IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LABMD, INC. and MICHAEL J. DAUGHERTY, Plaintiffs, v. TIVERSA HOLDING CORP.; ROBERT J. BOBACK, REED SMITH LLP; JARROD D. SHAW; CLARK HILL PLC AND ROBERT J. RIDGE, Defendants.	No. 2:17-cv-01365-CB-MPK Electronically Filed **JURY TRIAL DEMANDED**

PLAINTIFF LABMD, INC. AND MICHAEL J. DAUGHERTY'S BRIEF IN SUPPORT OF MOTION FOR RECUSAL OF THE HONORABLE CHIEF MAGISTRATE JUDGE MAUREEN P. KELLY

I. INTRODUCTION

"Bias is easy to attribute to others and difficult to discern in oneself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016). Plaintiffs LabMD, Inc. ("LabMD") and Michael J. Daugherty ("Daugherty") seek the recusal of the Honorable Chief Magistrate Judge Maureen P. Kelly based on the perception a reasonable person would have that she has a bias against LabMD, Daugherty and their counsel, James W. Hawkins ("Hawkins"), and a bias in favor of Defendants Reed Smith LLP ("Reed Smith"), Jarrod D. Shaw ("Shaw"), Clark Hill PLC ("Clark Hill"), Robert J. Ridge ("Ridge"), Tiversa Holding Corp. ("Tiversa"), Robert J. Boback ("Boback"). Her bias against Plaintiffs and their counsel and her bias in favor of Defendants is generally reflected in the fact that virtually all of Her Honor's rulings in other litigation between the parties in this Court have been in favor of Defendants Tiversa and Bobackand against Plaintiffs. Her most recent perceived bias, however, is the subject of this motion. A reasonable person would likely conclude

that Her Honor developed a predilection to rule in favor of some or all Defendants on their pending Rule 12(b)(6) motions to dismiss the moment the complaint in this action was filed and that Judge Kelly has a closed mind about Plaintiffs' claims in this matter. The record would further indicate to a reasonable person that Judge Kelly, subconsciously or otherwise, does not want LabMD and Daugherty to benefit from a global resolution of *all* claims between the parties. This is evidenced in several ways including, without limitation, Her Honor's (1) anger at and contempt for Plaintiffs and their counsel for pursuing a global resolution of all claims between the parties; (2) erroneous conclusion that Plaintiffs' counsel violated a duty of candor to the Court; (3) tolerance for lack of candor to the Court by several of the Defendants; and (4) lack of concern for or interest in Tiversa and Boback's intimidation of Plaintiffs' witnesses.

II. STATEMENT OF FACTS

In 2007, Tiversa, a so-called cybersecurity company in Pittsburgh and the Federal Trade Commission began a confidential and cooperative relationship where Tiversa would use proprietary technology to hack into computers on the internet, take files containing consumers' private health and personal information, try to sell its "remediation" services to the companies that allegedly leaked those files and, for companies that refused to pay Tiversa, turn those companies in to FTC investigators so that the FTC could investigate and prosecute those companies for violating Section 5 of the FTC Act.[1] Am. Compl. ¶ 1. ECF 46.

[1] *See Staff Of Comm. On Oversight & Gov't Reform, 113th Cong., Tiversa, Inc.: White Knight Or High-Tech Protection Racket?* 67 (2015) (Prepared for Chairman Darrell E. Issa) (the "OGR Report"). ECF No. 1-13. Also, on July 3, 2017, during oral argument in the appeal of the enforcement action, Judge Gerald B. Tjoflat of the Eleventh Circuit Court of Appeals stated his observation that, "the aroma that comes out of the investigation of this case is that Tiversa was shaking down private industry with the help of the FTC, will go to the -- with the threat of going to the FTC: "If you don't cooperate we will go to the FTC." It may well be how they got some of their clients. But that's – that's an aroma that -- and with falsifications to the Commission. The

In 2008, LabMD was a highly successful cancer detection laboratory in Atlanta, Georgia. On February 25, 2008, Tiversa used FBI surveillance software provided by then-U.S. Attorney Mary Beth Buchanan to enter into and take from a LabMD computer a 1,718-page LabMD file with personal health information on over 9,000 patients (the "1718 File"). Am. Compl. ¶ 31. This was a felony under 42 U.S.C. § 1320d-6 (Unlawful Possession and Use of Personal Health Information). Tiversa thereafter told LabMD that it found the 1718 File on the internet and threatened to report LabMD to the FTC if it did not pay Tiversa to "remediate" the alleged leak. Am. Compl. ¶ 46.

After LabMD refused to hire Tiversa, Tiversa turned LabMD in to the FTC. LabMD would later learn that it was one of approximately 100 other companies that Tiversa turned in to the FTC after they, too, refused to be shaken down by Tiversa. Am. Compl. ¶ 51.

Fueled by Tiversa's allegations that it found the 1718 File in cyberspace on computers of known identify thieves, the FTC investigated LabMD. It was an intrusive and exhaustive inquisition where FTC investigators issued burdensome voluntary access requests and civil investigative demands, terrifying and demoralizing LabMD staff and management. LabMD and Daugherty produced thousands of pages of documents, sat for hours of interviews and met with the FTC on numerous occasions by telephone and in person, only to be told by the FTC investigators, time after time, that LabMD's responses were inadequate. Am. Compl. ¶ 58.

On July 19, 2013, Daugherty posted a promotional trailer on the internet for *The Devil Inside the Beltway*, a book he had written about his ordeal with Tiversa and the FTC. The book, which was published in mid-September 2013, exposed Tiversa's theft of the 1718 File, the

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administrative law judge just shredded Tiversa's presentation, just totally annihilated it." Am. Compl. ¶ 6.

confidential relationship between the FTC and Tiversa and the FTC and Tiversa's abuse of Daugherty's small cancer detection laboratory. Three days after the promotional trailer was posted, an FTC attorney identified in the book told LabMD that he and his staff had recommended to their superiors that the FTC file an enforcement action against LabMD, which it did on August 28, 2013. Tiversa's chief executive officer Robert J. Boback ("Boback") would be the FTC's primary witness against LabMD. Am. Compl. ¶¶ 59, 60.

