CASE NO. 15-16416

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Petitioner and Appellant,

v.

SANMINA CORPORATION AND SUBSIDIARIES

Respondents and Appellees.

Appeal From The United States District Court,
Northern District of California, Case No. C-15-00092 PSG
Hon. Paul S. Grewal, United States Magistrate Judge

OPENING BRIEF OF RESPONDENTS SANMINA CORPORATION AND SUBSIDIARIES

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CORPORATE DISCLOSURE STATEMENT

Respondent and Appellee Sanmina Corporation ("Sanmina") hereby states, consistent with Federal Rule of Appellate Procedure 26.1, that there are no parent corporations of Sanmina and no publicly held corporations own 10% or more of Sanmina's stock. Certain unidentified "subsidiaries" of Sanmina Corporation were also named in the underlying petition. There are no subsidiaries of Sanmina Corporation whose shares of stock are owned by publicly held corporations other than Sanmina.

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I. INTRODUCTION

The district court properly ruled below that two internal memos prepared by Sanmina[1] tax department attorneys (collectively, the "Attorney Memos") are privileged documents and protected from discovery by the attorney work product doctrine; that Sanmina did not waive either the privilege or the work product protection by providing copies to Sanmina tax department personnel and to outside accounting and law firms who were advising Sanmina on tax issues; and that none of the recipients waived this privilege or protection by disclosing the contents of the Attorney Memos to anyone. The Service[2] now seeks to alter its positions below, acknowledging that one of the Attorney Memos is, in fact privileged; silently retracting its concession that Sanmina did not waive any privileges or protections by disclosing the Attorney Memos to their lawyers at DLA Piper; and adding arguments never advanced below. In an effort to hide the fact that it is now advancing different arguments, the IRS did not include in the Excerpts of Record its own reply brief and portions of the hearing transcript, including the page on

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1 Sanmina refers to Appellees Sanmina Corporation and subsidiaries.

2 Appellant, the United States of America, is referred to herein as "the Service" or "the IRS."

which it conceded that Sanmina did not waive any privilege or protection when it provided the Attorney Memos to the firms providing it with tax advice.[3]

Even if this Court were to allow the Service to change its contentions, those new arguments would not alter the outcome. Sanmina established below that the Attorney Memos are privileged and attorney work product; that they were provided only to persons and entities assisting Sanmina to analyze its tax exposure; and that neither Sanmina nor any of the persons or entities who had access to the Attorney Memos disclosed their contents to the Service or to any other party.

The district court thus ruled correctly, and its ruling should be affirmed on appeal.

II. STATEMENT OF JURISDICTION

Sanmina agrees that this is a timely appeal from a final appealable ruling of the United States District Court for the Northern District of California.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly rule that the two Attorney Memos, which were written by Sanmina's in-house tax counsel and analyzed the terms and tax consequences of a series of inter-company transactions, are protected from discovery by the attorney-client privilege and the attorney work product doctrine?

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[3] The IRS Reply Brief and the full Transcript of Proceedings are provided in Sanmina's Supplemental Excerpts of Record ("SER").

2. Did the district court properly reject Appellant's contention that Sanmina waived the attorney-client privilege and the attorney work product doctrine when Sanmina produced a valuation report in support of its worthless stock deduction that, in a single footnote, states that its authors reviewed the two Attorney Memos?

IV. STATEMENT OF THE CASE[4]

A. The Attorney Memos

Chris Croudace, an attorney in the Sanmina tax department, prepared a memo dated July 2, 2006, that analyzed the anticipated tax treatment of a series of intercompany loans and guarantees (the "2006 Memo"). (ER 79.) His last day with the company was July 5, 2006 (ER 87), and it is reasonable to infer that he prepared his memo to advise his employer/client of the terms of the summarized transactions and how he expected them to be treated under the federal tax laws. *See also*, ER 11 ("the IRS speculates that the 2006 memorandum was drafted because its author was leaving the company . . . .") His memo explained the reasons for those transactions, described their legal enforceability, and analyzed their anticipated tax treatment. (ER 79.) The memo cited and discussed IRS letter rulings and tax court decisions. (ER 79.)

[4] Appellant's statement of the procedural background is not disputed.

Contrary to the Service's current argument, the 2006 Memo was not removed in time from any potential tax dispute. As Sanmina's correspondence with the IRS makes clear, the tax dispute that has emerged primarily involves a series of agreements executed between September 30, 2004 and July 3, 2006. (ER 46.) Sanmina provided copies of each of those agreements to the Service. (ER 49-59.) Furthermore, the IRS cannot dispute the fact Mr. Croudace could reasonably have anticipated the prospect of litigation when he wrote his memo because it addresses what the IRS terms "a dubious position for a taxpayer to take regarding its own transaction . . . ." (Appellant's Opening Brief ("AOB"), p. 40).

Following Mr. Croudace's departure, Sanmina executed one additional agreement of relevance to this dispute, which was a December 19, 2008 guarantee of an intercompany receivable owed by Sanmina International AG ("Sanmina AG") to Sanmina-SCI Holding AB. (ER 47, 60). Sanmina tax department attorney Mark Johnson prepared a draft memo dated March 11, 2009 (the "2009 Memo") analyzing the "tax effect of the liquidation of Swiss-3600," which is Sanmina's internal designation for Sanmina AG. (ER 79-80). Like the 2006 Memo, the 2009 Memo largely consists of legal analysis – in this instance, of the liquidation of Sanmina AG. *Id.* It cites IRS revenue rulings, tax code provisions, tax court decisions, and a decision of the United States Supreme Court. *Id.* In the district court, the Service challenged Sanmina's designation of the 2009 Memo as a

privileged document, but it now admits that the 2009 Memo is protected by the attorney-client privilege and the attorney work product doctrine. (AOB, p. 15, p. 21 n. 4.)

B. The Tax Dispute

But for certain irrelevant details, in Section B.1. of its Statement of the Case the IRS accurately describes the events giving rise to the tax dispute. In summary, Sanmina is the parent company of a consolidated taxpaying group that includes Sanmina AG, a Swiss subsidiary.[5] (AOB, p. 4.) Sanmina claimed a $503 million worthless stock deduction based on its ownership of Sanmina AG stock. *Id.* Based, *inter alia,* on legal advice from the DLA Piper law firm, Sanmina concluded that it was entitled to take a worthless stock deduction because Sanmina AG had become insolvent and Sanmina's shares of stock in that company were therefore worthless. (ER 29-30, 46-48; AOB, p. 4.)

