IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

WELLS FARGO & COMPANY,	)	
	)	
Petitioner and Counter-Respondent,	)	Case No. 0:10-mc-57-JRT-JJG
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent and Counter-Petitioner.	)	

MEMORANDUM OF LAW OF *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF WELLS FARGO'S PETITION TO QUASH IRS SUMMONS AND RESPONSE TO RESPONDENT UNITED STATES' COUNTER-PETITION TO ENFORCE IRS SUMMONSES

STATEMENT OF IDENTITY

The Association of Corporate Counsel ("ACC") is the bar association for attorneys employed in the legal departments of corporations and private sector organizations worldwide. ACC has more than 26,000 members in over 75 countries, employed by over 10,000 organizations. The advice of these lawyers is fundamental to the integrity of corporate financial processes and crucial to the ability of corporations to comply fully with all applicable laws relating to accounting and federal taxation. ACC and its members are committed to ensuring that the work product privilege continues to play its historic role in safeguarding the rights of lawyers and clients to communicate freely and candidly. They fear

that the Internal Revenue Service's quest to obtain tax accrual workpapers—which contain the sensitive and confidential legal analyses of a company's own lawyers, addressing its vulnerabilities in litigation over its tax positions—poses a grave threat to the privilege in all areas, and thus to the ability of corporations to benefit from the advice of counsel.[1]

SUMMARY OF ARGUMENT

The work product privilege is an indispensable element of our adversarial system of justice. As codified in Federal Rule of Civil Procedure 26(b)(3), it allows a party to protect from discovery any document that its attorneys have prepared in anticipation of litigation. The privilege ensures that parties can obtain candid legal counsel without worrying that their lawyer's advice will be used against them by their adversaries. In doing so, it promotes compliance with the law and basic fairness.

Wells Fargo's tax accrual workpapers are entitled to work product protection under Rule 26(b)(3). Wells Fargo prepared these workpapers because of the prospect of litigation with the IRS—which indisputably is Wells Fargo's adversary with respect to the tax positions in question—and the workpapers contain the very same sort of "mental impressions" and "beliefs" concerning legal claims that the

[1] No party's counsel authored this brief, in whole or in part. Nor did a party, a party's counsel, or any person other than the ACC and its counsel contribute money that was intended to fund preparing or submitting the brief.

Supreme Court protected from disclosure in *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Moreover, Wells Fargo did not waive the privilege simply by disclosing the documents—on a confidential basis—to KPMG.

The issues before the Court are critical to American businesses, along with the tens of thousands of attorneys who advise them. Every day, these attorneys depend upon the work product privilege when providing their clients with confidential legal advice and analysis concerning the litigation-related aspects of their business operations. Allowing the IRS to obtain businesses' confidential assessment of their litigation positions against the IRS would undermine the attorney-client relationship, compromise the integrity of the adversarial process, and deter companies from prudent reliance on counsel. If such papers containing the sensitive legal analyses prepared by counsel were left unprotected, the resulting harm to businesses and their legal counsel would be sweeping. The Court should protect these workpapers from discovery.

ARGUMENT

I. THE POLICY CONSIDERATIONS UNDERLYING THE WORK PRODUCT PRIVILEGE PRECLUDE DISCLOSURE OF WELLS FARGO'S TAX ACCRUAL WORKPAPERS TO THE IRS

The work product privilege protects from discovery "documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." Fed. R. Civ. P. 26(b)(3)(A). American courts

have long recognized this privilege, and the Supreme Court lauded its "historical and necessary" function in *Hickman v. Taylor*, 329 U.S. at 511. As the Court explained, the purpose of the privilege is to prevent "unwarranted inquiries into the files and the mental impressions of an attorney." *Id*. at 510. The privilege reflects the Court's policy judgment that it is "essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id*.

The Supreme Court has interpreted the work product privilege broadly, to extend not only to materials prepared for use at trial, but also to materials "prepared by an attorney *in contemplation of litigation* which set forth the attorney's theory of the case and his litigation strategy." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 154 (1975) (emphasis added); *see also United States v. Nobles*, 422 U.S. 225, 238-39 (1975). The Eighth Circuit likewise has explained that the key phrase in Rule 26(b)(3)—"documents . . . prepared in anticipation of litigation"—encompasses any document that, "'in light of the nature of the document and the factual situation in the particular case, . . . can fairly be said to have been prepared or obtained *because of the prospect of* litigation.'" *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (emphasis added) (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2024, at 198-99 (1970)).

In *Searle*, the Eighth Circuit addressed whether the work product privilege protects a company's calculation of litigation reserves. The Court held that reserves estimating the cost a company is likely to incur in any given case *are* privileged because they "reveal the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim"; thus, "[b]y their very nature they are prepared in anticipation of litigation and, consequently, they are protected from discovery as opinion work product." *Searle*, 816 F.2d at 401 (citing *Hickman*, 329 U.S. at 512; *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)); *see also United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998) (same).

