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

REPLY 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
Br.	Appellee's answering brief
Doc.	Documents in the original record, as numbered by the Clerk of the District Court
ER	Excerpts of record
Gov't Br.	Appellant's opening brief
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
SER	Supplemental excerpts of record

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REPLY BRIEF FOR THE APPELLANT

INTRODUCTION

This case involves Sanmina's failure to comply with an IRS summons for two memoranda. "[B]ased on" those memoranda and other information, DLA Piper had concluded in a valuation report that a $113 million intercompany receivable between Sanmina and its wholly owned subsidiary, Sanmina AG, lacked economic substance and should be disregarded. (ER 36.) Sanmina gave the valuation report to the IRS to support a claimed $503 million worthless-stock deduction for

its 2009 tax year. The two memoranda had been prepared by Sanmina's in-house tax attorneys in 2006 and 2009.

As explained in our opening brief, the District Court should have ordered the summons enforced. The 2006 memo was not protected by either the attorney-client or the work-product privilege in the first instance. (Gov't Br. 21-34.) As we further explained (*id.* at 35-48), even if the 2006 and the 2009 memos were privileged, Sanmina waived any privilege that otherwise applied to either memo. Having produced the DLA Piper report to the IRS to support its position, Sanmina could not properly claim the attorney-client or work-product privilege to withhold the memos on which DLA Piper had based its conclusion.

On appeal, Sanmina seeks to divert attention from the merits of the issues at hand. Sanmina repeatedly – but wrongly – contends that the United States has waived arguments that we have consistently advanced. Seeking to shift its burden of proof to the United States, Sanmina asks the Court to draw inferences in its favor. Sanmina also misapprehends the standard of review, describing the District Court's ultimate conclusions as to privilege and waiver as factual findings. None of Sanmina's arguments has merit.

This reply brief addresses only those points raised in Sanmina's answering brief that we believe warrant a response. With respect to points not discussed here, we rely on our opening brief.

ARGUMENT

A. Sanmina fails to carry its burden to prove that the 2006 memo is protected by the attorney-client privilege

1. The United States has properly preserved its arguments

In our opening brief, we explained that the attorney-client privilege never protected the 2006 memo "to file" because the required attorney-client communication was missing. (Gov't Br. 21-27.) In response, Sanmina repeatedly, but wrongly, contends that the United States has waived its attorney-client privilege arguments by not raising them in the District Court. (Br. 1, 8, 14-21.) That contention is belied by the record. After Sanmina asserted privilege in the District Court (ER 65-76), the Government filed a reply brief (SER 1-22). There, we argued that Sanmina "has not demonstrated that the Memoranda are protected from production by valid claims of attorney-client privilege[.]" (SER 6; *see* SER 8, 10.) In that regard, we argued, *inter alia*, that:

- Sanmina bore the burden of establishing that the attorney-client privilege applied and that it had not been waived (SER 6, 10),
- the conclusory affidavits and log that Sanmina had submitted were insufficient to establish that the attorney-client privilege protected the memoranda (SER 11, 13),
- a person's status as a lawyer does not, in and of itself, make all communications with that person privileged (SER 11-12),
- Sanmina did not show that the memoranda provided legal advice, or that the memoranda were drafted in response to a specific request for legal advice (SER 11-13), and
- there was no indication that the 2006 memo was marked as attorney-client privileged (SER 13).

The reply brief that the Government filed below therefore refutes Sanmina's waiver contentions on appeal. Sanmina's related charge that the Government purportedly is attempting "to hide the fact that it is now advancing different arguments" by not including its reply brief below (and the entire oral argument transcript) in its excerpts of record (Br. 1) is frivolous. The Court's rules provide that the appellant's excerpts of record in cases like this one "shall" include the petition and

response, but "shall not include" briefs filed in the district court "unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor." Ninth Cir. R. 30-1.4(c), 30-1.5. *See also* Fed. R. App. P. 30(a)(2).[1]