On September 5, 2013, just one week after the FTC filed its enforcement action against LabMD, Tiversa and Boback also retaliated for *The Devil Inside the Beltway* by, *inter alia*, filing frivolous defamation claims against Daugherty and LabMD in the Western District of Pennsylvania. Tiversa and Boback alleged that statements Daugherty would soon publish in *The Devil Inside the Beltway*, revealing to the public that Tiversa surreptitiously took the 1718 File directly from a LabMD computer and that Tiversa and the FTC were working together to investigate and prosecute LabMD, were false, defamatory and harmful to Tiversa and Boback. Am. Compl. ¶¶ 63-65.

At the trial of the FTC's enforcement action against LabMD, Richard E. Wallace, a former Tiversa employee turned whistleblower, testified under criminal immunity that Tiversa's scheme with LabMD was a fraud, that Tiversa did not find the 1718 File in cyberspace, that Tiversa did not find the file on the computers of known identity thieves, that Tiversa took LabMD's file directly (and only) from a LabMD computer in Atlanta, Georgia and that Tiversa fabricated the evidence the FTC was using to prosecute LabMD. Am. Compl. ¶ 174. Wallace's testimony was so compelling that the FTC thereafter *formally withdrew all reliance upon Boback's false testimony and Tiversa's fabricated evidence*. Am. Compl. ¶ 175. Despite Wallace's testimony, despite the FTC's recognition that the testimony and evidence about finding the 1718 File in

cyberspace was fraudulent and despite the extensive findings of Tiversa's wrongdoing in the OGR Report - *White Knight Or High-Tech Protection Racket?* - Tiversa and Boback continued to press forward with their frivolous claims and abusive litigation against LabMD and Daugherty. Boback and Tiversa even doubled down by suing the whistleblower and LabMD's law firm for defamation because they disclosed Boback and Tiversa's frauds to Congress. Am. Compl. ¶ 131-132.

Before Wallace testified against them, Tiversa and Boback's guilt was made manifest by their repeated threats and intimidation of Wallace. When Wallace told Boback that he would not lie under oath, Boback told Wallace he *had* to lie and threated Wallace with a gun. Am. Compl. ¶ 117. When Wallace said he would not lie under oath, he was terminated. Tiversa and Boback left messages at the Wallace home such as "U R DEAD," "WATCH OUT," and "ICU." Am. Compl. ¶¶ 122. Boback tried to run Wallace off the road and used cameras and private investigators to surveil the Wallace home and family. Am. Compl. ¶ 121-122. In addition, after Boback told Wallace he would cancel his medical insurance if Wallace did not give his medical records to Boback, Boback violated 42 U.S.C. § 1320d-6 (Unlawful Possession and Use of Personal Health Information) by giving those records to Officer David Sitler of the Lancaster Township Police Department and told Officer Sitler he needed to "keep an eye" on Wallace. Am. Compl. ¶¶ 110-112.

On November 15, 2015, the FTC administrative law judge found in favor of LabMD. Am. Compl. ¶ 193. But this favorable ruling was too late for LabMD. The harm caused by Tiversa's frauds and other misconduct caused LabMD to shut its doors in January 2014.

On March 1, 2016, the Federal Bureau of Investigation raided Tiversa's headquarters in Pittsburgh. Am. Compl. ¶ 200. The raid was part of an investigation by the FBI and the Department of Justice regarding false statements Boback had made to the U.S. House of

Representatives Oversight and Government Reform Committee and the FTC. Am. Compl. ¶ 200. On March 10, 2016, when it was so obvious that Tiversa and Boback's claims against LabMD and Daugherty were frivolous, Tiversa dismissed its claims against Daugherty and LabMD with prejudice and its counsel, Defendants Shaw and Reed Smith, withdrew from representing Boback. With new lawyers at Defendant Clark Hill, Boback continues to assert his frivolous defamation claims against LabMD, Daugherty and the whistleblower. Am. Compl. ¶ 202-203.

LabMD filed a lawsuit against Tiversa and others in Atlanta, Georgia on October 19, 2011 for damages due to Tiversa's the theft of the 1718 File. That litigation concluded in October 2013 after Tiversa was dismissed for lack of personal jurisdiction.

In January of 2015, LabMD filed a lawsuit against Tiversa and Boback here in the Western District of Pennsylvania - *LabMD, Inc. v. Tiversa Holding Corp., et al.*, Civil Action No. 2:15-cv-92 (this case is hereinafter referred to as *Pennsylvania I*). Several claims in *Pennsylvania I* were based on Tiversa's theft of the 1718 File (which claims had been made in Georgia). Fraud-based claims were also made based on the fraudulent statements Boback and Tiversa made to the FTC and others. The fraud-based claims were not made in the original action in Georgia because LabMD only learned of Tiversa and Boback's frauds when the whistleblower came forward in April 2014. LabMD added a count for defamation in an amended complaint filed on February 12, 2016.

Tiversa and LabMD have been litigating against one another on a non-stop basis since October 19, 2011. Despite this,[2] and even though LabMD alleged and provided proof that Tiversa

[2] *See Santos v. United States*, 559 F.3d 189, 197 (3d Cir. 2009) (equitable tolling of a statute of limitations applies where a plaintiff has mistakenly filed an action in a wrong forum).

and Boback fraudulently concealed their wrongdoing[3] (including, for example, that Tiversa had escaped the jurisdiction of the courts in Georgia by perpetrating a fraud on the court[4]), the Court in *Pennsylvania I*, based on Her Honor's Reports and Recommendations, dismissed all of LabMD's theft and fraud-based claims based on statutes of limitations and dismissed most of LabMD's defamation claims, leaving only a small portion of LabMD's count for defamation. The remaining count is preventing LabMD from appealing the dismissals that Her Honor recommended.[5]

The parties met with Judge Kelly for a Case Management Conference in *Pennsylvania I* on August 29, 2017, during which the parties discussed mediation, insurance coverage, the addition of Michael J. Daugherty as an additional party on the remaining defamation claims and other topics. Tiversa and Boback alleged that a primary commercial general liability insurance ("CGL") policy and a corresponding umbrella policy issued by Chubb were the only applicable policies of insurance.

