CASE NO. 18-17036

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Petitioner and Respondent,

v.

SANMINA CORPORATION AND SUBSIDIARIES

Respondents and Appellants.

Appeal from The United States District Court,
Northern District of California, Case No. C-15-00092 WHA
Hon. William H. Alsup, United States Judge

OPENING BRIEF OF APPELLANTS

SANMINA CORPORATION AND SUBSIDIARIES

Michael C. Lieb (SBN 126831)
Leemore L. Kushner (SBN 221969)
ERVIN COHEN & JESSUP LLP
9401 Wilshire Boulevard, Ninth Floor
Beverly Hills, California 90212-2974
Telephone: (310) 273-6333
Facsimile: (310) 859-2325

Attorneys for Appellants
SANMINA CORPORATION AND SUBSIDIARIES

CORPORATE DISCLOSURE STATEMENT

Appellant Sanmina Corporation ("Sanmina") hereby states, consistent with Federal Rule of Appellate Procedure 26.1, that there are no parent corporations of Sanmina. The following entities own 10% or more of Sanmina's stock: BlackRock Institutional Trust Company, N.A. and The Vanguard Group, Inc. Certain unidentified "subsidiaries" of Sanmina Corporation were also named in the underlying petition. There are no subsidiaries of Sanmina Corporation whose shares of stock are owned by publicly held corporations other than Sanmina.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. INTRODUCTION

The parties dispute whether Sanmina[1] waived the attorney-client privilege and the attorney work product protection for two memos prepared by its tax department attorneys (collectively, the "Attorney Memos"). Waiver generally occurs with disclosure – and in the case of the attorney work product doctrine, by disclosure to an adversary. Neither Sanmina, nor anyone acting on its behalf, disclosed the contents of the Attorney Memos to anyone other than persons in a confidential relationship with the company.

The issue on this appeal is whether, notwithstanding the undisputed fact that Sanmina only disclosed the contents of the Attorney Memos to parties with whom it had a confidential relationship, it nonetheless waived the attorney-client privilege and the attorney work product doctrine when it provided the Attorney Memos to DLA Piper, LLC ("DLA Piper"), or when it provided the Internal Revenue Service ("IRS" or "Service") with a DLA Piper valuation report that referenced the two Attorney Memos in a footnote, but did not disclose their contents.

The district court (Magistrate Judge Grewal) originally concluded that the Attorney Memos are protected by both the attorney-client privilege and the attorney work product doctrine, and that no waiver occurred. The district court,

[1] Sanmina refers to Appellants Sanmina Corporation and subsidiaries.

however, did not conduct an *in camera* review of the Attorney Memos, and on appeal, this Court remanded the matter for the conduct of an *in camera* review. In its clarifying order, this Court also allowed the district court to revisit the waiver issue. The district court (Judge Alsup) conducted an *in camera* review, confirmed that the Attorney Memos constitute attorney work product and are protected by the attorney-client privilege, but without considering any additional evidence, disagreed with Magistrate Judge Grewal and found a waiver. This appeal followed.

With the privileged nature of the memos confirmed by the district court, the sole issue on appeal is waiver. As discussed below, the district court erred when it found a waiver because the contents of the Attorney Memos were never disclosed to the IRS, or to any party not in a confidential relationship with Sanmina.

II. STATEMENT OF JURISDICTION

This is an appeal from a final ruling of the United States District Court for the Northern District of California. [1 ER 1; 2 ER 8.][2] The district court's ruling is appealable because it fully and finally ended the litigation on the merits and left nothing for the court to do but execute the judgment. *Catlin v. United States*, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945); 28 U.S.C. § 1291.

[2] Citations to the Excerpt of Record are formatted as follows: [Vol. no.] ER [page no.].

In addition, the district court's ruling is appealable because this Court retained jurisdiction over the matter as part of its order of remand. [2 ER 120.]

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it ruled that Sanmina waived the attorney-client privilege for the two Attorney Memos?

2. Did the district court err when it applied Federal Rule of Evidence 502 to determine the existence of a waiver?

3. Did the district court err when it ruled that Sanmina waived attorney work product protection for the two Attorney Memos?

4. If Sanmina did commit a waiver, did the district court err when it extended that waiver beyond the facts and data contained in the Attorney Memos?

IV. STATEMENT OF PROCEDURAL BACKGROUND

This dispute arises in the context of a summons issued by the Internal Revenue Service[3] to Sanmina. [2 ER 271.] The IRS issued the summons as part of its review of a worthless stock deduction that Sanmina claimed in its 2009 federal income tax return. [2 ER 260.] The worthless stock deduction pertains to a wholly-owned subsidiary known as Sanmina AG, and often referred to as "Swiss 3600." [2 ER 261.] Sanmina determined that Swiss 3600 had become worthless

[3] Hereafter, "the Service" or "the IRS."

and, under federal income tax laws, Sanmina was therefore entitled to claim a worthless stock deduction equal to its basis in Swiss 3600 stock. [*Id.*]

The IRS does not dispute the propriety of Sanmina claiming a worthless stock deduction if its ownership interest in Swiss 3600 in fact became worthless. [2 ER 100-03.] Rather, the IRS questions whether the value of Sanmina's ownership interest in Swiss 3600 actually did become worthless in 2009. [2 ER 261; 2 ER 230-31; 2 ER 170-72.] That issue, according to the IRS, depends in part on whether Swiss 3600 was kept solvent by certain intercompany loans and guarantees. [2 ER 170-72.]

To support its claim that Swiss 3600 stock became worthless, Sanmina provided the IRS with a valuation report (the "DLA Piper Report") prepared by economists at the DLA Piper law firm. [*Id.*] The DLA Piper Report concluded that the intercompany loans and guarantees did not make Swiss 3600 solvent. [2 ER 230-31.] As part of the conclusion, DLA Piper noted that it reviewed the two Attorney Memos along with other documents, and discussed the loans and guarantees with Sanmina personnel. [*Id.*]

The IRS issued a summons seeking the two Attorney Memos. [2 ER 271.] It disputed that the memos were privileged – an issue that is no longer in dispute; and it claimed that any privilege or work product protection had been waived when

the DLA Piper Report mentioned, and relied in part on, the content of those memos. [2 ER 165.]

