No. 18-17036

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Petitioner-Appellee

v.

SANMINA CORPORATION AND SUBSIDIARIES,

Respondent-Appellant

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

BRIEF FOR THE APPELLEE

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GLOSSARY

ER	Excerpts of record
I.R.C. or Code	Internal Revenue Code (26 U.S.C.)
IRS	Internal Revenue Service
Sanmina	Sanmina Corporation and Subsidiaries
Sanmina AG	Sanmina International AG

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INTRODUCTION

Sanmina Corporation (Sanmina) claimed a deduction of approximately $503 million on its 2009 tax return for worthless stock in its wholly owned Swiss subsidiary, Sanmina AG. When questioned by the IRS, Sanmina supported that deduction with a valuation report prepared by DLA Piper. The conclusions in that report depended in part on two memoranda written by Sanmina's in-house counsel. When the IRS requested and then summoned those two memoranda, however,

Sanmina responded that they were protected by the attorney-client privilege and the attorney work-product doctrine. After conducting an *in camera* review, the District Court determined that Sanmina had waived both privileges by relying upon the valuation report that relied, in turn, upon the memos. Having procured the DLA Piper report and submitted it to the IRS in an effort to persuade the agency that the common stock in Sanmina's wholly owned subsidiary was in fact worthless, Sanmina cannot shield from scrutiny the materials that formed the foundation of DLA Piper's appraisal. The summons should be enforced.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this suit to enforce an administrative summons pursuant to I.R.C. (26 U.S.C.) §§ 7402(b) and 7604(a). This is the second appeal in this case. The first appeal was taken by the United States from the District Court's order of May 20, 2015, denying enforcement of the summons. I.R.C. § 7609(h)(1). That order was a final order resolving all claims of all parties. The appeal was timely filed on July 15, 2015, 28 U.S.C. § 2017(b); Fed. R. App. P. 4(a)(1)(B), and was docketed in this Court as No. 15-16416. This Court

had jurisdiction over that appeal pursuant to 28 U.S.C. § 1291. In a memorandum of December 20, 2017, this Court vacated the District Court's order and remanded for *in camera* review (ER 118-120), but "retain[ed] jurisdiction over this appeal" (ER 120). *See Malone v. Avenenti*, 850 F.2d 569, 573 (9th Cir. 1988) (noting power to retain jurisdiction while ordering a limited remand).

On October 4, 2018, the District Court issued an order on remand, concluding that both of the memoranda sought by the IRS were privileged in the first instance, but that Sanmina had waived both attorney-client privilege and attorney work-product protection with respect to both memoranda. (ER 1.) The order did not, however, order the summons enforced. (ER 1-7.) Instead, the District Court directed its clerk to inform this Court of the order. (ER 6-7.)

On October 18, 2018, Sanmina filed a "precautionary notice of appeal." (ER 8.) Sanmina observed that, because the District Court's decision is in some respects the opposite of its prior decision, Sanmina is "now more properly the appellant." (ER 8, 9.) This Court docketed Sanmina's appeal as No. 18-17036. Whether as a continuation of No. 15-16416 or as a new appeal (as styled in Sanmina's opening brief

and this brief), this Court has retained jurisdiction to review the District Court's order of October 4, 2018.

ISSUE PRESENTED

Whether the District Court correctly determined that Sanmina waived the attorney-client and attorney work-product privileges with respect to memos prepared by its in-house counsel in 2006 and 2009 (i) when Sanmina provided a DLA Piper valuation report relying upon those memos to the IRS, or (ii) when Sanmina provided those memos to DLA Piper to assist in the preparation of the valuation report.

STATEMENT OF THE CASE

A. Procedural background

This is the second appellate proceeding in a summons-enforcement suit brought by the United States to enforce an IRS administrative summons seeking two memoranda. (ER 8, 260, 286.) The District Court (Magistrate Judge Paul S. Grewel) initially denied enforcement (ER 121), but this Court vacated that decision and remanded, directing the District Court to "review the documents *in camera* and reconsider its ruling on the asserted privileges following its review of the pertinent documents" (ER 120). In response to a request

for clarification, this Court subsequently instructed the District Court "to reconsider *both*: (1) whether the memoranda are privileged in the first instance and, if so, (2) whether such privilege was waived." (ER 92.) On remand, the District Court (Judge William Alsup) reviewed the summoned memoranda *in camera* and concluded that the memoranda were privileged, but that Sanmina had waived the privilege. (ER 1-7.) The District Court directed the clerk to inform this Court of its decision (ER 7), and Sanmina filed a notice of appeal (ER 8).

B. Factual background

1. Sanmina claims a half-billion dollar tax deduction and supports it with a DLA Piper valuation report

Sanmina is the domestic parent company of a consolidated group of manufacturing companies that includes Sanmina International AG, Sanmina's wholly owned Swiss subsidiary ("Sanmina AG").[1] (ER 211.) In May 2006, Sanmina entered into a contribution agreement with Sanmina AG for 890 million Swedish Krona. (ER 211-212, 216-219.) Sanmina states that the purpose of the agreement was "solely in order

[1] Sanmina AG is sometimes referred to in the record as "Swiss-3600," and Sanmina itself is sometimes referred to as "Sanmina-SCI" or "US-1010."

to prevent [Sanmina AG] from becoming insolvent for statutory accounting purposes and being forced to undergo an involuntary liquidation under Swiss law." This contribution agreement was terminated as of its effective date (ER 212, 216, 220) and replaced by a contribution agreement with substantially identical terms, but with an effective date of July 3, 2006 (ER 212, 221-224).