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[3] *See In re Linerboard Antitrust Litig.,* 305 F.3d 145, 160 (3d Cir. 2002) (fraudulent concealment doctrine stops statute of limitations from running where the accrual date of a claim has passed but plaintiff's cause of action has been obscured by defendant's conduct); *Cunningham v. M&T Bank Corp.,* 814 F.3d 156, 159-60 (3d Cir. 2016) (issue of equitable tolling is not generally amenable to resolution on a Rule 12(b)(6) motion).

[4] Tiversa's dismissal was based on Boback's declaration that Tiversa had never solicited business in Georgia, other than LabMD's business. LabMD later learned that Tiversa had actually solicited business from at least five other companies in Georgia, entertained clients at the Masters Tournament in Augusta, Georgia and solicited customers at a convention Tiversa attended approximately a year before Boback's false declaration. After LabMD discovered that Tiversa had perpetrated a fraud on the court in Georgia, it moved to set aside the earlier judgment pursuant to Fed. R. Civ. P. 60(d)(3). In addition, LabMD filed suit against Tiversa, Boback and others in the Northern District of Georgia based largely on Tiversa's fraud on the court. That case, which was later transferred to the Western District of Pennsylvania, is stayed pending an appeal.

[5] LabMD filed motions for Rule 54(b) and 28 U.S.C. § 1292(b) certifications to appeal the rulings on an interlocutory basis but those motions were opposed and denied.

The parties chose to mediate the remaining count in *Pennsylvania I* with Carole Katz. In a September 19, 2017 pre-mediation conference call with Ms. Katz, Tiversa's counsel expressed for the first time ever that Tiversa might be interested in a global resolution of all claims between the parties. LabMD was surprised to hear this because Tiversa had never expressed *any* desire to settle *any* of the claims against it in any of five lawsuits between the parties. In later conversations, Tiversa's counsel confirmed Tiversa's desire to mediate a global resolution of all claims. A global resolution between the parties would resolve all claims in the following actions and appeals as well as this action:

1. *LabMD, Inc. v. Tiversa, Inc., Trustees of Dartmouth College and M. Eric Johnson*, in the United States District Court for the Northern District of Georgia, Civil Action No. 1:11-cv-4044 (*Georgia I*);

2. *LabMD, Inc. v. Tiversa, Inc.*, in the United States Court of Appeals for the Eleventh Circuit, Case No. 17-11274 (a pending appeal in *Georgia I*);

3. *Tiversa Holding Corp. and Robert J. Boback v. LabMD, Inc., Michael J. Daugherty and Richard Edward Wallace*, in the Allegheny Court of Common Pleas, Pennsylvania, Civil Action No. GD-14-016497 (*State Defamation Action*);

4. *LabMD, Inc. v. Tiversa Holding Corp., Robert J. Boback and M. Eric Johnson*, in the United States District Court for the Western District of Pennsylvania, Civil Action No. 2:15-cv-00092 (*Pennsylvania I*); and

5. *Michael J. Daugherty and LabMD, Inc. v. Joel P. Adams, David J. Becker, Robert. J. Boback, Anju S. Chopra, Wesley K. Clark, Sr., John C. Hansberry, Sam P. Hopkins, M. Eric Johnson, Eric D. Kline, Daniel J. Kopchak, Larry Ponemon, Howard Schmidt, Keith E. Tagliaferri, Brian J. Tarquinio, Morgan, Lewis & Bockius LLP, Pepper Hamilton LLP, Tiversa Holding Corp. and Trustees of Dartmouth College*, in the United States District Court for the Northern District of Georgia, Civil Action No. 1:16-cv-02480 (*Georgia II*) transferred to the Western District of Pennsylvania, Civil Action No. 17-368 (*Dragonetti Action*).

Tiversa and Boback's representations to Judge Kelly regarding insurance turned out to be false. After Tiversa and Boback failed to produce additional insurance policies, LabMD filed a Motion for Production of Insurance Policies as Required by Fed. R. Civ. P. 26(a)(1)(A)(iv) on

September 21, 2017. On September 25, 26 and 29, 2017, in response to LabMD's motion, Tiversa coughed up primary and excess Chubb D&O insurance policies as well as additional primary and excess CGL policies issued by CNA. Several of these policies provide coverage for malicious prosecution and abuse of process.

Boback opposed LabMD's motion for additional insurance policies. By order dated October 4, 2017, Boback was ordered to produce his homeowners and excess policies of insurance by October 13, 2017. When he produced those policies on October 13, 2017, LabMD learned that the policies provided coverage for defamation and malicious prosecution.

After receiving Boback's insurance policies and because the parties had agreed to mediate a resolution of *Georgia I, Georgia II, Pennsylvania I, Pennsylvania II*, the *State Defamation Action* and the *Dragonetti Action*, LabMD and Daugherty decided after receiving Boback's insurance policies on October 13, 2017 to prepare and file this lawsuit against Tiversa, Boback and their counsel with claims for violations of Pennsylvania's Dragonetti Act (malicious use of process) and common law abuse of process (this lawsuit is hereinafter referred to as the *Dragonetti Action*). Counsel for LabMD began drafting the complaint on October 15, 2017 and filed the complaint on October 20, 2017. ECF No. 1. LabMD and Daugherty chose to file the *Dragonetti Action* before the mediation scheduled for October 25, 2017, because, otherwise, the mediation would not have been successful because the parties would not have been able to settle all claims against one another. Other insurance carriers and other parties needed to be involved in order to achieve a global resolution.