It is undisputed that Sanmina timely objected, the IRS timely moved to enforce the summons, and the district court had jurisdiction to resolve the dispute. The district court (Magistrate Judge Grewal, presiding[4]) initially ruled that Attorney Memos are protected by both the attorney-client privilege and the attorney work product doctrine, and that no waiver had occurred. [2 ER 121]. The IRS appealed and, following oral argument, this Court issued two orders, the first of which remanded the matter for *in camera* review [2 ER 118]; and the second of which clarified the scope of remand to include further consideration of the waiver issue [2 ER 92].

Following remand, the case was reassigned to the Honorable William H. Alsup. Judge Alsup conducted an *in camera* review and confirmed that Sanmina had properly asserted both the attorney-client privilege and the attorney work product doctrine. [1 ER 3.] However, Judge Alsup, on the same record originally reviewed by Magistrate Judge Grewal, concluded that Sanmina had waived the attorney-client privilege and the attorney work product doctrine. [1 ER 3-7.]

---

[4] The parties stipulated to Magistrate Judge Grewal issuing a final decision. [2 ER 259.]

Sanmina then filed this appeal, noting that this Court previously retained jurisdiction of the matter. Sanmina suggested that fresh briefing and argument were required because Sanmina is now the appellant and the ruling previously briefed has changed. [2 ER 8]. Sanmina thus proceeds as appellant.

V. STATEMENT OF THE CASE

A. The Attorney Memos

Chris Croudace, an attorney in the Sanmina tax department, prepared a memo dated July 2, 2006, that analyzed the anticipated tax treatment of a series of intercompany loans and guarantees (the "2006 Memo"). [2 ER 244.] His last day with the company was July 5, 2006 [2 ER 252], and it is reasonable to infer that he prepared the memo in order to pass along to his successor information on the terms of the summarized transactions, including his analysis of how he expected them to be treated under the federal tax laws. *See also,* 2 ER 131 ("the IRS speculates that the 2006 memorandum was drafted because its author was leaving the company . . . .") His memo explained the reasons for those transactions, described their legal enforceability, and analyzed their anticipated tax treatment. [2 ER 244.] The memo cited and discussed IRS letter rulings and tax court decisions. [2 ER 244.]

Following Mr. Croudace's departure, Sanmina executed one additional agreement of relevance to this dispute, which was a December 19, 2008 guarantee of an intercompany receivable owed by Swiss 3600 to Sanmina-SCI Holding AB.

[2 ER 212, 225.] Thereafter, Sanmina tax department attorney Mark Johnson prepared a draft memo dated March 11, 2009 (the "2009 Memo") analyzing the "tax effect of the liquidation of Swiss-3600." [2 ER 244-245.] Like the 2006 Memo, the 2009 Memo largely consists of legal analysis – in this instance, of the liquidation of Swiss 3600. *Id.* It cites IRS revenue rulings, tax code provisions, tax court decisions, and a decision of the United States Supreme Court. *Id.*

In prior proceedings, while admitting that the 2009 Memo is protected by the attorney-client privilege and the attorney work product doctrine [AOB1[5], p. 15, p. 21 n. 4; 2 ER 116:4-9], the Service disputed Sanmina's contention that the 2006 Memo is similarly privileged.[6] Sanmina believes that, in light of the district court's *in camera* review following remand, the IRS no longer disputes that both memos are privileged. The issue currently before this Court is waiver.

B. The Tax Dispute

Sanmina is the parent company of an affiliated taxpaying group that includes Swiss 3600. [AOB1, p. 4.] Sanmina claimed a $503 million worthless stock

---

[5] AOB1 refers to Appellant's (the IRS') Opening Brief in the first appeal (Case no. 15-16416, [Dkt. 12]).

[6] Sanmina recognizes that the attorney work product doctrine is not a "privilege." This brief largely discusses the attorney-client privilege and the attorney work product doctrine separately, but for the sake of efficient writing, occasionally refers to the Attorney Memos as "privileged" or to the attorney-client privilege and the attorney work product doctrine as "privileges."

deduction based on its ownership of Swiss 3600 stock. *Id.* Based, *inter alia,* on legal advice from the DLA Piper law firm, Sanmina concluded that it was entitled to take a worthless stock deduction because Swiss 3600 had become insolvent and Sanmina's shares of stock in that company were therefore worthless. [2 ER 194-195, 211-213; AOB1, p. 4.]

The resulting worthless stock deduction offset all of Sanmina's taxable income for the 2009 tax year and generated a net operating loss ("NOL") carry-forward of approximately $150 million. [AOB1, p. 4.] Given the magnitude of the deduction, Sanmina sought advice from the DLA Piper law firm and from the Ernst & Young and KPMG accounting firms on the propriety of the worthless stock deduction. [2 ER 247.] Sanmina shared copies of the Attorney Memos with all three. [2 ER 245 (¶ 9), 247 (¶ 2), 254-255.]

As anticipated, the IRS examined Sanmina's tax returns and issued an Information Document Request ("IDR"), seeking support for the worthless stock deduction. [2 ER 187-188.] In response, Sanmina produced a July 23, 2009 document titled: "Sanmina-SCI Corporation: Estimate of Fair Market Value of Sanmina International AG" prepared by the DLA Piper law firm (the "DLA Piper Report"). The DLA Piper Report is addressed to Mark Johnson, the author of the 2009 Memo. [2 ER 194.] It concludes that the liabilities of Swiss 3600 (i.e.,

Sanmina International AG) exceeded its assets by $49 million, thus establishing its insolvency. [2 ER 195, 200.]

The IRS took issue with DLA Piper's decision to disregard two inter-company obligations, one of which the IRS apparently claims would have made Swiss 3600 solvent. DLA Piper described its reasoning:

> "We believed that the book value of each liability provides the best estimation of its FMV. However, based on interviews with Management and related documents provided by Management,[6] we concluded that the intercompany loan between Sanmina Holding AB and Sanmina Kista (about US$ 90 million) as well as the intercompany non-trade receivable between Sanmina-SCI and Sanmina AG [*i.e.,* Swiss 3600] (about US$ 113 million) should be disregarded."

