

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division**

CASE NO.: _____

WAYMO, LLC

Plaintiff,

Re: No. C 17-00939 WHA, N.D. Cal.

v.

UBER TECHNOLOGIES, LLC.,
OTTO TRUCKING, LLC,
and OTTOMOTTO, LLC,

Defendants.

**NON-PARTY CRAIG CLARK'S EMERGENCY
MOTION TO QUASH AND STAY SUBPOENA TO TESTIFY
AT A DEPOSITION IN CALIFORNIA ON DECEMBER 21, 2017**

Just three days ago, on Friday, December 15, 2017, non-party Craig Clark was served with a facially defective subpoena that purportedly required him to appear for a deposition just six days later, on December 21, 2017, in San Francisco, California, more than three thousand (3,000) miles away from his residence in South Florida.¹ Undersigned counsel has negotiated extensively with counsel for Waymo, LLC, the party that served the subpoena, to minimize the burden on Mr. Clark, but has been largely unsuccessful. Consequently, Mr. Clark was left with no choice but to file this emergency motion to quash the subpoena pursuant to Fed. R. Civ. P. 45.²

This Court is required to quash the subpoena pursuant to Rule 45(d)(3)(a) because (i) it fails to allow a reasonable time to comply, (ii) requires Mr. Clark to comply beyond the one hundred (100) mile geographical limit specified in Rule 45(c), (iii) will undoubtedly require Mr. Clark, who formerly served as an attorney for Defendant Uber Technologies, Inc. ("Uber"), to

¹ A true and correct copy of the subpoena is attached as **Exhibit 1**.

² Although the subpoena was issued by the Northern District of California, compliance with the subpoena is required in the Southern District of Florida because Mr. Clark is resident of South Florida. Thus, pursuant to Federal Rule of Civil Procedure 45(d)(3)(A) and (f), this motion to quash was filed in this Court.

disclose attorney-client privileged material, and (iv) will subject Mr. Clark to undue burden during the height of the holiday season. In addition, given that the deposition is currently scheduled on Thursday, December 21, 2017, Mr. Clark requests that the Court hold an expedited hearing on the motion to quash, and stay the enforcement of the subpoena until it rules upon the motion to quash the subpoena.

I. BACKGROUND

a. The Waymo v. Uber Litigation in the Northern District of California

On February 23, 2017, Waymo, an autonomous car development company that is a subsidiary of Google's parent company, Alphabet Inc., filed a lawsuit against Uber and other parties in the Northern District of California, alleging theft of trade secrets, patent infringement and other claims. With Waymo claiming damages of \$2.6 billion, the lawsuit has been heavily litigated, with more than 2,400 docket entries generated in just ten months.

Over the last ten months, there was never any indication that Mr. Clark, a former in-house attorney in Uber's Security Division, had any relevance to the litigation, either as a fact witness or as a lawyer. (Clark Declaration at ¶ 1, attached as **Exhibit 2**). Indeed, Mr. Clark had no substantive involvement, actual or anticipated, in the underlying litigation, and he never worked in the autonomous driving unit at Uber that is the subject of the litigation.

But the litigation took an unexpected turn on or about November 22, 2017. On that date, the Acting United States Attorney for the Northern District of California, Alex G. Tse, took the highly unusual step of sending a letter to United States District Judge William Alsup, notifying him that there was a pending criminal investigation of Uber. The U.S. Attorney's Office further advised Judge Alsup that it had interviewed Ric Jacobs, a former Uber employee, who accused Uber of a wide variety of misconduct, including the use of various technologies, including ephemeral communication services and non-attributable computing devices, that could be used to conceal the theft of trade secrets. (D.E. 2383). More importantly, the U.S. Attorney advised Judge Alsup that Mr. Jacobs' attorney had previously disclosed these same allegations in a May 5, 2017, letter to Angela Padilla, Uber's associate general counsel (hereinafter "the Jacobs letter"). (*Id.*).

