August 27, 2020

To: The Honorable John M. Facciola, *via email* at facciolj@georgetown.edu

Re: *In re: Marriott*, MDL 2879 (D. Md.), Response to Special Master Facciola's August 21, 2020 letter regarding CrowdStrike dispute

Dear Special Master Facciola:

We appreciate the time that you have spent analyzing this dispute.

You are correct that Marriott has not yet decided whether to designate CrowdStrike as a testifying expert witness under Rule 26(a)(2). You are also correct that if Marriott did so, plaintiffs would receive the information to which they are entitled under Rules 26(a)(2) and 26(b)(4). Marriott thus agrees with your approach, as further explained below.

Attorney/client privilege and Rule 23(b)(3)(A)-(B) also protect the material plaintiffs moved to compel. We apologize for misreading the initial order regarding whether CrowdStrike was hired in anticipation of litigation. Should Marriott decide not to designate CrowdStrike as a testifying expert witness, Marriott will be prepared to address this issue at that point.

Marriott agrees with your outline of the applicable rules, with one caveat. Your August 21, 2020 letter stated that if Marriott does not designate CrowdStrike as a testifying expert, Marriott "will have to establish that Crowdstrike is what the pertinent Rule, Fed. R. Civ. P 26(b)(4)(D), calls an 'Expert Employed Only for Trial Preparation.' Once again, discovery, if any from Crowdstrike, is defined and limited by this Rule." (S.M. Facciola August 21, 2020 Ltr.)

But, respectfully, Rule 26(b)(4) is not the only basis for Marriott to rightly refuse to disclose the materials plaintiffs seek in their motion to compel. *See Yeda Research & Dev. Co. v. Abbott GmbH & Co. KG*, 292 F.R.D. 97, 107 (D.D.C. 2013) ("Non-testifying experts receive protection under two parts of amended Rule 26."); *Higher One, Inc. v. TouchNet Info. Sys., Inc.*, 298 F.R.D. 82, 87 (W.D.N.Y. 2014) (nonexpert consultant treated "like an ordinary witness, subject to the relevancy requirements and any privileges that may apply"); Fed. R. Civ. P. 26, Adv. Comm. Notes to 2010 Am. (noting Rule 26(b)(4)(C) "does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine").

For example, plaintiffs' motion to compel seeks wide-ranging categories of information, including internal Marriott communications that do not contain any CrowdStrike representatives. (*See* Pl. Ltr. 1 (requesting "all communications between Marriott employees regarding CS's post-breach investigations, reports, assessments, decisions, findings, conclusions, and recommendations").) Internal communications, particularly those with in-house or outside counsel, may be covered by the attorney/client privilege or the work-product doctrine under Rule 26(b)(3)(A). (*See, e.g.*, Exs. J-N, submitted *in camera* with Marriott's August 14, 2020 letter.)

Furthermore, communications between Marriott or its lawyers and CrowdStrike may be covered under the attorney/client privilege because privileged persons include "retained professionals who assist the attorney to better understand the facts in providing competent legal advice to the attorney's client." *Richardson v. Sexual Assault/Spouse Abuse Res. Ctr., Inc.*, 764 F. Supp. 2d 736, 742 (D. Md. 2011) (citing *United States v. Kovel*, 296 F.2d 918, 921 (2d. Cir. 1961)). (*See,*

e.g., Exs. D-G, submitted *in camera* with Marriott's August 14, 2020 letter.) CrowdStrike's work is also work product under Rule 26(b)(3)(A)-(B), as well as Rule 26(b)(4)(D), because it was done in anticipation of litigation. *See Genesco, Inc. v. Visa U.S.A., Inc.*, 302 F.R.D. 168, 194 (M.D. Tenn. 2014) (applying rules to forensics expert following data security incident).

CrowdStrike is a consulting expert. We expect plaintiffs may argue that CrowdStrike "was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit," and that Rule 26(b)(4) does not apply for that reason. *Smith-Bunge v. Wisconsin Cent., Ltd.*, 946 F.3d 420, 422 (8th Cir. 2019) (citing Advisory Committee Notes). We disagree with that characterization and believe you were correct to cite the expert disclosure rules as a possible basis to recognize that this dispute is premature.