[2 ER 201 (emphasis added).] Footnote 6 in the quotation above identifies the three documents DLA Piper reviewed before reaching its conclusion. It lists the 2006 Memo, the 2009 Memo, and the "Capital Contribution Agreement between Sanmina-SCI Corporation and Sanmina International AG, July 3, 2006." [*Id.*]

Nowhere does the DLA Piper Report reveal the contents of either of the two Attorney Memos (or, for that matter, the content of its interviews with management that it also considered). Only the disclosure of the confidential portions of the privileged communications can effectuate a waiver. *Roberts v. Legacy Meridian Park Hosp., Inc.*, 97 F.Supp.3d 1245, 1253 (D. Or. 2015) *citing* 2 PAUL R. RICE, ATTORNEY–CLIENT PRIVILEGE IN THE UNITED STATES § 9:30 at 153–56 (2014). The DLA Piper Report merely states that DLA Piper

interviewed management and reviewed the three documents, after which DLA Piper concluded that the two referenced transactions should be disregarded. [2 ER 201.] Indeed, DLA Piper did not even state how, if at all, the Attorney Memos supported its conclusions.

In a letter dated February 13, 2014, Brian Dulkie, Sanmina's Director – Tax Controversy, provided the Service with all the documents memorializing the disregarded transactions. [2 ER 211, 214-225.] He also explained why the contribution agreements had zero value. [2 ER 212 (second full paragraph).] Mr. Dulkie also explained (and the IRS does not dispute) that DLA Piper's decision to disregard the contribution agreements did not change the result because, even if they were not disregarded, the contribution agreements could never have made Swiss 3600 solvent. [2 ER 212 ("these capital contributions could only prevent the company from having a net negative value (i.e., the common stock value would still be zero")).]

The IRS thus knows exactly what Sanmina's position is, and it has the underlying non-privileged documents that memorialize the transactions that Sanmina contends do not make Swiss 3600 solvent. Sanmina is not shielding *facts or data* from the IRS. Sanmina has provided the facts and data by producing the underlying transactional documents. What it has not provided are the Attorney Memos in which its in-house lawyers analyzed the tax implications of the

transactions that Sanmina contends do not make Swiss 3600 solvent. If the IRS has a different position on the tax implications of these transactions, its lawyers can formulate whatever arguments they want; they do not need, and they are not entitled to, the analysis of, and advice provided by, Sanmina's lawyers.

VI. SUMMARY OF ARGUMENT

As noted above, the district court determined, following *in camera* review, that Sanmina properly asserted the attorney-client privilege and the attorney work product doctrine to attempt to protect the Attorney Memos from disclosure. The IRS has not cross-appealed, and Sanmina does not believe that the IRS continues to challenge the initially privileged nature of either document.[7]

At issue in this appeal is the Service's claim, and the district court's ruling, that Sanmina waived both the attorney-client privilege and the attorney work product doctrine. Judge Alsup determined that the waiver occurred when Sanmina provided the Attorney Memos *to* DLA Piper, and he also ruled that, even if that disclosure did not constitute a waiver, Sanmina's disclosure of the DLA Piper Report to the IRS did. [1 ER 1.]

Sanmina respectfully submits that the district court erred. There could be no waiver, as the IRS itself conceded, when Sanmina provided privileged documents

[7] As noted above, the IRS expressly conceded the privileged nature of the 2009 Memo in the earlier appeal. [AOB1 at 21, n. 4.]

to its own accountants and lawyers; and the disclosure of the DLA Piper Report to the IRS did not disclose the contents of the Attorney Memos to any third party, and thus could not constitute a waiver. Furthermore, the district court failed to distinguish between the waiver of the attorney-client privilege and the waiver of the work product protection, the latter of which only occurs on disclosure to an adversary. DLA Piper was not Sanmina's adversary. Indeed, as noted above, the IRS initially conceded that the disclosure of the Attorney Memos to DLA Piper could not constitute a waiver of any type. The IRS then attempted to reverse its position as to waiver of the attorney-client privilege. However, the IRS *never* argued that the disclosure of the attorney memos to DLA Piper waived work product. [*See generally*, AOB1; 2 ER 32-33, 71-73.]

As discussed below, the district court erred in finding a waiver and its order should be reversed. The critical issue in this appeal is whether Sanmina disclosed the contents of the Attorney Memos to an adversary (in the case of a claimed attorney work product waiver), or to a party who is not bound by the privilege (in the case of an attorney-client privilege waiver). Sanmina did neither. Sanmina also did not impliedly waive any privilege by claiming a worthless stock deduction based on the advice and analysis of lawyers, accountants and economists.

VII. ARGUMENT

A. Standard of Review

The issue of waiver is reviewed *de novo. U.S. v. Ortland* 109 F.3d 539, 543 (9th Cir. 1997) (attorney-client privilege); *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 665 (9th Cir. 2003) ("whether a party has waived an otherwise applicable privilege is a mixed question of law and fact and is reviewed de novo.").

B. The Attorney Memos are Protected by the Attorney-Client Privilege and the Attorney Work Product Doctrine.

On remand, following *in camera* review, the district court confirmed that Sanmina properly asserted both the attorney-client privilege and the attorney work product doctrine. As to the attorney-client privilege, the court ruled that the Attorney Memos "were prepared by in-house counsel, in response to a request for legal advice, and contain legal advice communicated in confidence to Sanmina executives. Thus, the memoranda are protected by the attorney-client privilege." [1 ER 3:9-12).] With respect to the attorney work product doctrine, the court ruled that "the memoranda were protected by work-product because they were prepared because of a potential challenge by the IRS." [1 ER 3:23-24.]

