

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

3 IN RE: CAPITAL ONE CUSTOMER . Civil Action No. 1:19md2915
4 DATA SECURITY BREACH .
5 LITIGATION, . Alexandria, Virginia
6 August 21, 2020
7 10:59 a.m.

7 TRANSCRIPT OF MOTIONS HEARING
8 BEFORE THE HONORABLE JOHN F. ANDERSON
9 UNITED STATES MAGISTRATE JUDGE
(Via ZoomGov Video Conference)

9 APPEARANCES:

10 FOR THE PLAINTIFFS: NORMAN E. SIEGEL, ESQ.
11 JILLIAN R. DENT, ESQ.
12 LINDSAY T. PERKINS, ESQ.
13 Stueve Siegel Hanson LLP
460 Nichols Road, Suite 200
Kansas City, MO 64112

14 FOR CAPITAL ONE DEFENDANTS: DAVID L. BALSER, ESQ.
15 SUSAN M. CLARE, ESQ.
16 King & Spalding LLP
1180 Peachtree Street, N.E.
17 Atlanta, GA 30309-3521
and
18 ROBERT A. ANGLE, ESQ.
Troutman Pepper Hamilton
Sanders LLP
19 1001 Haxall Point, 15th Floor
20 P.O. Box 1122
Richmond, VA 23219

21 FOR AMAZON DEFENDANTS: TYLER G. NEWBY, ESQ.
22 Fenwick & West LLP
23 555 California Street, 12th Floor
San Francisco, CA 94104

24 (Pages 1 - 39)

25 COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

OFFICIAL COURT REPORTER: ANNELIESE J. THOMSON, RDR, CRR
U.S. District Court, Third Floor
401 Courthouse Square
Alexandria, VA 22314
(703)299-8595

P R O C E E D I N G S

1
2 THE COURT: Well, good morning. I think you can call
3 the case. Thank you.

4 THE CLERK: Certainly. In re Capital One Customer
5 Data Security Breach Litigation, Civil Action No. 19md2915.

6 THE COURT: And who do we have for the plaintiffs,
7 and who will be arguing for the plaintiffs?

8 MR. SIEGEL: Good morning, Your Honor. This is
9 Norman Siegel, co-lead counsel for the plaintiffs. With me are
10 my colleagues, Lindsay Todd Perkins and Jillian Dent, and I
11 will handle the argument this morning.

12 THE COURT: Thank you.

13 And who's here for Capital One?

14 MR. BALSER: Good morning, Judge Anderson. David
15 Balser on behalf of Capital One along with my partner, Susan
16 Clare, and my colleague, Robert Angle, and I'll be arguing the
17 motion on behalf of Capital One.

18 THE COURT: Thank you, Mr. Balser. Ms. Clare,
19 Mr. Angle.

20 And I have Mr. Newby is here for Amazon.

21 MR. NEWBY: Yes, Your Honor.

22 THE COURT: Okay. I take it Amazon is not -- doesn't
23 really have a position on these matters; is that correct?

24 MR. NEWBY: That's correct, Your Honor.

25 THE COURT: Thank you.

1 Okay. Mr. Siegel, I have had an opportunity to read
2 all the papers, the exhibits. I obviously understand this
3 issue from our earlier dealings with the Mandiant report. This
4 one is different, though, and I'm willing to hear any
5 additional argument that you have having to do with this
6 motion.

7 MR. SIEGEL: Sure, Your Honor. And I appreciate the
8 Court's time, and we'll keep it short. It is different than
9 Mandiant in some respects. We have the declarations, for
10 example, suggesting that at least in part, PwC was hired for
11 the litigation, but I think we all know the principles.

12 We've litigated the Mandiant issue, as you note, and
13 I think if you look at all of the evidence in front of the
14 Court, at least that, that we have and the Court has, we still
15 think that Capital One has failed to establish that the driving
16 force behind this report was, was something other than business
17 purposes. And I'd just like to walk through at a high level
18 why and point out a couple of specifics that we think really,
19 really do bear on the ultimate resolution of this.

20 As an initial matter, obviously, I think the
21 invocation of Rule 26 and the concept that this is a retained
22 expert on its face just appears contrived to us, candidly.
23 There was nothing in the record that identifies that we are
24 hiring you as an expert in the sense you would traditionally
25 see it from a law firm, like I'm sure King & Spalding has done

1 in this case and we've done in this case, that is, hiring them
2 specifically for a piece of litigation, but I'm not sure that
3 matters at the end of the day to the Court's analysis because I
4 think whether we're looking at this as a -- as work product in
5 the traditional sense or under Rule 26 as a retained expert,
6 we're still trying to figure out whether the driving force
7 behind this report is, is for business purposes.

8 And, and again, I do think, though, the fact that PwC
9 is engaged by the Board, not by outside counsel, does bear on
10 that, and the starting point for that is the, is the scope of
11 work, the SOW, which is Exhibit 2, and I -- I'm sorry.

12 THE COURT: By the Board and by the general counsel,
13 correct?

14 MR. SIEGEL: Correct. That's right. That's right.

15 And, and, you know, part, part of the issue here is
16 we're at a -- and the Court is at a little bit of an
17 information disadvantage here. We have the scope of work in
18 part, and, and the scope says that PwC is being retained to
19 perform an objective root cause analysis of the incident and to
20 assist Capital One's legal department, and it goes on from
21 there.

22 And so the initial purpose is the root cause
23 analysis, and I think, you know, to parse this a little bit,
24 you know, at the time this is -- that they're doing the scope
25 of work, they don't say "for the purpose of assisting of."

