UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

IN RE: CAPITAL ONE CONSUMER DATA SECURITY BREACH LITIGATION	)	MDL No. 1:19md2915 (AJT/JFA)

This Document Relates to the Consumer Cases

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF MANDIANT REPORT AND RELATED MATERIALS

Plaintiffs submit this Reply in Support of their Motion to Compel Production of the Mandiant Report and Related Materials ("Motion" or "Mot.") (Dkts. 412-414).

PRELIMINARY STATEMENT

It is well settled that "Courts disfavor assertions of evidentiary privilege because they shield evidence from the truth-seeking process." *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 748 (E.D. Va. 2007). Therefore, the party "claiming the protection bears the burden of demonstrating the applicability of the work product doctrine." *Solis v. Food Employers Labor Relations Ass'n*, 644 F.3d 221, 232 (4th Cir. 2011). Capital One has failed to do so here.

Although Capital One spends 30 pages trying to meet this high burden, the Court need look no further than the Statement of Work Capital One entered into with Mandiant in January 2019 for "incident response services" ("January 2019 SOW") and the agreement between Mandiant and Debevoise (the "Amended SOW") to see that one of the "most significant" factors considered by Judge Nachmanoff in a data breach case in this very Court has been clearly met. *In re Dominion Dental Servs. USA, Inc. Data Breach Litig.*, No. 1:19-CV-1050-LMB-MSN, 2019 WL 7592343, at *4 (E.D. Va. Dec. 19, 2019). The Court in Dominion found that the "actual description of services promised" in the post-breach statement of work was "almost identical to the services

promised" in the pre-breach statement of work, and that the "addition of language referencing 'under the direction of counsel' appear[ed] designed to help shield material from disclosure rather than to fundamentally alter the business purposes of the work." *Id.* The same failed attempt to cloak the Mandiant Report in privilege is apparent here.

Placed side by side, the services contracted for in the January 2019 SOW are essentially identical to those contracted for in the Amended SOW:

The January 2019 SOW (Dkt. 414-2, Ex. 2, at -97223)	**The Amended SOW (Dkt. 435-2, Ex. A, at -393993)**
[redacted]	Mandiant will provide services and advice, <u>*as directed by counsel*</u>, relating to the following areas: • Computer security incident response • Digital forensics, log, and malware analysis • Incident remediation

Further, the Amended SOW incorporates all terms from the January 2019 SOW and the 2015 Master Services Agreement, including the deliverables (such as the Mandiant Report) which are not detailed in the Amended SOW but are detailed in the January 2019 SOW. *See* Dkt. 435-2, Ex. A, at -393993 (incorporating terms of January 2019 SOW); Dkt. 414-2, Ex. 2, at -97224 (detailing [redacted]). And, Capital One admits that it paid Mandiant from the retainer it had contracted for in January 2019. The addition of the language that Mandiant would provide the exact same services but now "as directed by counsel" simply does not "fundamentally alter" what Mandiant had been previously contracted to and was on retainer to do: respond and render forensic services to Capital One in the event of a data breach – as Capital One put it: a "business critical" function. *See* Dkt. 414-3, Ex. 3 (February 2019 PowerPoint), at -185319.

Further, just as in *Dominion*, the record here confirms "that the report was used for a range of non-litigation purposes." *See In re Dominion*, 2019 WL 7592343, at *4. The Report was distributed to four regulators, Capital One's outside auditor, 32 non-lawyers within the company, and at least one seeming distribution list entitled "Corporate Governance Office General Email Box." Dkt. 435-5, Ex. 2 (May 5, 2020 Email), at 7-8. And this is only a list of individuals and entities who received the full report, begging the question how many individuals, both inside and outside the company, received summaries, portions of, or representations about the Report – a point on which Capital One is silent in its Opposition. And, documents produced after Plaintiffs filed their Motion further highlight that the Report was widely used for business purposes. *See, e.g.*, Ex. 15, CAPITALONE_MDL_000392048 ([redacted]). That the Mandiant Report was used for such business purposes belies Capital One's assertions that the Report was attorney opinion work product. And it is telling that Capital One does not offer the Court the opportunity to examine the Report *in camera* to see its true nature.

That the Mandiant Report was disclosed so widely does not just show that the "driving force" behind the Report was business purposes, but its distribution also confirms that any purported privilege has been waived. And, even if the Report was privileged, given the forensic nature of the Report, which is impossible to replicate by routine document discovery (even discovery as extensive as in this case), Plaintiffs have a substantial need for the Report.