C. Sanmina Did Not Waive the Attorney-Client Privilege.

The district court did not distinguish between the attorney-client privilege and the attorney work product doctrine when it found that Sanmina waived both

when it disclosed the Attorney Memos to DLA Piper and, again, when Sanmina disclosed the DLA Piper Report to the IRS. As discussed in this section of the brief, the district court erred as to the attorney-client privilege analysis because Sanmina did not disclose the contents of the Attorney Memos to any party other than those with whom it had a confidential relationship, and it did not assert claims that placed their content in issue. As discussed in sub-section E, below, the court also erred when it applied the same waiver analysis to both the attorney-client privilege and the attorney work product doctrine because, in addition to all the requirements that apply to attorney-client privilege waiver, work product will only be waived by disclosure if the disclosure is to an adversary. Thus, undeniably, Sanmina's disclosure of the Attorney Memos to DLA Piper could not have constituted a work product waiver.

1. Sanmina Did Not Waive the Attorney-Client Privilege by Disclosing the Attorney Memos to DLA Piper.

In order for the act of providing the Attorney Memos to DLA Piper to constitute a waiver, the IRS would have had to demonstrate that this disclosure was inconsistent with maintaining the confidential nature of the attorney-client relationship. *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982) ("Any disclosure inconsistent with maintaining the confidential nature of the attorney-client relationship waives the privilege."); *Bittaker v. Woodford*, 331 F.3d 715, 719

(9th Cir. 2003) ("An express waiver occurs when a party discloses privileged information to a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public.").

a. The IRS Admitted that Disclosure of the Attorney Memos to Sanmina's Lawyers and Accountants Did Not Constitute a Waiver.

Not only did the IRS fail to show that Sanmina's disclosure to its accountants and DLA Piper created a waiver, it conceded during argument in the district court that it did not:

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

[2 ER 161:2-5; *see also,* 2 ER 129, n. 43.] This concession – although legally correct – creates a fatal problem for the IRS because Sanmina undoubtedly did disclose the contents of the Attorney Memos to DLA Piper. It is disclosure of contents that can create a waiver. But, because DLA Piper stood in a confidential relationship with Sanmina (for purposes of the attorney-client privilege waiver analysis), and because it undeniably could not be viewed as Sanmina's adversary (for purposes of the work product waiver analysis), the disclosures to DLA Piper could not create a waiver. The production of the DLA Piper Report to the IRS indisputably constituted a disclosure of the contents of that report to an adversary

who is not in a confidential relationship with Sanmina. But the DLA Piper Report merely disclosed to the IRS the *existence* of the Attorney Memos. It did not disclose their contents.

In an attempt to limit its concession, the IRS argued: "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." [2 ER 27:19-20.] There is, however, no reasoned basis on which to distinguish Ernst & Young and KPMG, on the one hand, from DLA Piper.[8] All three were retained to provide tax advice. [2 ER 243-244 (¶¶ 2-3), 247 (¶ 2).]

The distinction the Service has always drawn is that DLA Piper stated that it relied on the Attorney Memos, while the work product of Ernst & Young and KPMG was never disclosed to the IRS. But that distinction applies only to the analysis of whether Sanmina waived the privileges when it disclosed the DLA Piper Report to the IRS. There is simply no reasoned way to justify the Service's

[8] For privilege analysis purposes, there is no distinction between the "accountants" and the role served by DLA Piper. Both the accountants and DLA Piper provided tax advice. [2 ER 247.] The communications seeking tax advice from DLA Piper were protected by the attorney-client privilege; the communications seeking tax advice from the accountants were equally protected by the tax practitioner's privilege. *See* discussion in subsection 1.b., below.

attempt to distinguish the effect of Sanmina giving the Attorney Memos to Ernst & Young and KPMG from the effect of giving them to DLA Piper.

Importantly, DLA Piper did not just provide Sanmina with valuation services but also provided it with legal tax advice. [2 ER 129:11-13, 130:7-10 (findings of fact); 247 (supporting evidence).] As discussed below, for privilege purposes, there is no difference between legal advice and tax advice that goes beyond mere calculations and advises a client on tax compliance.

b. The Disclosures to DLA Piper and the Accountants Could Not Create an Attorney-Client Privilege Waiver.

Sanmina only distributed the Attorney Memos outside the company to its counsel and tax accountants providing it with tax advice. [2 ER 245 (¶¶ 8-9), 254-255.] The rendering of tax advice, whether by accountants or lawyers, is privileged. *See* 26 U.S.C. §7525; *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999) (Section 7525 "extends the attorney-client privilege to 'a federally authorized tax practitioner,' that is, a non-lawyer who is nevertheless authorized to practice before the Internal Revenue Service."); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2nd Cir. 1984) ("Tax advice rendered by an attorney [or a federally authorized tax practitioner through 26

U.S.C. § 7525] is legal advice within the ambit of the privilege."). The accountants and lawyers were thus required to maintain the privilege.[9]

Because the distribution of the Attorney Memos to accountants and lawyers providing Sanmina with legal tax advice was, itself, a privileged communication, that privileged communication cannot constitute a waiver of the attorney-client privilege. *See, U.S. v. Graf*, 610 F.3d 1148, 1158-59 (9th Cir. 2010) (collecting cases); *see also Samuels v. Mitchell*, 155 F.R.D. 195, 198 (N.D. Cal. 1994) ("A line of cases beginning with *United States v. Kovel*, 296 F.2d 918, 922 (2nd Cir. 1961), has recognized that the attorney-client privilege is not automatically waived if an otherwise privileged document is disclosed to a third party.").

The district court ruled, however, that, by *engaging* DLA Piper to prepare a fair market value analysis, Sanmina committed a waiver of both the attorney-client privilege and the attorney work product doctrine. There is no basis for finding a work product waiver because, as discussed in Section E, below, DLA Piper could never be considered an adversary. But there is also no basis to find a waiver of the

---

[9] The district court also originally found that the attorneys, DLA Piper, were retained, *inter alia*, to provide legal advice, and that finding is supported by the record. [2 ER 129:11-13, 130:3-5 (district court finding); ER 247 (supporting evidence).] The ruling presently on appeal does not repudiate the court's original finding, and there is not any evidentiary basis to do so.

attorney-client privilege because, even after being engaged to prepare a valuation analysis, DLA Piper continued to be bound by the privilege.

