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 CONSUMER Cases

CAPITAL ONE'S REPLY BRIEF IN SUPPORT OF RULE 72 OBJECTIONS TO ORDER GRANTING PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF MANDIANT REPORT

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TABLE OF CONTENTS

INTRODUCTION

The Magistrate Judge misapplied controlling law in holding that the Mandiant Report is not protected work product. The crux of the error in the Magistrate Judge's Order is the conclusion that the Mandiant Report—prepared under a separate, post-breach engagement between Debevoise & Plimpton and Mandiant at a time when Capital One was defending against a fusillade of lawsuits—is not protected work product because Capital One and Mandiant had a prior retainer agreement for general incident response services. This holding is not only contrary to established law, it creates significant practical problems and skewed incentives for companies facing cybersecurity risks.

For the reasons set forth below, this Court should set aside the Order and rule that the Mandiant Report is protected work product.

ARGUMENT

I. THIS COURT SHOULD INDEPENDENTLY DETERMINE WHETHER THE MANDIANT REPORT IS PROTECTED WORK PRODUCT.

This Court is not required to defer to the Magistrate Judge's erroneous legal conclusion that the Mandiant Report is not protected work product. Under Rule 72(a), this Court has a duty to set aside a ruling that is "contrary to law" and should do so here.

A. This Court Owes No Deference to the Magistrate Judge's Ruling.

Plaintiffs give no more than lip service to Rule 72(a), which says the Court "must . . . set aside" the Magistrate Judge's Order if it is "contrary to law." Fed. R. Civ. P. 72(a). There is no real dispute that the "contrary to law" standard is the same as the *de novo* review standard. *See Patton v. Johnson*, 915 F.3d 827, 833 (1st Cir. 2019) ("[F]or questions of law, 'there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and review under Rule 72(b)'s *de novo* standard.'"); *Haines v. Liggett Grp., Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) ("[T]he

phrase 'contrary to law' indicates plenary review as to matters of law."); *Harrison v. Shanahan*, No. 1:18cv641 (LMB/IDD), 2019 WL 2216474, at *4 (E.D. Va. May 22, 2019) (same); *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014) (same); *CertusView Techs., LLC v. S & N Locating Servs., LLC*, 107 F. Supp. 3d 500, 504 (E.D. Va. 2015) (same).

The contrary to law standard applies not just to pure questions of law, but also to mixed questions of law and fact—*i.e.*, issues concerning how the Order applied the law of work product to the facts here. *See, e.g.*, *In re Grand Jury Proceedings, Thursday Special Grand Jury Sept. Term, 1991*, 33 F.3d 342, 353 (4th Cir. 1994) ("The district court's decision that certain of the subpoenaed documents were not subject to privilege is a mixed question of law and fact subject to *de novo* review."); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir. 1999) (same); *see also Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 350 (4th Cir. 1992) (reviewing privilege issue *de novo* where, as here, "[t]he background facts … were largely undisputed" and "the determination … primarily involved the application of a legal standard to historical facts"), *vacated on other grounds*, Nos. 91-1873(L), 91-1874, 1993 WL 524680 (4th Cir. Apr. 7, 1993); *accord Harleysville Ins. Co. v. Holding Funeral Home, Inc.*, No. 1:15cv00057, 2017 WL 4368617, at *4, 9–10 (W.D. Va. Oct. 2, 2017) (applying *de novo* standard of review, disagreeing with magistrate judge's application of case law, and setting aside ruling that work product protection was waived); *Neilson v. Union Bank of Cal., N.A.*, No. CV-02-06942 MMM (CWx), 2003 WL 27374179, at *2 (C.D. Cal. Dec. 23, 2003) (noting that "[w]here the relevant facts are undisputed, proper application of an evidentiary privilege is a question of law" and reversing a magistrate judge's work product ruling). Here, Capital One challenges the Magistrate Judge's ultimate legal conclusion that the Mandiant Report is not protected work product—or, put differently, the

Magistrate Judge's construction and application of the law on work product to the relevant facts. *See* Dkt. 557 at 12-13 (hereinafter "Objs."). This Court should therefore review the Order *de novo*.

Plaintiffs argue that setting aside a magistrate judge's order on a non-dispositive matter is "extremely difficult to justify." *See* Dkt. 566 (hereinafter "Opp.") at 1, 4 (quoting *CertusView Techs., LLC*, 107 F. Supp. 3d at 504). But Rule 72(a) contains no "extremely difficult to justify" standard.[1] Rather, it calls for clear-error review of a magistrate judge's factual findings and *de novo* review for legal determinations and conclusions. Likewise, Plaintiffs' suggestion that the Magistrate Judge's Order should be reviewed merely for an abuse of discretion is incorrect. *See, e.g.*, *Chaudhry*, 174 F.3d at 402 (the Fourth Circuit "review[s a] district court's decision that certain documents are subject to privilege *de novo*"—not for abuse of discretion—"since it involves a mixed question of law and fact"). In any event, a court "by definition abuses its discretion when"—as here—"it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996); *Cunningham v. Johnson*, 241 F. App'x 913, 917 (4th Cir. 2007) (similar); *see also Hamlett v. Krippendorf*, No. 7:02CV00060, 2002 WL 32882039, at *2-*3 (W.D. Va. Mar. 21, 2002) ("A district court has no discretion to misapply the law.").