Christopher Croudace, an attorney in Sanmina's tax department, wrote a memorandum to the file entitled "Memo: Guarantee and Capital Contribution Agreement Concerning Sanmina International AG" (the 2006 memo). (ER 244, 254.) Croudace's memo is dated July 2, 2006, the day before the effective date of the contribution agreement. (ER 244.) Croudace left Sanmina on July 5, 2006. (ER 252.)

According to privilege logs produced by Sanmina, there is no indication that Croudace circulated the 2006 memo before he left Sanmina, or that anyone at all read the 2006 memo before March 10, 2009, when Mark Johnson, another attorney in Sanmina's tax department, found the 2006 memo in the file and read it. (ER 254.) Johnson promptly produced his own memorandum, entitled "Memo draft: Stock and Debt Losses on Swiss-3600," on March 11, 2009 (the

2009 memo). (ER 201, 254.) In May 2009, Johnson circulated his own memo to various managers and executives at Sanmina; Croudace's 2006 memo was circulated to a similar distribution list in June 2009. (ER 254.)

Sanmina stated that it also supplied both memos to outside advisors "to support Sanmina's taking of a worthless stock deduction in the approximate sum of $500 million based on the negative value of Sanmina's shares in [Sanmina AG]." (ER 247.) "Given the significance of the tax treatment," Sanmina stated, it "proceeded with the expectation that IRS would likely call upon Sanmina to defend the worthless stock deduction." (ER 247.) According to Sanmina, it therefore "sought advice from DLA Piper, Ernst & Young, and KPMG concerning the propriety of the deduction." (ER 247.) Sanmina provided the 2006 and 2009 memoranda to all three firms. (ER 247, 249.)

Sanmina claimed the $503 million deduction on its 2009 federal income tax return. (ER 261.) The deduction was sufficient to eliminate Sanmina's taxable income for its 2008 tax year (2009 fiscal year) and to create a net operating loss carry-forward of approximately $150 million

(ER 247). The IRS opened an examination into Sanmina's 2008, 2009, and 2010 tax years (ER 265-266).

During the course of the IRS examination, Sanmina sought to support its deduction by voluntarily producing to the IRS a DLA Piper valuation report valuing the stock of Sanmina AG as of June 30, 2009. (ER 105-106, 193-202, 267-268, 276.)[2] The report states that Sanmina asked DLA Piper to provide an estimate of the fair market value (FMV) of the common stock of Sanmina AG as of June 30, 2009, for tax compliance purposes, "specifically for confirming the worthlessness of Sanmina International AG's common shares." (ER 194.) The report "[e]stimate[d] the value of the equity of the Subject Company by applying a combination of the Discount Cash Flow ('DCF') methodology and the Net Asset Value ('NAV') methodology." (ER 199.)

In applying the Net Asset Value methodology, the report began from the "belie[f] that the book value of each liability provides the best estimation of its FMV." (ER 201, 276.) DLA Piper discarded this

[2] The record on appeal contains excerpts from two versions of the DLA Piper report. (*See* ER 201, 276.) Sanmina gave both versions to the IRS in support of its claimed deduction. There is no pertinent difference between the versions.

presumption in valuing Sanmina AG, however, "based on interviews with Management[fn6] and related documents provided by Management." Those interviews and documents caused DLA Piper to "conclude[ ] that . . . the intercompany non-trade receivable between [Sanmina] and Sanmina AG (about US$113 million) should be disregarded." (ER 201, 276.) Footnote six cites the capital contribution agreement discussed above, together with Croudace's 2006 memo and Johnson's 2009 memo. (ER 201, 276.)

DLA Piper concluded that book value was not relevant here because "the nature of the intercompany non-trade receivable of Sanmina AG from [Sanmina] is to make Sanmina AG solvent for local statutory purposes." (ER 201, 276.) Thus, DLA Piper concluded, Sanmina "never had any intension [*sic*] or reason to fund and then pay down the receivables." (ER 201, 276.) Far from intending to honor the terms of its July 2006 agreement, DLA Piper explained, "[i]t was Sanmina's sole intention to book this receivable as Sanmina AG's balance sheet." (ER 201, 276.) For that reason, DLA Piper "concluded that it is appropriate to disregard this intercompany receivable as it has no real economic substance." (ER 201, 276.)

The pertinent part of the report reads in full as follows (ER 201, 276):

Net Asset Value Method

Step 3: Adjusted liabilities to their market values, if different from their book values

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.

Since Sanmina Kista is the subsidiary of Sanmina Holding AB, the intercompany loan between these two companies will be eliminated during the roll-up of the individual entities' FMV estimates.

On the other hand, the nature of the intercompany non-trade receivable of Sanmina AG from Sanmina-SCI is to make Sanmina AG solvent for local statutory purposes and Sanmina-SCI never had any intension or reason to fund and then pay down the receivables. It was Sanmina-SCI's sole intention to book this receivable as Sanmina AG's balance sheet. Therefore, we concluded that it is appropriate to disregard this intercompany receivable as it has no real economic substance.

* * *

---

6. Memo draft: Stock and Debt Losses on Swiss-360, March 11, 2009.

> Capital Contribution Agreement between Sanmina-SCI Corporation and Sanmina International AG, July 3, 2006.
>
> Memo: Guarantee and Capital Contribution Agreement Concerning Sanmina International AG, July 2, 2006.

Relying on this analysis, the DLA Piper report concluded that the value of Sanmina AG as of June 30, 2009, was negative $49 million. (ER 200, 202.)

2. The IRS seeks the memoranda relied upon by DLA Piper in the valuation report

The IRS requested copies of the memoranda cited in footnote 6 of the valuation report, but Sanmina refused to produce them. (ER 268.) The IRS summoned the documents (ER 271, 273), but Sanmina objected, asserting that "each is protected by the attorney-client privilege and the attorney work product doctrine" (ER 278). This summons-enforcement suit followed.

a. Initial proceedings

The United States made a *prima facie* showing that the summons should be enforced under *United States v. Powell*, 379 U.S. 48, 57-58 (1964), and the District Court issued an order to show cause why the summons should not be enforced. (Doc. 4, ER 127, 285.) Sanmina resisted only on the ground that the memoranda were subject to

attorney-client privilege and were privileged as attorney work product, and that these protections had not been waived. (ER 234-241.) The United States argued that Sanmina had not met its burden of showing that the memoranda were privileged in the first instance (ER 174-177), and further argued that Sanmina had waived any privilege that attached to either memorandum by providing both memoranda to DLA Piper, and then by voluntarily disclosing DLA Piper's report—which expressly relied on the memoranda—to the IRS. (ER 178.)

The District Court (Magistrate Judge Grewal), without conducting an *in camera* review, concluded that the attorney-client privilege protected both the 2006 and the 2009 memoranda because they "constituted tax advice from lawyers to Sanmina." (ER 128.) The court also held that Sanmina did not waive the attorney-client privilege when it gave the memoranda to DLA Piper, "because DLA Piper was Sanmina's legal counsel, even if DLA Piper sometimes provided non-legal services to Sanmina." (ER 130.) Nor did Sanmina's disclosure of DLA Piper's valuation report to the IRS result in waiver, the court held, because "DLA Piper's mere mention of the existence of the memoranda did not summarize or disclose the content of the memoranda." (*Id.*)

b. The prior appeal

On appeal, a panel of this Court concluded that the "resolution of this case would be greatly facilitated by a more informed analysis from the district court." (ER 119.) This Court therefore instructed the District Court to "review the documents *in camera* and reconsider its ruling on the asserted privileges following its review of the pertinent documents." (ER 120.) In response to a request for clarification (*see* ER 115), the panel "instruct[ed] the district court on remand to review the memoranda in camera and, upon such review, to reconsider *both*: (1) whether the memoranda are privileged in the first instance and, if so, (2) whether such privilege was waived." (ER 92.)

c. The order on remand

After three hearings (ER 11, 75, 93), briefing on the issue of waiver only (ER 22, 35, 60, *and see* ER 88), and *in camera* review of the 2006 and 2009 memos (ER 1), the District Court issued an order concluding that the memos were protected in the first instance by both the attorney-client privilege and the attorney work-product privilege (ER 3). The memos were protected by the attorney-client privilege, the court concluded, because they "were prepared by in-house counsel, in

response to a request for legal advice, and contain legal advice communicated in confidence to Sanmina executives." (ER 3.) They were protected as attorney work-product, the court concluded, even though "there was no pending litigation when the memoranda were drafted," because "Sanmina reasonably anticipated that the IRS would scrutinize its $503 million stock deduction." (ER 3.)

The District Court concluded, however, that Sanmina had waived both protections, first by disclosing the memos to DLA Piper (ER 4) and again by disclosing the DLA Piper valuation report to the IRS (ER 5). The court determined that Sanmina had disclosed the memos to DLA Piper "not for the purpose of receiving legal advice," but because Sanmina "[a]nticipat[ed] that the IRS would adopt an 'adverse position' to taking a $500 million deduction," and wanted DLA Piper to "produc[e] a valuation report to then turn over to the IRS." (ER 4.) Citing this Court's decision in *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981), the District Court concluded that "Sanmina cannot disclose a privileged attorney communication relevant to an issue of material fact, then invoke privilege to shield that communication from discovery." (ER 4.)

The District Court rejected Sanmina's claim that the valuation report's conclusions were not based on the memoranda as "in direct conflict with the valuation report itself." (ER 4.) The court observed that the valuation report "explicitly stated that DLA Piper based its conclusions on 'the related documents provided by management,' then referenced the memoranda by name" (ER 4), and concluded that the "valuation report relied on the contents of the memoranda in concluding that Sanmina's largest asset, an intercompany receivable worth $113 million, lacked substance and should be disregarded" (ER 5). In short, the court concluded, Sanmina waived any pertinent privilege because "Sanmina relies on DLA Piper's determination" and "DLA Piper . . . based its conclusions on the memoranda in question." (ER 6.)

As an additional basis for its ruling, the District Court also concluded that "Sanmina's disclosure of the DLA Piper valuation report to the IRS waived any applicable privilege as to materials used in the valuation." (ER 5.) That is because "[t]he analyses that informed the valuation report's conclusions should, in fairness, be considered together." (ER 5, citing Fed. R. Evid. § 502(a)(3).) The "foundational

material," the Court held, had to be made accessible in order for "the IRS or any other reader to evaluate the DLA Piper opinion." (ER 5.)

Finally, the District Court rejected Sanmina's argument that "the footnote merely disclos[ed] the existence of the memoranda" and thus "did not waive any applicable privilege as to their entire contents." (ER 5.) Quoting this Court's opinion in *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996), the court held that Sanmina could not elect which portions of the memoranda to reveal because "'a privilege holder'" cannot "'selectively disclos[e] privileged communications to an adversary, revealing those that support the cause while claiming shelter of the privilege to avoid disclosing those that are less favorable.'" (ER 6.)