Wells Fargo's tax accrual workpapers—like the litigation reserve analyses in *Searle*—were prepared "'because of the prospect of litigation.'" *Searle*, 816 F.2d at 401 (citation omitted). *Searle* involved litigation reserves calculated with respect to products liability lawsuits, and Wells Fargo calculates its reserves with respect to potential tax lawsuits against the IRS. Both reserve calculations take essentially the same form and serve essentially the same function: Just as in *Searle*, the workpapers here "reveal the mental impressions, thoughts, and conclusions" of a company's attorneys evaluating prospective litigation outcomes. *Id.* Accordingly—as both the D.C. Circuit and Northern District of Alabama have held—such workpapers are entitled to protection from discovery by the IRS. *See United States v. Deloitte LLP*, 610 F.3d 129, 136-38 (D.C. Cir. 2010); *Regions Fin.*

Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *7 (N.D. Ala. May 8, 2008).

A. The Work Product Doctrine Advances Important Goals of Privacy, Efficiency and the Fair Administration of Justice

As the Eighth Circuit recognized in *Searle*, the "application of the work product doctrine to specific documents is guided by the purposes of the doctrine set out in *Hickman*." 816 F.2d at 400. There, the Supreme Court held that memoranda, written by an attorney and discussing witness interviews conducted when investigating an accident, were "attorney work product" not discoverable in subsequent litigation over the accident. *Hickman*, 329 U.S. at 511. The Court reached this conclusion based on its desire to promote privacy, efficiency and the fair administration of justice. These same purposes protect tax accrual workpapers, *especially* when the IRS's publicly stated objective is to scour such workpapers for companies' confidential assessments of their own legal vulnerabilities—as opposed to the facts of their transactions, which are freely available to the IRS on audit.

As the *Hickman* Court declared, it would be both "harsh and unwarranted" to open "the files and mental processes of lawyers" to the "free scrutiny of their adversaries." *Id*. at 514. A lawyer must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Id*. at 510. He must be free to "assemble information, sift what he considers to be the relevant

from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.* at 511. Therefore, "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs"—the "work product of the lawyer"—must be privileged from discovery. *Id.* Otherwise "much of what is now put down in writing would remain unwritten," and "[a]n attorney's thoughts, heretofore inviolate, would not be his own." *Id.*

The *Hickman* Court explained that the work product privilege is necessary to "promote justice," "protect . . . clients' interests," and ensure "an orderly working of our system of legal procedure." *Id.* at 511-12. Otherwise, "[i]nefficiency, unfairness, and sharp practices would inevitably develop." *Id.* at 511. The privilege protects the basic fairness and integrity of the adversarial system by preventing a party from stealing its legal theories from the candid assessments of opposing counsel. As Justice Jackson put it, "[d]iscovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).

B. The IRS's Reinterpretation of the Work Product Privilege Would Inhibit Lawyers From Providing Candid and Confidential Litigation-Related Advice to Businesses In a Wide Variety of Contexts

The IRS argues that materials prepared for business purposes or pursuant to regulatory requirements should be unprotected by the work product doctrine, *even assuming such materials were prepared in anticipation of litigation. See* IRS

Reply 1 ("Even Assuming Wells Fargo Anticipated Litigation, Its Tax Accrual Workpapers Are Not Protected Work Product …."). This position seeks to undermine the policies animating *Hickman*, with far-reaching consequences.

1. Forcing Companies to Share Tax Accrual Workpapers With the IRS Violates *Hickman*'s Core Concerns

Tax accrual workpapers prepared pursuant to Financial Accounting Standards Board Interpretation No. 48 ("FIN 48") document the candid and private analyses of a company and its attorneys about the litigation prospects of its tax positions. *See* Wells Fargo Br. 8-11, 29-31. By the IRS's own admission, the FIN 48 analysis "requires companies to assume that the position will be . . . *litigated* [against the IRS] to the 'highest court possible.'" Declaration of Richard G. Stevens 7, ECF No. 11 (emphasis added); *see also id*. at 8 (same). The FIN 48 workpapers at issue here thus include "an assessment of the taxpayer's [legally uncertain tax] position and potential for sustaining that position," "documents written by the taxpayer's employees and officers . . . evaluating the tax strategies," and "Wells Fargo's views concerning potential weaknesses with the transaction's proposed tax treatment." Declaration of Timothy L. Erickson 9-10, ECF No. 9 ("Erickson Decl."). They indisputably constitute "legal analysis that falls squarely within *Hickman*'s area of primary concern—analysis that candidly discusses the attorney's litigation strategies, appraisal of likelihood of success, and perhaps the feasibility of reasonable settlement." *Adlman*, 134 F.3d at 1200.

The IRS's zeal to discover these workpapers exemplifies the sharp and unfair practices that the Supreme Court sought to avoid in *Hickman*. The IRS unapologetically declares that it will use Wells Fargo's workpapers to identify "issues that have not yet been discovered or fully examined by the [IRS] examination team." Erickson Decl. at 9. It demands the workpapers because they contain information—including "Wells Fargo's views concerning potential weaknesses with [a] transaction's proposed tax treatment"—that otherwise would not be available to the IRS auditors. *Id*. at 10. What the IRS wants, in short, is for Wells Fargo to hand over a roadmap to its own legal vulnerabilities—exactly what the Supreme Court prohibited in *Hickman*. *See Delaney, Migdail & Young Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987) (discovery of party's assessment of its own "legal vulnerabilities"—for the purpose of "mak[ing] sure [that the other party] does not miss anything in crafting its legal case"—is "precisely the type of discovery the Court refused to permit in *Hickman*").

Forcing companies to turn over tax accrual workpapers in cases like this one would give the IRS an "unfair advantage" in the litigation over uncertain tax positions that inevitably would follow such disclosures. *United States v. Roxworthy*, 457 F.3d 590, 595 (6th Cir. 2006). It would enable the IRS to free ride off of the "wits" of its adversary by choosing to bring enforcement actions against

the taxpayer's most vulnerable tax positions—as identified by the taxpayer's own counsel. *Hickman*, 329 U.S. at 516 (Jackson, J., concurring).

It also would provide the IRS an undue advantage in settlement negotiations. After all, FIN 48 expressly requires the taxpayer to determine its willingness to settle litigation with the IRS over a given tax position (and at what price). As the Second Circuit has noted, allowing the IRS to access such analyses would be an "'intolerable intrusion on the … bargaining process,'" because it would "'allow[] one party to take advantage of the other's assessment of his prospects for victory and an acceptable settlement figure.'" *Adlman*, 134 F.3d at 1202 (second alteration in original) (quoting Edward H. Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269, 1283 (1969)). *See also* Henry J. Lischer, Jr., *Work Product Immunity for Attorney-Created Tax Accrual Workpapers?: The Aftermath of* United States v. Textron, 10 Fla. Tax Rev. 503, 536 n.133 (2011) (disclosure would give IRS an unfair informational advantage in settlement discussions).

Leaving tax accrual workpapers unprotected also would detract from the frankness and fullness of written communications between companies and their tax attorneys. Faced with the prospect of disclosure to the IRS, attorneys would be induced to limit the details contained in tax accrual workpapers. *See, e.g.*, Scott Novick, *What In-House Tax Professionals Should Do in light of Textron*, Global Tax Blog (Aug. 31, 2009), http://web20.nixonpeabody.com/globaltaxblog/

Lists/Posts/Allposts.aspx (advising tax departments to "[l]imit[] tax accrual work papers to numerical analysis with minimal supporting narrative"). Over time, this "would inevitably erode the quality of the financial reporting process and would impose costs throughout the economy." Stuart J. Bassin, *Managing Tax Accrual Workpapers After* Textron, 123 Tax Notes 571, 579 (2009).

The IRS has plenty of ways to obtain *factual* information from taxpayers concerning their transactions and asserted tax positions.[2] But it should not be permitted to force companies to reveal the legal analyses and settlement positions they would rely upon should the IRS challenge their positions in court. Such compelled disclosure would make a mockery of the adversary system that the privilege is "designed to promote." *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997).

[2] For example, the IRS creates the forms (including tax return forms) that require taxpayers to provide the information the IRS deems necessary, *see* I.R.C. § 6011(a); it has the authority to require disclosure of specific types of transactions it deems suspect, *see* Treas. Reg. § 1.6011-4; it can obtain, during an audit, factual information needed to ascertain the correctness of a tax return or determine a taxpayer's correct liability, *see* I.R.C. § 7602(a); and it can issue administrative summonses for records and testimony not only of the taxpayer and its employees, but also of third parties, *id.* § 7602(a)(2), (3). Indeed, the IRS recently mandated that certain corporations now file a schedule that discloses their "uncertain tax positions." IRS Announcement 2010-75, 2010-41 I.R.B. 428 (Oct. 12, 2010), *available at* http://www.irs.gov/pub/irs-irbs/irb10-41.pdf. In doing so, the IRS made clear that it is seeking factual information and not the taxpayers' legal analysis of the uncertain tax positions. *Id.* at 429.

2. The IRS's Theory Would Penalize Businesses for Their Prudent Reliance on Counsel in Other Litigation-Related Contexts

As a practical matter, the IRS's cramped view of the work product privilege would preclude companies from obtaining candid analyses of litigation-related business matters in many important contexts beyond tax accrual workpapers. These analyses—in connection with internal investigations and prospective corporate transactions, for example—are generated in anticipation of litigation, but also often are driven by a company's desire to comply with its legal obligations and make appropriate business decisions. Denying the work product privilege to these analyses would penalize companies for their prudence and dissuade them from conducting robust examinations in the first place—to the detriment of the companies, their shareholders and the public at large.