Nor do Plaintiffs' cases support anything other than *de novo* review. In *Malibu Media, LLC v. John Does 1-23*, 878 F. Supp. 2d 628 (E.D. Va. 2012), the district court judge affirmed the magistrate judge's order without identifying the Rule 72 objections under review or addressing the

[1] Plaintiffs' argument on this point is derived from an incomplete snippet of a statement from Wright & Miller. *See CertusView Techs., LLC*, 107 F. Supp. 3d at 504 (quoting *Carlucci v. Han*, 292 F.R.D. 309, 312 (E.D. Va. 2013), in turn quoting 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3069 (2d ed. 1997)). In the pertinent section of Wright & Miller, the authors summarize *both* bases for reversal under Rule 72(a)—clearly erroneous and contrary to law—and are not describing the "contrary to law" standard in Rule 72(a) in particular. *Federal Practice & Procedure* § 3069.

underlying legal and factual issues. *See id.* at 629. And while *Stone v. Trump*, 356 F. Supp. 3d 505 (D. Md. 2018), recited a more deferential review standard—asking whether there was "legal authority that support[ed]" the magistrate's ruling[2] and whether that ruling reflected an abuse of discretion—it nonetheless reviewed the merits of the disputed issues and independently determined that the magistrate's order was correct. *Id.* at 511. Regardless, the best view is that the "contrary to law" standard is the same as the *de novo* standard. *See supra*, pp. 1-2; Objs. at 11 & n.8. And that is the lens through which this Court should review the Magistrate Judge's Order.[3]

B. The Court Can and Should Consider All of Capital One's Evidence.

1. Rule 72(a) permits consideration of additional evidence.

When a district judge reviews a magistrate judge's order on a non-dispositive matter, the district judge is free to consider evidence that was not presented to the magistrate judge. *See Harleysville Ins. Co*, 2017 WL 2210520, at *2 ("In conducting my [Rule 72(a)] review, it is within my discretion to receive and consider additional evidence."); *Sky Angel U.S., LLC v. Discovery Commc'ns, LLC*, 28 F. Supp. 3d 465, 479 (D. Md. 2014) (noting, while conducting a Rule 72(a) review, that "[t]he [district] judge may also receive further evidence"), *aff'd*, 885 F.3d 271 (4th Cir. 2018); *United States v. Caro*, 461 F. Supp. 2d 478, 480 n.2 (W.D. Va. 2006) (explaining that "the district judge has the discretion to" consider "evidence not considered by the magistrate judge" when conducting a Rule 72(a) review), *aff'd*, 597 F.3d 608 (4th Cir. 2010); *see also* 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3069 (3d ed. 2020)

[2] Notably, in construing the "contrary to law" standard this way, the *Stone* court relied only on a decision from the Western District of Kentucky. *Stone*, 356 F. Supp. 3d at 511 (citing *Guiden v. Leatt Corp.*, No. 5:10-CV-00175, 2013 WL 4500319, at *3 (W.D. Ky. Aug. 21, 2013)).

[3] Even if the Court were to apply a more deferential standard of review—including a "clearly erroneous," "abuse of discretion," or "any legal authority" standard as Plaintiffs suggest—the Court should still set aside the Order because the Magistrate Judge's ruling that the Mandiant Report is not protected work product cannot be sustained under any of these standards of review.

("[A] district judge should have at least the authority to consider further evidence in reviewing rulings on nondispositive matters."). This Court therefore has broad discretion to consider Exhibit 2 and the declarations of D.J. Palombo and Heather Caputo.

Plaintiffs cite out-of-circuit cases to argue that "Rule 72(a) *precludes* the district court from considering factual evidence that was not presented to the magistrate judge." Opp. at 7 (emphasis added). Of the two in-circuit cases they cite to support their argument that the newly submitted evidence should be stricken, one is from the Rule 72(b) context, which Plaintiffs acknowledge is governed by a different standard. *See id.* (citing *Virgin Enters. Ltd. v. Virgin Cuts, Inc.*, 149 F. Supp. 2d 220, 223 (E.D. Va. 2000)). The other describes "motions to strike as incredibly disfavored" and notes that "[a]t least one district court in the Fourth Circuit . . . has held that a district judge can hear new evidence when reviewing a non-dispositive motion." *See HSBC Bank USA, N.A. v. Reyolds-Resh*, No. 3:12-CV-00668, 2014 WL 317820, at *4-*5 (S.D.W. Va. Jan. 28, 2014).