1 It's a separate, independent, in our view, secondary or
2 tertiary purpose is to assist Capital One's counsel. In other
3 words, the primary purpose is the, the risk assessment.

4 THE COURT: Well, how could one advise Capital One on
5 the legal issues without knowing what the root cause of the
6 problem was? You know, that, that is what causes me some
7 concern about the way that you're, you know, it's two separate
8 things is not, you know, No. 1, and then if you get around to
9 it, you need to do No. 2. This is you need to do 1 and 2, and
10 my reading of it is you would have to do 1 in order to properly
11 be in a position to deal with the second issue.

12 MR. SIEGEL: It's entirely possible, but that's
13 not -- and again, I understand I'm parsing this, but they
14 didn't say "for the purpose of," and I think if they said "for
15 the purpose of," it would be entirely consistent with what Your
16 Honor just articulated, right? We need to do a root cause
17 analysis to assist us in advising you on these legal matters.

18 I think that's different, and I -- the reason I point
19 that out is not just because it appears to be the primary
20 purpose, but if you look at the declarations, they're, they're
21 very carefully worded to say, to say the exact same thing.

22 The declarations, for example, this is the Cooper
23 declaration at 8, which is the same exact language as the Klane
24 declaration at 4, the purpose of PwC's root cause analysis was
25 to provide the Board with an independent opinion of the root

1 causes of the cyber incident and also to assist me and others
2 in providing legal advice.

3 And so the concept that they're saying "and also"
4 there versus "for the purpose of," which I think is, would be
5 more closely tethered to, to your interpretation of the SOW, I
6 think, is important.

7 THE COURT: Well, look at paragraph 4 of the
8 Finneran --

9 MR. SIEGEL: Okay.

10 THE COURT: -- declaration, where he says the purpose
11 was to do the root cause analysis.

12 The Board needed such an opinion so that it could
13 properly discharge its fiduciary oversight duties following the
14 cyber incident, including its responsibility to oversee the
15 company's preparation for and defense of the pending litigation
16 and anticipatory regulatory enforcement actions.

17 MR. SIEGEL: I was going to use that in support of
18 our argument because --

19 THE COURT: All right.

20 MR. SIEGEL: -- the broad language there of, of "the
21 purpose of discharging our fiduciary duties," they have these
22 broad fiduciary duties: They're a public company, they have
23 shareholders, of course, and the way that particular paragraph
24 is worded is similar to what we think is how the others are.

25 Of course, they need this, but it's not, it's not in

1 our view the first instance being the litigation. We
2 understand that it may also be used for that purpose in some
3 way, but the primary view is they've had a massive data breach.

4 They need to figure out -- and this is another
5 critical component, it's sort of the why-we-need-it question --
6 it's not the technical reasons why Capital One suffered this
7 data breach, which as, as the -- Capital One continues to
8 assert, you know, we've given them tons of information about
9 that, they now have the Mandiant report, but importantly for
10 our case, it's the nontechnical reasons, and the nontechnical
11 reasons are we prioritized moving to the cloud and not data
12 security. We didn't have the right people in place. We didn't
13 have the right vendors in place.

14 That as a, as a root cause versus here is the
15 technical, highly technical with respect to Mandiant report,
16 the way this breach happened, you know, the WAF
17 mis-configuration, the technical way that all this data was
18 compromised, versus what they characterize as the nontechnical
19 components of it, which include things like -- and again, this
20 is, this is how they characterize it -- cyber governments, risk
21 management, the talent work streams, who they had in these
22 positions making decisions about cybersecurity.

23 All of those would, of course, be necessary from a, a
24 general root cause analysis to figure out what went wrong and
25 how to remediate it, none of which are necessarily related to

1 the provision of legal services.

2 And so just -- and I think if you, if you look at the
3 contemporaneous references to the PwC report, this is clearly
4 what you see, and that's why we've attached several of those
5 references to our, to our motion.

6 And, you know, you have, for example, what we
7 attached as Exhibit 1, this is at Bates No. page ending in 547,
8 this has the chart that says "PwC Industry Perspective" at the
9 top of it, and just generally speaking there, it's saying "PwC
10 Industry Perspective," and it's talking about how similar
11 organizations are measuring their cyber risk, and they are
12 comparing sort of an industry standard with how Capital One
13 measured against that standard and how in their words, they --
14 if you look at the second sort of bullet point on the right
15 side, that Capital One expanded its technology footprint in
16 recent years through large-scale transformations, including
17 transition to the cloud. Although the transformation initially
18 progressed faster than Capital One's cyber capabilities, the
19 maturity of Cyber One cyber program has been a top enterprise
20 priority, and they are comparing that to industry standards
21 against something called Ness, which provides these four levels
22 of security.

23 But the point as it relates to this motion is that
24 this is PwC's input. This has nothing as far as we can see
25 related to the provision of legal services. It's why did this

1 breach happen from again a nontechnical standpoint and how are
2 they going to fix it.

3 And similarly and maybe more directly, in Exhibit 5,
4 there's the -- I think this is the first or second page, it's
5 the executive summary of Exhibit 5 -- it's the second page,
6 under "Key Takeaways," management is developing the following
7 action plans to address the findings from several assessments
8 as an outcome of the cyber event, including the incident root
9 cause analysis conducted by PwC.

10 THE COURT: Right.

11 MR. SIEGEL: The cyber action plan -- I'm sorry, did
12 I cut you off, Your Honor?

13 THE COURT: I was just going to say, you know,
14 Exhibit 1, Exhibit 5, many of these exhibits discuss the PwC
15 report in addition to multiple other investigations being used
16 to develop a plan, so, you know, it is not PwC in and of
17 itself. And even this key takeaway talks about several
18 assessments as to the outcome.

