Gibson, Dunn & Crutcher LLP
200 Park Avenue
New York, NY 10166-0193
Tel 212.351.4000
www.gibsondunn.com

Jason J. Mendro
Direct: +1 202.887.3726
JMendro@gibsondunn.com

August 8, 2019

FILED VIA ECF

Hon. Paul W. Grimm
U.S. District Court District of Maryland
6500 Cherywood Lane, Suite 465A
Greenbelt, MD 20770

Re: **Defendants' Opposition to Securities and Derivative Plaintiffs' Motion to Unseal (ECF No. 349) in *In re: Marriott International, Inc. Customer Data Security Breach Litigation*, No. 8:19-md-02879**

Dear Judge Grimm:

Defendants submit this letter in opposition to the request of the Securities and Derivative Plaintiffs (collectively, "Plaintiffs") to unseal confidential documents filed in the Government, Financial Institution, and Consumer Tracks (ECF No. 349). Plaintiffs' request should be denied because (1) it impermissibly attempts to circumvent the discovery stay imposed by the Private Securities Litigation Reform Act ("PSLRA"), and (2) the sealed filings are warranted by compelling interests.

A. *The PSLRA Bars Plaintiffs' Motion*

Plaintiffs' motion is an attempted end-run around the PSLRA's discovery stay.[1] The PSLRA, which governs the Securities and Derivative Tracks, imposes an automatic stay on all discovery pending resolution of motions to dismiss. 15 U.S.C. § 78u–4(b)(3)(B); *see also* ECF No. 279 at 5 (staying discovery in both tracks). In accordance with the Court's Orders, Defendants have produced discovery, including confidential information, only in tracks that are not subject to the PSLRA. Plaintiffs now seek to expose confidential discovery materials in public court filings, so that they can access discovery that federal law bars them from obtaining at this juncture.

Congress enacted the PSLRA "to address the perceived widespread abuse of the securities laws by overzealous attorneys and investors." *In re Carnegie Int'l Corp. Sec. Litig.*, 107 F. Supp. 2d 676, 679 (D. Md. 2000). Universal recognition of the gravity of this problem resulted in overwhelming bipartisan support for the PSLRA, sufficient even to overcome a presidential veto. As courts routinely observe, the PSLRA bars securities plaintiffs from "using the discovery process" to "find[] a sustainable claim[]." *380544 Canada, Inc. v. Aspen Tech., Inc.*, 2007 WL 2049738, at *2 (S.D.N.Y. July 18, 2007) (citation omitted); *see also, e.g., N.Y.S. Teachers' Ret. Sys. v. Gen. Motors Co.*, 2015 WL 1565462, at *3 (E.D. Mich. Apr. 8, 2015) (same).

Plaintiffs do not argue that any statutory exception to the PSLRA stay applies here. Instead, they style their request as a motion to unseal and purport to invoke the public right of access. As Judge Bredar observed, it is "improper for Plaintiffs to wield the 'public interest' as a mechanism to

[1] Derivative Plaintiffs also seek to circumvent the settled rule that they are not entitled to discovery to plead the required elements of demand futility. *See, e.g., In re Merck & Co., Inc. Sec., Deriv. & ERISA Litig.*, 493 F.3d 393, 400 (3d Cir. 2007) ("discovery generally may not be used to supplement allegations of demand futility").

unravel a confidentiality agreement to which Plaintiffs assented." *Myles v. RENT-A-Ctr., Inc.*, 2016 WL 3077399, at *3 (D. Md. June 1, 2016). Plaintiffs assented to the Protective Order (ECF No. 271) and Case Management Order #3 (ECF No. 279 at 5), which ordered certain documents to be produced in "all other tracks," but not produced to Plaintiffs during the discovery stay.

This Court should not allow Plaintiffs to evade the PSLRA to glean information that they "might . . . use" in "amending their claims in direct contravention of one of the purposes of the PSLRA." *See In re Am. Funds Sec. Litig.*, 493 F. Supp. 2d 1103, 1106–07 (C.D. Cal. 2007); *see also In re Spectranetics Corp. Sec. Litig.*, 2009 WL 3346611, at *7 (D. Colo. Oct. 14, 2009) ("Any tactic to achieve discovery solely for . . . drafting a superior complaint through discovered material is rejected under the PSLRA.").

B. *The Sealed Filings Are Appropriate and Necessitated by Compelling Interests*

Even if Plaintiffs seek to unseal materials "for the public at large," rather than for the purpose of "drafting their own amended complaints" (ECF No. 354), the motion should be denied. The public right of access is not absolute and "must be balanced against countervailing considerations supporting confidentiality." *Doe v. Blue Cross Blue Shield*, 103 F. Supp. 2d 856, 857 (D. Md. 2000). Access may be denied when "necessitated by a compelling governmental interest," *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606–07 (1982), or by private interests "subject to harm by disclosure," *Robinson v. Bowser*, 2013 WL 3791770, at *3 n.4 (M.D.N.C. July 19, 2013), so long as the limits on access are narrowly tailored to serve those interests. Here, Defendants' confidentiality designations are necessary and narrowly tailored to serve three compelling interests:

(1) Sealing the information protects it from criminals that could use it to perpetrate "future cyberattacks." (ECF No. 333 ¶ 6.) Disclosure of the sealed information could, for instance, help hackers hone their strategies. *See generally* Decl. Kristin Harding Supp. Def.'s Opp'n Sec. Pls.' Mot. Unseal ("Harding Decl."); *see also, e.g.*, *OneAmerica Fin. Partners, Inc. v. T-Sys. N. Am., Inc.*, 2016 WL 891349, at *4 (S.D. Ind. Mar. 9, 2016) ("[C]oncerns about hackers and a cyber attack justif[y] sealing information about a company's IT systems."); *In re Google Inc. Gmail Litig.*, 2013 WL 5366963, at *3 (N.D. Cal. Sept. 25, 2013) (granting motion to seal parts of complaint because "hackers and spammers could use this information to circumvent Google's anti-virus and anti-spam mechanisms").