Sanmina is also wrong to suggest that the petition to enforce the summons should have included an "analysis of the privilege [and] waiver issues raised in this appeal." (Br. 15.) Summons enforcement proceedings are "summary in nature." *United States v. Clarke*, 134 S. Ct. 2361, 2367 (2014), quoting *United States v. Stuart*, 489 U.S. 353, 369 (1989). 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. *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). The United States usually satisfies that burden with an IRS agent's affidavit. (ER 102-06.) *See Clarke*, 134 S. Ct. at

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[1] We note that the District Court record is also available electronically, and that this Court's rules permit appellees to file supplemental excerpts of record, as Sanmina has done here. Also, while not required, Sanmina had "the opportunity to respond" (Br. 34) at oral argument in the District Court to the Government's reply brief below (SER 25-46, 51-53).

2367; *Stuart*, 489 U.S. at 359-60. It is not required to anticipate and refute the taxpayer's defenses to compliance with the summons. Rather, Sanmina, as the party claiming privilege in opposition to the summons, bore the burden of raising and proving its claim in response to the petition. *See United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011); *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981).

Moreover, to the extent that the Government's opening brief on appeal elaborated upon arguments raised below, this does not amount to raising "new arguments." (Br. 2, 8, 14-15, 20-21.) "[P]arties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *Thompson v. Runnels*, 705 F.3d 1089, 1098 (9th Cir. 2013) (citation omitted). Indeed, if the rule were otherwise, an appellant could not discuss an adverse opinion in a meaningful way, and the appellate courts could simply review that opinion and the briefs filed below. "An argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time pressured environment of the trial court, and there is nothing wrong with that." *Puerta v. United States*, 121 F.3d

1338, 1341-42 (9th Cir. 1997). Sanmina is flatly wrong to contend that the Government is raising new arguments on appeal regarding the 2006 memo.

2. Sanmina's attorney-client privilege claim cannot be reconciled with this Court's precedent

Sanmina fares no better on the merits of its claim that the 2006 memo "to file" was an attorney-client privileged communication. (Br. 15-20.) Although Sanmina bears the burden of proving its privilege claim, *see Richey*, 632 F.3d at 566, Sanmina concedes that it "cannot determine" whether the author of the 2006 memo, Christopher Croudace, ever sent it to anyone. (Br. 18 n.10.) Sanmina states that it is "possible" he did not. (Br. 16 n.8; *see* ER 87.) As explained in our opening brief, there is no evidence that the 2006 memo was reviewed (or even discovered) until 2009. (Gov't Br. 7, 21, 24-25.) Sanmina therefore has not shown that it sought legal advice from its in-house tax counsel in connection with the 2006 memo, or that Croudace communicated

legal advice to it. *See Richey*, 632 F.3d at 566; *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009).[2]

In complete disregard of this Court's precedent, Sanmina contends that it—

> 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 counsel.

(Br. 20; *see* Br. 16-17, 19.) But this Court has made clear that the party asserting the attorney-client privilege bears the burden of proving each essential element, including that "legal advice … [was] sought" and that "communications relating to that purpose" were made. *Richey*, 632 F.3d at 566. *See also Ruehle*, 583 F.3d at 608; *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002). Therefore, contrary to Sanmina's contention, it was required to prove that "legal advice of any kind [was]

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[2] Contrary to Sanmina's contention (Br. 12-13), the doctrine of construing the attorney-client privilege narrowly "has particular force in the context of IRS investigations given the 'congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry.'" *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2002), quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (emphasis in original); *United States v. Rozin*, 552 F. Supp. 2d 693, 698 (S.D. Oh. 2008).

sought," that the 2006 memo contained "communications relating to that purpose," and that the 2006 memo revealed communications "by the client." *Richey*, 632 F.3d at 566. As explained in our opening brief, Sanmina proved none of those essential elements. (Gov't Br. 21-27.) Sanmina cannot overcome its failure to meet its burden by asking the Court to "infer that [Croudace] prepared his memo to advise his employer/client" (Br. 3) or by stating that the existence of "confidential communications from the client" is "self-evident" (Br. 20).