2. The Court should consider Capital One's newly submitted evidence under the circumstances here.

Plaintiffs assert that even if the Court *can* consider the Palombo and Caputo declarations and Exhibit 2, it should *not* because "Capital One offers no justification for its late-proffered evidence." Opp. at 8. But as Plaintiffs recognize, Capital One *did* provide an explanation for submitting new evidence with its Objections—to clarify the factual issues highlighted in the Magistrate Judge's Order and provide additional context and clarity on the facts upon which the Magistrate Judge's Order focuses. *Id.* at 9 (citing Objs. at 3 n.2.).[4]

[4] Plaintiffs assert that "[a]s to Exhibit 2, Capital One fails to offer any explanation as to why it was not introduced below or why it was only recently produced to Plaintiffs." Opp. at 8. Though not specifically mentioned in footnote 2 of Capital One's Objections, this exhibit was offered for the same reason as the Palombo and Caputo declarations: to clarify the factual issues discussed in the Magistrate Judge's Order. Exhibit 2 "was only recently produced to Plaintiffs" because document

Plaintiffs assert that there is nothing to clarify because "nothing in Judge Anderson's Order on work product or waiver was new or surprising to either party given both parties addressed the exact issues raised in the Order." *Id.* But while both parties addressed the broad "issues" discussed in the Order, neither party knew exactly which facts the Magistrate Judge's analysis would focus on until the Order was issued. Although the record below was sufficient to establish Capital One's work product claim, Capital One submitted the Palombo and Caputo declarations and Exhibit 2 to ensure that this Court has a clear view of all the relevant facts so that it can fully review the Magistrate Judge's Order and decide this issue—which is important both to these proceedings and to data breach litigation generally. *See* Dkt. 269 at 2-3 (highlighting the privileged nature of investigative reports as an important unresolved issue in this MDL); Dkt. 271 at 3-4 (same); Objs. Ex. 5 at 2-3 (Dkt. 557-7) (describing the importance of this issue to the cybersecurity bar).

The limited scope of the newly submitted evidence further counsels in favor of considering it and differentiates the situation here from that in *Virgin Enterprises. Ltd. v. Virgin Cuts, Inc.*, where this Court declined to consider evidence not presented to the magistrate judge when evaluating a Rule 72(b) objection. *See Tucker v. Sch. Bd. of City of Va. Beach*, No. 2:13CV530, 2015 WL 10690556, at *5 (E.D. Va. Sept. 30, 2015) (receiving new evidence on a Rule 72 objection and noting that the *Virgin Enterprises* court declined to receive "further evidence because of the volume of the additional evidence proffered, and because the magistrate judge was 'deprived of the benefit' of considering the vast amount of additional relevant evidence" in the first instance (citation omitted)).

production and privilege review in this matter are ongoing consistent with the Court's scheduling orders. *See* Dkt. 448 at 1.

3. The Magistrate Judge committed legal error on the evidence before him.

Regardless of whether the Court considers the additional evidence, it should still sustain Capital One's Objections to the Magistrate Judge's Order. While the newly submitted evidence helps to clarify issues raised by the Magistrate Judge's Order, this Court can and should overrule the Order based on the evidence presented to the Magistrate Judge alone.

Plaintiffs incorrectly assert that three arguments Capital One raises in its Objections rely solely on the newly submitted evidence: (1) that the Mandiant investigation and Report would have been different absent Debevoise's involvement, (2) that the way the Report was shared after its preparation does not indicate that it was prepared for business purposes or that work product protection was waived, and (3) that the "Investor Talking Points" attached to Plaintiffs' motion were not used. Opp. at 9-10, 16, 21, 25-26. While the new evidence provides additional factual support for each of these arguments, it is not the only evidence that supports them.

For example, both the Palombo and Caputo declarations make clear that the Mandiant Report would have taken a substantially different form absent litigation and Debevoise's involvement. *See* Palombo Decl. ¶¶ 4-7, 16; Caputo Decl. ¶¶ 3, 12; Objs. at 18. But the earlier Cantwell declaration supports this argument as well. *See* Cantwell Decl. (Dkt. 435-2) ¶ 5 (describing the purpose of Debevoise's investigation as "to provide legal advice to Capital One concerning the Cyber Incident, and to help the company prepare for" related "litigation and regulatory activity"); ¶ 8 (noting the scope of Debevoise's engagement of Mandiant was different from that provided for under the pre-existing SOW between Capital One and Mandiant); *id.* ¶ 19 (indicating that the Mandiant Report was customized to Debevoise's needs). Similarly, while the Caputo declaration provides additional detail as to why various non-legal employees received the Mandiant Report, *see* Caputo Decl. ¶¶ 13-19, the Blevins and Cantwell declarations and list of Report recipients Capital One submitted with its original Opposition cover similar ground. *See*

Blevins Decl. ¶¶ 17-18; Cantwell Decl. ¶¶ 20-22; Dkt. 435-5 at 7-8. As to the "Investor Talking Points," in its initial Opposition Capital One cited its press release announcing the Cyber Incident to show that unlike the defendant in *In re Dominion Dental Servs. USA, Inc. Data Breach Litigation*, there is no record evidence that Capital One used Mandiant's engagement to reassure members of the public about the soundness of its cybersecurity program. *Compare* 429 F. Supp. 3d 190, 193 (E.D. Va. 2019) *with* Dkt. 435 at 17 n.7. The Caputo declaration provides additional support for this point.

