No. 15-16416

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner-Appellant

v.

SANMINA CORPORATION AND SUBSIDIARIES,

Respondent-Appellee

ON APPEAL FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPENING BRIEF FOR THE APPELLANT

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GLOSSARY

2006 memo	Memo: Guarantee and Capital Contribution Agreement Concerning Sanmina International AG, July 2, 2006
2009 memo	Memo draft: Stock and Debt Losses on Swiss-3600, March 11, 2009
Doc.	Documents in the original record, as numbered by the Clerk of the District Court
ER	Excerpts of record
I.R.C. or Code	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Sanmina	Sanmina Corporation and Subsidiaries
Sanmina AG	Sanmina International AG

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STATEMENT OF JURISDICTION

The Internal Revenue Service issued an administrative summons to Sanmina Corporation and Subsidiaries ("Sanmina") on November 25, 2013, as part of an examination of Sanmina's tax liabilities. (ER 103, 108-13.) Sanmina failed to comply, and the United States filed a petition to enforce the summons in the United States District Court for the Northern District of California. (ER 97-119.) The District Court

had jurisdiction over the petition under §§ 7402(b) and 7604(a) of the Internal Revenue Code of 1986 (26 U.S.C.) ("I.R.C." or "Code").[1]

On May 20, 2015, the District Court entered an order denying enforcement of the summons. (ER 1-12.) The court's order was a final judgment that disposed of all claims of all parties. *See* I.R.C. § 7609(h)(1). On July 15, 2015, within sixty days after entry of the judgment, the United States filed a timely notice of appeal. (ER 13-15.) *See* 28 U.S.C. § 2107(b); Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction over the appeal rests upon 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In support of a claimed $503 million tax deduction for purportedly worthless stock in its subsidiary, Sanmina gave the IRS a valuation report prepared by DLA Piper. The report, in turn, relied on two memoranda prepared in 2006 and 2009 by Sanmina's in-house tax attorneys. The IRS issued a summons directing Sanmina to produce those two memoranda, but Sanmina failed to comply. The issues are:

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[1] Unless otherwise indicated, all statutory references are to the Code, as amended and in effect at the time in question.

1. Whether the District Court erred in holding that the attorney-client and work-product privileges protected the 2006 memo, which was written "to file" well before any tax controversy and then lay dormant for a three-year period.

2. To the extent that the 2006 and 2009 memos are privileged, whether Sanmina waived any attorney-client and work-product privilege that otherwise attached by (i) giving the IRS the valuation report that relied on the memoranda, or (ii) giving the memoranda to DLA Piper.

STATEMENT OF THE CASE

A. Procedural background

The United States brought this action to enforce a summons that the IRS had issued to Sanmina as part of an examination of Sanmina's tax liabilities. (ER 97-119.) As ordered by the District Court (ER 95), Sanmina filed a written response to the petition (ER 61-93), and the United States filed a reply (Doc. 9). After hearing oral argument (ER 16), the court entered an order denying enforcement of the summons (ER 1-12). The United States now appeals. (ER 13-15.)

B. Factual background

1. Sanmina gives the IRS a valuation report to support a claimed deduction

This case arises from a summons issued as part of an IRS examination of Sanmina's federal income tax liabilities. Sanmina is the domestic parent company of a consolidated group of manufacturing companies that includes Sanmina International AG, its wholly owned Swiss subsidiary ("Sanmina AG").[2] (ER 46.) On its federal income tax return for its 2009 tax year, Sanmina claimed a worthless-stock deduction of approximately $503 million in connection with its stock in Sanmina AG. (ER 22-23, 103.) The worthless-stock deduction offset all of Sanmina's taxable income for that year and also generated a net operating loss carry-forward of approximately $150 million. (ER 82.)

The IRS examined Sanmina's federal income tax returns for 2008, 2009, and 2010 and requested information regarding the worthless-stock deduction. (ER 22-23, 102-03.) In response, Sanmina gave the IRS a valuation report prepared by the law firm of DLA Piper determining that Sanmina AG was insolvent. (ER 23, 28-37.) Sanmina

[2] Sanmina AG is sometimes referred to in the record as "Swiss-3600," and Sanmina itself is sometimes referred to as "Sanmina-SCI."

had engaged DLA Piper to provide an estimate of the fair market value of the common stock of Sanmina AG. (ER 33.) The report, entitled "Sanmina-SCI Corporation: Estimate of Fair Market Value of Sanmina International AG," was written by an economist and stamped "Attorney-Client Privilege – Confidential Draft." (ER 28.) The report applied the traditional methods of valuation to appraise Sanmina AG as of June 30, 2009, and concluded that Sanmina AG had a value of negative $49 million. (ER 28-37.)

2. The valuation report relies on two memoranda from 2006 and 2009

Central to the valuation was DLA Piper's determination that Sanmina AG's largest asset, an intercompany receivable of $113 million, lacked economic substance and should be disregarded. (ER 36.) In support of that determination, the report stated that Sanmina booked the $113 million receivable on Sanmina AG's balance sheet for local law purposes but never intended to fund or pay it. (*Id.*) The report first acknowledged that "the book value of each liability provides the best estimation of its FMV," but then stated:

> However, based on interviews with Management and related documents provided by Management,[*fn6*] we concluded that the intercompany loan between Sanmina Holding AB and

> Sanmina Kista (about US $90 million) as well as the intercompany non-trade receivable between Sanmina-SCI and Sanmina AG (about US $113 million) should be disregarded.
>
> * * *
>
> … [T]he nature of the intercompany non-trade receivable of Sanmina AG from Sanmina-SCI is to make Sanmina AG solvent for local statutory purposes and Sanmina-SCI had never any intension [sic] or reason to fund and then pay down the receivables. It was Sanmina-SCI's sole intention to book this receivable as Sanmina AG's balance sheet. Therefore, we concluded that it is appropriate to disregard this intercompany receivable as it has no real economic substance.

(*Id*.)

As support for the conclusion that the inter-company receivable should be disregarded, the report cited three documents in footnote six: (i) "Memo draft: Stock and Debt Losses on Swiss-3600, March 11, 2009" (the "2009 memo"); (ii) "Memo: Guarantee and Capital Contribution Agreement Concerning Sanmina International AG, July 2, 2006 (the "2006 memo"); and, (iii) "Capital Contribution Agreement between Sanmina-SCI Corporation and Sanmina International AG, July 3, 2006." (*Id*. n.6.) The 2006 memo and the 2009 memo are at issue in this case.

3. Sanmina, asserting privilege, does not comply with an IRS summons for the 2006 and 2009 memoranda

The IRS issued a summons to Sanmina for the 2006 and 2009 memoranda that were cited in the valuation report as support for the conclusion that the inter-company receivable should be disregarded. (ER 108-13.) The summons required Christopher Sadeghian, a Sanmina vice president, to appear on a specified date and to produce the two memoranda for examination. (ER 108, 110.)

Sanmina refused to provide the memoranda, invoking the attorney-client, work-product, and tax-practitioner (I.R.C. § 7525) privileges. (ER 115-16.) According to Sanmina, the 2006 memo was written "to file" by Christopher Croudace, a member of its in-house tax counsel, three days before he left the company in July 2006. (ER 79, 87, 116.) The memo discussed the legal effect and tax treatment of "certain agreements among Sanmina and its subsidiaries." (ER 79.) The memo was first discovered by another member of Sanmina's in-house tax counsel, Mark Johnson, almost three years later – in March 2009 – and was circulated to Sanmina's management in June 2009. (ER 87-89.) The 2006 memo does not bear an attorney-client or work-product

privilege notation. (ER 18, 79.) As for the 2009 memo, Sanmina stated that it was prepared by Mark Johnson and analyzed the tax effect of the liquidation of Sanmina AG. (ER 80, 84.) The 2009 memo is stamped "Confidential – Work Product Privilege." (ER 79-80.)

Sanmina acknowledged having shared both memoranda outside the company. Sanmina shared both memoranda with DLA Piper so that it could prepare its appraisal. (ER 90.) DLA Piper, in turn, referred to both memoranda in the valuation report that Sanmina gave the IRS to support its claimed deduction. (ER 36.) In addition, both memoranda were shared with KPMG and Ernst & Young, who, according to Sanmina, "provided tax advice related to Sanmina's decision to take the worthless stock deduction" (ER 82) and prepared Sanmina's 2008 and 2009 returns (ER 24).

4. The United States petitions to enforce the summons

The United States filed a petition in the District Court to enforce the IRS summons. (ER 97-119.) The District Court ordered Sanmina to show cause why it should not be compelled to obey the summons. (ER 94-96.) The court's order stated that the United States had made a *prima facie* showing under *United States v. Powell*, 379 U.S. 48, 57-58

(1964), that the summons was issued for a legitimate purpose, that the information sought may be relevant to that purpose, that the information sought was not already in the IRS's possession, and that the administrative steps required by the Code had been followed. (ER 95.) Therefore, the burden shifted to Sanmina to oppose enforcement of the summons. (*Id.*)

In response, Sanmina did not dispute that the United States had made a *prima facie* showing under *Powell* that the summons should be enforced. Instead, Sanmina argued that the attorney-client and work-product privileges shielded the two memoranda from disclosure. (ER 61-76.) Sanmina contended that the attorney-client privilege applied because the memoranda were prepared by its former tax department lawyers, contained legal analysis, and were provided confidentially to company personnel who needed legal advice. (ER 69-70.) Sanmina also contended that the memoranda were protected work product because they ultimately supported its decision to claim a worthless-stock deduction and because the size of that deduction meant that it could reasonably have anticipated an IRS audit. (ER 73-75.) According to Sanmina, it did not waive the attorney-client or work-product privileges

when it distributed the memoranda outside the company. (ER 70-72, 75-76.)

The Government argued, in response, that the attorney-client privilege did not apply to the memoranda in the first instance because they were not attorney-client communications. (*Id*. at 10-13.) In particular, regarding the 2006 memo, the Government observed that there was no evidence that Sanmina had requested legal advice from its in-house counsel, or that the memo was shared with management prior to 2009. (*Id*. at 7, 11-13.) The Government further argued that the work-product privilege did not apply to either memo because neither was prepared in anticipation of litigation. (*Id*. at 16-19.) Instead, the memoranda were drafted before the tax return under audit was even prepared. (*Id*. at 18.)

The Government further argued that even if the memoranda were covered by the attorney-client or work-product privileges in the first instance, Sanmina had waived both privileges. (*Id*. at 13-15, 20.) The Government argued that Sanmina had waived the attorney-client privilege by providing the memoranda to DLA Piper, because DLA Piper was not rendering legal services in preparing the valuation. (*Id*.

at 15.) The Government also argued that Sanmina had waived both the attorney-client and work-product privileges by voluntarily disclosing DLA Piper's report – which expressly relied on the memoranda – to the IRS. (*Id*. at 14, 20.)

5. The District Court denies enforcement of the summons

After hearing oral argument (ER 16), the District Court declined to review the memoranda *in camera* and ruled in favor of Sanmina on all issues (ER 1-12). The court held that the attorney-client privilege protected both the 2006 and the 2009 memoranda because they "constituted tax advice from lawyers to Sanmina." (ER 8.) The court also held that Sanmina did not waive the attorney-client privilege when it gave the memoranda to DLA Piper, "because DLA Piper was Sanmina's legal counsel, even if DLA Piper sometimes provided non-legal services to Sanmina." (ER 10.) Nor did Sanmina's disclosure of DLA Piper's valuation report to the IRS result in waiver, the court held, because "DLA Piper's mere mention of the existence of the memoranda did not summarize or disclose the content of the memoranda." (*Id*.)