Sanmina misplaces its reliance on Croudace's status as a tax department attorney, contending that whenever an in-house attorney places a memo in a file, doing so is the equivalent of communicating legal advice to a client. (Br. 18 & n.11.) But that is not the rule. The attorney-client privilege "only protects disclosure of communications." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981). "[M]emos to file prepared by counsel do not reflect an intention to confidentially communicate with a client." *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 6 (N.D. Ill. 1980) (citing 8 J. Wigmore, *Evidence*, § 2292 (McNaughton Rev. 1961)). Indeed, if Sanmina's position were correct, the attorney-

client privilege would protect any document that an in-house attorney prepares.

Faced with these hurdles, Sanmina seeks to lower the bar by labelling the District Court's ultimate determinations as "factual findings" subject to a clearly erroneous standard of review. (Br. 10-12, 17-18, 26-27.) But there was no trial in this case, and the District Court denied the Government's request to review the two memoranda *in camera*. (ER 7; *see* SER 46.) In any event, the District Court did not find that the 2006 memo was prepared in response to a request for legal advice or that its existence was even known to Sanmina prior to 2009. Indeed, the court could not have made such findings given that (i) Sanmina has never alleged that the 2006 memo was prepared in response to a request for legal advice, and (ii) Sanmina concedes that it "cannot determine whether Mr. Croudace sent the 2006 Memo to anyone." (Br. 18, n.10.) As we have argued, without this showing, the 2006 memo does not satisfy the essential elements for the attorney-client privilege. The district court's contrary conclusion is "review[ed] independently and without deference to the district court." *Richey*, 632 F.3d at 563 (citation omitted).

B. Sanmina fails to carry its burden to prove that the 2006 memo is protected by the work-product privilege

Sanmina also falls far short of meeting its burden to prove that the 2006 memo was prepared in anticipation of litigation, as required for work-product protection to attach. (*See* Gov't Br. 27-34.) Croudace prepared the memo in July 2006. Not only was there no litigation (or even an audit) of Sanmina's 2009 tax year in 2006, but the relevant return had not been filed, and there was no evidence that Sanmina even contemplated claiming the worthless-stock deduction now at issue. To the contrary, Sanmina concedes that "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." (Br. 18.) It strains logic to argue that a memo regarding transactions whose tax treatment would not become "relevant" for three years was prepared, *ab initio*, in anticipation of the eventual tax litigation.

Sanmina ultimately relies on hindsight, contending that the 2006 memo "reflects an analysis of complex business and legal issues that ultimately supported Sanmina's decision to take a worthless stock deduction" three years later. (Br. 26; *see* ER 11.) That contention fails for two reasons. First, it lacks evidentiary support. Sanmina's sole

description of the 2006 memo in the proceedings below was that it discussed "certain agreements among Sanmina and its subsidiaries," including "their legal enforceability, and their tax treatment." (ER 79.) That vague declaration does not satisfy Sanmina's burden to prove that the 2006 memo was prepared in anticipation of litigation regarding the 2009 deduction or any other matter. (*See* Gov't Br. 29-33.)

Second, a document does not acquire work-product protection simply because litigation was a general possibility or "ultimately" ensues. (Gov't Br. 29.) *See United States v. Textron, Inc.*, 577 F.3d 21, 30-31 (1st Cir. 2009); *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, 1120 (7th Cir. 1983). Instead, for work-product protection to attach, the document must have been prepared "because of" litigation in the first place. *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004) ("*Torf*"), quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998).

Invoking a straw-man argument, Sanmina mischaracterizes the Government's position, stating that "the Service argues that the 2006

Memo must have been prepared to provide Sanmina with non-legal business advice." (Br. 25.) That is not our contention. The Government has never seen the 2006 memo and bears no burden to prove that it "must have been … business advice." Rather, as explained in our opening brief, the 2006 memo lacks work-product protection because any legal advice it may have contained was not rendered "because of" litigation. (Gov't Br. 27-34.) Clearly, not all legal or tax advice occurs in the context of litigation. (*Id.* at 31-32.) *See Textron*, 577 F.3d at 29-30; *Binks Mfg. Co.*, 709 F.2d at 1120. *Sanmina* bore the burden of proving that the 2006 memo was prepared "because of" litigation, and it utterly failed to do so.

