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

REPLY BRIEF OF APPELLANTS

SANMINA CORPORATION AND SUBSIDIARIES

Michael C. Lieb (SBN 126831)
Kenneth Hsu (SBN 306326)
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

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I. INTRODUCTION

Synthesizing the parties' arguments, as expressed in eleven district court and appellate court briefs before this one, this dispute really boils down to the meaning of the term "disclose." Both case law and common sense support the conclusion that a privileged memo is not disclosed if its contents are not revealed. Sanmina disclosed the Attorney Memos to DLA Piper, but that disclosure did not constitute a waiver because DLA Piper was in a confidential relationship with Sanmina. Sanmina provided the DLA Piper Report to the IRS, but doing so also did not constitute a waiver because the DLA Piper Report does not disclose what the Attorney Memos say.

Furthermore, even if there were a waiver, the district court's ruling undoubtedly went too far in requiring the disclosure of the confidential analyses of Sanmina's in-house attorneys. If anything is ordered disclosed, the disclosure should be limited to the factual statements in the Attorney Memos and not the legal analyses.

II. ARGUMENT

In this Reply, Sanmina will flip the order of argument from its Opening Brief and begin with the work product analysis. Because the Attorney Memos are protected as both work product and under the attorney-client privilege, if either protection is preserved, the memos are protected from discovery. The work

product analysis is the simpler of the two because, as discussed below, Sanmina did not disclose the Attorney Memos to an adversary, and that fact precludes a waiver finding.

A. Sanmina Did Not Waive Work Product.

While the proponent of the attorney-client privilege bears the burden of proving non-waiver, the party seeking discovery of attorney work product bears the burden of demonstrating waiver. *U.S. Inspection Services, Inc. v. NL Engineered Solutions, LLC,* 268 F.R.D. 614, 617-18 (N.D. Cal. 2010). The Government failed to meet its burden.

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

The Government now argues that Sanmina waived work product when it provided the Attorney Memos to DLA Piper because DLA Piper supposedly served as a "conduit" to the IRS. The Government expressly disavowed that argument below, and it cannot now be raised on appeal. Even if the Court were to consider the argument on the merits, it fails.

a. The Government Expressly Disavowed the Argument that Disclosure of the Attorney Memos to DLA Piper Waived Work Product.

As the Government admits, it never previously argued that Sanmina waived work product when it provided the Attorney Memos to DLA Piper. [GOB[1], p. 46; 2 ER 71-73, 184.] But the Government did not merely overlook the issue. Rather, when Sanmina addressed this issue in its brief below, the Government's reply brief chastised Sanmina for allegedly misrepresenting the Government's position because it was *not* arguing that the disclosure of the Attorney Memos to DLA Piper created a waiver:

> "According to Sanmina, its disclosure of the 2006 and 2009 memos to DLA Piper did not result in a waiver of the work-product privilege because DLA Piper was not (and was not a conduit to) an adversary. [Cite.] Sanmina misapprehends the Government's argument. [¶] In its opening brief, the United States explained that by disclosing the DLA Piper report *to the IRS,* Sanmina waived any work-product protection that otherwise covered the 2006 and 2009 memos."

[2 ER 32:16-22 (emphasis in original).] Having repudiated the argument below, the Government cannot now raise it for the first time on appeal. *U.S. v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990). This is particularly so because the issue of

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[1] "GOB" stands for the Government's Opening Brief (in this appeal). "AOB" refers to Appellant's (Sanmina's) Opening Brief.

whether DLA Piper should be viewed as a conduit to Sanmina's adversary is "fact-intensive." *U.S. v. Deloitte LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010).

b. <u>The Conduit Argument Fails on the Merits.</u>

To support its reversal of course, the Government now argues that the disclosure of the Attorney Memos to DLA Piper created a waiver because DLA Piper could be viewed as a "conduit to an adversary." [GOB, p. 46.] There is no factual or legal basis for such a finding.