For all of these reasons and those below, Plaintiffs request the Court grant their Motion to Compel the Mandiant Report and the related materials.

ARGUMENT

I. The Mandiant Report Does Not Qualify As Protected Work Product[1]

Capital One recklessly asserts that "*all* of the circumstances surrounding Mandiant's investigation support the conclusion that the Mandiant Report is protected work product." Capital One's Opposition ("Opp."), Dkt. 435 at 12 (emphasis in original). This is simply not so. Where there are "dual motives underlying the preparation of a particular document" – and even Capital One admits there were dual motives here (Opp. 17-19) – a court must determine *first* "the driving force behind the preparation of" the requested documents, and *second* "whether the document would have been created in essentially the same form in the absence of litigation[.]" *In re Dominion*, 2019 WL 7592343, at *2 (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992); *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)). Capital One has failed to show – and cannot show – either factor.

a. Capital One fails to establish that Mandiant rendered services any differently due to Debevoise's involvement.

That the "driving force behind the preparation of" the Mandiant Report was not litigation is clearly evidenced by the fact that many months before the Breach (when litigation could not have been anticipated) Capital One contracted for the exact services Mandiant rendered post-Breach. Indeed, the existence of the pre-existing contractual relationship imposing virtually identical investigative, remediation, and reporting obligations on Mandiant places this case squarely within Judge Nachmanoff's ruling in *Dominion* and Judge Simon's rulings in *Premera*. *See id.; In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1245-

[1] Capital One does not assert attorney-client privilege over the Mandiant Report.

46 (D. Or. 2017). Merely shifting supervisory authority and requiring Mandiant to designate its reports as work product does not alter the business purpose character of Mandiant's investigation.

As in *Dominion*, the services set forth in Capital One's January 2019 pre-breach SOW and the Amended post-breach SOW are "almost identical." *See In re Dominion*, 2019 WL 7592343, at *4. Capital One's January 2019 SOW stated that Mandiant would provide to Capital One [redacted] Dkt. 414-2, Ex. 2. The Amended SOW stated that Mandiant would provide these *exact same services almost verbatim* – except that it would purportedly provide the services "as directed by counsel." Dkt. 435-2, Ex. A. The Amended SOW then incorporated all terms from the January 2019 SOW and the 2015 Master Services Agreement, including the deliverables. *Id.* This means that Capital One contracted for the very document at the center of this Motion to Compel, the Mandiant Report, over six months before it anticipated litigation or even knew it had been breached. Therefore, the "most significant[]" factor in *Dominion* has been met: the services in the pre-Breach statement of work were "almost identical to the services promised in the" post-Breach statement of work.

That Mandiant provided the exact same services and deliverables as detailed in the January 2019 SOW but "as directed by counsel" does not "fundamentally alter" what Mandiant had been previously contracted to and was on retainer to do, and Capital One provides little more than conclusory statements to show that anything actually changed about the services Mandiant provided. Capital One explains that Mandiant "assisted" Debevoise by "helping Debevoise understand and interpret the technical matters it encountered," "consulting on specific sub-investigations Debevoise conducted on various technical matters," and "performing a 'red team' exercise to assess the vulnerability that led to the Cyber Incident." Opp. 7 (citing the Cantwell

Decl. ¶ 16). Capital One then states that "Debevoise's ability to provide legal advice was significantly enhanced by Mandiant's advice." *Id.* (citing Cantwell Decl. ¶ 17). None of this demonstrates that Mandiant's services and deliverables, which had been previously contracted for, changed as a result of the litigation. Rather, as in *Dominion*, the "addition of language referencing 'under the direction of counsel' appears to be designed to help shield material from disclosure rather than to fundamentally alter the business purposes of the work." *In re Dominion*, 2019 WL 7592343, at *4.

At various points in its Opposition, Capital One takes the questionable position that Mandiant was not contracted to provide incident response (when it clearly was), and attempts to argue that the services Mandiant was contracted for pre-Breach "were of an entirely different nature" than those rendered post-Breach. Opp. 2, 14. Capital One explains that, "In the two years before the Cyber Incident, Capital One did not need Mandiant to provide any incident response services" and so in those years it had ended up using the retainer on consulting and training services. *Id.* at 5. But that argument is frivolous. The fact that Capital One did not experience a breach warranting Mandiant's incident response services in the two years leading up to this Data Breach does not contradict the plain terms of the January 2019 SOW or the fact that Mandiant had been contracted to provide incident response *if* an incident (like the Data Breach) should occur. Capital One itself admits that it was planning, in the early summer of 2019, to repurpose the incident response retainer to consulting and training, but "this [re-purposing] was put on hold after Capital One discovered the Cyber Incident in July 2019." Opp. 5 (citing Blevins Decl. ¶ 11). Indeed, Capital One admits that it paid Mandiant for its investigation from the very retainer it contracted for in January 2019. Opp. 8 (citing Watts Decl. ¶ 3).

