

STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24CV029851-590

WATER.IO LTD (f/k/a WaterIO Ltd.),

Plaintiff,

v.

SEALED AIR CORPORATION,

Defendant.

**ORDER ON
DISCOVERY DISPUTES**

1. This case arises out of a contract dispute between Plaintiff Water.io Ltd and Defendant Sealed Air Corporation. Pending are two discovery motions filed by Water.io. (ECF Nos. 44, 124.) These motions concern a pair of documents that Sealed Air produced during discovery and later sought to retrieve on the ground that they are protected by the attorney-client privilege or work-product immunity and had been inadvertently produced. Now, Water.io asks the Court to determine that the documents are not privileged or immune.

2. **Background.** The consent protective order negotiated by the parties, and adopted by the Court, contains procedures for dealing with the inadvertent disclosure of purportedly privileged materials. In short, the parties agreed that inadvertent disclosure is not a waiver of privilege or immunity and that the disclosing party may assert a claim of privilege or immunity after the fact. This is commonly known as a claw-back provision. When the disclosing party attempts to claw back a document that it inadvertently produced, the receiving party has the option to return the document or to seek “a ruling from the Court that such Discovery Materials are not

subject to any privilege and are not subject to return and reclamation.” (Consent Protective Order ¶ 15, ECF No. 21.)

3. Here, the Court must determine the status of two documents that Sealed Air has clawed back.

4. The first dispute concerns a report prepared by William England, a Sealed Air employee, in May 2021. This document—the England Report, for ease of reference—contains England’s analysis of the parties’ contractual relationship. Sealed Air produced the England Report in May 2025 and clawed it back about three weeks later, asserting that it is protected by work-product immunity. Water.io then moved for a determination that the document is not protected. With the benefit of briefing, the Court held a hearing on this motion on 28 August 2025.

5. Not long after the hearing, a second dispute arose. This dispute concerns an e-mail that England sent to his supervisor, Ronald Cotterman, in May 2021. Sealed Air notified Water.io on 22 August 2025 that this document—the Cotterman E-mail, for ease of reference—was privileged and had been inadvertently produced. After Water.io raised this dispute under Business Court Rule 10.9, the Court authorized it to file a motion for relief. This second motion has been briefed, and in the interest of efficiency, the Court elects to decide it without an additional hearing. *See* BCR 7.4 (“The Court may rule on a motion without a hearing.”).

6. **England Report.** The parties dispute whether the England Report is protected by work-product immunity. The Court concludes that it is.

7. Rule 26(b)(3) of the North Carolina Rules of Civil Procedure protects “documents and tangible things” that were “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s consultant, surety, indemnitor, insurer, or agent” N.C. R. Civ. P. 26(b)(3). “Materials prepared in the ordinary course of business are not protected, nor does the protection extend to *facts* known by any party.” *Willis v. Duke Power Co.*, 291 N.C. 19, 35 (1976). “The test is ‘whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’” *In re Summons Issued to Ernst & Young, LLP*, 191 N.C. App. 668, 678 (2008) (quoting *Cook v. Wake Cnty. Hosp. Sys.*, 125 N.C. App. 618, 624 (1997)); *see also id.* (referring to “work-product privilege” as “an elastic concept”).

8. The England Report itself contains little information about the circumstances surrounding its creation. To ascertain these circumstances, the Court performed an in camera review of additional privileged communications submitted by Sealed Air. These communications show that Sealed Air’s in-house counsel, Lori Tyliniski, directed England to prepare the report under a reasonable apprehension of potential litigation with Water.io. *See Willis*, 291 N.C. at 35 (noting that immunity applies to material “prepared under circumstances in which a reasonable person might anticipate a possibility of litigation”). Indeed, Sealed Air’s outside counsel received England’s report and began handling communications with Water.io soon after he completed it. No evidence suggests that England would have conducted this

analysis or prepared this type of report in the ordinary course of his duties. The England Report therefore falls comfortably within the protections of work-product immunity. *See, e.g., Addison Whitney, LLC v. Cashion*, 2020 NCBC LEXIS 72, at *49–50 (N.C. Super. Ct. June 10, 2020) (concluding that investigative report prepared at the direction of counsel was protected by work-product immunity).

9. Even so, Water.io contends that it is entitled to retain and use the document because Sealed Air waived its claw-back rights. The Court disagrees.

10. Our Court typically interprets claw-back provisions like the one contained in the consent protective order “to contain implicit requirements that a producing party’s initial privilege review must have been reasonable and its assertion of privilege and claw-back must have been timely.” *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2019 NCBC LEXIS 54, at *30 (N.C. Super. Ct. Aug. 16, 2019). A waiver may occur when “a producing party acts in a completely reckless manner with respect to its privilege.” *Id.* at 30–31; *see also Morris v. Scenera Research, LLC*, 2011 NCBC LEXIS 34, at *27–29 (N.C. Super. Ct. Aug. 26, 2011) (discussing factors related to inadvertent disclosure with and without a claw-back agreement).