This revelation by the U.S. Attorney's Office triggered another round of intense and acrimonious litigation because Uber had apparently failed to produce the Jacobs letter to Waymo in discovery. Judge Alsup conducted a lengthy evidentiary hearing on November 28 and 29, 2017 to address, among other things, why the Jacobs letter had not been produced. During the hearing,

Judge Alsup heard testimony from several current and former Uber employees including Angela Padilla, Matt Henley, Nick Gicinto and, most importantly, Ric Jacobs. Based on Jacobs' own testimony, it became abundantly clear that the Jacobs letter was a woefully inaccurate advocacy piece, drafted by his attorney, to extract an outsized and undeserved settlement from Uber. Indeed, Mr. Jacobs testified that he did not write, let alone carefully or thoroughly review, the Jacobs letter, and that the letter was "hyperbolic," "speculative," and the product of "surmising." (Tr. Nov. 28, 2017 at 25, 30, 59, 86). Moreover, Jacobs recanted or disagreed with critical statements that his lawyer made in the letter, including that Uber engaged in clandestine efforts to steal trade secrets from Waymo." (*Id.* at 25, 29-30, 61). Thus, the contrast between Mr. Jacobs' testimony under oath, and the content of the advocacy piece drafted by his attorney, is troubling.

Although it became clear that the Jacobs letter was riddled with outright lies, exaggerations, inferences, and wild speculation, Judge Alsup nonetheless issued an order on December 1, 2017, postponing the trial date from December 4, 2017, to February 5, 2018, and authorizing Waymo to conduct supplemental discovery related to the Jacobs letter. (D.E. 2315). Judge Alsup put the parties on a very tight deadline, requiring supplemental discovery to be completed in just twenty-one days, by December 22, 2017.

Notably, the critical Jacobs letter—which served as the basis for the supplemental discovery—remained under seal until just three days ago, Friday, December 15, 2017. Thus, neither Mr. Clark nor his lawyers had access to any portion of the Jacobs letter until three days ago, and did not know the extent of the blatantly false and defamatory statements that Mr. Jacobs made about Mr. Clark. As it stands, Mr. Clark and his lawyers only have access to a redacted version of the letter made public three days ago. (Exh. 2 at ¶ 5).

b. Waymo's Delayed and Deficient Efforts to Subpoena Mr. Clark for a Deposition

With such a short discovery deadline, and given that Waymo is represented by a small army of lawyers, one would think that necessary witnesses would have been served with subpoenas immediately. They were not. Thirteen days after Judge Alsup issued his order, Waymo's counsel emailed an electronic copy of Mr. Clark's subpoena to Mark Howitson, Esq., Mr. Clark's personal counsel in California, and asked if he would accept service. (Howitson Declaration at ¶¶ 1-2, attached as **Exhibit 3**). Mr. Howitson declined to accept service, advised Waymo's counsel that he was not authorized to do so, and explained that Mr. Clark should be personally served at his

residence. (*Id.* at ¶ 3; Exh. 2 at ¶ 2). Moreover, he indicated that Mr. Clark was an attorney for Uber and that he expected issues concerning attorney-client privilege to inevitably arise. (Exh. 3 at ¶ 4). Mr. Howitson also noted that the subpoena was facially defective as it purported to require Mr. Clark to appear in San Francisco in violation of Rule 45. (*Id.* at ¶ 5). Mr. Howitson also requested that Waymo's counsel provide him with a redacted or unredacted copy of the Jacobs letter. (*Id.*). He also advised Waymo's counsel that he and Mr. Clark were unavailable on December 21, 2017, the date contained in the defective subpoena. (*Id.* at ¶ 4).

Waymo ignored Mr. Howitson's requests, and later emailed Mr. Howitson with a corrected copy of a subpoena it intended to serve on Mr. Clark, with the deposition location changed to Miami, Florida in compliance with Rule 45. (*Id.* at ¶ 2). In response, Mr. Howitson again advised that he was unauthorized to accept service on Mr. Clark's behalf. (*Id.* at ¶ 3; Exh. 2 at ¶ 2). Nevertheless, Mr. Howitson proposed that Mr. Clark would consider waiving formal service and voluntarily submit to a deposition in the spirit of compromise if (i) Waymo agreed to limit the deposition to four hours, (ii) Waymo agreed to refrain from asking any questions relating to an alleged data breach at Uber that occurred in 2016, (iii) Waymo agreed to provide relevant documents to Mr. Clark seven days in advance of the deposition, (iv) Waymo agreed to move the deposition to January 15, 2018, to accommodate Mr. Howitson's child care obligations, and undersigned counsel's holiday plans, and (v) Waymo reimbursed Mr. Clark and his counsel for travel expenses incurred. (*Id.* at ¶ 5).