Plaintiffs do not claim that CrowdStrike did anything wrong; their issue is with Marriott purportedly failing to keep the threat actor out to begin with. As the documents and declarations reflect, CrowdStrike was hired to work with legal counsel to investigate a data security incident after the fact because everyone knew that there was a real possibility of litigation—both with plaintiffs here, the plaintiffs in other tracks, and with regulators. (*See* Marriott's August 14, 2020 letter.) Attorneys need a forensics expert in this situation to translate the relevant technical evidence so they can advise and prepare accordingly.

The situation in *Smith-Bunge* was similar. There, a train company hired an engineer and accident reconstructionist to investigate the plaintiff's crash with a train. The plaintiff was an employee of the train company working on the track and was fired after the investigation. In the subsequent lawsuit, the court held Rule 26(b)(4) applied, and that decision was affirmed. *See Smith-Bunge v. Wisconsin Cent., Ltd.*, 2016 WL 11645462 (D. Minn. Oct. 27, 2016), *aff'd*, 946 F.3d 420 (8th Cir. 2019). Like here, the record was "devoid of any evidence that [the expert] took part in" the actions that allegedly caused plaintiff's harm, which in *Smith-Bunge* was "the final decision to terminate Plaintiff's employment." *Id.* at *6.

Nor does it matter if Marriott also used CrowdStrike's analysis for a secondary business purpose, so long as the purpose of the work was to help counsel prepare for the inevitable litigation that would follow. Just like ordinary work product under Rule 26(b)(3), "'[t]here is no reason a party should be deprived of the protection of rule 26(b)(4)(B) merely because he or she economically makes double use of expensive expert consultation.'" *William A. Gross Const., Assoc., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 262 F.R.D. 354, 362 (S.D.N.Y. 2009) (Peck, J.) (quoting *Hermsdorfer v. American Motors Corp.*, 96 F.R.D. 13, 14 (W.D.N.Y.1982) and citing prior location of 26(b)(4)(D)).

For example, in a case citing *Gross*, an insurer hired counsel and an accounting firm to help determine why a reinsurer was not paying certain bills from a third party, as it was supposed to. *Amtrust N. Am., Inc. v. Safebuilt Ins. Servs., Inc.*, 2016 WL 3260370, at *2 (S.D.N.Y. June 10, 2016). The insurer used that work to renegotiate the bills with the third party, a business purpose, as well as to prepare for litigation to recover amounts it claimed the reinsurer still owed. Relying on Judge Peck's decision in *Gross*, the court rejected the reinsurer's attempt to discover the accounting firm's work. *Id.* at *3-4. The court explained: "Even if the Court assumes that [the accounting firm's] analysis was helpful in plaintiffs' negotiations with [the third party], these facts do not strip away work-product protection." *Id.* at *4 (citing *Gross*, 262 F.R.D. at 362).

The Special Master's proposed approach is the correct one. Marriott's initial letter focused on work product and privilege generally because the issue plaintiffs raised was whether CrowdStrike's work was done in anticipation of litigation, which is the same under either Rule 26(b)(3)(A)-(B) or Rule 26(b)(4)(D). But the expert disclosure rules are also relevant here. If Marriott were to designate CrowdStrike as a testifying expert, plaintiffs would receive substantial information. If not, the parties can litigate whether CrowdStrike's work was in anticipation of litigation or otherwise privileged (issues presented to you by Marriott in its original response).[1]

This view is consistent with plaintiffs' objections to Marriott's discovery requests. Plaintiffs objected to interrogatories "to the extent [they] seek[] early expert discovery, which is not appropriate at this state [sic] of the case." (*See, e.g.*, Sample Resp., Ex. A.)

Nor will waiting impede plaintiffs' discovery. As explained in Marriott's initial letter, Marriott has already agreed to provide plaintiffs with the underlying evidence and stated that it will not object to a factual deposition of CrowdStrike. (*See* Marriott's August 14, 2020 letter 1.)

Thus, plaintiffs will have the facts and evidence during fact discovery, just not CrowdStrike's opinions and communications. During expert discovery, Marriott will decide whether CrowdStrike will testify as an expert. At this point, you will be in the best position to resolve any dispute that plaintiffs have regarding CrowdStrike, including whether CrowdStrike is an expert, whether the work was in anticipation of litigation, and whether specific documents are privileged. And by class certification and summary judgment, plaintiffs will have everything to which they are entitled under the rules.

Respectfully,

/s/ *Gilbert S. Keteltas*

[1] As Marriott noted in its August 14 letter, this dispute is also premature because the parties have yet to agree on a privilege-log proposal. The parties should agree on this proposal before addressing privilege disputes.