In fact, the district court made no finding that DLA Piper was a conduit. The district court simply lumped together the work product and attorney-client privilege waiver analysis and erroneously held: "Sanmina cannot disclose a privileged attorney communication relevant to an issue of material fact, then invoke privilege to shield that communication from discovery." [1 ER 4.] In support of this conclusion, the district court cited *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18 (9th Cir. 1981), which is not a work product case.

To support the district court's ruling, the Government cites only to *Goodrich Corp. v. U.S. Environmental Protection Agency*, 593 F.Supp.2d 184 (D.D.C. 2009) as standing for the proposition that the Environmental Protection Agency "waived privilege by providing work product to a regional board." [GOB, p. 46.] The *Goodrich* Court did not find that the EPA waived work product simply because it

provided a model to its regional board. Rather, that was merely the first step in a three-step analysis. The second step recognized that the regional board *shared the model's results with Goodrich's lawyers*. *Id.* at 191.

Additionally, as a third step, the court found waiver only after concluding that disclosure of the document in question "would not reveal EPA's litigation strategies or trial preparations." *Id.* at 192. As discussed in Sanmina's Opening Brief, the disclosure of the Attorney Memos would reveal more than just facts; it would reveal Sanmina's legal analyses. [AOB, pp. 31-35; 1 ER 3 (finding that the Attorney Memos "contain legal advice communicated in confidence to Sanmina executives").] Sanmina further addresses this issue below in Section A.3.

c. Treating DLA Piper as a Conduit Would Undermine the Attorney Work Product Doctrine.

No authority supports the contention that DLA Piper served as a conduit to disclosure of the Attorney Memos to an adversary. DLA Piper served as Sanmina's counsel in addition to preparing the valuation report. [2 ER 247 ("Sanmina sought advice from DLA Piper, Ernst & Young and KPMG concerning the propriety of the [worthless stock] deduction.").] There is no reason for Sanmina to expect its counsel or valuation consultant to disclose the content of privileged information to an adversary.

The decision in *Deloitte* speaks volumes. Like the case at bench, the discovery dispute in *Deloitte* arose out of a tax dispute between the taxpayer, Dow Chemical Company ("Dow") and the IRS. *Deloitte*, 610 F.3d at 133. Dow sued the Government to challenge an adjustment to the tax returns of two of Dow's subsidiaries. The Government served a subpoena on Deloitte, which was Dow's auditor. *Id.* Deloitte produced a number of documents and withheld three as work product. As relevant here, the withheld documents included a memo prepared by Dow's in-house counsel and a tax opinion by Dow's outside counsel. *Id.*

The Government argued that Dow waived work product when it provided the memorandum and tax opinion to Deloitte. *Id.* at 134. The district court rejected that argument and the D.C. Circuit Court of Appeals affirmed. *Id.* at 134. Quoting *Hickman v. Taylor*, *infra*, the court noted that, in the absence of strong attorney work product protection:

> "[M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."

Id. at 134-35 (quoting *Hickman v. Taylor,* 329 U.S. 495 (1947)). This observation applies overwhelmingly here. The Attorney Memos were drafted in 2006 and 2009 to analyze the legal effect of the transactions discussed in the DLA Piper

Report. Without work product protection, that information would likely never have been memorialized and the purpose of the transactions never recorded.

Consistent with the D.C. Circuit Court's ruling in *Deloitte,* the fact that the Attorney Memos were provided to DLA Piper does not create a waiver because such a ruling would undermine the purposes of the work product protection. It is for that reason that 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); *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); *Sugar Hill Music v. CBS Interactive Inc.*, No. 11-CV-9437 DSF (JCX), 2014 WL 12586744, at *8 (C.D. Cal. Sept. 5, 2014); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at *3 (S.D. Fla. May 18, 1998) (disclosure to outside auditors did not waive work product "since there is an expectation that confidentiality of such information will be maintained by the recipient.").

Thus, even if this Court were inclined to allow the Government's untimely and unpreserved "conduit" argument, the argument fails. As a factual matter, DLA Piper did not disclose the contents of the Attorney Memos to the IRS, and any

ruling that DLA Piper served as a conduit to an adversary would undermine the essential purpose of the attorney work product doctrine.