Companies regularly commission internal investigations, led by counsel, upon discovery of potential violations of law or significant risks posed by company actions or products. They do so in a wide variety of contexts, in a manner that provides significant benefits both to themselves and to the general public. *See, e.g.*, *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1263 (3d Cir. 1993) ("We should encourage the voluntary, cooperative, and speedy resolution of workplace safety problems …."); Priya Cherian Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 Stan. L. Rev. 1447, 1449 (2008) ("[T]he SEC and the

DOJ have enthusiastically embraced the role that self-monitoring and cooperation play in assisting their investigations [into international bribery and corruption]."); Paul D. Sarkozi, *Internal Investigations: An Overview of the Nuts and Bolts and Key Considerations in Conducting Effective Investigations: Legal Ethical & Strategic Issues* 95, 99 (PLI Corp. Law Practice, Course Handbook Series No. 1564, 2006) (emphasizing role of internal investigations in ensuring integrity of company accounting processes).

Courts have recognized that because the "suspicion" of legal violations signals the possibility that litigation may occur, internal investigations into such violations are performed "in contemplation of litigation." *In re Grand Jury Investigation*, 599 F.2d 1224, 1229-30 (3d Cir. 1979); *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 445 (S.D.N.Y. 2004). At the same time, however, these investigations *also* often are conducted under the compulsion of law or for the purpose of voluntary compliance in the future—neither of which is directly connected to pending or imminent litigation. Because of the presence of these ordinary, non-litigation-related business purposes, any notes or other materials prepared by counsel in the course of these investigations would—if the IRS has its way—be stripped of the protection of the work product privilege.

Companies also rely on counsel when contemplating business transactions that may result in litigation. For example, a company conducting diligence with

respect to a potential merger may task counsel with assessing the impact of the counterparty's pending or potential litigation on the combined enterprise. Because the point of such analysis is to assess the outcome of litigation or anticipated litigation, the counsel's work product in such circumstances traditionally has been privileged on behalf of the combined entity. *See Adlman*, 134 F.3d at 1199-200; Anne King, Comment, *The Common Interest Doctrine and Disclosures During Negotiations for Substantial Transactions*, 74 U. Chi. L. Rev. 1411, 1423 & n.70, 1424 & n.77, 1425 & n.80, 1429 & n.107 (2007). But because these analyses are chiefly commissioned for business purposes, the IRS approach would *deny* them protection from discovery.

Finally, to the extent tax accrual workpapers—or other reserve analyses or sensitive litigation analyses—are unprivileged from disclosure to the IRS, they also would be unprivileged with respect to private litigants. These adversaries would demand the disclosure of such workpapers as a matter of course, to support their own lawsuits second-guessing the companies' financial statements. Here, for example, the IRS approach necessarily exposes the sensitive and confidential legal analyses of Wells Fargo's lawyers not only to the Government, but to *anyone* eager to exploit the company's own work product when bringing suit.

Adoption of the IRS position in this case would constrict the scope of the work product privilege sharply in each of the contexts discussed above. The result

would be to chill responsible corporate conduct, and to discourage companies from seeking legal analysis when they need it most. *See* Jacob A. Kling, Comment, *Tax Cases Make Bad Work Product Law: The Discoverability of Litigation Risk Assessments After* United States v. Textron, 119 Yale. L.J. 1715, 1719-22 (2010); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 Am. Crim. L. Rev. 147, 149 (2000). Faced with such an erosion of the work product privilege as advocated by the IRS, companies would be less likely to undertake investigations in the first place—and more likely to order counsel not to document their findings and analyses in writing. This would undermine corporate self-evaluation and result in ill-informed business decisions, without providing any significant benefits to the public. Over the long term, it also "'would inevitably reduce voluntary compliance with the law, produce more litigation, and increase the workload of government law-enforcement agencies.'" *EEOC v. Lutheran Social Servs.*, 186 F.3d 959, 966 (D.C. Cir. 1999) (citation omitted).

Although the IRS suggests that this chilling effect is imagined, from the perspective of the corporate legal counsel represented by the ACC—who are in far better position to assess the consequences on the businesses they advise—it is quite real. Indeed, in the wake of the First Circuit's *Textron* decision siding with the IRS and fashioning a new standard for application of the work product privilege—

holding that tax accrual workpapers were *not* covered by the privilege because they are not created "for use" in litigation itself, *United States v. Textron*, 577 F.3d 21, 26-27 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010)—practitioners immediately began urging companies to pare down the explanations given in written analyses in order to minimize potential disclosure of sensitive litigation analyses to their adversaries.[3] This Court should reject any narrowing of the work product privilege that promotes such results.

