August 27, 2020

The Honorable John M. Facciola (Ret.) <facciolj@georgetown.edu>

Re: *In re: Marriott,* MDL 2879 (D. Md.), CrowdStrike Investigation

Dear Special Master Facciola:

Plaintiffs have provided Your Honor with documents demonstrating that: 1) Marriott had a prior existing business relationship with CrowdStrike; and 2) it engaged CrowdStrike for similar business purposes here (determining the cause of the breach, remediating the breach, and providing security-based products and services to prevent future breaches—all which were necessary and consistent with Marriott's ordinary business practices). We agree with your assessment that if Marriott designates a standard retained consultant as an expert witness, we are entitled to discovery of that expert subject to the Federal Rules and expert witness disclosures. However, this would not apply to CrowdStrike. Our contention is that this is not the first step in the analysis and only comes into play *after* Marriott has first satisfied its burden to show that CrowdStrike was engaged for litigation purposes (a showing we believe Marriott has not and cannot meet). We believe that Your Honor must first decide the purposes of CrowdStrike's retention before analyzing whether CrowdStrike has protections as an expert (testifying or not). We also partially agree that if Marriott does not designate CrowdStrike as a testifying expert that Fed. R. Civ. P 26(b)(4)(D) may define and limit discovery, but again, only if Marriott first demonstrates that CrowdStrike was hired as an expert for litigation purposes.

If the Court does not decide the issue of the scope and purposes of CrowdStrike's retention now and Marriott is allowed to withhold CrowdStrike materials and designate CrowdStrike as a *potential* expert for the purposes of litigation in the future, significant problems could arise. Most importantly, it would allow Defendants to shield relevant, potentially-damaging fact discovery from parties by simply designating entities retained for a business purpose as experts after-the-fact.[1] Not only would this be contrary to public policy, it also ignores the relevant legal analysis that must be performed, as detailed below.

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[1] Indeed, Baker Hostetler "retained" many of Marriott's pre-breach service providers to investigate the cause of the breach for Marriott. *See, e.g.,* Ex. A, MI_MDL_00002268 (January 2019 Statement of Work signed by IBM, Marriott, and Baker Hostetler after IBM had already provided business services for Marriott); *compare* Ex. B, IBM000291 (Marriott engaged IBM pre-breach for its Guardium product, which was suspected as possibly "the component that alerted the client to the breach;" after the breach, IBM was "quietly engaged [in mid-November 2018] to help with forensics" in November 2018); Ex. C, IBM000285 (evincing Marriott, not Baker Hostetler, engaged IBM); *see also*, *e.g.*, Ex. D, MI_MDL_00013811 (noting throughout the business functions (forensic analysis of the breach) that IBM and CrowdStrike had been retained to perform, but also noting at 13815 that Marriott would assert that the work performed by Defendant Accenture, as well as CrowdStrike and IBM—all of whom had prior business relationships with Marriott—was "protected from disclosure" because Marriott had Baker Hostetler retain them after the breach).

Work Product and Application of Rule 26(b): In their July 17 letter, Plaintiffs detailed why they are entitled to certain documents and communications relating to CrowdStrike, the forensic investigator retained by Marriott to assist in investigating and remediating the data breach. Specifically, Plaintiffs contended that no work product protection attaches to these materials because the "driving force" behind CrowdStrike's investigation was for business purposes, not litigation. *See In re Dominion Dental Servs. USA, Inc. Data Breach Litig*., 429 F. Supp. 3d 190, 192–93 (E.D. Va. 2019) (setting forth relevant standards in Fourth Circuit).

Marriott argued in its August 14 response letter that CrowdStrike's investigation is protected as legal advice or work product prepared in anticipation of litigation. ***Marriott did not assert that CrowdStrike was retained as an expert witness for purposes of this litigation.***

After receiving these submissions, Your Honor communicated your belief that the subject of the parties' letters—whether the CrowdStrike materials sought are protected—may be premature depending on whether Marriott designates CrowdStrike as a testifying or consulting expert under the Federal Rules. In particular, if CrowdStrike was retained as a testifying expert, then Plaintiffs would only be entitled to those categories of documents expressly permitted under Rule 26(b)(4)(C), which provides that other than communications relating to compensation and facts, data, and assumptions used to form the expert's opinions, attorney-expert communications are subject to Rules 26(b)(3)(A) and (B) governing work product protections. *See* Fed. R. Civ. P 26(b)(4)(C)(i)-(iii). Alternatively, if Marriott does not designate CrowdStrike as a testifying expert, then "CrowdStrike becomes, by the operation of the Fed. R. Civ. P 26(b)(4)(D), an Expert Employed for Trial Preparation"—which protects from disclosure facts known or opinions held by an expert absent "exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means." Fed. R. Civ. P 26(b)(4)(D)(ii).