LabMD and Daugherty had the option of waiting until after the mediation to file the *Dragonetti Action*. If they had done so, the mediation would have been a waste of time and resources because additional claims, additional parties and additional insurance companies

(including, for example, Boback's umbrella coverage provider) needed to participate. Thus, in order to avoid a costly and futile exercise, LabMD and Daugherty chose to file the Dragonetti Action before the mediation. The long-term benefits of resolving *Georgia I*, *Georgia II*, *Pennsylvania I*, *Pennsylvania II*, the *State Defamation Action* and the *Dragonetti Action* clearly outweighed the short-term consequences of postponing the mediation.

In response to the *Dragonetti Action*, Tiversa filed a Motion for Emergency Teleconference on October 23, 2013. Tiversa asked for a postponement of the mediation in order to address a number of issues that it and its counsel felt needed to be resolved before the parties could conduct a meaningful mediation. LabMD and Daugherty had no objection to the requested postponement.

A teleconference was held with Judge Kelly on October 24, 2017. Her Honor immediately expressed extreme anger at LabMD, Daugherty and their counsel, James W. Hawkins, for filing the *Dragonetti Action*. Before allowing or hearing *any* explanation from Hawkins, Her Honor accused Hawkins of breaching his duty of candor to the Court by failing to inform the Court about the *Dragonetti Action* during a teleconference with the Court on October 12, 2017. Her Honor expressed her belief that on October 12, 2017, LabMD, Daugherty and Hawkins had already decided to file the *Dragonetti Action* because, according to Her Honor, the new complaint was "clearly in the pipeline given its sheer volume." This assertion/accusation was incorrect. Hawkins explained to Judge Kelly that the decision to file the *Dragonetti Action* was made in the last several days. Specifically, LabMD and Daugherty decided to file the *Dragonetti Action* after October 13, 2017, only after receiving the insurance policies Judge Kelly had ordered Boback to produce. Hawkins did not begin drafting the complaint for the *Dragonetti Action* until October 15, 2017. Exhibit A hereto is a true and correct copy of a screen shot showing the "Properties" of the Word

document Hawkins used for the first draft of the complaint in *Dragonetti Action*. As noted in the screenshot, the document was first created on Sunday, October 15, 2017 at 1:00 p.m.

Her Honor also accused Hawkins of violating her directive to work in a constructive manner to achieve the greatest chance of resolution in mediation. That was, in fact, LabMD, Daugherty and Hawkins' primary objective. Hawkins explained to Her Honor that the primary reason for filing the lawsuit was because after the Case Management Conference on August 29, 2017, (1) all parties agreed to mediate a global resolution and (2) in order to achieve a global resolution, all causes of action needed to be on the table. The global resolution desired by *all* parties would not have been achieved without LabMD and Daugherty's additional claims having been filed and considered by the parties and their insurers. Additional parties and additional insurance carriers needed to be at the table to achieve a settlement of *Georgia I, Georgia II, Pennsylvania I, Pennsylvania II*, the *State Defamation Action* and the *Dragonetti Action*.

Her Honor expressly disagreed with Plaintiffs' strategy and focused, instead, on her belief that the parties should have been able to settle the one remaining defamation count. But no party was interested in settling only one claim – it was too problematic given all of the other litigation and LabMD's need to appeal the Court's dismissal of all of its other claims. Judge Kelly then stated her position that at least some of the claims in the *Dragonetti Action* were barred by the statute of limitations. Her Honor noted that Tiversa and Boback's original defamation action was filed more than four years earlier in 2013. Hawkins explained that the statute of limitations on a Dragonetti Act claim does not begin to accrue before proceedings have terminated in favor of the person against whom they are brought. *See* 42 Pa.C.S. § 8351(a)(2). Thus, the statute of limitations on LabMD and Daugherty's Dragonetti Act claims, he explained, did not accrue before March 10, 2016 when Tiversa dismissed *with prejudice* all of its claims against LabMD and Daugherty in the

State Defamation Action in the Allegheny County Court of Common Pleas. The *Dragonetti Action* was filed well within the two-year statute of limitations for malicious prosecution in 42 Pa. C.S.A. § 5524(1).

Her Honor expressed no anger and made no comment about Tiversa and Boback's August 29, 2017 misrepresentations to the Court regarding applicable insurance coverages. In addition, after Hawkins mentioned LabMD and Daugherty's discovery of additional instances of Boback's intimidation of plaintiffs' witnesses, Her Honor expressed no concern. Judge Kelly concluded by ordering a postponement of the scheduled mediation, staying the case and scheduling a follow-up hearing in Pittsburgh for December 4, 2017.

On November 11, 2017, Mark D. Shepard, a partner at Judge Kelly's former law firm, Babst, Calland, Clements and Zomnir, P.C., entered an appearance in the *Dragonetti Action* on behalf of Reed Smith LLP and Jarrod D. Shaw. Shepard and Judge Kelly not only practiced law at the same firm, they simultaneously served on the management committee of that firm. It was obvious that Reed Smith and Shaw chose Judge Kelly's former firm and Shepard in particular because of their belief that those affiliations with Her Honor would be beneficial to them. Shaw would later underscore the retention of Shepard and Judge Kelly's former firm at the December 4, 2017 hearing.

At the December 4, 2017 hearing,[6] Judge Kelly reiterated her view that Hawkins breached his duty of candor by not telling the Court and the other parties during the October 12, 2012 teleconference with the Court that a new lawsuit was about to be filed. She emphasized again the length of the complaint, noting that it is "85 pages" and was filed "only eight days" after the

[6] A true and correct copy of the transcript from the December 4, 2017 hearing is attached hereto, incorporated herein and marked as Exhibit B.

October 12, 2017 conference call. It was evident that Her Honor did not accept Hawkins' representation as to when his clients made the decision to file the new lawsuit. Nor did Her Honor acknowledge the fact that the global resolution desired by the parties would be the best outcome for the parties, the Court, the Northern District of Georgia, the Eleventh Circuit Court of Appeals, and the Allegheny County Court of Common Pleas.