C. The IRS Position Misconstrues Rule 26(b)(3) and its Rationales

Rule 26(b)(3) affirmatively protects from disclosure any document prepared by a party or its representative "in anticipation of litigation." This broad language codifies the historic purposes of the work product doctrine set forth by the Supreme Court in *Hickman*, encompassing documents such as tax accrual workpapers prepared for the dual purpose of analyzing anticipated litigation and for business reasons. In this case, FIN 48 requires taxpayers to anticipate litigation when they prepare their financial statements. The workpapers analyzing the merits

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[3] *See*, *e.g.*, Shearman & Sterling LLP, Client Publication, *First Circuit Denies Work Product Protection to Litigation Risk Assessments Provided to Financial Auditors* at 2 (Aug. 21, 2009), *available at* http://www.shearman.com/Publications/List.aspx?viewAll=true ("[Clients] should proceed cautiously in revealing attorney work product in documents that serve a business or regulatory function," and "[t]axpayers should limit such disclosures to the extent possible."); Kaye Scholer LLP, *Blurred Vision: Courts, Corporations Don't See Eye to Eye on Attorney Work Product Protection* at 3 (Oct. 19, 2009), *available at* http://www.kayescholer.com/news/client_alerts/20091019 ("[P]rudent litigators should take care in these very uncertain times.").

of the legal claims that would arise in such lawsuits—and the likelihood that such claims would succeed—therefore *by their very nature* are generated "in anticipation of litigation." Accordingly, they are protected by the plain language of Rule 26(b)(3).

The IRS's contrary argument is inconsistent with Rule 26(b)(3) and the core policies at the heart of the work product privilege. The IRS argues that FIN 48's requirement that taxpayers *assume* litigation when preparing their workpapers means that those workpapers were not created "in anticipation of litigation." It further argues that even if they *were* prepared "in anticipation of litigation," the workpapers should be discoverable despite the plain text of Rule 26(b)(3), both because they were created for ordinary business purposes and also because the anticipated litigation is unlikely or remote. These arguments do not withstand scrutiny.

1. FIN 48 Requires Taxpayers to "Anticipate" Litigation For the Purposes of Rule 26(b)(3)

The IRS concedes that FIN 48 requires taxpayers, when calculating their tax reserves, to "assume[e]" (1) that the IRS will detect any uncertain tax positions in their returns, (2) that it will challenge each such position, and (3) that "the issue will be litigated to the highest court." IRS Reply 14. Nonetheless, the IRS protests that "[t]hose are *assumptions* that Wells Fargo is forced to make under FIN 48, whether or not it actually anticipates that litigation will ensue." *Id*. Its conclusion

is that because it is *FIN 48* that requires taxpayers to anticipate litigation—whether or not those *taxpayers* otherwise expect such litigation to come about—the workpapers are not protected work product.

The IRS's logic is flawed. Rule 26(b)(3) protects all materials prepared "in anticipation of litigation," without qualification as to the *motive* for anticipating litigation. In *Adlman*, for example, the fact that a business transaction prompted the party to analyze the outcome of potential litigation did not alter the conclusion that the party "anticipated" litigation as part of its analysis. Here, the fact that taxpayers are required by FIN 48 to analyze the possibility of litigation likewise does not change the fact that tax accrual workpapers are prepared "in anticipation" of that litigation. Indeed, FIN 48 ensures that *all* tax accrual workpapers are prepared in anticipation of litigation.

The IRS's approach is also inconsistent with the purpose of the work product privilege—to protect the "files and mental processes of lawyers" from the "free scrutiny of their adversaries," so as to prevent "inefficiency, unfairness and sharp practices" that would "poorly serve[]" both "the interests of the clients and the cause of justice." *Hickman*, 329 U.S. at 514, 511. Indeed, the need to maintain confidentiality for legal counsel and candid assessments of risks is crucial to our adversarial system of justice—it is important *whenever* litigation is anticipated, whether by a regulatory requirement or otherwise. Though the IRS tries to

differentiate between litigation anticipated because of regulatory requirements and litigation anticipated for other reasons, this is a distinction without a difference. The IRS never even *tries* to square this distinction with *Hickman* or the purposes of Rule 26(b)(3). Because FIN 48 materials are—by definition—prepared in anticipation of litigation, they are protected by Rule 26(b)(3) and the work product doctrine.

2. A Document Prepared "In Anticipation of Litigation" Is Protected Even If It *Also* Is Prepared for Business or Regulatory Purposes

The IRS also argues that tax accrual workpapers prepared in anticipation of litigation lose work product protection if they *also* are prepared in the "ordinary course of business" or "pursuant to regulatory requirements." That argument is contrary to the text of Rule 26, the Advisory Committee note accompanying that text, binding Supreme Court and Eighth Circuit precedent, and the longstanding policy consensus favoring attorney-client confidentiality even in the context of financial audits.

First, the IRS assumes that a party invoking the privilege must "show that [a document] was motivated by preparation for litigation *and nothing else*." *Regions*, 2008 WL 2139008, at *6 (rejecting this claim). But that is not what Rule 26(b)(3) actually says. To the contrary, the plain text of the rule affirmatively *bestows* the privilege on documents so long as they are "prepared in anticipation of litigation";

it does not *deny* the privilege to documents if they are motivated in any way by business or other reasons. The preparation of workpapers in accordance with accounting rules does not exclude them from protection if they satisfy the requirements of Rule 26(b)(3). *See Deloitte*, 610 F.3d at 135 ("reject[ing]" the argument that a tax document "cannot be work product because it was generated as part of the routine audit process, not in anticipation of litigation"); *Adlman*, 134 F.3d at 1200 ("The fact that a document's purpose is business-related [is] *irrelevant* to the question whether it should be protected under Rule 26(b)(3)." (Emphasis added)).[4]