19 Obviously, there have been discussions of not only
20 the Mandiant investigation but there were internal
21 investigations done as well which you have had access to, and
22 so this was a, you know, getting a large group of information
23 together in order to formulate an action plan, which doesn't in
24 and of itself indicate that this was the driving force or the
25 dominant reason for why the PwC report was prepared six or

1 seven weeks after the announcement, after Mandiant had already
2 been retained, after 60 lawsuits had already been filed.

3 MR. SIEGEL: Entirely possible. I agree it was a
4 component, but what -- what's clearly unique about the PwC
5 report and why in their own words they commissioned the PwC
6 report was in addition to these technical components is the
7 nontechnical components that I discussed, right?

8 So we, we know Mandiant and others were doing the how
9 technically did Ms. Thompson access this data, and we
10 understand that, and we, we think we are gaining a handle on
11 that based on the Mandiant report and other materials, but
12 what's far deeper and tethered very closely to the allegations
13 in this case is what were the institutional problems? And
14 those institutional problems are ultimately what causes at the
15 end of the day the, the technical defect that goes to the
16 breach.

17 But, Judge, maybe, maybe I can get to the heart of
18 the matter here, and I think based on the Court's question, you
19 know, I'd like to mention two other things. One is look at the
20 distribution of this report, right? I mean, we had 50 people
21 on the Mandiant report. Here we have three times that.

22 And, you know, if, if the primary goal here, the
23 driving force was to defend against litigation, if you just run
24 down the list of folks that they have identified that we attach
25 in Exhibit 3, there's at least a dozen different departments

1 within Capital One, cyber, software engineering, data
2 engineering, technology, all of that would make sense for
3 remediation. All of that makes sense for organizational
4 changes in the company.

5 But if this is -- if this is specifically a work
6 product, we were doing this for purposes of litigation
7 document, why is marketing and retail getting this? There is
8 no explanation for that. There is no explanation for a wide
9 variety of these departments: accounting, commercial banking,
10 financial services.

11 And the reason, we suspect, that all these
12 departments were getting it is because they, they again from a
13 nontechnical standpoint knew they had to make changes
14 throughout the organization with respect to how to address the
15 breach and make sure it did not happen again, not to defend
16 this lawsuit.

17 And -- so that's, that's point 1. The second
18 point -- and I'll just go back to the statement of work. We
19 have, we have this language that I read, which, you know, I
20 read as, as being in the conjunctive, in other words, they are
21 doing this risk assessment, providing that service, and then
22 separately assisting Capital One, if there's a reading that
23 it's for the purpose of, and we're reading out the word "and,"
24 you know, okay, that may have been their intent, but there's no
25 way to divine that. It's obviously Capital One's burden.

1 And I, I suppose I would ask, and I'm very sensitive
2 about burdening the Court with more work than it already has in
3 this case, but I would just ask that the Court does what many
4 of these other courts have done, including the *B&C Seafood* case
5 we cited which we think is close at some point, is look at
6 these documents in camera. I think all you would need is the
7 scope of work, and, you know, page 2 of the scope of work is
8 completely redacted, page 3 is redacted, page 4 is redacted,
9 and the top of page 5 is redacted.

10 And there's three separate sections that are redacted
11 in the scope of work because we know it picks up on page 5 with
12 No. 4, and you know what? Maybe there's -- maybe the scope of
13 work says we want PwC to conduct an analysis -- a damages risk
14 analysis that you would see in a products liability case, a
15 failure rate analysis, a plaintiffs have alleged in the MDL
16 that they've lost valuable information as a result of the
17 breach. We want you, PwC, to value that and, and help us with
18 our risk assessment.

19 Maybe it says that and your view of, of how that
20 initial paragraph from the SOW reads may be, you know, it may
21 be supported by that. I suspect the -- and obviously, the
22 reason we're making this motion is because we believe in
23 reading the contextual documents that the scope of work is
24 likely very different.

25 But look, we're willing to -- we're willing to deal

1 with whatever the result is on an in camera analysis of the
2 scope of work and the report. You look at those two things
3 side by side. You have the limited information in addition
4 that we've had. You have our arguments that this was spread
5 far and wide throughout the organization, including to scores
6 of those who have nothing to do with, with legal defense, and
7 we'll live with the Court's decision once it has full
8 information about the scope of work and what the work product
9 was from Capital One.

10 So unless the Court has other questions, I think
11 that's the most practical way to, to proceed if the Court has
12 any, any doubts about, one way or the other whether the
13 defendant has met its burden on this document.

14 THE COURT: So the decision of *B&C Seafood* that you
15 rely heavily on and just mentioned --

16 MR. SIEGEL: Yes.

17 THE COURT: -- talks about the case and distinguishes
18 that case from the *JPC* case.

19 The *B&C Seafood* case involved an instance in which
20 there was a single report prepared, and it talks about this
21 case being different than the *JPC* case in which there were two
22 separate reports.

23 In this case, we're dealing with a factual situation
24 like *JPC*, where there were actually two separate, well, more
25 than two but multiple reports prepared, Intel reports and

1 Mandiant and PwC.

2 I mean, in reading the *B&C* decision, it seemed
3 significant to the magistrate judge in that case that there was
4 a single report prepared and it had multiple reasons for being
5 prepared.

6 Any comment on that?

7 MR. SIEGEL: I, I think my, my first comment is I --
8 the context here, of course, is we have a single report. We
9 have a PwC report at issue in this case, but there's a --
10 there's a closer example that I think is like JPZ -- *JPC* that
11 we talk about, which is *Target*, where you have these very
12 specific, separately delineated SOWs and reports that come back
13 from the vendor versus what we have here, which is a single PwC
14 report. And so we, we think it's -- it is actually closer to,
15 to the *Seafood* case and unlike *Target* and, and *JPC*.