Indeed, just as in *Dominion* and *Premera*: the "amended statement of work confirms that the scope of the work remained the same" and Capital One (like the defendants in those cases) has "done little to show 'that Mandiant changed the nature of its investigations at the instruction of outside counsel and that Mandiant's scope of work and purpose became different in anticipation of litigation." *Dominion*, 2019 WL 7592343, at *4 (quoting *Premera*, 296 F. Supp. 3d at 1246).

Dominion is directly on point and Capital One's attempts to distinguish *Dominion* fail. First, contrary to Capital One's argument otherwise, Capital One, similar to the defendants in *Dominion*, has not shown that the nature of the work Mandiant was doing for Capital One "changed after the breach was discovered and defendants retained counsel." Opp. 15.[2] Second, that the plaintiffs in Dominion, who were first notified of the breach on June 21, 2019, did not file their lawsuit until August 9, 2019, does not change the analysis: the fact that the statement of work was amended post-breach to be at the direction of counsel strongly suggests that Dominion and its outside counsel anticipated litigation. Third, Capital One makes much of the fact that Mandiant's investigation in Dominion concluded prior to a lawsuit being filed; however, Capital One ignores the fact that Mandiant's final report in *Dominion* was not issued until after the first lawsuit was filed. *Id.* at *2 (stating that the final report was issued on August 19, 2019). Finally, that there was no separate internal investigation in *Dominion* is also not a distinguishing factor. While a separate-track internal investigation may be probative that a counsel-directed investigation qualifies for

[2] Similarly, Capital One attempts to distinguish *Premera* by arguing the defendants in *Premera* "had not presented evidence 'showing that Mandiant changed the nature of its investigation after counsel became involved or that its 'scope of work and purpose became different in anticipation of litigation." Opp. 14 (quoting *In re Premera*, 296 F. Supp. 3d at 1245). But here Capital One has likewise not presented any evidence showing that Mandiant "changed the nature of its investigation" due to counsel's involvement; rather, the evidence to date shows that Mandiant performed the exact same investigation it had been previously contracted to perform but simply reported the results first to Debevoise.

work product protection, the ample evidence here regarding the pre-existing contract for the exact services Mandiant performed post-breach overpowers any suggestion that the "driving force" behind Mandiant's investigation was litigation.[3]

It is also worth noting that Judge Nachmanoff in *Dominion* reviewed the Mandiant Report *in camera* prior to his decision. He stated that although the "facts in the record alone [were] sufficient to support granting plaintiffs' motion," "a review of the contents of the report itself reflects that the information is entirely factual, relates directly to the business interests of the defendants, and does not appear to include legal analysis or attorney work product." *In re Dominion*, 2019 WL 7592343, at *2 n.4. Though the Plaintiffs maintain the facts in the record alone are sufficient for the Court to grant their Motion, should the Court entertain any doubts about the nature of the Report, Plaintiffs respectfully request the Court review the Report *in camera*.

Unlike *Dominion*, which should control here, the cases cited by Capital One where defendants successfully withheld similar reports as privileged are distinguishable. For example, in *In re Experian*, 2017 WL 4325583 at *3 (C.D. Cal. 2017), there was no evidence of a continuous business relationship with Mandiant, much less evidence that Experian had previously contracted for the exact services performed post-breach as there is here.[4] Moreover, in *Experian*, the report

[3] Moreover, Mandiant's investigation appears to be the only forensic investigation into the causes of the Data Breach that was performed. *See* Dkt. 414-13, Ex. 13, at Answer 11 ([redacted]).

[4] Capital One suggests that Plaintiffs' arguments in the Motion "would lead to the absurd result that Debevoise would have been forced to engage a cybersecurity expert having no prior relationship with Capital One[.]" Opp. 13 n.4. This misconstrues Plaintiffs arguments. As evinced in *Experian*, a company may have had a prior relationship with a cyber-security expert who is later hired by its outside counsel for litigation purposes. But that is not what happened here. Here, Capital One had Mandiant on retainer for investigating any data breach that may occur within a given year; then, when a data breach did occur, Capital One amended its contract with Mandiant in an attempt to shield the results of the investigation from discovery.

was only partially disseminated to the incident response team, which suggests it may have contained legal theories or advice concerning the litigation. *Id.* at *2. Here, Capital One has disseminated the full Report to at least 32 non-attorneys, four regulators and its outside accountant.