Second, the Advisory Committee's note to Rule 26(b)(3) confirms that documents prepared "pursuant to public requirements" are still protected if—as the IRS is willing to assume *arguendo*, *see* IRS Reply 1-2—they are prepared "in anticipation of litigation." The Advisory Committee clarified the "in anticipation of litigation" requirement by explaining that "Materials assembled … pursuant to public requirements *unrelated* to litigation … are not under the qualified immunity provided by [Rule 26(b)(3)]." Fed. R. Civ. P. 26(b)(3) advisory committee note on

[4] In its reply brief, the IRS cites Sixth Circuit precedent purportedly establishing that, when a document is created for *both* litigation and nonlitigation purposes, the court must decide which of these purposes predominates as the "driving force" underlying the document's preparation. But the IRS misreads the caselaw. IRS Reply 5-6. In *Roxworthy*, for example, the Sixth Circuit explicitly rejected "a requirement that the *primary* or sole purpose of the [documents] be in preparation of litigation." *Roxworthy*, 457 F.3d at 599 (emphasis added).

1970 amendments (emphasis added). The obvious implication of this phrase is that materials created pursuant to public requirements *are* protected if they *are* "related to" litigation, provided they also satisfy the "in anticipation of litigation" standard set forth in the Rule. *Pac. Gas & Elec. Co. v. United States*, 69 Fed. Cl. 784, 792 (2006). Needless to say, workpapers prepared pursuant to FIN 48—which explicitly *requires* taxpayers to assume litigation—are obviously "related to" litigation. *See, e.g., Morales v. TWA, Inc.*, 504 U.S. 374, 383-84 (1992) (the phrase "relating to" has a "'broad scope'" and "'expansive sweep,'" and means "'ha[ving] a connection with or reference to'" (citing *Black's Law Dictionary* 1158 (5th ed. 1979))). Contrary to the IRS's assertion, therefore, tax accrual workpapers are *not* unprotected simply because they were prepared "for nonlitigation purposes such as fulfilling regulatory requirements." IRS Reply 1-2.

Third, the Supreme Court and the Eighth Circuit also have made clear that documents prepared for business purposes are not automatically ineligible for the privilege, if the documents otherwise satisfy the Rule. In *Upjohn Co. v. United States*, for example, the Supreme Court considered whether the privilege protected the notes and memoranda of an attorney who had conducted an internal investigation on behalf of a corporate client. 449 U.S. 383 (1981). The investigation's purpose was to provide "legal advice concerning compliance with

securities and tax laws, foreign laws, currency regulations, duties to shareholders, *and* potential litigation in each of these areas." *Id.* at 394 (emphasis added).

Under the IRS's theory in this case, these notes and memoranda should have been categorically *unprotected*, as they were prepared for multiple purposes, including both (1) "compliance with securities and tax laws" and (2) "potential litigation." *Id*. But the Supreme Court held the documents privileged because they "reveal[ed] the attorneys' mental processes in evaluating [interviews conducted with employees]." *Id*. at 401 (remanding the case for consideration of whether an unrelated exception to this general rule applied). The Court recognized that so long as a document was prepared by a company in anticipation of litigation—even if it was also used for business purposes—it is privileged under Rule 26(b)(3). The IRS endorses precisely the *opposite* view in this case.

The IRS's position is also inconsistent with *Searle*. The Eighth Circuit recognized that the individual litigation reserve calculations at issue there served "business planning purposes," insofar as they were "used by the risk management department" in analyzing the company's "budget, profit, and insurance considerations." *Searle*, 816 F.2d at 401. But those business planning purposes did not exclude the reserve calculations from protection under Rule 26(b)(3). Based on the *content* of those analyses—their revelation of "the mental impressions, thoughts, and conclusions of an attorney in evaluating a legal

claim"—the Court concluded that the documents "[b]y their very nature" were "prepared in anticipation of litigation and, consequently, [were] protected from discovery as attorney work product." *Id.*[5] And while the IRS cites several out-of-circuit cases in its effort to argue that any document prepared for ordinary business purposes is necessarily unprotected by the privilege, IRS Br. 15-16, the Government has elsewhere explicitly recognized the conflict between the "primary motivating purpose" approach applied in two of those cases and the "because of the prospect of litigation" test adopted by the Eighth Circuit and most other federal courts of appeals. *See* Br. for the United States in Opp. at 16, *Textron Inc. v. United States*, 130 S. Ct. 3320 (2010) (No. 09-750).

Finally, although the IRS argues that because tax accrual workpapers are prepared by companies for sharing with their outside auditors and thus for the purpose of obtaining clean financial statement audit opinions, those workpapers

[5] *Searle* did allow the discovery of documents containing "aggregate reserve information" that did not "reveal[] the individual case reserve figures" and thus were not brought "within the protection of the work product doctrine." 816 F.2d at 401-02. Again focusing on the *character* of the two types of documents, the Court held that the individual reserve calculations revealing the "mental impressions, thoughts, and conclusions" of the company's lawyers "lose their identity when combined to create the aggregate information," thus "diluting" the protected content to such a degree that "it would be impossible to trace back" from the aggregate information "and uncover the reserve for any individual case." *Id.* at 401-02. The aggregate documents were unprotected because they constituted exclusively "'ordinary course of business'" information, *id.* at 401 (quoting advisory committee's notes to Fed. R. Civ. P. 26(b)(3)), and no longer reflected any content prepared "because of" litigation under the Eighth Circuit standard. Consistent with *Searle*, Wells Fargo produced aggregate tax reserve information to the IRS, but Wells Fargo's individual tax reserve documents are "[b]y their very nature" privileged. *Id.*

necessarily are unprotected, this theory is at odds with the very policies underlying financial statement audits. Since 1975, a well-recognized "treaty" between the legal and accounting professions has guided the manner in which corporate counsel's evaluations of litigation loss contingencies like those at issue here are shared with the company's outside auditors in the course of a financial statement audit. American Bar Association, *Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information* (1975), *available at* http://www.abanet.org/buslaw/attorneyclient/policies/aicpa.pdf. The "treaty" recognizes the "public interest in protecting the confidentiality of lawyer-client communications" in light of the "expanding complexity of our laws and governmental regulations," notwithstanding the fact that "our legal, political and economic systems depend to an important extent on public confidence in published financial statements." *Id*. at 5-6. It thus reflects the practical business interest in keeping litigation-related legal analyses out of the hands of potential adversaries, even when those analyses are created to assist in preparing financial statements. The IRS's position, therefore, is at odds with public policy favoring confidentiality in this context, as recognized by the treaty.

3. The Prospect of Litigation With the IRS Is Neither Too Unlikely Nor Too Remote To Trigger the Privilege

The IRS's opening brief argues that Wells Fargo cannot assert the work product privilege because "the prospect of litigation over [its uncertain tax

positions] was necessarily too remote at the time the workpapers were prepared." IRS Br. 22. Its claim seems to be that because the potential litigation was not pending, imminent, or sufficiently likely to ensue, the workpapers are unprotected. *Id*. at 25-26. But the IRS's position—once again—ignores the language and purposes of Rule 26(b)(3). Under the rule, attorney work product is privileged so long as it was prepared "in anticipation of" litigation, regardless whether that prospective litigation is imminent or ever actually transpires.

The IRS also deploys its "remote prospect" argument to try to distinguish this case from *Searle*. It argues that litigation in *Searle* was either imminent or pending. But the Court's analysis in *Searle* did not turn on the immediacy of the litigation. Rather, it turned on the content of the relevant documents. The Court extended the privilege to the reserve calculations not because the litigation was ongoing or probable, but because the calculations involved—"[b]y their very nature"—the "mental impressions, thoughts, and conclusions of an attorney in evaluating a legal claim." *Searle*, 816 F.2d at 401. Precisely the same sorts of mental impressions are at issue here.

In any event, the IRS is *constantly* auditing large corporations like Wells Fargo. The IRS's Coordinated Industry Case program, "under which the IRS *permanently* assigns an agent to audit the corporation's tax compliance over time," Kristin E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of)*

Compliance with Administrative Procedure Act Rulemaking Requirements, 76 Geo. Wash. L. Rev. 1153, 1189 n.171 (2008) (emphasis added), has historically encompassed over 1,500 companies, John W. Lee, *Transaction Costs Relating to Acquisition or Enhancement of Intangible Property: A Populist, Political, But Practical Perspective*, 22 Va. Tax. Rev. 273, 285 n.61 (2002). Moreover, the potential for litigation with respect to such audits is significant. Of the 516 audits that the IRS conducted of the largest companies (with over $20 billion in assets) in 2009, a full 236 of these audits—46% of them—resulted in disagreements over the amount of tax owed. IRS, *Internal Revenue Service Data Book, 2009* at 22, 27 (2009). And IRS attorneys are frequently litigating against taxpayers in court: In 2009 alone, the IRS Chief Counsel's office participated in 34,478 individual lawsuits. *Id*. at 61.

In these circumstances, the general prospect of litigation between the IRS and large corporate taxpayers is hardly "remote."[6] Prudence requires businesses and their corporate counsel to remain prepared to defend their tax positions against an IRS challenge. The work product privilege protects the legal analyses they generate when doing precisely that.

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[6] Moreover, the term "litigation" in Rule 26(b)(3) is not limited to civil or criminal trials. *See* Restatement (Third) of the Law Governing Lawyers § 87 cmt. h (2000) (defining "litigation" in work product context to encompass any proceeding in which "evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues").

II. DISCLOSURE OF TAX ACCRUAL WORKPAPERS TO A COMPANY'S OUTSIDE AUDITORS DOES NOT WAIVE THE WORK PRODUCT PRIVILEGE

The IRS also argues that, even if the tax accrual workpapers were privileged work product, Wells Fargo waived the privilege by disclosing them to KPMG, the company's independent auditor. It thus seeks to punish the company for complying with its most basic financial reporting responsibilities. But the IRS is wrong: When a company discloses its workpapers to its auditors, it does not waive the privilege.

As a policy matter, a finding of waiver based on a company's sharing of its tax accrual workpapers with its own auditors would have disastrous consequences. Such a ruling likely would enable any of the company's potential adversaries to gain access to those workpapers. *See In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846-47 (8th Cir. 1988) (waiver of privilege with respect to particular parties constitutes waiver with respect to all parties); *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, 450 F.3d 1179, 1192-97 (10th Cir. 2006) (same). Indeed, it may be construed in some circumstances as a subject matter waiver of *all* privileged communications and confidential information regarding the litigation or subject at issue. *See, e.g., In re Echostar Commc'ns Corp.*, 448 F.3d 1294, 1303-04 (Fed. Cir. 2006).

These results would undermine sound corporate governance just as if the workpapers never had been privileged in the first place. Faced with the prospect of widespread disclosure of any information they share with their auditors, corporations "could very well [be] discourage[d] . . . from conducting a critical self-analysis and sharing the fruits of such an inquiry with the appropriate actors." *Merrill Lynch*, 229 F.R.D. at 449; *see also, e.g.*, Chris Jung, Note, Textron*: The False Choice Between Financial Transparency and Litigant Confidentiality*, 7 N.Y.U. J. L. & Bus. 393, 395 (2010) (disclosure of workpapers to IRS "actually discourages transparency by disincentivizing companies from communicating freely with their independent auditors"); Robert W. Pommer III, *First Circuit Reverses Course in Closely Watched Work Product Case; Establishes Broad New Standard That Could Extend Outside Tax Area*, 41 Sec. Reg. & L. Rep. (BNA) 2050, 2053 (2009) (urging companies in wake of *Textron* to "exercise greater caution when sharing documents with the[ir] outside auditors"). But any impediment to the transparent sharing of information between companies and their auditors would undermine a core goal of the Sarbanes-Oxley Act—"to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." H.R. Rep. No. 107-610, at 69 (2002) (Conf. Rep.), *as reprinted in* 2002 U.S.C.C.A.N. 542, 542. These developments would

have the perverse effect of *deterring* transparency in corporate financial disclosures.

In light of these consequences, it should not be surprising that courts have held that disclosure of work product to outside auditors in this context does not waive the privilege. This is because the work product privilege is not automatically waived by any disclosure of a protected document to a third party; rather, it is waived only when a party "disclos[es] material in a way inconsistent with keeping it from an adversary." *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997) (citing 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2024, at 368-69 (1994)). A company does nothing of the sort when it provides its tax accrual workpapers to its auditors.

An independent auditor is not the "adversary" of the companies it audits; indeed, the applicable ethics guidelines make clear that even the *threat* of adversity between an auditor and client can raise questions about the auditor's independence. American Institute of Certified Public Accountants ("AICPA"), AICPA Professional Standards, Code of Professional Conduct, Rule 101.08 (2005), *available at* http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/et_101.aspx. And as the D.C. Circuit recently explained in *Deloitte*, an independent auditor's "power to issue an adverse opinion, while significant, does not make it the sort of litigation adversary contemplated by the waiver standard."

610 F.3d at 140; *see also Merrill Lynch*, 229 F.R.D. at 448 (making same point). Nor is an independent auditor its client's *potential* adversary with respect to the tax accrual workpapers at issue here. In preparing tax accrual workpapers, a company "anticipate[s] a dispute with the IRS, not a dispute [with its auditor]." *Deloitte*, 610 F.3d at 140.

Finally, a company's auditor is not a conduit to its adversaries. Clients disclose workpapers to their auditors with clear and reasonable expectations that such workpapers will remain confidential. After all, independent auditors are bound by the AICPA Code of Professional Conduct Rule 301.01, which provides that "[a] member in public practice shall not disclose any confidential client information without the specific consent of the client." *See also* PCAOB, Rule 3100, *available at* http:// http://pcaobus.org/Rules/PCAOBRules/Pages/Section_3.aspx (requiring auditing firms to comply with applicable standards of practice).

CONCLUSION

For the foregoing reasons, this Court should grant Wells Fargo's petition to quash the IRS summons and deny the IRS's counter-petition.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(D)

I HEREBY CERTIFY that the foregoing Memorandum of Law of Amicus Curiae Association of Corporate Counsel In Support of Petitioner Wells Fargo's Petition to Quash IRS Summons and Response to Respondent United States' Counter-Petition to Enforce IRS Summons complies with Local Rule 7.1(d) and the Court's May 31, 2011 Order Granting Motions to File Amicus Briefs. I further certify that, in preparation of this memorandum, I used Word 2003, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the above referenced memorandum contains 6,989 words.

s/ Richard P. Bress
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