16 And again, you know, we have in this case the
17 in-house counsel, the Board, whatever it is, but just a single
18 scope of work where the first item they're doing is the root
19 cause analysis. And again, there's no delineation between root
20 cause analysis and the separate attendant, secondary or
21 tertiary purpose of legal services or legal help, which again,
22 maybe, maybe the SOW pages that have been redacted will
23 illuminate that.

24 And final, final thought of *Target*: The -- Verizon,
25 which was the vendor of *Target*, separated two teams. They had

1 separate people. And so we, we think it's very different.
2 Here it's obviously one team doing a single report. The
3 driving or at least primary purpose in the scope of work as far
4 as we can tell is that root cause analysis, which critically
5 includes these nontechnical reasons for the breach.

6 THE COURT: Okay. Mr. Balser?

7 MR. BALSER: Your Honor, I think you've put your
8 finger right on the key issue, not surprisingly. I think the
9 context in which this motion is made is important, and I think
10 the fact that multiple internal analyses by the company
11 regarding the root causes and the impacts of the cyber incident
12 have been produced, technical analyses performed by third
13 parties such as the Mandiant report and the iDiscovery
14 Solutions assessment of the impacted PII have been produced,
15 the company's forward-looking remediation plan has been
16 produced, and tens of thousands of other documents related to
17 these analyses or other self-evaluation such as our internal
18 audits and risk assessment have been produced.

19 That's in -- and on top of that, the plaintiffs have
20 taken already six 30(b)(6) witness depositions on 29 topics,
21 including on the root cause and remediation efforts, and
22 there's another 30(b)(6) deposition to come on the post-breach
23 investigations that the company undertook.

24 It's telling that, that the plaintiffs don't even
25 attempt to make a substantial need or exceptional circumstances

1 argument for this report because they simply can't make that
2 showing given the significant volume of, of information
3 relating to the root cause and remediation that have already
4 been produced by the company in this case.

5 We agree with Mr. Siegel that the key question for
6 the Court, whether it's under Rule 26(b)(4)(D) or the work
7 product doctrine, is whether PwC was retained to perform the
8 root cause analysis in anticipation of litigation, but the only
9 evidence on this point are Capital One's uncontroverted
10 declarations which clearly establish that PwC was retained
11 because of the litigation, and that absent litigation or
12 potential regulatory enforcement action here, PwC would not
13 have been retained at all, because as Your Honor points out,
14 there were multiple other analyses, including root cause
15 analyses, being undertaken by management at the time, and we
16 knew those would be discoverable, and those have been produced.

17 I think, you know, the testimony of Matt Cooper, the
18 general counsel of Capital One, is important for the Court to
19 focus on, and Mr. Cooper is a 25-year lawyer, very
20 sophisticated. He's the one who hired, along with
21 Mr. Finneran, PwC in this matter.

22 Paragraph 9 of his declaration said the need for PwC
23 to conduct an independent root cause analysis would not have
24 existed absent the pending litigation and risk of regulatory
25 enforcement action, and as Mr. Finneran points out -- and

1 Mr. Finneran was the prior general counsel, had been the
2 general counsel of Capital One for 24 years, is now secretary
3 of the company, working with the Board.

4 Your Honor pointed out paragraph 4 of his
5 declaration, which we think is very helpful to understand the
6 Board's fiduciary duties to manage this litigation, but he also
7 said in paragraph 7 that the significant litigation and
8 regulatory pressures following the cyber incident motivated the
9 Board's decision to retain an independent expert to conduct a
10 root cause analysis.

11 Plaintiffs have no evidence to contradict Capital
12 One's declarations, and so in order to find that the PwC --
13 that PwC here was not retained to special litigation, the Court
14 would essentially have to disregard the sworn testimony from
15 Capital One's senior executives, and there's really no basis to
16 do that.

17 And as Your Honor, I think, pointed out from the very
18 beginning here, you know, this is different from Mandiant in a
19 very, very important respect. Unlike Mandiant -- unlike the
20 Mandiant situation, PwC did not have a preexisting agreement
21 with Capital One to perform a root cause analysis and had never
22 performed a root cause analysis regarding a security incident
23 for Capital One before.

24 I do want to address the plaintiffs' primary
25 arguments here. I won't belabor the points because I think the

1 Court has a good handle on it, but I do want to respond to a
2 couple of the points that Mr. Siegel made.

3 The first relates to the parsing of the language in
4 the statement of work. The, the undisputed proof, as I just
5 outlined, shows that the engagement wouldn't have occurred
6 absent litigation, and as Mr. Siegel acknowledges, the
7 statement of work is presented in the conjunctive, saying that
8 it was being done for a root cause analysis and to assist the
9 legal department, and I think importantly here, it's important
10 to understand these are two sides of the same coin, and I think
11 the Court gets this. PwC's root cause analysis was provided in
12 order to assist with legal advice and strategy formulation
13 relating to ongoing and anticipated litigation.

14 Plaintiffs', you know -- look, the reliance on the
15 *B&C Seafood* case, we think, is misplaced. I think Your Honor
16 put your finger on it, but the key -- there are a couple key
17 distinguishing facts in *B&C* that don't make it, I think,
18 particularly on point here.

19 First, the expert in that case was retained before
20 litigation. The expert's report was required by the shipping
21 company for compliance with the internal -- the International
22 Safety Management Code, and I think most importantly, the court
23 found that the report was clearly designed for future risk
24 mitigation. It proposed safety-related corrective actions to
25 be taken.

