

IN THE 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

**OPPOSITION TO CAPITAL ONE’S RULE 72 OBJECTIONS TO ORDER GRANTING
PLAINTIFFS’ MOTION TO COMPEL PRODUCTION OF MANDIANT REPORT**

Plaintiffs submit this Opposition to Capital One’s Rule 72 Objections to Order Granting Plaintiffs’ Motion to Compel Production of Mandiant Report (“Objections” or “Objs.”) (Dkt. 556-557). Because Judge Anderson’s Order was neither clearly erroneous nor contrary to law, Capital One’s objections should be overruled and the Order affirmed.

INTRODUCTION

A district court may only reverse the decision of a magistrate judge on a non-dispositive matter pursuant to Rule 72(a) when the ruling is “clearly erroneous or is contrary to law.” *Advanced Training Grp. Worldwide, Inc. v. Proactive Techs. Inc.*, No. 19-CV-505-TSE, 2020 WL 2738381, at *1 (E.D. Va. Jan. 29, 2020) (quoting Fed. R. Civ. P. 72(a)). Because of this exacting standard, “[a]ltering a magistrate judge’s non-dispositive orders is extremely difficult to justify.” *CertusView Techs., LLC v. S & N Locating Servs., LLC*, 107 F. Supp. 3d 500, 504 (E.D. Va. 2015) (internal quotations and citations omitted). “If a court is not firmly convinced that such an error has occurred, then ‘the magistrate judge’s order must be affirmed.’” *Id.* (quoting *Giganti v. Gen-X Strategies, Inc.*, 222 F.R.D. 299, 304–05 (E.D. Va. 2004)).

Capital One spends 30 pages re-litigating Judge Anderson’s factual findings, including by substantially and inappropriately relying on new evidence that it could have easily introduced

during the briefing below. Yet, Capital One fails to establish clear error or any conclusion contrary to law. That is because there is none.

First, Judge Anderson applied the appropriate work product analysis under Fourth Circuit law. In the Order, he explained that “a document must be prepared ‘because of’ the prospect of litigation and the court must determine ‘the driving force behind the preparation of each requested document’ in resolving a work product immunity question.” Dkt. 490, Order at 6 (quoting *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992)). This determination includes two lines of inquiry, the second of which is whether “the work product would not have been prepared in substantially similar form but for the prospect of that litigation.” *Id.* at 6-7 (quoting *RLI Ins. Co. v. Conseco, Inc.*, 477 F. Supp. 2d 741, 748 (E.D. Va. 2007)). Capital One itself set forth this *exact* standard in its briefing below, stating: “The second prong of the Fourth Circuit’s ‘because of’ inquiry asks whether the document ‘would not have been prepared in substantially similar form but for the prospect of that litigation.’” Dkt. 435 at 11 (quoting *E.I. Du Pont de Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09-cv-58, 2010 WL 1489966, at *3 (E.D. Va. Apr. 13, 2010) (quoting *RLI Ins. Co.*, 477 F. Supp. 2d at 748)). Grasping at straws, Capital One now contends that the very standard it set forward as controlling was inappropriately “elevated” and “incorrectly relied on.” Objs. 17, 19. Its arguments on this front should be roundly rejected.

Second, it is no wonder Capital One would like the Court to believe the wrong standard was applied, because Capital One’s *real* objection is with Judge Anderson’s factual findings, which are subject to the even more exacting “clear error” standard of review. Capital One acknowledged the nature of the factual inquiry below, noting that “there is no bright-line test to distinguish materials prepared in anticipation of litigation from those prepared in the ordinary

course, so courts in this Circuit take ‘a ‘case-by-case’ approach.’” Dkt. 435 at 11 (quoting *Lewis v. Richland Cty. Recreation Comm’n*, 2018 WL 4596119, at *6 (D.S.C. Sept. 25, 2018)). Capital One argued to Judge Anderson that the “essential facts” confirmed the Mandiant Report was work product (*id.* at 10); Plaintiffs disagreed. Judge Anderson considered all of the evidence submitted by the parties, which included 19 exhibits submitted by Plaintiffs – most of which were comprised of documents produced by Capital One – and 3 declarations and 5 exhibits submitted by Capital One. Then, applying the standard set forth by both parties to the evidence presented, he made a detailed factual determination that Capital One had “not carried its burden of establishing that the Mandiant Report is entitled to protection under the work product doctrine.” Order at 1. Although Capital One may disagree with Judge Anderson’s Order and findings, it does not and cannot point to any clear error in his analysis as required under Rule 72(a).

Instead, despite extensive meet and confers on the issue of the Mandiant Report reaching back to January and the many months it had to marshal any and all evidence to oppose Plaintiffs’ anticipated motion on the issue, Capital One now attempts a do over. This is clear from Capital One’s submission of two *new* declarations addressing issues expressly raised by Plaintiffs in their initial Motion and which Capital One could have offered in opposition but did not. *See* Dkt. 557-1 (Palombo Decl.) and 557-2 (Caputo Decl.). Capital One also now introduces as an exhibit a report that was issued in September 2019, but only produced by Capital One on June 4, 2020 – seemingly so that it could be used as an exhibit to its Objections. Dkt. 557-4 (Exhibit 2 – Project Star Report, issued September 13, 2019). Even though the late-produced evidence does not affect the analysis or outcome of the work product inquiry, it should be stricken, or at the very least disregarded. *See Virgin Enterprises Ltd. v. Virgin Cuts, Inc.*, 149 F. Supp. 2d 220, 223 (E.D. Va. 2000) (“[A]ttempts to raise new evidence on appeal [under Rule 72(a)] are disfavored” in the

district courts in the Fourth Circuit.); *Stone v. Trump*, 356 F. Supp. 3d 505, 511 (D. Md. 2018), amended on reconsideration, 402 F. Supp. 3d 153 (D. Md. 2019) (“It is not the function of objections to discovery rulings to allow wholesale relitigation of issues resolved by the magistrate judge.”) (quoting *Buchanan v. Consol. Stores Corp.*, 206 F.R.D. 123, 124 (D. Md. 2002)).

