

No. 18A_____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL J. DAUGHERTY and LABMD, INC.,

Applicants,

v.

ALAIN H. SHEER, in his individual capacity and
RUTH T. YODAIKEN, in her individual capacity,

Respondents.

**Application for an Extension of Time
To File Petition for a Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit**

**APPLICATION TO THE HONORABLE
CHIEF JUSTICE JOHN ROBERTS, JR.**

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PARTIES TO THE PROCEEDINGS

Michael J. Daugherty (“Daugherty”) and LabMD, Inc. (“LabMD”) are plaintiffs and Alain H. Sheer (“Sheer”) and Ruth T. Yodaiken (“Yodaiken”) are defendants in a *Bivens* action filed by Daugherty and LabMD in the United States District Court for the District of Columbia. Sheer and Yodaiken are appellants and Daugherty and LabMD are appellees in an interlocutory appeal of that case to the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”).

STATEMENT PURSUANT TO RULE 29.6

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

APPLICATION FOR EXTENSION OF TIME

Pursuant to this Court’s Rules 13.5, 22, and 30.3, Daugherty and LabMD hereby request a 60-day extension of time, to and including December 31, 2018, within which to file a petition for a writ of certiorari in this case.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment sought to be reviewed is the judgment by the D.C. Circuit in *Daugherty v. Sheer*, 891 F.3d 386 (D.C. Cir. 2018) (attached as Exhibit A).

JURISDICTION

The D.C. Circuit issued the subject judgment on June 1, 2018. On August 3, 2018, the D.C. Circuit denied Daugherty and LabMD’s Petition For Panel Rehearing Or, In The Alternative, For Rehearing En Banc. Pursuant to this Court’s Rules 13.1,

13.3, and 30.1, LabMD and Daugherty's petition for a writ of certiorari would be due for filing no later than November 1, 2018. This application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

BACKGROUND

Until January 2014, LabMD operated as a small, medical services company providing doctors with cancer-detection services. In connection with its testing and other services, LabMD collected and maintained certain personal information on thousands of patients. Daugherty is LabMD's sole shareholder and chief executive officer.

Tiversa Holding Corp. ("Tiversa") was a so-called cybersecurity firm that allegedly offered breach detection and remediation services until several months after it was raided by the Federal Bureau of Investigation in March 2016 in connection with false statements Tiversa's CEO, Robert J. Boback ("Boback") had made to (1) the Federal Trade Commission in connection with an investigation of and administrative enforcement action against LabMD and (2) Congress in connection with an investigation by the staff of the U.S. House of Representatives Oversight and Government Reform Committee into the FTC's use of Tiversa and Boback as sources for investigations and as witnesses to support the FTC's enforcement actions.

Based on evidence allegedly gathered by Tiversa in February 2008, the FTC began an investigation of LabMD in January 2010. The FTC investigated LabMD for an alleged violation of Section 5 of the FTC Act based on Tiversa's allegations that

LabMD leaked a 1,780-page file (the “1718 File”) containing confidential information on over 9,000 patients, that the file was found on the computers of known identity thieves and that the file was spreading in cyberspace. Aided by the immunized testimony of a whistleblower and former Tiversa employee, LabMD would later prove at the trial of an FTC administrative enforcement action filed against it by the FTC that (1) Tiversa had hacked the 1718 File directly from a LabMD computer; (2) the 1718 File was never found on the computers of known identity thieves; (3) the 1718 File was never found anywhere in cyberspace; (4) Boback’s testimony in the enforcement action was false; and (5) Tiversa’s evidence in the enforcement action was fabricated.

After a lengthy trial, the FTC administrative law judge ruled in favor of LabMD. The Commission reversed the ALJ, entered a cease and desist order and refused to stay the order pending an appeal by LabMD. LabMD successfully moved the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) to stay the Commission’s cease and desist order¹ and the Eleventh Circuit recently vacated the Commission’s ruling on the ground that the Commission’s cease and desist order was unenforceable because it did not direct LabMD to cease committing an unfair act or practice within the meaning of 15 U.S.C. § 45(a). *LabMD, Inc. v. FTC*, 891 F.3d 1286, 1288 (11th Cir. 2018). The FTC chose not to petition this Court for a writ of certiorari.

¹ *LabMD, Inc. v. FTC*, 678 F. App’x 816, 820 (11th Cir. 2016) (finding that the Commission’s interpretation of likely consumer injury was unreasonable and not entitled to *Chevron* deference).

On July 19, 2013, shortly before the FTC filed its enforcement action against LabMD, Daugherty posted a trailer on the internet for *The Devil Inside the Beltway*, a book he had written and would soon publish about his dealings with Sheer, Yodaiken and other FTC officials who investigated LabMD. The trailer referred to the FTC's actions as an "abusive government shakedown" and explained that Daugherty's book would "blow the whistle" about how "the Federal Trade Commission began overwhelming ... [LabMD, a] small business, a cancer detection center, with their abusive beltway tactics."

On July 22, 2013, three days after the trailer for *The Devil Inside the Beltway* was posted on the internet, Sheer told a LabMD attorney that he and his staff had just recommended an enforcement action against LabMD. The FTC filed its enforcement action on August 29, 2013, which caused LabMD to close its doors to normal operations in January 2014. *LabMD, Inc.*, 678 F. App'x at 819.