Judge Kelly asked the parties for their positions on mediation with Ms. Katz. Shaw stated that all defendants planned to file a Rule 12(b)(6) motion in the *Dragonetti Action*. Her Honor expressed her predilection on the complaint when she responded, "That was what I expected, having read it."[7] Her Honor then emphasized that there were only two defamation claims left in *Pennsylvania I* and that because that was all that was left, "it should have been easy to resolve it, until the lawsuit was filed by Hawkins on behalf of Daugherty." Her Honor apparently failed to recall or refused to believe Hawkins' explanation on October 24, 2017, that the parties had expressed to Ms. Katz their desire to negotiate a global resolution of all claims and further failed to recall or refused to believe that LabMD and Daugherty's stated objective in filing the new lawsuit, also explained by Hawkins on October 24, 2017, was to put *all* causes of action on the settlement table in order to achieve an overall resolution.

Her Honor asked for the parties' positions on further postponement of the mediation. She permitted Tiversa and Boback's counsel to speak freely and fully about numerous topics including the validity of the claims in the *Dragonetti Action*, the defendants' chosen counsel in the

[7] Additional examples of Her Honor's predilection to rule against Plaintiffs on statute of limitations grounds are found in her December 20, 2017 Order in *Pennsylvania I* where she notes, "The previous case of *Tiversa Holding Corp. and Robert J. Boback v. LabMD, Inc. and Michael J. Daugherty*, Civil Action No. 13-1296, was closed over three years ago on November 4, 2014" and her statement at the December 4, 2017 hearing in *Pennsylvania I* that Tiversa and Boback's defamation action was a "case a long, long time ago that Judge Fischer had."

Dragonetti Action (with Shaw emphasizing the fact that he and his former firm were represented by Judge Kelly's former partner and former law firm), Tiversa's objections to LabMD's discovery requests in *Pennsylvania I* (before counsel had met and conferred), allegations that defendants' insurers are now "hesitant to want to reach a resolution," allegations that the claims in the *Dragonetti Action* are meritless, concerns about specific allegations in the complaint in the *Dragonetti Action* (see further discussion below), and Ridge's accusation that by filing the *Dragonetti Action* Hawkins had somehow engaged in the "unlawful practice of law." After she asked Hawkins to speak, she cut him off before he could state three sentences:

> THE COURT: Let me hear from Hawkins.
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> MR. HAWKINS: Thank you, Your Honor. In the mid '90s, I had a client who was very strongly interested in mediation, and that was a point in time when I became a very big proponent of mediation. I spent eight years as the chief litigation counsel for Kimberly-Clark Corporation –
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> THE COURT: Mr. Hawkins, with all due respect, I don't need an opening statement. What I want to hear about is your client's position at this point with regard to where this case stands and how this case moves forward. Does it move forward to mediation? Does it move forward with discovery? Or does it remain stayed pending the outcome of the motions to dismiss in the lawsuit that your clients -- you've just filed on behalf of your client?

In response, Hawkins stated, "I was about to conclude that it is my view and our view that mediation will not be successful unless all the parties are interested and feel ready to mediate. So, if the defendants are not ready and do not want to at this time, Your Honor, we agree that mediation should be postponed."

Near the end of the conference, Judge Kelly asked Hawkins is there was anything else he wanted to raise. In furtherance of comments he made to the Court on October 24, 2017, Hawkins wanted to inform the Court about Tiversa and Boback's intimidation of Plaintiffs' witnesses. Her Honor responded as follows:

> THE COURT: This is the first I've heard of it. I don't have any motion in front of me. No one has been given an opportunity to address it, so I'm not going to hear argument on it now. My view of every case is I want to be fair to all the litigants and to have that brought up and argued now without any prior notice to counsel, that's not fair.[8]

During the hearing, counsel for Tiversa requested an extension of the current stay because "we don't think we can effectively move forward until the newest case is resolved through a motion to dismiss one way or the other." At their suggestion, Judge Kelly permitted the defendants in *Pennsylvania I* to file a motion to continue the stay until the Court ruled on the defendants' anticipated Rule 12(b)(6) motions to dismiss the claims in the *Dragonetti Action.* The Court granted that motion over LabMD's objection on December 20, 2017. A true and correct copy of this Order is attached hereto and marked as Exhibit C. In that Order, Her Honor's anger and refusal to accept Hawkins' representations were apparent again:

> At no time during the Court conferences on August 29, 2017, or October 12, 2017, did LabMD or its counsel ever complain to this Court that there had been any discovery misconduct or abuse by Defendants or their counsel,[9] nor did LabMD ever inform the Court that it intended to file any claims against Defendants and their respective counsel.[10]
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> On October 20, 2017, a mere eight days after the October 12 status conference, LabMD filed yet another new lawsuit against Tiversa and Boback, docketed at Civil Action No. 17-1365 ("the New Case"), and named Tiversa and Boback's legal counsel in the instant action as defendants. Specifically, LabMD named Reed Smith LLP and Jarrod D. Shaw, Esquire and Clark Hill PLC and Robert J. Ridge, Esquire as defendants. In the New Case, LabMD alleges "abusive litigation and wrongful use of civil proceedings" in two other lawsuits involving theses parties: (1) an ongoing (but stayed) state defamation action in the Court of Common Pleas of Allegheny County; and (2) a federal defamation action that was dismissed over three years ago on November 4, 2014.[11] ECF No. 288-1.

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[8] Prior notice had been given at the conference with the Court on October 20, 2017, in emails exchanged between counsel and in the complaint in the *Dragonetti Action*.

[9] There had been *no* discovery before August 29, 2017. For almost six years, Tiversa and Boback successfully maneuvered through state and federal courts in Pennsylvania and Georgia to avoid producing *any* discovery to LabMD.

[10] As previously discussed, LabMD and Daugherty made the decision to file the complaint in *Dragonetti Action* after October 13, 2017, after receiving Boback's insurance policies. Counsel began drafting that complaint on Sunday, October 15, 2017 at 1:00 p.m.