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

Aside from its contention that it can infer the contents of the Attorney Memos from the conclusions DLA Piper drew, the Government does not actually contend that Sanmina or DLA Piper disclosed the contents of those memos. Rather, the Government's argument on work product waiver consists of two contentions.

First, the Government tries to invoke Rule 502(a) of the Federal Rules of Evidence. As discussed in Sanmina's Opening Brief, Rule 502(a) addresses (and limits) the *scope* of waiver; it does not determine when a waiver occurs. The Government does not truly dispute this point. It claims instead that the waiver arises from "the reliance of the disclosed DLA Piper report on the [Attorney Memos], with the undisputed result (ER 14) that the analysis contained in the memos can be inferred from the conclusions drawn in the report." [GOB, p. 35.] But that is not a waiver because the DLA Piper Report did not disclose the contents of the Attorney Memos.

Second, the Government makes what can best be described as the "sword and shield" argument, contending that Sanmina cannot both use the DLA Piper

Report and shield any documents underlying the report. In fact, the Government goes way beyond the two Attorney Memos, arguing that handing the IRS the DLA Piper Report "result[ed] in a waiver of the work-product privilege for all communications on the same subject matter – including [the Attorney Memos]." [GOB, p. 44.] So, the Government is actually arguing that the DLA Piper Report's mention of the two Attorney Memos is not even that important because, according to the Government, there is no more work product (or attorney-client) privilege as to any communication concerning the issues discussed in the DLA Piper Report. To be clear, the Government's position is that a taxpayer who takes a deduction cannot claim attorney work product or the attorney-client privilege as to any communication relevant to that deduction. The Government offers absolutely no support for that outlandish argument, which would obliterate the attorney work product doctrine.

The authorities the Government does cite, *U.S. v. Nobles*, 422 U.S. 225 (1975) and *U.S. v. Salsedo,* 607 F.2d 318 (9th Cir. 1979), fail to support its position.

In *Nobles,* the defense in a criminal case sought to refresh the recollections of two witnesses *by showing them* excerpts from an investigator's report to attempt to convince them to change their testimony. *Nobles,* 422 U.S. at 227-28 (defense

counsel "was allowed, despite defense [sic] counsel's initial objection,[2] to refresh [the witness's] recollection by referring to a portion of the investigator's report."). The investigator's report was attorney work product. When the defense investigator later attempted to testify to the statements made to him by the witnesses (which the witnesses denied), the trial court ruled that he could not testify unless the relevant parts of his report were disclosed. *Id.* at 237.[3]

Most obviously, *Nobles* involved the actual disclosure of the investigator's report – defense counsel showed it to two witnesses during their testimony. *Id.* at 227. It also concerned an attempt by an investigator to testify about what he was told while shielding from discovery the notes about what he was told. *Id.* at 228. DLA Piper is not being asked to tell anyone what was in the Attorney Memos. Indeed, *Nobles* merely emphasizes the point that disclosure triggers waiver. If DLA Piper described the contents of the Attorney Memos, those memos would

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[2] The objection must have come from the prosecution because the defense lawyer was doing the questioning. This seems to be confirmed by footnote 2 to the opinion, which states that the government's attorney objected on the ground of the report's legibility. *Nobles*, 422 U.S. at 228, n.2.

[3] The trial court's order was limited to only the relevant parts of the report: "(If the investigator) is allowed to testify it would be necessary that those portions of (the) investigative report which contain the statements of the impeached witness will have to be turned over to the prosecution; nothing else in that report." *Nobles,* 422 U.S. at 229, n.3.

become discoverable. But DLA Piper simply said it reviewed them to inform its conclusions. That is not disclosure and that does not produce a waiver.