LabMD was represented by pro bono counsel in the enforcement action as well as in its appeal of the Commissioner's adverse judgment against it. *Id.*

On November 20, 2015, LabMD and Daugherty filed their *Bivens* action against Sheer and Yodaiken claiming, *inter alia*, that those individuals violated LabMD and Daugherty's First Amendment rights when they used false information and omissions to recommend and pursue an administrative enforcement action against LabMD in retaliation for Daugherty's book, *The Devil Inside the Beltway*. LabMD and Daugherty specifically alleged in their complaint that FTC Commissioners would not have authorized the enforcement action but for Sheer and

Yodaiken's misrepresentations and omissions, including their refusal to disclose to the Commissioners that (1) the 1718 File was hacked from a LabMD computer by Tiversa; (2) Tiversa's downloading and distribution of the 1718 File was a felony under 42 U.S.C. § 1320d-6(a)(2) (criminal violations for obtaining individually identifiable health information relating to an individual and/or disclosing individually identifiable health information to another person); (3) no one other than Tiversa ever searched for, saw or took the 1718 File; and (4) Boback and Tiversa had manufactured evidence to make it appear that the 1718 File had spread in cyberspace when, in fact, it had not.

Sheer and Yodaiken moved to dismiss the *Bivens* complaint on numerous grounds, including qualified immunity. The district court granted the motion in part but denied it with respect to LabMD and Daugherty's First Amendment claims against Sheer and Yodaiken. The district court held, "Plaintiffs' First Amendment rights to criticize the actions of the federal government without fear of government retaliation are as clearly established as can be, and a serious escalation of an agency's investigation or enforcement against Plaintiffs for publicly criticizing the agency would appear to violate that clearly established constitutional right." *Daugherty v. Sheer*, 248 F. Supp. 3d 272, 290 (D.D.C. 2017).

The D.C. Circuit reversed. It held that LabMD and Daugherty had not established that Sheer or Yodaiken violated clearly established law because even if their recommendations for and pursuit of the enforcement action were made in retaliation for *The Devil Inside the Beltway*, the court believed the FTC had an

“alternative cause” to file an enforcement action against LabMD. *Daugherty v. Sheer*, 891 F.3d 386, 392 (D.C. Cir. 2018). The court cited no authority for the proposition that an alternative cause was legally available or sustainable nor did the court opine as to whether the FTC would have actually pursued that alternative cause if Sheer and Yodaiken had not made misrepresentations and omissions to the Commission in retaliation for *The Devil Inside the Beltway*.

The D.C. Circuit failed to account for the fact that the ALJ in the enforcement action and the Eleventh Circuit in LabMD’s appeal of the Commissioner’s reversal of the ALJ had already ruled that the alternative cause hypothesized by the D.C. Circuit was not legally or factually viable.

The D.C. Circuit’s ruling that a hypothetical alternative cause to pursue government action against LabMD would give FTC officials qualified immunity under the alleged facts is an unprecedented extension of the doctrine of qualified immunity. It has no basis in the common law, in the D.C. Circuit or in this Court’s precedents.

REASONS JUSTIFYING AN EXTENSION OF TIME

This case presents substantial and important questions regarding qualified immunity for federal government officials who are alleged to have recommended, caused and pursued an enforcement action against Daugherty and LabMD in retaliation for speech protected by the First Amendment of the U.S. Constitution.

Daugherty and LabMD have good cause for the requested extension because (1) Daugherty and LabMD’s undersigned counsel is a sole practitioner whose only

experience in this Court is the filing of a petition for a writ of certiorari; (2) Daugherty and LabMD have been diligently looking for additional counsel, with experience in this Court, to assist the undersigned counsel on a *pro bono* basis but have yet to locate and engage such counsel; (3) when said counsel is located and engaged, they will need additional time to become familiar with the record below, relevant legal precedents and the issues involved in this matter; and (4) Daugherty and LabMD do not expect to find, engage and prepare said counsel before the current deadline for filing their petition for certiorari, November 1, 2018. Thus, Daugherty and LabMD respectfully request a 60-day extension of time to file their petition for certiorari so that they have additional and adequate time to locate, engage and prepare counsel with suitable experience in this Court who is willing to represent Daugherty and LabMD on a *pro bono* basis.

Before filing this application, the undersigned counsel asked Sheer and Yodaiken's counsel whether his clients would consent or not oppose the requested extension. Said counsel referred the request to the Office of Solicitor General ("OGS") but OGS did not respond before the filing of this application.

There would be no unfair prejudice if the Court were to grant Daugherty and LabMD's application. Moreover, there is no pressing event that would be affected by a 60-day extension of time for filing a petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, Daugherty and LabMD respectfully request that this Court grant them a 60-day extension of time, to and including December 31, 2018, within which to file a petition for a writ of certiorari.

Dated: October 18, 2018

Respectfully submitted,

/s/ James W. Hawkins

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RULE 29 CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Rules of this Court, I certify that all parties required to be served have been served. On October 18, 2018, I caused a copy of an Application for an Extension of Time To File Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on those on the attached service list.

/s/ James W. Hawkins

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