SUMMARY OF ARGUMENT

Sanmina claimed a $503 million tax deduction for purportedly worthless stock in its subsidiary. To support its position that the stock was worthless, Sanmina voluntarily gave the IRS a valuation report prepared by an economist at DLA Piper. That report, in turn, relied on two memoranda prepared in 2006 and 2009 by Sanmina's in-house tax attorneys. The IRS attempted to obtain those memoranda by issuing a

summons, which the Government then sought to enforce in the District Court. On remand from a prior appeal, the court held that although the memoranda were protected by the attorney-client and work-product privileges in first instance, both privileges were waived.

The District Court correctly ruled that Sanmina waived the privileges by its voluntary disclosures on two separate occasions, either of which is dispositive.

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

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

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

The District Court's finding that the privileges were waived should be affirmed, and the summons should be enforced.

ARGUMENT

Any applicable privilege was waived, either when Sanmina provided the DLA Piper report relying on the 2006 and 2009 memos to the IRS, or when Sanmina provided the memos to DLA Piper

Standard of review

Whether the attorney-client privilege or the work-product privilege has been waived is reviewed *de novo*. *United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990); *United States v. Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990); *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 683 (1st Cir. 1997). The issue was raised at ER 11-91 and was ruled on at ER 1-7.

A. The IRS has broad summons authority

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

1. Congress has conferred upon the Secretary of the Treasury the responsibility to determine tax liability, and has given the Secretary broad authority to conduct investigations for that purpose. I.R.C.

§§ 6201(a), 6301, 7601, 7602. As the Secretary's delegate, the Commissioner of Internal Revenue has broad statutory authority to issue summonses in furtherance of its investigatory responsibility. I.R.C. § 7602(a)(1)-(3). As an investigatory tool, the IRS summons "is a crucial backstop in a tax system based on self-reporting." *United States v. Clarke*, 573 U.S. 248, 254 (2014); *see United States v. Bisceglia*, 420 U.S. 141, 146 (1975).

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

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

2. In this case, the District Court correctly held that the United States had met its burden under *Powell* for enforcement of the summons through the declaration of an IRS Revenue Agent. (ER 127.) Sanmina has not argued to the contrary; thus, it has conceded that the two memoranda at issue "may be relevant" to the investigation of its tax liabilities. *Powell*, 379 U.S. at 58. Instead, Sanmina argued that the attorney-client and work-product privileges shielded the two

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

memoranda from production, and that those privileges had not been waived. (ER 46-59, 234-241.)

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

The attorney-client privilege generally protects confidential communications by a client to an attorney made in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 (1976). The work-product privilege, by contrast, applies only to documents specifically "prepared in anticipation of litigation or for trial." Fed. R. Civ. P. Rule 26(b)(3). Both privileges may be waived by voluntary disclosure. *See United States v. Plache*, 913 F.2d 1375, 1379 (9th Cir. 1990) (attorney-client); *United States v. Nobles*, 422 U.S. 225, 239 (1975) (work product). The party invoking either privilege bears the

burden to establish that it applies to the materials at issue and that it has not been waived. *Hernandez v. Tanninen*, 604 F.3d 1095, 1102 (9th Cir. 2010); *Weil v. Inv./Indicators, Research & Mgmt., Inc.,* 647 F.2d 18, 25 (9th Cir. 1981).

In this case, the District Court correctly found that the privileges had been waived, first when Sanmina provided the memos to DLA Piper "for the purpose of determining the value of Sanmina AG's common stock" (ER 4), and again when Sanmina voluntarily disclosed the DLA Piper valuation report to the IRS (ER 5).[4] At bottom, the court concluded, it would be "fundamentally unfair" to allow Sanmina to rely on DLA Piper's valuation report (as it does), "while withholding its foundation." (ER 6.) As we demonstrate below, these conclusions are correct and should be affirmed.

[4] In light of the District Court's holding, after *in camera* review, that both memoranda were privileged in the first instance (ER 3), the United States no longer contests the threshold applicability of either privilege to either memo, but continues to maintain that both privileges were waived for both memos, as discussed in the text.

B. Sanmina waived any attorney-client privilege that had attached to either memo when it gave the DLA Piper valuation report to the IRS

1. The District Court correctly determined that, because the valuation report relied on the analysis in the memos, fairness required disclosure of the memos

In an effort to persuade the IRS that Sanmina AG's stock was worthless, Sanmina voluntarily gave the IRS the DLA Piper valuation report. That disclosure resulted in a waiver of any attorney-client privilege with respect to both the 2009 memo and the 2006 memo cited in the valuation report. Sanmina, as the proponent of the attorney-client privilege, bears the burden to prove that the privilege has not been waived. *See Hernandez*, 604 F.3d at 1102; *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d at 25; *United States v. Flores*, 628 F.2d 521, 526 (9th Cir. 1980).

As the District Court observed (ER 6), the waiver doctrine is rooted in notions of fundamental fairness, and "it would be fundamentally unfair for Sanmina to disclose the valuation report while withholding its foundation." As this Court held in *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996), and as the District Court held here (following *Tennenbaum*) (ER 6), the waiver

doctrine prevents a privilege holder from selectively disclosing privileged communications to an adversary, revealing those that support its allegations, while claiming the shelter of the privilege to avoid disclosing those that are less favorable.

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

withhold or disclose, but after a certain point his election must remain final." *Id*. at 24 (citation omitted). *See also Hernandez*, 604 F.3d at 1100 ("raising a claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject").

The same principles apply here. Sanmina'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. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) (*citing Weil*, 647 F.2d at 24). The valuation report expressly relied on the two memoranda, which were central to DLA Piper's conclusion that Sanmina AG was insolvent. (ER 201.) Based on the memoranda, DLA Piper concluded that Sanmina AG's largest asset—the $113 million intercompany receivable—lacked economic substance and should be disregarded, with the result that Sanmina AG's liabilities exceeded its assets. (ER 201-202.)