Other points discussed in the Palombo and Caputo declarations are likewise covered by the evidence submitted to the Magistrate Judge, albeit in less detail. For example, the Blevins, Cantwell, Caputo, and Palombo declarations all describe the relationship between Capital One and Mandiant over time and explain how Capital One's strict onboarding procedures would have made it difficult for Debeovise to retain any cybersecurity vendor besides Mandiant. *See* Blevins Decl. ¶¶ 4-14; Cantwell Decl. ¶¶ 6-7, 10; Caputo Decl. ¶¶ 3-4, 6-11; Palombo Decl. ¶¶ 8-9, 11-12. The Palombo, Blevins, and Cantwell declarations also explain that *Mandiant did no work on the Cyber Incident until after being retained by Debevoise*, that Mandiant at all times worked under Debevoise's control and supervision, and that Mandiant's investigation and Report were informed by Debevoise's direction and investigatory objectives. *See* Blevins Decl. ¶¶ 14-15, 17-18; Cantwell Decl. ¶¶ 8-9, 12, 15-19, 23; Palombo Decl. ¶¶ 13-17. And both the Caputo and Watts declarations explain why Capital One labeled the Mandiant retainer a "business critical expenses" in a pre-breach February 2019 presentation and why that fact in no way undermines Capital One's work product claim here. *See* Caputo Decl. ¶ 5; Watts Decl. (Dkt. 435-3) ¶¶ 3-5.

In sum, while facts detailed in the Palombo and Caputo declarations sharpen and clarify some of the issues raised in the Magistrate Judge's Order, none of the arguments Capital One makes in its Rule 72 Objections relies solely on this new material.

II. THE MANDIANT REPORT IS PROTECTED WORK PRODUCT.

A. The Prior SOW Is Not Dispositive.

Plaintiffs misconstrue Capital One's position as to the proper test for determining whether a document is entitled to work product protection. *See* Opp. at 10, 12. Capital One does not "disavow" the second prong of the test articulated in *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 748 (E.D. Va. 2007). To the contrary, Capital One recognized in its initial Opposition and its Objections that courts often ask whether the document in question "would not have been prepared in substantially similar form but for the prospect of … litigation." *See* Dkt. 435 at 11; Objs. at 13 (quoting *RLI*, 477 F. Supp. 2d at 748).[5] Capital One instead takes issue with the *way* the Magistrate Judge applied the work product standard.

The Magistrate Judge's ruling turns almost entirely on the fact that Capital One and Mandiant had a pre-existing SOW calling for general "incident response services." *See* Order at 7-8 (emphasizing that Capital One had a "pre-existing SOW with Mandiant to perform essentially the same services that were performed in preparing the subject report"). This is the crux of the Order's legal error. If the point of *RLI*'s "but for" test is to differentiate between documents prepared in anticipation of litigation and those prepared in the ordinary course, then the Mandiant

[5] The Fourth Circuit has never applied *RLI*'s "but for" test. The Fourth Circuit's pronouncements on work product focus on whether litigation was the "driving force behind [a document's] preparation," and as Capital One noted in its Objections, the "driving force" standard is thus the touchstone. *See Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992). The Fourth Circuit has also held that "materials prepared in the ordinary course of business" are "not documents prepared in anticipation of litigation"—and that is the issue *RLI*'s "but for" inquiry seeks to address as well. *Id.*

Report—which was prepared in the face of an onslaught of litigation, at the direction of counsel, and in the aftermath of the Cyber Incident—clearly satisfies it. *See* Objs. at 13-18.

Capital One has presented extensive evidence confirming that the Mandiant Report constitutes work product. For instance, Capital One has explained how the Mandiant Report was directly informed by the involvement and direction of Debevoise and the circumstances of the Cyber Incident. *See* Objs. at 5-9, 13-14, 18. It has further explained how Mandiant's work would have differed absent litigation and the involvement of outside counsel. *See id.* at 9-10, 18. And it has demonstrated that the purpose of the Mandiant Report was to address the litigation risks attendant to the Cyber Incident, in contrast to the internal business investigations carried out by Capital One's own Cyber team. *See id.* at 7-8, 16. The Mandiant Report should thus be protected as work product. *See, e.g., Cooper v. Richland Cty. Recreation Comm'n*, No. 3:16-cv-1606 MGL-TER, 2018 WL 4594944, at *7 (D.S.C. Sept. 25, 2018) (considering "totality of the circumstances" to find work product protection existed where counsel for company hired third party to investigate workplace harassment claim, and rejecting argument that similar investigation would have been conducted by human resources department in any event); *In re Vecco Instruments, Inc. Sec. Litig*., No. 05-MD-1695 (CM) (GAY), 2007 WL 210110, at *1-*2 (S.D.N.Y. Jan. 25, 2007) (applying the "but for" test and extending work product protection to investigation performed by forensic accounting firm after company realized a financial restatement might be required).

That both the pre-existing SOW and the Debevoise-Mandiant SOW generally provide for "incident response services" is not determinative of the nature of the work Mandiant *actually did* in preparing its Report. The Capital One-Mandiant SOWs only set out the nature of a given engagement "at a high level;" the "specifics of [Mandiant's work are] then determined on a case-by-case basis." Palomobo Decl. ¶ 10. Indeed, Mandiant's "incident response services" encompass

a broad variety of potential incidents and associated services, and some security incidents would be expected to result in litigation while others would not. *See* Objs. at 4 & n.4, 17-18. *Further, Mandiant did not perform incident response work for Capital One on an ongoing basis; in fact, it had not provided any such services for more than two years prior to the Cyber Incident*. Blevins Decl. ¶¶ 7, 14. Mandiant's pre-existing retainer for general "incident response services" thus proves very little about the specific nature of Mandiant's work *in this case*.

The contrary conclusion reached by the Magistrate Judge and urged by Plaintiffs has far-reaching practical implications for companies confronting the ever-growing threat of cybersecurity attacks and attendant litigation. These real-world consequences should not be ignored, for "the [work product] doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system." *United States v. Nobles*, 422 U.S. 225, 238 (1975). According to the rule set out in the Order, the applicability of the work product doctrine hinges on whether the cybersecurity consultants engaged by outside counsel had any prior relationship with the company responding to a data breach. If it stands, then, the Order would force companies responding to data breaches to choose between (i) using their preferred, pre-approved forensic analyst or (ii) enjoying work product protection in subsequent litigation.[6] Respectfully, that rule defies common sense, and would hamstring companies from responding to and investigating data breaches in a timely, candid, and effective way. Objs. at 19-21.[7]

[6] Notably, Plaintiffs effectively concede that the Order would have this effect. Opp. at 18.

[7] Plaintiffs also contend that Defendants failed to raise these practical concerns before the Magistrate Judge. *See* Opp. at 17. That is incorrect. In its initial Opposition brief, Capital One pointed out that adopting Plaintiffs' arguments would "effectively penalize Capital One for taking the initiative to pre-approve an expert consultant who could readily assist counsel in responding to a cybersecurity incident" and highlighted the "absurd result" if Debevoise were "forced to engage a cybersecurity expert having no prior relationship with Capital One to protect the expert's work from disclosure in litigation." *See* Dkt. 435 at 13-14 n.4. Even if Capital One had not raised the argument before the Magistrate Judge, this Court could still consider it. *See United States v.*

B. *Dominion* and *Premera* Do Not Control Here.

Contrary to Plaintiffs' arguments and the Magistrate Judge's Order, the relevant case law confirms that the Mandiant Report is protected as work product. *See* Objs. at 14-16 (citing cases, including *Experian* and *Target*, as supporting Capital One's work product claim); Doc. 435 at 13-16 (same). The Magistrate Judge's Order relied heavily on *In re Premera Blue Cross Customer Data Security Breach Litigation*, 296 F. Supp. 3d 1230 (D. Or. 2017) and *Dominion Dental*, 429 F. Supp. 3d at 190, but those decisions turned on critical facts not present here.

In *Premera*, Mandiant was hired directly by the company, and Mandiant was already conducting a "review [of] Premera's data management system" *when Mandiant discovered the data breach* at issue in that case. 296 F. Supp. 3d at 1245. Mandiant then continued its work by investigating the breach, and the court found that Mandiant's breach investigation was not protected as work product because "[t]he *only thing* that appear[ed] to have changed involving Mandiant was the identity of its direct supervisor, from Premera to outside counsel." *Id*. (emphasis added). Here, in contrast, Mandiant did no work on the Cyber Incident until *after* being engaged by Debevoise. *See* Cantwell Decl. ¶ 6; Blevins Decl. ¶ 14; Palombo Decl. ¶ 15. Neither Plaintiffs nor the Order meaningfully address this key distinguishing fact. To the contrary, the Order erroneously equates the mere existence of a prior Capital One-Mandiant SOW—under which *no* incident response work had been performed for years before the Cyber Incident, *see* Blevins Decl. ¶ 7—with the work Mandiant was *actively performing* for Premera and which *led to the very discovery of the Premera breach*, *see* Order at 11. To the limited extent *Premera* is relevant, it supports the conclusion that the Mandiant Report is work product.

George, 971 F.2d 1113, 1118 (4th Cir. 1992) ("[A] district court is required to consider all arguments directed to [an] issue, regardless of whether they were raised before the magistrate."); *Sines v. Kessler*, No. 3:17-CV-00072, 2019 WL 691788, at *3 (W.D. Va. Feb. 19, 2019) (following *George* in the context of a Rule 72(a) objection).