11. The record shows that Sealed Air’s initial review for privilege and immunity was reasonable. Its counsel took the usual—and reasonable—step of screening a large set of electronic documents using key words and then reviewing those potentially protected documents more closely before producing them. (*See* Aff. Rose ¶ 6, ECF No. 73.) The England Report went undetected because it does not contain the search words used by counsel. (*See* Aff. Rose ¶ 7.) This is the epitome of

inadvertent production. Even if a more comprehensive set of search times might have flagged the England Report (which is far from clear), the approach taken by Sealed Air and its counsel was hardly reckless.

12. Moreover, Sealed Air asserted its claw-back rights in a timely fashion. Upon learning that it had inadvertently produced the England Report, Sealed Air notified Water.io that same day. (*See* Aff. Rose ¶ 7.) There was no delay at all, much less the sort of delay that might evince carelessness on Sealed Air's part. And the entire period from production to claw-back was less than three weeks. *See, e.g., Aramony v. United Way of Am.*, 969 F. Supp. 226, 237 (S.D.N.Y. 1997) (“[A] request for the return of the privileged material within twenty-four hours of learning of the inadvertent production weighs against a loss of privilege.”).

13. In sum, Sealed Air has not waived its claw-back rights.

14. Water.io's reliance on Rule 26(b)(3)'s exception to work-product immunity is also unpersuasive. It is true that a party may obtain discovery of a protected document if it has a “substantial need” and “is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” N.C. R. Civ. P. 26(b)(3). Here, though, Water.io may depose England and obtain the unprotected documents that underlie his analysis and report. Thus, it faces no undue hardship in obtaining the substantial equivalent of the report itself, and the exception does not apply. *See Addison Whitney*, 2020 NCBC LEXIS 72, at *50 (“Defendants cannot show that they are ‘unable without undue hardship to obtain the substantial equivalent of

the materials by other means' because, at least at the time of the hearing, they had not deposed Dmytruk about the facts underlying the report.”).

15. The Court therefore denies Water.io’s motion to obtain the England Report.

16. **Cotterman E-Mail.** The parties dispute whether certain statements within the Cotterman E-Mail are privileged and whether Sealed Air waived its claw-back rights. Assuming, without deciding, that portions of the document are privileged, the Court concludes that Sealed Air did not assert the privilege in a timely manner.

17. Water.io represents, without rebuttal, that it displayed and read aloud the Cotterman E-mail during the parties’ mediation on 10 July 2025. Sealed Air’s attorneys did not object to its use at the time. Nor did they assert a claim of privilege or inadvertent production within a reasonable time afterward. It was not until six weeks later that Sealed Air asserted the privilege upon learning that Water.io intended to refer to the document in an amendment to its complaint. Sealed Air’s six-week delay in asserting its rights is not timely. *See Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 700 (S.D. Fla. 2009) (holding that defendant waived privilege in part due to “three-week lag after [plaintiff] used the document in support of its motion for sanctions”); *see also Clarke v. J.P. Morgan Chase & Co.*, 2009 U.S. Dist. LEXIS 30719, at *19–21 (S.D.N.Y. Apr. 10, 2009) (collecting cases on failure to demand return promptly).

18. In a footnote, Sealed Air calls the document’s display at the mediation “a red herring.” (ECF No. 136 at 6 n.3.) It is not. The initial production may well have been

inadvertent. But Water.io put Sealed Air on notice that the document had been produced when it displayed and read the document during the mediation session. At that point, Sealed Air had the obligation to act, and its failure to do so has consequences. “The attorney-client privilege is a fragile thing,” requiring vigilance by the litigant claiming its protection. *Addison Whitney*, 2020 NCBC LEXIS 72, at *10. And “courts have emphasized that claw back requests should be made immediately, with delays of even a few weeks determined to be too long, much less nearly two months.” *Skansgaard v. Bank of Am., N.A.*, 2013 U.S. Dist. LEXIS 48176, at *9 (W.D. Wash. Mar. 6, 2013).

19. As a final matter, Water.io purports to reserve the “right to seek a broader waiver of the privilege at a later date.” (ECF No. 140 at 7.) If Water.io means to seek a subject matter waiver, the time to do so was in connection with this motion. There is no reason to address this matter piecemeal. Water.io has not shown that Sealed Air’s delayed assertion of its claw-back rights as to the Cotterman E-mail ought to result in a subject matter waiver. And having reviewed the record, the Court concludes that the circumstances that ordinarily support imposition of a subject matter waiver are not present. *See Technetics Grp. Daytona, Inc. v. N2 Biomedical, LLC*, 2018 NCBC LEXIS 116, at *17 (N.C. Super. Ct. Nov. 8, 2018) (noting that “courts have refused to find a subject matter waiver where the results are particularly harsh and do not address the problems the subject matter waiver rule was designed to protect” (citation and quotation marks omitted)); *Morris*, 2011 NCBC LEXIS 34, at *32–33 (limiting application of subject matter waiver).

20. **Conclusion.** For these reasons, the Court **DENIES** Water.io's motion to obtain the England Report but **GRANTS** its motion to obtain the Cotterman E-mail.

SO ORDERED, this the 24th day of November, 2025.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases