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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

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

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S NOTICE OF
MOTION AND MOTION FOR ORDER
TO SHOW CAUSE WHY DEFENDANTS
SHOULD NOT BE HELD IN CONTEMPT
OF THE PRELIMINARY INJUNCTION
ORDER (Dkt. 426) AND EXPEDITED
DISCOVERY ORDER (Dkt. 61)**

[PUBLIC REDACTED VERSION]

Date: July 27, 2017

Time: 8:00 a.m.

21 Ctrm: 8, 19th Floor

Judge: Honorable William H. Alsup

22 Trial Date: October 10, 2017

1 TO DEFENDANTS UBER TECHNOLOGIES, INC., OTTOMOTTO LLC, AND OTTO
2 TRUCKING LLC, AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on July 27, 2017 on 8:00 a.m., or as soon thereafter as the
4 matter may be heard, in the courtroom of the Honorable William Alsup at the United States
5 District Court for the Northern District of California, 450 Golden Gate Ave., San Francisco,
6 California, Plaintiff Waymo LLC ("Waymo") shall and hereby does move the Court for an Order
7 to Show Cause why Defendants Uber Technologies, OttoMotto LLC, and Otto Trucking LLC
8 should not be held in contempt of the Court's Preliminary Injunction Order (Dkt. 426) and
9 Expedited Discovery Order (Dkt. 61) for: (1) failing to "exercise the full extent of their corporate,
10 employment, contractual, and other authority" to cause their agent Stroz Friedberg to return all
11 materials in Stroz Friedberg's possession that Anthony Levandowski downloaded from Waymo's
12 servers; (2) failing to timely notify Waymo and the Court about the apparent destruction of five
13 discs of downloaded materials; (3) failing to "exercise the full extent of their corporate,
14 employment, contractual, and other authority" to cause their agent, Morrison & Foerster, LLP
15 ("MoFo") to return the downloaded materials; and (4) failing to "exercise the full extent of their
16 corporate, employment, contractual, and other authority" to cause Otto Trucking's officer, Mr.
17 Levandowski, to return the downloaded materials.

18 Waymo's motion is based on this notice of motion and supporting memorandum of points
19 and authorities, the supporting declaration of Patrick Schmidt and accompanying exhibits, reply
20 briefing in further support of this motion and supporting declarations and accompanying exhibits,
21 as well as other written or oral argument that Waymo may present to the Court.

22
23 DATED: June 21, 2017

QUINN EMANUEL URQUHART & SULLIVAN, LLP

24
25 By /s/ Charles K. Verhoeven

Charles K. Verhoeven

26 Attorneys for Plaintiff Waymo LLC
27
28

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INTRODUCTION

The Court has issued multiple Orders requiring Defendants to return to Waymo the more than 14,000 files stolen by Anthony Levandowski. First, on March 16, the Court's Expedited Discovery Order ordered Defendants to "produce for inspection all files and documents downloaded by Anthony Levandowski" by March 31. (Dkt. 61 at 2 ¶ 4.) After Defendants refused to turn over *any* of the stolen files, the Court issued a second Order (the Preliminary Injunction Order), this time ruling that "Defendants must immediately and in writing exercise the full extent of their corporate, employment, contractual, and other authority to (a) prevent Anthony Levandowski and all other officers, directors, employees, and agents of defendants from consulting, copying, or otherwise using the downloaded materials; and (b) cause them to return the downloaded materials and all copies, excerpts, and summaries thereof to Waymo (or the Court) by **MAY 31 AT NOON.**" (Dkt. 426 at 23 ¶ 2.) Once again, the compliance deadline came and went without the return of a single one of the misappropriated files.

Defendants have never disputed that some of the stolen files are in the hands of Stroz Friedberg ("Stroz"), a digital forensics firm that Defendants retained as an agent in 2016 to conduct due diligence in connection with Uber's contemplated acquisition of the Otto Defendants. Nor has anyone ever disputed that Mr. Levandowski still has the downloaded files. Moreover, just days ago Boies Schiller Flexner ("BSF") revealed that another one of Defendants' agents — Morrison & Foerster LLP ("MoFo") — *also* has been sitting on some of the stolen files for over a year. Nevertheless, in flagrant disregard of two Court Orders, not a single one of the downloaded files has been returned to Waymo to date. Meanwhile, Stroz remains Defendants' agent in this very litigation, Mr. Levandowski remains a senior officer with full stock privileges at Otto Trucking, and MoFo remains counsel of record for Uber and Ottomotto.

Nor is this Defendants' only willful violation of the Court's Orders. In addition to ordering the production of any downloaded materials, the Court's March 16 Expedited Discovery Order required that "[i]f any part of said downloaded materials has been deleted, destroyed, or modified, then defendants shall state the full extent thereof and produce all documents bearing on said deletion, destruction, or modification." (Dkt. 61 at 2 ¶ 4.) No statement of any destruction

1 was provided pursuant to the Court's Order by the March 31 deadline. Yet, over two months later,
 2 Defendants Uber's and OttoMotto's June 5 response to Waymo's expedited interrogatory revealed
 3 that documents were destroyed, allegedly at Uber's direction, back in March 2016:

4 On or about March 11, 2016, Mr. Levandowski reported to [Travis] Kalanick,
 5 Nina Qi and Cameron Poetzsch at Uber as well as Lior Ron that he had
 6 identified five discs in his possession containing Google information. Mr.
 7 Kalanick conveyed to Mr. Levandowski in response that Mr. Levandowski should
 8 not bring any Google information into Uber and that Uber did not want any
 9 Google information. Shortly thereafter, Mr. Levandowski communicated to Uber
 10 that he had destroyed the discs.

11 (Ex. 1 at 4.)¹

12 There is no avoiding the plain fact that Defendants have willfully violated two Court
 13 Orders. Waymo respectfully requests that the Court promptly issue an Order to Show Cause why
 14 Defendants should not be held in contempt.

15 **STATEMENT OF FACTS**

16 **I. DEFENDANTS HAVE BEEN UNDER AN OBLIGATION TO PRODUCE THE** 17 **DOWNLOADED MATERIALS SINCE MARCH 2017**

18 On March 16, 2017, the Court issued its Expedited Discovery Order in this case, which set
 19 a March 31 deadline for Defendants to "produce for inspection all files and documents
 20 downloaded by Anthony Levandowski, Sameer Kshirsagar, or Radu Raduta before leaving
 21 plaintiff's payroll and thereafter taken by them." (Dkt. 61 at 2 ¶ 4.) The Expedited Discovery
 22 Order also stated: "If any part of said downloaded material has been deleted, destroyed, or
 23 modified, then defendants shall state the extent thereof and produce all documents bearing on said
 24 deletion, destruction, or modification" by the same March 31 deadline. (*Id.*) Defendants did not
 25 produce any of the downloaded materials by this March 31 deadline, nor did they report on the
 26 destruction of any such materials. Instead, Defendants provided redacted privilege logs between
 27 April 10 and April 13 that were supposedly responsive to the Court's Order. (Dkts. 272-2, 272-4,
 28 & 272-6.)

¹ Unless otherwise noted, citations herein to "Ex. ____" shall refer to the accompanying Declaration of Patrick Schmidt in Support of this Motion.

1 Notably, Defendants' privilege logs redacted the identity of the agent that performed due
 2 diligence for Defendant Uber's potential acquisition of the Otto Defendants. After Defendants'
 3 redactions were rejected by both this Court and the Federal Circuit, Defendants finally admitted
 4 that this due diligence agent was Stroz. As discussed below, Stroz is also the very entity that
 5 Defendants retained in this case to purportedly search Defendants' computer networks for the
 6 downloaded materials. (Statement of Facts § III, *infra*.)

7 **II. THE COURT'S PI ORDER REQUIRES DEFENDANTS TO USE THE FULL**
 8 **SCOPE OF THEIR AUTHORITY TO COMPEL ALL OF THEIR OFFICERS AND**
 9 **AGENTS TO RETURN THE DOWNLOADED MATERIALS**

10 On May 11, 2017, the Court issued its Preliminary Injunction Order ("PI Order"). (Dkt.
 11 426.) Initially, the PI Order found that "Waymo has made a strong showing that Levandowski
 12 absconded with over 14,000 files from Waymo, evidently to have them available to consult on
 13 behalf of Otto and Uber. As of the date of this order, those files have not been returned and likely
 14 remain in Levandowski's possession. The record further indicates that Uber knew or at least
 15 should have known of the downloading but nevertheless proceeded to bring Levandowski and
 16 Otto on board." (*Id.* at 7.) The PI Order further found that "at least some information from those
 17 files, if not the files themselves, has seeped into Uber's own LiDAR development efforts." (*Id.* at
 18 17.)

