STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs. D-101-CR-2024-00013

ALEXANDER RAE BALDWIN,

Defendant.

RESPONSE TO STATE OF NEW MEXICO'S MOTION FOR *IN CAMERA* INSPECTION OF JOINT DEFENSE AGREEMENT BETWEEN HANNAH GUTIERREZ REED AND ALEXANDER BALDWIN

Jason Bowles of Bowles Law Firm, hereby responds to the State of New Mexico's Motion for In Camera Inspection of Joint Defense Agreement Between Hanna Gutierrez-Reed and Alexander Baldwin, and responds as follows:

In the instant motion, the State seeks in camera review of any written joint defense/common interest agreement between counsel for Mr. Baldwin and counsel for Ms. Gutierrez Reed. This issue arose when the State sent subpoenas to undersigned counsel and his legal assistant requesting all communications between the two defendants' attorneys. The State has now amended that subpoena request to focus on communications regarding Mr. Baldwin's call to undersigned counsel's office and a text exchange with undersigned counsel, Thell Reed and Hannah Gutierrez Reed discussing the call. These materials within the amended agreement have now been disclosed (two emails from Melinda Zamora) or are in possession of the State (text exchange). This matter has also been briefed in related motions to quash subpoenas.

Undersigned counsel indicated that by disclosing the two emails from Ms. Zamora, he did not waive objection as to protected communications with counsel for Mr. Baldwin, under an oral joint defense/common interest agreement entered between them at the outset of all such communications.

New Mexico courts and courts across the country recognize the joint defense/common interest privilege. As the State cited in its Response to Counsel Jason Bowles Motion to Quash Subpoena:

> In New Mexico, courts have recognized the joint defense privilege as the "common interest" doctrine. See Santa Fe Pac. Gold Corp. v. United Nuclear Corp., 2007-NMCA-133, 143 N.M. 215. However, the party claiming the privilege must demonstrate its applicability. Abq. Journal v. Bd. Of Educ. Of Albuquerque Pub. Sch., 2019-NMCA-012, 19-21, 436 P.3d 1. A joint defense agreement is not established where defendants merely contemplate a joint defense agreement and attend a meeting together. See e.g., *Ludwig v. Pilkington* No. Am., Inc., No. 03 C 1086, 2004 WL 1898238, at * 4 (N.D. Ill. Aug. 13, 2004). When co-defendants enter into a joint defense agreement, by contrast, each defendant retains his own attorney. *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989). Once a joint defense agreement has been entered, communications made during joint defense strategy sessions are privileged. See *Wilson P. Abraham Const. Corp. v. Armco Steel Corp.*, 559 F.2d 250, 253 (5th Cir.1977); *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.1989). In Schwimmer, 892 F.2d 237 (2d Cir.1989), the Court stated that a claim resting on the common interest rule requires a showing that "the communication in question was given in confidence and that the client reasonably understood it to be so given." 892 F.2d at 244. It is important to note, however, that "a joint defense agreement does not create an attorney-client relationship between an attorney and the co-defendant." *United States v. Exec. Recycling, Inc.*, 908 F. Supp. 2d 1156, 1159–60 (D. Colo. 2012).
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> The attorney-client privilege has four elements: "(1) a communication (2) made in confidence (3) between privileged persons (4) for the purpose of facilitating the attorney's rendition of professional legal services to the client." *Santa Fe Pac. Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 14, 143 N.M. 215. The party claiming the privilege has the burden to establish "a communication is protected as an exception to the ordinary rule" that "the public has a right to every man's evidence." Id. ¶ 13 (internal quotation marks and citation omitted).

The Common Interest Privilege is simply an extension of the attorney-client privilege, and the work-product doctrine. *Higgins, supra., citing United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Hanwha Azdel, Inc. v. C & D Zodiac, Inc.*, 617 Fed. Appx. 227, 243 (4th Cir. 2015)(an extension of the attorney-client privilege); *Smith v. Pergola 36 LLC*, No. 22-cv-4052, 2022 WL 17832506, at *7 (S.D.N.Y. Dec. 21, 2022); *Bitler Inv. Venture II, LLC v. Marathon Ashland Petro. LLC,* No. 1:04-cv-477, 2007 WL 465444 *2 (N.D. Ind. Feb.2, 2007)(It is not an independent source of privilege or confidentiality.); *In re Processed Egg Products Antitrust Litigation*, 278 F.R.D. 112, 115 (E.D. Pa. 2011); *U.S. v. Gumbaytay*, 276 F.R.D. 671, 673 (M.D. Ala. 2011).

Under the Common Interest Privilege, communications voluntarily made among different parties and their attorneys do not waive privilege "where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel in the course of an ongoing common enterprise and multiple clients share a common interest about a legal matter." *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015). In the circumstances where the common interest privilege applies, it protects not only the communications between any of the clients and attorneys regardless of whether the communicating client's own attorney is present but also the communications between any of the clients' respective attorneys. *Schwimmer,* 892 F.2d at 244; *In re Monsanto Co.,* 998 S.W.2d 917, 922 (Tex.App. 1999); *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 214 (Tenn. Ct. App. 2002).

Counsel for Mr. Baldwin and undersigned counsel, at the outset of their communications, entered into an oral joint defense/common interest agreement as to any communications between them. Thus, there is no written agreement to review in camera. However, a written agreement is

not a requirement to protect the joint defense communications. *See Cooey v. Strickland*, 269 F.R.D. 643, 652 (S.D. Ohio 2010); *In re Teleglobe Communications Corp.*, 493 F.3d 345, 363 (C.A.3 2007). No writing is required because the attorney client privilege, from which the doctrine is derived, is not dependent on a writing. *See Hanover Ins. Co. v. Rapo & Jensen Ins. Services Inc.*, 449 Mass. 609, 618 (Mass. 2007). Counsel intended their discussions and communications to be privileged in the defense of their respective clients.

That said, counsel, without waiving said privileges, disclosed to the State the two emails written by Ms. Zamora to the undersigned, setting forth her contemporaneous memory of the calls by Mr. Baldwin to undersigned's law office. The State is also in possession of the text exchange between Thell Reed, Hannah Gutierrez Reed and undersigned counsel. There are no other emails from Ms. Zamora regarding Mr. Baldwin's calls to the office. Thus, undersigned counsel has agreed to provide these materials pursuant to the State's amended request. As counsel reflected on the timing of Mr. Baldwin's call to the office, he believes the State is correct that at the time of that call, respective defense counsel had not yet spoken to create the joint defense agreement.

Addressing the other concerns raised by the State in its citations of *United States v. Stepney*, 246 F. Supp. 2d 1069, 1077 (N.D. Cal. 2003) and *United States v. Henke,* 222 F.3d 633, 643 (9th Cir. 2000)), these are two federal cases out of the Ninth Circuit which are not controlling on this Court. There does not appear to be any New Mexico precedent that follows the California courts' pronouncements. Second, as already noted, the parties did not enter into a written joint defense/common interest agreement but did agree orally to keep their communications protected.

The State has expressed concern that the Court review any such written agreement (there is none) to ensure that "the agreement does not create (or waives) any confidentiality obligations or attorney-client privilege between the defendants and the attorney who is not his or her counsel."

State's Motion at 1. The parties did not waive any privilege in their oral agreement. Counsel also asserts that communications have not involved discussing statements from their respective clients.

Ms. Gutierrez Reed has not been offered any agreement by the State to testify and she has invoked her privilege against self-incrimination, question by question, during a recent pretrial interview, as she is facing a separate charge of bringing a gun into a bar, and has filed an appeal of her conviction. Thus, the concern about Mr. Baldwin's attorneys cross examining her is neither well founded nor ripe. Recently, the special prosecutor brought up the prospect of use immunity for Ms. Gutierrez Reed but that has not been pursued to date. However, even if it were, counsel can think of no limitation on either counsel for Baldwin or counsel for Ms. Gutierrez Reed in cross examining the others' client, given that no communications from the clients have been exchanged.

Finally, to reiterate, counsel has complied with the State's amended subpoena demand and disclosed email communications related to Mr. Baldwin's calls to undersigned's office. The State is already in possession of the text chain with Thell Reed and Hannah Gutierrez Reed and indeed is in possession of Ms. Gutierrez Reed's complete phone download, which has been litigated previously. Accordingly, for all these reasons, this motion should respectfully be denied.

Respectfully submitted,

/s/ Jason Bowles
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was sent through the ESF system, which caused the following parties to be served by electronic means, as reflected on the Notice of Electronic Filing this 20th day of May, 2024, to the parties listed in the filing system.

/s/ Jason Bowles
Jason Bowles
Bowles Law Firm