The District Court further held that the work-product privilege protected both memoranda and had not been waived. The court

acknowledged that the memoranda appeared to have been drafted to advise on business decisions, and stated that "[t]he court applies a 'because of' standard under such circumstances." (ER 11.) Under that standard, the work-product privilege applies to a document if "in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004). That standard was met here, the District Court concluded, because "Sanmina's description of the memoranda indicates an analysis of complex business and legal issues that ultimately supported Sanmina's decision to take a worthless stock deduction," and "[t]he size of the worthless stock deduction meant that Sanmina could reasonably have anticipated that the IRS would scrutinize and challenge Sanmina's tax treatment[.]" (ER 11.) The court held that disclosure of the DLA Piper valuation report to the IRS did not result in waiver because the report "merely references the documents, rather than summarizes them." (ER 12.)

The District Court accordingly denied the petition to enforce the summons. (*Id.*)

SUMMARY OF ARGUMENT

Sanmina claimed a $503 million tax deduction for purportedly worthless stock in its subsidiary. To support its position that the stock was worthless, Sanmina gave the IRS a valuation report prepared by an economist at DLA Piper. That report, in turn, relied on two memoranda prepared in 2006 and 2009 by Sanmina's in-house tax attorneys. The IRS attempted to obtain those memoranda by issuing a summons, which the Government then sought to enforce in the District Court, but the court held that the memoranda were protected by the attorney-client and work-product privileges and that neither privilege was waived.

1. The District Court erred in ruling that the 2006 memo was privileged in the first instance. The 2006 memo is not protected by the attorney-client privilege because it does not involve an attorney-client communication. Rather, the memo was written "to file" and then lay dormant for a three-year period. There is no evidence that Sanmina had asked its in-house tax counsel for any advice before he prepared the

memo, or that anyone even reviewed the memo until 2009. Therefore, the essential requirement of an attorney-client communication is missing. Sanmina did not meet its burden to prove that the 2006 memo was a protected attorney-client communication.

The 2006 memo also is not protected by the work-product privilege. Sanmina utterly failed to show that the memo was prepared because of the prospect of litigation, as required under this Court's precedent. Rather, Sanmina merely alleged that the memo discussed the tax and legal effect of "certain agreements among Sanmina and its subsidiaries." Even assuming that these unspecified "agreements" relate to the $113 million intercompany receivable that DLA Piper later determined lacked economic substance, there is still nothing to indicate that, in 2006, Sanmina contemplated litigation with the IRS. Indeed, there is no evidence that, in 2006, Sanmina even contemplated the worthless-stock deduction it claimed in 2009 that the IRS is now examining. Sanmina therefore did not prove that the 2006 memo was prepared in anticipation of litigation.

2. The District Court also erred in holding that Sanmina did not waive the privileges by its voluntary disclosures of the memoranda and

the valuation report. Although the Government no longer contests the threshold applicability of the attorney-client and work-product privileges to the 2009 memo, any such privilege was waived. And to the extent this Court holds that either privilege applies to the 2006 memo, such privilege was also waived.

As for the attorney-client privilege, it was waived with respect to both memoranda when Sanmina gave the IRS the valuation report that explicitly relied on them. The voluntary disclosure of privileged communications constitutes waiver of the attorney-client privilege for all other communications on the same subject. Accordingly, when Sanmina disclosed the DLA Piper report to the IRS, it waived the privilege for the 2006 and 2009 memos, which were cited in the report and were central to its conclusion that Sanmina AG was insolvent. Sanmina cannot affirmatively rely on DLA Piper's determination of insolvency to justify its worthless-stock deduction, but simultaneously shield the underlying analysis behind a claim of attorney-client privilege.

Sanmina also waived the attorney-client privilege with respect to both memos when it gave them to DLA Piper for use in preparing the

valuation report. DLA Piper conducted a fair market value analysis, not a legal analysis, and was not acting as a lawyer in preparing the valuation report. Because Sanmina's communications with DLA Piper do not fall within the protection of the attorney-client privilege, Sanmina's disclosure of the 2006 and 2009 memos to DLA Piper waived any privilege that otherwise attached to those memos.

Finally, Sanmina's disclosure of the DLA Piper report to the IRS also resulted in the waiver of any work-product privilege that otherwise covered the 2006 and the 2009 memoranda. As mentioned, the memoranda were central to the report's conclusion that Sanmina AG was insolvent, and the report was disclosed to Sanmina's adversary (the IRS). Having produced the valuation report to try to persuade the IRS that Sanmina AG's stock was worthless, Sanmina cannot now retreat behind the work-product privilege to shield the documents on which DLA Piper based that conclusion.

The District Court's order denying enforcement of the summons should be reversed.

ARGUMENT

I

The 2006 memo is not protected by the attorney-client privilege or by the work-product privilege in the first instance

Standard of review

The threshold applicability of the attorney-client privilege and the work-product privilege are mixed questions of law and fact that this Court reviews "independently and without deference to the district court." *United States v. Richey*, 632 F.3d 559, 563-64 (9th Cir. 2011) (citation omitted); *United States v. Ruehle*, 583 F.3d 600, 606 (9th Cir. 2009) (citation omitted). This Court reviews *de novo* the District Court's rulings on the scope of the attorney-client and work-product privileges. *Richey*, 632 F.3d at 563-64. This issue was raised at ER 69-70, 72-75, 99, and Doc. 9 at 5-7, 11-15, and was ruled on at ER 8-11.

A. The IRS has broad summons authority

This case concerns Sanmina's obligation to comply with an IRS summons. To place that obligation in context, we briefly review the statutory framework.

1. Congress has conferred upon the Secretary of the Treasury the responsibility to determine tax liability, and has given the Secretary

broad authority to conduct investigations for that purpose. I.R.C. §§ 6201(a), 6301, 7601, 7602. As the Secretary's delegate, the Commissioner of Internal Revenue has broad statutory authority to issue summonses in furtherance of its investigatory responsibility. I.R.C. § 7602(a)(1)-(3). As an investigatory tool, the IRS summons "is a crucial backstop in a tax system based on self-reporting." *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014); *see United States v. Bisceglia*, 420 U.S. 141, 146 (1975).