Similarly, *In re Target Corp. Customer Data Sec. Breach Litig*., 2015 WL 6777384 (D. Minn. Oct. 23, 2015) is inapposite. First, in *Target*, there was no pre-existing relationship with Verizon, the incident response vendor at issue in that case. Second, Target had carefully tailored the investigation involving Verizon into two tracks: (1) the "ordinary-course investigation" in conjunction with one team from Verizon which explored "how the breach happened" and how Target "could respond to it appropriately;" and (2) a separate track that involved a separate team from Verizon educating "Target's lawyers" about "the breach so that they could provide Target with legal advice." *Id.* at *2. Target only claimed privilege over documents within the second track.[5] Given these facts, the Court in *Target* did not have to decide the question that is presented here: whether a previously-contracted for service to investigate how a breach happened and the remedial measures a company needs to take is privileged attorney-work product.[6]

In short, the January 2019 SOW and Capital One's failure to present evidence that the services rendered by Mandiant changed at all (much less fundamentally changed) pursuant to the Amended SOW shows that the driving force behind Mandiant's investigation was not the litigation.

[5] Like in *Dominion*, the Court in *Target* reviewed the documents at issue *in camera*. *Id*. at *2.

[6] The other two cases cited by defendants as protecting Mandiant reports or similar reports as work product contained little to no discussion of the factual circumstances pursuant to which the incident response vendors were retained, and, in any event, are not controlling. *See* Ex. 16, *Genesco, Inc. v. Visa, Inc*., No. 3:13-cv-00202 (M.D. Tenn. Mar. 25, 2015), Dkt. No. 969, at 2; Ex. 17, *In re Arby's Rest. Grp., Inc. Data Sec. Litig*., No. 1:17-mi-55555-WMR (N.D. Ga. March 25, 2019), Dkt. 453.

b. Capital One presents no evidence that the Mandiant Report would not have been created in essentially the same form even if no litigation was anticipated.

In addition to determining the "driving force" behind a document, the other key question a court must ask is "whether the document would have been created in essentially the same form in the absence of litigation[.]" *In re Dominion*, 2019 WL 7592343, at *2 (citing *Adlman*, 134 F.3d at 1195). Capital One acknowledges that this question is the second prong of the Fourth Circuit's "because of" inquiry. *See* Opp. 11. But nowhere in its Opposition does Capital One contend that the Mandiant Report was prepared in a different form due to the litigation. Nor could it.

The declaration submitted by Debevoise describes the Mandiant Report as follows: "Mandiant issued a written report detailing the technical factors that allowed the criminal hacker to penetrate Capital One's security." Dkt. 435-2, Cantwell Decl. ¶ 19. This is the same deliverable contracted for in the pre-Breach January 2019 SOW and incorporated via the January 2019 SOW into the Amended SOW: Mandiant was to provide [redacted] Dkt. 414-2, Ex. 2, at -97224; Dkt. 435-2, Ex. A, at -393993. Nothing in the Amended SOW suggests that the form of the Mandiant Report changed based on the prospect of litigation or involvement of counsel.

Capital One does argue that the Mandiant Report is "core opinion work product." Opp. 4, 25. But Capital One does not contend or present any evidence that the Report contains the "mental impressions, conclusions, opinions, [and] legal theories of a party's attorney or other representative *concerning the litigation*." Opp. 20 (quoting Fed. R. Civ. P. 26(B)(3)(B) but omitting the final key phrase: "concerning the litigation") (emphasis added). By its own account, the Mandiant Report contains factual information and conclusions regarding the "technical factors" that allowed the Data Breach to occur. Such information does not "embody opinions and theories about the litigation." *Nat'l Union Fire Ins.*, 967 F.2d at 985.

Capital One's failure to cite the complete language of Rule 26(B)(3)(B) coupled with the very cases Capital One cites to purportedly support its contention that the Mandiant Report constitutes opinion work product demonstrate the fact that it clearly is not. For example, in *In re Allen*, 106 F.3d 582, 603, 608 (4th Cir. 1997), the investigator was "retained to conduct an investigation using her legal expertise" and the protected document contained "her theories and opinions regarding [the pending] litigation." And in *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961), the Court explained that the presence of an accountant does not destroy the privilege if the communications are "made in confidence for the purpose of obtaining legal advice from the lawyer[,]" but if "what is sought is not legal advice but only accounting service … or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." Finally, *Hickman v. Taylor*, 329 U.S. 495, 509 (1947), concerned "an attempt to secure the production of written statements and mental impressions contained in the files and the mind of the attorney." All of these situations are inapposite to the one here.