Likewise, Plaintiffs are wrong that *Dominion* controls here. In that case, there was an existing agreement—entered into almost a year before discovery of the breach—between the company, Mandiant, *and the company's outside counsel*. 429 F. Supp. 3d at 191. In other words, the existing arrangement in *Dominion*—negotiated long before there was any anticipation of litigation—expressly contemplated that Mandiant's work would be conducted alongside outside counsel, thus making it difficult for Dominion to establish that Mandiant's report would not have been "'prepared in a substantially similar form' absent the threat of litigation." *Id*. at 194. This all stands in stark contrast to the facts here, where the existing relationship between Capital One and Mandiant only contemplated services to be provided *directly to the company*, and where Mandiant's work was ultimately performed under a *completely separate* and superseding engagement entered into with outside counsel *after* the company discovered the Cyber Incident and anticipated litigation. Neither Plaintiffs nor the Order address this key difference between the facts of *Dominion* and this case.[8] *Dominion* is further distinguishable because the company in that case—unlike Capital One here—"publicized the retention and work of Mandiant for 'non-litigation purpose[s]' such as reassuring customers"—a point the *Dominion* court heavily relied on in determining that Mandiant's work in that case was performed for business purposes. *Id*.; *see*

[8] To the extent *Dominion* held that the mere existence of a prior agreement with a cybersecurity vendor precludes work product protection where a subsequent agreement with outside counsel calls for similar work and deliverables—*i.e.*, investigative services and a report—*Dominion* was wrongly decided. Cybersecurity firms like Mandiant are in the business of performing investigations and generating reports, and thus it is hardly surprising that a company's agreement with Mandiant—irrespective of the "driving force" behind the engagement—would contemplate these core services. Rather, the pertinent question is whether the services in question were performed for business or litigation purposes. And here, the *undisputed facts* demonstrate that Mandiant provided investigative services to Debevoise for decidedly *litigation-related* reasons.

id. at 192 (noting the defendants provided a client with talking points and instructed it to "assure [the client's] own customers that Dominion brought in Mandiant to assist in the investigation").

Premera and *Dominion* are also distinguishable because in both cases, the courts based their rejection of work product protection in part on the fact that Mandiant performed the only investigation into the breach. *See Premera*, 296 F. Supp. 3d at 1245 (distinguishing *Target* on the grounds that "there was only one investigation, performed by Mandiant, which began at Premera's request"); *Dominion*, 429 F. Supp. 3d at 195 (same). Here, Capital One conducted several internal investigations into the Cyber Incident, and reports generated in those investigations (including management's own post-incident investigative report) have already been produced to Plaintiffs. *See* Objs. at 16. The Magistrate Judge's Order nonetheless faulted Capital One for not providing enough details on "the full nature and extent of those investigations and how the results were used within Capital One." Order at 4. But nothing in *Premera* or *Dominion*—or any other relevant case law—suggests that such specific details are required. What matters, instead, is that Capital One conducted an internal investigation parallel to Debevoise's and Mandiant's investigation, that Capital One has produced to Plaintiffs the report generated from management's internal investigation, and that Plaintiffs have examined Capital One witnesses about the investigations into (and causes of) the Cyber Incident. *See In re Target Corp. Customer Data Sec. Breach Litig.*, MDL No. 142522 (PAM) (JJK), 2015 WL 6777384, at *2 (D. Minn. Oct. 23, 2015) (upholding company's claim of protection over third-party firm's investigation conducted in anticipation of litigation where separate, non-privileged investigation was conducted to determine "how the breach happened"); *In re Experian Data Breach Litig.*, No. SACV 15-01592 (AGD) (FMx), 2017 WL 4325583, at *2 (C.D. Cal. May 18, 2017) (finding Mandiant report protected as work product

where its purpose was to "assist Jones Day in providing legal advice in anticipation of litigation," in contrast to the company's own "internal investigation" and "remediation efforts").

In sum, the Order's extensive reliance on *Premera* and *Dominion* is misplaced.

C. Capital One's Subsequent Use of the Mandiant Report for Incidental Business Purposes Did Not Strip It of Work Product Protection.

Whether the Mandiant Report is protected as work product depends on the circumstances existing *at the time the Report was prepared*. *See Chambers v. Allstate Ins. Co.*, 206 F.R.D. 579, 588 (S.D. W. Va. 2002). A document prepared in anticipation of litigation does not lose its work product protection simply because it is later used for business purposes. *See United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010). The Magistrate Judge's Order erroneously relied on subsequent business uses of the Mandiant Report to strip it of work product protection.

Specifically, in holding that the Mandiant Report is not work product, the Order relied on the fact that "at least several members of Capital One's cyber technical, enterprise services, information security and cyber teams were provided with a copy of the Mandiant Report, and that it was used by Capital One for various business and regulatory purposes." Order at 10. That aspect of the Order conflicts with cases holding that a document does not lose its work product protection solely because it is later used for "a business decision as well as a legal decision." *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-md-2836, 2019 WL 6122012, at *4 (E.D. Va. July 16, 2019).