Waymo finally served Mr. Clark with a subpoena at his Florida residence on December 15, 2017, just four business days before the scheduled deposition. (Exh. 2 at ¶ 5). Curiously, Waymo chose to serve Mr. Clark with the defective subpoena requiring him to appear in San Francisco, rather than the later-issued but still defective subpoena requiring him to appear in Miami. Thus, Mr. Clark has still not been served with a subpoena that complies with Rule 45. (Exh. 3 at ¶ 6).

Interested in alleviating his burden and in a last effort to reach an accord with counsel for Waymo, on December 17, 2017, Mr. Clark's counsel tried again to meet and confer with counsel for Waymo by telephone, and explained the deficiencies in the subpoena. (*Id.* at ¶ 9). Again, in the spirit of compromise, Mr. Clark proposed that: 1) the deposition would occur on December 22, 2017, in San Francisco, California, despite the late notice and the extensive travel required; 2) it would last only four (4) hours; 3) Waymo would produce any and all documents that it intended to show Mr. Clark or question him about by the end of the day Tuesday, December 19, 2017; 4)

Waymo would pay the round trip airfare for Mr. Clark and undersigned counsel plus overnight hotel rooms in San Francisco; and 5) that Waymo would not ask Mr. Clark about the alleged 2016 data breach. (*Id.*). Although Waymo eagerly accepted Mr. Clark's offer to travel to San Francisco, California, saving Waymo and its counsel the time, expense, and aggravation of traveling to Miami, Florida, it refused to accept any of Mr. Clark's proposed accommodations, except that it agreed to hold the deposition on December 22, 2017, giving Mr. Clark one extra day to prepare for the deposition, though without the benefit of reviewing any documents in advance of the deposition. (*Id.* at ¶ 10).

While Mr. Howitson and Waymo were engaged in ongoing negotiations and discussions, Mr. Clark diligently searched for counsel in South Florida, where he resides, to represent him. Mr. Clark retained undersigned counsel on December 12, 2017. (Exh. 2 at ¶¶ 3-4). Consequently, although Mr. Clark has worked diligently with undersigned counsel, including throughout the weekend, he has not had adequate time to prepare for the deposition in this matter. (*Id.* at ¶ 6).

Compounding the burden here, and despite multiple requests to the parties to the litigation, the undersigned did not receive any documents related to Mr. Clark until the evening of December 15, 2017, when a heavily redacted version of the Jacobs letter was made available to the public. (*Id.* at ¶ 5; Exh. 3 at ¶ 7). Accordingly, Mr. Clark and his counsel will have only three business days to prepare to testify on several issues, many of which are also the subject of the government's criminal investigation.

Moreover, due to the compressed time frame, Mr. Clark has not been able to meet and coordinate with counsel for Uber, his former employer, regarding the delicate and difficult attorney-client privilege issues that will undoubtedly arise during Mr. Clark's deposition. To be sure, Mr. Clark's role at Uber was to provide legal advice, and there is no doubt that virtually all of the questions posed to him will require difficult privilege determinations, unless privilege has been waived on certain topics. Mr. Clark intends to scrupulously abide by the California Rules of Professional Conduct, and intends to protect the interests of his former client, despite the fact that he was wrongfully and illegally terminated. To achieve these objectives, Mr. Clark believes he needs time to address the privilege issues with Uber, and to understand the scope of any potential waivers.

II. LEGAL ARGUMENT

Mr. Clark, whose sterling reputation in Silicon Valley has been wrongfully damaged by an underperforming and disgruntled former Uber employee, anxiously awaits the opportunity to clear his name and to expose the sensational and patently false allegations made by Mr. Jacobs. Mr. Clark, however, is entitled under the Federal Rules of Civil Procedure to do so at an appropriate time and place, not across the country in a hastily scheduled deposition without adequate notice.