For all of these reasons and those below, Plaintiffs request the Court overrule Capital One’s objections and affirm Judge Anderson’s Order granting Plaintiffs’ Motion to Compel the Mandiant Report.

LEGAL STANDARDS

A. The Standard of Review

In setting forth the Standard of Review, Capital One asserts that Judge Anderson’s Order is “entitled to no deference.” Dkt. 557, Objs. at 11. That is simply not so.

Under Federal Rule of Civil Procedure 72(a), a district court may only reverse the decision of a magistrate judge on a non-dispositive matter when the ruling is “clearly erroneous or is contrary to law.” “[A]ltering a magistrate judge’s non-dispositive orders is extremely difficult to justify.” *CertusView Techs., LLC*, 107 F. Supp. 3d at 504 (internal quotations and citations omitted). A magistrate judge’s finding is “clearly erroneous” only when “although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). “If a court is not firmly convinced that such an error has occurred, then ‘the magistrate judge’s order must be affirmed.’” *CertusView Techs., LLC*, 107 F. Supp. 3d at 504 (quoting *Giganti*, 222 F.R.D. at 304–05).

The “contrary to law” standard “ordinarily suggests a plenary review of legal determinations,” but “the decisions of a magistrate judge concerning discovery disputes . . . should

be afforded ‘great deference.’” *Malibu Media, LLC v. John Does 1-23*, 878 F. Supp. 2d 628, 629 (E.D. Va. 2012). Under the “contrary to law” standard, “the critical inquiry is whether there is legal authority that supports the magistrate’s conclusion.” *Stone*, 356 F. Supp. 3d at 511 (quoting *Guiden v. Leatt Corp.*, 2013 WL 4500319, at *3 (W.D. Ky. Aug. 21, 2013)). “That reasonable minds may differ on the wisdom of a legal conclusion does not mean it is clearly erroneous or contrary to law.” *Id.* Importantly, “it is not the function of objections to discovery rulings to allow wholesale relitigation of issues resolved by the magistrate judge.” *Id.* (quoting *Buchanan*, 206 F.R.D. at 124).

B. The Work Product Doctrine

It is well settled that “Courts disfavor assertions of evidentiary privilege because they shield evidence from the truth-seeking process.” *RLI Ins. Co.*, 477 F. Supp. 2d at 748. 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). That party “bears the burden of showing that the documents were created in anticipation of litigation, and ‘must come forward with a specific demonstration of facts’ in that regard, either through affidavits or a privilege log.” *Williams v. Big Picture Loans, LLC*, 303 F. Supp. 3d 434, 448 (E.D. Va. 2018) (quoting *RLI Ins. Co.*, 477 F. Supp. 2d at 748). “Moreover, as with the attorney-client privilege, the scope of the work-product doctrine is narrowly construed.” *Id.*

The “‘mere fact that litigation does eventually ensue does not, by itself, cloak materials’ with work product immunity.” *Nat’l Union Fire Ins. Co.*, 967 F.2d at 984 (quoting *Binks Mfg. Co. v. Nat’l Presto Indus., Inc.*, 709 F.2d 1109, 1118 (7th Cir.1983)). When there is an incident, such as there was here with Capital One’s Data Breach, “it can be expected that designated personnel will conduct investigations, not only out of a concern for future litigation, but also to prevent

reoccurrences, to improve safety and efficiency in the facility, and to respond to regulatory obligations.” *Id.* “Determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question.” *Id.* Where there are “dual motives underlying the preparation of a particular document,” a court must determine: (1) whether the party “faces an actual claim or a potential claim following an actual even or series of events that reasonably could result in litigation;” and (2) “whether the document would have been created in essentially the same form in the absence of litigation[.]” *See In re Dominion Dental Servs. USA, Inc. Data Breach Litig.*, 429 F. Supp. 3d 190, 193 (E.D. Va. 2019) (quoting *Nat’l Union Fire Ins. Co.*, 967 F.2d at 984; *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)); *RLI Ins. Co.*, 477 F. Supp. 2d at 748. Capital One agreed that the two-pronged inquiry governed in the briefing below. Dkt. 435 at 10-11 (describing the applicable two-pronged inquiry).

ARGUMENT

I. The Court Should Strike or Otherwise Disregard the Late-Introduced Palombo and Caputo Declarations and Exhibit 2, The Project Star Report.

As an initial matter, Capital One introduces two new declarations – the declaration of D.J. Palombo, a consultant with Mandiant (Dkt. 557-1) and Heather Caputo, Vice President, Senior Associate General Counsel at Capital One (Dkt. 557-2) – and one new exhibit (Dkt. 557-4, Exhibit 2, the Project Star Report) to support its Objections. Capital One could have, and should have, introduced this evidence in the briefing below, and this late-introduced evidence should now be either stricken from the record or otherwise disregarded in its entirety.¹

¹ The two other exhibits introduced here but not below – an excerpt from the deposition of Michael Fisk (Dkt. 557-3, Exhibit 1) and a Law360 Article (Dkt. 557-7, Exhibit 5) – post-date the briefing below and therefore Plaintiffs do not challenge their inclusion for this reason. Even so, neither exhibit impacts the inquiry at hand here. Although Capital One could have submitted a declaration from Mr. Fisk below, his testimony is only offered to say that Mandiant’s investigation was

“While the Court is generally not precluded from considering additional evidence not submitted by a party to a magistrate judge when reviewing a report and recommendation issued by such judge on a dispositive motion [pursuant to Rule 72(b) of the Federal Rules of Civil Procedure], there is nothing in Rule 72(a) of the Federal Rules of Civil Procedure which states that it may do so on a non-dispositive issue, such as that decided here.” *State Farm Mut. Auto. Ins. Co. v. CPT Medical Servs., P.C.*, 375 F. Supp. 2d 141, 158 (E.D.N.Y. 2005) (comparing Fed. R. Civ. P. 72(a) with Fed. R. Civ. P. 72(b)). As a result, courts have held that “Rule 72(a) precludes the district court from considering factual evidence that was not presented to the magistrate judge.” *Thai Lao Lignite (Thailand) Co. v. Gov't of Lao People's Democratic Republic*, 924 F. Supp. 2d 508, 512 (S.D.N.Y. 2013) (citations omitted), appeal withdrawn (Nov. 7, 2013).

