

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

FILED
DISTRICT COURT
OKLAHOMA COUNTY, OKLAHOMA
October 9, 2026 4:58 PM
RICK WARREN, COURT CLERK
Case Number CJ-2025-2626

BILLY & LACY HURSH,

Plaintiffs,

v.

STATE FARM FIRE & CASUALTY COMPANY;

MARK D. WELTY; and MARK D. WELTY

INSURANCE AGENCY, INC.,

Defendants.

Case No. CJ-2025-2626

**DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY’S
EMERGENCY MOTION TO STRIKE PLAINTIFFS’ SUPPLEMENT TO PLAINTIFFS’
MOTION TO COMPEL RE-PRODUCTION OF ELECTRONICALLY
STORED INFORMATION IN THE FORM DEFENDANT STATE FARM ELECTED**

INTRODUCTION

Defendant State Farm Fire and Casualty Company (“State Farm”) moves to strike Plaintiffs’ October 8, 2026, Supplement and its accompanying exhibits, prohibit further use or disclosure of the materials identified below until State Farm’s privilege claims are resolved, and award State Farm the reasonable attorney fees and expenses incurred in addressing Plaintiffs’ violation. The governing statute is explicit. Once State Farm notified Plaintiffs that specified discovery materials were subject to claims of attorney-client privilege and work-product protection, Plaintiffs were required to “return, sequester, or destroy” those materials and could not “use or disclose” them until the privilege claims were resolved. *See* 12 Okla. Stat. § 3226(B)(5)(b).

Plaintiffs do not dispute receiving that notice, and the privilege issue remains pending before the Court. Yet, even after that notice, Plaintiffs used the disputed materials in their October 8 Supplement, filed them with the Court, and disclosed them to a retained expert. And these were not isolated mistakes. The October 8 filing was the third time Plaintiffs filed or tried to use the

same disputed document after notice. Section 3226(B)(5)(b) prohibits all use, not merely public disclosure. The fact that the last filing was under seal does not cure the violation, and similarly cannot cure the disclosure of the information to Plaintiffs' expert. Because the statute prohibited each of those actions pending resolution of State Farm's claims, the Court should strike the Supplement and its exhibits, prevent further use or disclosure of the materials, and award State Farm the fees and expenses caused by Plaintiffs' violation of the law.

RELEVANT FACTS

State Farm has notified Plaintiffs' counsel that the documents at issue are subject to a claim of privilege. As Plaintiffs freely admitted in their Sept. 23, 2026, Notice of Supplemental Authority, State Farm notified Plaintiffs that discovery materials marked HUR00158702-09 and HUR00158712-19 contain materials subject to attorney-client privilege and the work product doctrine. *See* Pls. Not. of Supp. Auth., at 6, Ex. 24 (Sept. 23, 2026). State Farm has already moved the Court to strike Plaintiffs' previous use of these materials. *See* Def's Br. in Supp of App. (Oct. 5, 2026). The Court is currently determining whether the materials are privileged.

Even while State Farm's claim of privilege is currently pending before the Court, Plaintiffs continue to use the documents subject to State Farm's privilege claims. Most recently, on October 8, 2026, Plaintiffs filed State Farm's privileged materials in their "Supplement" to their Motion to Compel, which argues that Plaintiffs are entitled to reproduction of metadata.

ARGUMENT

I. Section 3226(B)(5)(b) Prohibits Plaintiffs from Using or Disclosing the Claimed Privilege Materials Pending Resolution of State Farm's Privilege Claims.

Oklahoma law provides:

If information produced in discovery is **subject to a claim of privilege** or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being

notified, **a party shall promptly return, sequester, or destroy the specified information and any copies the party has; shall not use or disclose the information until the claim is resolved**; shall take reasonable steps to retrieve the information if the party has disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.

12 Okla. Stat. § 3226(B)(5)(b) (emphasis added).

This motion does not require the Court to resolve State Farm’s privilege claims. Section 3226(B)(5)(b)—the applicable statute here—governs the period after notice and *before* that determination. During that period, Plaintiffs cannot disclose the specified information.

