hansberry, I believe, is out of the Pittsburgh office. Eric Kline is most certainly out of the Pittsburgh office." Id. This exchange, which Mr. Shaw contends was a misstatement, does not amount to clear and convincing evidence that Mr. Kline represented Tiversa in this action or was otherwise an officer of this Court. To be an officer of the court for purposes of Rule 60(d)(3), an attorney must have some participation in the underlying litigation. See Herring, 424 F.3d at 390 (finding Rule 60(d)(3) applicable to conduct of lawyers that "did not represent the United States in the litigation sought to be reopened . . . [but] they did represent the United States Air Force's claim of privilege over a document central to that litigation."); Pumphrey v. K.W. Thompson Tool Co., 62 F.3d 1128, 1130-31 (9th Cir. 1995) (holding that defendant's vice president and general counsel was an officer of the court for purposes of Rule 60(d)(3), though he did not enter an appearance in the case or sign any documents filed with the court, he "participated significantly" in the litigation by attending trial on defendant's behalf, gathering information to respond to discovery

requests and framing the answers, and participating in the videotaping of a video introduced at trial). Here, LabMD's evidence does not show that Mr. Kline *actually participated* in the litigation of this case. Without such evidence, LabMD cannot prove that any misrepresentations in this litigation were made "by an officer of the court." Herring, 424 F.3d at 386.

Mr. Hansberry, as counsel of record for Tiversa in this action, is an officer of this Court and the Eleventh Circuit. See, e.g., Herring, 424 F.3d at 390. Thus, to show fraud on the court, LabMD must prove that Mr. Hansberry made representations concerning Tiversa's contacts with Georgia

that were intentionally false, id. at 386, or at the very least, "willfully blind to the truth, or in reckless disregard of the truth." Rodriguez, 465 F. App'x at 509.[17] But LabMD does not allege that Mr. Hansberry had *actual* knowledge of Tiversa's contacts with Georgia. Instead, LabMD argues Mr. Kline's knowledge should be *imputed* to Mr. Hansberry. Dkt. No. [33-1] at 12 n.11; Dkt. No. [45] at 9. At the hearing on this matter, LabMD conceded that imputed knowledge is not enough to meet the high standard for fraud on the court. And in its reply brief, LabMD recognizes that it needs discovery to determine whether Mr. Hansberry had actual knowledge of Tiversa's contacts with Georgia. Dkt. No. [45] at 9. Thus, based on the allegations and evidence before it,

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[17] The Court does not decide whether the intentional fraud standard of the Third, Fourth, Tenth, and D.C. Circuits, or the Sixth Circuit's willful blindness/reckless disregard standard applies. See supra p. 5.

the Court concludes that LabMD has not proved by clear and convincing evidence that Tiversa committed a fraud on the court.

LabMD also moves for limited discovery to determine the extent of the Pepper Hamilton Attorneys' knowledge regarding Tiversa's various contacts with Georgia. Dkt. No. [34-1] at 2-3. LabMD seeks leave to depose and serve subpoenas duces tecum on Mr. Boback, the Pepper Hamilton Attorneys, individuals associated with The Privacy Institute, and Rule 30(b)(6) designees from Tiversa, Pepper Hamilton, and the law firm of Morgan, Lewis and Bockius. Id. at 3.

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. Duhaime, 183 F.3d at 7 (requiring "some showing that a fraud actually has occurred" for discovery in aid of a motion attacking a final judgment). Thus, the Court will permit limited discovery, though not to the extent requested by LabMD. Instead, LabMD may serve ten (10) written interrogatories on John Hansberry of Pepper Hamilton within thirty (30) days of the date of this Order. Such interrogatories, objections, and responses thereto shall comply with Federal Rule of Civil Procedure 33 and are limited to the Rule 60(d)(3) issues. If the parties have disputes regarding these interrogatories, counsel are instructed to follow the Standing Order's requirements for handling discovery disputes. See Dkt. No. [38].

IV. CONCLUSION

Based on the foregoing, LabMD's Rule 60(d)(3) Motion for Relief from Judgment [33] is **DENIED**

with the right to re-file. LabMD's Motion for Discovery [34] is **GRANTED IN PART** and **DENIED IN PART**, such that LabMD may serve ten (10) written interrogatories on John Hansberry within thirty (30) days of the date of this Order.