Mandiant was not retained for its legal expertise or to provide legal advice; it was retained by Capital One to provide technical and forensic advice regarding how the Data Breach had occurred and how it could be prevented in the future. The fact that lawyers at Debovoise (or any other lawyer) used the Mandiant Report to guide its thinking does not transform the report itself into privileged material. In that respect, the report is just like any other factual evidence that cannot be cloaked in privilege. Mandiant could only provide facts about the investigation and its remediation recommendations; what counsel ultimately did with them is outside the scope of Plaintiffs' request. That counsel used facts uncovered in Mandiant's investigation to provide legal advice does not entitle Capital One to claim privilege over those facts. As this Court has previously stated: "[L]itigants cannot escape their obligations to disclose underlying facts by communicating

them to an attorney or having an attorney direct the fact investigation." *In re Dominion*, 2019 WL 7592343, at *3 (quoting *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836-DEM, 2019 WL 6122012, at *3 (E.D. Va. July 16, 2019)). Capital One wholly fails to establish the second prong of the Fourth Circuit's "because of" test because it presents no evidence that the Mandiant Report was prepared in any different form due to the litigation.

c. Capital One used the Mandiant Report for business purposes.

Further underscoring that Capital One has failed to establish the Mandiant Report is work product, the even minimal record before the Court is replete with evidence that Capital One used the Mandiant Report for business purposes. Capital One contends that Plaintiffs conflate the Fourth Circuit's "because of" standard with the Fifth Circuit's "primary motivating purpose" test. Opp. 18 (citing *In re El-Atari*, 2013 WL 593705, at *6 (E.D. Va. Bankr. Feb. 14, 2013)). However, this ignores the Fourth Circuit's dictate that to resolve whether a document is work product a court must determine "the driving force behind the preparation of each requested document." *Nat'l Union Fire Ins. Co.*, 967 F.2d at 984. This is because, as the Fourth Circuit explained, following an incident it can be expected that a company "will conduct investigations, not only out of concern for future litigation, but also to prevent reoccurrences, to improve safety […], and to respond to regulatory obligations." *Id.* Therefore, "materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes are not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3)." *Id.*

As detailed *supra*, there is ample evidence in the record that Capital One contracted with Mandiant months before the Data Breach for the very Report at issue in this Motion to Compel and that the Report was prepared in the same format it would have been absent the litigation. *See RLI Ins. Co.*, 477 F. Supp. 2d at 747–48.

Accentuating the obvious business-purpose of the technical Report, just as in *Dominion*, the record here confirms "that the report was used for a range of non-litigation purposes." *See In re Dominion*, 2019 WL 7592343, at *4. The fact that the Report was distributed to four regulators, Capital One's outside auditor, 32 non-lawyers within the company, and at least one seeming distribution list entitled "Corporate Governance Office General Email Box" is telling. Dkt. 435-5, Ex. 2, at 7-8. The expert reports produced this Fall in this litigation would certainly never be so widely distributed. And, documents produced after Plaintiffs filed their Motion offer even more evidence that the Report was widely used for business purposes. *See*, *e.g.*, Ex. 15, CAPITALONE_MDL_000392048 ([redacted]). Further, although Capital One maintains that the Report was shared with "only a limited number of non-legal employees" and only four employees in Capital One's Cyber Organization (Opp. 16-17), Capital One does not provide any evidence as to whether portions of the report were distributed or whether conclusions or recommendations of the report were distributed or utilized more broadly.[7] And evidence such as the PowerPoint from February 2019 deeming Mandiant's incident response as a "business critical" expense is certainly probative of the fact that Mandiant's services were needed irrespective of the litigation. Dkt. 414-3, Ex. 3 (February 2019 PowerPoint), at -185319.