Plaintiffs unavailingly argue that the Magistrate Judge considered subsequent business uses of the Report to be "probative of whether work product protection applied in the first place." Opp. at 20. But there is no meaningful difference between erroneously finding that subsequent business uses strip a document of work product protection and relying on such subsequent business uses to find that work product protection never attached in the first place. At bottom, it is contrary to law to hold, as the Magistrate did, that ancillary business uses of a document—occurring *after* the

document is prepared for litigation purposes—deprive the document of work product protection. *See United States v. Neuroscience, Inc.*, No. 14-MC-003-SLC, 2015 WL 7731475, at *6 (W.D. Wis. Feb. 10, 2015) (explaining that "how a particular [document] later was used" is irrelevant to the work product analysis since "the focus is on the circumstances of the [document] at the time it was made"); *Aaron v. U.S. Dep't of Justice*, No. CV 09-00831 (HHK), 2011 WL 13253641, at *7 n.12 (D.D.C. July 15, 2011) ("[M]aterial generated in anticipation of litigation may also be used for ordinary business purposes without losing its protected status.").

Finally, even if Capital One's subsequent use of the Mandiant Report were pertinent to the question whether the Report was work product at the time it was created (and it is not), work product retains its protection even when it is also "*intended* to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation." *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998) (emphasis added). Plaintiffs do not dispute that work product protection covers "dual purpose" documents where "their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 910 (9th Cir. 2004).[9] Yet the Magistrate Judge's Order overlooks that the Mandiant Report could be used for "dual purposes" while retaining work product protection, and instead erroneously assumes that a document must be exclusively used for litigation purposes or otherwise lose its protection. *See* Order at 7-8. The law does not support that approach, and the Order's significant reliance on subsequent business uses was therefore legal error.

[9] Plaintiffs try to distinguish *In re Grand Jury Subpoena*, arguing that the facts of that case were "very different from the facts here," but all they point to is the fact that Capital One had an existing SOW with Mandiant. Opp. at 19 n.3. As explained above, the existing SOW does not control the work product analysis, and the Order's treatment of that fact as dispositive was erroneous.

III. PLAINTIFFS' WAIVER ARGUMENTS PROVIDE NO BASIS TO OVERRULE CAPITAL ONE'S OBJECTIONS.

A. Plaintiffs' Disclosure-Based Waiver Arguments Fail.

1. Disclosure to the banking regulators did not waive protection.

First, Plaintiffs' contention that Capital One did "not explain why the Report was disclosed to [the OCC, FDIC, FRB, and CFPB]" is incorrect. *See* Opp. at 22. Capital One informed the Magistrate Judge that it provided the Mandiant Report to regulators because it "has a legal obligation to respond to requests from th[o]se regulators." Dkt. 435 at 10, 23; Objs. at 23 (citing regulators' broad statutory examination powers in 12 U.S.C. §§ 248, 481, 1820, and 5515). The OCC and FRB have also explained to the Court that "[FRB] … and OCC … examiners conduct continuous on-site supervision and have near-plenary access to Capital One's books and records." Dkt. 511 at 3 (hereinafter "Mot. Intervene").[10]

Second, Plaintiffs' speculation that the regulators may have been "adversarial" to Capital One at the time of the disclosures is both wrong and misses the point. *See* Opp. at 22. The waiver analysis here begins and ends with the Financial Services and Regulatory Relief Act of 2006 ("FSSRA"). That statute categorically prohibits disclosures to the FRB, OCC, CFPB, and FDIC from being "construed as waiving, destroying, or otherwise affecting" a claim of privilege. 12 U.S.C. § 1828(x)(1). The FSSRA's anti-waiver provision broadly extends to disclosures made "for any purpose in the course of any supervisory ***or*** regulatory process," 12 U.S.C. § 1828(x)(1), including those regulatory processes in which regulators may be "adverse" to a financial

[10] To the extent Plaintiffs would require Capital One to disclose the specific regulatory requests that elicited disclosure of the Mandiant Report, they ignore that "supervisory correspondence between Capital One and its regulators, and internal Capital One documents referring to or reflecting supervisory communications" are the FRB's confidential supervisory information and non-public OCC information that itself is subject to the bank examiners privilege. Mot. Intervene at 20.

institution, such as investigations and regulatory enforcement actions. *See United States v. Heine*, No. 3:15-cr-238-SI-2, 2016 WL 1270907, at *11 (D. Or. Mar. 31, 2016) (FSSRA's anti-waiver provision extended to bank's disclosures to FDIC during FDIC investigation of bank).[11] Thus, no waiver occurred by disclosing the Report to the regulators.