1 If you look at Mr. Serbee's declaration from PwC, he,
2 he states that the PwC report does not contain any
3 recommendations for remediation.

4 So you have a situation here where we've got
5 litigation all over the place. Sixty cases have been filed.
6 The MDL proceedings are already underway. We've got regulatory
7 proceedings down the pike, congressional investigations on the
8 doorstep, already internal investigations going on on root
9 cause analysis, and the general counsel and the Board say in
10 order to manage this litigation, in order to fulfill our
11 fiduciary duties to oversee this litigation, we need an
12 independent, unvarnished view from an expert that we're going
13 to pay a lot of money to to provide us a protected analysis
14 that we can use to guide our, our duties as legal officers and
15 as fiduciaries to the company to manage this litigation, and
16 that's what was done.

17 And that's why I think the 26(b)(4)(D) paradigm is
18 important. There is a whole -- in addition to the, the
19 protections afforded traditional work product, the 26(b)(4)(D)
20 paradigm has an unfairness and kind of inequity element to it
21 that I think is important here; that is, you know, there is no
22 question that our able adversaries on the other side can't
23 piece together from the information that's been provided and by
24 hiring their own experts what happened here, what the root
25 causes were, including the nontechnical root causes, because

1 we've produced all that information to them.

2 They shouldn't be able to piggyback on our paid
3 expert work that we took steps to maintain confidentiality of,
4 careful steps, lawyers involved in every single one of the
5 interviews that PwC undertook, managed by the general counsel
6 and the former general counsel company to ensure protection.
7 They shouldn't get the benefit of that work.

8 They can recreate their own. We've given them
9 everything they need both in terms of documents and access to
10 witnesses to understand the root cause here, and they shouldn't
11 be able to piggyback on our protected confidential,
12 independent, expert work here.

13 The second thing I wanted to address is the argument
14 that because PwC focused on more than just the technical root
15 cause, that somehow that reflects the business purpose. I
16 think the Court needs to look no further than the allegations
17 in the representative complaint to understand that that doesn't
18 hold water.

19 All of these issues, issues relating to governance,
20 talent, etc., are squarely at issue in the various lawsuits
21 that have been filed against Capital One. For example, in
22 paragraph 9 of the operative representative complaint, in this
23 MDL, the plaintiffs allege that the actions and events giving
24 rise to the plaintiffs' claims partly include, and I quote,
25 decisions made by Capital One's governance in management

1 personnel.

2 Plaintiffs also claim in their lawsuit that Capital
3 One failed to implement policies and practices consistent with
4 the requirements of the FTC Act and of the Gramm-Leach-Bliley
5 Act, which are core governance issues. And they also further
6 allege in paragraph 123 of their complaint that Capital One
7 failed to effectively train all members of its workforce.

8 So these, these issues are squarely related to issues
9 in the litigation and are, are covered by both the work product
10 doctrine and Rule 26(b)(4)(D).

11 The, the fact that, I mean, if you think about what
12 they're saying here, so we, we get -- we pay \$3.5 million for
13 PwC to undertake an independent analysis of what happened, and
14 they do a thorough job, and we have an extensive report from
15 them. That is done to enable Matt Cooper to fulfill his duties
16 as general counsel or John Finneran, as secretary of the Board,
17 to advise the Board on their fiduciary duties to manage
18 litigation, but there are also some other things in that, that
19 report that are helpful to correct the issues that have been
20 identified.

21 There are no remedial recommendations made, as
22 Mr. Serbee testifies, but the fact that Capital One didn't just
23 put the report in the drawer but took the findings to improve
24 and map to the remediation efforts doesn't mean that this was
25 not a protected work product report from the outset.

1 And I would point out that the remedial efforts here
2 are intertwined with the litigation. I mean, Mr. Siegel
3 pointed out -- they pointed out in their opening brief, I think
4 it's an important point, the plaintiffs are seeking injunctive
5 relief here. They want to get an order from this Court
6 requiring changed practices from the business in Capital One,
7 and part of the Board's responsibility and Matt Cooper's
8 responsibility is to think about those claims for injunctive
9 relief and advise the company on remedial efforts that would
10 enable us to defeat those claims for injunctive relief.

11 So, so that's what I mean when I say there are two
12 sides of the same coin. These are very intertwined issues
13 here.

14 And so, you know, for these reasons, we think that
15 the evidence is overwhelming and it's clear that the driving
16 purpose here was the litigation, and the fact that there were
17 some additional uses to which the findings could be used in no
18 way vitiates the, the determination at the outset that this was
19 done because of the litigation, and absent the litigation, PwC
20 wouldn't have been hired at all because we had all these other
21 work streams being undertaken, including by Mandiant, of the
22 root causes of the breach.

23 Just very briefly on Mr. Siegel's plea for an in
24 camera review, the plaintiffs haven't come close to making a
25 showing to, to obtain an in camera review here. The, the issue

1 THE COURT: Back in? Okay. We'll give a minute and
2 see.

3 But thank you for that opportunity, Mr. Siegel.

4 MR. SIEGEL: I had a Ninth Circuit argument about two
5 weeks ago where my, my opposing counsel dropped off in the
6 middle of my, my argument, so I decided to wait.

7 MR. NEWBY: I think it was my partner, Norm.

8 MR. SIEGEL: That's right; it was your partner. He
9 disappeared, but he resurfaced. He came back.

10 THE COURT: Well, we'll readmit him if he accepts our
11 invitation to return.

12 MS. CLARE: I can take -- I can start on the waiver
13 argument, Your Honor. So -- and specifically with respect to
14 the Capital One employees. So as Your Honor -- or as
15 Mr. Balser was, was saying, this was a situation where we had a
16 report, a report that identified the root causes of the, of the
17 incident, and the Capital One Board of Directors then had an
18 obligation to put that into, into action. They couldn't just
19 put it in a vault.