Moreover, Capital One's assertions that the "Mandiant Report was not commissioned to serve a regulatory or compliance-related function" misses the point. *See* Opp. at 19. Whether the Report was commissioned pursuant to regulatory requirements or not, the fact that Capital One

[7] Capital One attempts at various points in its Opposition to shift the burden of *disproving* privilege to Plaintiffs. For example, Capital One states that Plaintiffs "offer no evidence showing that [the draft investor relations talking points] were ever used." Opp. 17 n.7. But Capital One does not offer evidence or even any representation that the investor relations talking points were *not* used.

shared the full Report with its regulators shows the Report was needed for business purposes, otherwise it would likely not have been shared. For example, in *Dominion*, the Court noted that defendants "appear[ed] to have used information gleaned from the Mandiant report in communications with state regulators[,]" indicating that the Report had served a business purpose. *See In re Dominion*, 2019 WL 7592343, at *2. So too here, where Capital One shared the full Report (not just information gleaned from the Report) with four major bank regulators and its outside auditor. For all of the above-stated reasons, the Court should find the Mandiant Report is not work product.

II. Even If the Mandiant Report Was Protected by the Work Product Doctrine, Capital One Waived that Protection

Capital One does not dispute that it shared the Mandiant Report with four federal bank regulators, a third-party auditor, and 32 non-lawyer employees for reasons unrelated to its legal needs. *See* Opp. 9, 22-24. Instead, Capital One argues that its disclosures of the Report – for reasons that Capital One does not explain – categorically cannot amount to waiver. That is incorrect. First, Capital One argues that its disclosures to bank regulators cannot result in waiver pursuant to the Financial Services and Regulatory Relief Act of 2006 ("FSRRA"), 12 U.S.C. § 1828(x). But, other than stating that, as a general matter, banking supervision is not adversarial in nature (Opp. 23), Capital One does not challenge Plaintiff's contention that the banking regulators were in an adversarial position to Capital One in the immediate aftermath of the Data Breach at the time it shared the Mandiant Report with them. *See* Dkt. 413, Mem. in Supp. at 18.

In fact, despite the burden being on Capital One to show it did not waive work product protection, *Walton v. Mid-Atl. Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010), Capital One does not explain at all its purpose in disclosing the Report to regulators. While there is little in the way of case law or legislative history on the meaning or purpose of section 1828(x), as one

commentator on the provision explained, "different policy considerations are at play" when disclosure of privileged material is made in the "enforcement context" rather than "in the ordinary course of supervision" such that the anti-waiver provision may not apply. 2 Attorney-Client Privilege in the U.S. § 9:91; *see also E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 605 (E.D. Va. 2010) (stating that "sharing information privately with an interested Government agency" does not waive work product protection "*so long as the Government is not in a position adversarial to the disclosing party*") (emphasis added).

Regardless, this Court need not be the first to grapple with the applicability of section 1828(x) in this context because Capital One fails to carry its burden to show that its other disclosures did not amount to waiver. First, Capital One contends that as a matter of law, a company's disclosure of work product to its independent auditor cannot result in waiver. Opp. 23-24. The law is not so clear-cut. Rather, to make a determination as to whether disclosure to an independent auditor results in waiver, courts assess the circumstances of the audit and the relationship between the company and the auditor to determine whether the auditor is or could become adverse to the company. *See, e.g.*, *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002) (holding role of independent auditor was "public watchdog," and thus potentially adversarial to the disclosing company such that work product protection was waived); *see also* Daniel M. Reach, Keep Your Friends Close but Your Auditors Closer: Corporations Risk Waiver When Independent Auditors Request Work Product, 23 U. Fla. J.L. & Pub. Pol'y 29, 44-48 (2012) (describing courts' considerations in determining whether disclosure to independent auditor waives work product protection). Capital One provides the Court with *no information* with which to assess the circumstances of the audit by E&Y and whether the relationship between Capital One and E&Y could potentially become adversarial. Thus, Capital

One has failed to carry its burden to show its disclosure of the Mandiant Report to E&Y did not result in the waiver of work product protection.[8]

Finally, Capital One contends it did not waive work product protection by putting findings from the Mandiant Report at issue because it did not specifically refer to or cite the Mandiant Report in representing to the public in its press release that it had "fixed the issue" that led to the Data Breach, and representing in discovery that "it had determined that Paige Thompson was the only hacker to exploit the issues that gave rise to the Breach." Opp. 24. First, Capital One cites no support for its suggestion that to put protected material at issue the privilege holder must explicitly cite to the protected source material. Second, Capital One does not explain where else, besides through Mandiant's findings, that it could have made these determinations.[9] Instead, it essentially attempts to flip the burden to Plaintiffs to prove these findings came from the Mandiant Report. It is Capital One's burden to prove it has not waived work product protection, not Plaintiffs.[10] Lastly,

[8] Likewise, relying on *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981), Capital One contends its disclosure of the Report to 32 non-lawyer employees cannot result in waiver as a matter of law. Opp. 22 n.8. But *Upjohn* did not say a company's disclosure of privileged information with its employees cannot result in waiver. Rather, *Upjohn* holds that communications by a company's employees to the company's counsel at the direction of corporate superiors for the purpose of securing legal advice from counsel are privileged. 449 U.S. at 394. Capital One does not explain why it shared the Mandiant Report with 32 non-lawyer employees, other than to say they had an unspecified "specific need to examine it" (Opp. 9), and thus fails at its burden to show these disclosures did not result in waiver.

