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VIA CM/ECF

The Honorable Paul W. Grimm
United States District Court for the District of Maryland
6500 Cherrywood Lane, Suite 465A
Greenbelt, MD 20770

Re: *In Re: Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*
Case No. 8:19-md-02879-PWG (D. Md.)

Dear Judge Grimm:

On behalf of Plaintiff, Bank of Louisiana, the only financial institution class plaintiff in these consolidated actions, we the undersigned submit this letter brief to illuminate our positions on two items contained in the recently submitted [Proposed] Case Management Order No. 3. Specifically, we would ask the Court: 1) to require production of the PFI report and other investigative materials before the deadline for amendment of the financial institution claims; and 2) to schedule a hearing on Motions to Dismiss the financial institution claims to coincide with any hearing on Motions to Dismiss the consumer claims. Mindful of this Court's expressed preference for letter briefs, we have opted to submit our position in this format.

Our position on these matters is consistent with this Court's emphasis on efficiency and avoidance of unnecessary litigation effort. Requiring production of the PFI Report and other investigative reports related to the Data Breach prior to the deadline for amending complaints will promote efficiency by ensuring that the allegations conform to the available facts, thus eliminating unnecessary discovery and motion practice over allegations based on "information and belief" that may be inconsistent with facts already developed in the PFI and other investigations. Likewise, hearing the Motions to Dismiss on both financial institution and consumer claims at the same time will avoid needless repetition of overlapping arguments.

Early Production of the Payment Card Industry Forensic Investigator (PFI) Report and Other Investigative Reports Related to the Data Breach

Early production of the PFI Report¹, other investigative reports, and all materials provided to government regulators investigating the Data Breach at issue by Marriott will greatly facilitate all parties' ability to frame the issues in the case for the Court. Bank of Louisiana requests that Marriott produce the PFI Report on June 3, 2019. In its letter to the Court of May 13, 2019, Marriott set forth its intended challenges to Bank of Louisiana's current Complaint. At the leadership hearing a few weeks ago, Bank of Louisiana announced its intent to amend the Complaint to provide Marriott and the Court with a more detailed and comprehensive lawsuit to address many of the issues raised in Marriott's challenge. The parties agree the Amended Complaint must be filed on or before June 28, 2019. However, Marriott proposes delaying the delivery of the PFI Report until July 3, 2019, even though the PFI Report (or similar reports) are known and immediately available to Marriott and likely will shape the allegations of any amended complaint. At the upcoming Court Conference on May 30, 2019, Bank of Louisiana will demonstrate that none of the challenges raised in Marriott's May 13, 2019 letter are sufficient to result in dismissal without an opportunity to amend. Since Bank of Louisiana will be amending its Complaint, it only makes sense to ensure that any amendments are informed by critical known information that is already obtainable from the PFI Report and other investigation materials.

All parties to this case will benefit from Bank of Louisiana's ability to present the Court with a more concrete description of the claims against Marriott. Early production of the PFI Report and similar reports will result in an Amended Complaint that most clearly squares the issues.

A brief description of the PFI report will demonstrate why obtaining the PFI Report before an amendment will streamline the allegations and focus the litigation. To be sure, if the PFI Report and other investigatory materials are produced *after* Bank of Louisiana's Amended Complaint is filed, Bank of Louisiana will likely request leave of Court to file a further Amended Complaint to conform its allegations against Marriott to available evidence – a very inefficient process, indeed.

When payment card data may be at risk, the card networks may require a retailer to hire a Payment Card Industry Forensic Investigator (PFI) to conduct a forensic examination. The PFI is required to submit a final PFI report containing its investigative findings to the card networks using a report template issued by the PCI Security Standards Council (SSC). Appendix A of the template requires the PFI to identify whether the retailer was compliant with all sub-

¹ Plaintiff seeks for Marriott to produce the PFI Report and any other third-party or internal investigative reports related to the Data Breach. For efficiency, the letter explains the rationale for early production of the PFI Report. The same justification applies to any other similar reports.

requirements of Payment Card Industry Data Security Standard (“PCI DSS”) at the time of the incident and, if the retailer was not, identify whether the noncompliance caused or contributed to the breach. *See, e.g.,* Craig A. Hoffman, *2015 Baker Hostetler Incident Response Report Deeper Dive—Retailer Liability Arising from Stolen Payment Cards*, DAILY PRIVACY MONITOR (May 12, 2015), available at <https://www.dataprivacymonitor.com/data-breaches/2015-bakerhostetler-incident-response-report-deeper-dive-retailer-liability-arising-from-stolen-payment-cards/> (last visited May 21, 2019).

In short, the PFI Report is an analysis of the depth and breadth of a retailer Data Breach, as here, performed by an independent firm. Unarguably, such reports are discoverable. Providing the PFI report to Bank of Louisiana prior to its filing of an Amended Complaint is logical. With the guidance of the information from the PFI Report, the Amended Complaint will contain the most cogent description of the Data Breach at issue with all necessary details for the Court to fully and fairly assess Bank of Louisiana’s claims and examine any resulting Motion to Dismiss in the most transparent manner. To obtain the PFI Report long after the Amended Complaint is filed only increases the likelihood Plaintiff may be forced to seek leave to file a Second Amended Complaint – which is wasteful, unnecessary, and could create additional delay in the prosecution of the case.