The other case cited by the Government, *Salsedo*, merely cites *Nobles* to support affirmance of the defendant's conviction after the trial court ordered the defendant to produce to the prosecution the defense's transcript that translated to English a recording <u>that the government supplied to the defense</u>. *Salsedo*, 607 F.2d at 320. *Salsedo* does not contain any analysis, and it is not clear what use the defense made of the transcript. The contents of the recording were obviously not privileged because the prosecution gave it to the defense, and citing *Nobles*, this Court found that the defense's use of the transcript created a work product waiver for the translation. *Id.* at 321.

The Government also cites *In re Sealed Case,* 676 F.2d 793 (D.C. Cir. 1982), to support its waiver argument. This decision, however, turns on the fact that a company self-reported anti-bribery law violations, delivered a report that claimed to report those violations accurately , and then claimed work product as to the notes of its general counsel that, as described by the appellate court, revealed "a different, highly embarrassing, version of events" from that described in the disclosure report. *Id.* at 822. There has been no finding by the district court that any part of the Attorney Memos contradicts the DLA Piper Report.

There is absolutely no authority for the proposition that, by submitting the DLA Piper Report in support of its worthless stock deduction, Sanmina waived all applicable privileges as to any communications relevant to the issues that report discusses. Indeed, the Government's authorities simply reinforce the fact that the touchstone of waiver is disclosure. If the content of a privileged communication is disclosed to an adversary, then a work product waiver may follow. Sanmina never disclosed the contents of the two Attorney Memos to any adversary, so there was no waiver.

3. Under No Circumstances Did the Government Establish a Right to Sanmina's Core Attorney Work Product.

Sanmina extensively briefed the application of Rule 26(b)(4)(C) to the case at bench. This rule governs disclosures by designated expert witnesses, expressly excluding from the required disclosure any core attorney work product. In simplest terms, even if DLA Piper were considered akin to a designated testifying expert, the Government would then, per Rule 26(b)(4)(C), only be entitled to the "facts and data" contained in the Attorney Memos. It would not be entitled to the legal analyses they contain.

Thus, as discussed in *Deloitte*, "the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation" are "virtually undiscoverable." *Deloitte,* 610 F.3d at 135; *see also*

Republic of Ecuador v. Mackay, 742 F.3d 860, 869, n.3 (9th Cir. 2014) (quoting *Deloitte*). Yet, the district court ordered their disclosure simply because DLA Piper took into consideration the facts recited in the Attorney Memos as part of the preparation of its report.

Judge Alsup viewed Rule 26(b)(4)(C) as irrelevant because "[t]he events in question occurred outside of federal litigation and are governed by general principles." [1 ER 6.] The Government doubles down on this point, arguing in its brief that any reference to Rule 26(b) is "spurious."

Certainly, the analysis is not spurious. It actually was suggested by Judge Alsup. [2 ER 81-82; 2 ER 14-20.] Furthermore, Rule 26(b)(3) merely "partially codifies the work-product doctrine announced in *Hickman*." *Id.* at 136. Indeed, as the *Deloitte* Court stated, the work product protection developed by the Supreme Court in *Hickman* is broader than Rule 26(b)(3). *Deloitte,* 610 F.3d at 136 ("[e]ven if the government is correct in asserting that the Deloitte Memorandum falls outside the definition given by Rule 26(b)(3), this does not conclusively establish that it is not work product.").[4]

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[4] Specifically, the D.C. Circuit explained that, while Rule 26(b)(3) addresses only documents, *Hickman* also protects intangible work product. *Deloitte,* 610 F.3d at 136.

At this juncture of the proceedings, it is undisputed that the Attorney Memos contain work product. Indeed, on *in camera* review, Judge Alsup described the memos as containing "legal advice communicated in confidence to Sanmina executives." [1 ER 3.] Regardless of whether Rule 26(b) applies, the attorney work product doctrine, which Rule 26(b) partially codifies, does. Under the work product doctrine, the analysis of Sanmina's counsel is "virtually undiscoverable."