Indeed, Federal Rule of Civil Procedure 45 emphasizes the importance of protecting non-parties from harassment, annoyance, and undue burden, and minimizing the expense associated with unexpected participation in litigation. *See, e.g., Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 234 (1964) (noting that the long-standing rules regarding service of subpoenas within 100 miles “is designed not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation, which policy is strongly emphasized in the Federal Rules of Civil Procedure”) *disapproved of on other grounds by Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987). Significantly, it provides that a subpoena may only command a person to attend a deposition that is within 100 miles of where the person resides, is employed, or regularly transacts business, and authorizes the imposition of a sanction – lost earnings and reasonable attorney’s fees – on the party issuing and serving the subpoena if it fails to take reasonable steps to avoid imposing undue burden or expense on the potential deponent. Fed. R. Civ. P. 45(c)(1)(A) and (d)(1). Moreover, quashing is not permissive. Rule 45 states that the court where compliance is required must quash a subpoena on timely motion if it:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

Fed. R. Civ. P. 45(d)(3)(A)(i)-(iv); *Regents of Univ. of California v. Kohne*, 166 F.R.D. 463, 464 (S.D. Cal. 1996) (noting that the provisions of Fed. R. Civ. P. are to be read literally), *dismissed*, 113 F.3d 1256 (Fed. Cir. 1997).

The subpoena at issue here is fatally defective on each of those four bases. Indeed, Mr. Clark was served with the defective subpoena on December 15, 2017, just four (4) business days

before the scheduled deposition in San Francisco, California, well more than 100 miles from his residence, and at a time and date that is extremely inconvenient and impractical for he and his counsel, especially during the height of the holiday season.

Mr. Clark's preparation for his deposition is also complicated by the fact that he functioned as an attorney at Uber and many of Jacobs' fabrications appear to concern Mr. Clark's provision of legal advice. Thus, much of Mr. Clark's testimony may be subject to evidentiary privileges held and controlled by Uber, and many of Waymo's inquiries could result in inadvertent disclosure of information protected by the attorney-client privilege or other applicable evidentiary privileges.

Further, at the time of filing this motion, Mr. Clark and his counsel are just three business days away from a scheduled deposition and have only been able to review a heavily redacted copy of the 37-page letter that implicates Mr. Clark in matters that are the subject of a criminal investigation by the U.S. Attorney's Office of the Northern District of California. Thus, the undersigned is unable to adequately assess Mr. Clark's potential liability, which is inarguably prejudicial to Mr. Clark.

Finally, the undue burden caused by this subpoena is further underscored by the fact that it is cumulative of several other witness depositions. Mr. Clark understands that Waymo has taken or will soon take the depositions of at least seventeen (17) former and current Uber employees regarding the substance of the Jacobs letter, including Mr. Clark's supervisors and Uber's former Chief Executive Officer, and has examined witnesses at the November 28 and 29, 2017 evidentiary hearings concerning this very issue. Thus, Mr. Clark should not be unduly burdened under Rule 45, particularly because the discovery sought by Waymo is unreasonably cumulative and disproportionate to the incremental value expected from Mr. Clark's testimony.

Waymo was apprised of the defects in its subpoena during the meet and confer process and made no meaningful effort to address them. Specifically, Mr. Howitson noted that the subpoena Waymo intended to serve was facially defective, indicated that he was concerned about the duration of the deposition, explained the potential privilege issues given that Mr. Clark served as Uber's attorney, noted Mr. Clark's inability to access relevant documents to prepare for the deposition, and apprised Waymo of Mr. Clark's and his counsel's unavailability on December 21, 2017 and throughout the holiday period. (Exh. 3 at ¶¶ 3-5).

Further, although not obligated to do so, Mr. Clark offered Waymo a significant concession: his voluntary appearance at a deposition across the country in San Francisco well in

advance of upcoming trial to avoid causing Waymo additional expense and delay in the underlying case. (*Id.* at ¶ 5). In return, Mr. Clark asked Waymo for a variety of reasonable accommodations to minimize the burden placed upon him by these rushed discovery proceedings. (*Id.*). Without explanation, Waymo rejected these reasonable requests, before belatedly conceding only that which it had to – that it would not question Mr. Clark about an alleged 2016 data breach because it had no relevance to the Jacobs letter, and Judge Alsup already prohibited this line of inquiry during the evidentiary hearings. (*Id.* at 8; Tr. Nov. 29, 2017 at 89-90); see *Overseas Ventures, LLC v. ROW Mgmt., Ltd.*, 12-62415-CIV, 2014 WL 12613279, at *1 (S.D. Fla. Jan. 29, 2014) (urging the party issuing a subpoena to make a meaningful effort to cooperate and choose an alternative to subjecting a non-party to incur the expenses associated with traveling for a deposition).