[9] Indeed, documents produced after Plaintiffs filed their Motion indicate that Plaintiffs are correct. *See* Ex. 18, CAPITALONE_MDL_000392963 ([redacted]); Ex. 19, CAPITALONE_MDL_000392129 ([redacted]).

[10] At a minimum, Plaintiffs renew their request that the Court review the Mandiant Report *in camera* to determine whether these findings are contained therein. In addition, even if it were inclined to deny Plaintiffs' Motion to Compel, it should do so without prejudice so Plaintiffs can obtain discovery to determine how Capital One made these findings.

Capital One's conclusory assertion that it is not selectively disclosing findings from the Mandiant Report for tactical purposes (Opp. at 25) is demonstrably false. Capital One is putting forth purportedly exculpatory findings from the Report while seeking to shield the rest of it from production. That is the very definition of putting the Report directly at issue for purposes of waiver. *See E.I. Dupont de Nemours & Co.*, 269 F.R.D. at 605. Thus, even if the Mandiant Report were entitled to work product protection – it is not – Capital One has waived that protection.

III. Plaintiffs Cannot Obtain the Substantial Equivalent of the Mandiant Report Through Other Means Without Undue Hardship

The Mandiant Report is not privileged and should be produced. But even if this Court finds the Mandiant Report to be subject to work product protection, it should order it produced because Plaintiffs have a substantial need for the information in the report.

First, Capital One asserts that the Mandiant report is "opinion" work product and absolutely immune from discovery. Opp. 25. This is a misinterpretation of the work-product doctrine. While the Mandiant Report certainly contains *Mandiant's* forensic analysis and conclusions about Capital One's data security, opinion work product does not protect "opinions" generally, but "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B). As described *supra*, Capital One has provided no evidence that Mandiant provided conclusions or opinions about the litigation itself. Mandiant is not qualified, and per both the SOWs was not asked, to provide opinions about litigation merits or strategy. It was asked to provide its opinions on the facts underlying this litigation: the cause and scope of the Data Breach. That is not an opinion "concerning this litigation" as "opinion" work-product is defined. *See In re Zetia*, 2019 WL 6122012, at *3 (citing *Upjohn Co.*, 449 U.S. at 395).

Second, Plaintiffs do have a "substantial need" for the Report, which is a crucial liability and remediation document, and Plaintiffs cannot obtain the "substantial equivalent" by other means without undue hardship. Mandiant almost certainly had unfettered access to Capital One's cyber infrastructure and cyber employees over the course of several months, and was therefore able to form forensic conclusions about how technically the Data Breach was achieved and make technical recommendations regarding remediation. Even with expansive written discovery and additional depositions beyond the allotted ten depositions per side, Plaintiffs would not necessarily be able to obtain the "substantial equivalent" of the Mandiant Report. Capital One represents that Plaintiffs only want the Mandiant Report to "streamline" the discovery process and prosecute their case more "efficiently." Opp. 25. Although that is certainly true, Plaintiffs explained in their Motion that the provision of the "limited technical documents" that can be obtained pursuant to written discovery and limited "ability to question Capital One cyber security and infrastructure employees" via a set number of depositions, is insufficient to replicate the forensic examination performed by Mandiant in the wake of the Data Breach. Mem. in Supp. 22. Simply put, this is a crucial forensic liability document that Plaintiffs would not be able to replicate given the confines of litigation.[11]

[11] Plaintiffs have engaged in expansive but reasonable discovery and do not seek the Mandiant Report to "freeload," as Capital One seems to suggest. Opp. 26-27. Further, Capital One's suggestion that Plaintiffs cannot claim undue hardship because "Plaintiffs' counsel sought leadership positions from the Court based on representations that they had sufficient resources to adequately litigate the case" (Opp. 27) misconceives the undue burden standard. Capital One has over $28 Billion in revenue and it recently claimed undue burden related to the logging of privileged documents, which the Court heard and credited. *See* Dkt. 373, Pretrial Order #19 on ESI Protocol. The undue burden standard is a question of proportionality that takes into account not only the resources of the parties but also "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information [...], the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