Finally, the Government's argument that the district court analyzed the documents to determine that they must be disclosed in full, including the analysis of Sanmina's counsel [GOB, pp. 49-50], is belied by the district court's statement that there was no need to do so because Rule 26(b)(4)(C) does not apply. [1 ER 6.] There is simply no justification offered by the Government or supplied by the Court to require the production of materials that are "virtually undiscoverable" under Supreme Court precedent and the Federal Rules of Civil Procedure. Thus, to the extent this Court concludes that Sanmina waived work product, that waiver can only extend to the "facts and data," if any, contained in the Attorney Memos.

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

The Government's argument as to the attorney-client privilege primarily focuses on its contention that the disclosure of the DLA Piper Report created a waiver. It also argues, however, that Sanmina waived the privilege when it gave

the Attorney Memos to DLA Piper. Sanmina will begin with the latter issue before focusing on whether the disclosure of the DLA Piper Report created a waiver.

1. Sanmina Did Not Waive the Attorney-Client Privilege When It Gave the Attorney Memos to DLA Piper.[5]

As discussed in Sanmina's Opening Brief, the Government did, in fact, repudiate the argument that Sanmina waived the attorney-client privilege when it provided the Attorney Memos to DLA Piper because it argued that "the DLA Piper Report is the document effectuating the waiver." [2 ER 161:2-5; *see also* 2 ER 129, n. 43 (original ruling).]

The Government now attempts to alter its position, arguing that "the Government abandoned only its argument that Sanmina's disclosure of the memos to its accountants, Ernst & Young and KPMG, resulted in a waiver." [GOB, pp. 41-42.] But that is not what the Government said – it said, "the DLA Piper Report is the document effectuating the waiver." More importantly, the Government's effort to distinguish DLA Piper from the accountants only undermines its position. If there was no waiver when Sanmina gave the Attorney Memos to the

[5] It is important to note that, even if Sanmina waived the attorney-client privilege by giving the Attorney Memos to DLA Piper (and it did not), as discussed above, this issue is largely mooted by the fact that this disclosure could not have waived work product.

accountants, that is because the accountants were in a confidential relationship with Sanmina. The Government never explains how accountants could be in a confidential relationship with Sanmina, but a law firm would not be.

The Government does, of course, argue that the difference is that DLA Piper prepared a report – and that is exactly the point. The Government did not, and cannot, argue that Sanmina waived the privilege when it gave the Attorney Memos to DLA Piper. It must be arguing – and in fact it did argue – only that Sanmina waived the privilege when it produced the DLA Piper Report to the IRS.

Undeterred, the Government complains that Sanmina only supported its claim of a confidential relationship with DLA Piper through a declaration, and without providing the engagement letter or billing statements. [GOB, p. 39.] First, that is not true. The DLA Piper Report itself states that its "analysis will be used by Sanmina's management . . . to make a determination of the value on liquidation of the Subject Company . . . . " [2 ER 198.][6] Second, the Government offered no conflicting evidence. Notwithstanding the district court's invitation to conduct what it termed (tongue in cheek) a "bone-crushing evidentiary hearing." [2 ER

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[6] The Government also spins DLA Piper's report language to state that "it could be disclosed to any 'tax authorities' who became 'interested.'" [GOB, p. 41.] The report actually states: "Sanmina will not disclose our analysis to third parties other than its financial auditors and interested tax authorities without our expressed written consent." [2 ER 198.]

117.] The Government elected not to proceed with such a hearing but chose instead to leave a record consisting only of Sanmina's undisputed description of its relationship with DLA Piper. [2 ER 86-87.] It made this decision even after Magistrate Judge Grewal, on review of the same record, ruled that DLA Piper was retained to provide legal advice. [2 ER 129:11-13; 130:1-5.]

In short, the Government previously abandoned its argument that Sanmina waived the attorney-client when it gave the Attorney Memos to DLA Piper, and properly so. Because DLA Piper was in a confidential relationship with Sanmina, the transmission of the Attorney Memos to DLA Piper could not have created a waiver. *See U.S. v. Graf,* 610 F.3d 1148, 1158-59 (9th Cir. 2010) (collecting cases).