The resulting worthless stock deduction offset all of Sanmina's taxable income for the 2009 tax year and generated a net operating loss ("NOL") carry-forward of approximately $150 million. (AOB, p. 4.) It was thus no doubt a significant item in Sanmina's tax returns that Sanmina fully expected would draw IRS scrutiny. (ER 82.) Sanmina therefore sought advice from the DLA Piper law

[5] Certain documents, including specifically the 2009 Memo, refer to this subsidiary as "Swiss-3600."

firm and from the Ernst & Young and KPMG accounting firms on the propriety of the worthless stock deduction. (*Id.*)

As anticipated, the IRS examined Sanmina's tax returns and issued an Information Document Request ("IDR"), seeking support for the worthless stock deduction. (ER 22-23.) In response, Sanmina produced a July 23, 2009 document titled: "Sanmina-SCI Corporation: Estimate of Fair Market Value of Sanmina International AG" prepared by the DLA Piper law firm (hereafter, the "DLA Piper Report"). The DLA Piper Report is addressed to Mark Johnson, the author of the 2009 Memo. (ER 29.) It concludes that Sanmina AG's liabilities exceeded its assets by $49 million, thus establishing its insolvency. (ER 30, 35.)

The IRS took issue with DLA Piper's decision to disregard two inter-company obligations that the IRS apparently claims would have made Sanmina AG solvent. DLA Piper described its reasoning:

> "We believed that the book value of each liability provides the best estimation of its FMV. However, based on interviews with Management and related documents provided by Management,[6] 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."

(ER 36 (emphasis added).) Footnote 6 in the quotation above identifies the three documents DLA Piper reviewed before reaching its conclusion. It lists the 2006 Memo, the 2009 Memo, and the "Capital Contribution Agreement between Sanmina-SCI Corporation and Sanmina International AG, July 3, 2006." (*Id.*) Nowhere does the DLA Piper Report reveal the contents of either of the two Attorney Memos (or for that matter, the content of its interviews with management that it also considered); rather, it states that DLA Piper interviewed management and reviewed the three documents, after which DLA Piper concluded that the two referenced transactions should be disregarded. Indeed, DLA Piper does not even state how, if at all, the Attorney Memos support its conclusions.

Furthermore, in a letter dated February 13, 2014 (ER 46), Brian Dulkie, Sanmina's Director – Tax Controversy, provided the Service with all of the documents memorializing the disregarded transactions (ER 49-59). He also explained why the contribution agreements had zero value (ER 47 (second full paragraph)). Mr. Dulkie also explained (and the IRS does not dispute) that DLA Piper's decision to disregard the contribution agreements did not change the result because, even if they were not disregarded, the contribution agreements could never have made Sanmina AG solvent. (ER 47 ("these capital contributions could

only prevent the company from having a net negative value (i.e., the common stock value would still be zero").)

The IRS thus knows exactly what Sanmina's position is, and it has the underlying documents that memorialize the transactions that Sanmina contends do not make Sanmina AG solvent. It is thus entirely untrue that Sanmina is hiding behind a privilege to shield information from the IRS. Sanmina has provided the information; what it has not provided are the Attorney Memos in which its in-house lawyers analyzed the tax implications of the transactions that Sanmina contends do not make Sanmina AG solvent. If the IRS has a different position on the tax implications of these transactions, its lawyers can formulate whatever arguments they want; they do not need, and they are not entitled to, the analysis of and advice provided by Sanmina's lawyers.

V. SUMMARY OF ARGUMENT

The IRS makes three arguments it never asserted below to support its contention that the 2006 Memo is not protected by the attorney-client privilege. Because they were never raised in the district court, these new arguments are not preserved for appeal. Furthermore, none of these new arguments has any merit, and the fact that all three could also have been made with respect to the 2009 Memo (which the Service now admits is privileged), only further undermines the Service's position.

Moving on from its three new attorney-client privilege arguments, the Service repeats its argument below that that the 2006 Memo is not work product because Sanmina could not have anticipated in 2006 that the Service would challenge a worthless stock deduction taken in 2009. The district court properly rejected this argument because the case law make clear that a lawyer's analysis may be made in anticipation of litigation even if the litigation is not imminent. Indeed, the fact that DLA Piper reviewed the 2006 Memo in the course of preparing its valuation report confirms that Mr. Croudace properly anticipated that his analysis would be useful to Sanmina in the event of a future tax dispute with the IRS.

With the Service admitting that the 2009 Memo (which, like the 2006 Memo, was prepared by a Sanmina tax department lawyer and addressed to "file") is shielded from discovery by both the attorney-client privilege and the attorney work product doctrine, it focuses its effort to obtain that memo on the contention that Sanmina waived the attorney-client privilege and the work product doctrine as to both Attorney Memos. First, the IRS claims that Sanmina waived its rights by producing the DLA Piper Report to the IRS in response to an IDR. As the district court properly found, that argument fails because the DLA Piper Report does not disclose any content of the Attorney Memos. Second, although the Service previously acknowledged that its waiver argument relied exclusively on the

production of the DLA Piper Report, the result would not change if the Service is permitted to revive its second waiver argument, which contends that Sanmina committed a waiver by providing the Attorney Memos to its counsel and tax advisors. The district court correctly found that those disclosures constituted confidential communications (and in the case of work product, certainly did not constitute disclosure to an adversary), and thus could not result in a waiver.

In fact, Sanmina has fully disclosed to the IRS the basis for the worthless stock deduction that underlies the current dispute, and it has produced all of the underlying transactional documents the Service has requested. But the Service is not entitled to the legal analyses of Sanmina's in-house counsel; the IRS lawyers can undertake their own analysis and reach their own conclusions.

VI. ARGUMENT

A. Standard of Review

The applicable standard of review is described in *U.S. v. Richey*, 632 F.3d 559, 563-64 (9th Cir. 2011). While the Service correctly states that the ultimate determination concerning the application of the attorney-client privilege and the attorney work product doctrine is reviewed *de novo* (AOB, p. 17), the Service omits to state that the district court's factual findings are reviewed for "clear error." *Id.* "A finding is clearly erroneous if it is illogical, implausible, or without support in the record." *Id.* (citations omitted).

The district court found, *inter alia*, the following facts, none of which the IRS attacks under the clearly erroneous standard of review:

1. The Attorney Memos constituted tax advice from lawyers to Sanmina and not merely preparation of tax returns or number crunching. (ER 8:4-6.)