20 And when they are disclosing it to Capital One's
21 employees, you have to remember we're talking here about the
22 work product doctrine, so we're not -- our employees are not
23 our litigation adversaries. There is no disclosure to
24 litigation -- our litigation adversaries.

25 The employees who received the report, it was tightly

1 controlled by the legal department. Most of the employees who
2 received the report received it via a method where they had
3 read-only access, so they weren't able to distribute it
4 further.

5 Additionally, Your Honor, you know, we have
6 identified the specific purposes for which the various
7 employees received the report. They were members of the legal
8 department. They were senior management. They were those
9 with enterprise-wide control or governance functions, who
10 needed to -- massive PwC findings to various remediation plans,
11 and they were doing so to ensure that those efforts were
12 comprehensive and satisfactory.

13 I think it's important, Your Honor, to also note that
14 when we talk about waiver, the waiver doctrine does not apply
15 under Rule 26(b)(4)(D).

16 THE COURT: I don't agree with that. Help me
17 understand, you think that there are no instances in which one
18 could waive the privilege for a retained but non-testifying
19 expert, such as I could use part of the report, but the rest of
20 the report could be protected?

21 MS. CLARE: If you use part of the report in
22 litigation as the court, then I think you could waive it, but I
23 think the -- with respect to Rule 26(b)(4)(D), the, the rule
24 itself is grounded in fairness. So you're looking at, as
25 Mr. Balser noted, where you have a situation where Capital One

1 has expended an extraordinary amount of money to conduct an
2 independent root cause analysis, the, the waiver argument --
3 the reason that you can't have waiver under those circumstances
4 is because it would be unfair to then provide the -- to have
5 forced Capital One to provide the report to its litigation
6 adversary.

7 So that's why whereas under the work product
8 doctrine, that's grounded generally in privacy concerns, so you
9 could have waiver in that circumstance, but there -- and courts
10 have held that there is no waiver under Rule 26(b)(4)(D).

11 It appears that Mr. Balser may have rejoined.

12 MR. BALSER: Your Honor, I'm on the phone. I
13 apologize, my internet connection just went kaput, but I'm now
14 back on the line. Can you hear me?

15 THE COURT: We can. Thank you.

16 MR. BALSER: I apologize for that.

17 THE COURT: No problem. I think Ms. Clare has
18 addressed the issues that I had with the waiver argument, and I
19 was explaining that I needed to hear some explanation and legal
20 argument as to really the employees, and I think I understand
21 Capital One's position on the regulators and the Ernst & Young
22 accountant issue.

23 I'm going to go ahead, I'm going to give Mr. Siegel
24 one last opportunity to --

25 MR. SIEGEL: Thank you, Your Honor. Just a few

1 points. So again, I just -- I want to focus on the
2 contemporaneous documents that we have. The other one I didn't
3 mention but I think responds directly to what Mr. Balser argued
4 is Exhibit 6, which is a memo from Rob Alexander to the risk
5 committee where -- it's page 2, where he's talking about the
6 nontechnical root causes of the event, including related to
7 governance and risk management, and then he says: These
8 nontechnical root causes are nuanced and not as readily
9 identifiable as the technical root causes. Therefore, our
10 identification of these root causes is very preliminary, not as
11 grounded, and subject to change based on the ongoing learnings
12 from all the root cause analyses.

13 And, and those other root cause analyses that relate
14 to what they describe as nontechnical root causes is the PwC
15 report.

16 So in that respect, it really is no different than
17 Mandiant. It's technical versus nontechnical just in terms of,
18 of root cause.

19 So here's the other couple points I'll make, and then
20 I'll stop. The number of people that saw this, it's not just a
21 waiver issue. It demonstrates that the primary purpose here
22 was a business purpose. There's no other reason you would have
23 it spread across that many people in the organization,
24 completely untethered to anything related to litigation,
25 including, like I said, marketing as being one example.

1 And I think for the Court's benefit and, and the
2 parties' benefit, you know, we, we can't divine what's in the
3 scope of work, and neither can the Court. It's, again, with
4 the caveat that we are very cautious about burdening the Court
5 with more work in this case, that's going to tell the tale
6 here.

7 I mean, again, if the scope of work is written in a
8 way that's tethered to litigation, I can envision one outcome.
9 If it's on the other end, as we think based on these other bits
10 and pieces from other documents, it is truly a root cause
11 analysis as its primary goal here, I think it is a different
12 outcome and one in our favor.

13 And if you look at those side by side, the scope of
14 work with the PwC report, I think that's going to drive the
15 results here, and again, one we'll live with for better or
16 worse.

17 THE COURT: Well, thank you for the briefing, I've
18 found it actually very helpful in understanding the issues, and
19 for giving me another week to be able to look at the fulsome
20 briefs that were able to get provided. I think it helped me
21 and probably helped the parties be able to have a few extra
22 days to prepare the opposition and the reply as well. The
23 briefing was very good.

24 This is a different issue than the Mandiant issue,
25 and I highlighted that at the beginning, and -- but it still is

1 a significant issue that I have considered, and I -- just so I
2 don't forget it, I don't view reviewing four pages of a
3 statement of work as being overburdening the Court when you,
4 you know, give me binders full of exhibits and things to read
5 on a motion. Four pages is, is no big deal.