2. The DLA Piper Report Did Not Create a Waiver.

The Government offers several arguments in support of its contention that Sanmina waived the attorney-client privilege when it provided the DLA Piper Report to the IRS. Each of the Government's arguments represents a different approach to decoupling disclosure from waiver. The Government does not dispute that the contents of the Attorney Memos have never been disclosed to it, but it argues: (a) selective waiver; (b) implied waiver; (c) waiver by reliance; and (d) waiver by implicit disclosure. None of these theories overcome the fact that

Sanmina never disclosed what is in the Attorney Memos, and (as to implied waiver), Sanmina never placed the contents of the Attorney Memos at issue.

a. **<u>There Was No Selective Waiver.</u>**

Attempting to support the district court's ruling, the Government argues that "the waiver doctrine prevents a privilege holder from selectively disclosing privileged communications to an adversary . . . . " [GOB, pp. 24-25.] In support, the Government cites several cases (discussed below), some of which address the selective waiver doctrine.

In support of its selective waiver argument, the Government argues that "Sanmina voluntarily[7] gave the IRS the DLA Piper [Report]." [GOB, p. 24.] The Government's problem is that the DLA Piper Report did not disclose any part of the Attorney Memos, and this is the place where the Government's selective waiver argument fails. Sanmina did not disclose – selectively or otherwise – the contents of the Attorney Memos. Without disclosure, there is no selective disclosure, and thus no waiver.

The cases that both parties cite all agree that only a disclosure creates a waiver. In *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337 (9th Cir. 1996), this

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[7] The use of the term "voluntarily" is questionable. As the Government acknowledges, Sanmina produced the DLA Piper Report in response to an Information Document Request issued by the IRS after the IRS opened an examination of Sanmina's tax returns. [2 ER 170-171; GOB, p. 8.]

Court made clear that the crucial issue is disclosure: "we have admonished that the focal point of privilege waiver analysis should be the holder's disclosure of privileged communications to someone outside the attorney-client relationship, not the holder's intent to waive the privilege." *Id.* at 341.

In *Weil,* the defendant disclosed Blue Sky advice from its counsel. This Court framed the issue as follows: "The 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." *Weil,* 647 F.2d at 23. The Court found a limited waiver solely as to counsel's legal advice concerning Blue Sky Law compliance.

In *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010), this Court found a waiver when the plaintiff offered into evidence the testimony and notes of his prior counsel concerning the statements of a recalcitrant witness. *Id.* at 1102. *U.S. v. Flores*, 628 F.2d 521 (9th Cir. 1980), was not a waiver case. This Court found that questions put to an attorney (who inexplicably filed a claim to recover a weapon supposedly improperly seized from a client under criminal indictment) did not implicate the attorney-client privilege. *Id.* at 526. "Responsive answers to the questions put by the court would not be within the attorney-client privilege." *Id.*

Finally, Sanmina will not repeat the lengthy discussion of *U.S. v. Richey*, 632 F.3d 559 (9th Cir. 2011) from its Opening Brief. By way of summary, even though the appraiser in *Richey* referred to the contents of his file to support his opinion, this Court did not find that this reference created a waiver. *Id.* at 567-68. Rather, this Court ruled that the entire appraisal file could not be considered attorney work product and remanded the matter to the district court to order the production of any documents in the file that were not subject to valid claim of attorney-client privilege. *Id.* *Richey* is simply irreconcilable with the Government's position here. In a nearly identical situation, in which an appraisal was submitted to support a tax deduction, and the report referenced documents in the appraiser's file that supported his analysis, this Court did not find that the appraiser's reference to and reliance on those supporting documents waived otherwise valid claims of attorney-client privilege. *Id.*

Despite its citation to *Tennenbaum*, *Weil*, and *Hernandez*, all of which focus on disclosure as the essential element of waiver, the Government argues that "[n]one of this Court's precedents" support tying waiver to disclosure. [GOB, p. 27.] To further deflect these authorities, the Government argues that Sanmina has derived the disclosure requirement solely from *Roberts v. Legacy Meridian Park Hospital*, 97 F.Supp.3d 1245 (D. Or. 2015), a case Sanmina cited in a single sentence in its opening brief.