2. The Attorney memos contain legal analysis. (ER 8:12.)

3. The Attorney memos were prepared by Sanmina's tax department lawyers. (ER 8:13.)

4. The Attorney memos were provided confidentially to company personnel who had a need for legal advice. (ER 8:13-14.)

5. DLA Piper was not engaged to provide non-legal valuation services rather than legal advice. (ER 9:11-13.) DLA Piper was Sanmina's legal counsel even if DLA Piper sometimes provided non-legal services to Sanmina. (ER 10:3-5.)

6. The memoranda contain an analysis of complex business and legal issues that ultimately supported Sanmina's decision to take a worthless stock deduction arising from its ownership of Sanmina AG. (ER 11:9-11.)

7. The 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 11:11-13.)

8. The DLA Piper Report merely references the Attorney Memos and does not summarize them. Sanmina thus disclosed no privileged work product to the IRS. (ER 12:1-2.)

Because the IRS does not argue that any of the district court's factual findings are clearly erroneous, the analysis proceeds on the basis of the above factual findings, with the district court's legal conclusions reviewed *de novo*. *See In re Joelson*, 427 F.3d 700, 702 (1st Cir. 2005) (declining to disturb bankruptcy court's factual findings when appellant failed to contest them).

B. The 2006 Memo Is Protected by the Attorney-Client Privilege and the Attorney Work Product Doctrine.

As the IRS concedes (AOB, p. 20), its power to obtain information by summons is "not absolute and is limited by the traditional privileges, including the attorney client privilege" and the work product doctrine. *Upjohn Co. v. United States*, 449 U.S. 383, 398, 101 S.Ct. 677, 687 (1981); *United States v. Euge*, 444 U.S. 707, 714, 100 S.Ct. 874, 879 (1980) (IRS summonses are "subject to the traditional privileges and limitations"). Although the IRS contends that privileges should be construed narrowly in the context of IRS investigations (AOB, p. 20), it

cites no authority for that proposition.[6] In fact privilege and work product protections apply, without modification or caveat, to the IRS. *Upjohn, supra.*

1. The 2006 Memo Is Attorney-Client Privileged.

The attorney-client privilege protects communications between a client and its attorney related to the purpose of securing legal advice, as well as legal advice provided by the attorney that would reveal the content of the confidential communications. *Matter of Fischel*, 557 F.2d 209, 211 (9th Cir. 1977).[7] The privilege applies equally to communications from the client to its attorney and from the attorney to its client. *Upjohn*, 449 U.S. at 390. It also applies in proceedings to enforce IRS summonses, *see id.* at 395-96 (applying attorney-client

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[6] The Service cites *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984), for the proposition that privileges should be more narrowly construed in the context of an IRS investigation. That is not what the Court held. Rather, the Court overruled an appellate court's creation of a work product protection for an accountant's tax accrual work papers, reaffirming instead that only the "'traditional privileges and limitations'" apply to an IRS summons. *Id.* (quoting *United States v. Euge*, 444 U.S. at 714); *accord United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21 (1st Cir. 2009).

[7] The Service cites *Fischel* as supporting the view that a document will be privileged only if it discloses the content of client communications. *Fischel* actually rejects that view: "Of necessity the privilege is not limited to the actual communication by the client to the attorney. Ordinarily the compelled disclosure of an attorney's communications or advice to the client will effectively reveal the substance of the client's confidential communication to the attorney. To prevent this result, the privilege normally extends both to the substance of the client's communication as well as the attorney's advice in response thereto." *Fischel*, 557 F.2d at 211.

privilege in IRS summons enforcement action), and specifically to legal advice relating to a tax claim. *See, e.g., United States v. Roxworthy*, 457 F.3d 590, 594-600 (6th Cir. 2006).

Having lost on this issue below, the IRS presents on appeal an entirely new set of arguments. Because they were not presented to the district court, those arguments, which would not change the outcome anyway, have been waived.

a. The Service is Advancing Waived Arguments.

With few exceptions, a party may not raise an issue on appeal unless it was raised in the trial court. This rule ensures that the parties and the courts have a full opportunity to litigate issues and to prevent the gaming of the trial and appellate system. *See, e.g., Connecticut General Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003); *Doi v. Halekulani Corp.*, 276 F.3d 1131, 1140 (9th Cir. 2002); *Gribben v. United Parcel Service, Inc.*, 528 F.3d 1166, 1171 (9th Cir. 2008).

In *Dream Palace v. County of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004), this court described the reason behind the waiver rule, writing that it "serves to ensure that legal arguments are considered with the benefit of a fully developed factual record, offers the appellate courts the benefit of the district court's prior analysis, and prevents parties from sandbagging their opponents with new arguments on appeal." These concerns ring particularly true here, where the IRS

initiated the proceedings below by filing a document called Petition to Enforce Internal Revenue Summons. (ER 97.) That document did not contain any analysis of the privilege or waiver issues raised in this appeal; instead, it simply argued that the Service followed the procedural steps necessary to enforce its summons. (*Id.*) Sanmina then filed its "Response" in which it attempted to anticipate the arguments the Service would make to overcome Sanmina's privilege and work product objections. (ER 61.) In both the Response's Introduction and Conclusion, and in Sanmina's argument to the district court, Sanmina asked for the opportunity to respond to any arguments made by the IRS and not addressed in Sanmina's Response. (ER 65, 76-77; SER 25-26.)

Based upon its decision to deny enforcement of the Summons, the district court found it unnecessary to allow Sanmina to submit additional evidence or argument. (ER 7:8-13.) It would thus be manifestly unfair to Sanmina for this court to consider arguments not made before the district court and thus not considered by the district court when it decided that Sanmina did not need an opportunity to file a rebuttal.

b. <u>The Service's New Arguments on Appeal Would Fail in Any Event.</u>

The IRS's only argument against application of the attorney-client privilege below consisted of the contention that Sanmina failed to demonstrate that the

Attorney Memos provided legal advice as opposed to business advice. (SER 10-13.) The district court rejected that argument. (ER 8-9.) The IRS has not renewed it in this appeal. The balance of this section of the brief thus addresses, in an abundance of caution, arguments not properly preserved for appeal.