[11] Tiversa and Boback dismissed their federal defamation action *without* prejudice in order to add Wallace as an additional party. Because Wallace was a resident of Pennsylvania, adding him to

In n. 2 on p. 3 of her Order, Judge Kelly foretold her anticipated ruling against LabMD and Daugherty in the *Dragonetti Action* when she made the comment (irrelevant to her Order) that, "The previous case of *Tiversa Holding Corp. and Robert J. Boback v. LabMD, Inc. and Michael J. Daugherty*, Civil Action No. 13-1296, was closed over three years ago on November 4, 2014."[12]

III. ARGUMENT AND CITATION OF AUTHORITIES

LabMD and Daugherty seek a recusal of the Honorable Chief Magistrate Judge Maureen P. Kelly pursuant to 28 U.S.C. § 455(a) and Canon 3 of the Code of Conduct for United States Judges on the ground that her impartiality might reasonably be questioned. 28 U.S.C. § 455(a) simply provides that "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "Whenever a judge's impartiality 'might reasonably be questioned' in a proceeding, 28 U.S.C. § 455(a) commands the judge to disqualify himself *sua sponte* in that proceeding." *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993). Under Canon 3 of the Code of Conduct for United States Judges, "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which…the judge has a personal bias or prejudice concerning a party."

Bias (the opposite of impartiality) is defined as an "[i]nclination; prejudice, predilection; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." Black's Law Dictionary 171 (9th ed. 2009).

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the federal defamation case would have destroyed diversity. The dismissal without prejudice of the federal defamation claims was *not* a termination in favor of LabMD and Daugherty and, therefore, did not trigger the two-year statute of limitations for Dragonetti claims.

[12] During the December 4, 2017 hearing, Her Honor described that action as a "case a long, long time ago that Judge Fischer had".

It is important to recognize that "[a] party seeking recusal need not show actual bias on the part of the court, only the possibility of bias. . . . Under § 455(a), if a reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality under the applicable standard, then the judge must recuse." *Selkridge v. United of Omaha Life Ins. Co.,* 360 F.3d 155, 167 (3d Cir. 2004) (quoting *Krell v. Prudential Ins. Co. of Am. (In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions)*, 148 F.3d 283, 343 (3d Cir. 1998) (internal quotations omitted)). As the Supreme Court has noted, "even if there is no showing of actual bias in the tribunal, . . . due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1972). Indeed, the appearance of impartiality is as important as actual impartiality. *See*, *e.g.*, *Liteky v. United States*, 510 U.S. 540, 563-65 (1994) (Kennedy, J., concurring) (explaining that one of the very objects of law is the impartiality of its judges in fact and appearance); *Liljeberg v. Health Servs. Acquisition Corp*., 486 U.S. 847, 860 n.8 (1988) ("The goal of section 455(a) is to avoid even the appearance of partiality."); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

The duty to be patient, dignified and respectful to litigants and their counsel and the duty to accord a full right to be heard are addressed in Canon 3 of the Code of Conduct for United States Judges which states, *inter alia*, that a judge "should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity" and "should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law." Under Comment 3A(3) of Canon 3 of the Code of Conduct for United States Judges, "[t]he duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias."

An independent reasonable person with knowledge of the following would likely conclude that Judge Kelly has a bias against Plaintiffs and their counsel *and* a bias in favor of Defendants:

1. The parties and Her Honor agreed in *Pennsylvania I* that the deadline for amendments to the pleadings was October 29, 2017. On August 29, 2017, LabMD informed Her Honor at the Case Management Conference that it intended to add Daugherty as an additional party to LabMD's *only remaining defamation claim*. The August 29, 2017 Hearing Memo reflects Judge Kelly's reaction to that disclosure:

> Plaintiff's counsel indicated that he may wish to add Mr. Daugherty as a Plaintiff and include defamation claims on his behalf, the Court informed him that such a request will not be granted in light of the fact that this case has been in litigation for over 2½ years and such an amendment/addition at this point in the posture of the case will unduly prolong the case. To the extent that Mr. Daugherty wishes to assert such a claim, he is free to initiate a separate lawsuit – to the extent that the claim is not already addressed in other pending lawsuits.

The addition of Daugherty would not have prolonged the case *at all* because he would simply be an additional party on an existing claim. Moreover, it was neither LabMD nor Daugherty's fault that the case was 2½ years old. By telling Daugherty that he had to pursue his claim somewhere else, it would appear to a reasonable person that the Court was not interested in an efficient adjudication of Daugherty's rights. To a reasonable person, this would be perceived as a bias against Daugherty as well as a home court advantage to the Pittsburgh parties and their Pittsburgh counsel.

2. In its August 28, 2017 Initial Disclosures in *Pennsylvania I*, Tiversa stated the following regarding insurance agreements which may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment:

> Tiversa has coverage under the following insurance policies: Federal Insurance Company, Policy Nos. 3580-87-59 (Primary) & 7982-58-02 (Umbrella).

In his August 28, 2017 Initial Disclosures in *Pennsylvania I*, Boback stated the following regarding insurance agreements which may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment: "See Defendant Tiversa's initial disclosures."

Tiversa and Boback represented to the Court at the Case Management Conference that the insurance policies listed above were the only ones at issue. LabMD later learned that these representations and the representations in Tiversa and Boback's Initial Disclosures were false. After LabMD filed its Motion for Production of Insurance Policies as Required by Fed. R. Civ. P. 26(a)(1)(A)(iv) on September 21, 2017, Tiversa produced additional policies of insurance and amended its Initial Disclosures on September 25, 2017 follows:

> Tiversa has coverage under the following insurance policies: Federal Insurance Company, Policy Nos. 3580-87-59 (Primary) & 7982-58-02 (Umbrella). Additional, Tiversa is producing an additional policy issued by Federal Insurance Company, Policy No. 8207-6411 under which insurance may be liable to satisfy all or part of a possible judgment in this action. Tiversa further is producing an insurance policy issued by CNA, Policy No. 425614983, which is not providing coverage for this action, but is being produced nonetheless.
>
> Tiversa will provide additional insurance policies to the extent they are located or obtained from insurers or other third-parties.