While Sanmina's argument does not solely rely on *Roberts,* but is also supported by, *inter alia*, *Tennenbaum*, *Weil*, and *Hernandez*, Sanmina is not at all reluctant to discuss *Roberts.* In that case, Roberts alleged that his lawyer lacked authority to enter into a settlement on the client's behalf. *Id.* at 1255. Roberts submitted a declaration saying that his attorney lacked that authority. *Id.* Defendants argued that, by submitting his declaration, Roberts disclosed enough about his communications with his lawyer to create a waiver. *Id.* The district court ruled otherwise: "The error in Defendants' argument, however, is that Dr. Roberts, in his declaration, did not disclose, reveal, or describe, in whole or in part, the substance of any confidential communication that he actually had with his attorney, Mr. McDougal." *Id.* at 1253. Quoting the Rice treatise, the district court emphasized the point: "Merely disclosing the fact that there were communications or that certain subjects were discussed, however, does not constitute a partial disclosure. *The disclosure must be of confidential portions of the privileged communications*." *Id.* (citing 2 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 9:30 at 153-56 (2014)) (emphasis added).

Roberts breaks no new ground. It simply repeats the universal test for waiver – waiver is triggered by disclosure of the confidential information. *See also 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.”). No such disclosure occurred in this case.

In short, Sanmina did not disclose the contents of the Attorney Memos to any parties with whom it was not in a confidential relationship. Without disclosure, there is no waiver. Without a waiver, there is no selective waiver.

b. Sanmina’s Worthless Stock Deduction Did Not Place the Contents of the Attorney Memos at Issue.

In *Roberts*, *supra*, while finding that there was no express waiver because Roberts did not disclose any part of his conversations with his counsel, the Court found an implied waiver because Roberts’ claims were inconsistent with maintaining the confidentiality of his communications with his counsel.

Generally, an implied waiver of the privilege occurs if “(1) [t]he party asserting the privilege acts affirmatively (2) to place the privileged communications in issue between the party seeking discovery and itself (3) such that denying access to the communication becomes manifestly unfair to the party seeking discovery.” *Laser Indus., Ltd. v. Reliant Techs., Inc.*, 167 F.R.D. 417, 446 (N.D. Cal. 1996).

Roberts, which cites extensively to *Bittaker,* illustrates this type of implied waiver. Roberts alleged that his lawyer agreed to a settlement on Roberts’ behalf without Roberts’ consent. Roberts thereby raised in litigation the issue of whether

Roberts gave his attorney the authority to settle on his behalf. It would be impossible to litigate that claim without inquiring into the communications between Roberts and his counsel. *See Bittaker* 33 F.3d at 718-19; *see also id.* at 728 (O'Scannlain, J., concurring) ("[I]t is axiomatic that when a client places the performance of his lawyer at issue, the client waives his or her right to assert the attorney-client privilege.").

Sanmina's worthless stock deduction did not place the contents of the Attorney Memos or the performance of its counsel at issue, and it is not impossible to adjudicate Sanmina's worthless stock deduction unless the IRS receives the internal analyses of Sanmina's counsel. Sanmina is not claiming that it could take the worthless stock deduction because its lawyers said so. It claimed the deduction because its shares of stock in Swiss 3600 became worthless. Sanmina undeniably received, and always in this situation would receive, legal advice on the viability of the deduction. But getting legal advice about a legal issue is not the same as placing that legal advice at issue in the litigation. Otherwise, there would be no attorney-client privilege.

c. <u>Reliance Does Not Create Waiver.</u>

As a slight variation on its implied waiver argument, the Government contends that, because DLA Piper relied on whatever Sanmina's lawyers said in the Attorney Memos, Sanmina is attempting to get away with a selective waiver.

That is completely wrong. As discussed above, there is no waiver because there is no disclosure, and there cannot be a selective waiver without a waiver.

