IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE: MARRIOTT INTERNATIONAL CUSTOMER DATA SECURITY BREACH LITIGATION.

MDL No. 19 and 2879
(JUDGE GRIMM)

Supplement to Report and Recommendation

I was not aware that plaintiffs had filed a submission to me on August 27, 2020. The submission arrived in my email inbox at 8:46 p.m. on that day. I had assumed that plaintiffs were not going to file anything when nothing had arrived by the close of business. I, therefore, proceeded to complete my Report and Recommendation on August 28, 2020. Thanks to some technical glitch, I did not see the submission until today, August 29, 2020. In fairness to plaintiffs, I wanted to speak to their contentions.

As matters now stand, I believe that we are agreed that the Federal Rules of Civil Procedure will constrain the discovery to which plaintiffs are entitled if Marriott names CrowdStrike as a testifying opinion

witness. Plaintiffs nevertheless fear that that Marriott will only name Crowdstrike as a potential expert and may use that as a stratagem to avoid discovery. However, I can assure plaintiffs that Judge Grimm (if he accepts my recommendation) and I expect that Marriott will make its decision about Crowdstrike sincerely and in good faith. Marriott will certainly be bound by the decision it makes and its consequences.

Plaintiffs also insist that the issue of whether Crowdstrike was hired for a business purpose persists and should be resolved now. I disagree.

First, if Marriott names Crowdstrike as a testifying expert, plaintiffs are entitled to the discovery Fed. R. Civ. P 26(a)(2)(B) permits and constrains. That Rule flows from a party's designation that a certain person will be called to give expert testimony under Fed. R. Evid. 702, 703, or 705. It has nothing to do with whether that person, now designated an expert, was hired by that party at one time for some other purpose. Thus, if Marriott names Crowdstrike as a testifying expert, the issue of whether or not Marriott hired Crowdstrike in anticipation of litigation or for a business purpose evaporates.

Second, Marriott claims attorney-client privilege as well, and, as I pointed out in my Report and Recommendation, resolution of that claim has nothing to do with why Marriott hired Crowdstrike.

Finally, as I also explained in my Report and Recommendation, privilege claims cannot be resolved in gross. Instead, we will have to examine each document to ascertain whether it is privileged. That obligation also evaporates if Marriott names Crowdstrike as a testifying witness for those documents, claimed to be privileged, may not be available to plaintiffs because of the constraints the Federal Rules of Civil Procedure impose on discovery from experts.

Therefore, I persist in my view that all legal issues pertaining to discovery from Crowdstrike should await Marriott's indicating whether it will name Crowdstrike as a testifying expert witness.

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John M. Facciola

August 29, 2020