Even more critically, Capital One has represented that it remediated its inadequate data security, presumably based on the investigation and recommendations of Mandiant. In its Opposition, Capital One suggests that Plaintiffs should be content to, for example, receive its Interrogatory Answers detailing its remediation efforts, rather than discovering what the forensic cyber-security expert recommended Capital One to do. Opp. 27. But Capital One's answers to Plaintiffs' interrogatories regarding remedial steps are neither detailed nor comforting. *See* Dkt. 414-13, Ex. 13 at Answer 12. And Plaintiffs are entitled to know Mandiant's remedial recommendations, which cannot be found except in the Mandiant Report. This is particularly critical given that Capital One still has in its possession Plaintiffs', and one-hundred million other similarly-situated individuals', extremely sensitive personal information. Plaintiffs are entitled to know what Mandiant's recommendations are to determine (1) what Capital One knows about its data security flaws, (2) whether Capital One followed Mandiant's recommendations, which will inform the scope of necessary injunctive relief, and (3) to cross-examine Capital One regarding the basis of its conclusions that there was, for example, no other exfiltration by other hackers. For these reasons, should the Court find the Mandiant Report is work product that has not been waived, it should also find that Plaintiffs' have a substantial need and order the Report produced.

IV. Relevant Communications Relating to the Mandiant Report Should Be Produced Because the Mandiant Report Is Not Privileged

Because the Mandiant Report is not privileged, the Court – like the Court in *Dominion* – should also order produced the related communications. *See Dominion*, 2019 WL 7592343, at *3 (holding that the Mandiant Report "and associated communications" were not work product privileged). The reasons Capital One suggests this Court should not do so should be rejected.

First, Capital One erroneously contends this request is procedurally improper. It is proper. Capital One acknowledges that Plaintiffs requested that Capital One produce these

communications during several meet and confers. Opp. 29 n.11. During those meet and confers, Plaintiffs consistently maintained that documents related to the Mandiant investigation were not privileged, and Capital One consistently maintained that they were. The parties even briefed a motion concerning whether these very communications needed to be logged on the basis of privilege. *See* Dkt. 352, at 5-7. Before that and consistently thereafter, Capital One has maintained that Mandiant's investigation, and all documents related thereto, are privileged because the investigation itself was privileged. And Plaintiffs have consistently responded that the investigation, and all documents related thereto, are not. Capital One cannot now seriously contend that the parties have not adequately discussed this issue such that it is not properly before the Court.

Second, to the extent the Mandiant Report is not work product (and it is not), then the documents and communications Plaintiffs request regarding the Mandiant Report, "its factual conclusions," and its "recommended remediation measures" likewise cannot be withheld as privileged. Plaintiffs do not suggest that these communications and documents could not contain material that is privileged on a separate basis. For example, the Court in *Dominion*, ordered the defendants to produce the Mandiant Report and its underlying materials and associated communications within 14 days, but acknowledged that there may be portions of the documents that defendants contended were privileged for other reasons, which could be properly withheld; therefore, the Court also ordered that any privilege log be produced along with the Report. *Dominion*, 2019 WL 7592343, at *5. Plaintiffs request the same here.

CONCLUSION

For all the reasons set forth above and in their Motion, Plaintiffs request that the Court grant their Motion to Compel and order the Mandiant Report and related documents produced.

Dated: May 12, 2020.

Respectfully Submitted,

/s/__Steven T. Webster_____
Steven T. Webster (VSB No. 31975)
WEBSTER BOOK LLP
300 N. Washington Street, Suite 404
Alexandria, Virginia 22314
Tel: (888) 987-9991
swebster@websterbook.com

Plaintiffs' Local Counsel

Norman E. Siegel
STUEVE SIEGEL HANSON LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112
Tel: (816) 714-7100
siegel@stuevesiegel.com

Karen Hanson Riebel
LOCKRIDGE GRINDAL NAUEN, P.L.L.P
100 Washington Avenue South, Suite 200
Minneapolis, MN 55401
Tel: (612) 339-6900
khriebel@locklaw.com

John A. Yanchunis
MORGAN & MORGAN COMPLEX LITIGATION GROUP
201 N. Franklin Street, 7th Floor
Tampa, FL 33602
Tel: (813) 223-5505
jyanchunis@ForThePeople.com

Plaintiffs' Co-Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/ Steven T. Webster
Steven T. Webster (VSB No. 31975)
WEBSTER BOOK LLP