Citing *Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct. 385, 392 (1947), the Service argues for the first time on appeal that, because Sanmina could not determine to whom, if anyone, Mr. Croudace sent it,[8] the 2006 Memo is a memo prepared by Mr. Croudace for his own use, and thus is not subject to the attorney-client privilege because it is not a communication with his client. As this court is no doubt aware, *Hickman* is the seminal attorney work product case in which the Court ruled that an adversary generally cannot obtain an attorney's notes of witness interviews or the facts he gathered in defense of his client. The Court termed these materials the "work product of the lawyer." *Id.* at 511. That concept was later added to Federal Rule of Civil Procedure 26(b)(3).

But Mr. Croudace clearly did not prepare the 2006 Memo for his own use (although if he did, it would be work product). To the contrary, as the IRS admits,

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[8] As Sanmina clearly stated, it could not obtain access to many of Mr. Croudace's emails, including those during the short period between the date of the 2006 Memo and his termination date, and Sanmina does not currently employ anyone who recalls the distribution of his memo. Thus, it is not true that Sanmina stated that Mr. Croudace did not send the memo to anyone; Sanmina stated that it does not have a record of whom he sent it to and it is "possible" that he did not send it to anyone (other than "file"). (ER 87.)

Mr. Croudace prepared the memo as he was preparing to leave his job. (AOB, p. 23.)[9] He thus actually had no use for the information in the 2006 Memo; it was his client that needed the information, and the memo is thus a classic attorney-client communication. Indeed, the trial court made a factual finding that the Attorney Memos "constituted tax advice from lawyers to Sanmina" (ER 8:4-6) and the Service makes no argument that this conclusion was clearly erroneous.

Citing *U.S. v. Richey*, 632 F.3d 559 (9th Cir. 2011), the Service next argues for the first time on appeal that the 2006 Memo cannot be privileged unless Sanmina asked Croudace to prepare it. The Service's argument is not supported by *Richey* or any other published decision. As *Richey* states, a communication is privileged if it relates to the purpose of the attorney consultation. *Id.* at 566, *citing U.S. v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010).

To the extent that the Service is arguing more generally that there is no proof that Mr. Croudace's job duties included giving the company tax advice (an argument to which the IRS at least alluded below), the assertion is simply wrong. As Sanmina established, Mr. Croudace was an attorney in Sanmina's tax department (ER 79). His job, on its face, consisted of giving Sanmina tax advice.

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[9] Specifically, the IRS argues: "the evidence suggests that Croudace unilaterally decided to document events or his impressions for the file in light of his impending departure."

The trial court agreed, and made a factual finding that both Attorney Memos contain legal advice. (ER 8.) That finding is supported by the record. (ER 79-80.)

The IRS next argues that, because Mr. Croudace wrote his memo to file, he did not communicate any legal advice to his client. Again, this is a new argument that the Service attempts to raise for the first time in this appeal. (SER 10-13.) Furthermore, the IRS never explains why the 2006 Memo to file is not a communication with Sanmina while the 2009 Memo to file is. At best, the IRS draws a distinction between the two memos on the ground that the 2009 Memo went immediately to other personnel, while the 2006 Memo may not have been reviewed until 2009 – *i.e.*, at the time that the tax treatment of the 2006 transactions became relevant.[10] But the entire argument misses the point. Sanmina was Croudace's client, not other corporate personnel or Sanmina's tax advisors. Croudace gave his memo to his client by putting it in the client's files and the client then provided it to people who were tasked with advising it on its 2009 tax returns.[11] *See also*, Ruling, p. 11 (ER 11) ("Any delay in reviewing the

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[10] As noted above, Sanmina cannot determine whether Mr. Croudace sent the 2006 Memo to anyone because his emails are no longer available.

[11] As such, this situation is not analogous to an outside lawyer preparing a memo to file that is not shared with the client. That memo is likely to constitute work product, but because it is not communicated to the client, it will not be protected by the attorney-client privilege unless it describes attorney-client communications. When an in-house lawyer sends a memo to "file," however, it is the equivalent of an outside lawyer sending the memo to his or her client.

memoranda also works against the notion that the memoranda were drafted for the purpose of tax return preparation.").

Finally, the IRS argues that the 2006 Memo can only be privileged if its disclosure would disclose Sanmina's communications to Croudace.[12] The IRS did not make this argument below either. It argued below only that the Attorney Memos should be construed as business advice rather than legal advice, and that the court should find that Croudace and Johnson were not acting as attorneys when they drafted the memos. (SER 10-13.)

Once again, the IRS's new argument is completely inapposite. For the privilege to apply, Sanmina does not need to show that the 2006 Memo discloses Sanmina's statements to its counsel. Rather, the attorney-client privilege "cloaks a communication from attorney to client '<u>based</u>, in part at least, upon a confidential communication [to the lawyer] from [the client].'" *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984) (emphasis added.) In other words, the test is not whether the lawyer regurgitates back to the client the information the client provided, but whether the communication to the client is based in whole or in part on communications from the client.

[12] Again, the IRS never explains why this afterthought of an argument applies to the 2006 Memo but not to the 2009 Memo.

Thus, when an attorney conveys to the client facts obtained from third parties, those facts do not thereby become cloaked in the attorney-client privilege (although they may be work product). *Id., citing Brinton v. Department of State*, 636 F.2d 600, 604 (D.C.Cir.1980). But that is not the case here. Mr. Croudace was an in-house lawyer who prepared a memo analyzing the terms of transactions his client entered into. It is thus self-evident that the 2006 Memo is *based*, at least in part, on confidential communications from the client. *See also, Mead Data Central, Inc. v. United States Department of Air Force*, 566 F.2d 242, 254 (D.C.Cir.1977) (communications from attorney to client are shielded if they rest on confidential information obtained from the client).

In short, the Service has now abandoned the only argument it made below – *i.e.*, that the Attorney Memos constituted business advice rather than legal advice. It instead advances arguments that were not made below and are thus not preserved for appeal. But even if this court were to consider these new arguments, they are inapposite. Sanmina did not need to show that it asked Mr. Croudace to prepare the 2006 Memo in order for it to be privileged; it did not need to show that Mr. Croudace sent the memo to anyone; and it did not need to show that the 2006 Memo contained confidential communications from Sanmina to its counsel. The trial court correctly rejected the Service's argument that the Attorney Memos are not privileged because they constituted business advice, and even if this court were

to consider the Service's new arguments (and it should not), the outcome would not change.