IT IS SO ORDERED this 12th day of May, 2016.

Leigh Martin May
LEIGH MARTIN MAY
UNITED STATES
DISTRICT JUDGE

APPENDIX B

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

LABMD, INC.	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO.
v.	:	1:11-CV-4044-LLM
	:	
TIVERSA, INC.,	:	
TRUSTEES OF	:	
DARTMOUTH	:	
COLLEGE, and	:	
M. ERIC JOHNSON,	:	
	:	
Defendants.	:	

ORDER

This case comes before the Court on Plaintiff's Motion for Reconsideration [64] and Motion for Discovery [65]. After due consideration, the Court enters the following Order:

I. BACKGROUND

Defendant Tiversa, Inc. ("Tiversa") provides peer-to-peer file monitoring and data breach remediation services to corporations, government agencies, and individuals using technology to scan for and protect against data exposure. Dkt. No. [1-1] at 5-6. In 2008, Tiversa obtained a 1,718-page document that was created and stored by Plaintiff LabMD, Inc.

("LabMD"). That document ("1718 File" or "File") included personally identifiable information ("PII") and protected health information ("PHI") such as the Social Security numbers, insurance information, and treatment codes of LabMD patients. Id. at 12. Tiversa's CEO, Robert Boback, called LabMD to inform it of the File's discovery and to solicit business from LabMD. Id. at 17-18. Boback claimed the File was discovered on a peer-to-peer file sharing network ("P2P") and downloaded from an unknown source, the identity of which could be discovered by engaging Tiversa's professional services. Id. at 18-19. Over the next few months, Tiversa sent several emails to LabMD to solicit its business, offering to provide investigation and remediation services. Id. at 19-24. LabMD did not engage Tiversa's services, and ultimately sued Tiversa for violations of the Computer Fraud and Abuse Act and Georgia law when LabMD discovered that Tiversa had allegedly obtained the File through improper means. Id. at 25-32. LabMD alleged Tiversa intentionally searched the internet and computer networks for files containing PII and PHI, and intentionally accessed LabMD's computers and networks to download the 1718 File without authorization. Dkt. No. [1-1] at 16, 25.

LabMD originally initiated this action in the Superior Court of Fulton County, Georgia on October 19, 2011, id. at 2, and it was subsequently removed to this Court. Dkt. No. [1]. According to LabMD, Tiversa was subject to personal jurisdiction in Georgia under subsections (2) and/or (3) of the Georgia long-arm statute, which permits the exercise of jurisdiction over a nonresident defendant if it:

> (2) Commits a tortious act or omission within

> this state . . . ;
>
> (3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state.

O.C.G.A. § 9-10-91.

In November 2011, Tiversa moved to dismiss for lack of personal jurisdiction arguing the download of the 1718 File occurred in Pennsylvania, not Georgia, and that it had not engaged in any other acts or omissions in Georgia, conducted any business in Georgia, or in any way availed itself of jurisdiction in Georgia. Dkt. No. [5] at 1. In support of its motion, Tiversa submitted the Declaration of Mr. Boback ("Boback Declaration") attesting to Tiversa's lack of contact with Georgia. Dkt. No. [8-1]. Relying in part on this declaration, the Court found that the Georgia long-arm statute was not satisfied because, under subsection (2), the tortious act did not occur within Georgia since the file was downloaded from Pennsylvania, and under subsection (3), Tiversa did not regularly conduct or solicit business in Georgia. Dkt. No. [23-1]. On August 15, 2012, the Court granted Tiversa's motion and dismissed the case without prejudice. Id. The Eleventh Circuit affirmed that decision in an opinion dated February 5, 2013. Dkt. No. [29]. LabMD subsequently filed an action against Tiversa in the Western District of Pennsylvania.

Since that time, LabMD claims to have

discovered evidence that Mr. Boback's Declaration, Tiversa's motion to dismiss, and Tiversa's appellate briefing contained false statements regarding Tiversa's contacts with Georgia and the circumstances surrounding the download of the 1718 File. Dkt. No. [33-1] at 3-5. LabMD moved to reopen this case, moved for relief from the dismissal judgment under Rule 60(d)(3), and moved for jurisdictional discovery.

The Court granted the Motion to Reopen for the purpose of hearing and determining the Motion for Relief and the Motion for Discovery. Dkt. Nos. [47]. In their Motion for Relief, LabMD argued that Tiversa committed fraud on the Court and the Eleventh Circuit because its Motion to Dismiss contained two false statements: (1) "Tiversa does not regularly solicit business in Georgia," and (2) "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." Dkt. No. [33-1] at ¶¶ 22-23 (quoting Dkt. No. [8-1] ¶¶ 10, 15).

LabMD argued that Tiversa's attorneys knew the statements were false at the time they were made.[18] First, LabMD argued that Eric Kline reviewed and was fully aware of the contents of two documents, Exhibits J and K, which demonstrated Tiversa's Georgia contacts. Id. ¶ 43. Second, LabMD pointed to evidence that a former Tiversa employee,

[18] At the time of the Motion, Tiversa's counsel of record was John Hansberry of Pepper Hamilton, LLP. However, LabMD argued that Eric Kline also worked as Tiversa's attorney at the time.

Richard Wallace, testified under oath in another action that he located the 1718 File in Atlanta and downloaded it, then used a browse host function to cause LabMD's computer to show him other files, and proceeded to download those files from LabMD's computer as well. Dkt. No. [33-14] at 1372-73.

The Court determined that the evidence suggested that the statements might be false, but that their falsity did not constitute "egregious misconduct . . . or the fabrication of evidence by a party *in which an attorney is implicated*." Dkt. No. [49] at 11 (emphasis in original). That is, the Court determined Plaintiff had to show that the fraud was intentionally propagated by an officer of the court.

First, the Court determined there was no evidence that Kline actually participated in the underlying litigation such that he could be considered an officer of the court for purposes of "fraud upon the court." Second, the Court dismissed Plaintiff's argument that Hansberry, who did participate in the underlying litigation, had imputed knowledge of these additional contacts because Kline was his law partner.

However, the Court permitted Plaintiff to serve ten written interrogatories on Hansberry to determine if he did have actual knowledge of these additional contacts. In making that determination, the Court dismissed the Motion for Relief with the right to refile only if Plaintiff obtained evidence that Hansberry knew of the additional contacts and intentionally withheld the information from the Court.

On November 10, 2016, the Court held a second telephone conference to deal with some discovery issues related to the ten interrogatories. Dkt. No. [61].

The Court ordered Hansberry only to answer interrogatories five, six, and a modified version of interrogatory 8. Id. at 7:7-8. Hansberry was given 14 days to respond to the interrogatories and Plaintiff was told to then refile its Rule 60(d)(3) Motion within 30 days *only* if there was new information. Id. at 7:21-24.

Plaintiff has now filed a Motion for Reconsideration regarding the Court's May 2016 Order and its November 2016 Order. Dkt. No. [64]. Defendants oppose this Motion.

II. LEGAL STANDARD

Generally, parties "may not employ a motion for reconsideration as a vehicle to present new arguments or evidence that should have been raised earlier, introduce novel legal theories, or repackage familiar arguments to test whether the Court will change its mind." Brogdon v. Nat'l Healthcare Corp., 103 F. Supp. 2d 1322, 1338 (N.D. Ga. 2000) (internal citations omitted). Rather, to warrant vacating an order, parties must satisfy the standards of either Rule 59(e) (motion to alter or amend a judgment) or Rule 60(b) (motion for relief from judgment or order). Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 806 n.5 (11th Cir. 1993).

Appropriate grounds for reconsideration under Rule 59(e) include: (1) an intervening change in controlling law, (2) the availability of new evidence, and (3) the need to correct clear error or prevent manifest injustice. See Hood v. Perdue, 300 F. App'x 699, 700 (11th Cir. 2008) (citing Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995), aff'd,

87 F.3d 1242 (11th Cir. 1996)); Estate of Pidcock v. Sunnyland Am., Inc., 726 F. Supp. 1322, 1333 (S.D. Ga. 1989). Likewise, appropriate grounds for reconsideration under Rule 60 include "mistake, inadvertence, surprise, or excusable neglect," newly discovered evidence, fraud, a void judgment, or a judgment that has been satisfied or is no longer applicable. FED. R. CIV. P. 60(b). A party may also seek relief from a final judgment for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6).

III. DISCUSSION

As discussed above, the Court allowed Plaintiff to conduct limited discovery into its allegations that Tiversa and its attorneys defrauded the Court. The Court told Plaintiff that, if it discovered new evidence regarding Hansberry's knowledge and intent to defraud, it had the right to refile its Motion for Relief from Judgment. However, without new evidence, the Court would not consider a renewed motion.

Plaintiff has now asked for the Court to reconsider that decision and its decision to limit discovery. Plaintiff has identified 17 individual reasons why the Court should do so. These reasons include Plaintiff's assertions of newly discovered evidence and clear errors of law.[19]

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[19] The full list includes: (1) since filing its first Motion for Relief, Plaintiff has discovered additional evidence that Tiversa defrauded the Court; (2) the policy favoring the finality of judgments does not apply here because the judgment at issue was without prejudice and therefore not final; (3) the Supreme Court does not required that the an "officer of the court" be implicated on alleged fraud on the court; (4) even so, Tiversa's attorney Eric Kline was an officer of the court; (5) the Court should have held Hansberry accountable for Kline's actions; (6)

a. Alleged Errors of Law

First, Plaintiff argues that, at the November 10, 2016, telephonic conference, the Court impermissibly limited its own ability to rule on the Rule 60(d)(3) Motion. Specifically, Plaintiff points to the Court's statement, "We have already an order dismissing this case for lack of jurisdiction which has been affirmed by the Eleventh Circuit. So I don't have jurisdiction to do a lot of things in this case." Dkt. No. [60] at 8. Plaintiff argues that this isolated statement shows that the Court did not properly consider Plaintiff's arguments and allow Plaintiff to conduct a thorough investigation. According to Plaintiff, the Supreme Court has ruled to the contrary, holding that

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the Court should not have restricted relief based on its belief that the Court's power was limited by prior rulings; (7) the Court should have permitted jurisdictional- related discovery and made an independent determination of personal jurisdiction before considering Plaintiff's request for discovery; (8) the Court failed to accept as binding admission or give any weight to Mr. Shaw's judicial representation that Kline represented Tiversa in this litigation; (9) the Court accepted as irrefutably true Mr. Shaw's unsworn statement that he earlier misspoke regarding Kline's role; (10) the Court accepted Hansberry's interrogatory responses as irrefutably true; (11) the Court denied Plaintiff any cross examination of Mr. Shaw or Mr. Hansberry; (12) the Court denied Plaintiff any discovery from Tiversa; (13) the Court denied Plaintiff any discovery from Boback, Tiversa's co-founder; (14) the Court denied Plaintiff any discovery from Kline; (15) the Court denied Plaintiff any discovery from Kline's actually participation in the lawsuit; (16) the Court denied Plaintiff any discovery from Kline's law firm; and (17) the Court limited Plaintiff's discovery to effectively prevent Plaintiff from discovering and proving fraud on the Court.

courts have inherent power to "investigate whether a judgment was obtained by fraud." Dkt. No. [64-1] at 10 (quoting Universal Oil Prods. Co. v. Root Ref. Co., 328 U.S. 575, 580 (1946)).

The problem with Plaintiff's argument is that it is inconsistent with the Court's actions in this case. The Court never found that it had *no* power to investigate this issue. Instead, the Court exercised its inherent powers and allowed Plaintiff to conduct an investigation by serving interrogatories on Hansberry. This allowance of discovery shows that the Court used its inherent power to investigate Plaintiff's allegations.

The Court never limited discovery to Hansberry because it felt limited in its power.[20] Instead, the Court crafted its order allowing discovery directed to Hansberry consistent with the finding that Hansberry's knowledge was what was key to the allegations in Plaintiff's motion. The Court determined that no other discovery was likely to produce information related to the issues before the Court.

Next, Plaintiff argues that Rule 60 is only concerned with final judgments and thus, should not have been applied in this case. Plaintiff argues that, because the judgment dismissing this case for lack of personal jurisdiction was not final, the Court should have set it aside when Plaintiff asked.

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[20] The Court's decision to limit discovery was unrelated to the isolated comment from the telephone conference. This is particularly true given the fact that the Court limited the discovery in May and made the cited statement several months later.

First, the Court notes that Plaintiff was the one to style its Motion a Rule 60 Motion. Additionally, as Defendants argue, Plaintiff failed to raise this argument in its initial brief. Lastly, Plaintiff has failed to explain why it failed to do so.