Plaintiffs believe this skips an important precursor: ***Marriott has the burden to establish that the driving force behind engaging CrowdStrike was for litigation, rather than for business purposes***, regardless of whether the issue is considered through the lens of Rule 26(b)(4) or traditional work product standards.

For example, in the (seemingly unlikely) event that Marriott designates CrowdStrike as a testifying expert, then by rule Marriott can only shield from disclosure CrowdStrike materials that properly qualify as work product. *See* Fed. R. Civ. P 26(b)(4)(C) ("Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any [testifying] witness . . . ."). Because Rule 26(b)(3)(A) requires an evaluation of whether the requested materials were prepared in anticipation of litigation, the same analysis is necessary.

If Marriott does not designate CrowdStrike as a testifying witness, then CrowdStrike is not automatically treated as a consulting expert under Rule 26(b)(4)(D). That is because the rule only applies to "an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial." Fed. R. Civ. P 26(b)(4)(D). Consequently, CrowdStrike can only qualify for the protections as a consulting expert if Marriott can first

establish that it was retained in anticipation of litigation—the same analysis required under Rule 26(b)(3)(A).

Other courts confronted with this question have recognized that "'in anticipation of litigation' as that phrase is used in Rule 26(b)(4)(D) and in the context of work-product protection" requires the same analysis: "[w]hile litigation need not be imminent, the *primary motivating purpose* behind the creation of a document or investigative report must be to aid in possible future litigation." *Tellabs Operations, Inc. v. Fujitsu Ltd.*, 283 F.R.D. 374, 388 (N.D. Ill. 2012) (emphasis in original) (rejecting defendant's claims of work product and Rule 26(b)(4)(D) protection where primary purpose of inspection was business purposes) (quoting *Binks Mfg. Co. v. Nat'l Presto Indus.,* 709 F.2d 1109, 1119 (7th Cir. 1983)). By contrast, the authority discussed in your note to the parties, *Sara Lee Corp. v. Kraft Foods Inc*., 273 F.R.D. 416 (N.D. Ill. 2011), is not relevant at this stage because there was no dispute in *Sara Lee* as to whether the expert was retained in anticipation of litigation under Rule 26(b)(4)(D). Marriott needed to uncover the cause of the breach and remediate the breach as a business purpose *regardless of potential litigation*.

Thus, in examining whether a CrowdStrike document qualifies for work product protection or is subject to Rule 26(b)(4)(D)'s protections, the analysis is the same—it turns on whether the "driving force" behind the creation of the document was litigation, or business purposes, and on the occasions where there may be "dual motives" underlying the preparation of a particular document, whether "the document would have been created in essentially the same form" in the ordinary course of business. *In re Dominion Dental Servs. Data Breach Litig.*, 429 F. Supp. 3d 190, 192–93 (E.D. Va. 2019) (citing *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co*., 967 F.2d 980, 984 (4th Cir. 1992); *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)).

Even if Marriott designates CrowdStrike as a consulting expert at some point in the future, that designation does not automatically afford Marriott the protections of Rule 26(b)(4)(D) because "the party asserting the protection of Rule 26(b)(4)(D), 'bears the initial burden of showing that the protection applies.'" *McBeath v. Tucson Tamale Co*., 2017 WL 3118779, at *6 (D. Ariz. July 21, 2017) (quoting *U.S. Inspection Servs., Inc. v. NL Engineered Sols., LLC*, 268 F.R.D. 614, 617 (N.D. Cal. 2010)); *see also Tellabs Operations*, 283 F.R.D. at 390 ("a party cannot sustain its burden under Rule 26(b)(4)(D) with equivocal evidence"). Any other interpretation could have severe consequences as it would allow parties to shield from discovery documents prepared by relevant third-party witnesses by designating them as consulting experts regardless of the original purpose for which they were retained. Just as with work product claims over documents that serve a dual purpose, when analyzing whether an expert is a non-testifying expert under Rule 26(b)(4)(D), courts have found "worrisome . . . the possibility that a party may utilize the dual purpose rationale to cloak legitimate witnesses." *In re Painted Aluminum Prods. Antitrust Litig.,* 1996 WL 397472, at *1, *2 n.2 (E.D. Pa. July 9, 1996) (rejecting claim that expert was a non-testifying expert even though he "was retained subsequent to the initiation of litigation and had not previously performed any work on defendants' behalf" because facts showed expert's retainer was primarily motivated by business considerations).