Indeed, “attempts to raise new evidence on appeal [under Rule 72] are disfavored” in the district courts in the Fourth Circuit. *Virgin Enterprises Ltd.*, 149 F. Supp. 2d at 223-24 (rejecting introduction of new evidence on a Rule 72 appeal and holding it would only “rely on the evidence before the Magistrate Judge”); *HSBC Bank USA, Nat. Ass'n v. Resh*, No. 3:12-CV-00668, 2014 WL 317820, at *5 (S.D.W. Va. Jan. 28, 2014) (holding the court did “not have the authority to consider evidence at this stage which was not before the Magistrate” and would not, in any event, exercise discretion to consider it given the “extensive opportunities the parties have had to document the events leading up to the filing of the motion to compel”).

This Court has explained that “there are substantial reasons for declining” to allow the introduction of new evidence on a Rule 72 objection, including: (1) “permitting such piecemeal

external, not internal. Objs. 8. The Law360 article is offered to support an argument that could have been made below but was not and is therefore waived, as described *supra*.

presentation of evidence is exceptionally wasteful of time of both the magistrate and district judges;” (2) “opposing parties would be put to the burden of proceedings which, to a considerable degree, would be duplicative;” (3) “there would be instances in which parties would be encouraged to withhold evidence which might be embarrassing as well as helpful on the merits, in the expectation of using it before the district judge only if they fail to prevail before the magistrate judge on a more abbreviated showing;” and (4) “the routine consideration of evidence in support of objections which could have been presented before the magistrate judge would reward careless preparation of the initial papers.” *Virgin Enterprises Ltd.*, 149 F. Supp. 2d at 223–24 (declining to consider newly introduced declaration and exhibits) (quoting *Morris v. Amalgamated Lithographers of America*, 994 F. Supp. 161 (S.D.N.Y. 1998)).

Here, Capital One offers no justification for its late-proffered evidence. As 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. Exhibit 2 is Capital One’s Project Star Post-Incident Report and is dated September 13, 2019. Dkt. 557-4. Despite the fact that this is a key document which Capital One has clearly known about and which Plaintiffs requested in January, Capital One produced the document to Plaintiffs a little over one week ago on June 4, 2020, after Judge Anderson made his ruling and just days before the filing of their Objections. *See* Objs. 16. This document could have been produced months ago and could have been used to support Capital One’s arguments below should Capital One have wanted to do so. Indeed, Capital One specifically argued below that the Mandiant Report should not be produced because “Capital One conducted multiple internal investigations after the Cyber Incident.” Dkt. 435 at 15. Even though the existence of the internal reports do not render the Mandiant Report work product, Exhibit 2 should be stricken or otherwise disregarded.

For the two late-proffered declarations, Capital One states in a footnote that it offers the two new declarations “to clarify issues raised in the Magistrate Judge’s order,” but offers no explanation as to what unanticipated issues raised in the Order need clarification. Objs. 3 n.2. This is almost certainly 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 during the briefing and argument before Judge Anderson. There is nothing in the Order that requires clarification by way of the newly introduced evidence, which Capital One proceeds to extensively rely on throughout its Objections. Rather, the introduction of the two new declarations is a transparent attempt by Capital One to re-litigate key questions clearly raised in Plaintiffs’ Motion and which Capital One had ample opportunity to address below.

For example, Capital One attempts to use both declarations to undermine Judge Anderson’s Order by purportedly showing that “Mandiant’s investigation and report would have been very different if Capital One had engaged Mandiant to investigate the Cyber Incident for *business* purposes.” Objs. 18 (citing as the sole evidence for that point the Caputo and Palombo Declarations) (emphasis in original). Although the declarations demonstrate no such thing, as Capital One essentially admits,² this exact issue was *central* to the briefing below and was addressed by both parties. Indeed, in Plaintiffs’ opening Motion, Plaintiffs plainly argued that “the Mandiant Report, which is a forensic report, was almost certainly prepared in essentially the same form that it would have been absent litigation.” Dkt. 413 at 16. Therefore, Capital One had ample chance to offer these declarations below should it have wished to do so to combat Plaintiffs’

² Even with the addition of these two declarations, the most Capital One can say is that: “Had the Report been prepared primarily for business purposes, it would have *likely* taken a different form by, for example, providing recommendations for remediating the effects of the Cyber Incident instead of focusing on assessing the technical factors that led to the Incident.” Objs. 10 (citing Caputo Decl. ¶ 12; Palombo Decl. ¶ 6) (emphasis added).

argument but did not. So too with Capital One's arguments regarding waiver and its widespread sharing of the Report amongst employees and outside entities. Plaintiffs specifically raised these arguments below (Dkt. 413 at 13-14, 17-19). Capital One therefore had the opportunity to set forth evidence combatting Plaintiffs' waiver arguments – to set forth specific facts to establish what it now seeks to establish via the Caputo Declaration that there has been no waiver even given the extensive sharing of the Report – but did not (*see* Dkt. 435 at 16-17, 22-24).