Finally, hours before filing this motion to quash, counsel for Mr. Clark again offered significant concessions, this time proposing: 1) the deposition would occur December 22, 2017, in San Francisco, California, despite the late notice and the extensive travel required; 2) it would last only 4 hours; 3) Waymo would produce any and all documents that it intended to show Mr. Clark or question him about by the end of the day Tuesday, December 19, 2017; 4) Waymo would pay the round trip airfare for Mr. Clark and undersigned counsel plus overnight hotel rooms in San Francisco; and 5) the aforementioned limitation on testimony would be honored. (*Id.* at 9). Despite Mr. Clark’s generous offer to save Waymo and its counsel the time, expense, and aggravation of traveling to Miami, Florida, Waymo refused to accept any of Mr. Clark’s proposals, except that it agreed to give Mr. Clark one extra day to prepare for the deposition. (*Id.* at ¶ 10).

Accordingly, Waymo completely and flagrantly disregarded Rule 45 “undue burden” requirement, as well as Mr. Clark’s rights as a non-party who has been sucked into this litigation based on the hyperbolic and sensationalist allegations ginned up by a disgruntled former Uber employee. This subpoena must be quashed, and the court should order Waymo to pay Mr. Clark’s reasonable attorney’s fees incurred in preparation of this motion.

III. CONCLUSION

Although the underlying litigation may be critically important to the parties, Mr. Clark is a private citizen whose rights as a non-party must be protected from abusive tactics. Thus, this Court must quash the subpoena pursuant to Rule 45(d)(3)(a) because the subpoena (i) fails to allow a reasonable time to comply, (ii) requires Mr. Clark to comply beyond the one hundred (100) mile geographical limit specified in Rule 45(c), (iii) will undoubtedly require Mr. Clark, who formerly

served as an attorney for Uber to disclose attorney-client privileged material, and (iv) subjects Mr. Clark to undue burden during the height of the holiday season. In addition, given the exigency of this motion, Mr. Clark requests an expedited hearing in advance of the December 21, 2017 scheduled deposition, and a stay of the enforcement of the subpoena until disposition of this motion.

CERTIFICATE OF COMPLIANCE WITH S.D. FLA. L.R. 7.1(A)(3)

Consistent with Southern District of Florida Local Rule 7.1(a)(3), undersigned counsel conferred with counsel for Waymo, LLC, in a good faith effort to resolve the issues raised in the motion and was unable to do so.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of December, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record in the matter of *Waymo v. Uber et al.*, Case No. C 17-00939 WHA, as identified below, via email.

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UNITED STATES DISTRICT COURT
for the
Northern District of California

WAYMO LLC,

Plaintiff

v.

UBER TECHNOLOGIES, INC.; OTTOMOTTO
LLC; OTTO TRUCKING LLC,

Defendant

Civil Action No. 3:17-cv-00939

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Craig Clark
7587 Mandarin Drive, Boca Raton, FL 33433
(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Quinn Emanuel Urquhart & Sullivan LLP, 50 California St. # 22, San Francisco, CA 94111) and Date and Time (12/21/2017 9:00 am)

The deposition will be recorded by this method: stenographic and videographic

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 12/08/2017

CLERK OF COURT

OR

/s/ David Eiseman

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Waymo LLC

, who issues or requests this subpoena, are:
David Eiseman, 50 California St #22, San Francisco, CA 94111; davideiseman@quinnemanuel.com; 415-875-6600

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 3:17-cv-00939

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division**

CASE NO.: _____

WAYMO, LLC

Plaintiff,

Re: No. C 17-00939 WHA, N.D. Cal.

v.

UBER TECHNOLOGIES, LLC.,
OTTO TRUCKING, LLC,
and OTTOMOTTO, LLC,

Defendants.

**DECLARATION OF CRAIG CLARK IN SUPPORT OF NON-PARTY CRAIG
CLARK'S EMERGENCY MOTION TO QUASH AND STAY SUBPOENA TO TESTIFY
AT A DEPOSITION IN CALIFORNIA ON DECEMBER 21, 2017**

I, Craig Clark, Esq., do hereby declare and state:

1. From December 1, 2015, to November 21, 2017, I served as a staff attorney assigned to Uber's Security team and provided legal advice and guidance to Uber personnel working both inside and outside Uber's security group.