2. Sanmina Did Not Waive the Attorney-Client Privilege by Providing the DLA Piper Report to the IRS.

The district court ruled as an alternative basis for finding a waiver that, when Sanmina delivered the DLA Piper Report to the IRS, Sanmina waived the attorney-client privilege for the Attorney Memos. [1 ER 5.] Below, the parties primarily focused on the issue of disclosure, with Sanmina demonstrating that the DLA Piper Report did not disclose the contents of the Attorney Memos, and the IRS claiming that the conclusion DLA Piper drew from those memos reveals enough of their contents to require disclosure. [2 ER 48-55, 68-71].

The district court, however, based its ruling on Federal Rule of Evidence 502, finding not that the DLA Piper Report disclosed the contents of the Attorney Memos, but that fairness required their disclosure. [1 ER 6.] In doing so, the court erred in several ways.

a. Rule 502(a) Defines the Extent of a Waiver; it Does Not Determine the Existence of a Waiver.

Rule 502(a) reads as follows:

> "When the disclosure is made in a federal proceeding or to a federal office or agency *and waives the attorney-client privilege or work product protection*, the waiver extends to an

> undisclosed communication or information in a federal or state proceeding only if:
>
> "(1) the waiver is intentional;
>
> "(2) the disclosed and undisclosed communications or information concern the same subject matter; and
>
> "(3) they ought in fairness to be considered together."

Fed.R.Evid. 502(a) (emphasis added). Rule 502 does not change the determination of what constitutes a waiver; it simply addresses the scope of waiver *if* a waiver has occurred. The Explanatory Notes confirm this point:

- "[W]hile establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally."
- "These rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, *if a waiver*, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary."

See Explanatory Note on Evidence Rule 502 (emphasis added; citation omitted).[10]

[10] *See also* Fed.R.Evid. 502 Advisory Committee Note (2011) ("[W]hile establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally. The rule governs only certain waivers by disclosure."); Roger S. Haydock and David F. Herr, Discovery Prac. 15.04[A] (8th Edition 2019-1 Supplement) ("The most important impact of Rule 502 is to limit the scope of any waiver, in most instances, to the information actually produced or disclosed. The rule permits the court to find a broader waiver has occurred if fairness requires it, but in the ordinary course, the common law rule of "subject matter waiver" is limited by Rule 502.").

The district court's reliance on Rule 502 as altering the law of waiver is simply misplaced. *First*, there must be a waiver by a disclosure to a federal agency or in a federal proceeding. *Then*, Rule 502(a) is consulted to determine its scope.

b. Sanmina Did Not Waive the Attorney-Client Privilege Under Federal Common Law.

The court found waiver based on its view that the Attorney Memos were "foundational material explicitly relied on in forming the [DLA Piper] opinion."[11] That, however, was precisely the situation that confronted this Court in *U.S. v. Richey*, 632 F.3d 559 (9th Cir. 2011). Indeed, the parties agree that *Richey* is the case most on point. In *Richey*, based on advice from their counsel (Thornton) taxpayers (the Peskys) claimed a deduction for the charitable contribution of an easement. *Id.* at 562. Thornton hired an appraiser (Richey), who appraised the value of the easement at $1.5 million. *Id.* Richey's report contained the following note: "[t]his report may not include full discussion of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser's opinion

[11] DLA Piper did not say that it relied on the Attorney Memos; it stated that it reviewed them, along with a Contribution Agreement; that it talked with management; and that it (DLA Piper) reached the conclusion that certain receivables should be disregarded. DLA Piper also explained why it disregarded the receivables. [2 ER 201 ("Sanmina-SCI had never any intension [sic] or reason to fund and then pay down the receivables.").] It did not say, for example: "we disregarded the receivables because Sanmina's lawyers told us to." That would be a conclusion that relied on statements by lawyers.

of value. *Supporting documentation concerning the data, reasoning, and analyses is retained in the appraiser's file.*" *Id.* at 563 (emphasis added.)

These facts are remarkably similar to the case at bar where DLA Piper prepared an economic analysis of Swiss 3600 and included in its report a footnote stating that it examined the two Attorney Memos as part of its analysis. In *Richey*, as here, the taxpayer claimed that certain of the documents in the appraiser's file were protected by the attorney-client privilege and the attorney work product doctrine.

But three distinctions make this case a clearer case than *Richey* to find no waiver. First, unlike in *Richey* (*id.* at 567), Sanmina provided a privilege log that supported its claim. [2 ER 254-255]. Second, here, unlike in *Richey*, the district court has determined that the two Attorney Memos are privileged. Third, unlike in *Richey*, Sanmina has turned over all the supporting documents reviewed by DLA Piper and referenced in its report, other than the two privileged Attorney Memos. [2 ER 214-224, 245 (¶ 10), 257.]

Adding one more element to the *Richey* case, because the taxpayers paid the assessment after the IRS disallowed their deduction, the district court denied enforcement of the summons on the ground that the IRS was not proceeding in good faith in seeking enforcement. Sanmina does not contest good faith in this proceeding.

On appeal, this Court first reversed the district court's finding of lack of good faith. Proceeding to the issue of attorney-client privilege, this Court focused primarily on its earlier decision in *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18 (9th Cir. 1981). The Service argued in this case, and Judge Alsup agreed, that *Weil* compels disclosure of the Attorney Memos. But *Richey*, which construes *Weil* in a situation analogous to the case at bar, reaches the opposite conclusion. Noting that Richey failed to produce a privilege log or otherwise to catalogue the documents in his file, this Court held that "[i]t was . . . clear error for the district court to conclude that the *entire* appraisal work file is protected by the attorney-client privilege." *Id.* at 567 (emphasis added). This Court ordered Richey "to appear before the IRS to testify about the *non-privileged* documents contained in the work file, as commanded by the summons." *Id.* (emphasis added).

This Court also offered guidance on which documents would not be privileged, stating "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 . . . ." *Id.*

Importantly, *Richey* did not actually find a waiver. Rather, the Court rejected a blanket assertion of privilege over the appraiser's file.[12] If this Court

[12] Indeed, the Court remanded the matter for *in camera* review to determine whether the appraiser's file contained privileged materials.

believed that Richey's reference to supporting documents being contained in his appraisal file effected a waiver (which is the ruling of Judge Alsup from which Sanmina appeals), it would have said so.