19 Given these findings, the PI Order set forth a detailed set of actions that Defendants must
 20 take. Relevant to this Motion, the PI Order held that "Defendants must immediately and in
 21 writing exercise the full extent of their corporate, employment, contractual, and other authority to
 22 (a) prevent Anthony Levandowski and all other officers, directors, employees, and agents of
 23 defendants from consulting, copying, or otherwise using the downloaded materials; and (b) cause
 24 them to return the downloaded materials and all copies, excerpts, and summaries thereof to
 25 Waymo (or the Court) by **MAY 31 AT NOON.**" (*Id.* at 23 ¶ 2.) "Downloaded materials" were
 26 defined as "all materials that Anthony Levandowski downloaded from Waymo and kept upon
 27 leaving Waymo's employment." (*Id.* at 22 ¶ 1.)
 28

1 **III. DEFENDANTS FAIL TO ASK THEIR AGENT STROZ TO RETURN THE**
 2 **DOWNLOADED MATERIALS**

3 Stroz is Defendants' agent in connection with the due diligence that Defendants conducted
 4 as to Uber's potential acquisition of the Otto entities. (Dkt. 370 ¶¶ 9-10.) Indeed, counsel for
 5 Defendants Uber and Otto repeatedly called Stroz their "agent" at a recent discovery hearing
 6 before Judge Corley in relation to this work. (5.25.17 Hearing Tr. at 24:6-7; 38:5-12; 53:4-9.) As
 7 Defendants have stated, the main thrust of Stroz's work was "to conduct an investigation
 8 regarding the activities of *Mr. Levandowski*, Mr. Ron, and certain other former Google employees
 9 who had joined Otto, *surrounding their respective departures from Google and onboarding to*
 10 *Otto*." (Dkt. 370 at ¶ 9 (emphasis added).) Otto Trucking has also claimed Stroz is its agent.
 11 (E.g., Dkt. 572 at 1-2.) As the Court is aware, Waymo claims that Mr. Levandowski stole
 12 confidential Waymo files and provided them to Defendants for use in Defendants' self-driving car
 13 efforts. Thus, these stolen files (*i.e.*, the "downloaded materials") would have been front and
 14 center in Stroz's investigative efforts, a fact that neither Stroz nor Defendants has ever denied.²
 15 As part of this due diligence, Stroz prepared a Due Diligence Report that is the subject of a motion
 16 to compel by Waymo and is part of the "relentless concealment of likely probative evidence, both
 17 documentary and testimonial, from Waymo's view" that the Court noted in its PI Order. (Dkt. 426
 18 at 8.)

19 Stroz is also Defendants' agent in this very litigation, as they are acting as Defendants'
 20 discovery vendor and digital forensics consultant. (Dkt. 175-1 (Faulkner Decl.)). By its own
 21 testimony, Stroz has provided extensive e-discovery services for Defendants in this case related to
 22 Defendants' alleged search of their computer networks for the downloaded materials. (*Id.* at ¶¶ 3-
 23 6.)

24 On May 31, Waymo asked Defendants whether they had instructed their agent Stroz to
 25 return any copies of the downloaded materials in Stroz's possession. Defendants Uber and

26 _____
 27 ² Indeed, recent briefing by Mr. Levandowski suggests that Stroz has imaged the entire contents
 28 of Mr. Levandowski's personal computer and has these image files in its possession. (Dkt. 583 at
 8 & Dkt. 652 at 3.)