Once again relying on inference to supply what it failed to prove, Sanmina speculates that Croudace could have "foreseen a potential IRS challenge to the tax treatment of [the] transactions" discussed in his 2006 memo. (Br. 25, 26 n.18.) But there is not a scintilla of evidence that this was the case. Moreover, Sanmina has conceded that "the tax treatment of the 2006 transactions became relevant" in "2009," when Sanmina decided to claim the worthless-stock deduction. (Br. 18.)

Because the 2006 memo was so far removed from any decision-making, audit, or litigation involving the 2009 deduction, this case is distinguishable from the cases relied on by Sanmina (Br. 23-24). In particular, this case is nothing like *Adlman*, which Sanmina discusses at length. In *Adlman*, the taxpayer contemplated, in the spring of 1989, a merger that would lead to a large tax loss. 134 F.3d at 1195. It obtained a tax opinion from Arthur Andersen in August 1989, completed the merger in December 1989, and then claimed the loss on its 1989 tax return. *Id.* The Second Circuit held that if, on remand, the evidence showed that the August 1989 tax opinion was prepared "because of" anticipated litigation over the loss, then it might be protected by the work-product doctrine. *Id.* at 1203-04.

Here, as previously mentioned, there is no indication that Sanmina contemplated in 2006 claiming a worthless-stock deduction in 2009. Thus, there is no reasonable basis to even infer that Croudace's 2006 memo to file, which lay undiscovered for three years, was prepared

"because of" anticipated litigation over the 2009 worthless-stock deduction.[3]

The other cases on which Sanmina relies do not support it. Because there was no "tax audit" of Sanmina's 2009 tax year in 2006 (Br. 25), Sanmina misplaces reliance on *Deseret Mgmt. Corp. v. United States*, 76 Fed. Cl. 88 (2007). Equally inapposite are *United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006), *nonacq.*, AOD-2007-04 (2007), and *Delaney, Migdail & Young, Chtd. v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (Br. 25), where memos advised of "the types of legal challenges likely to be mounted," the "potential defenses available," and the "likely outcome." Sanmina made no comparable showing in this case. Nor can Sanmina rely on decisions regarding "dual-purpose" documents (Br. 21-22), having failed to show that Croudace prepared the 2006 memo for *any* litigation purpose. *Cf. Torf*, 357 F.3d at 909

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[3] Contrary to Sanmina's contention (Br. 24 n.16), *Adlman* and *Roxworthy* are not "binding precedent" in this Court, and Internal Revenue Manual § 5.17.6.15 does not describe them as such. It is also well settled that taxpayers are not entitled to rely on provisions of that manual in any event. *See, e.g., Fargo v. Commissioner*, 447 F.3d 706, 713 (9th Cir. 2006); *Valen Mfg. Co. v. United States*, 90 F.3d 1190, 1194 (6th Cir. 1996).

(documents prepared to assist attorney hired to defend company under criminal investigation); *Adlman*, 134 F.3d at 1197, 1204 (analysis of "likely outcome of litigation expected to result" from transaction; still not work product if substantially the same memo would have been prepared in ordinary course of business). In sum, Sanmina failed to meet its burden to prove that the 2006 memo is protected work product.

C. When it gave the valuation report to the IRS, Sanmina waived any attorney-client or work-product privilege that otherwise attached to the 2006 memo and the 2009 memo

1. Sanmina waived the attorney-client privilege for both memoranda

In the valuation report that Sanmina gave to the IRS, DLA Piper concluded that Sanmina AG's largest asset, an intercompany receivable of $113 million, lacked economic substance and should be disregarded. That conclusion was central to DLA Piper's determination that Sanmina AG was insolvent. DLA Piper explicitly stated that it "based" that conclusion on interviews and "documents provided by Management" – specifically, the 2006 and 2009 memos cited in the report. (ER 36.) Having voluntarily produced the DLA Piper report to support its position, Sanmina waived any attorney-client privilege for the 2009 memo and, if this Court should hold that the 2006 memo was

privileged in the first instance, for that memo as well. (*See* Gov't Br. 35-41.) Sanmina acknowledges that it bears the burden to prove that the privilege was not waived.[4] (Br. 33 n.23.)