Capital One's tardy and transparent attempt to introduce and extensively rely on new evidence for points raised directly below and for which they had abundant opportunity to address previously should be rejected. The Court should strike or otherwise disregard the Palombo and Caputo Declarations and Exhibit 2. *See, e.g., Wartell v. Purdue Univ.*, No. 1:13-CV-99 RLM-APR, 2014 WL 4261205, at *5 (N.D. Ind. Aug. 28, 2014) (striking additional materials because the “parties had a full opportunity to put before the magistrate judge whatever information either thought pertinent” and “[a]pplication of the clear error standard in this case demands that review be limited by the information before the magistrate judge”).

II. The Magistrate Judge's Conclusion That The Mandiant Report Is Not Work Product Is Not Contrary to Law or Clearly Erroneous.

Capital One does not and cannot establish the Order is contrary to law or that the Order contains any clear error.

a. Capital One fails to establish the Order was contrary to law.

Judge Anderson applied the correct legal standard for determining work product immunity – a standard that is widely accepted and used in the district courts in the Fourth Circuit – and therefore his Order was in no way contrary to law. In fact, in the briefing below, Capital One set forth *the exact test* for work product that Judge Anderson relied on in the Order and which Capital One now disavows.

Capital One explained in its Opposition below: “To determine whether a document was prepared ‘because of’ the prospect of litigation, this Court must first ask whether Capital One ‘face[d] an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.’” Dkt. 435 at 10-11 (quoting *Nat’l Union*, 967 F.2d at 984). Capital One then proceeded to explain: “The second prong of the Fourth Circuit’s ‘because of’ inquiry asks whether the document ‘would not have been prepared in substantially similar form but for the prospect of that litigation.’” *Id.* at 11 (quoting *E.I. Du Pont de Nemours & Co.*, 2010 WL 1489966, at *3 (quoting *RLI Ins. Co.*, 477 F. Supp. 2d at 748)).

Judge Anderson set forth the legal standard offered by Capital One *verbatim* in his Order: “work product protection applies when the party faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation **and** the work product would not have been prepared in substantially similar form but for the prospect of that litigation.” Order at 6-7 (citing *RLI Ins. Co.*, 477 F. Supp. 2d at 748) (emphasis in original).

Capital One now attempts to argue that Judge Anderson “misapplied the Fourth Circuit’s ‘because of’ standard” by applying “the test in an unduly restrictive manner to hold that the second prong was not satisfied.” Objs. 12-13 (citing Order at 7-10). Then, in a somewhat contradictory fashion, Capital One attempts to argue that the second prong is not even “relevant.” Objs. 17. Capital One argues that Judge Anderson “elevated the test for work product applied in *RLI In Co. v. Conseco, Inc.*, 477 F. Supp. 2d at 748 over the Fourth Circuit’s ‘because of’ test[,]” pointing to the Order’s holding that: “the determinative issue is whether the Mandiant Report would have been prepared in substantially the same form but for the prospect of [the] litigation.” Objs. 17 (quoting Order at 7). Capital One argues that addressing this second prong was in error. It was not. Moreover, Capital One’s argument ignores that Judge Anderson found the issue of whether the

Report was prepared in “substantially the same form” to be “determinative” only because the Court found the first prong of the “because of” test had been met. Directly before the sentence cited by Capital One, the Order states: “There is no question that at the time Mandiant began its ‘incident response services’ in July 2019, there was a very real potential that Capital One would be facing substantial claims following its announcement of the data breach.” Order at 7. It was only because the first prong was met that the second prong was “determinative” of the issue.

Capital One’s attempts to confuse the law and disavow standards it previously set forth as controlling should be rejected. As set forth in the Order, *both* prongs are relevant to the “driving force” and “because of” inquiry because “the fact that there is litigation does not, by itself, cloak materials with work product immunity” and the “because of standard is designed to protect only work that was conducted because of the litigation and not work that would have been done in any event.” Order at 6 (citing *Nat’l Union Fire Ins.*, 967 F.2d at 984; *RLI*, 477 F. Supp. 2d at 747). Therefore, a court, just as Judge Anderson did here, must ask not only whether there was litigation or the prospect of litigation *but also* whether “the work product would not have been prepared in substantially similar form but for the prospect of litigation.” *Id.* Put another way: the “work product doctrine withholds protection from documents that would have been created in essentially similar form irrespective of the litigation.” *Id.*

Judge Anderson’s Order was not contrary to law.

b. Capital One fails to establish the Order misapplied the “because of” test or committed clear error in its findings.

Capital One next contends that Judge Anderson’s Order misapplied the “because of” work product test. But instead of articulating any actual misapplication of law, Capital One simply rehashes many of the same arguments it made in its Opposition below and attempts to use its inappropriately-introduced new evidence to undermine the Order. But just because Capital One

disagrees with Judge Anderson's finding that Capital One has not carried its burden in establishing the Mandiant Report qualifies for work product protection does not mean that the Order is contrary to law or clearly erroneous. *See Stone*, 356 F. Supp. 3d at 511 (quoting *Guiden.*, 2013 WL 4500319, at *3) (that "reasonable minds may differ on the wisdom of a legal conclusion does not mean it is clearly erroneous or contrary to law"). Rule 72 requires objectors to meet the exacting standard of clear error on appeal to prevent litigants like Capital One wastefully re-litigating decisions with which they merely disagree. None of Capital One's three arguments regarding misapplication have any merit.

First, Capital One argues that litigation was the "driving force" behind the Mandiant Report, though it is unclear what portion of the Order Capital One is objecting to other than setting forth a general disagreement with the ultimate finding of no work product protection. *See* Objs. 13-16. Even Capital One admits "there is no 'hard and fast rule' to determine whether a document was prepared because of the prospect of litigation" and that Courts consider a range of factors, including the: "(1) nature of the documents, (2) the nature of the litigation, (3) the relationship between the parties, (4) other facts peculiar to the case, (5) the involvement of counsel, and (6) the time when the document is created." Objs. 13. Capital One contends (as it did below) that "all of these factors show that litigation was the 'driving force' behind the preparation of the Mandiant Report." *Id.* at 14 (emphasis added); *see also* Dkt. 435 at 12 (stating "all of the circumstances surrounding Mandiant's investigation support the conclusion that the Mandiant Report is protected work product") (emphasis in original). Capital One then proceeds to re-litigate the exact arguments it made below, which the Order addressed and rejected, without pointing to any clear error (and, in fact, pointing to no specific error at all) in Judge Anderson's analysis.