1 OttoMotto said they had not: “We have not directed Stroz to do anything with respect to any
2 allegedly downloaded files because Uber does not have control over Mr. Levandowski’s personal
3 property, including any property he may have provided to Stroz. Uber cannot compel a third party
4 to produce documents that it does not control.” (Ex. 2 at 3 (5.31.17 email from W. Ray to A.
5 Roberts).) In a subsequent meet-and-confer between the parties, Uber and OttoMotto reiterated
6 their position that the downloaded materials are Mr. Levandowski’s “personal property and he put
7 very tight restrictions on the ability even of Stroz to share that with anyone . . .” (*Id.* at 1 (6.1.17
8 email from M. Baily to W. Ray).) Otto Trucking similarly stated that they had not directed or
9 asked Stroz to return the downloaded materials, giving the same explanation that these materials
10 are Mr. Levandowski’s “property.” (Ex. 3 at 1 (6.14.17 email from J. Judah to S. Brun).)

11 On May 1, Waymo filed a motion to compel production of the Due Diligence Report that
12 Stroz provided to Defendants, along with associated documents. (Dkt. 321.) Defendants
13 Uber/OttoMotto an opposition brief (in which Defendant Otto Trucking joined), contending that
14 the Due Diligence Report was protected by the attorney-client privilege and work product
15 protection and that identifying which documents Stroz selected as exhibits or attachments to the
16 Report would intrude on work product protection. (*See generally* Dkts. 369, 389.) As noted
17 above, Defendants do not seek to justify their failure to ask Stroz to return the **downloaded**
18 **materials** based on privilege, but instead based on the contention that the downloaded materials
19 are somehow Mr. Levandowski’s personal property.

20 On June 12— more than a month after the Court ordered Defendants to “**immediately** and
21 in writing” exercise their authority over their agents — BSF forwarded to Waymo two letters of
22 the same date, one addressed to Mr. Levandowski and the other addressed to Stroz, that purported
23 to (finally) ask Stroz to return the downloaded files. (Ex. 4.) However, even this letter is plainly
24 less than the full extent of Uber and Ottomotto’s authority. After going through the motions of
25 telling Stroz that Uber and Ottomotto “do not want” Stroz to “retain possession of” or “destroy or
26 delete” the downloaded materials, but rather “want” Stroz to produce them to Waymo, the letter
27 then explains to Stroz that “Uber and Ottomotto do not have the contractual power to order Stroz”
28 to do any of those things. (*Id.* at 2 ¶ 4.)

1 **IV. ON JUNE 8 UBER SERVES AN INTERROGATORY RESPONSE STATING**
 2 **THAT SOME OF THE DOWNLOADED MATERIALS WERE DESTROYED IN**
 3 **MARCH OF LAST YEAR**

4 On June 8, Uber served a response to Waymo's Expedited Interrogatory No. 1. In relevant
 5 part, Uber's response stated:

6 On or about March 11, 2016, Mr. Levandowski reported to Mr. Kalanick, Nina Qi
 7 and Cameron Poetzsch at Uber as well as Lior Ron that he had identified five
 8 discs in his possession containing Google information. Mr. Kalanick conveyed to
 9 Mr. Levandowski in response that Mr. Levandowski should not bring any Google
 10 information into Uber and that Uber did not want any Google information.
 11 Shortly thereafter, Mr. Levandowski communicated to Uber that he had destroyed
 12 the discs. Uber never received those discs, and does not know whether those
 13 discs contained any of the "DOWNLOADED MATERIALS."

14 (Ex. 1 at 4.) Also, in a recent deposition, Mr. Ron — one of the two Managing Members for
 15 Defendant Otto Trucking — [REDACTED]
 16 [REDACTED]. (Ex. 5 (Ron Depo. Tr.) at
 17 90:16-94:4, 266:4-14.) Mr. Poetzsch, [REDACTED] (Ex. 6
 18 (Poetzsch Depo. Tr.) at 21:24-22:1), [REDACTED]
 19 [REDACTED] (*id.* at 259:1-7) .