Sanmina seeks to avoid the consequences of producing the valuation report by understating the extent of DLA Piper's reliance on the two memoranda. But in its report, DLA Piper did not state merely that it "reviewed" the 2006 and 2009 memos, as Sanmina contends. (Br. 3, 7, 29, 33, 35, 41.) Instead, DLA Piper's conclusion that the intercompany receivable should be disregarded was "based on interviews with Management and related documents provided by Management," specifically, the 2006 and 2009 memoranda, which are cited in the report. (ER 36.) DLA Piper reached that conclusion even after acknowledging its belief that "the book value of each liability provides the best estimation" of fair market value. (*Id.*) Indeed,

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[4] Sanmina has waived any argument that the Government bore an initial burden of production on this issue by failing to develop it in its answering brief. (Br. 33 n.23.) *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (argument not addressed in answering brief is waived); *cf. United States v. Strong*, 489 F.3d 1055, 1060 n.4 (9th Cir. 2007) ("The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal.").

elsewhere in its brief, Sanmina concedes the importance of the memos to DLA Piper's valuation, describing the memos as "analyz[ing] the tax implications of the transactions that Sanmina contends do not make Sanmina AG solvent." (Br. 8.) In consequence, Sanmina's contention that the memos need not "in fairness, be considered together" with the valuation report (Br. 33 (citing Fed. R. Evid. 502(a)) lacks merit.[5] Having produced the report to support its worthless-stock deduction, Sanmina cannot selectively invoke the attorney-client privilege to shield the very documents on which DLA Piper explicitly "based" its conclusion. (ER 36.)

Sanmina's contention that the DLA Piper report did not disclose the "contents" of the memos (Br. 30-33, 36) ignores this Court's waiver jurisprudence. As explained in our opening brief, when Sanmina disclosed the DLA Piper report to the IRS, it waived the privilege for all communications on the same subject. (Gov't Br. 38-39.) *See Richey*, 632 F.3d at 566 ("Voluntary disclosure of privileged communications

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[5] As is apparent in our opening brief, the Government's waiver arguments rely on federal common law, including this Court's precedent, in addition to Fed. R. Evid. 502(a). (*See* Br. 30; Gov't Br. 35-47.)

constitutes waiver of the privilege for all other communications on the same subject."); *Weil*, 647 F.2d at 24. This includes the 2006 and 2009 memos, which were cited in the report as a basis for the conclusion that Sanmina AG was insolvent. (ER 36.) *Accord United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir. 1972) (where information in working papers was transcribed on returns, disclosure waived privilege not only for transmittted data but also for details underlying that information).

In any event, the DLA Piper report did summarize the apparent "contents" of the memoranda, stating that the intercompany receivable should be disregarded because it was booked for local law purposes but Sanmina never intended to fund or pay it. (ER 36.) Sanmina was not free to disclose so much about that subject matter but then withhold the remainder. *See Weil*, 647 F.2d at 24 ("When (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.") (citation omitted). Contrary to Sanmina's contention (Br. 31), this Court has held that the privilege was waived when much *less* was disclosed than here. In *Weil*, the Court held that a mutual fund had waived the privilege as to communications between its officers and counsel

regarding registration of fund shares, when the fund's officer testified at deposition that counsel had advised that "it would be best to register wherever the Fund had a single shareholder." *Weil*, 647 F.2d at 23, 25.

Sanmina attempts to draw a distinction between a scenario in which DLA Piper was explicitly told by Sanmina's in-house counsel to disregard the intercompany receivable, and the scenario here, where DLA Piper reached that conclusion by reviewing memos prepared by Sanmina's in-house counsel. (Br. 29.) Sanmina concedes that if the former scenario had occurred, then its disclosure of the valuation report, reiterating the instructions from in-house counsel, would result in a waiver. But there is no principled distinction to be drawn. In this case, Sanmina placed the contents of the memoranda at issue by producing a valuation report to the IRS that expressly relied on them. (ER 36.) Where a party places an attorney's communications at issue, the courts have found a waiver of the attorney-client and work-product privileges. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162-63 (9th Cir. 1992) (party waived attorney-client privilege by claiming during discovery that its tax position was reasonable because it was based on advice of counsel); *Walker v. County of Contra Costa*,