Federal cases interpreting §3226(B)(5)(b)’s federal analog, Fed. R. Civ. P. 26(b)(5)(B), uniformly conclude that filing documents subject to a claim of privilege and making arguments about them after notice is “a clear violation.” *Marshall v. McGill*, No. CV 10-01436-PHX-ECV, 2011 WL 13118589, at *2 (D. Ariz. June 8, 2011); *Doe v. Lahey Health Sys., Inc.*, No. 19-CV-11014-PBS, 2020 WL 13561721, at *2 (D. Mass. Aug. 12, 2020) (“[Party] explicitly violated Rule 26.”); *Lin v. CGIT Sys., Inc.*, No. CV 20-11051-JGD, 2023 WL 12023448, at *3 (D. Mass. Sept. 29, 2023) (“[Party] failed to follow the directives of Rule 26(b)(5)(B).”).

Parties may not even review a document after receiving notice that it contains privileged material. *United States Equal Emp. Opportunity Comm’n v. George Washington Univ.*, 502 F. Supp. 3d 62, 74 (D.D.C. 2020) (“[W]hen a party makes a claim of privilege pursuant to Rule 26(b)(5)(B), the opposing party has two choices: it may accept the claim or it may challenge the claim by providing the material under seal to the Court for determination of the issue of privilege; it may not, however, review the material to determine for itself whether the claimed privilege applies.” (collecting cases)); *Greater New York Taxi Ass’n v. City of New York*, No. 13-CV-3089(VSB)(RWL), 2018 WL 2316629, at *6 (S.D.N.Y. May 8, 2018) (“Upon being notified that the documents were privileged, Plaintiffs should have immediately ceased their review of the

clawed back documents.”).

II. Plaintiffs Violated Oklahoma Law by Filing the Materials, Relying on Them, and Disclosing Them to an Expert.

Despite the clear law prohibiting them from doing so, Plaintiffs have filed what they call a “Supplement” to their Motion to Compel that attaches materials subject to State Farm’s claim of privilege, and they *admit* that they have given the materials subject to a claim of privilege to a retained expert.¹ This is a clear violation of 12 Okla. Stat. § 3226(B)(5)(b). Plaintiffs’ counsel, thus far, have offered no explanation or excuse for their behavior. *See* Okla. R. Prof. Conduct 3.4(d) (“A lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.”).

Arguing that the documents are not privileged “is no excuse for failing to follow” the Rule. *See Doe*, 2020 WL 13561721, at *2. As § 3226(B)(5)(b) states, a party “shall not use or disclose the information until the claim [of privilege] is resolved,” regardless of whether they believe the claim is invalid. *See Raymond v. Spirit AeroSystems Holdings, Inc.*, No. 16-1282-JTM-GEB, 2017 WL 2831485, at *15 (D. Kan. June 30, 2017) (Faced with a claw-back request, “[i]t was not Plaintiffs’ prerogative to unilaterally determine whether the information received anonymously was truly proprietary, confidential, privileged, or some combination of those labels, and use the information it deemed appropriate.”) (quoting *Radiance Aluminum Fence, Inc. v. Marquis Metal Material, Inc.*, 335 F.R.D. 371, 377 (E.D. Mich. 2020)); *McDermott Will & Emery LLP v. Superior Court*, 10 Cal. App. 5th 1083 (2017) (affirming disqualification of counsel who used inadvertently

¹ State Farm will address the substance of Plaintiffs’ Motion to Compel in its forthcoming response. Plaintiffs’ Supplement establishes little more than that Plaintiffs paid their expert to compare approximately three near-duplicate PDFs. The expert concluded that the PDFs differ from one another, a fact apparent from the face of the documents. Nonetheless, the expert opines that additional metadata is necessary to “confirm” what is obvious from the documents. The documents’ differences and characteristics that Plaintiffs seek to confirm are not subject to serious dispute and, in any event, are irrelevant to the issues before the Court.

disclosed privileged material without notifying the privilege holder).

III. The Court Must Strike the Supplement and the Disputed Materials.

The Court has inherent authority to control its own docket and may therefore strike material from the record. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44–45 (1991); *United States v. Miljus*, No. CIV-06-1832-PK, 2009 WL 2095981, at *1 (D. Or. Feb. 19, 2009), *report and recommendation adopted*, No. CIV. 06-1832-PK, 2009 WL 1211307 (D. Or. May 1, 2009). When counsel ignore their obligations regarding privileged materials, courts strike improperly filed materials. *See Lin v. CGIT Sys., Inc.*, No. CV 20-11051-JGD, 2023 WL 12023448, at *3 (D. Mass. Sept. 29, 2023) (“Accordingly, CGIT is entitled to have the email stricken from the record.”); *Radiance Aluminum Fence, Inc. v. Marquis Metal Material, Inc.*, 335 F.R.D. 371, 377 (E.D. Mich. 2020).

Because Oklahoma law prohibits Plaintiffs from “using” documents subject to a claim of privilege, the Court may not entertain Plaintiffs’ arguments about the documents. *E.g., YWCA of Oklahoma City v. Melson*, 1997 OK 81, 23 n.42 944 P.2d 304, 311 (recommending procedures for performing an *in camera* inspection, including maintaining documents in a sealed container until the court assesses privilege). Accordingly, the Court must strike not only the exhibits consisting of and containing the materials subject to State Farm’s privilege claims, but also the Supplement itself because its arguments are based on these documents.

IV. Fees and Other Curative Relief Are Warranted.

State Farm additionally requests that the Court sanction Plaintiffs for their repeated violations pursuant to its inherent authority. A sanction, including at least an award of attorneys’ fees State Farm has incurred in presenting this issue, is appropriate. *Marshall v. McGill*, No. CV 10-01436-PHX-ECV, 2011 WL 13118589, at *3 (D. Ariz. June 8, 2011) (“Defendants obviously

disputed Plaintiff's claim that the document was privileged but that issue was for the court, not Defendants, to resolve. Given the clear violation of Rule 26(b)(5)(B) and [applicable ethical rules], a sanction is warranted.”); *see Chang v. Able C&C Co.*, 778 F. Supp. 3d 654, 675 (D.N.J. 2025), *appeal denied*, No. 23-CV-2590 (KSH) (JRA), 2025 WL 3158396 (D.N.J. Nov. 12, 2025) (“[Counsel’s] continued participation in this case, after wrongfully possessing and relying on [opposing party’s] Privileged Documents, is highly prejudicial to [opposing party]. Therefore, [counsel], but not [counsel’s client], is ordered to pay [opposing party’s] attorney's fees and expenses in connection with the instant Motion.”); *Mayorga v. Ronaldo*, 606 F. Supp. 3d 1003, 1027 (D. Nev. 2022), *aff’d*, No. 22-16009, 2023 WL 8047781 (9th Cir. Nov. 21, 2023) (“[T]he district court found that the employee acted in bad faith warranting dismissal when he held on to documents that contained attorney-client work product and confidential information and relied on them in the prosecution of his case.” (citing *Xyngular Corp. v. Schenkel*, 200 F. Supp. 3d 1273, 1318 (D. Utah 2016), *aff’d*, 890 F.3d 868 (10th Cir. 2018))). Plaintiffs have repeatedly violated § 3226(B)(5)(b) in plain view of the Court, and evidence of their violations appears on the docket. *See* Pls. Not. of Supp. Auth., at 6, 9-13, Exs. 14, 24 (Sept. 23, 2026); *see generally* Pls. Supp. to Pls’ Mot. to Compel Re-prod. (Oct. 8, 2026).

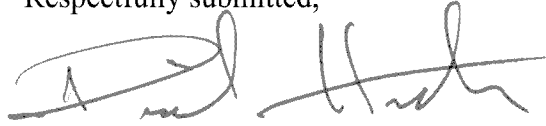
At a minimum, State Farm should not bear the expense of enforcing obligations that § 3226(B)(5)(b) imposed automatically upon Plaintiffs after notice. Thus, State Farm respectfully requests an award limited to the reasonable fees and expenses it incurred in investigating the disclosure, preparing this motion, and securing compliance.

CONCLUSION

For the reasons set forth above, the Court should strike the October 8 Supplement and all exhibits containing, quoting, describing, or relying on the disputed materials; direct Plaintiffs to

cease using or disclosing the disputed materials pending the privilege ruling; require Plaintiffs to sequester or return the materials and all copies, consistent with § 3226(B)(5)(b); require Plaintiffs to identify persons to whom the materials were disclosed and take reasonable steps to retrieve the materials; require Plaintiffs to instruct their expert not to review, use, disclose, or rely on the materials; and award State Farm its reasonable fees and expenses incurred in bringing this Motion.

Respectfully submitted,



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CERTIFICATE OF MAILING

I do hereby certify that on October 9, 2026, a true, correct and exact copy of the above and foregoing document was served by placing same in the United States mail, with proper postage thereon duly prepaid, to those parties as listed below:

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A handwritten signature in black ink, appearing to read "David R. Herber", written over a horizontal line.

David R. Herber