2. On December 9, 2017, I received notice from Mark Howitson, my personal counsel in California, that I may be served with a subpoena to testify at a deposition in the *Waymo v. Uber* litigation. I never authorized Mr. Howitson to accept service of a subpoena on my behalf, and I understand Mr. Howitson advised counsel for Waymo accordingly. I understood that the subpoena delivered via email to my personal counsel violated Federal Rule of Civil Procedure 45(c) in that it required that I testify at a deposition beyond the geographical limitations of the rule and did not meet the time requirements of Rule 45.

3. Cognizant that the electronic copy of the subpoena intended to be served on me scheduled my deposition for December 21, 2017, and based on the fact that the United States

Attorney's Office for the Northern District of California disclosed that it was conducting a criminal investigation of Uber, I sought to hire counsel in South Florida, where I reside.

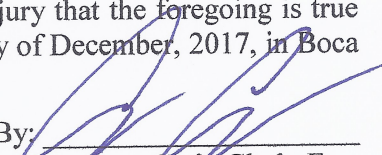
4. On December 12, 2017, I met with and a day later retained the firm of Stumphauzer & Sloman PLLC.

5. On Friday, December 15, 2017, I was personally served at my Florida residence with a subpoena to testify at a deposition to be held in San Francisco, California, just four business days later. At the time of service, my counsel and I had still not received any of the documents necessary for my preparation in advance of the scheduled deposition, except for a heavily redacted copy of the Jacobs letter, which was made publicly available on the court's docket late evening on December 15, 2017.

6. Given that the subpoena to testify at a deposition on December 21, 2017 in San Francisco, California was served upon me only four business days before on Friday, December 15, 2017, and that my counsel and I have received few documents in advance of the deposition that are helpful to my preparation, I believe that my counsel and I do not have sufficient time to adequately prepare for this deposition. Further, I believe that requiring my testimony under these circumstances considering the parallel criminal investigation would be unduly burdensome to me. Moreover, requiring myself and my counsel to travel across the country at the height of the holiday season, and four days before Christmas, conflicts with personal and family plans and imposes an undue burden.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and is based upon my personal knowledge this 17th day of December, 2017, in Boca Raton, Florida.

By:



Craig Clark, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO.: _____

WAYMO, LLC

Plaintiff,

Re: No. C 17-00939 WHA, N.D. Cal.

v.

UBER TECHNOLOGIES, LLC.,
OTTO TRUCKING, LLC,
and OTTOMOTTO, LLC,

Defendants.

_____ /

**DECLARATION OF MARK HOWITSON IN SUPPORT OF NON-PARTY
CRAIG CLARK'S EMERGENCY MOTION TO QUASH AND STAY SUBPOENA TO
TESTIFY AT A DEPOSITION IN CALIFORNIA ON DECEMBER 21, 2017**

I, Mark Howitson, Esq., do hereby declare and state:

1. After having previously been a colleague of Mr. Clark's, I now serve as his personal counsel in California.

2. On December 13, 2017, 13 days after Judge Alsup issued an order authorizing Waymo, LLC, to seek supplemental discovery concerning a letter from Ric Jacobs (hereinafter, the "Jacobs letter"), a former Uber employee, to Uber in-house counsel, counsel for Waymo emailed two electronic subpoenas to me and asked if I would accept service. At that time neither were served on Mr. Clark personally.

3. During a telephone call with Waymo's counsel, I declined to accept service, and advised Waymo's counsel that Mr. Clark should be personally served because I was not authorized to accept service on his behalf. Mr. Clark lives in Florida and I live and am licensed to practice law in California.

4. I also mentioned that Mr. Clark was a lawyer at Uber and I asked if he and counsel for Uber had an arrangement to address attorney-client privilege issues that would inevitably arise. Waymo's counsel said that they did not, but indicated that would pose many issues to deal with during a deposition. Waymo's counsel then asked me for a date for the deposition. I again noted

that we had several issues to address first, but that I knew I was unavailable on December 21, 2017. I never agreed to any other date for the deposition.

5. Nonetheless, on December 14, 2017, I sent an email to counsel for Waymo to meet and confer. I proposed that Mr. Clark would consider waiving his objections to deficient service and voluntarily submit to a deposition if (i) the deposition was limited to four hours, (ii) Waymo agreed to refrain from asking any question relating to an alleged data breach at Uber that occurred in 2016, (iii) Waymo agreed to provide relevant documents to Mr. Clark seven days in advance of the deposition, (iv) Waymo agreed to move the deposition to January 15, 2018, and (v) Waymo reimbursed Mr. Clark for travel expenses incurred for he and his counsel.