2. Disclosure to EY did not waive protection.

Contrary to Plaintiffs' argument, Capital One has provided ample information for the Court to determine that its disclosure of the Report to EY did not waive work product protection. The Mandiant Report was provided to EY "in its role as Capital One's auditor" so EY could determine whether the "Cyber Incident had [any] impact on Capital One's internal controls over financial reporting." Cantwell Decl. ¶¶ 14, 21. In these circumstances, EY was not Capital One's adversary for waiver purposes. *See Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (S.D.N.Y. 2004) (noting that "any tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine," and finding that disclosure for purposes of assessing company's internal controls did not effect a waiver). The D.C. Circuit rejected the "public watchdog function" rationale underpinning Plaintiffs' cases in *Deloitte LLP*: "In short, Deloitte's independent auditor

[11] Plaintiffs' case citations are misleading and inapposite. First, *Alaska Electric* does not "actually undermine[] Capital One's contention." *See* Opp. at 23. Plaintiffs tellingly fail to inform the Court that the "fourth regulator" in that case was the CFTC. *Compare Ak. Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at *4 (S.D.N.Y. Nov. 16, 2016) *with* Opp. at 23. The FSSRA's anti-waiver provision does not extend to the CFTC. *See* 12 U.S.C. § 1813(z) (defining "Federal banking agency" for purposes of the FSSRA to include the "[OCC], the [FRB], [and] the [FDIC]."). Second, *Kolon* involved a disclosure to the FBI and did not implicate the FSSRA's anti-waiver mandate. *See E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 605 (E.D. Va. 2010). At bottom, Congress's plain directive in the FSSRA necessarily overrides any contrary case law on this subject.

obligations do not make it a conduit to Dow's adversaries," 610 F.3d at 142-43. EY is neither Capital One's adversary in the relevant sense nor a conduit to its adversaries. No waiver occurred.[12]

3. Internal "disclosures" did not waive protection.

Plaintiffs' argument that Capital One's internal disclosures of the Mandiant Report waived work product protection also fails. The evidence before the Magistrate Judge was that Capital One provided the report to employees who had a "critical need to examine it." Cantwell Decl. ¶ 21. Plaintiffs can do no more than speculate that (i) these employees are "also Capital One cardholders," (ii) their "information was [likely] compromised" in the Cyber Incident, and therefore (iii) they "are likely absent class members." *See* Opp. at 25. But Plaintiffs offer no evidence—and there is none—that the Report was shared with any employees who are actually adverse to Capital One for purposes of this litigation. The theoretical possibility that an employee could *become* adverse to Capital One at some point in the future in no way means Capital One was prohibited from sharing the Mandiant Report with a limited number of employees who had a legitimate need to review it.

B. Plaintiffs Misapprehend the "At Issue" Waiver Doctrine.

Plaintiffs' "at issue" waiver argument fails. As the Fourth Circuit recently observed, that a company's "disclosure covered the same topic as [a privileged investigation] or . . . was made pursuant to the advice of counsel doesn't mean that" an at issue waiver has occurred. *In re Fluor Intercontinental, Inc.*, 803 F. App'x 697, 702 (4th Cir. 2020); *see also Billings v. Stonewall*

[12] Notably, *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115-17 (S.D.N.Y. 2002), and *United States v. Hatfield*, No. 06-CR-0550 (JS), 2010 WL 183522, at *3–4 (E.D.N.Y. Jan. 8, 2010)—which Plaintiffs cite, *see* Opp. at 24—directly conflict with the Second Circuit's *Adlman* decision, which opined that a document created at the request of, and provided to, a company's independent auditor was protected work product. *See Adlman*, 134 F.3d at 1200 (scenario (iii)).

Jackson Hosp., 635 F. Supp. 2d 442, 445 (W.D. Va. 2009) (interrogatory response that disclosed information that was subject of privileged investigation, but did not disclose "anything related to [the legal advice] or [the privileged communications]," did not effect waiver). As in *In re Fluor*, the statements at issue here "do no more than describe [Capital One's] general conclusions about" the Cyber Incident. 803 F. App'x at 702. Contrary to Plaintiffs' suggestion, it is not enough that Mandiant (at Debevoise's direction) might have provided input on the press release or that an interrogatory response related to a subject of Mandiant's investigation. *Compare id.* at 698–99 (no waiver even though statements in a disclosure were arguably based on advice of counsel) *with In re Martin Marietta Corp.*, 856 F.2d 619, 626 n.2 (4th Cir. 1988) (waiver because statements directly quoted from internal audit interviews and "summariz[ed] in substance and format the interview results"). In short, the press release and interrogatory response Plaintiffs cite did not effect any waiver of work product protection.[13]

CONCLUSION

Accordingly, Capital One respectfully asks this Court to set aside the Order compelling Capital One to produce the Mandiant Report.[14]

[13] *Kolon*, which Plaintiffs cite, found a waiver because a press release included information that was "based on some work product." 269 F.R.D. at 606. But that result cannot be squared with *In re Fluor* and is, therefore, legally incorrect. Nor is there any basis to conclude, as the *Kolon* court did, that Capital One has made "testimonial use" of the Mandiant Report.

[14] While Capital One believes that *in camera* review of the Mandiant Report is unnecessary for the Court to sustain Capital One's Objections to the Order, Capital One has no objection to *in camera* review if the Court believes it is appropriate or would be helpful.

Dated: June 16, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2020, I caused the foregoing document to be filed with the Clerk of Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/
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Counsel for Capital One