That concern is amplified in this case. For one, like in other data breach cases, CrowdStrike was retained to do a forensic analysis of how the breach occurred (which directly impacts upon whether Marriott was negligent in its cybersecurity practices) and how to remedy and prevent a subsequent data breach (which directly impacts upon Plaintiffs' requested injunctive relief). These are business purposes. The potentially damaging factual analysis done by CrowdStrike makes it a virtual foregone conclusion that Marriott would never call CrowdStrike as a testifying expert in order to artificially shield that analysis from the plaintiffs. Thus, an analysis of the CrowdStrike materials only in regard to Rule 26(b)(4)(D) would be deleterious to this and virtually all data breach litigation as defendants would simply designate every root cause analysis as expert work.

Moreover, analyzing the CrowdStrike investigation under Rule 26(b)(4)(D) would lead to further problems since Defendant Accenture, who provided factual analyses to Marriott in a non-litigation setting, received the CrowdStrike materials and is asserting work-product protection for those materials on behalf of Marriott. Such an assertion of protection over communications with CrowdStrike cannot logically be squared under a Rule 26 analysis.

Plaintiffs have already made their case as to why the driving force behind the engagement of CrowdStrike was for a business purpose, including submitting documentation establishing that CrowdStrike was an existing vendor that Marriott retained to perform similar ongoing work, the statement of work was clearly business driven, and CrowdStrike regularly shared investigative findings with Marriott personnel and executives to help manage Marriott's business operations. For the same reasons the CrowdStrike materials are not protected as work product, such materials cannot be shielded from disclosure under Rule 26(b)(4)(D).

Waiver: Even if Your Honor finds the CrowdStrike materials to be work product in some respect or potentially subject to rules regarding expert disclosure, Marriott has waived its claims of protection by distributing CrowdStrike's reports and findings to various third parties.[2] Plaintiffs contend that any finding must address this issue, as well.

Since Plaintiffs' July 17 letter, third parties have produced additional documents further demonstrating a clear waiver of any protected material. Specifically, a year-end memorandum produced by outside auditor Ernst & Young ("EY") reflects that CrowdStrike's role was to provide "endpoint detection and response monitoring, host forensics, and other investigative services during the investigation;" EY had access to CrowdStrike's investigative findings; and CrowdStrike was interviewed by EY regarding its findings. Ex. E, EY-MARRIOTT-00016558.

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[2] "Work-product immunity is waived if the client, the client's lawyer, or another authorized agent of the client: ... (4) discloses the material to third persons in circumstances in which there is a significant likelihood that an adversary or potential adversary in anticipated litigation will obtain it." *Cont'l Cas. Co. v. Under Armour, Inc.*, 537 F. Supp. 2d 761, 772 (D. Md. 2008) (quoting Restatement (Third) of the Law Governing Lawyers § 91 (2000)).

While Marriott contends that work product protection is only waived if disclosed to an adversary, no such limitation applies to the attorney-client privilege—which is Marriott's primary basis for withholding the Crowdstrike materials.[3] In any event, Marriott's widespread dissemination of the CrowdStrike materials substantially increases the likelihood of public disclosure or release to Marriott's adversaries, such that the distribution to Marriott's independent auditors as well as to Accenture, a co-Defendant in this lawsuit because of its conduct regarding the data breach (making Accenture at least a "potential adversary" to Marriott), constitutes waiver. *See, e.g.*, *In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981) ("[R]elease of otherwise protected material without an intent to limit its future disposition might forfeit work product protection, regardless of the relationship between the attorney and the recipient of the material."); *Cont'l Cas. Co.*, 537 F. Supp. 2d at 772.

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We appreciate Your Honor's consideration of this matter and hope that we've answered your questions regarding Marriott's potential retention of CrowdStrike as an expert in the future. We are happy to provide further explanation, argument, and analysis via conference should you find it helpful.

Respectfully,

/s/ Amy E. Keller *\/s/ Andrew N. Friedman* */s/ James J. Pizzirusso*

Co-Lead Counsel, Consumer Track

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[3] Waiver of attorney-client privilege is much broader than waiver of work product protection. *See generally Cont'l Cas. Co.*, 537 F. Supp. 2d 761. As with work product, the party seeking protection must prove its applicability "as well as its non-waiver." *United States v. Cohn*, 303 F. Supp. 2d 672, 679 (D. Md. 2003) (citations omitted). "The holder of the privilege can waive it expressly, or through conduct." *Id.* (citation omitted). Consequently, "any voluntary disclosure by the client to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter." *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (citation omitted).