2. Sanmina errs in its contention that waiver occurred only if the DLA Piper report reproduced the "contents" of the memos

Sanmina argues throughout its brief that to waive the attorney-client privilege, it is not enough that DLA Piper relied on the analysis in the memos, nor that the analysis in the memos may be, at least in part, inferred from the DLA Piper report. Instead Sanmina argues that, to waive the privilege, the report must do no less than "reveal the contents" of the memos. (Br. 9.) *See also*, *e.g.*, Br. 12 ("The critical issue in this appeal is whether Sanmina disclosed the contents of the Attorney Memos . . ."); Br. 14 ("the district court erred . . . because Sanmina did not disclose the contents of the Attorney Memos . . ."); Br. 15 ("It is disclosure of contents that can create a waiver"); Br. 27 ("Neither the face of the DLA Piper Report, nor any other evidence before the district court, demonstrated that Sanmina disclosed the *contents* of the Attorney Memos . . .").

None of this Court's precedents regarding the waiver of attorney-client privilege adopts this "contents" standard. Rather, Sanmina derives this supposed standard, so crucial to its case, from a district court case, *Roberts v. Legacy Meridian Park Hosp., Inc.*, 97 F. Supp. 3d

1245, 1253 (D. Or. 2015). (*See* Br. 9.) The *Roberts* case, however, does not support Sanmina's theory. To begin with, *Roberts* concerns a circumstance where the existence of attorney-client communications was disclosed, but the court found that the substance of those communications could not be inferred. 97 F. Supp. 3d at 1253. Moreover, the portion of the *Roberts* case relied upon by Sanmina comes under the heading "Express Waiver, or Waiver by Voluntary Disclosure"; it is followed immediately by an additional analysis, "Implied Waiver, or Waiver by Claim Assertion," *id.*, which concludes on the same facts that attorney-client privilege *was* waived, *id.* at 1255. As the district court in *Roberts* explained, *id.* at 1254, quoting 2 Paul R. Rice, Attorney-Client Privilege in the United States § 9:55 at 480 (footnotes omitted in *Roberts*), the doctrine of implied waiver applies "[w]hen clients have injected issues into actions, the fair resolution of which required the disclosure of confidential attorney-client communications." In such cases, *id.*, "courts need to be primarily concerned"—as the District Court was here—"with not permitting the privilege holder from placing the opposing party in an untenable position by injecting an issue into the litigation and then hiding behind

the privilege to preclude its fair and complete resolution." This Court has adopted the doctrine of implied waiver. *Bittaker v. Woodford*, 331 F.3d 715, 720–21 (9th Cir. 2003).

The district court in *Roberts* permitted the plaintiffs in that case to withdraw their claim if they preferred to do so in order to avoid a conclusion that attorney-client privilege had been waived by implication. 97 F. Supp. 3d at 1255-56. Likewise, here, Sanmina could have avoided production of the memos simply by declining to rely on the DLA Piper valuation report. To be sure, that decision might have left Sanmina in the position of having claimed a half-billion dollar loss without a supporting appraisal. What is not fair, as the District Court here held, is for Sanmina to use the DLA Piper valuation report to support its claimed loss while refusing to share the memos that, according to the report itself, underpin its analysis.

Sanmina similarly misreads several of this Court's opinions addressing the issue of waiver. Sanmina would distinguish *Weil v. Inv./Indicators, Research & Mgmt., Inc.,* 647 F.2d 18 (9th Cir. 1981), for example, because in that case part of the attorney's advice was stated, rather than implied in such a way that it could easily be inferred.

(Br. 24-25.) But this Court's decision in *Weil* did not turn upon the finding of an express statement, but applied a broader standard, holding that "[w]hen (the privilege holder's) conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final." *Id.* at 24 (citation omitted). Similarly, Sanmina would read this Court's opinion in *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010), as limiting the waiver doctrine to cases of express disclosure (Br. 26 n.14). But the case itself states a broader standard, *viz.*, the same implied waiver standard discussed, *supra*, that "raising a claim that requires disclosure of a protected communication results in waiver as to all other communications on the same subject." 604 F.3d at 1100.

The same reasoning controls in *Richey*, where this Court remanded for examination of waiver issues regarding the documents supporting a valuation report, and in *Tennenbaum*, where this Court held that the mere unfulfilled promise to disclose did not constitute a

waiver. As the District Court concluded, the DLA Piper report represents far more than a promise to disclose the memos: by relying upon the memos to abandon its ordinary valuation methodology, the report implicitly disclosed the analysis contained in those memos. Because Sanmina relies on that report, fairness to the reader requires access to the underlying analysis, i.e., access to the memos.

3. The DLA Piper report did not merely mention the memos but relied upon them to support otherwise unexplained conclusions

The District Court correctly rejected Sanmina's contention, implicitly reiterated on appeal (Br. 24), that the DLA Piper report merely mentioned the legal memoranda. (ER 5-6.) Although DLA Piper did not reproduce the memoranda in its report, it did spell out the logical relationship between the memoranda and the report's conclusions. DLA Piper initially acknowledged that it "believed that the book value of each liability provides the best estimation of its [fair market value]" (a belief that would not support Sanmina's claim to a deduction). (ER 201.) But DLA Piper then reached a contrary conclusion "based on" interviews and "related documents provided by Management," including the two memoranda at issue here. (*Id.*) The

memoranda were therefore crucial to the ultimate question of the worthlessness of the Sanmina AG stock.

The DLA Piper report also summarized the apparent contents of the memoranda, stating that the intercompany receivable should be disregarded because it was booked for local law purposes and Sanmina never intended to fund or pay it (*id.*). Even counsel for Sanmina has admitted that "I don't think it's a difficult job to reach certain inferences" about the memoranda from the DLA Piper report. (ER 14.) The District Court correctly concluded that the report's reliance on the memoranda, and its summary of their contents, is sufficient to waive the privilege. As the court explained, for "the IRS or any other reader to evaluate the DLA Piper opinion, the materials on which the opinion were based became discoverable. Otherwise, the . . . reader would be forced to simply accept the opinion without access to the foundational material." (ER 5.) Such a result, the court held, would be "fundamentally unfair." (ER 6.)

The District Court's conclusion comports with the law in this Circuit. The attorney-client privilege cannot be selectively waived. *In re Pacific Pictures*, 679 F.3d 1121, 1127-28 (9th Cir. 2012) (explicitly

rejecting "selective waiver" of the attorney-client privilege). *See Richey*, 632 F.3d at 566; *Weil*, 647 F.2d at 25; *accord United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 808-09 (D.C. Cir. 1982); *United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981). The Federal Rules of Evidence are to the same effect: where the intentional disclosure to "a federal office or agency" waives the attorney-client or work-product privilege, the waiver extends to communications or information that concern the same "subject matter" that ought in fairness to be considered together. Fed. R. Evid. 502(a).

Under this rule, Sanmina cannot rely on DLA Piper's determination that the intercompany receivable lacked economic substance (a dubious position for a taxpayer to take regarding its own transaction),[5] but then refuse to disclose the underlying analysis.

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

(continued…)

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

Sanmina should not "be allowed, after disclosing as much as [it] pleases, to withhold the remainder." *Weil*, 647 F.2d at 24 (citation omitted). Instead, having deployed the DLA Piper report to buttress its claim to a deduction, Sanmina must now produce the "other communications about the same matter" (*id.* at 23) that are responsive to the IRS summons. In essence, Sanmina contends that it is entitled to a tax deduction based on DLA Piper's conclusions, but that the IRS cannot examine those conclusions because the underlying memoranda

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(…continued)
consequences of his choice … and may not enjoy the benefit of some other route he might have chosen to follow but did not.").

are privileged. The District Court correctly discerned the "fundamental unfairness" in that position, and correctly held that Sanmina waived any attorney-client privilege that otherwise attached to the 2006 memo and the 2009 memo when it gave the DLA Piper report to the IRS.

4. The District Court did not err in invoking Fed. R. Evid. 502(a)

Sanmina also argues (Br. 19-21) that the District Court erred in invoking Federal Rule of Evidence 502(a). The Rule, however, contemplates a situation just like this case, where one document is disclosed to (*inter alia*) a federal agency, and another document remains undisclosed. Fed. R. Evid. 502(a). Sanmina thinks the rule is inapplicable because, it argues, the rule first requires "a waiver by a disclosure to a federal agency or in a federal proceeding." (Br. 21.) The waiver, as discussed *supra*, is the reliance of the disclosed DLA Piper report on the memos, with the undisputed result (ER 14) that the analysis contained in the memos can be inferred from the conclusions drawn in the report.

In such a case, Rule 502(a) provides that the privilege is waived with respect to the "undisclosed communication or information" if three factors are met. First, the waiver must be "intentional." Fed. R. Evid.

502(a)(1). Sanmina plainly intended to disclose the DLA Piper report to the IRS. Second, "the disclosed and undisclosed communications or information concern the same subject matter." Fed. R. Evid. 502(a)(2). By relying on the memos, the DLA Piper report (the "disclosed" communication) demonstrates that the memos themselves (the "undisclosed" communications) "concern the same subject matter."

The final element of Rule 502(a) is that the communications "ought in fairness to be considered together." As we have explained, after reviewing the memos *in camera*, the District Court here correctly concluded that "[i]n order for . . . any . . . reader to evaluate the DLA Piper opinion," that reader also needed to read "the foundational material explicitly relied on in forming the opinion." (ER 5.) *See* Argument B.1, *supra*.

Also meritless is Sanmina's contention (Br. 28-29) that the District Court's fairness finding was unsupported by the record. The United States produced excerpts from the DLA Piper report showing that, in that disclosed report, DLA Piper relied on the undisclosed

memos.[6] It was Sanmina's burden to show that the privilege was not waived. *Hernandez*, 604 F.3d at 1102; *Weil*, 647 F.2d at 25. If Sanmina believed that the complete report would have established that the privilege was preserved (*see* Br. 28-29), it could have introduced the complete report. The District Court did not err in concluding that fairness required disclosure of the foundational materials as would permit a reader to follow the valuation decisions made in the DLA Piper report.

C. Sanmina also waived any attorney-client privilege attached to either memo when it gave them to DLA Piper for use in preparing the valuation report

1. A disclosure made to an appraiser is not protected by attorney-client privilege

As the District Court determined (ER 4), Sanmina waived any attorney-client privilege for an additional reason: "[a]ny attorney-client privilege that might have attached to the memoranda was waived when Sanmina voluntarily disclosed the memoranda to DLA Piper, not for the purpose of receiving legal advice, but for the purpose of determining the

[6] Sanmina's assertion that the Government bore an initial burden of production on the issue of waiver (Br. 28) is erroneous and finds no support in this Court's attorney-client privilege jurisprudence. In any event, the Government met any such burden, as explained in the text.

value of Sanmina AG's common stock." Although DLA Piper is a law firm, it conducted a "fair market value ('FMV') analysis," not a legal analysis, in this case. (ER 194.) As DLA Piper itself described the nature of the engagement, Sanmina "asked [it] to provide an estimate of the fair market value ("FMV") of 100 percent of the common stock of its wholly-owned subsidiary," Sanmina AG, as of June 30, 2009. (ER 198.)

Because DLA Piper was not acting as a lawyer in preparing the valuation report, Sanmina's disclosures to DLA Piper were not protected by the attorney-client privilege. This Court has repeatedly held that where a lawyer is not acting in his or her capacity as such, the communications are not privileged. *See, e.g., United States v. Huberts*, 637 F.2d 630, 640 (9th Cir. 1980) (no privilege could be asserted where the lawyer acted as "a business agent rather than a legal advisor"); *Liew v. Breen*, 640 F.2d 1046, 1050 (9th Cir. 1981) (lawyer-client communications were not privileged where the "clients did not approach him for legal advice and assistance, but rather with the aim of finding [investment opportunities]"). Voluntarily disclosing privileged documents to third parties, such as DLA Piper here, generally destroys the attorney-client privilege. *In re Pacific Pictures*, 679 F.3d at 1127.

Although Sanmina broadly asserts that DLA Piper was its "outside counsel" (Br. 36), Sanmina introduced no evidence (such as an engagement letter or billing statements) to prove that it consulted DLA Piper for *legal* advice regarding the worthless-stock deduction. (*See* ER 207 (requesting supporting documentation).) In its brief on appeal (Br. 17), the only "supporting evidence" Sanmina points to in this regard is the declaration of Brian Dulkie, in which Dulkie distinguishes between the "tax advice" provided by KPMG and Ernst and Young, on the one hand, and on the other hand, "advice . . . concerning the propriety of the deduction" which Sanmina sought from KPMG, Ernst and Young, and DLA Piper. (ER 247.)

Sanmina's contention is misconceived. The valuation report, which was prepared by an economist (ER 195, Br. 4), is a straightforward appraisal devoid of legal discussion. The report applied "a combination of the Discount Cash Flow ("DCF") methodology and the Net Asset Value ("NAV") methodology" to estimate the fair market value of 100 percent of Sanmina AG's common stock to be negative $49 million as of the valuation date. (ER 195, 199.)

While "[t]he attorney-client privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice," *Richey*, 632 F.3d at 566, there is no evidence here that an attorney advising Sanmina engaged DLA Piper's appraisal services for the purpose of providing legal advice. This Court has squarely rejected the argument that appraisal services obtained for tax purposes fall within the protected circle. In *Richey*, the Court held that the attorney-client privilege did not extend to an appraiser retained by the taxpayer's attorney, who advised the taxpayer to claim a charitable deduction for a conservation easement. *Id*. at 567. The Court held that "any communication related to the preparation and drafting of the appraisal for submission to the IRS was not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value" of the property. *Id*.

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

2. The disclosure to DLA Piper was inconsistent with maintaining a confidential relationship

Sanmina argues (Br. 14) that providing the memos to DLA Piper could only have worked a waiver if "this disclosure was inconsistent with maintaining the confidential nature of the attorney-client relationship." Indeed, it was: unlike confidential legal advice, the report was prepared with the express understanding that it could be disclosed to any "tax authorities" who became "interested." (ER 198.) The District Court found (ER 3), and Sanmina does not dispute on appeal, that Sanmina "reasonably anticipated that the IRS would scrutinize its $503 million stock deduction"—*i.e.*, before it procured the report, Sanmina anticipated that the IRS would become an "interested tax authorit[y]" to whom the report could be disclosed.

Sanmina erroneously contends (Br. 15-16) that the United States conceded this issue, based on a statement made by counsel for the Government at a hearing conducted before the first appeal (ER 161), to the purported effect that it was the transmission of the DLA Piper report to the IRS, rather than the transmission of the memoranda to DLA Piper, that waived the privilege. 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 (ER 160-161). Although Sanmina now denies this distinction (Br. 16), the magistrate judge who heard the argument recognized it (ER 129 & n.43). This Court has held that communications "related to the preparation and drafting of [an] appraisal for submission to the IRS" are "not made for the purpose of providing legal advice, but, instead, for the purpose of determining the value." *Richey*, 632 F.3d at 567. The United States advocated the issue in its briefs on remand. (ER 27-28, 70-71.) The District Court correctly considered this argument on the merits and held that the communications between Sanmina and DLA Piper made for the purpose of determining the value of the stock of Sanmina AG were not made for the purpose of providing legal advice, and therefore were not privileged.

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

D. Sanmina waived any work-product privilege that applied to the memos

1. Sanmina waived any work-product privilege that otherwise protected the memos when it provided the valuation report to the IRS

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

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

Indeed, Sanmina contests this waiver finding only by reference to its argument that the DLA Piper report does not disclose or describe the contents of the attorney memos. (Br. 37.) Just as Sanmina's disclosure of the valuation report to the IRS resulted in a waiver of the attorney-client privilege for all communications on the same subject matter, so too did the disclosure result in a waiver of the work-product privilege for all communications on the same subject matter—including the 2006 and 2009 memoranda. *See* Argument B, *supra*. It is well recognized that the same rules govern the scope of waiver for both the attorney-client and work-product privileges. *See* Fed. R. Evid. 502(a) (when a disclosure is made to a federal agency, such as the IRS, the same rule governs the scope of waiver for both attorney-client and work-product privileges); *Bittaker v. Woodford*, 331 F.3d 715, 722 n.6 (9th Cir. 2003) ("Although our decision is couched in terms of the attorney-client privilege, it applies equally to the work product privilege, a complementary rule that protects many of the same interests.") (*citing Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981)). "Other than the fact that the initial waiver must be to an 'adversary,' there is no compelling reason for differentiating waiver of work product from

waiver of attorney-client privilege." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.,* 293 F.3d 289, 306 (6th Cir. 2002) (fn. ref. omitted).

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

selective and misleading presentation of evidence." Fed. R. Evid. 502(a) advisory committee's note (2007).

2. Sanmina also waived any work-product privilege that otherwise protected the memos when it gave them to DLA Piper

Although the Government did not argue the point below, the District Court also found that Sanmina waived any attorney work-product privilege that applied to the 2006 and 2009 memos when it gave them to DLA Piper. (ER 5.) To be sure, as Sanmina points out (Br. 35), attorney work-product privilege generally can be waived only by disclosure to an adversary, and DLA Piper was not Sanmina's adversary. Disclosure to a third party may waive the privilege, however, if the third party is a conduit to an adversary. *See*, *e.g.*, *Goodrich Corp. v. U.S. E.P.A.*, 593 F. Supp. 2d 184, 192 (D.D.C. 2009) (Environmental Protection Agency waived privilege by providing attorney work-product to a regional board).

Sanmina relies (Br. 36) upon cases finding that disclosure to an auditor or similar third party did not waive the work-product privilege. But those auditors were expected to keep the communications from the privilege-holder confidential. *See*, *e.g.*, *Merrill Lynch & Co. v. Allegheny*

Energy, Inc., 229 F.R.D. 441, 448 (S.D.N.Y. 2004) (auditor "under an ethical and professional obligation to maintain materials received from its client confidential"); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-cv-2152, 1998 WL 2017926, at *3 (S.D. Fla. May 18, 1998) ("expectation that confidentiality . . . will be maintained"). Here, in contrast, DLA Piper's report was intended for disclosure to "interested tax authorities." (ER 198.) The expectation of confidentiality was therefore absent. Under these circumstances, the fundamental rule of fairness comes into play: Sanmina cannot launder the analysis contained in the memos by providing the memos to DLA Piper to obtain a report intended for the IRS, then withhold the memos from the IRS.

In sum, the District Court correctly held that Sanmina waived the attorney-client and work-product privileges with respect to the 2006 and 2009 memos.

E. The District Court correctly determined that the entirety of the memos, including the legal analyses, must be produced in response to the summons

Finally, Sanmina argues that the rule limiting disclosures required of experts retained for trial or for trial preparation under Fed. R. Civ. P. 26(b)(4)(D) should be imported into the realm of attorney-

client privilege and attorney work-product waivers. (Br. 34.) The argument is spurious: as the District Court observed (ER 6), the memoranda and the valuation report were prepared and disclosed outside the context of a court proceeding; the "specialized rules" of Fed. R. Civ. P. 26(b)(4), governing expert witnesses, are therefore beside the point. *See MIT*, 129 F.3d at 684. Sanmina even agrees, arguing elsewhere in its opening brief that Rule 26(b)(4) does not apply here, because the DLA Piper report is "not the same" as an expert report. (Br. 31.)

Nevertheless, Sanmina would rely on the terms of Rule 26(b)(4)(C) and (D) to limit its disclosures to the portions of the memos that restate the contracts it has already disclosed (Br. 34), and to avoid disclosing "the legal analyses of Sanmina's in-house counsel" (Br. 39). In fact those rules, if applicable, would require disclosure: given the manner in which DLA Piper used the memos, the legal analysis in those memos likely is "communication" that "identif[ies] assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed." Fed. R. Civ. P. 26(b)(4)(C)(iii). That "DLA Piper did not say" so in so many words (Br. 32) is hardly conclusive. To the

contrary, the contracts by themselves could hardly explain why DLA Piper decided to abandon its usual method of valuing liabilities by the book—and DLA Piper did not attribute its decision to the contracts alone. (ER 201.)

Sanmina makes one final misbegotten effort to avoid disclosing the legal analyses in the memos. (Br. 39.) It argues that, once the District Court found a waiver of the attorney-client and attorney work-product privileges, the court was obliged under Fed. R. Evid. 502(a) "to determine what parts, if any, of the Attorney Memos 'ought in fairness' to be considered alongside the DLA Piper Report." (Br. 38.) Sanmina contends that "the District Court did not engage in such an analysis" and that the case therefore should be remanded (again). (*Id.*) But the District Court engaged in precisely the analysis Sanmina advocates: Sanmina simply does not like the result. The court held that "[t]he analyses that informed the valuation report's conclusions should, in fairness, be considered together [with that report]." (ER 5.) "Otherwise," the court reasoned, "the IRS or any other reader would be forced to accept the opinion without access to the foundational material, and, in this case, the foundational material explicitly relied on in

forming the opinion." (ER 5.) Because the privileges were waived, the court ruled that "the memoranda are subject to production." (ER 1.) In short, the District Court already has held that the entirety of the memos must be disclosed.

CONCLUSION

For the foregoing reasons, the District Court's order should be affirmed, and the summons should be enforced.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, counsel for the United States of America respectfully inform the Court that this case is related to case No. 15-16416, where the Court ordered a remand for *in camera* review. The case now being briefed pertains to the District Court's ruling after *in camera* review.

CERTIFICATE OF COMPLIANCE

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

Case No. 18-17036

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Attorney for United States of America

Dated: June 20, 2019

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 20th day of June, 2019, by using the appellate CM/ECF system. I further certify that service of the brief was made on counsel for the appellant by CM/ECF.

/s/ Bethany B. Hauser
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