Policy No. 8207-6411 is a D&O insurance policy. On September 26, 2017, Tiversa produced approximately ten more insurance policies and on September 29, 2017, Tiversa produced additional D&O insurance policies.

Boback refused to comply with LabMD's demands to produce his homeowners and excess insurance policies and opposed LabMD's motion. After Judge Kelly ordered him to do so, he produced the policies to LabMD on October 13, 2017.

The amount and existence of insurance is critically important to resolving disputes, as evidenced in the fact that Congress chose to include the requirement for disclosing insurance in

Fed. R. Civ. P. 26(a)(1)(A)(iv). The fact that Judge Kelly never held Tiversa's lawyers accountable for their misrepresentations to the court and never even admonished them to fully comply with the Federal Rules of Civil Procedure in order to achieve a fair resolution would suggest to a reasonable person under these circumstances that Her Honor is biased in favor of Tiversa, Boback and their counsel.

3. Further evidence of Her Honor's bias is shown in the fact that on October 24, 2017, Judge Kelly expressed great anger at and accused Hawkins of violating his duty of candor to the Court before giving him *any* opportunity to be heard. The accusation was not only erroneous, it was also an unnecessary and gratuitous insult that fueled Defendants' belief that Judge Kelly is "on their side." Based solely on the length of the complaint here, Judge Kelly concluded that on October 12, 2017, preparation of the complaint for the *Dragonetti Action* was well under way, that Plaintiffs and Hawkins had already decided to file the complaint and that Hawkins and his clients intentionally failed to inform the Court of the anticipated filing. Judge Kelly refused to accept Hawkins' representation that the decision to file the complaint had only been made in the last few days. Indeed, Hawkins did not begin drafting the complaint for the *Dragonetti Action* until October 15, 2017, as shown in Exhibit A hereto.

4. To a reasonable person, the following exchange between Her Honor and Hawkins on December 4, 2017, is additional evidence of Her Honor's bias against him as shown in her blatant refusal to let him speak openly and freely:

> THE COURT: Let me hear from Mr. Hawkins.
>
> MR. HAWKINS: Thank you, Your Honor. In the mid '90s, I had a client who was very strongly interested in mediation, and that was a point in time when I became a very big proponent of mediation. I spent eight years as the chief litigation counsel for Kimberly-Clark Corporation –

> THE COURT: Mr. Hawkins, with all due respect, I don't need an opening statement. What I want to hear about is your client's position at this point with regard to where this case stands and how this case moves forward. Does it move forward to mediation? Does it move forward with discovery? Or does it remain stayed pending the outcome of the motions to dismiss in the lawsuit that your clients -- you've just filed on behalf of your client?

A reasonable person would consider Her Honor's interruption of Hawkins' response to be unnecessary, rude, disrespectful and punitive.

5. A reasonable person with knowledge of a federal judge's Canon 3 duty to be patient, dignified and respectful to litigants *and* their counsel and the duty to accord a full right to be heard would question why Judge Kelly would accuse a lawyer of violating his ethical duty of candor to the Court without giving him an opportunity to be heard, why Her Honor would jump to conclusions before gathering facts, why Judge Kelly would not let Hawkins speak fully and freely as she had allowed other counsel to speak, why Her Honor made her disrespect for Plaintiffs' counsel so evident, why Judge Kelly failed to respect Hawkins' ethical obligation to represent his clients zealously and why Her Honor could not accept the fact that Hawkins and his clients wanted to achieve a global resolution of all claims. Such person would reasonably conclude that Her Honor is biased against Plaintiffs and their counsel and biased in favor of the Defendants. Given these circumstances, if Judge Kelly does not recuse, a ruling in favor of Defendants would be perceived by a reasonable person as favoritism to the Defendants and an act of retribution fueled by Her Honor's anger, contempt and disrespect for Plaintiffs and their counsel. Under these circumstances, the ruling would not be seen as an impartial, fair-minded decision. It would be tainted with the appearance of impropriety.

6. A reasonable person would appreciate the fact that Plaintiffs chose to file the *Dragonetti Action* before the mediation in order to avoid a futile exercise that would have cost a lot of money and wasted the time of several lawyers and their clients, an insurance representative

and the mediator. As the record shows, Plaintiffs have never objected to postponing the mediation. And, to be clear, Plaintiffs have not and will not seek the disqualification of Shaw, Ridge or their law firms – in any of the litigation between the parties. Even though the allegations in the complaint here show that Defendants Shaw, Reed Smith, Ridge and Clark Hill created their current predicament by engaging in abusive litigation, Plaintiffs are willing to wait until all parties are ready to mediate a global resolution. That is the reasonable thing to do. A reasonable person would see that such is necessary in order to optimize the possibility of resolving *Georgia I, Georgia II, Pennsylvania I, Pennsylvania II*, the *State Defamation Action* and the *Dragonetti Action*. Judge Kelly's attempt to force her desired result of resolving only one claim in one lawsuit is a clear bias against Plaintiffs.

7. At the December 4, 2017 hearing in *Pennsylvania I*, Judge Kelly asked the parties for their positions on mediation with Ms. Katz. Shaw stated that all defendants planned to file a Rule 12(b)(6) motion in the *Dragonetti Action*. Her Honor then said, "That was what I expected, having read it." Under all of the circumstances described herein, a reasonable person would conclude that Her Honor had not only made up her mind, she wanted all parties to know that she would be ruling against Plaintiffs. The statement was unnecessary. Its only purpose was to signal to the parties how Judge Kelly would rule. To a reasonable person, this statement reveals Her Honor's bias against Plaintiffs and her bias in favor of Defendants, her former law partner and her former law firm.