When a summoned party fails to comply with a summons, the United States may petition a federal district court to enforce the summons. I.R.C. §§ 7402(b), 7604(a). To demonstrate the propriety of a contested summons, the United States need make only a "minimal" initial showing that the summons was issued in good faith, *i.e.*, that: (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the information sought may be relevant to that purpose; (3) the information sought is not already within the Commissioner's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392

(9th Cir. 1985).[3] Once the United States has made its *prima facie* showing, the party opposing enforcement bears the "heavy" burden either to disprove one of the *Powell* factors or to demonstrate that enforcement of the summons would constitute an abuse of the court's process (because, for example, it was issued for an improper purpose). *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978); *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993); *Fortney v. United States*, 59 F.3d 117, 120 (9th Cir. 1995).

2. In this case, the District Court correctly held that the United States had met its burden under *Powell* for enforcement of the summons through the declaration of an IRS Revenue Agent. (ER 7.) Sanmina has not argued to the contrary; thus, it has conceded that the two memoranda at issue "may be relevant" to the investigation of its tax liabilities. *Powell*, 379 U.S. at 58. Instead, Sanmina argued that the attorney-client and work-product privileges shielded the two memoranda from production, and that those privileges had not been

[3] In addition, the IRS may not issue a summons or begin an enforcement proceeding if a "Justice Department referral" is in effect with respect to the person whose potential liability is being investigated. I.R.C. § 7602(d).

waived. (ER 69-76.) The District Court erred when it agreed with Sanmina's arguments.

The IRS's broad summons authority is subject to both the attorney-client and work-product privileges, two distinct doctrines whose protections sometimes overlap. *See Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981); *United States v. Euge*, 444 U.S. 707, 714 (1980). Privileges are narrowly construed in the context of IRS investigations, given the "congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry." *United States v. Arthur Young & Co.,* 465 U.S. 805, 816 (1984) (emphasis in original).

The attorney-client privilege generally protects confidential communications by a client to an attorney made in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The work-product privilege, by contrast, applies only to documents specifically "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. Rule 26(b)(3). Both privileges may be waived by voluntary disclosure. *See United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990) (attorney-client); *United States v. Nobles*, 422 U.S. 225, 239

(1975) (work product). The party invoking either privilege bears the burden to establish that it applies to the materials at issue and that it has not been waived. *Hernandez v. Tanninen*, 604 F.3d 1095, 1102 (9th Cir. 2010); *Weil v. Inv./Indicators, Research & Mgmt., Inc.,* 647 F.2d 18, 25 (9th Cir. 1981). Sanmina did not meet those burdens in this case.[4]

B. The attorney-client privilege never protected the 2006 memo because the required attorney-client communication was missing

The District Court erred by holding that the attorney-client privilege shields the 2006 memo from production in response to the IRS summons. (ER 8-9.) The 2006 memo was written "to file" by one of Sanmina's in-house tax counsel, Christopher Croudace, shortly before he left the company, and it was not reviewed (or even discovered) until three years later, in 2009. (ER 79, 87-90.) Under these circumstances, Sanmina fell far short of meeting its burden to prove that the memo is a privileged attorney-client communication.

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[4] The United States no longer contests the threshold applicability of either privilege to the 2009 memo, but continues to maintain that both privileges were waived for that memo, as discussed in Argument II, *infra*.

"That a person is a lawyer does not, *ipso facto*, make all communications with that person privileged." *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). Instead, this Court has held that the attorney-client privilege exists only where:

> (1) legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.

Richey, 632 F.3d at 566 (citation omitted). The party asserting the attorney-client privilege bears the burden of proving each of these essential elements. *Ruehle*, 583 F.3d at 608; *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002); *United States v. Abrahams*, 905 F.2d 1276, 1283 (9th Cir. 1990), *overruled on other grounds by United States v. Jose*, 131 F.3d 1325 (9th Cir. 1997).

Leaving aside the issue of waiver (which we will address in Argument II.A), the attorney-client privilege does not apply to the 2006 memo in the first instance, because Sanmina failed to prove that an attorney-client communication took place. At least three of the essential elements for the privilege to exist are missing:

1. *Sanmina did not prove that "legal advice of any kind [was] sought."* Sanmina neither alleged nor proved that it "sought" legal advice of any kind from its in-house tax counsel in connection with the 2006 memo. *Richey*, 632 F.3d at 566. Instead, the evidence suggests that Croudace unilaterally decided to document events or his impressions for the file in light of his impending departure. (ER 87-90.) The attorney-client privilege does not extend to an unsolicited memorandum prepared by Sanmina's in-house tax counsel for their own records. As the Supreme Court stated in *Hickman v. Taylor*, 329 U.S. 495, 508 (1947), the "protective cloak" of the attorney-client privilege does not extend to "the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." *See United States v. Brown*, 478 F.2d 1038, 1039-40 (7th Cir. 1973) (attorney-client privilege did not protect attorney's memorandum summarizing notes and legal judgments he made at a meeting to discuss tax consequences of transaction).

2. *Sanmina did not prove that the 2006 memo contained "communications."* The District Court's holding is erroneous for the additional reason that Sanmina did not prove that Croudace "*communicat[ed]"* legal advice to it. *Richey*, 632 F.3d at 566 (emphasis added). Instead, the evidence showed that the 2006 memo was written "to file" and that it apparently remained there, undiscovered, for three years. (ER 79, 85, 87-90.) There is no evidence that anyone in the company even knew of the 2006 memo until another in-house attorney, Mark Johnson, happened upon it in 2009. (ER 87-90.) The required attorney-client communication is therefore missing. *See Richey*, 632 F.3d at 567 ("to the extent the files contain documents that were not communications, they are not protected by the attorney-client privilege").

Although Sanmina baldly asserted in the District Court that the 2006 memo was "provided confidentially to company personnel who had a need for legal advice" (ER 69-70), that assertion finds no support in the record. Sanmina identified no one who either distributed or received the 2006 memo before 2009. (ER 87-90.) As Sanmina acknowledged, once Croudace prepared the memo, "it is entirely

possible that he did not send it to anyone." (ER 87.) Sanmina did not prove that the 2006 memo contained any communication at all, let alone that any such communication satisfied the requirements for the attorney-client privilege. Because no evidence to that effect was presented in the District Court, the court's conclusion that the 2006 memo was "provided confidentially to company personnel who had a need for legal advice" (ER 8) is simply wrong.

3. *Sanmina did not prove that the 2006 memo revealed communications "by the client."* The attorney-client privilege protects communications "by the client" to the attorney. *Richey*, 632 F.3d at 566; *see Fisher,* 425 U.S. at 403. While the privilege can also extend to communications *to* a client *by* an attorney, such communications are protected only if they "directly or indirectly reveal communications of a confidential nature by the client to the attorney." *Matter of Fischel*, 557 F.2d 209, 212 (9th Cir. 1977) (attorney's summaries of client's business transactions with third parties, prepared for client, were not privileged because they did not reveal confidential client communications; for privilege to apply to communications by attorney, attorney's communications "must be so interwoven with the privileged

communications" as to "lead[ ] irresistibly" to disclosure of client's confidential communications); *accord United States v. (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977). Sanmina neither alleged nor proved that complying with the summons for the 2006 memo would lead to disclosure of its confidential communications.

Because Sanmina did not prove (i) that it asked Croudace for legal advice, (ii) that he communicated any such advice to Sanmina, and (iii) that the disclosure of the 2006 memo would reveal Sanmina's confidential communications, the District Court erred in concluding that the 2006 memo is privileged. Sanmina's contentions in the District Court that Croudace was a member in good standing of a state bar, and that the 2006 memo included legal citations (ER 66-67, 79), are insufficient to carry its burden to make a particularized showing that a privileged communication took place. *See Abrahams*, 905 F.2d at 1283. Instead, Sanimina's showing "was meager, amorphous, and ultimately inadequate." *Id.*

Because the attorney-client privilege "has the effect of withholding relevant information from the factfinder," it is narrowly construed, and

"applies only when necessary to achieve its purpose." *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citing *Fisher*, 425 U.S. at 403); *See In re Pacific Pictures Corp.,* 679 F.3d 1121, 1126 (9th Cir. 2012). That purpose "is to protect and foster the client's freedom of expression. It is not to permit an attorney to conduct his client's business affairs in secret." *Matter of Fischel*, 557 F.2d at 211. Because Sanmina did not carry its burden to prove that the 2006 memo was a protected attorney-client communication, the District Court erred in holding that the attorney-client privilege shielded the memo from disclosure.

C. The work-product privilege never protected the 2006 memo

1. The work-product privilege extends only to materials prepared in anticipation of litigation or for trial

The work-product doctrine is a "qualified privilege" that protects certain materials that were prepared "in anticipation of litigation" or for trial. *United States v. Nobles*, 422 U.S. at 237-38; Fed. R. Civ. P. 26(b)(3). Derived from the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495, the work-product privilege has as its purpose to protect the adversary process by "prevent[ing] exploitation of a party's efforts in preparing for litigation." *Admiral Ins. Co. v. United States*

Dist. Court for Dist. of Arizona, 881 F.2d 1486, 1494 (9th Cir. 1989). Conversely, the work-product privilege does not cover materials prepared in the ordinary course of business or for non-litigation purposes, because the rationale for the privilege does not apply there. *United States v. Textron, Inc.*, 577 F.3d 21, 30-31 (1st Cir. 2009).

The question sometimes arises whether a document prepared for more than one purpose was prepared "in anticipation of litigation." Under the test applied in this Court, work-product protection may attach to such a dual-purpose document only if it "was created *because of* anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2003) ("*Torf*") (emphasis added), *quoting United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998). *Accord, Maine v. Dep't of Interior*, 298 F.3d 60, 70 (1st Cir. 2002); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118-20 (7th Cir. 1983).

A document will *not* acquire work-product protection simply because it was prepared by a lawyer, because litigation on that subject matter was a general possibility, or because litigation ultimately ensues. *See Richey*, 632 F.3d at 568; *Textron*, 577 F.3d at 30-31; *Nat'l Union Fire Ins. Co.*, 967 F.2d at 984; *Binks*, 709 F.2d at 1120. If a document would have been created "in substantially similar form" regardless of the prospect of litigation, the document is deemed to have been created in the ordinary course of business and is not protected. *Richey*, 632 F.3d at 568; *Torf*, 357 F.3d at 908; *ReedHycalog UK, Ltd. v. Baker Hughes Oilfield Ops. Inc.*, 242 F.R.D. 357, 360 (E.D. Tex. 2007).

2. The 2006 memo was not prepared in anticipation of litigation or for trial

Sanmina fell far short of meeting its burden to prove that the 2006 memo was prepared in anticipation of litigation. *See Hernandez*, 604 F.3d at 1102. According to Sanmina, the memo addresses the tax and legal implications of "certain agreements among Sanmina and its subsidiaries." (ER 79.) Sanmina did not provide any further detail, and the District Court declined to review the memo *in camera*. The record is thus devoid of evidence that the 2006 memo – discussing

unspecified intercompany agreements – was prepared "because of" anticipated litigation.

In its valuation report, DLA Piper cited to the 2006 memo in support of its conclusion that Sanmina AG's $113 million intercompany receivable lacked economic substance. (ER 36.) Thus, it is possible that the unspecified "agreements" addressed in the 2006 memo include the intercompany agreements relating to the intercompany receivable. Even if that is so, it does not retroactively cloak the 2006 memo in work-product protection. The memo is dated July 2, 2006: almost four years before Sanmina filed its 2009 return on June 15, 2010, claiming the worthless-stock deduction that the IRS is now examining. (ER 23.) There is no evidence that in 2006, Sanmina even contemplated claiming a worthless-stock deduction for Sanmina AG on its 2009 return. Nor is there any evidence that Sanmina or its lawyers contemplated, in 2006, that the validity of the intercompany receivable would turn out to be a major issue in determining the propriety of a deduction not yet contemplated. The District Court therefore erred in holding that the memo was protected work product. (ER 10-11.)

Indeed, the District Court made no actual finding that the 2006 memo was prepared "in anticipation of litigation." Instead, the court concluded that Sanmina's description "indicates an analysis of complex business and legal issues that ultimately supported" Sanmina's decision to take a worthless-stock deduction. (ER 11.) The court's reasoning rests on two fundamental misconceptions: (i) that all analysis of "complex business and legal issues" occurs in anticipation of litigation, and (ii) that a pre-existing document may later acquire work-product protection because it "ultimately" supports a tax return position that was apparently first envisioned several years later. (*Id.*)

The court's analysis does not withstand scrutiny. It is not enough to trigger work-product protection "that the materials were prepared by lawyers or represent legal thinking" – a "vast category" that includes "[m]uch corporate material prepared in law offices or reviewed by lawyers." *Textron*, 577 F.3d at 29-30. Nor is it enough that "events are documented with the general possibility of litigation in mind." *Nat'l Union Fire Ins. Co.*, 967 F.2d at 984; *see Binks Mfg. Co.*, 709 F.2d at 1120 (attorney's in-house memoranda were not protected work product because they were not prepared "*because* of" the prospect of litigation

and no "articulable claim, *likely* to lead to litigation, had arisen") (emphasis in original; citations omitted). Instead, the work-product doctrine protects only work done in anticipation of litigation, and Sanmina did not prove that the 2006 memo fell into that protected category.

As noted in the valuation report, the 2006 memo was written during the same time period that Sanmina entered into the capital contribution agreement with Sanmina AG. (ER 46-47, 51-59.) There was no evidence that the memo was prepared for potential use in litigation (if and when it should arise) rather than for use in the transaction, or that the memo would serve any useful purpose for Sanmina in conducting litigation if it arose. *See Textron*, 577 F.3d at 30. And even if the memo could turn out to be useful in litigation, it was created irrespective of litigation and is therefore not protected work product. *See Richey*, 632 F.3d at 568 (work-product privilege did not protect appraiser's work file where there was no "evidence in the record that [he] would have prepared [it] differently in the absence of prospective litigation").

The District Court rested its contrary conclusion on the declarations of Maribeth Bautista, Sanmina's corporate counsel, and Brian Dulkie, Sanmina's director of tax controversy. (ER 11 n.53-54; *see* ER 78-82.) But neither declaration stated that the 2006 memo discussed the then-far-off liquidation of Sanmina AG or any other issue that Croudace anticipated would be litigated. The absence of a work-product designation on the memo (ER 18) is therefore unsurprising.

Nor does Bautista's statement that the memo discussed "certain IRS letter rulings and two tax court decisions" (ER 79) trigger work-product protection. Not all legal research and analysis occurs in anticipation of litigation. *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982). If it did, the work-product doctrine would subsume the attorney-client privilege for virtually any document that a lawyer creates. Even if prepared by lawyers and reflecting legal analysis, "[m]aterials assembled in the ordinary course of business … or for other nonlitigation purposes" are not protected by the work-product doctrine. Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970). *Accord Hickman v. Taylor*, 329 U.S. at 510 n.9 (reports made in ordinary course of business are not protected).

The District Court also erred in relying on the supposition that "[t]he size of the worthless stock deduction meant that Sanmina could reasonably have anticipated that the IRS would scrutinize and challenge Sanmina's tax treatment of its holdings in [Sanmina AG]." (ER 11.) As we have explained, Sanmina presented no evidence that it even contemplated, when the memo was prepared in 2006, taking the worthless-stock deduction that it later claimed on its 2009 return.

Indeed, the District Court's analysis, if allowed to stand, would create a perverse incentive in the context of IRS investigations: the more dubious a tax position, the more readily the taxpayer might challenge, on work-product grounds, a summons for transactional documents by alleging that the IRS was reasonably likely to examine the return. (ER 11.) That result would make no sense in the IRS summons context, where privileges are narrowly, not broadly, construed. *Arthur Young & Co.,* 465 U.S. at 816. Here, the District Court erred by denying enforcement of the summons for the 2006 memo on work-product grounds.

II

To the extent that the 2006 and the 2009 memoranda are privileged, Sanmina's disclosures resulted in waiver of both the attorney-client and the work-product privileges for both memoranda

Standard of review

Whether the attorney-client privilege or the work-product privilege has been waived is reviewed *de novo*. *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990); *United States v. Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 683 (1st Cir. 1997). This issue was raised at ER 24, 41-42, 70-72, 75-76, and Doc. 9 at 8-10, 15, and was ruled on at ER 9-12.

A. Sanmina waived any attorney-client privilege that otherwise protected the memoranda

1. Sanmina waived the attorney-client privilege for both memoranda when it gave the valuation report to the IRS

In an effort to persuade the IRS that Sanmina AG's stock was worthless, Sanmina voluntarily gave the IRS the DLA Piper valuation report. That disclosure resulted in a waiver of any attorney-client privilege with respect to *both* the 2009 memo and the 2006 memo cited in the valuation report (if this Court should hold that the 2006 memo was privileged in the first instance). Sanmina, as the proponent of the

attorney-client privilege, bears the burden to prove that the privilege has not been waived. *See Hernandez*, 604 F.3d at 1102; *Weil v. Inv./Indicators, Research & Mgmt., Inc.,* 647 F.2d 18, 25 (9th Cir. 1981); *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980).[5] The waiver doctrine is rooted in notions of fundamental fairness. It prevents a privilege holder from selectively disclosing privileged communications to an adversary, revealing those that support its allegations, while claiming the shelter of the privilege to avoid disclosing those that are less favorable. *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996).

Sanmina's disclosure of the DLA Piper report to the IRS resulted in a "waiver of the privilege for all other communications on the same subject," including both the 2006 and 2009 memoranda. *Richey*, 632 F.3d at 566 (*quoting Weil*, 647 F.2d at 24). The valuation report expressly relied on the two memoranda, which were central to DLA Piper's conclusion that Sanmina AG was insolvent. (ER 36.) Based on

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[5] To the extent that the District Court held that the Government bore an initial burden of production on the issue of waiver (ER 4), that holding is erroneous and finds no support in this Court's attorney-client privilege jurisprudence.

the memoranda, DLA Piper concluded that Sanmina AG's largest asset – the $113 million intercompany receivable – lacked economic substance and should be disregarded, with the result that Sanmina AG's liabilities exceeded its assets. (ER 36-37.)

The District Court summarily dismissed these points, stating that Sanmina's disclosure of the report to the IRS did not waive the attorney-client privilege for the underlying memoranda because "DLA Piper's mere mention of the existence of the memoranda did not summarize or disclose the content of the memoranda." (ER 10.) The court's conclusion is wrong for three reasons.

First, the court wholly failed to grasp the centrality of the two memoranda to DLA Piper's insolvency determination. DLA Piper initially acknowledged that it "believed that the book value of each liability provides the best estimation of its [fair market value]" (a belief that would not support Sanmina's claim to a deduction). (ER 36.) But DLA Piper then reached a contrary conclusion based on interviews and "related documents provided by Management," including the two memoranda at issue here. (*Id.*) The memoranda were therefore crucial to the ultimate question of the worthlessness of the Sanmina AG stock.

Second, instead of a "mere mention" of the memoranda (ER 10), the DLA Piper report went on to summarize their apparent contents, stating that the intercompany receivable should be disregarded because it was booked for local law purposes and Sanmina never intended to fund or pay it (*id.*). That DLA Piper "buried" the citation to the memoranda in a footnote, as the District Court stated (ER 1), is beside the point, because DLA Piper relied on the memoranda to support its conclusion.

Third, the District Court's distinction between a "mention" of the memoranda on the one hand, and a "summar[y] or disclos[ure of] the content" on the other (ER 10), simply does not matter under this Court's law. The attorney-client privilege cannot be selectively waived in this circuit. *In re Pacific Pictures*, 679 F.3d at 1127-28 (explicitly rejecting "selective waiver" of the attorney-client privilege). *See Richey*, 632 F.3d at 566; *Weil*, 647 F.2d at 25; *accord United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 808-09 (D.C. Cir. 1982); *United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981). The Federal Rules of Evidence are to the same effect: where the intentional disclosure to "a federal office or agency" waives the attorney-

client or work-product privilege, the waiver extends to communications or information that concern the same "subject matter" that ought in fairness to be considered together. Fed. R. Evid. 502(a). Sanmina was therefore not free to disclose "just a little," as the District Court seemed to think, and this Court has held that waiver occurred where much less was disclosed.

For example, in *Weil*, the plaintiffs sought to discover communications between an investment fund and its "Blue Sky" counsel. The plaintiffs argued that the investment fund had waived the attorney-client privilege by disclosing during a deposition that "the Fund had been advised by its Blue Sky counsel that 'it would be best to register wherever the Fund had a single shareholder.'" 647 F.2d at 23. This Court stated that "[t]he question, then, is whether the Fund may disclose a privileged attorney communication about a matter that is relevant and material to issues in the case, and then invoke the privilege to prevent discovery of other communications about the same matter." *Id.* The court held that the Fund could not do so, stating that "[w]hen (the privilege holder's) conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he

intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final." *Id.* at 24 (citation omitted). *See also Hernandez*, 604 F.3d at 1100 ("raising a claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject").

The same principles apply here. Sanmina cannot rely on DLA Piper's determination that the intercompany receivable lacked economic substance (a dubious position for a taxpayer to take regarding its own transaction),[6] but then refuse to disclose the underlying analysis. Sanmina's attempt to use the privilege as both a sword and a shield is

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[6] *See, e.g., Bradley v. United States*, 730 F.2d 718, 719-21 (11th Cir. 1984) (rejecting taxpayers' argument that their own transaction lacked sufficient economic substance to give rise to tax liability); *Cornelius v. Commissioner*, 494 F.2d 465, 471 (5th Cir. 1974) ("a taxpayer cannot elect a specific course of action and then when finding himself in an adverse situation extricate himself by applying the age-old theory of substance over form") (citation omitted); *see also Commissioner v. Nat'l Alfalfa Dehydrating & Milling Co.,* 417 U.S. 134, 149 (1974) ("while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice … and may not enjoy the benefit of some other route he might have chosen to follow but did not.").

precisely what the waiver doctrine is designed to prevent. *See Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) ("The privilege which protects attorney-client communications may not be used both as a sword and a shield. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived.") (citation omitted).

Sanmina should not "be allowed, after disclosing as much as [it] pleases, to withhold the remainder." *Weil*, 647 F.2d at 24 (citation omitted). Instead, having deployed the DLA Piper report to buttress its claim to a deduction, Sanmina must now produce the "other communications about the same matter" (*id*. at 23) that are responsive to the IRS summons. In essence, Sanmina contends that it is entitled to a tax deduction based on DLA Piper's conclusions, but that the IRS cannot examine those conclusions because the underlying memoranda are privileged. By agreeing with Sanmina's internally inconsistent position, the District Court erred as a matter of law. Sanmina waived any attorney-client privilege that otherwise attached to the 2006 memo and the 2009 memo when it gave the DLA Piper report to the IRS.

2. Sanmina also waived the attorney-client privilege for both memoranda when it gave them to DLA Piper for use in preparing the valuation report

In addition to the waiver by disclosure to the IRS, Sanmina also waived any attorney-client privilege for both memoranda when it gave them to DLA Piper for use in preparing the valuation report. Although DLA Piper is a law firm, it conducted a "fair market value ("FMV") analysis," not a legal analysis, in this case. (ER 29.) As DLA Piper itself described the nature of the engagement, Sanmina "asked [it] to provide an estimate of the fair market value ("FMV") of 100 percent of the common stock of its wholly-owned subsidiary," Sanmina AG, as of June 30, 2009. (ER 33.)

Because DLA Piper was not acting as a lawyer in preparing the valuation report, Sanmina's disclosures to DLA Piper were not protected by the attorney-client privilege. This Court has repeatedly held that where a lawyer is not acting in his or her capacity as such, the communications are not privileged. *See, e.g., United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980) (no privilege could be asserted where the lawyer acted as "a business agent rather than a legal advisor"); *Liew v. Breen*, 640 F.2d 1046, 1050 (9th Cir. 1981) (lawyer-client

communications were not privileged where the "clients did not approach him for legal advice and assistance, but rather with the aim of finding [investment opportunities]"). Voluntarily disclosing privileged documents to third parties, such as DLA Piper here, generally destroys the attorney-client privilege. *In re Pacific Pictures*, 679 F.3d at 1127.

Although Sanmina broadly asserted that DLA Piper was its "outside counsel" (ER 70), Sanmina introduced no evidence (such as an engagement letter or billing statements) to prove that it consulted DLA Piper for *legal* advice regarding the worthless-stock deduction. (*See* ER 42 (requesting supporting documentation).) The valuation report, which was prepared by an economist, is a straightforward appraisal devoid of legal discussion. The report applied "a combination of the Discount Cash Flow ("DCF") methodology and the Net Asset Value ("NAV") methodology" to estimate the fair market value of 100 percent of Sanmina AG's common stock to be negative $49 million as of the valuation date. (ER 34, 37.)

While "[t]he attorney-client privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice," *Richey*, 632 F.3d at 566, there is no

evidence here that an attorney advising Sanmina engaged DLA Piper's appraisal services for the purpose of providing legal advice. This Court has squarely rejected the argument that appraisal services obtained for tax purposes fall within the protected circle. In *Richey*, the Court held that the attorney-client privilege did not extend to an appraiser retained by the taxpayer's attorney, who advised the taxpayer to claim a charitable deduction for a conservation easement. *Id.* at 567. The Court held that "any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value" of the property. *Id.*

Because Sanmina's communications with DLA Piper do not fall within the protection of the attorney-client privilege, Sanmina's disclosure of the 2006 and 2009 memoranda to DLA Piper waived any privilege that otherwise might have covered the memoranda.

B. Sanmina waived any work-product privilege that otherwise protected the memoranda when it gave the valuation report to the IRS

In addition to waiving the attorney-client privilege, Sanmina also waived any work-product privilege that might otherwise have covered

the 2006 and 2009 memoranda when it gave the DLA Piper report to the IRS. "[D]isclosure to an adversary, real or potential, forfeits work product protection." *MIT*, 129 F.3d at 687; *see Doe No. 1 v. United States*, 749 F.3d 999, 1008 (11th Cir. 2014); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988).[7] In this case, there is no question that the IRS is Sanmina's adversary. Therefore, even if the 2006 and 2009 memos were protected work product, any protection they enjoyed was waived when Sanmina gave the DLA Piper report to the IRS.

Yet the District Court ruled out a work-product waiver on the ground that "the DLA Piper report merely references the documents, rather than summarizes them." (ER 12.) That distinction (like the court's similar distinction in the attorney-client privilege context (ER 10)) is irrelevant. Just as Sanmina's disclosure of the valuation report to the IRS resulted in a waiver of the attorney-client privilege for all

[7] Waiver of the work-product privilege thus differs slightly from waiver of the attorney-client privilege, which may be waived by disclosure to *any* third party.

communications on the same subject matter, so too did the disclosure result in a waiver of the work-product privilege for all communications on the same subject matter – which includes the 2006 and 2009 memoranda. *See* Argument II.A.1, *supra.* It is well recognized that the same rules govern the scope of waiver for both the attorney-client and work-product privileges. *See* Fed. R. Evid. 502(a) (when a disclosure is made to a federal agency, such as the IRS, the same rule governs the scope of waiver for both attorney-client and work-product privileges); *Bittaker v. Woodford*, 331 F.3d 715, 722 n.6 (9th Cir. 2003) ("Although our decision is couched in terms of the attorney-client privilege, it applies equally to the work product privilege, a complementary rule that protects many of the same interests.") (*citing Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981)). "Other than the fact that the initial waiver must be to an 'adversary,' there is no compelling reason for differentiating waiver of work product from waiver of attorney-client privilege." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289, 306 (6th Cir. 2002) (fn. ref. omitted).

Having produced the valuation report to try to persuade the IRS that Sanmina AG's stock was worthless, Sanmina cannot now deploy

the work-product privilege to shield the underlying documents on which DLA Piper based that conclusion. *See Nobles*, 422 U.S. at 239 (by electing to present investigator as witness, party waived work-product privilege as to underlying report); *United States v. Salsedo*, 607 F.2d 318, 320-21 (9th Cir. 1979) (by referencing transcript of conversation between the defendant and a government informant in his cross-examination of the government witnesses, "defendant's counsel waived any work product privilege in relation to the transcript"); *cf. In re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982) ("Protecting the adversary system does not require … allow[ing] corporations to withhold records that are properly characterized as underlying documents of their reports to the SEC"). The work-product privilege is not intended to allow a party to gain a tactical advantage by making "a selective and misleading presentation of evidence." Fed. R. Evid. 502(a) advisory committee's note (2007).

In sum, the 2006 memo was never protected by either the attorney-client or the work-product privilege. With respect to both the 2006 and the 2009 memoranda, any privilege that otherwise attached was waived by Sanmina's disclosure of the valuation report to the IRS.

The attorney-client privilege was also waived by Sanmina's disclosure of both memoranda to DLA Piper. The District Court's contrary holdings are erroneous, and its order denying enforcement of the IRS summons should be reversed.

CONCLUSION

For the foregoing reasons, the District Court's order should be reversed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States of America respectfully inform the Court that they are not aware of any cases related to this appeal that are pending in this Court.

CERTIFICATE OF COMPLIANCE

With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements of Federal Rule of Appellate Procedure 32(a)

Case No. 15-16416

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Attorney for United States of America

Dated: November 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on this 23rd day of November, 2015, by using the appellate CM/ECF system. I further certify that service of the brief was made on counsel for the appellant by CM/ECF.

/s/ Deborah K. Snyder
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General Information

Court	United States Court of Appeals for the Ninth Circuit; United States Court of Appeals for the Ninth Circuit
Federal Nature of Suit	Taxes - United States as Plaintiff or Defendant[1870]
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