In its recap of its arguments below, Capital One acknowledges that it had a pre-existing contract with Mandiant, but states that the “undisputed evidence makes it clear that Mandiant was engaged to aid in the investigation Debevoise conducted to help the company prepare for litigation.” Objs. 14. But that is the very issue that *was* disputed below and on which Judge Anderson made factual findings. Judge Anderson explained that the “only significant evidence that Capital One has presented concerning the work Mandiant performed is that the work was at the direction of outside counsel and that the final report was initially delivered to outside counsel.” Order at 8. On the other hand, Plaintiffs’ evidence and Capital One’s own evidence showed that Capital One’s “long-standing” relationship with Mandiant included a “pre-existing SOW with Mandiant to perform essentially the same services that were performed in preparing the subject report.” *Id.* at 7. Even more critically, the “services to be provided in the January 7, 2019 SOW are the same services described in the [Debevoise] Letter Agreement,” and “Capital One’s senior manager of the cyber security operations center and the person responsible for managing Capital One’s relationship with Mandiant acknowledged that as a financial institution that stores sensitive financial and other sensitive information, it is critical that it be positioned to immediately respond to any potential compromise of the security of its systems.” *Id.* at 7-8 (citing to Blevins Decl. ¶ 5).

The facts establishing the existence of the pre-existing contractual relationship imposing virtually identical investigative, remediation, and reporting obligations on Mandiant placed this case squarely within the rulings in *Dominion Dental* and *Premera*. See *In re Dominion Dental*, 429 F. Supp. 3d 190; *In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1245-46 (D. Or. 2017). Those courts found that merely shifting supervisory authority and requiring Mandiant to designate its reports as work product did not alter the business purpose character of Mandiant’s investigation. And, in a detailed analysis of both *Dominion Dental* and

Premera, Judge Anderson found these two on-point cases “persuasive.” Order at 10-14. Capital One’s attempts to distinguish *Dominion* and *Premera* were considered and rejected by Judge Anderson. Objs. 15 n.9; see Order at 11-14. Capital One may wish the Court had analyzed the cases differently but it points to no clear error in the Court’s analysis or any analysis that is contrary to law.

Moreover, the cases cited by Capital One in its Objections as more similar than *Dominion Dental* and *Premera* were expressly considered in the Order and were found to be either distinguishable or unhelpful. Order at 9-10 (addressing, analyzing, and distinguishing *In re Experian Data Breach Litig.*, 2017 WL 4325583 (C.D. Cal. May 18, 2017); *In re Arby’s Rest. Grp., Inc. Data Sec. Litig.*, No. 1:17mi55555-WMR (N.D. Ga. March 25, 2019) Doc. No. 453; *In re Target Corp. Customer Data Sec. Breach Litig.*, 2015 WL 6777384 (D. Minn. Oct. 23, 2015); and *Genesco, Inc. v. Visa, Inc.*, No. 3:13-cv-00202 (M.D. Tenn. Mar. 25, 2015), Doc. No. 969, at 2.). Capital One points to no error in the Order’s analysis of these cases; it merely vents its disagreement and states why it would have found these cases – and not *Dominion Dental* and *Premera* – to be more persuasive.

Second, Capital One argues that Judge Anderson incorrectly “concluded that the pre-existing SOW between Capital One and Mandiant was nearly dispositive.” Objs. 16. As an initial matter and as discussed *supra*, Capital One’s argument here (in direct contradiction of its previous arguments) that the second prong of the work product inquiry is not relevant should be rejected. Capital One then argues that even if that inquiry were “relevant,” Judge Anderson “misapplied it,” and proceeds to exclusively rely on two declarations that it did *not* submit to Judge Anderson to prove that Judge Anderson “misapplied” the law. *Id.* at 17-19.

As explained above, because this entire argument rests on evidence not presented to the Magistrate Judge below, it should be rejected outright. But even if it is not disregarded, Capital One cannot carry its burden in establishing the Mandiant Report would have been prepared any differently because of the litigation. Capital One contends that “Mandiant’s investigation and report would have been very different if Capital One had engaged Mandiant to investigate the Cyber Incident for *business* purposes” because, in that case, “Mandiant’s investigation would have focused on remediation, as opposed to causation issues pertinent to legal liability determinations.” *Id.* at 18. This proposition ignores the logical fallacy that remediation recommendations cannot be offered if the technical factors leading to the Breach are not assessed. In an effort to support its faulty proposition, Capital One cites to the Palombo Declaration which explains what Mandiant “typically” does when engaged by counsel versus the company. *Id.* Capital One explains at a general level that “absent the risk of litigation, Mandiant would not have worked with Capital One’s legal department or outside counsel” and that the Report “would not ‘reflect the areas of inquiry that [Debevoise] direct[ed] Mandiant to focus on.” *Id.*

What Capital One does not cite to is any specific fact establishing that Mandiant actually did anything fundamentally different from what it would have done under the pre-existing SOW or that the Report was altered because it was done at the “direction of counsel.” *See In re Dominion Dental*, 429 F. Supp. 3d at 194 (finding 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”). As Judge Anderson noted in the Order, the evidence Capital One presented below regarding the form of the investigation and report was akin to that presented in

Dominion Dental: “Even in the face of a statement in an affidavit from Dominion Dental that the Mandiant report would not have been prepared in a substantially similar form and may not have been necessary at all without the threat of litigation, the court found Dominion Dental had not carried its burden, relying heavily upon the fact that the description of services in the statement of work in existence prior to the data breach was ‘almost identical’ to the services in the post-data breach statement of work.” Order at 12-13 (discussing *Dominion Dental*, 429 F. Supp. 3d at 194). The improper new evidence, should it be considered, is more of the same and simply does not establish that the Mandiant Report was prepared any differently, much less substantially-so, due to the threat of litigation.

Third, Capital One’s contention that the Order “has unworkable practical implications for heavily regulated companies that suffer data breaches” is not only irrelevant but was not raised below and is waived. Plaintiffs argued below that the pre-existing relationship with Mandiant for the very same services ultimately provided rendered the services and resulting report not subject to the work product protection. *See* Dkt. 413 at 12-16. Yet, Capital One did not argue to Judge Anderson that considering a pre-existing relationship would disincentivize companies from retaining incident response vendors. *See generally* Dkt. 435. The argument is therefore waived. *See Giganti v. Gen-X Strategies, Inc.*, 222 F.R.D. 299, 307–08 (E.D. Va. 2004) (“[T]his objection must be denied because it was not argued before the magistrate judge and cannot be raised for the first time as part of plaintiffs’ Rule 72 motion”); *Claytor v. Computer Assocs. Int’l, Inc.*, 211 F.R.D. 665, 667 (D.Kan.2003) (refusing to consider objections not raised in front of the magistrate judge on the ground that clearly erroneous review does not permit a party to obtain a “‘second shot’ based on new arguments”). Further, the only evidence Capital One relies on to establish the

purported practical implications is the newly introduced Caputo Declaration, which, as discussed *supra*, should be stricken or otherwise disregarded.

Even if considered, Capital One's argument about the practical implications is unpersuasive. Capital One argues that its inability to hide a technical forensic report that it contracted for years before litigation was ever anticipated would disincentivize it from "keeping an incident response vendor on retainer" while in the same breath states that, in the event of an incident, it is "under the gun to determine whether there has in fact been an intrusion, the scope of the intrusion, and whether any sensitive data was exfiltrated." Objs. 19-20. Capital One, a company with billions in revenue that depends on hundreds of millions of customers using their services, has clear business interests in keeping an incident response vendor on retainer. This is evidenced by the fact that Capital One has done so for years now. Capital One and Debevoise, despite their protestations otherwise, could have easily hired a different vendor to assist Debevoise in "understanding" the technical aspects of the Breach. Objs. 7. They chose not to. Instead, they chose to paper over the existing SOW with Mandiant such that Mandiant could perform the services it had been retained years ago to perform but *under the veil of privilege*. Here, as in *Dominion Dental*, 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*, 429 F. Supp. 3d at 194. If practical considerations are considered at all, it weighs against Capital One's construct, which assumes the ability of a defendant to shield a document from discovery merely by creating the veneer of privilege after the fact.

c. Capital One fails to establish the Magistrate Judge's consideration of the later uses of Mandiant Report was contrary to law or clear error.

Capital One last argues that Judge Anderson inappropriately considered the uses of the Mandiant Report in determining whether the document qualifies for work product protection. Objs.

21. But Capital One ignores the clear precedent that the later uses of a document may inform the work product analysis – an analysis which Capital One admits involves a consideration of the “totality of the circumstances.” *Id.* (citing *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004)).³

Capital One’s litany of grievances that Judge Anderson’s considerations of the distribution and use of the Mandiant Report “constitutes legal error” misses the point. Objs. 23-25. Capital One misconstrues the Order’s holding when it argues that the Order held the work product protection was undermined or overcome by its later distribution. The Order held no such thing. Rather, Judge Anderson recounted in the Fact Section of his Opinion that the Report had been distributed to 50 employees, a “corporate governance office general email box” (which Capital One only now for the first time explains was accessible by 7 people), and the Board (who were not listed on the list Capital One compiled of persons receiving the Report). Importantly, Judge Anderson then reasoned that Capital One’s distribution of the Report “to four different regulators and to Capital One’s accountant” showed “that the results of an independent investigation into the cause and the extent of the data breach was significant for regulatory and business reasons.” Order. 8.

³ Capital One points to *In re Grand Jury Subpoena* as “instructive.” Objs. 22. But that case involved very different facts. In that case, the EPA informed a company that it was under investigation for violating federal waste management laws. *Id.* at 904. In order to defend against this investigation, the company hired an attorney who prepared a legal defense, which included the hiring of an expert, and submitted numerous documents to the EPA in order “to avoid litigation.” *Id.* at 904. Then, two years later, a grand jury investigating that same company subpoenaed the expert, requesting “any and all records relating in any way to any work” regarding the work the expert did for the company. *Id.* Although the expert produced some documents, it withheld others as protected work product. The Court found that “taking into account the facts surrounding [the documents’] creation” they clearly had a “litigation purpose.” *Id.* at 909-10. This is because these documents were created specifically “to avoid litigation with the government” (*id.* at 908), which is very different from the facts here where Capital One retained Mandiant years before litigation could have been anticipated to perform the exact services and issue the exact Report at the center of Plaintiffs’ Motion to Compel.

Essentially, he found that the distribution was probative of whether work product protection applied in the first place – not whether established work product was undermined by later distribution (which is a waiver argument). This is not error.

In *In re Experian*, a case on which Capital One heavily relies, the Court considered this exact factor for the exact same reason. The Court considered who the Mandiant Report was provided to as probative in determining whether the Report met the “because of” test. *In re Experian Data Breach Litig.*, 2017 WL 4325583, at *2. The Court explained that its finding that the Report was work product was “supported” by “the fact that Mandiant’s full report wasn’t given to Experian’s Incident Response Team.” *Id.* So too in Judge Anderson’s opinion. That the Mandiant Report was not work product to start with was supported by Capital One’s widespread distribution and use of the Report. *See* Order at 8, 10. Capital One points to no case demonstrating that taking the facts of how the Report is used into consideration in determining whether the document constitutes work product is contrary to law and it ignores that the very case it relies on (*Experian*) does exactly that.

Along these same lines, Capital One again distorts the Order’s holding, arguing that Judge Anderson “relied” on various grounds to “destroy[] the Report’s work product protection.” *Objs.* 25-26. Not so. The Court did not find that the Report’s work product protection was “destroyed”: it found that Capital One had not carried its burden to establish the work product protection *in the first place*. Order at 1. That Capital One deemed the retainer of Mandiant “business critical” is probative of whether the “incident response services performed by Mandiant would not have been done in substantially similar form even if there was no prospect of litigation.” Order at 2, 7. So too with the fact that Mandiant was paid out of the retainer that had been paid many months before litigation was ever contemplated. Order at 8, 11-12. And the Fourth Circuit itself has stated that

materials prepared pursuant to regulatory requirements are “not documents prepared in anticipation of litigation within the meaning of Rule 26(b)(3).” *Nat’l Union Fire Ins. Co.*, 967 F.2d at 984.

Egregiously, Capital One attacks the Order for referencing the Investor Talking Points, introduced as an exhibit to Plaintiffs’ Motion to Compel, stating that the Talking Points at issue here, unlike those in *Dominion Dental*, were “never used.” Objs. 26 at n.15. This is the first time Capital One has represented that the Investor Talking Points were not used. In their opening Motion, Plaintiffs argued that these Investor Talking Points, which contained language reassuring investors and outside entities that Capital One was investigating the Breach and had retained Mandiant, showed a business purpose for the investigation and constituted waiver. *See* Dkt. 413 at 18-19. Instead of presenting evidence that the Investor Talking Points had never been used, Capital One chose to respond: “Plaintiffs offer no evidence showing that these talking points were ever used[.]” Dkt. 435 at 17 n.7. Capital One did so despite full-well knowing that the burden to establish the privilege and to establish the privilege had not been waived was theirs to carry. Capital One now submits the Caputo Declaration to purportedly prove that these Investor Talking Points were “never used.” Objs. 26 n.15. Its submission of the Caputo Declaration should be rejected and its attacks on the Order disregarded.

III. The Court Need Not Reach The Questions of Waiver Given Capital One Has Not Shown the Order to Be Contrary to Law or Clearly Erroneous, But Even So, Capital One Failed to Establish No Waiver Occurred Despite Now Two Opportunities to Do So.

The Court need not reach whether the work product privilege is waived because Capital One has not shown that Judge Anderson’s Order finding Capital One failed to establish the Mandiant Report qualifies for work product protection is contrary to law or contains clear error. Moreover, because Judge Anderson specifically did not reach the questions of waiver or

substantial need, this Court need not address those issues on a Rule 72(a) objection. Even so, with respect to waiver, Capital One has clearly not carried its burden despite having been afforded the opportunity to do so. *See Walton v. Mid-Atl. Spine Specialists, P.C.*, 694 S.E.2d 545, 549 (Va. 2010) (“The proponent of the privilege has the burden to establish . . . that the privilege was not waived”).⁴

Capital One does not dispute that it shared the Mandiant Report with four federal bank regulators, a third-party auditor, and over 32 non-lawyer employees for reasons unrelated to its legal needs.⁵ *See* Dkt. 435 at 9, 22-24; Objs. 27-30. Instead, Capital One again argues that its disclosures of the Report categorically cannot amount to waiver. Objs. 27. Capital One is incorrect.

First, Capital One argues for a second time 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). Objs. 27-28. But it still does not explain why the Report was disclosed to the regulators or whether the regulators were in an adversarial position to Capital One at the time. Below, Capital One stated, as a general matter, that banking supervision is not adversarial in nature (Dkt. 435 at 23), but, Capital One again does not challenge Plaintiff’s contention that the banking

⁴ With respect to Plaintiffs’ substantial need for the Mandiant Report, Judge Anderson stated that “based on current record it appears that the event logs and network diagrams reviewed by Mandiant may be available to the plaintiffs.” Order at 7 n.2. Because substantial production of documents is not set to be completed until July 1, 2020, Plaintiffs respectfully request that if the Objections be sustained on this ground, it be without prejudice such that Plaintiffs can review the documents produced by Capital One.

⁵ For the first time, Capital One explains that the email box on its list of recipients was accessible by 7 people and that 14 members of the Board of Directors received the Report. These 12 Board members were not listed as recipients of the Report on Capital One’s list – an omission noted by Judge Anderson. *See* Order at 5. And it is unclear to Plaintiffs whether the 7 individuals with access to the email box were included in the original list provided. Based on this additional information, the actual total number of employees and individuals in receipt of the Mandiant Report may be over 70 people.

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 at 18.

In fact, despite the burden on Capital One to show it did not waive work product protection, *Walton*, 694 S.E.2d at 549, Capital One fails once again to explain at all its purpose in disclosing the Report to regulators, other than citing to regulations that state disclosure “shall not be construed as waiving” privilege. Objs. 27. 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.

And Capital One again fails to address case law in this district which states that “sharing information privately with an interested government agency” does not waive work product protection only “*so long as the Government is not in a position adversarial to the disclosing party.*” *E.I. Dupont de Nemours & Co.*, 269 F.R.D. at 605 (emphasis added). The one case Capital One does cite for the proposition that sharing a document with its regulators does not waive the privilege actually undermines Capital One’s contention. In that case, although the Court found that the privilege was not waived by the sharing of documents with the defendant’s three “prudential” regulators, the Court found it may have waived the privilege over documents it shared with a fourth regulator who was investigating the defendant and therefore in an adversarial relationship with the defendant. *Alaska 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) (explaining that the analysis for the fourth regulator was “more complicated” because as the Second Circuit has stated: “disclosure of attorney work product in connection with a government investigation waives the privilege in later civil discovery”)

(quoting *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 233 (2d Cir. 1993)). Capital One has now had two opportunities to assert that it was not in an adversarial position to the regulators when it shared the Report with them. Yet it still has not done so.

Second, Capital One fails here (as it did below) to carry its burden to show that its disclosure to its outside auditor did not amount to waiver. Capital One contends that as a matter of law, a company's disclosure of work product to its independent auditor cannot result in waiver. Objs. 28. 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).⁶ Although as a general matter sharing

⁶ *Medinol* has been followed in subsequent cases and the inquiry into whether disclosure to an outside auditor waives work product privilege is fact-specific. For example, in *United States v. Hatfield*, No. 06-CR-0550 (JS), 2010 WL 183522, at *3-4 (E.D.N.Y. Jan. 8, 2010), the Court found that disclosure of work product to an outside auditor resulted in waiver because the auditor's interests "allied with the truth" whereas the defendants' interests "aligned with whatever was best" for the defendants. *Id.* at *4. Therefore, "although [the outside auditor's] interests were not necessarily adversarial to [defendants], [the auditor] was – at a minimum – not 'allied in interest' and did not share 'litigation objectives in common with them.'" *Id.* The Court further reasoned that "[s]haring potentially inculpatory information with an entity dedicated to uncovering financial irregularities is entirely inconsistent with the 'zone of privacy' that 'underlie[s] the work product doctrine'" and it "substantially increase[d] the opportunity for potential adversaries' to obtain it." *Id.* (quoting *Medinol*, 214 F.R.D. at 114-15).

work product with an outside auditor may not waive the privilege, Capital One again fails to provide the Court with any 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. *See* Objs. 28. 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.

Third, Capital One contends that its widespread distribution to employees, including a substantial number of non-lawyer employees, did not result in waiver. Obs. 28-29. But as Judge Anderson stated at the hearing: “It only takes one.” May 15, 2020 Hr’g Tr. 22:7. Capital One contends that its disclosure of the Report to non-lawyer employees cannot result in waiver as a matter of law because “none of Capital One’s employees are or will become Capital One’s adversaries in litigation arising out of the Cyber Incident.” Objs. 29. This ignores the obvious fact that Capital One employees who are also Capital One cardholders are likely absent class members whose information was compromised in the Breach and a whole host of other scenarios in which employees may be adverse or become adverse. It also ignores the fact that Capital One provided no explanation below as to why the Report was shared with these particular employees, other than to say that they had an unspecified “specific need to examine it,” or that Capital One provided no evidence below as to the restrictions placed on dissemination of the Report. *See* Dkt. 435 at 9;⁷ *see also Upjohn v. United States*, 449 U.S. 383, 395 (1981) (holding 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). Indeed, in its inappropriate attempt to introduce new evidence, Capital One still does not address whether and how many individuals

⁷ The late introduced evidence via the Caputo Declaration should be discounted, as described *supra*, but still does not provide sufficient information to establish no waiver has occurred.

received portions of the Report or summaries of the Report, despite being questioned about that issue during oral argument. *See* May 15, 2020 Hr'g Tr. 21:5-22:5.

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.” Objs. 29-30; *see also* Dkt. 435 at 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 again does not explain where else, besides through Mandiant’s findings, that it could have made these determinations. 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. Plaintiffs have pointed to two specific defenses Capital One has put directly at issue and evidence shows are based upon the Mandiant Report.⁸ The cases Capital One cites for the proposition that these conclusions are not directly at issue are inapposite. *See Smith v. Scottsdale Ins. Co.*, 40 F. Supp. 3d 704, 724 (N.D.W. Va. 2014), *aff'd*, No. 5:12CV86, 2014 WL 4199207 (N.D.W. Va. Aug. 22, 2014), and *aff'd*, 621 F. App'x 743 (4th Cir. 2015)

⁸ Indeed, exhibits submitted in support of Plaintiffs’ Reply brief below indicate that Plaintiffs are correct that these defenses, placed at issue by Capital One, are addressed by the Mandiant Report. *See* Dkt. 445; Dkt 509-3, Ex. 18, CAPITALONE_MDL_000392963 (redacted July 29, 2019 email chain between Capital One, Mandiant, and Debevoise re: “Possible wording for press release,” which suggests Mandiant was consulted on the representations made to the public in the press release); Dkt. 509-4, Ex. 19, CAPITALONE_MDL_000392129 (Aug. 23, 2019 Calendar invite involving Mandiant, Capital One, and Debevoise entitled: “Project Star: Data Sources re: Paige Thompson as sole intruder”).

(finding that opinion work product reflecting settlement decisions was not placed at issue); *Black & Decker Corp. v. United States*, 219 F.R.D. 87, 91-93 (D. Md. 2003) (refusing to grant broad waiver as to “all communications between plaintiff” and its auditor where plaintiff placed advice of auditor at issue and examining the documents *in camera* to make an assessment).

Lastly, Capital One’s conclusory assertion below, alluded to here, that it is not selectively disclosing findings from the Mandiant Report for tactical purposes (Dkt. 435 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.⁹ 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.

CONCLUSION

For all the reasons set forth above, Plaintiffs request that the Court overrule Capital One’s Rule 72 objections and uphold Judge Anderson’s Order that Capital One must produce the Mandiant Report.

Dated: June 12, 2020.

Respectfully Submitted,

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⁹ At a minimum, Plaintiffs would 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 sustain Capital One’s objections, it should do so without prejudice so Plaintiffs can obtain discovery to determine how Capital One made these findings. Indeed, ongoing discovery may reveal the privilege Capital One asserts over the Mandiant Report has been waived on other grounds. For example, Capital One’s selective disclosure of certain investigation reports, such as the inappropriately and late-produced Exhibit 2 Project Star Report (which is labeled “work product”), but not others, such as the Mandiant Report, is a tactical waiver of certain attorney-client and work product claims but not others.

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CERTIFICATE OF SERVICE

I hereby certify that on June 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
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