6 But the question is whether it's necessary in this
7 case, and, you know, as Mr. Balser, I think, adequately
8 explained, the issues involved in this litigation are not what
9 necessarily caused, that is, the technical issue, but there are
10 also many nontechnical issues, and so when you talk about is
11 it, you know, geared towards the litigation, then, you know,
12 that's a very broad brush that one can or can't necessarily
13 know what was in the mind of the person who was drafting the
14 statement of work at the time.

15 So I, I don't think that there is a real reason for
16 me to have to look at the statement of work before I make a
17 decision in this case on this motion.

18 Again, this is different than Mandiant. We didn't
19 have a, a statement of work with the exact type, you know,
20 services to be done. It was basically transferred from Capital
21 One to the law firm to do the exact, almost the exact same work
22 under the same terms and conditions.

23 The timing of this I also find to be significant, to
24 be honest with you. You know, this is you had Mandiant
25 retained to get in there, to find things out, to take action

1 immediately, to find what actually caused the technical side of
2 things and do their report.

3 This hiring PwC was six or seven weeks after the
4 announcement, so I think the announcement was in late July.
5 They didn't retain PwC until mid-September. This was after
6 60-some lawsuits had been filed, and I think the Board
7 responsibly decided that they needed to have an independent
8 voice to come in and tell them what happened and why, and I
9 think when you read what we've talked about, and I understand
10 why the plaintiffs want to parse it, but I think you have to
11 read it, read it in the context of what was going on at the
12 time, that one would have to know what, what -- how this issue
13 happened technically and nontechnically to be able to analyze
14 and deal with the litigation issues that were ongoing and
15 pending, and with the regulatory issues that obviously had been
16 undertaken long before they were retained. So, you know, I
17 think that also is indicative of the Board needing to get its
18 own independent investigation.

19 The declarations from Cooper, Finneran, and Klane, I
20 think, do establish that the primary or driving force, the
21 dominant purpose, whatever language you want to use here for
22 this, was for the general counsel to get information so that
23 the general counsel could adequately advise his client, Capital
24 One, as to what, what they were facing as a result of this data
25 breach investigation.

1 So I do think clearly it was, you know, litigation
2 was ongoing. I think those declarations do establish that this
3 was -- that the primary purpose, driving force, whatever,
4 was -- and I don't think, you know, this, you know, the talking
5 about the 26(b)(4)(D) and work product, you know, 26(b)(4)(D),
6 you still have to show that it was done in anticipation of
7 litigation or to prepare for trial.

8 So, you know, I think that issue of, you know, what
9 was the purpose or the primary purpose of this report, the
10 driving force, comes into play in both of those analyses, and I
11 think on that, that issue, Capital One has established that the
12 driving force was for to deal with the litigation and the legal
13 issues and provide legal advice to the Board.

14 You know, these issues come up because they're used
15 for separate purposes. I mean, you, you wouldn't have to
16 determine what the driving force or the dominant purpose was if
17 it wasn't used for other purposes as well, so that, that sort
18 of answers the question is which one is the, the driving force.
19 That doesn't mean that it can't be used for other purposes and
20 that using it for other purposes then automatically
21 extinguishes any right that it has to protection under the work
22 product doctrine.

23 The waiver argument is an interesting one. I think,
24 you know, I, I was convinced by the, I believe, the explanation
25 in the Williams declaration about the regulators and the

1 obligations to if you don't provide me the information, you
2 know, you're going to be fined or have some certain issues to
3 deal with.

4 Obviously, it's kind of difficult when you have to
5 provide that kind of report to your regulators, who are, you
6 know, looking into what action they are going to take and
7 impose upon you, but that's the way the system works, and I
8 don't think that there was a waiver by complying with their
9 request for that information.

10 The Ernst & Young issue, you know, accountants, you
11 know, I think it's limited in its scope. Certainly there
12 wasn't a broad-based waiver there based on the issues having to
13 do with providing Ernst & Young some access to that report.

14 Klane, I think, adequately explains -- I wish I had a
15 little bit more information about the timing as to when these
16 people were given access to the report, you know, but I think
17 based on the overall record, you know, 150 sounds like a lot,
18 but when you're talking about 50,000 employees, it's not like
19 we sent a company-wide memo out to everybody about certain
20 things.

21 And I can see the rationale behind the we can't just
22 put this report in a drawer and ignore it. I think they have a
23 fiduciary responsibility if they get a report and it shows
24 issues that need to be addressed, you know, even though the
25 driving force was for the litigation, if it outlines certain

1 things that need to be done, I think the Board has an
2 obligation to relay that information, whether it's in the form
3 of providing the exact report or something else.

4 So when it all comes down to it, I think Capital One
5 in this instance has -- and it does have the burden of proof --
6 has met that burden of proof in this case. It has to me shown
7 that the primary purpose or driving force behind the retention
8 of PwC at the time period in September was to provide legal
9 advice to the Board through the general counsel and that the
10 disclosures that have been made to the regulators, the
11 accountant, and to other employees within Capital One, don't
12 constitute a waiver. So I'm going to deny the motion to compel
13 for those reasons.

14 Before I let you-all go, though, I'm concerned a
15 little bit about the parties sealing information in the
16 memoranda that at least when I see it -- and again, this is --
17 these are quotes from exhibits that very well may be entitled
18 to be filed under seal because those exhibits have confidential
19 information in them.

20 It appears to me that in many instances, the parties
21 are filing -- or asking the Court to let material remain under
22 seal just because it was quoted in an exhibit that may be under
23 seal. For example, you know, the statement of work has some
24 specific information in there that, you know, is protected by
25 for business purposes or whatever.