227 F.R.D. 529, 535 (N.D. Cal. 2005) (defendant waived attorney-client and work-product privileges for investigation documents by asserting adequacy of investigation as an affirmative defense). The attorney-client privilege cannot be used as both a shield and a sword, as Sanmina seeks to do in this case. *Chevron*, 974 F.2d at 1162. (*See* Gov't Br. 40-41.)

Sanmina's remaining arguments against waiver raise a series of irrelevant matters that warrant only brief discussion. For example, the United States was not required to produce the entire DLA Piper report in the District Court in this summons enforcement proceeding. (Br. 34.) If Sanmina believed that portions of the report helped satisfy its burden of proof as to privilege or waiver, Sanmina should have produced them in response to the District Court's show-cause order. (ER 94-96.) Sanmina's suggestion that the IRS Revenue Agent's credentials are somehow lacking (Br. 34-35) is baseless. In the District Court, Sanmina did not dispute that the United States had established a *prima facie* case under *Powell* for enforcement of the summons. (ER 7.) *See Clarke*, 134 S. Ct. at 2367; *Stuart*, 489 U.S. at 359-60. Sanmina cannot suggest otherwise now.

For the same reason, Sanmina cannot now dispute that the 2006 and 2009 memos "may be relevant" to the investigation of its tax liabilities. *Powell*, 379 U.S. at 58. Its arguments on the merits of whether Sanmina AG's stock was worthless (Br. 7-8, 10, 36) have no place here. The point is *not* that "DLA Piper concluded" that the $113 million receivable should be disregarded (Br. 7 (emphasis omitted); *see* Br. 6, 29, 35), but, instead, that it used the memos to do so. Nor is the IRS's "position" regarding Sanmina's transactions at issue in this summons enforcement proceeding. (Br. 8; *see* Br. 10.) A summons is an investigatory tool. Its purpose is "'not to accuse,' much less to adjudicate, but only 'to inquire.'" *Clarke,* 134 S. Ct. at 2367 (quoting *United States v. Bisceglia*, 420 U.S. 141, 146 (1975)). Unless Sanmina can sustain its privilege claim, it must comply with the IRS summons for the 2006 and 2009 memos. Sanmina's irrelevant contentions provide no support for the District Court's conclusion that the attorney-client privilege was not waived.

2. Sanmina waived the work-product privilege for both memoranda

In the final paragraphs of its answering brief, Sanmina contends that "the work product protection has not been waived." (Br. 39

(heading).) According to Sanmina, its disclosure of the 2006 and 2009 memos to DLA Piper did not result in waiver of the work-product privilege because DLA Piper was not (and was not a conduit to) an adversary. (Br. 40.) Sanmina misapprehends the Government's argument.

In our opening brief, we explained that by disclosing the DLA Piper report *to the IRS*, Sanmina waived any work-product protection that otherwise covered the 2006 and 2009 memos. (Gov't Br. 44-47.) Sanmina concedes that a work-product waiver occurs "if a disclosure is inconsistent with maintaining secrecy against an *adversary*." (Br. 39 (emphasis in original).) Sanmina does not dispute that the IRS is its adversary for this purpose. Yet Sanmina ignores that disclosing the report to the IRS waived any work-product protection for the memos on which DLA Piper "based" its conclusion. (ER 36; *see* Br. 39-40, Gov't Br. 44-47.)

To the extent that Sanmina contends elsewhere in its answering brief that disclosing the DLA Piper report *to the IRS* did not waive the work-product privilege (Br. 30, 35, 36), Sanmina is wrong. As explained in our opening brief, once a disclosure is made to an adversary, the

same rules govern the scope of the waiver for both the attorney-client and work-product privileges. (Gov't Br. 45-46; *see* ER 21 (agreeing that there can be a subject matter waiver of both privileges).) Sanmina is therefore wrong to contend that it could produce the DLA Piper report, which based its conclusion on the memos, but then withhold the memos themselves.