20 **V. DEFENDANT OTTO TRUCKING FAILS TO EXERCISE ITS FULL AUTHORITY**
 21 **TO CAUSE MR. LEVANDOWSKI TO RETURN THE DOWNLOADED**
 22 **MATERIALS**

23 Mr. Levandowski is an officer of Defendant Otto Trucking — specifically, he is Otto
 24 Trucking's sole Managing Member other than Mr. Ron. Given Otto Trucking's obligations under
 25 the PI Order to "exercise the full extent of [its] corporate, employment, contractual, and other
 26 authority" to cause Mr. Levandowski to return the downloaded materials, Waymo requested that
 27 Otto Trucking take action by [REDACTED]
 28 [REDACTED] (Ex. 3 at 5-6 (6.7.17 email
 from L. Cooper to J. Cooper et al.)) Otto Trucking responded that it would not or could not take
 the step. It reasoned that [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

1 [REDACTED]
 2 [REDACTED] (*Id.* at 4 (6.8.17 email from Walsh to J. Cooper et al.)) (internal citation
 3 omitted). Otto Trucking later doubled down, asserting, despite this Court's rulings to the contrary
 4 (Dkt. 426 at 23 fn. 9, 6.7.17 Hearing Tr. 93:8-24), that taking *any* action against Mr. Levandowski
 5 for refusing to obey the Court's Order is not only impossible, but would violate Mr.
 6 Levandowski's Fifth Amendment rights:

7 As reflected in the various agreements, [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED] Further, we believe that attempting to
 11 coerce Mr. Levandowski to agree to take punitive action against himself if he
 12 refuses to waive his 5th Amendment rights raises constitutional issues that are
 13 unique and different from those raised by the Court's direction to Uber to take
 punitive action against Mr. Levandowski. We also do not believe that Judge Alsup
 intended to require such action through the preliminary injunction order.

14 (*Id.* at 2 (6.12.17 email from S. Brun to J. Cooper).)

15 Notably, Mr. Ron testified in deposition that [REDACTED]
 16 [REDACTED]
 17 [REDACTED]

18 [REDACTED]. (Ex. 5 (Ron Depo. Tr.) at 25:23-26:18, 53:22-54:24.)

19 **VI. DEFENDANTS FAIL TO EXERCISE THEIR FULL AUTHORITY TO CAUSE**
 20 **THEIR AGENT, MOFO, TO RETURN THE DOWNLOADED MATERIALS**

21 The parties met and conferred on June 1 regarding Defendants' compliance (or lack
 22 thereof) with Paragraph 2 of the Court's PI Order, and Waymo promptly memorialized that
 23 discussion on June 2. (Ex. 7 at 3 (6.2.17 J. Judah email to J. Cooper et al.)) On the June 1 meet
 24 and confer, in response to a direct question from Waymo, MoFo represented that "it does not have
 25 any of the materials that Anthony Levandowski downloaded from Waymo and kept upon leaving
 26 Waymo's employment, regardless of how long he kept them for and whether or not any such
 27 materials qualify as trade secrets or proprietary or confidential information (the 'downloaded
 28 materials'), or any copies, excerpts, or summaries of the downloaded materials." (*Id.*)

1 However, almost two weeks later, on June 12, counsel at BFS (oddly, not MoFo) emailed
 2 Waymo to explain that what MoFo had represented on June 1 was not accurate. BFS explained
 3 that, “to be sure the record is clear and accurate,” they needed to provide certain “caveats and
 4 clarifications” to what MoFo had said on the June 1 call. (*Id.* at 1.)

5 Significantly, BFS “clarified” that MoFo, Defendants’ agent, *did* have some of the
 6 downloaded materials:

7 2. MoFo does not have any downloaded materials (or any copies, excerpts or
 8 summaries thereof), *except to the extent that any such material may appear*: (1)
 9 excerpted in or as an exhibit to the Stroz Report, which is privileged; and (2) *in*
 10 *certain materials AL and other persons provided to Stroz to which MoFo was*
 11 *given limited access during the Stroz investigation* pursuant to the terms of the
 AL-Stroz contract and the protocol governing the investigation, and under strict
 conditions preventing MoFo from sharing those materials with anyone, including
 Uber.

12 (*Id.* (emphasis added).) Defendants have never explained why MoFo’s possession of stolen files
 13 was not revealed until June 12, why those stolen files were not returned to Waymo on March 31 or
 14 May 31, or how the terms of an unproduced contract between two third-parties (Mr. Levandowski
 15 and Stroz) could prevent *MoFo* from returning the stolen files or prevent *Defendants* from
 16 requiring MoFo to do so.