Here, the district court found that the two Attorney Memos *are* protected by the attorney-client privilege and the attorney work product doctrine. Based on that finding, any ruling that the mere mention of the Attorney Memos in a footnote resulted in a waiver cannot be reconciled with *Richey*. There is simply no analytical difference between Richey noting that his appraisal file contained supporting documents and DLA Piper noting that it reviewed the Attorney Memos as part of its valuation analysis. Neither statement effectuated a waiver.

Rather than follow *Richey,* the district court focused its analysis on *Weil, supra*. *Weil*, however, involved the disclosure of the contents of legal advice rather than, as in *Richey* and the case at bar, the mere statement that an appraiser considered the contents of documents that, in this case, the court found to be privileged.

The procedural history of *Weil* is somewhat unique because review was triggered by dismissal of a complaint following failure to post a bond. After denying class certification, the district court ordered plaintiff to post a bond, finding plaintiff's complaint to be obviously without merit or brought in bad faith. To review that finding, however, this Court first considered defendants' refusals to

answer deposition questions and discovery requests concerning the Blue Sky advice they received from counsel. Critically, during deposition, an officer of the named defendant "testified 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.'" *Weil*, 647 F.2d at 23. The officer thus disclosed the *content* of counsel's advice. Citing numerous cases, the Court wrote: "it has been widely held that voluntary disclosure of the *content* of a privileged attorney communication constitutes waiver of the privilege as to all other communications on the same subject." *Id.* at 24 (emphasis added; citations omitted.)

The DLA Piper Report, on the other hand, did not disclose the contents of any attorney-client communications. Nowhere did DLA Piper state or summarize the contents of the Attorney Memos. DLA Piper simply stated that it reviewed those memos, talked to management, reviewed a separate transactional document, and DLA Piper determined that an intercompany receivable lacked substance and should thus be disregarded.

In addition to *Richey*, the parties cited extensively to *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996). Judge Alsup held that *Tennenbaum* supports waiver. But the court cited *Tennenbaum* not for its holding but for a general statement of the law. *Tennenbaum* held that waiver requires disclosure. *Id*. at 341 ("The triggering event is disclosure, not a promise to disclose.") This

Court reached that conclusion in *Tennenbaum* even though the privilege holder signed a settlement agreement that included an agreement to waive claims of privilege. Citing as additional authority California Evidence Code § 912(a) and proposed (but never enacted) Rule 511 of the Federal Rules of Evidence, this Court held that waiver cannot be based on an agreement to waive, but on actual disclosure.[13] Because the trustee in *Tennenbaum* did not disclose the contents of privileged communications, his agreement to waive did not constitute a waiver.

As applied here, the *Tennenbaum* analysis is consistent with *Richey* and *Weil*. All three cases recognize that waiver occurs upon disclosure of the contents of the privileged communications. No disclosure occurred here.[14]

As *Tennenbaum* makes clear, under Rule 502, the IRS must first demonstrate that Sanmina disclosed the content of the communications in the

---

[13] California Evidence Code §912(a), which this Court cites as a source "to which we normally look for guidance," as well as the model for proposed Rule 511 reads in pertinent part: "the right of any person to claim a privilege . . . is waived with respect to a communication by such privilege if any holder of the privilege, without coercion, *has disclosed* a significant part of the communication or has consented to such *disclosure made* by anyone." *Tennenbaum*, 77 F.3d at 341 (emphasis in original).

[14] The parties also argued over the application of *Hernandez v. Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010). That case also involved the disclosure of the content of attorney-client communications. Specifically, plaintiff "disclosed communications between him and [his attorney] Ferguson about Tanninen. He also disclosed favorable portions of Ferguson's communications with Tanninen and produced some of Ferguson's notes of those conversations."

Attorney Memos before it argues the scope of the waiver. It has utterly failed to do so. 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 to anyone other than the lawyers and accountants who were giving it tax advice. Undeniably, a footnote stating that DLA Piper reviewed the Attorney Memos does not disclose their contents.[15]

D. The District Court's Rule 502(a) "Fairness" Conclusion.

The district court applied Rule 502(a) to conclude that the Attorney Memos should, in fairness, be considered along with the DLA Piper Report. As discussed in Section C.2.a, above, the district court erred when it used Section 502(a) to determine the existence of a waiver. And as discussed below, even if the district court were correct in analyzing fairness to determine the existence of a waiver, the court's fairness finding is insupportable. Furthermore, to the extent that the district court's fairness finding really constituted a determination that Sanmina placed the contents of the Attorney Memos at issue, the court also erred in that regard.

---

[15] The IRS also cites cases in which advice of counsel is used as a defense to a claim that the defendant acted willfully or in bad faith. *E.g., Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001) (AOB1, p. 41.) Those cases have no application here, where Sanmina is not asserting an advice of counsel defense or any other theory that places in issue the tax advice it received.

1. The IRS Failed to Establish that Fairness Supported Disclosure of the Attorney Memos.

Although Sanmina agrees that it bears the ultimate burden of proof on the issue of waiver, the IRS had an initial burden of production. "If the party seeking discovery asserts that the privilege which initially attached to the communication in question was subsequently waived, that party must bear the burden of *production* on the issue of waiver." *United States v. Chevron Corp.*, 1996 WL 444597, at *4 (N.D. Cal. May 30, 1996) (emphasis in original). Thus, to the extent this Court concludes that the district court properly used a fairness analysis to determine whether a waiver occurred, the IRS was required to introduce evidence to show why. It did not.

Moreover, even if the IRS had established that the DLA Piper Report disclosed enough about the Attorney Memos to create a waiver, it *still* would have failed to meet its burden of production under Section 502(a) because the IRS did not produce any evidence that the Attorney Memos should, in fairness, be considered together with the DLA Piper Report. *See,* Fed.R.Evid. 502(a)(3).