6. Waymo finally served Mr. Clark with a subpoena at his Florida residence on December 15, 2017, just four business days before the scheduled deposition. The subpoena served on Mr. Clark again required him to appear in San Francisco, California, which does not comply with Rule 45.

7. At the time of service on December 15, 2017, Mr. Clark, his counsel in Florida, and myself had still not received from Waymo any of the documents that I had requested in advance of the scheduled deposition, except for a heavily redacted copy of the Jacobs letter, which was made publicly available on the court's docket late evening on December 15, 2017.

8. Later that day, Waymo's counsel rejected my requests, conceding only that it would not question Mr. Clark about an alleged 2016 data breach. This was not surprising because I had informed Waymo's counsel that Judge Alsup already prohibited this line of inquiry during the evidentiary hearings, and noted that those issues lacked any relevance to the issues raised in the Jacobs letter.

9. On December 17, 2017, myself and Mr. Stumphauzer tried again to meet and confer with counsel for Waymo by telephone. We explained the deficiencies in the subpoena and that we intended to file a motion to quash. Again in the spirit of compromise, we proposed: 1) the deposition would occur December 22, 2017, in San Francisco, California, despite the late notice and the extensive travel required; 2) it would last only 4 hours; 3) Waymo would produce any and all documents that it intended to show Mr. Clark or question him about by the end of the day Tuesday, December 19, 2017; 4) Waymo would pay the round trip airfare for Mr. Clark and Mr. Stumphauzer (Miami to SFO) plus overnight hotel rooms in San Francisco; and 5) the aforementioned limitation on testimony would be honored.

10. Via email that evening, Waymo rejected all but one of Mr. Clark's proposals, indicating that Waymo would accept Mr. Clark's offer to travel to San Francisco, California, saving Waymo and its counsel the time, expense, and aggravation of traveling to Miami, Florida, and in exchange Mr. Clark would be given one extra day to prepare for the deposition without the benefit of receiving any documents.

11. Without receiving any of the documents I requested in advance of the deposition, and on such short notice and thousands of miles to journey, Mr. Clark was left with no choice but to protect his rights as a non-party and file a motion to quash the defective subpoena.

12. I have child care responsibilities and long-standing travel plans that make it very difficult and burdensome to travel to Miami until January 10, 2017. I cannot appear in any capacity due to travel plans between December 24, 2017, and January 10, 2017.

Pursuant to Title 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and is based upon my personal knowledge this 17th day of December, 2017.

By: 

Mark Howitson, Esq.

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

WAYMO, LLC

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Stumphauzer & Sloman PLLC, 305-371-9686
1 SE 3rd Avenue, Suite 1820, Miami, FL 33131

DEFENDANTS

UBER TECHNOLOGIES, LLC
OTTOMOTTO, LLC, & OTTO TRUCKING, LLC

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|-----------------------------------------|----------------------------|----------------------------|---------------------------------------------------------------|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
		LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	
		IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions		

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation - Transfer
- 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 Federal Rule of Civil Procedure 45(d)(3)(A) and (f)
 Brief description of cause:
 Motion to quash subpoena to testify at a deposition in CA served on FL resident

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Alsup, N.D. California DOCKET NUMBER C 17-00939 WHA

DATE 12/18/2017 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division**

CASE NO.: _____

WAYMO, LLC

Plaintiff,

Re: No. C 17-00939 WHA, N.D. Cal.

v.

UBER TECHNOLOGIES, LLC.,
OTTO TRUCKING, LLC,
and OTTOMOTTO, LLC,

Defendants.

_____ /

[PROPOSED]

**ORDER GRANTING NON-PARTY CRAIG CLARK’S EMERGENCY MOTION
TO QUASH AND STAY SUBPOENA TO TESTIFY
AT A DEPOSITION IN CALIFORNIA ON DECEMBER 21, 2017**

THIS CAUSE came before the Court upon non-party Craig Clark’s Emergency Motion to Quash and Stay Subpoena to Testify at a Deposition in California on December 21, 2017. (ECF No.__). After having reviewed the Motion and being otherwise fully advised in the premises, it is hereby:

ORDERED and ADJUDGED that the Motion is GRANTED, and the subpoena to testify at a deposition QUASHED.

DONE AND ORDERED in Chambers at Miami, Florida, this _____ day of December, 2017.

cc: All counsel of record