Nonetheless, Plaintiff's argument is not persuasive for several reasons. First, the argument assumes that courts should always set aside judgments when faced with a Motion for Relief if the judgment was non-final. Put another way, Plaintiff's argument implies that courts should set aside any non-final judgment when requested merely because it is non-final.

The Court finds that, whether the strict Rule 60 standard applies or the more liberal Rule 59 standard applies, courts should still investigate whether the judgment was wrong or somehow procured by fraud. It would be against the policy of judicial economy to set aside non-final judgments when requested merely because they are non-final.

In a similar vein, Plaintiff argues that it was wrong for the Court to require Plaintiff to prove fraud upon the Court. According to Plaintiff, because the judgment was non-final, Plaintiff should not have had that burden.

Interestingly, Plaintiff contends there is no authority for a court to impose such a burden. However, the Eleventh Circuit has specifically held that a party seeking relief even under the more liberal Rule 59 standard for non-final judgments must "set forth facts or law of such a strongly convincing nature" that the court is induced to reverse its prior decision. Slomcenski v. Citibank, N.A., 432 F.3d 1271, 1277 n.2

(11th Cir. 2005). See also Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (holding that Rule 59 may only be granted by showing newly discovered evidence or manifest error of law or fact); Hammonds v. Sharp, No. 1:05-CV-831-WKW, 2015 WL 1346829, at *3 (M.D. Ala. March 24, 2015) (holding that Slomcenski creates a heavy burden for movants under Rule 59); Pennington v. Colvin, No. 3;12-CV-4191-SLB, 2014 WL 7178368, at *2 (N.D. Ala. Dec. 16, 2014) (holding that Arthur creates a high burden under Rule 59); In re Diplomat Const., Inc., 2013 WL 5999713, at *1 (N.D. Ga. Oct. 24, 2013 (holding that Rule 59 relief is an extraordinary remedy which should be used sparingly). Therefore, no matter which standard was applied, Plaintiff's facts at the time it filed its Motion were insufficient to warrant reversal.

Next, Plaintiff takes issue with the Court's finding that: (1) an officer of the court must perpetrate fraud on the Court; and (2) Hansberry was the only officer of the court for purposes of Defendants' alleged fraud upon the Court. As discussed above, the Court held that, to demonstrate fraud upon the court, a 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." Herring v. U.S., 424 F.3d 384, 390 (3d Cir. 2005). The Court further held that, to be an officer of the court, "an attorney must have some participation in the underlying litigation." Dkt. No. [49] at 13 (citing Herring v. U.S., 424 F.3d 384, 390 (3d Cir. 2005)). Lastly, the Court held that Plaintiff had not presented any actual evidence that Eric Kline, an attorney working in the same law firm as Hansberry and who allegedly new of Tiversa's additional Georgia contacts, actually participated in the litigation.

Plaintiff argues that the Court should not have required that the fraud be perpetrated by an attorney.[21]Plaintiff's argument is unpersuasive for several reasons. First, in its brief in support of its Rule 60 Motion, Plaintiff specifically laid out the elements of fraud upon the court as including fraud implemented by an officer of the court. Dkt. No. [33-1] at 43.

Second, binding Eleventh Circuit precedent *requires* this Court to impose such a condition. That is, the Fifth Circuit held that, to prove fraud upon the court, "an attorney [must be] implicated." Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978). As it is well known, the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981. Bonner v. Pritchard, 661 F.2d 1206 (11th Cir. 1981). This would include the Rozier decision.

Next, Plaintiff argues that, even if an officer of the court is required for fraud upon the court, the Court's definition of officer of the court is too narrow such that it impermissibly excluded Kline. That is,

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[21] As support, Plaintiff cites several out of circuit cases it claims show that there is no requirement that the fraud be perpetrated by an attorney. Plaintiff makes a long argument that the requirement that the fraud be perpetrated by an attorney was created and based upon non-binding law. Essentially, Plaintiff argues that, because the binding law was reasoned and based upon non-binding sources, the currently binding law is not really binding. This argument is convoluted and ignores the fact that circuit courts regularly create binding law based upon the persuasive nature of non-binding sources.

Plaintiff argues that the Court should not have required that an officer of the court is only the attorney of record in the litigation. Instead, Plaintiff argues that, in Theard v. U.S., 354 U.S. 278, 281 (1957), the Supreme Court found that any attorney admitted to the bar is an officer of the court for purposes of perpetrating fraud upon the court.