Contrary to Sanmina's contention, there is no inconsistency in the Government's arguments that (i) Sanmina failed to establish that the 2006 memo is privileged, and that (ii) Sanmina waived any applicable privilege for both memos. (Br. 29 n.19.) Whether the 2006 memo is privileged depends upon the circumstances known in 2006, but whether Sanmina waived any privilege for both the 2006 and the 2009 memos depends upon the circumstances at the time of the waiver. And Sanmina, not the United States, is the party taking "both sides of the disclosure argument" (*id.*), by selectively revealing privileged communications while claiming the shelter of privilege to avoid disclosing other communications on the same subject. The Court should reject Sanmina's opportunistic position. *See United States v. Nobles*, 422 U.S. 225, 239 (1975) (defendant, "by electing to present the

investigator as a witness, waived the [work-product] privilege with respect to matters covered in his testimony"); *United States v. Salsedo*, 607 F.2d 318, 320-21 (9th Cir. 1979) (counsel waived work-product protection for transcript by referencing it in cross-examination). Sanmina waived any work-product protection that otherwise attached to the 2006 and 2009 memos when it disclosed the DLA Piper report to the IRS.

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

As explained in our opening brief, Sanmina also waived any attorney-client privilege for both memoranda when it gave them to DLA Piper for use in preparing the valuation report. (Gov't Br. 42-44.) DLA Piper conducted a "fair market value" analysis, not a legal analysis, in this case. (ER 29.) Communications are not privileged where a lawyer is not acting in his or her capacity as such. *See, e.g., United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980); *Liew v. Breen*, 640 F.2d 1046, 1050 (9th Cir. 1981). Therefore, Sanmina's disclosure of the memos to DLA Piper destroyed any attorney-client privilege that otherwise attached.

In response, Sanmina again raises a meritless contention that the United States is "apparently shifting positions." (Br. 37; *see* Br. 1-3, 10.) Sanmina erroneously contends that, in the proceedings below, the Government abandoned the argument that Sanmina's disclosure of the memoranda to DLA Piper resulted in a waiver. In reality, the Government abandoned only its argument that Sanmina's disclosure of the memos to its accountants, Ernst & Young and KPMG, resulted in waiver. (SER 51.) Although Sanmina denies this distinction (Br. 37 n.27), the District Court recognized it (ER 9 & n.43). The court concluded, however, that Sanmina's transmittal of the memos to DLA Piper did not result in a waiver of the attorney-client privilege because "DLA Piper was Sanmina's legal counsel, even if DLA Piper sometimes provided non-legal services to Sanmina." (ER 10.)

That conclusion is wrong for the reasons explained in our opening brief (at 42-44). The record provides no support for Sanmina's contention that DLA Piper "provided it with legal tax advice" (Br. 38) or "legal advice" (Br. 5, 39). Instead, in describing the nature of the engagement, DLP Piper stated that 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[.]" (ER 33.) The resulting report was an appraisal, prepared by an economist, estimating the fair market value of 100 percent of Sanmina AG's common stock to be negative $49 million. (ER 30, 34, 37.) *See Richey*, 632 F.3d at 567 ("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). Sanmina produced no evidence in the District Court that it engaged DLA Piper to provide legal advice or that the report contained any.

Therefore, by disclosing the 2006 and 2009 memos to DLA Piper, Sanmina waived any attorney-client privilege that otherwise attached to either memo. Sanmina also waived any attorney-client or work-product privilege that otherwise attached to either memo by disclosing the DLA Piper report to the IRS. The District Court erred when it denied the petition to enforce the IRS summons for the two memoranda.

CONCLUSION

For the reasons stated above and in the Government's opening brief, the District Court's order should be reversed and the summons enforced.

Respectfully submitted,

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Case No. 15-16416

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(s) /s/ Deborah K. Snyder

Attorney for United States of America

Dated: March 9, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on this 9th day of March, 2016, by using the appellate CM/ECF system. I further certify that service of the brief was made on counsel for the appellee by CM/ECF.

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