In fact, the IRS did not even provide the district court with a full copy of the DLA Piper Report so the court could make a reasoned fairness finding. Instead, the IRS provided excerpts of the DLA Piper Report [2 ER 193-203] and a declaration of Jean Elting Rowe in which she stated that certain documents

Sanmina provided to the IRS on January 20, 2014 "do not adequately explain why Sanmina AG's $113 million receivable from Sanmina has no fair market value." [2 ER 189-190.] Even if she had the credentials to make the above statement (and her declaration failed to establish that she does), Rowe simply stated that *one* set of documents provided by Sanmina did not, *by itself*, explain the issue adequately. She did not claim that the DLA Piper Report fails to explain it adequately; she did not provide the district court with a full copy of the DLA Piper Report so it could make a reasoned assessment of the adequacy of the explanation in the report; and Rowe admitted that three weeks after she received the documents that supposedly failed to explain Sanmina's treatment of the receivable, Sanmina provided an explanation, the adequacy of which Rowe does not dispute. [2 ER 190.]

Thus, to the extent the district court properly considered fairness in finding the existence of a waiver, the IRS failed to provide the court with a record on which it could base such a finding. Similarly, to the extent this Court concludes that the district court properly found a waiver under federal common law, the record also fails to support the district court's Rule 502(a) conclusion that fairness requires disclosure of the Attorney Memos so that they can be considered along with the DLA Piper Report.

2. To the Extent the District Court Ruled that Sanmina Placed the Contents of the Attorney Memos in Issue, the Court Erred.

There is an undercurrent, in the district court's ruling and in the Service's arguments, that Sanmina waived the privileges by placing the contents of the Attorney Memos at issue. The district court's fairness determination seems to implicate such a determination, as does the Service's reliance on cases involving waiver by asserting reliance on advice of counsel as a defense.

Indeed, the district court hearing focused almost exclusively on Judge Alsup's inclination to find a waiver by analogizing DLA Piper to a designated expert witness and ordering disclosure of the contents of its files just as an expert is required to disclose materials on which he or she relied. [2 ER 14-20.] That analogy, however, does not assist the IRS because the expert disclosure rules changed in 2010 to limit an expert's disclosure obligations to "facts or data."

Federal Rule of Civil Procedure 26 governs the designation of expert witnesses and the disclosure of information provided to them. At the outset, there is no court proceeding calling for expert testimony; DLA Piper has not been "retained or specially employed to provide expert testimony in the case;"[16] and the

16 *See* Fed.R.Civ.Proc. 26(a)(2)(B).

IRS has never even asserted a right to depose or elicit hearing testimony from DLA Piper (despite this Court's invitation to bring in witnesses and hold an evidentiary hearing [2 ER 113]). Thus, while there are reasons to compare the DLA Piper Memo to an expert report under Rule 26, the two are not the same.

DLA Piper's role is more properly described as an expert employed for trial preparation, whose information is not discoverable. *See* Rule 26(b)(4)(D).[17] If the Service commenced litigation, Sanmina would likely retain an expert who would opine on the validity of its worthless stock deduction. It is unlikely that DLA Piper would be that expert.

Nonetheless, following through on the Court's analogy during the hearing of this matter [2 ER 11], were DLA Piper viewed as a testifying expert, Sanmina's disclosure obligations would be governed by Rule 26(b)(3). Rule 26(b)(3)(A) reads: "Ordinarily a party may not discover documents and tangible things that are

---

[17] Rule 26(b)(4)(D) states:

> "Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:
>
> "(i) as provided in Rule 35(b); or
>
> "(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means."
>
> Fed. R. Civ. P. 26(b)(4)(D).

prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). The rule then carves out exceptions for, as applicable here, "facts and data" provided to, and considered by, a designated expert.

Rule 26(b)(4)(C) reads:

> "Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any [expert] witness . . . except to the extent that the communications:
>
> > "(i) relate to compensation for the expert's study or testimony;
> >
> > "(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
> >
> > "(iii) identify 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).

Subsection (C)(i) does not apply on its face. Subsection (C)(iii) also does not apply because DLA Piper did not say that the Attorney Memos identify assumptions on which it relied (and to the extent it did, those assumptions would consist of assumed facts and data). Subsection (C)(ii) would apply to the extent that the Attorney Memos contain facts or data on which DLA Piper relied. But the Attorney Memos contain far more than facts and data; they contain attorneys' legal

analyses of the anticipated tax treatment of certain transactions. [1 ER 3, 2 ER 244-245 (¶¶ 6-7)].

The legal analyses contained in the Attorney Memos could never be discoverable under the 2010 amendments to Rule 26. Fed. R. Civ. P. 26(b)(3)(B); *Republic of Ecuador v. Mackay*, 742 F.3d 860, 870 (9th Cir. 2014) ("The historical evolution of the rule, its current structure, and the Committee's explanatory notes make clear that the driving purpose of the 2010 amendments was to protect opinion work product—*i.e.*, attorney mental impressions, conclusions, opinions, or legal theories—from discovery.") (citation omitted); *see also Allstate Ins. Co. v. Electrolux Home Prod., Inc.*, 840 F. Supp. 2d 1072, 1077–78 (N.D. Ill. 2012) ("The rule was amended in 2010 to require the disclosure of 'facts or data' rather than 'data or other information,' which made clear that disclosure of theories or mental impressions of counsel is not required."); *Ansell Healthcare Products LLC v. Reckitt Benckiser LLC*, 2017 WL 6328149, at *2 (D. Del., Dec. 11, 2017, No. 15-CV-915-RGA) (quoting advisory committee notes to 2010 amendments: "[t]he refocus of disclosure on 'facts or data' is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel."); *Fialkowski v. Perry*, 2012 WL 2527020 (E.D. Pa., June 29, 2012, No. CIV.A. 11-5139) (requiring disclosure of documents relied upon by an expert to the extent

they contained facts, data or assumptions and denying disclosure of any legal analysis in those documents).

The IRS disclaimed the Rule 26(b)(4)(C) analysis, presumably because it does not assist it. But to the extent the expert disclosure rules may serve as a useful analogy, those rules would support only the disclosure of heavily redacted versions of the Attorney Memos, with all legal analysis removed. The Service would then be left with an attorneys' paraphrasing of the terms of contract documents that have already been voluntarily produced *verbatim.* [2 ER 245 (¶ 10), 257].