8. A reasonable person would consider witness intimidation, a felony under 18 U.S.C. § 1512 and 18 Pa.C.S.A. § 4952, to be a subject of great concern for courts. Her Honor might typically have such concern but not here where it is Plaintiffs' witnesses that have been and are being intimidated. In furtherance of comments he made to the Court on October 24, 2017,

Hawkins tried to discuss past and current witness interference and intimidation with Her Honor on December 4, 2017. Her Honor responded as follows:

> THE COURT: This is the first I've heard of it. I don't have any motion in front of me. No one has been given an opportunity to address it, so I'm not going to hear argument on it now. My view of every case is I want to be fair to all the litigants and to have that brought up and argued now without any prior notice to counsel, that's not fair.

But prior notice *was* given at the conference with the Court on October 24, 2017. In addition, Defendants are well aware of the allegations because several instances of Boback and Tiversa's intimidation of witnesses are included in a complaint filed by Wallace against Tiversa and Boback on November 1, 2017, a true and correct copy of which is attached hereto and marked as Exhibit D. In addition, allegations of Tiversa and Boback's witness intimidation are included in the complaint in *Pennsylvania II* as predicate acts in support Plaintiffs federal and Georgia RICO claims, in the complaint here and in emails between counsel. Regardless, a reasonable person would conclude that Judge Kelly's refusal to have any discussion about the illegal intimidation of Plaintiffs' witnesses reveals a bias against Plaintiffs and in favor of Defendants, two of whom were perpetrated the intimidation.

At their suggestion, Judge Kelly permitted the defendants in *Pennsylvania I* to file a motion to continue the stay until the Court ruled on the defendants' anticipated Rule 12(b)(6) motions to dismiss the claims in the *Dragonetti Action.* The Court granted that motion over LabMD's objection on December 20, 2017. In her December 20, 2017 Order granting Tiversa and Boback's motion to continue the stay in *Pennsylvania I*, Her Honor made her anger and refusal to accept Hawkins' representations apparent again:

> At no time during the Court conferences on August 29, 2017, or October 12, 2017, did LabMD or its counsel ever complain to this Court that there had been any discovery

> misconduct or abuse by Defendants or their counsel,[13] nor did LabMD ever inform the Court that it intended to file any claims against Defendants and their respective counsel.

The first part of this statement was irrelevant and unnecessary to the ruling. Indeed, there had been *no* discovery before August 29, 2017, which would lead a reasonable person to conclude that Judge Kelly is going out of her way to chastise and insult Plaintiffs and their counsel. As to her comments on misconduct and abuse by Defendants and their counsel, the witness interference and intimidation Hawkins attempted to raise with the Court was learned *after* the October 12, 2017 conference. If he had been heard, Hawkins would have disclosed to Her Honor that on November 1, 2017, the whistleblower filed a lawsuit in Butler County against Tiversa and Boback that contained numerous examples of Boback and Tiversa's intimidation of the whistleblower and his family, including a threat by Boback at gunpoint.[14] Hawkins also tried to explain to Her Honor that on November 29, 2017, Steven Zoffer, counsel for Tiversa in the Dragonetti Action, falsely represented to Hawkins that Zoffer's firm was representing *all* of the former Tiversa employees that LabMD had just subpoenaed. The purpose of this false representation obvious - to prevent LabMD from interviewing the most relevant witnesses in the case. But LabMD knew the representation was false because several of the witnesses Zoffer allegedly represented had already told Hawkins not only that they had refused the offer to be represented by Zoffer's firm but also that an attorney in Zoffer's office told the witnesses that they were wrong to have already spoken with LabMD's counsel. This strategy could be extremely detrimental to LabMD, especially given the fact that numerous witnesses have already expressed fear that Boback and Tiversa will retaliate against them and their families just as he has intimidated the whistleblower and his family.

[13] Tiversa and Boback produced *no* discovery before August 29, 2017.
[14] See ¶ 185(d) in Exhibit D.

9. Judge Kelly also stated in her December 20, 2017 ruling in *Pennsylvania I*, "Inexplicably, the Complaint in the New Case [the *Dragonetti Action*] contains allegations concerning discovery responses the instant case. Id. ¶¶150-151." A reasonable person aware of all the circumstances here would draw several conclusions from this statement. First, the relevancy of the allegations referenced by Judge Kelly is plainly set forth in the complaint in the *Dragonetti Action*. After six years of Tiversa and Boback avoiding discovery and after four years of Tiversa and Boback calling the whistleblower a liar, Tiversa has now conceded in its discovery responses in *Pennsylvania I* that the whistleblower was right all along. Second, a reasonable person would see this statement as yet another gratuitous insult. Third, the statement is another expression of Judge Kelly's predilection to rule against Plaintiffs on Defendants Rule 12(b)(6) motions. Fourth, because Defendant Shaw complained about these specific allegations at the December 4, 2017 hearing, a reasonable person would conclude that Judge Kelly is assuring Defendant Shaw and Tiversa that she heard them loud and clear. And why do that? Why would a court make so many irrelevant, insulting and pejorative comments about Plaintiffs, their counsel, their allegations, their drafting, their claims, their litigation strategy and their settlement strategy? It should be clear that a reasonable person would see it as bias.

IV. CONCLUSION

The totality of circumstances set forth herein compels a recusal of the Honorable Chief Magistrate Judge Maureen P. Kelly pursuant to 28 U.S.C. § 455(a) and Canon 3 of the Code of Conduct for United States Judges because a reasonable man, were he to consider all of these circumstances, would harbor doubts about the Her Honor's impartiality.

Dated: April 17, 2018

Respectfully submitted,

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/s/ James W. Hawkins

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

LABMD, INC. and MICHAEL J. DAUGHERTY, Plaintiffs, v. TIVERSA HOLDING CORP.; ROBERT J. BOBACK, REED SMITH LLP; JARROD D. SHAW; CLARK HILL PLC AND ROBERT J. RIDGE, Defendants.	No. 2:17-cv-01365-MPK Electronically Filed **JURY TRIAL DEMANDED**

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for parties of record electronically by CM/ECF.

/s/ James W. Hawkins
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