Indeed, the same cases cited above undercut the Government's argument. Most obviously, in *Richey,* the taxpayer relied on the appraiser's report to support its tax deduction and the appraiser relied on the information he had in his files, which included privileged documents. *Richey*, 632 F.3d at 567-68. This Court did not rule that the appraiser's files thereby became discoverable, but rather remanded the matter for discovery of the non-privileged documents in that file. *Id.*

d. The Government Asks the Court to Create a New Waiver Standard of Implicit Disclosure.

Unable to demonstrate that Sanmina or DLA Piper disclosed any part of the confidential communications contained in the Attorney Memos or placed their contents at issue, the Government proposes a new standard, ultimately arguing that a waiver can be implied if the content of the privileged documents is "implicitly disclosed." [GOB, p. 31 (arguing: "by relying upon the memos to abandon its ordinary valuation methodology, the report implicitly disclosed the analysis contained in those memos.").]

The Court will not find any support anywhere for the implicit disclosure standard the Government advocates. Nor will it find any support for the Government's tortured reading of *Roberts, supra,* which the Government attempts

to distinguish because “the court found that the substance of those [attorney-client] communications could not be inferred.” [GOB, p. 28.] In fact, it would be pretty easy to infer that, according to Roberts, he either told the lawyer not to settle or the lawyer never asked. That did not matter. As the Court wrote: “Whatever Dr. Roberts may have told his attorney, Mr. McDougal, in confidence, including about Dr. Roberts’s interest or lack of interest in settlement, was not revealed by Dr. Roberts in his declaration. That is the end of the analysis . . . . ” *Id.* So, too, here, whatever the Attorney Memos said is not revealed anywhere in the DLA Piper Report. That is the end of the analysis.

e. <u>Summary of Attorney-Client Privilege Waiver Argument.</u>

The only argument seriously urged by the Government is that the reference in the DLA Piper Report to the Attorney Memos either waives the privilege by disclosure or places the contents of the Attorney Memos in issue. However, the DLA Piper Report does not disclose the contents of the Attorney Memos, and Sanmina did not put the contents of those memos in issue simply because it claimed a worthless stock deduction based, in part, on the legal advice of its in-house counsel.

C. <u>The District Court Erred by Using Rule 502(a) to Find the Existence of a Waiver.</u>

Finally, and briefly, the Government's effort to defend the district court's use of Rule 502(a) does not defend it at all. Indeed, the Government tries to redirect the discussion, arguing: "[t]he waiver, as discussed *supra,* is the reliance of the disclosed DLA Piper report on the memos . . . ." [GOB, p. 35.] That, however, is not what the district court said. Citing Rule 502(a)(3), the district court ruled that the disclosure of the DLA Piper Report created a waiver because the report "should, in fairness, be considered together [with the Attorney Memos]." [1 ER 5.] Many privileged materials could, in fairness, be considered in reviewing a party's legal position. That is not the test for the existence of a waiver, but rather it measures the extent of waiver *if* a waiver can be found. Sanmina respectfully submits that the trial court misapplied Rule 502(a) when it used the rule to find the existence of a waiver.

III. <u>CONCLUSION</u>

The district court erred when it found a work product waiver even though the Attorney Memos were never disclosed to an adversary. The court also erred when it found that Sanmina waived the attorney-client privilege when it provided the DLA Piper Report to the IRS or when Sanmina took a worthless stock deduction. Sanmina thus properly withheld the Attorney Memos. Furthermore,

even if this Court were to disagree and find a waiver, the waiver could not extend to the legal analyses of Sanmina's in-house counsel, and a blanket order to produce the Attorney Memos without redaction undeniably intrudes on Sanmina's attorney work product rights. The ruling of the district court should either be reversed in full, or it should be reversed in part and remanded to consider the appropriate redactions to the Attorney Memos prior to production.

DATED: September 10, 2019 Respectfully submitted,

Michael C. Lieb
Kenneth Hsu
ERVIN COHEN & JESSUP LLP

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

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 10th day of September, 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 a member of the bar of this Court.

Executed on September 10, 2019, at Beverly Hills, California.

/s/ Michael C. Lieb

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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