Simply put, the DLA Piper Memo describes the bases for its conclusions and Sanmina provided the Service with all the underlying transactional documents on which the Attorney Memos (and thus DLA Piper) relied. The Attorney Memos also contain few, if any, facts that the IRS doesn't already have. There is simply no basis in the Federal Rules of Civil Procedure to allow the Service to conduct discovery to obtain access to the analyses of Sanmina's lawyers, even if those analyses were provided to someone who is treated as a Rule 26(b) testifying expert.

Sanmina will return to this issue in subsection F., below. But to the extent this Court may conclude that Rule 502(a) can be used to determine the existence of

a waiver based on analogizing DLA Piper's role to that of a testifying expert, that analysis does not support the court's waiver finding.

E. Sanmina Did Not Waive Work Product.

As the IRS itself conceded, a work product waiver occurs only on disclosure to an adversary. For that reason, the IRS never argued that Sanmina waived work product when it provided the Attorney Memos to DLA Piper. [*See, generally*, AOB1; 2 ER 32-33, 71-73.] The district court disregarded that concession and found that Sanmina waived work product when it gave the Attorney Memos to DLA Piper. That finding was erroneous, and the backup finding that Sanmina waived work product when it provided the DLA Piper Report to the IRS fails because, as discussed in Section C.2.b., above, the DLA Piper Report does not disclose the contents of the Attorney memos.

1. Sanmina Did Not Waive Work Product When It Provided the Attorney Memos to DLA Piper

A work product waiver only occurs if a disclosure is inconsistent with maintaining secrecy against an adversary. *Samuels v. Mitchell*, 155 F.R.D. 195, 197, 200 (N.D. Cal. 1994) (no work product waiver unless the disclosure "substantially increases the opportunity for potential adversaries to obtain the information"); *Gramm v. Horsehead Indus., Inc.*, 1990 WL 14204 at *5 (S.D.N.Y. Jan. 25, 1990) (no waiver of work product protection to a document transmitted to

the company's outside auditors because such a disclosure "cannot be said to have posed a substantial danger at the time that the document would be disclosed to plaintiffs."). Indeed, without creating a waiver, work product may be shown to others, "simply because there was some good reason to show it." *United States v. Adlman*, 134 F.3d 1194, 1200 n.4 (2d Cir. 1998).[18]

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

[18] This issue is not in dispute. The IRS conceded that work product waiver requires disclosure to an adversary and it therefore did not argue that Sanmina's disclosure of the DLA Piper Report to DLA Piper created a waiver. [2 ER 71-73, 184.]

IRS's concession) that Sanmina's disclosure of the Attorney Memos to DLA Piper waived work product.

2. Sanmina Did Not Waive Work Product When It Provided the DLA Piper Report to the IRS.

Sanmina does not dispute that the IRS should be viewed as its adversary. Thus, if the DLA Piper Report disclosed the contents of the Attorney Memos to the IRS, then work product would be waived as to the facts and data in those memos.

The DLA Piper Report, however, does not disclose or describe the contents of the Attorney Memos.[19] Thus, for all the reasons discussed above, including particularly in Section C.2.b., Sanmina's disclosure of the DLA Piper Report to the IRS did not waive work product.

F. If There Was a Waiver, It Does Not Cover the Entirety of the Attorney Memos.

Sanmina discussed Rule 502 above to address the district court's use of that rule to determine the existence of a waiver. Rule 502 does not address that issue. It does, however, govern scope after a party commits a waiver. Thus, should this

[19] In fact, DLA Piper's description of the Attorney Memos would barely even qualify as an adequate privilege log under Rule 26(b)(5). It certainly did not summarize, excerpt or describe their contents.

Court find that Sanmina waived either the attorney-client privilege or attorney work product, Rule 502 establishes the scope of that waiver:

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

Fed. R. Evid. 502(a).

Under Rule 502(a), upon finding a waiver under the common law, the district court (assuming it found that the waiver was intentional and that the Attorney Memos concern the same subject matter as the communication creating the waiver) would have next proceeded to determine what parts, if any, of the Attorney Memos "ought in fairness" to be considered along with the DLA Piper Report. The district court did not engage in such an analysis. It simply ruled that the entirety of those memos must be produced, thereby imposing on Sanmina disclosure obligations far in excess of the obligations it would have incurred if it had designated DLA Piper as a testifying expert at trial.

Thus, if this Court were to find that Sanmina committed a waiver of both the attorney-client privilege and work product, Sanmina respectfully submits that the next step would be to remand this matter to the district court to identify the "facts and data" contained in the Attorney Memos that ought, in fairness, to be

considered along with the DLA Piper Report. Any ordered disclosures should not under any circumstances apply to the legal analyses of Sanmina's in-house counsel.

VIII. CONCLUSION

The district court erred when, after confirming on *in camera* review that the Attorney Memos are privileged, it found a blanket waiver because Sanmina provided them to DLA Piper, its legal and tax advisor, or because the DLA Piper Report contained a footnoted reference to the Attorney Memos. Furthermore, even if Sanmina did commit a waiver, that waiver should be limited to the facts and data in the Attorney Memos that ought in fairness to be considered along with the DLA Piper Report, and should not include the legal analysis of counsel.

DATED: March 15, 2019

Respectfully submitted,

Michael C. Lieb
Leemore L. Kushner
ERVIN COHEN & JESSUP LLP

By: */s/ Michael C. Lieb*
Michael C. Lieb
Attorneys for Appellants SANMINA CORPORATION AND SUBSIDIARIES

STATEMENT OF RELATED CASES

This appeal is related to Ninth Circuit Case no. 15-16416. This is an appeal from the district court ruling after the remand ordered in case no. 15-16416.

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 15th day of March, 2019, by using the appellate CM/ECF system. I further certify that service of the brief was made on counsel for Appellate by CM/ECF.

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

Executed on March 15, 2019, at Beverly Hills, California.

/s/ Michael C. Lieb

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 18-17036

I am the attorney or self-represented party.

This brief contains 9,174 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Michael C. Lieb **Date** March 15, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov