

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

**STATE OF NEW MEXICO,  
Plaintiff,**

**No. D-101-CR-2024-0013**

**vs.**

**Judge Mary Marlowe Sommer**

**ALEXANDER RAE BALDWIN,  
Defendant.**

**STATE'S EXPEDITED MOTION TO COMPEL DISCLOSURE  
OF PROPERLY SUBPOENAED DOCUMENTS**

COMES NOW the State of New Mexico by its Special Prosecutors Kari T. Morrissey and Erlinda O. Johnson, and hereby respectfully moves this Court for an expedited order for the disclosure to the State all communications between defense counsel for defendant and witness Jonah Foxman which were subpoenaed pursuant to a properly issued subpoena served on Mr. Jonah Foxman and in support thereof, the State submits the following.

**INTRODUCTION**

On October 21, 2021, the defendant Alexander Baldwin shot and killed Halyna Hutchins during a rehearsal while filming the movie Rust. At the time, Jonah Foxman worked as Mr. Baldwin's personal assistant. Indeed, Mr. Foxman was present in Santa Fe during the filming of Rust and was on the set of the film on October 21, 2021.

The State requested this Court authorize the issuance of an out of state subpoena to take a statement and subpoena duces tecum for documents to be served on Mr. Foxman. The subpoena duces tecum sought the production of the following:

All email, text, audio, social media or any other type of communication between Jonah Foxman and Alexander Baldwin, or anyone on Alexander Baldwin's behalf or any representatives of

Alexander Baldwin from September 1, 2021 through December 30, 2022 that relates in any way to the movie “Rust”, the filming of “Rust,” the death of Halyna Hutchins, litigation involving the death of Halyna Hutchins or any actions taken by Alexander Baldwin as a result of the death of Halyna Hutchins.

[X] All email, text, audio, social media or any other type of communication between Jonah Foxman and Alexander Baldwin, or anyone on Alexander Baldwin’s behalf or any representatives of Alexander Baldwin from October 21, 2021 through May 6, 2024 related to Jonah Foxman’s contact with prosecutors or investigators investigating the death of Halyna Hutchins on October 21, 2021 from October 21, 2021 through May 6, 2024.

[X] A copy of any and all nondisclosure agreement(s) between Jonah Foxman and Alexander Baldwin.

[X] all video footage, audio recordings and photographs in your possession taken between October 6, 2021, through October 21, 2021, on the set of the film Rust, in Santa Fe, NM.

The subpoena was served on Mr. Foxman through his counsel, Washington, D.C. Attorney David Frazee. On June 3, 2024, Mr. Frazee advised counsel for the State that he had spoken with counsel for Mr. Baldwin in order to determine whether there was representation of Mr. Baldwin beyond this criminal case. The State understands counsel for Mr. Baldwin inquired of Mr. Frazee whether a privilege would be claimed as it relates to the production of some of the subpoenaed material. Mr. Frazee further advised counsel for the State that he understood that counsel for Mr. Baldwin represented a company that presumably employed Mr. Foxman and that communications between Mr. Foxman and counsel for Mr. Baldwin were covered by the attorney-client privilege in the context of corporate counsel and corporate employee.

Counsel for the State thereafter reached out to counsel for Mr. Baldwin with the following inquiry,

Good afternoon Luke,

We have been made aware that you will be asserting a privilege as it relates to text message communication requested by a state subpoena duces tecum served on Jonah Foxman through his counsel for the disclosure of text messages between you and other members of Mr. Baldwin's defense team and witness Jonah Foxman.

Would you please explain the basis of the assertion of privilege as it relates to the subpoenaed communications? We would appreciate a prompt response as time is of the essence and this is an issue that may need to be addressed by the Court.

Counsel for the defendant has not responded to the State's email inquiry. Therefore, the State files the instant motion.

Mr. Foxman does not have standing to assert attorney-client privilege or authority to withhold properly subpoenaed documents. The defense has refused to apprise the state of the basis for any claim of attorney-client privilege the defense may assert, justifying the withholding of properly subpoenaed communications between Mr. Foxman and counsel for Mr. Baldwin. The state presumes Baldwin's attorneys will attempt to justify Mr. Foxman's withholding the subpoenaed communications by claiming attorney-client privilege.

### **ARGUMENT**

#### **I. All Documents Ordered Produced by the Subpoena Served on Mr. Foxman Must be Produced to the State and Mr. Baldwin's Counsel have no Standing to Prevent Disclosure**

Rule 16-304(A) NMRA directs that a "lawyer shall not ... unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value[.]" Evaluation of the scope of an attorney's obligation requires, instead, examination of our basic rules governing discovery and procedure. *Cf. In re Estrada*, 2006-NMSC-047, ¶ 32, 140 N.M. 492, 143 P.3d 731 (per curiam) (noting that discovery rules are designed to ensure "disclos[ure] to the fullest practicable extent" and counsel's failure to

comply with these rules may rise to the level of violating the Rules of Professional Conduct (internal quotation marks and citation omitted) ).

In this case, the State served a properly issued subpoena duces tecum on witness Jonah Foxman. The State has been notified by Mr. Foxman's attorney that he will not be disclosing communications between Mr. Foxman and Mr. Baldwin's attorneys because of the attorney-client privilege as Baldwin's attorneys claim to represent the company for which Mr. Foxman was employed and their communications are privileged. Mr. Baldwin's attorneys have not filed a motion to partially quash the subpoena duces tecum. Therefore, the subpoenaed material must be disclosed.

Rule 5-511(E) states in part,

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of court from which the subpoena issued.

Rule 5-511(E) NMRA 2016. Here, under the guise of a fortuitous claim of an attorney-client privilege of which the State has seen no evidence, lawfully subpoenaed documents are being withheld. This conduct requires the Court's intervention. The State respectfully requests this Court order Mr. Foxman to produce all the subpoenaed material.

## **II. The Attorney-Client Privilege does not Apply to the Subpoenaed Communications and their Disclosure Must be Ordered**

Rule 11-503 NMRA governs the scope of the attorney-client privilege in New Mexico. The rule states that "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client[.]" Rule 11-503(B) NMRA 2013. "The elements of attorney-client privilege ... are ... a communication ... made in confidence ... between privileged persons ... 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 privilege protects communications between client and attorney when made in confidence for the purpose of seeking or giving legal advice. *See Ullman v. State*, 23 Conn. 698, 711 (1994); *accord Standard Chartered Bank PLC v. Ayala Intern. Holdings (U.S.), Inc.*, 111 F.R.D. 76, 79 (S.D. N.Y. 1986), citing *Upjohn v. United States*, 449 U.S. 383, 391 (1981) (privilege “applies to communications made in confidence by a client to an attorney for the purpose of obtaining legal advice. It also applies to confidential communications made by the legal attorney to the client if such communications contain legal advice or reveal confidential information on which the client seeks legal advice”). The party asserting confidentiality bears the burden of showing that the privilege applies to each document. *See Pina v. Espinoza*, 2001-NMCA-055, 29 P.3d 1062.

While a party which is not subject to the subpoena may have standing to assert a privilege, *see, Broadcourt Capital Corp. v. Flagler Securities, Inc.*, 149 F.R.D. 626, 628 (D. Colo. 1993), the party must make a clear showing that the claimed privilege applies, *see, Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984). A claim of privilege is governed by the common law and is to be strictly construed. *Trammel v. United States*, 445 U.S. 40, 47, 50 (1980). A mere allegation of privilege is insufficient. *See, Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995). Rather, the party withholding documents must state the specific privilege and how all of the elements of the privilege apply. *Loftis v. Amica Mut. Ins.*

*Co.*, 175 F.R.D. 5, 8 (D. Conn. 1997), citing *State v. Hanna*, 150 Conn. 457, 466 (1963); accord *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995). “This burden can only be met by an evidentiary showing based on competent evidence and cannot be discharged by mere conclusory or ipse dixit assertions.” *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 470 (S.D. N.Y. 1993) (internal quotation marks and citations and external citations omitted)).

Here, no party has moved to assert a privilege applies, justifying withholding of the subpoenaed communications. Therefore, the Court must not entertain that as a basis for Mr. Foxman’s non-disclosure of text/email messages between counsel for Mr. Baldwin and Mr. Foxman. If a party were to assert a blanket claim of privilege, the State submits that the attorney-client privilege does not apply here and full compliance with the subpoena must be ordered.

The State is at a loss to understand how the attorney-client privilege applies to communications between Mr. Baldwin’s criminal defense attorneys and witness Jonah Foxman. Any claims by Baldwin’s attorneys that the attorney-client privilege applies<sup>1</sup> is insufficient to withhold production of documents subpoenaed. Indeed, any bald-faced assertion that a privilege exists is insufficient to justify non-disclosure by Mr. Foxman. *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984).

Even if a claim of privilege exists, the privilege must be narrowly construed. *Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, 687, 763 P.2d 1144, 1152 (1988) (“the [attorney-client] privilege must be strictly construed to ensure that it does not unduly impinge on the more general, overriding duty of insisting that investigations and decisions be based on truth and reality as opposed to fiction or fabrication.”). Additionally, it should be noted that the attorney-client privilege “only applies when the lawyer is acting as a lawyer, *i.e.*, giving legal advice.” *In*

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<sup>1</sup> It should be noted that defense counsel has not notified the State that they would be arguing that Mr. Foxman’s withholding production of the documents is justified by an assertion of an attorney-client privilege.

*Re Grand Jury Subpoena Duces Tecum Dated Sep. 15, 1983*, 731 F.2d 1032, 1037 (2<sup>nd</sup> Cir. 1984) (citations omitted).

Here, the only information obtained by the State was provided by Mr. Foxman's counsel advising that Mr. Baldwin's criminal defense attorneys may claim the attorney-client privilege exists in the context of Mr. Baldwin's corporation which allegedly employed Mr. Foxman. The state has not been provided with any evidence supporting the claim that Mr. Baldwin's attorneys also represented the corporation. More importantly, it is unknown if the privilege applies to the withheld communications.

As it relates to cases involving corporations, "[t]he administration of the attorney-client privilege in the case of corporations...presents special problems. As an inanimate entity, a corporation must act through agents." *Commodity Futures Trading Comm'n v Weintraub*, 471 U.S. 343, 348 (1985); *Hansen Constr. v. Everest Nat'l Ins.*, 2017 WL 7726711, at \*2 (D. Colo. July 28, 2017). In *Upjohn v. United States*, the Supreme Court ruled that a corporation-client is not just represented by its "control-group" and may extend to other employees. *Upjohn v. United States*, 449 U.S. 383, 394 (1981). However, those employees must be authorized to speak for the corporation, *Mead Data Central v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977), and possess the information needed by counsel. *Maintenance Enterprise v Dyno Nobel*, 2009 WL 10670683, \*3 (D. Wyo. 2009) (citing, *Upjohn*, 449 U.S. at 391).

Patently, "[t]he privilege does not protect non-legal communications, including business and technical advice, unless the communications are intended to meet problems which can be characterized as predominantly legal." *Carrier Corp. v. The Home Ins. Co.*, 1992 WL 139778, \*3 (Superior Ct. of Conn. June 12, 1992) (unpublished opinion) (citing *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 203-04 (E.D.N.Y. 1988)); *In re Cnty. of Erie*, 473 F.3d 413, 421-422 (2<sup>nd</sup> Cir. 2007)

(“When an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged” (citation omitted)).

Here, even if Baldwin’s attorneys represented the corporation and Mr. Foxman was an employee of the company, there is no evidence that the subpoenaed communications are privileged and protected by the attorney-client privilege. Indeed, if the withheld text messages/communications merely convey factual information, not seeking or procuring legal advice, the privilege does not apply. *See United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998) (privilege protects only “legal advice or strategy sought by the client”); *see also Plaza Ins. Co. v. Lester*, 2015 WL 3528336, at \*5 (D. Colo. June 4, 2015) (“Some of the documents included on Plaza's privilege log simply direct the Treece Firm to collect police files or court records.”); *United States v. Badger*, 2013 WL 3937023, at \*2 (D. Utah July 30, 2013) (“The attorney-client privilege extends only to communications and not to facts.”)

The attorney-client privilege protects communications between employees and corporate legal counsel only on matters within the scope of their corporate responsibilities, as well as communications between corporate employees in which prior advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities. *See In re Vioxx*, 501 F.Supp.2d 789, 796 (E.D.La.2007).

The privilege is applicable when (1) the communication was made for the purpose of securing legal advice, (2) the employee making the communication did so at the direction of a corporate superior, (3) the superior made the request so that the corporation could secure legal advice, (4) the subject matter of the communication is within the scope of the employee’s corporate duties, and (5) the communication is not disseminated beyond those persons, who,



because of the corporate structure, need to know its contents. *Diversified Industries, Inc. v. Meredith*, 572 F. 2d 596, 611 (8th Cir. 1978).

In this case, no one has claimed a privilege exists as it relates to the communications between Mr. Foxman and counsel for Mr. Baldwin and therefore, the Court ought not entertain any claims of privilege by Mr. Foxman as he lacks standing to assert such a claim. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 (1985) (The power to assert or waive a corporation's attorney-client privilege generally rests with the corporation's management and is exercised by its officers and directors). Absent a claim of privilege by the party having standing to assert such a claim, the State respectfully requests this Court order Mr. Foxman to produce all of the texts/communication between Mr. Baldwin's attorneys and Mr. Foxman.

Alternatively, even if Mr. Baldwin's attorneys claim a privilege as it relates to the text messages, the State submits it has not been demonstrated to the Court that the messages were made for the purpose of securing legal advice, that the subject matter of the communication is within the scope of Mr. Foxman's corporate duties, that Mr. Foxman's communications with counsel were done at the request of a corporate superior and that the request was made so that the corporation could secure legal advice. There is simply no evidence that any of the foregoing was present when the text messages between Mr. Foxman and counsel for Mr. Baldwin were exchanged. Therefore, the attorney-client privilege does not apply, and the messages must be produced. If there is any credible question about the applicability of the attorney-client privilege, the State respectfully requests this Court conduct an *in camera* inspection of the messages to determine whether any privilege applies.

The State is filing this motion expedited pursuant to LR1-201(H) with the intention of having the matter decided quickly so that the parties will have adequate time to prepare for trial. The State requests the defendant's response be filed by noon June 8, 2024.

Wherefore, for the foregoing reasons, the State respectfully requests this Court order the production of all the material subpoenaed, including text messages/communication between Mr. Baldwin's counsel and Jonah Foxman.

Respectfully Submitted,

/s/ Kari T. Morrissey

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Erlinda O. Johnson

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I hereby certify that a true and accurate Copy of the foregoing was provided to Counsel for the defendant via e-mail This 4<sup>th</sup> day of June 2024.

/s/ Erlinda O. Johnson

Erlinda O. Johnson