First, the Court already informed Plaintiff that it was "not going to revisit" this issue. Dkt. No. [60] at 21:22-23. Second, the Court did not say that, in the context of fraud upon the court, the attorney had to be counsel of record to be considered an officer of the court. Instead, the Court found that there had to be evidence that the attorney participated in the underlying litigation. Being counsel of record merely evinces the attorney's participation. Plaintiff's citation to Theard does not change that the attorney must still participate in the litigation.

That is, while Theard says that any attorney admitted to the bar is an officer of the court, Rozier requires that the officer be implicated in the fraud in some way. In that sense, even if an attorney is admitted to the bar, if he or she did not participate in the litigation, he or she could not be implicated in the fraud. For that reason, even though Kline may be an officer of the court in the sense that he is admitted to a bar, Plaintiff failed to present any evidence that he actually participated in the litigation such that he could have perpetuated the alleged fraud on the Court.

Next, Plaintiff argues that it *has* presented evidence that Kline participated in the litigation. Specifically, Plaintiff points to the admission by another attorney, Mr. Shaw, that Kline represented

Tiversa in this case. Plaintiff argues that it was manifest error for the Court to ignore this evidence. Additionally, Plaintiff argues that the Court should have at least imputed Kline's knowledge to Hansberry.

However, Plaintiff's argument is merely a rehashing of the arguments it presented to the Court in its Motion. As these arguments were already heard and dismissed, they are not properly presented for this Motion for Reconsideration. Brogdon, 103 F. Supp. 2d at 1338. The Court will not analyze them further.

Lastly, Plaintiff argues that the Court erred by limiting discovery only to Hansberry. Plaintiff argues that the Court should have allowed discovery upon Tiversa, Boback, Kline, and Pepper Hamilton, LLP. Not doing so, Plaintiff argues, made it so that Plaintiff could never prove fraud upon the Court.

Again, Plaintiff has already presented these arguments to the Court. The Court considered them and decided that, based upon the law, Hansberry was the only relevant person for determining whether there was fraud upon the court. As Plaintiff has not convinced the Court that Kline, Boback, or Pepper Hamilton could have perpetuated the fraud, the Court's reasoning remains.

b. Newly Discovered Evidence

Plaintiff contends that it has now found more evidence that Boback lied about his Georgia contacts. First, Plaintiff learned that Boback spoke at an Executive Training Conference in Atlanta on March 31, 2010. Plaintiff also contends that Joel Adams, a Tiversa Board Member, attended the conference, too.

Relatedly, Plaintiff contends it recently learned that Boback and Adams collected business cards at the conference from thirteen potential customers located in Georgia.

During that trip, Plaintiff claims that Boback met with Robin Meade at CNN headquarters to discuss a promotional piece for Tiversa. In a separate trip, Plaintiff claims that a Tiversa Advisory Board member solicited business for Tiversa at the Masters Golf Tournament in Augusta, Georgia. Lastly, Plaintiff claims that another Advisory Board member solicited business for Tiversa while visiting Atlanta for a presentation at Georgia Tech.

Defendants argue that this newly discovered evidence is irrelevant because it focuses only on Tiversa and Boback, not Hansberry. Defendants argue that, in its previous Order, the Court clearly indicated, "To show fraud on the Court, LabMD must prove that Mr. Hansberry made representations concerning Tiversa's contacts with Georgia that were recklessly false, or at the very least, willfully blind to the truth, or in reckless disregard of the trust." Dkt. No. [49] at 14. The Court made that finding because, as discussed above, only an officer of the court can defraud the court and the Court found that Hansberry was the only relevant officer of the court because he was the only attorney involved in the litigation.

The Court agrees with Defendants. This newly discovered information does not show that Hansberry knew of the additional contacts. Plaintiff makes no mention of Hansberry with regard to this evidence. As such, Plaintiff has not presented any new evidence that might change the Court's opinion. Plaintiff's Motion for Reconsideration is **DENIED**.

Plaintiff has also moved the Court to allow additional discovery upon Tiversa, Boback, Kline, Brian Tarquinio, David Speers, Morgan Lewis, LLP, and Pepper Hamilton, LLP. However, for the same reasons discussed above, Plaintiff has not convinced the Court that it should allow additional discovery beyond Hansberry. As such, that Motion is **DENIED**.