To require Bank of Louisiana to submit an Amended Complaint without the benefit of having seen the PFI Report is to invite a game of “Twenty Questions,” with Bank of Louisiana forced to make allegations based on “information and belief” as to topics which have been addressed, and quite possibly disposed of, in contemporaneous investigations by independent actors.

Production of Information Marriott Provided to Government Regulators

Plaintiff also seeks from Marriott all materials provided to government regulators investigating the Data Breach. The advantage of an early production of this information tracks the rationale for production of the PFI Report and similar investigative reports.

Marriott will not be burdened by having to comply with this request as the information has been previously gathered, vetted for privilege, and delivered to the appropriate regulatory body. A reproduction of the previously produced information is simple. The benefits of the early production of this information is profound. The Amended Complaint would be tailored to the precise circumstances of the Data Breach at issue and will be laser focused on the scope of the breach and the damage caused by it.

Any resistance by Marriott that such a production would be overbroad is exaggerated. The information sought is limited to any investigation of the Data Breach itself, which directly corresponds to the claims in this case. To the extent Marriott resists due to the “clone discovery” nature of Bank of Louisiana’s request, courts routinely reject similar arguments, finding that when the same conduct is at issue there is no need to do a document-by-document analysis for

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relevance or to see if it falls within a plaintiff's specific request. *See, e.g., Schneider v. Chipotle Mexican Grill, Inc.*, 2017 WL 1101799, at *3-4 (N.D. Cal. Mar. 24, 2017); *In re Plastics Additives Antitrust Litig.*, 2004 WL2743591, at *12-13 (E.D. Pa. Nov. 29, 2004); *In re Bank of America Corp. Sec., Derivative, & ERISA Litig.*, 2009 WL 4796169, at *2-3 (S.D.N.Y. Nov. 16, 2009); *Singer v. Nicor, Inc.*, 2003 WL 22013905, at *2 (N.D. Ill. Apr. 23, 2003); *Munoz v. PHH Corp.*, 2013 WL 684388, at *4-6 (E.D. Cal. Feb. 22, 2013). The requested information is clearly discoverable, assuming just one of Bank of Louisiana's claims survives Marriott's challenge. Any delay in obtaining this information will only prolong the discovery stage of the litigation with no material benefit. To the contrary, the early production of this information will pay huge dividends in terms of efficiency when full discovery begins.

Additionally, early production of the PFI Report and other investigations will inform the negotiation of an ESI Protocol. The parties are to meet and confer in the first few weeks of June to submit an ESI Protocol to the Court by June 20, 2019. Bank of Louisiana currently lacks key information about the breach and its aftermath, Marriott's internal terminology, the identity of witnesses with relevant knowledge about the platforms implicated by the Data Breach, the way in which those people are organized, and how Marriott stores relevant information. Many, if not all, of those mysteries will be solved by the identified productions. The limited information and documents that Bank of Louisiana seeks through this early production is critical to identifying and negotiating search terms, custodians, and the other ESI issues that Proposed CMO # 3 contemplates. Without such information, Bank of Louisiana simply cannot adequately evaluate—and certainly cannot agree to—a list of search terms and custodians or other matters relating to an ESI Protocol.

Finally, Proposed CMO # 3 contemplates the parties serve Initial Document Requests on June 20, 2019 (Bank of Louisiana) or July 3, 2019 (Marriott's suggestion). Production of the PFI Report and governmental regulatory productions will allow Bank of Louisiana to formulate targeted discovery (with no significant burden on Marriott) and would undoubtedly help avoid the inefficiencies and headaches of discovery duplicative of earlier investigations. Under Marriott's proposal, the parties' Initial Document Requests will coincide with Marriott's delivery of the PFI Report. The resulting inefficiency of that approach is self-evident.

The parties have committed to an aggressive timetable for discovery and briefing. The early production of documents that (a) are unquestionably going to be produced in the case, and (b) bear precisely on the core issues in the case, is the most logical and efficient way to handle these issues.

Timing of Motion to Dismiss Hearing

In Proposed CMO # 3, Bank of Louisiana proposed conducting the hearing on Marriott's anticipated Motion to Dismiss on November 20, 2019 (or an earlier date that would be convenient for the Court). Notably, Bank of Louisiana proposes the hearing coincide with a hearing on any Motion to Dismiss the Consumer Track claims. In contrast, Marriott proposes a hearing on the Financial Institution Track on October 4, 2019 and proposes November 8, 2019 for the Consumer Track. The efficient presentation of the legal issues, and the corresponding

preparation by the Court and its staff, supports conducting the hearings on the same date. While the two Tracks are undoubtedly different in many respects, from prior experience in numerous other retail Data Breach cases, the anticipated grounds Marriott will advance in their respective Motions to Dismiss will be similar enough that a simultaneous hearing benefits all involved.

Bank of Louisiana's suggestions outlined above will foster both efficiency and fairness to all parties. We respectfully ask the Court to incorporate these suggestions into its CMO # 3.

Respectfully submitted,

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