2. The 2006 Memo Is Attorney Work Product.

The attorney work product doctrine applies to documents prepared in anticipation of litigation.[13] The work product protection preserves "a zone of privacy in which a lawyer can prepare and develop legal theories and strategy with an eye toward litigation . . . ." *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) ("*Adlman*") (emphasis added); *U.S. v. ChevronTexaco Corp.*, 241 F.Supp.2d 1065, 1082 (N.D. Cal. 2002) ("*ChevronTexaco*"); *see also*, Fed. R. Civ. Proc. 26(b)(3).

A document is prepared in anticipation of litigation – and thus may be protected from discovery – if "the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Adlman*, 134 F.3d at 1202 (emphasis added). Moreover, a document that satisfies this standard "does not lose protection … merely because it is created in order to assist with a business decision." *Id.*; *accord, In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.),*

[13] The term "litigation" in the context of the work product doctrine is defined in the Restatement (Third) of the Law Governing Lawyers as "civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency…." *Deseret Mgmt. Corp. v. U.S.*, 76 Fed.Cl. 88, 92 (2007) (citing Restatement (Third) of the Law Governing Lawyers).

357 F.3d 900, 908 (9th Cir. 2003)[14] (citing *Adlman*); *Hodges, Grant & Kaufman v. United States*, 768 F.2d 719, 719-22 (5th Cir. 1985) (holding that a document prepared by plaintiff "in anticipation of 'dealing with the IRS' … may well have been prepared in anticipation of an administrative dispute and thus may constitute 'litigation.'"); *ChevronTexaco*, 241 F.Supp.2d at 1082-84 ("we agree with the Second Circuit that … the work product doctrine can reach documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose."); *Long-Term Capital Holdings v. United States*, 2002 WL 31934139 at *9 (D. Conn. Oct. 30, 2002) ("While the [tax opinion] may have been prepared in part to assist in a business decision, it is nevertheless eligible for work product protection because it is a document that was prepared with an eye toward litigation.").

[14] The IRS cites *Torf* as adopting the view that attorney work product only applies to documents created "because of anticipated litigation" and that would not have been created in substantially similar form but for the prospect of litigation. Although the issue is immaterial here, where the evidence shows that the only reason for preparing the 2006 Memo was the prospect of litigation, the IRS's quotation of *Torf* is misleading. Shortly after the language quoted by the IRS (AOB, p. 28), this Court found that a consultant's report that may have been prepared absent the prospect of litigation nonetheless constituted work product because it was prepared "at least in part, to help McCreedy advise and defend Ponderosa in anticipated litigation . . . ." *Torf*, 357 F.3d. at 909. This Court held such documents "fall within the broad category of documents that were prepared for the overall purpose of anticipated litigation." *Id.*

In *Adlman*, the Second Circuit made clear that a legal tax analysis generated in anticipation of a possible IRS audit constitutes attorney work product, even if that material also assisted in making a business decision. *Adlman*, 134 F.3d at 1195. There, the IRS sought production of a document containing the tax analysis of the taxpayer's advisor at Arthur Anderson. *Id.* at 1195-96. The taxpayer engaged Arthur Anderson to assist its counsel in evaluating the tax implications of a proposed restructuring that would produce tax consequences that were expected to be challenged by the IRS. *Id.* at 1195. Arthur Anderson prepared a memorandum containing its analysis that detailed the likely IRS challenges to the reorganization; discussed Treasury regulations, judicial decisions and IRS authorities; proposed possible legal theories; and recommended preferred methods of structuring the transactions. *Id.* The Second Circuit reasoned that the work product doctrine extended to such documents prepared to "assess the desirability of a business transaction, which, if undertaken, would give rise to" litigation. *Id.*[15]

The Second Circuit found in *Adlman* that the magnitude and complexity of the transaction, the company's history of being surveyed or audited by the IRS, and

[15] The facts at bar yield an easier conclusion than those in *Adlman*. In *Adlman*, the tax advice did not just analyze completed transactions, but also provided advice on <u>how</u> to structure the transactions (arguably, business rather than legal advice). The 2006 Memo does not contain (and given the date of its preparation could not contain) any business advice. It only analyzes the anticipated tax treatment of agreements already entered into or to be signed the following day.

the novelty of the legal questions all supported the reasonable anticipation of litigation with the IRS. *Id.* at 1196. Other courts, including this one, have likewise found the anticipation of litigation requirement satisfied based on similar considerations. *See Roxworthy*, 457 F.3d at 600 (finding anticipation of litigation in the form of an anticipated IRS audit based upon the company's size, the large tax consequences resulting from the transaction, audit history, and unsettled nature of certain legal aspects);[16] *ChevronTexaco*, 241 F.Supp.2d at 1082 (finding anticipation of litigation where taxpayer "reasonably believed that it was a virtual certainty that the IRS would challenge the … transaction" because the company's tax returns were routinely examined by the IRS, the company was engaged in a transaction involving a "substantial amount of tax dollars" and the IRS "had previously questioned similar transactions."); *U.S. v. Deloitte LLP*, 610 F.3d 129 (D.D.C. 2010) (finding that pre-transaction tax opinion prepared before the tax return was filed and before actual litigation commenced is protected by the work product doctrine); *see also, Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3rd Cir. 1993) (litigation need not be imminent for work product protection to apply).

[16] Although the Internal Revenue Manual acknowledges *Adlman* and *Roxworthy* to be binding precedent (*see* I.R.M. ¶ 5.17.6.15), the Service ignores *Roxworthy* completely and only cites *Adlman* as being a case quoted in *Torf*.

The IRS nonetheless argues that the work product privilege cannot apply to the 2006 Memo because Mr. Croudace could not have foreseen in 2006 the possibility that in 2009, Sanmina would take a position that would lead to potential litigation. Thus, being removed in time from the actual dispute, the Service argues that the 2006 Memo must have been prepared to provide Sanmina with non-legal business advice.

Not only is that argument unsupported by the evidence, it is also inconsistent with the position the IRS has consistently taken with respect to its own work product. In *Delaney, Migdail & Young v. IRS*, 826 F.2d 124, 126-27 (D.C. Cir. 1987), the Service successfully invoked work product protection for its attorneys' memoranda which analyzed "the legal ramifications" of a proposed program. The court agreed with the Service that the memoranda were protected work product even though they did not relate to a specific claim and were written long before any actual dispute concerning the program arose. Similarly, in *Deseret Mgmt. Corp. v. U.S.*, 76 Fed.Cl. 88, 92 (2007), the Service cited *Roxworthy*, *supra*, to argue successfully that documents created by the Service during a tax audit (but before litigation) were work product.

In summary, the IRS attack on the work product doctrine consists of nothing more than pure speculation that Mr. Croudace could not have foreseen a potential IRS challenge to the tax treatment of transactions that, even in its Opening Brief,

the Service characterizes as "dubious." But, the contents and circumstances surrounding the preparation of the 2006 Memo, not the IRS's unsupported speculation, dictate the outcome. *See Torf,* 357 F.3d at 907 (work product protection applies "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.'").[17]

The 2006 Memo reflects an analysis of complex business and legal issues that ultimately supported Sanmina's decision to take a worthless stock deduction arising from its ownership of Sanmina International AG. (ER 11:9-11 (district court's finding of fact); ER 79 (supporting evidence).) The size of the resulting worthless stock deduction meant that Sanmina could reasonably have anticipated that the Service would scrutinize, and might ultimately challenge, Sanmina's tax treatment of its holdings in Sanmina AG. (ER 11:11-13 (district court's finding of fact); ER 82 (supporting evidence).)[18] The court's factual findings are supported

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[17] The IRS also argues that Sanmina advocates to create a "perverse incentive" for a taxpayer to obtain legal advice when it takes a position the IRS might attack. First, the incentive is not "perverse;" a taxpayer should proceed more cautiously as it wades into waters that draw IRS scrutiny. Second, the IRS is really just attacking the entire premise of attorney work product; it is built on the prospect of litigation, and thus on the likelihood of a legal challenge.

[18] In fact, it is also false to suggest that Mr. Croudace could not have known the significance of the potential tax deduction and thus the likelihood that it would be challenged. A worthless stock deduction is a write-off of the taxpayer's entire basis in the stock. 26 U.S.C.A. § 165.

by the evidence, are not challenged on appeal by the IRS, and compel the conclusion that the Attorney Memos constitute work product.

C. Sanmina Did Not Waive the Attorney-Client Privilege or the Work Product Protection.

Sanmina only distributed the Attorney Memos outside the company to its counsel and accountants providing it with tax advice. The district court found that the attorneys, DLA Piper, were retained, *inter alia*, to provide legal advice, and that finding is supported by the record. (ER 9:11-13, 10:3-5 (district court finding); ER 82 (supporting evidence).) The IRS does not argue on appeal that Sanmina waived any privilege or protection from discovery by providing the Attorney Memos to its accountants.

The IRS instead makes two arguments in support of its waiver contention. First, it relies on the production of the DLA Piper Report itself, arguing that by providing the report to the IRS, Sanmina committed a blanket waiver of all privileged communications concerning its worthless stock deduction. (AOB, p. 36 ("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.").) Second, it argues that Sanmina committed a waiver when it provided the Attorney Memos to DLA Piper. (AOB, p. 42.) As discussed below, the district court properly rejected both arguments.

1. Sanmina Did Not Commit a Waiver by Providing the DLA Piper Report to the IRS.

Although the IRS complains that, even after reviewing the DLA Piper Report, it does not have enough information to understand the transactions discussed in the Attorney Memos (ER 105 (Rowe decl.)), it contends that the report nonetheless disclosed so much information that Sanmina waived any applicable privileges. The Service advances three arguments on appeal as to why Sanmina's disclosure of the DLA Piper Report to the IRS results in a waiver of the protections from discovery that would otherwise be afforded to the Attorney Memos.

The Service first argues, without any citation to authority, that the district court erred in not finding a waiver because it "wholly failed to grasp the centrality of the two memoranda to DLA Piper's insolvency determination." (AOB, p. 37.) The meaning of that argument is unclear, and it is impossible to respond to it without some accompanying legal analysis. But the statement that a privileged document was central to the DLA Piper Report is the equivalent of saying that an attorney's conversations with his or her client were central to the allegations in the

complaint drafted by the attorney. Neither creates a waiver because neither discloses the content of privileged communications.[19]

Second, the Service argues that, by producing the DLA Piper Report to the IRS, Sanmina waived any privilege or protection from discovery because the DLA Piper Report does not merely mention the Attorney Memos; it relies on them. As an initial matter, that contention is wrong. DLA Piper did not say that it relied on the Attorney Memos; it stated that it reviewed them, along with a Contribution Agreement; that it talked with management; and that it (DLA Piper) reached the conclusion that certain receivables should be disregarded. DLA Piper also explained why it disregarded the receivables. ER 36 ("Sanmina-SCI had never any intension [sic] or reason to fund and then pay down the receivables."). It did not say, for example: "we disregarded the receivables because Sanmina's lawyers told us to." That would be a conclusion that relied on statements by lawyers. Furthermore, this second argument suffers from the same defect as the first argument because it is really the same as the first. How the DLA Piper Report having "relied" on the Attorney Memos would be different from the Attorney

[19] Ironically, the Service takes both sides of the disclosure argument, contending on the one hand that Sanmina has failed to establish that the 2006 Attorney Memo is privileged (and speculating below that both Attorney Memos merely contained business advice) because Sanmina has not adequately described its contents (SER 11-13), but later arguing that Sanmina has waived any applicable privileges by disclosing too much (SER 14).

Memos being "central" to the DLA Piper Report is unclear; however neither centrality nor reliance results in a waiver because, as the district court correctly found, the DLA Piper Report does not disclose the contents of the Attorney Memos. (ER 10:7-10, 12:1-2.)

Finally, the IRS contends that the DLA Piper Report operated as a subject matter waiver under the attorney-client privilege and the attorney work product doctrine. That argument relies on Rule 502(a)[20], which reads, in pertinent part:

> (a) **Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.** When the disclosure is made in a federal proceeding or to a federal office or agency ***and waives the attorney-client privilege or work-product protection***, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
>
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> (3) they ought in fairness to be considered together.

[20] Although the IRS argues subject matter waiver, Rule 502 does not actually provide for a subject matter waiver, but rather, by its terms, addresses the waiver issue on a communication-by-communication basis.

Fed. R. Evid. 502(a) (emphasis added). The IRS's argument under Section 502 is backwards. To invoke Section 502(a), the Service must first show that the DLA Piper Report disclosed the content of attorney-client communications or attorney work product before analyzing whether such a disclosure entitles the Service to additional communications. It made no showing of disclosure because, as the district court properly found, the DLA Piper Report does not, in fact, disclose the contents of any attorney-client communications. (ER 10:7-10, 12:1-2.)

The Service cites a series of cases that stand for the proposition that a partial disclosure of attorney-client communications can create a waiver for all such communications. But those cases actually undermine the Service's arguments because in each of those cases, waiver was predicated on a disclosure of the contents of the attorney client communication that is not present here:

- In *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 23 (9th Cir. 1981), the defendant "disclosed the content of a privileged communication [with] Blue Sky counsel . . . ." (Emphasis added.) This court found a waiver as to communications with Blue Sky counsel.
- Similarly in *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010), the plaintiff "disclosed communications between him and [his attorney] Ferguson about Tanninen. He also disclosed favorable

portions of Ferguson's communications with Tanninen and produced some of Ferguson's notes of those conversations." This court found a waiver (albeit a limited one) because Hernandez disclosed the content of his communications with his counsel.

- Finally, the Service's citation to this court's decision in *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996), completely undermines its position. In *Tennenbaum*, a bankruptcy trustee executed a settlement agreement in which, *inter alia,* he agreed to waive the attorney-client privilege. In a deposition, he was asked questions that intruded on the privilege and he refused to answer, arguing that the agreement to waive the privilege did not constitute a waiver. This court agreed, holding: "The triggering event is disclosure, not a promise to disclose." *Id.* at 341.

As *Tennenbaum* makes clear, under Rule 502, the IRS must first demonstrate that Sanmina disclosed the content of the communications in the Attorney Memos before it argues the scope of the waiver.[21] It has utterly failed to do so. Neither the face of the DLA Piper Report, nor any other evidence before the

[21] *See* Fed.R.Evid. 502 Advisory Committee Note (2011) ("[W]hile establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally. The rule governs only certain waivers by disclosure." (emphasis added)).

district court, demonstrated that Sanmina disclosed the contents of the Attorney Memos to anyone other than the lawyers and accountants who were giving it tax advice. The fact that a valuation report states that the Attorney Memos were reviewed in connection with the preparation of that report does not disclose their contents.[22]

Moreover, even if the IRS had established that the DLA Piper Report disclosed the contents of the Attorney Memos, it *still* would have failed to meet its burden of production[23] under Section 502(a) because it did not produce any evidence that the Attorney Memos should, in fairness, be considered together with the DLA Piper Report. *See*, Fed.R.Evid. 502(a)(3). As Magistrate Judge Grewal explained in *Theranos, Inc. v. Fuisz Techs., Ltd.*, 2013 WL 2153276, at *1 (N.D. Cal. May 16, 2013), "[A] subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and

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[22] The IRS also cites cases in which advice of counsel is used as a defense to a claim that the defendant acted willfully or in bad faith. *E.g., Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) (AOB, p. 41.) Those cases have no application here, where Sanmina is not asserting an advice of counsel defense.

[23] Sanmina acknowledges that it bears the ultimate burden of proof. But the IRS first bore the burden of production. "If the party seeking discovery asserts that the privilege which initially attached to the communication in question was subsequently waived, that party must bear the burden of *production* on the issue of waiver." *United States v. Chevron Corp.*, 1996 WL 444597, at *4 (N.D. Cal. May 30, 1996) (emphasis in original).

misleading presentation of evidence to the disadvantage of the adversary." (*Citing* Fed.R.Evid. 502(a) Advisory Committee Note (2011).[24]

Here, the IRS did not produce any evidence of unfairness. In fact, the IRS did not even provide the district court with a full copy of the DLA Piper Report. Instead, with its Reply (to which Sanmina did not have the opportunity to respond) the IRS provided excerpts of the DLA Piper Report (ER 27-37) and a declaration of Jean Elting Rowe in which she stated that documents Sanmina provided to the IRS on January 20, 2014 "do not adequately explain why Sanmina AG's $113 million receivable from Sanmina has no fair market value." (ER 24-25.) That statement, a classic "negative pregnant," says nothing.[25] Rowe – assuming *arguendo* that she even has the credentials to make the above statement (and her declaration fails to establish that she does) – simply states that one set of documents provided by Sanmina does not, by itself, explain the issue adequately.

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[24] In *Theranos,* Magistrate Judge Grewal found a waiver; here, he did not because he found Sanmina did not disclose any attorney-client communications and thus there was no need to engage in the three-point analysis under Rule 502(a).

[25] *See United States v. Watson*, 792 F.3d 1174, 1182 (9th Cir. 2015) (a "negative pregnant" is "[a] denial implying its affirmative opposite by seeming to deny only a qualification of the allegation and not the allegation itself") *citing* Black's Law Dictionary 1132 (9th ed. 2009). As applied here, the Rowe declaration implies that Sanmina failed to provide sufficient information for the service to assess the tax treatment of the receivable, but she really only denies that the materials Sanmina provided on January 20, 2014 were, by themselves, adequate.

She did not claim that the DLA Piper Report fails to explain it adequately; she did not provide the district court with a full copy of the DLA Piper Report so it could make a reasoned assessment of the adequacy of the explanation; and she admits that, three weeks after she received the documents that supposedly failed to explain Sanmina's treatment of the receivable, Sanmina provided an explanation which, she does not contend was inadequate. (ER 25.) Thus, even if the IRS had made the predicate showing that Sanmina disclosed the content of the Attorney Memos (and it did not), the IRS failed to produce any evidence, as required by Section 502(a)(3) that the Attorney Memos should, in fairness, be considered along with the DLA Piper Report.

Finally, the Service relies on *Richey*, 632 F.3d 559, for the proposition that Sanmina waived the attorney-client privilege and the attorney work product doctrine because DLA Piper supported its report with the Attorney Memos. This argument should be rejected for two separate reasons. First, as discussed above, DLA Piper did not say that. DLA Piper said it reviewed the Attorney Memos, along with other information. (ER 36.) DLA Piper then stated that it reached a conclusion, and it explained the basis for that conclusion. *Id.*

Second, *Richey* does not hold that producing a valuation report to the IRS waives any claim that documents reviewed by the authors of the report are privileged. Rather, in *Richey*, this court noted that the defendant and intervenors

failed to identify the allegedly privileged documents in the appraiser's file and ruled: "Richey remains obligated to appear before the IRS to testify about the non-privileged documents contained in the work file, as commanded by the summons." *Id.* at 567 (emphasis added). *Richey* simply did not reach the issue of which documents in the file were discoverable, it merely ruled that the appraiser needed to testify about the non-privileged ones.[26]

Finally, much of the IRS's waiver argument rests on a faulty premise. Sanmina does not contend that it is entitled to a worthless stock deduction *because* DLA Piper says so. (AOB, p. 41 (arguing that Sanmina "contends that it is entitled to a tax deduction based on DLA Piper's conclusions").) Rather, Sanmina is entitled to a worthless stock deduction because Sanmina AG became worthless. The IRS asked Sanmina to provide support for its position, and Sanmina complied with that demand. But the propriety of the deduction does not rest on DLA Piper's opinion, but on whether Sanmina AG had any value.

