

**3. A ruling from the U.S. District Court for the Northern District of Mississippi ordering that the Defendant was required to sequester documents that were subject to a claim of privilege by the Plaintiff under Federal Rule of Civil Procedure 26(b)(5)(B) and the Defendant could not view or use any of the putatively privileged information pending resolution of the privilege claim.**

In *GXO Logistics Supply Chain, Inc. v. Young Living Essential Oils, LC*, No. 23-CV-61-SA-RP, 2024 WL 3930501 (N.D. Miss. Aug. 23, 2024), U.S. Magistrate Judge Roy Percy addressed the sequestration procedures required by Rule 26(b)(5)(B) once a party has received notice of a claim of privilege as to information previously produced.

In this action resulting from the breakdown of the parties' business relationship, Plaintiff produced 16 documents during discovery that it later claimed contained privileged information. *Id.* at \*1. Pursuant to Rule 26(b)(5)(B), Plaintiff notified Defendant of the claim of privilege as to those documents, and Defendant sequestered the documents pending resolution of Plaintiff's privilege claim.

But the parties disagreed over whether Defendant, having sequestered the documents, could review the documents in order to assess and oppose Plaintiff's claim of privilege. Plaintiff argued that Defendant should not be permitted to view the sequestered documents pending resolution of the privilege claim, but Defendant argued that it should be permitted to view and use the putatively confidential information in opposing the privilege claim. Plaintiff filed a motion to prohibit Defendant from viewing the subject documents pending resolution of the privilege claim.

Magistrate Judge Percy began his analysis by explaining that Rule 26(b)(5)(B) provides, in relevant part, that after receiving notice of a claim of privilege as to information previously produced, the receiving party "must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; ... and may promptly present the information to the court under seal for a determination of the claim."

Magistrate Judge Percy referred to the reasoning of a prior decision, *In re Google RTB Consumer Privacy Litigation*, No. 21-cv-02155-YGR (VKD), 2022 WL 1316586 (N.D. Cal. May 3, 2022), which explained that the goal of Federal Rule of Evidence 502(d) was to promote more efficient and cost-effective discovery in cases involving substantial quantities of ESI. He reasoned that to accomplish this goal, the rule permits parties to avoid the need for exhaustive preproduction privilege reviews by providing a mechanism for parties to claw back privileged materials after the fact without waiving privilege. But he noted that allowing "receiving parties to examine and brief the contents of documents subject to a claw back notice would defeat the purpose of the rule, as parties would likely choose to undertake an exhaustive pre-production review to identify and withhold privileged information rather than risk a waiver for briefing purposes only."

Magistrate Judge Percy explained that "in the typical circumstances contemplated by Rule 502(d), where a party produces a large volume of documents without exhaustive privilege review

and later discovers that the production includes privileged material, nothing in Rule 26(b)(5)(B) requires a court to permit the receiving party to examine and brief the contents of the putatively privileged material in challenging the claim of privilege. *Id.* at \*2 (quoting *In re Google*). He also pointed out that Rule 26(b)(5)(B) permits parties to “present” the privileged material to the court under seal.

Magistrate Judge Percy noted that there was no indication that the information Plaintiff sought to claw back had already been used or disclosed in a substantive way in the litigation, such as in a brief filed with the court or in deposition testimony about the information. *Id.* at \*3. He therefore distinguished this case from one where a document had already been used or disclosed in a substantive way in the litigation before the producing party attempted to claw it back, in which it would be impracticable or unreasonable to require parties to avoid discussing the contents of a putatively privileged document in briefing and argument challenging the claim of privilege.

Magistrate Judge Percy found that it was not impracticable or unreasonable to prohibit Defendant, when challenging Plaintiff’s claim of privilege, from discussing the specific contents of the putatively privileged information. Accordingly, Magistrate Judge Percy granted Plaintiff’s motion. He ordered that pending resolution of the dispute over Plaintiff’s clawback request, Defendant could not view the sequestered documents or use any putatively privileged information it may have learned when viewing the subject documents prior to receiving the clawback request.