1 And I'm going to just sort of take a minute, and if
2 you-all could maybe look at this and help me understand why
3 some of these issues are, are -- and I'll do it in a way
4 hopefully that we can not disclose exactly the information --
5 but starting with the plaintiffs' memorandum in support of
6 their motion to compel, there are -- and I think Capital One
7 has agreed that the redactions on page 6 probably aren't
8 necessary, but the redaction on page 1, we go down to the
9 introduction paragraph, the fifth, fifth line -- fourth line
10 down, where it says, "The cyber event plan, a plan consisting
11 of," and then the description of that plan or the quote from
12 that description has been redacted.

13 I'm, I'm having a little bit of a hard time
14 understanding why that description of the plan in and of itself
15 is something that is worthy of being filed under seal, and I
16 don't know, Mr. Angle, whether you're the right person to call
17 on for this, you seem to be dealing with a lot of the sealing
18 motions, or not, or whether Mr. Balser or Ms. Clare or others,
19 but, I mean, that -- the language that appears in that quote
20 doesn't seem to me to be sensitive business information that
21 needs to be filed under seal, and I think, you know, to some
22 extent has been discussed in briefing otherwise where
23 multi-reasons and other purposes and even in the declarations,
24 I think, have had some mention of there being, you know, the
25 four different areas in which it was done and certain things

1 being mapped into other things.

2 So can anybody help me understand why that specific
3 information, which is also, I think, included in the redactions
4 on page 7, why that would be considered sensitive business
5 information?

6 MR. ANGLE: Your Honor, I'm obviously on the
7 pleadings relating to sealings. I'll try and address it, and
8 I'll just say that, you know, in looking at it at this moment,
9 I agree with your point that it does not appear to be currently
10 confidential, and we have tried to be sensitive to Your Honor's
11 concerns because I know you definitely want to make sure we're
12 not overdesignating, and I will say that we have -- we're not
13 quite perfect, and we're still working at it, but that's
14 something that we'll definitely take another look at.

15 THE COURT: Well, and I -- let me just -- instead of
16 going through them, and I was prepared to sort of go through
17 them one by one, but I think that it probably isn't worthy of
18 these large number of people's time and efforts. I'm sure
19 you've got more productive things to do.

20 I'll tell you that my view is that -- and I want to
21 be reasonable in this regard. I don't think that by including
22 a quote from an exhibit that is -- I will allow to file under
23 seal, that that in some way waives the right for the entire
24 exhibit to remain under seal.

25 I don't want to force on the parties that if you're

1 going to file a, you know, 40-page exhibit, that you go through
2 and redact, you know, only the specific parts of that exhibit
3 that need to be under seal, that there's a lot of it. I mean,
4 some like the Mandiant statement of work, given its
5 significance, I think we needed to do that, but in general, you
6 know, if you're, if you're going to quote from something, I
7 don't think you can determine that that's going to be a waiver
8 of any ability to keep the exhibit confidential.

9 So I'm going to ask you-all, and this only goes to
10 the specific redactions in the briefing, not to the exhibits
11 themselves, to go back and look at those redactions and let me
12 know. In the response that was done for the initial brief, you
13 know, I think there was a comment sort of in passing that these
14 redactions are appropriate as to three of the four pages in
15 which there were redactions, but, you know, I need to go back
16 and look at those before I sign an order that says I'm finding
17 that that information should be filed under seal, and when I
18 went back and looked at those specific redactions, I was having
19 a hard time.

20 So I had the sense that it may be some concern by the
21 parties that if they allowed certain quotes to be done, that
22 they may be waiving things. And I may just be missing
23 something that really is important, but I know it's ought to go
24 back and certainly for all of these briefs, file something and
25 let me know. I understand the exhibits part. I don't need any

1 supplementation of why you think certain exhibits should be
2 filed under seal.

3 And the reply has a few things in there that, page 16
4 is the only page in which there is a -- well, maybe not 16. I
5 think there's only, like, one -- page 6, there are a few quotes
6 in the reply that have the same kind of issues that I'm not so
7 sure necessarily need to be filed under seal.

8 So take a look at that. I'm going to wait until I
9 get some sort of supplemental pleading before I actually rule
10 on those motions -- three motions to seal that are pending.

11 MR. ANGLE: Yes, Your Honor. Your guidance is very
12 helpful. We'll take a second look at those and get something
13 back on file early, early this coming week to clarify the
14 issues.

15 THE COURT: Okay. Anything else that the parties
16 want to raise before we finish for this week?

17 MR. SIEGEL: Nothing from plaintiffs, Your Honor.
18 Thank you.

19 THE COURT: Okay. Last chance, Mr. Balser.

20 MR. BALSER: Thank you, Your Honor. I again
21 apologize for the technical difficulties at the end there. I
22 appreciate your patience.

23 THE COURT: Well, Ms. Clare ably stepped in and took
24 care of it for us, so okay?

25 MR. BALSER: She's my lawyer.

1 THE COURT: That's right. I was going to put
2 Mr. Angle on the spot, but I could see he was a little worried
3 about that.

4 MR. ANGLE: I was looking forward to it actually.

5 THE COURT: All right. Well, you-all have a good
6 week.

7 MS. CLARE: Thank you, Your Honor.

8 THE COURT: Thank you. You too.

9 A VOICE: Thank you. Bye-bye.

10 MS. CLARE: Bye-bye.

11 (Which were all the proceedings
12 had at this time.)

13

14 CERTIFICATE OF THE REPORTER

15 I certify that the foregoing is a correct transcript of
16 the record of proceedings in the above-entitled matter.

17

18

19

_____/s/
Anneliese J. Thomson

20

21

22

23

24

25