Plaintiffs dismiss these concerns, arguing that they do not seek information about "current systems in use." (ECF No. 354 at 3.). But Plaintiffs' motion would expose information that poses a risk to systems currently in use. *See, e.g.*, Harding Decl. ¶ 13. And to the limited extent any of the sealed information is stale, it is of minimal value to the public—except perhaps to litigants crafting claims, who already have the information federal law permits them to receive. Moreover, Plaintiffs ignore that hackers (including the one involved here) can gain from a forensic analysis of a cyberattack against an IT system, operational or not. *See id.* ¶¶ 7–12; *see also* Order at 4–5, *In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, No. 16-2752 (N.D. Cal. Jan. 3, 2018) (insight into past hacking methods "could be used by cyber-attackers to attempt to again hack Yahoo's systems").

(2) The compelling governmental interest in shielding ongoing investigations requires keeping certain information sealed. *Dish Network L.L.C. v. Sonicview USA, Inc.*, 2009 WL 2224596, at *7 (S.D. Cal. July 23, 2009) (sealing informant declarations to avoid jeopardizing "pending or yet-to-

be-filed cases"); *Hunter v. Heffernan*, 1996 WL 426834, at *1 (E.D. Pa. July 30, 1996) (sealing materials "disclosure of [which] could well impede and jeopardize an ongoing law enforcement investigation"); *see also* Harding Decl. ¶¶ 10, 13. Plaintiffs offer no substantive response. Instead, they declare that this concern is "unfounded" and vaguely reference "prior data breach cases."[2]

(3) Marriott's concern about offering "competitors[] insight into certain aspects of Marriott's internal business practices" (ECF No. 333 ¶ 6) also justifies filing limited discovery, and information derived therefrom, under seal. *See Maxtena, Inc. v. Marks*, 2013 WL 12328065, at *3 (D. Md. Mar. 29, 2013) (information is "commercially sensitive" and "merits sealing" if it can cause "competitive harm to the company," reveal "data regarding [its] strategies," or "harm its relationships with" "investors and customers").

Marriott has employed the least restrictive means necessary to safeguard the confidential information. With respect to the materials Plaintiffs seek to unseal (ECF Nos. 294, 328, 352, 331-1), Marriott "specified individual portions to be redacted" in a manner "narrowly tailored to [these three] compelling interest[s]," "instead of requesting that all of the documents and briefing be sealed in their entirety." *See In re Constellation Energy Grp., Inc. Sec. Litig.*, 2012 WL 1067651, at *12 (D. Md. Mar. 28, 2012); *see also Young v. United Parcel Servs., Inc.*, 2011 WL 665321, at *22 (D. Md. Feb. 14, 2011) (granting motion to seal "sensitive corporate data" where motion focused on a narrow category of information), *rev'd on other grounds*, 135 S.Ct. 1338 (2015).[3] The PFI Report is justifiably sealed in its entirety. *See* Harding Decl. ¶¶ 5–12. Any less restrictive means to protect Marriott's information would be insufficient given that, "it is impossible to predict what information would be most useful for a hacker[.]" *OneAmerica*, 2016 WL 891349, at *4; *see also Music Grp. Macao Commercial Offshore Ltd. v. Foote*, 2015 WL 3993147, at *8 (N.D. Cal. June 30, 2015) (sealing in full exhibit that could "pose a threat to Plaintiff's network security").[4]

Finally, it bears emphasis that Plaintiffs' motion threatens to undermine the efficiency of this multidistrict litigation. Defendants have endeavored in good faith to engage in early discovery, relying on the understanding that their productions would not be used by shareholder plaintiffs in a manner that is contrary to the PSLRA. If Plaintiffs are permitted to evade the restrictions of federal law and obtain confidential discovery material indirectly through productions made to other plaintiffs, then future discovery in all of the tracks will become more complicated.

Plaintiffs' motion to unseal should be denied.

---

[2] Plaintiffs' citation to Senator Warren's report is puzzling, as the materials released to the public did not include the report, analogous to the PFI Report, issued by the cybersecurity firm that "investigat[ed] the Equifax breach." *See* ECF No. 354 at 3, n.2 (citing www.warren.senate.gov/files/documents/2018_2_7_%20Equifax_Report.pdf).

[3] Marriott recognizes the importance of "explicitly identify[ing] information . . . , and describ[ing] how its release will" cause harm. *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 123 (D. Md. 2009). In brief, Marriott's limited redactions concern: (1) IT and cybersecurity policies, reports, and testing; (2) the Marriott-Starwood acquisition; (3) the breach; (4) the PFI Report; and (5) governmental investigations of the breach. Should the Court require more detail on any of these items than what can be provided in this short submission, Marriott would welcome the opportunity to provide it.

[4] Plaintiffs' reliance on *Zahran v. Trans Union Corp.*, 2002 WL 31010822 (N.D. Ill. Sept. 9, 2002), a case decided more than 13 years ago and before the recent wave of significant data breaches, is misplaced. The premise of *Zahran* has been eschewed in favor of a more prudent view that favors sealing information. *See OneAmerica*, 2016 WL 891349, at *4.

Respectfully submitted,

/s/ Jason J. Mendro

Jason J. Mendro

cc: All Counsel of Record (via ECF)