2. A ruling from the U.S. District Court for the Southern District of Ohio finding that Plaintiff had waived privilege over certain documents it had inadvertently produced when it failed to timely rectify the disclosure, and that the Plaintiff could not preclude the Defendant from using the privileged documents under either the Federal Rules of Civil Procedure or the parties' clawback agreement.

In *LifeBio, Inc. v. Eva Garland Consulting, LLC*, No. 21-cv-722, 2023 WL 3258586 (S.D. Ohio May 4, 2023), U.S. Magistrate Judge Kimberly A. Jolson addressed whether either the Federal Rules of Civil Procedure or the parties' clawback agreement precluded Defendant from using indisputably privileged emails that Plaintiff had inadvertently produced in light of Plaintiff's failure to timely assert the privilege.

Plaintiff, a health technology company, brought claims against Defendant, a consulting company, for breach of contract and breach of good faith and fair dealing. *Id.* at *1. In the course of responding to Defendant's discovery demands, Plaintiff produced emails to Defendant that the parties would later agree, and Magistrate Judge Jolson would later find, contained privileged material. *Id.* at *1-3. Almost a year after the emails' inadvertent disclosure, Plaintiff applied to the court to strike the emails from the record, including from Defendant's motion for summary judgment, Defendant's opposition to Plaintiff's motion for summary judgment, and two deposition transcripts. *Id.* at *1-2. Because there was no question that the emails were privileged, the remaining question was whether Plaintiff was entitled to strike the emails from the record under either the parties' clawback agreement or Federal Rule of Evidence 502.

Magistrate Judge Jolson started her analysis with an examination of the relevant legal rules. She noted that whether documents are privileged is a question of state law (in this case Ohio law), but whether privilege has been waived in federal court is a question of federal law governed by Federal Rule of Evidence 502. Normally, providing privileged material to another party in federal court waives the privilege with respect to that material. However, the Federal Rules of Evidence provide at least two ways for a party to limit its waivers of privilege: Federal Rule of Evidence 502(b) and Federal Rule of Evidence 502(e). Rule 502(b) provides that disclosure of privileged material does not operate as a waiver if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error ...." *Id.* at *3. Rule 502(e) states that "[a]n agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order," which Magistrate Judge Jolson stated "'codifies the well-established proposition' that parties may agree 'to limit the effect of waiver by disclosure between or among them.'" *Id.* at *4 (quoting the Federal Rules of Evidence advisory committee notes on Rule 502(e)). Although Magistrate Judge Jolson noted that the Sixth Circuit had not yet taken up the issue, she held that Rule 502(e) allows a clawback agreement between the parties to modify the specific requirements of Rule 502(b). *Id.* at *4-5.

Magistrate Judge Jolson held that Plaintiff failed to appropriately claw back the emails it produced under either the parties' agreement or the requirements of Rule 502(b). She noted that the parties' agreement provided that parties would "have ten business days" in which to do three things: "(1) assert a claim for privilege in writing; (2) produce a privilege log setting forth the basis of privilege for each privileged document; and (3) produce redacted versions of the

documents to the extent that only portions of them were privileged." *Id.* at *5. This agreement was ratified by an order of the court. Magistrate Judge Jolson found that Plaintiff's claim under the clawback agreement failed because Plaintiff did not make its request within 10 business days. *Id.* at *6. Additionally, Plaintiff failed to either produce a privilege log or redacted versions of the emails at issue. As such, Plaintiff waived privilege under the parties' binding agreement.

Magistrate Judge Jolson rejected Plaintiff's argument that Defendant could not use the privileged emails because Defendant failed to comply with Fed. Civ. R. 26(B)(8)(b) by "not promptly returning, sequestering, or destroying the specific information and using the information despite the claim being unresolved and Plaintiff maintaining privilege." *Id.* at *7. She found that under Rule 26(B)(8)(b), which was partially incorporated into the parties' clawback agreement, Defendant would be obligated to return, sequester, or destroy the privileged material only once Plaintiff made a claim of privilege. But Plaintiff did not make a claim of privilege until after privilege had already been waived.

Magistrate Judge Jolson held as well that Plaintiff could not claw back the emails under Rule 502(b). Although Plaintiff's disclosure was plainly inadvertent, as required under the rule, Plaintiff did not "promptly take steps to rectify the error" and so could not avail itself of Rule 502(b)'s exception to waiver. To demonstrate this, Magistrate Judge Jolson described a series of failures to "protect the sanctity of the attorney-client privilege repeatedly, over a ten-month period." *Id.* at *8. She noted that Defendant informed Plaintiff of the inadvertent disclosure, but Plaintiff did not take any action for a month, despite "repeated prompting by Defendant." Plaintiff did not expressly assert privilege at that time. After this response by Plaintiff, Defendant asked that the parties confer regarding the emails and the privilege and waiver issues surrounding it, but Plaintiff never responded and made no more attempts over many months to claw back the emails. Magistrate Judge Jolson further highlighted that Plaintiff's counsel allowed multiple witnesses, including Plaintiff's CEO, to answer questions in depositions about the privileged emails and never brought the privilege issue to the court's attention. At one of those depositions, "Plaintiff's counsel stipulated to the at-issue email, then objected to it, then agreed with Defendant's counsel that the email had been stipulated to." Magistrate Judge Jolson also noted that Plaintiff did not raise a privilege issue in its opposition to Defendant's motion for summary judgment, which used the emails as an exhibit, nor when the emails were used in response to Plaintiff's motion for summary judgment. Finally, she noted that no request was made to put the emails under seal or any portion of the summary judgment briefing that incorporated them.

Magistrate Judge Jolson held that "nothing about Plaintiff's attempts to rectify this situation was attentive, diligent, or even 'reasonable,'" and "[n]or were they 'prompt[ ].'" *Id.* at *9. She stated that Plaintiff "did not have a heavy burden to assert privilege but still failed to meet it, despite ample opportunity to do so." *Id.* at *8. Instead, Plaintiff "ignored five emails from Defendant's counsel about the at-issue documents" and "waited over 300 days," which was "long after the proverbial cat was out of the bag." *Id.* at *8-9. Magistrate Judge Jolson noted that "it was Plaintiff's obligation to treat the privilege like a crown jewel" and it failed to do so. She therefore denied Plaintiff's motion to strike the privilege material from the record. *Id.* at *9.