IV. CONCLUSION

In accordance with the foregoing, the Court **DENIES** Plaintiff's Motion for Reconsideration [64] and Motion for Discovery [65]. As Plaintiff has not presented any new evidence regarding Hansberry's alleged fraud upon the Court within the time allowed, the Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 20th day of March, 2017.

Leigh Martin May
LEIGH MARTIN MAY
UNITED STATES
DISTRICT JUDGE

APPENDIX C

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11274-EE
Non-Argument Calendar

D.C. Docket No. 1:11-cv-04044-LMM

LABMD, INC.,

Plaintiff-Appellant,

versus

TIVERSA, INC.,
a Pennsylvania Corporation,

Defendants – Appellees,

M. ERIC JOHNSON, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(December 7, 2017)

Before JORDAN, ROSENBAUM, and EDMONDSON, Circuit Judges.

PER CURIAM:

LabMD, Inc. appeals the district court's orders denying LabMD's motion for post-judgment relief -- filed pursuant to Fed. R. Civ. P. 60(d)(3) -- and denying in part LabMD's motion for post-judgment discovery. No reversible error has been shown; we affirm.

I. Background

Tiversa, Inc. is a company that monitors global peer-to-peer network searches and provides peer-to-peer intelligence and security services. In 2008, Tiversa downloaded a 1,718-page document (the "1,718 File") that had been created and stored on a LabMD computer and that contained patient social security numbers, insurance information, and treatment codes. Tiversa notified LabMD that it had discovered the 1,718 File on a peer-to-peer file sharing network and then attempted to solicit LabMD's business.

In 2011, LabMD (a Georgia corporation) filed this lawsuit against Tiversa[22] (a Pennsylvania corporation) in the Superior Court of Fulton County, Georgia. LabMD asserted claims for violations of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, and of Georgia law. The case was removed to federal court. The District Court for the Northern District of Georgia dismissed the case without prejudice, concluding that

[22] LabMD also named as defendants Trustees of Dartmouth College and M. Eric Johnson. In an earlier order, this Court dismissed those defendants as parties to this appeal.

-- based on Tiversa's limited contacts with Georgia -- the court lacked personal jurisdiction over Tiversa under Georgia's long-arm statute, O.C.G.A. § 9-10-91. We affirmed the dismissal on appeal. LabMD, Inc. v. Tiversa, Inc., 509 F. App'x 842 (11th Cir. 2013) (unpublished).

In 2016, LabMD filed a Rule 60(d)(3) motion for post-judgment relief, contending that Tiversa committed fraud on the court. Briefly stated, LabMD asserted that -- in support of Tiversa's motion to dismiss LabMD's complaint -- Tiversa and Tiversa's lawyers made knowingly false statements about Tiversa's contacts with Georgia and about the circumstances surrounding the downloading of the 1,718 File. LabMD also sought post-judgment discovery to obtain additional evidence in support of its Rule 60(d)(3) motion.

In a thorough and detailed order, the district court denied LabMD's Rule 60(d)(3) motion with a right to refile. The district court determined that "[t]o prove fraud on the court, LabMD must show that Tiversa's counsel knew that the [complained-of statements] were false." (emphasis in original). Because LabMD failed to show by clear and convincing evidence that an "officer of the court" was involved in the alleged fraud, the court concluded that LabMD was entitled to no Rule 60(d)(3) relief.

The district court did, however, grant in part LabMD's motion for limited discovery: the court permitted LabMD to serve ten interrogatories on Tiversa's counsel-of-record, John Hansberry. In doing so, the court noted LabMD's assertion that discovery was needed "to determine whether Mr. Hansberry had actual knowledge of Tiversa's contacts with Georgia."

Later, in response to a dispute between the parties about discovery, the district court ordered Mr. Hansberry to respond without objection to three of the ten original interrogatory questions. The district court clarified again that discovery was to be limited to determining "whether or not Mr. Hansberry had made representations concerning Tiversa's contacts with Georgia that were intentionally false, or, at the very least, willfully blind to the truth or in reckless disregard of the truth." LabMD moved for reconsideration of the district court's rulings. The district court denied relief.[23]

II. Standard of Review

We review the denial of a Rule 60(d)(3) motion under an abuse-of-discretion standard. Booker v. Dugger, 825 F.2d 281, 285 (11th Cir. 1987). And we review for abuse of discretion decisions about discovery. Harrison v. Culliver, 746 F.3d 1288, 1297 (11th Cir. 2014). "[U]nder the abuse of discretion standard, we will leave undisturbed a district court's ruling unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." Id.

III. Discussion

Under Rule 60(d)(3), a district court can "set aside a judgment for fraud on the court." See Fed. R. Civ. P. 60(d)(3). "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

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[23] LabMD raises no challenge on appeal to the district court's denial of LabMD's motion for reconsideration.

party in which the attorney is implicated, will constitute a fraud on the court." Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) (emphasis added) (quotation omitted). "Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court." Id. (quotation omitted). The party seeking relief under Rule 60(d)(3) must establish fraud "by clear and convincing evidence." Booker, 825 F.2d at 283. The district court has broad discretion in making rulings about discovery. Iraola & CIA., S.A. v. Kimberly-Clark Corp., 325 F.3d 1274, 1286 (11th Cir. 2003). When "it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied." Avirgan v. Hull, 932 F.2d 1572, 1580-81 (11th Cir. 1991) (concluding the district court abused no discretion in imposing restrictions on discovery when the court's ruling permitted discovery on the dispositive issue in the case); Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186, 1190 (5th Cir. 1978) ("When the record becomes clear enough to disclose that further discovery is not needed to develop significant aspects of the case . . . discovery should be ended."). Further, "we will not overturn discovery rulings unless it is shown that the District Court's ruling resulted in substantial harm to the appellant's case." Harrison, 746 F.3d at 1297.

Here, the district court determined properly that to prove fraud on the court, LabMD had to show that Tiversa's lawyer knew that statements made to the court about Tiversa's contacts with Georgia were false. The only attorney-of-record in this case was Mr. Hansberry. And LabMD has failed to show that

another lawyer was involved in Tiversa's representation.[24] The district court, thus, limited post- judgment discovery to the pertinent issue before it: whether Mr. Hansberry had actual knowledge of Tiversa's contacts with Georgia and mispresented intentionally that information to the court.

Given the circumstances of this case, we cannot say that the district court committed a clear error of judgment in limiting the scope of LabMD's post-judgment discovery. The district court's ruling permitted discovery about the dispositive issue in the case. And the additional discovery requested by LabMD would not have been helpful in resolving that dispositive issue. As a result, LabMD cannot show that the district court's ruling resulted in substantial harm. LabMD has demonstrated no abuse of

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[24]LabMD contends that Eric Kline, one of Mr. Hansberry's law partners, also acted as Tiversa's lawyer in this case. The evidence LabMD relies on in support of its position is a statement -- made in 2014 by Tiversa's current lawyer (Mr. Shaw) -- during a hearing in a separate case in the Western District of Pennsylvania. There, in response to a question from the court, Mr. Shaw said that both Mr. Kline and Mr. Hansberry represented Tiversa in this case. Mr. Shaw now says that his 2014 statement was incorrect. Moreover, nothing evidences that Mr. Shaw ever worked at the same law firm as Mr. Kline and Mr. Hansberry (not a partner or an associate of Kline or Hansberry) or that Mr. Shaw had involvement with this case during the pertinent time: in 2011 and 2012. The district judge determined that Mr. Shaw's 2014 statement did not persuade her that Mr. Kline in fact participated in this case or had otherwise acted as an officer of the court. LabMD has failed to show on appeal that the district court's factual determination about Mr. Kline's lack of participation in this case was clearly erroneous. We also reject LabMD's assertion that this statement constitutes a binding judicial admission on Tiversa in this case.

discretion.

On appeal, LabMD concedes that it cannot demonstrate -- with clear and convincing evidence -- that Tiversa committed fraud on the court. LabMD argues only that the district court denied prematurely its Rule 60(d)(3) motion without first permitting additional discovery. Because we have determined that the district court abused no discretion in limiting the scope of discovery, LabMD can show no abuse of discretion in the district court's denial of its Rule 60(d)(3) motion.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11274-EE

LABMD, INC.,

Plaintiff-Appellant,

versus

TIVERSA, INC.,
a Pennsylvania Corporation,

Defendants – Appellees,

M. ERIC JOHNSON, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(April 18, 2018)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, ROSENBAUM, and EDMONDSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

J.L. Edmonson
UNITED STATES CIRCUIT JUDGE

ORD-42