In short, the evidence demonstrates that Sanmina did not disclose the contents of any part of its Attorney Memos to the IRS. Sanmina thus did not waive the attorney-client privilege or the attorney work product doctrine.

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[26] Indeed, the court remanded the matter for *in camera* review to determine whether the appraiser's file contained privileged materials. The district court did not conduct such a review here because, unlike in *Richey*, the documents at issue have been specifically identified in a detailed privilege log, and Sanmina established that they are privileged.

2. Sanmina Did Not Commit a Waiver by Providing the Attorney Memos to DLA Piper.

Unlike the waiver analysis concerning disclosure of the DLA Piper Memo to the IRS, which is governed by Rule 502(a) (which applies only to disclosures to federal agencies or in a federal proceeding), the waiver analysis tied to Sanmina providing the Attorney Memos to DLA Piper is governed by the common law. *See* Fed.R.Evid. 501. Under the common law, the attorney-client privilege waiver analysis also differs from the work product waiver analysis. Both analyses, however, reach the same conclusion.

Any analysis should start, once again, with the Service's apparently shifting positions. At oral argument, the Service stated that it was relying exclusively on the contention that a waiver occurred when Sanmina produced the DLA Piper Report to the IRS:

> And you also seized upon our point that, again, the DLA Piper report is the document effectuating the waiver. It's not the transaction [sic] from Sanmina to their accountants[27] of the memorandum.

[27] For privilege analysis purposes, there is no distinction between the "accountants" and the role served by DLA Piper. Both the accountants and DLA Piper provided tax advice. (ER 82.) The communications seeking tax advice from DLA Piper were protected by the attorney-client privilege; the communications seeking tax advice from the accountants were equally

(SER 51:2-5; *see also,* ER 9, n. 43.) Now, however, the Service argues that the transmission of the Attorney Memos to DLA Piper created a waiver. That argument is waived and it is wrong under both the attorney-client privilege and the attorney work product doctrine.

a. Sanmina Did Not Waive the Attorney Client Privilege When it Gave the Attorney Memos to DLA Piper.

DLA Piper did not just provide Sanmina with valuation services but also provided it with legal tax advice. (ER 9:11-13, 10:7-10 (findings of fact); ER 82 (supporting evidence).) For privilege purposes, there is no difference between legal advice and tax advice that goes beyond mere calculations and advises a client on tax compliance. "Tax advice rendered by an attorney [or a federally authorized tax practitioner through 26 U.S.C. § 7525] is legal advice within the ambit of the privilege." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2nd Cir. 1984) (holding that consultation as to the tax consequences of a reorganization and whether those consequences should affect the structure of a corporate realignment is privileged legal advice).

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protected by the tax practitioner's privilege. 26 U.S.C. §7525; *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999) (Section 7525 "extends the attorney-client privilege to 'a federally authorized tax practitioner,' that is, a non-lawyer who is nevertheless authorized to practice before the Internal Revenue Service.").

Because the distribution of the Attorney Memos to lawyers providing Sanmina with legal advice was, itself, a privileged communication, that privileged communication cannot constitute a waiver of the attorney-client privilege. *See*, *Graf*, 610 F.3d at 1158; *see also Samuels v. Mitchell*, 155 F.R.D. 195, 198 (N.D. Cal. 1994) ("A line of cases beginning with *United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961), has recognized that the attorney-client privilege is not automatically waived if an otherwise privileged document is disclosed to a third party.").

b. The Work Product Protection Has Not Been Waived.

The protections against work product waiver stand even stronger than those applicable to the attorney-client privilege because a work product waiver only occurs if a disclosure is inconsistent with maintaining secrecy against an adversary. *Samuels*, 155 F.R.D. at 200 (no work product waiver unless the disclosure "substantially increases the opportunity for potential adversaries to obtain the information"); *Gramm v. Horsehead Indus., Inc.*, 1990 WL 14204 at *5 (S.D.N.Y. Jan. 25, 1990) (no waiver of work product protection to a document transmitted to the company's outside auditors because such a disclosure "cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs."). Indeed, without creating a waiver, work product may be shown to

others, "simply because there was some good reason to show it." *Adlman*, 134 F.3d at 1200, n.4.

There is no credible argument that Sanmina's disclosure of the Attorney Memos to its outside counsel (DLA Piper) constituted disclosure to an adversary or created a conduit for disclosure to an adversary. That disclosure thus did not waive work product protection. *See also, Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 448 (S.D.N.Y. 2004) (plaintiff's disclosure of an investigative report to plaintiff's outside auditor did not waive work product protection because auditor was not an adversary or a conduit to a potential adversary); *Gutter v. E.I. Dupont de Nemours & Co.*, 1998 WL 2017926 (S.D. Fla. May 18, 1998) (disclosure to outside auditors did not waive work product privilege "since there is an expectation that confidentiality of such information will be maintained by the recipient.").

In short, the Service cannot establish a work product waiver because Sanmina's disclosure of the Attorney Memos to DLA Piper was not inconsistent with maintaining confidentiality against an adversary.

VII. CONCLUSION

The district court correctly ruled that the Attorney Memos, which contain legal analyses prepared by Sanmina's in-house lawyers, are protected by the attorney-client privilege and the attorney work product doctrine. The court further

correctly ruled that neither DLA Piper's statement that it reviewed the Attorney Memos nor Sanmina's transmission of those memos to DLA Piper created a waiver. The ruling of the district court should therefore be affirmed.

DATED: January 22, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(A)(7)(C) AND CIRCUIT RULE 32-1

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and based upon the word processing program used to prepare the brief, contains 9,595 words.

Dated this 22nd day of January, 2016.

By: /s/ *Michael C. Lieb*
Michael C. Lieb

STATEMENT OF RELATED CASES

Respondents and Appellees Sanmina Corporation and Subsidiaries agree that there are no related cases to this appeal.

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 22nd day of January, 2016, by using the appellate CM/ECF system. I further certify that service of the brief was made on counsel for Appellate by CM/ECF.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on January 22, 2016, at Beverly Hills, California.

/s/ Linda M. Moore
Linda M. Moore

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]
Docket Number	15-16416