17 ARGUMENT

18 “Federal courts have the power to enforce compliance with their orders. One way is
 19 through holding a party in civil contempt.” *Perez v. i2a Techs., Inc.*, No. C 15-04963 WHA, 2015
 20 WL 7753330, at *3 (N.D. Cal. Dec. 2, 2015) (Alsup, J.). “To establish a *prima facie* case for civil
 21 contempt, the moving party must establish by clear and convincing evidence that the defendants:
 22 (1) violated a court order, (2) beyond substantial compliance, and (3) such violation was not based
 23 on a good faith and reasonable interpretation of the order.” *Id.*; *see also Perez v. RMRF Enter.,*
 24 *Inc.*, No. C 13-80059 SI, 2014 WL 3869935, at *2 (N.D. Cal. Aug. 6, 2014) (same).

25 Applying these factors, Defendants should be held in civil contempt for: (1) failing to
 26 “exercise the full extent of their corporate, employment, contractual, and other authority” to cause
 27 their agent Stroz Friedberg to return all materials in Stroz Friedberg’s possession that Anthony
 28 Levandowski downloaded from Waymo’s servers; (2) failing to timely notify Waymo and the

1 Court about the apparent destruction of five discs of downloaded materials; (3) failing to “exercise
 2 the full extent of their corporate, employment, contractual, and other authority” to cause their
 3 agent, Morrison & Foerster, LLP (“MoFo”) to return the downloaded materials; and (4) failing to
 4 “exercise the full extent of their corporate, employment, contractual, and other authority” to cause
 5 Otto Trucking’s officer, Mr. Levandowski, to return the downloaded materials

6 **I. DEFENDANTS ARE IN CONTEMPT FOR FAILING TO TAKE ALL STEPS TO**
 7 **CAUSE STROZ TO RETURN THE DOWNLOADED MATERIALS**

8 **A. Defendants Violated the PI Order and Expedited Discovery Order With**
 9 **Respect to Stroz**

10 As noted above, the Court’s PI Order required Defendants to “exercise the full extent of
 11 their corporate, employment, contractual, and other authority” to cause their “officers, directors,
 12 employees, and agents” to “return the downloaded materials and all copies, excerpts, and
 13 summaries thereof to Waymo (or the Court) by **MAY 31 AT NOON.**” (Dkt. 426 at 23 ¶ 2.) The
 14 Expedited Discovery Order required that Defendants produce these materials by March 31. (Dkt.
 15 61 at 2 ¶ 4.)

16 As detailed above (Statement of Facts § II, *supra*), there is no dispute that Stroz is
 17 Defendants’ agent. Yet May 31 (not to mention March 31) has come and gone, and Defendants
 18 have refused to use their full authority to persuade or compel Stroz to return any of the
 19 downloaded materials that Stroz possesses (as required by the PI Order) so that Defendants could
 20 produce these materials (as required by the Expedited Discovery Order). Thus, Defendants have
 21 violated both Orders. Nor do Defendants have any reasonable or good faith excuse for this
 22 violation, as discussed in Section I(C), *infra*.

23 Nor, for that matter, have Defendants ever denied that Stroz possesses at least some of the
 24 downloaded materials. Indeed, the facts of this case raise a strong inference that Stroz does indeed
 25 possess these documents. Consider, for example, the very first privilege log that Defendants
 26 produced, in response to the Court’s March 16 order for Defendants to produce the downloaded
 27 materials. This document was replete with references to Stroz — though Stroz’s name was
 28 originally and improperly redacted. Defendants have provided no explanation (and no explanation

1 is apparent) for why Stroz would have been listed on this privilege log, except that Stroz possesses
 2 the downloaded materials that this log was designed to address.

3 **B. Defendants’ Violation Was “Beyond Substantial Compliance”**

4 There can be no doubt that Defendants’ violation is “beyond substantial compliance.”
 5 Indeed, Defendants have fallen short of substantial compliance in two distinct ways.

6 First, to date, the *only* effort that Defendants have made to induce or persuade Stroz to
 7 return the downloaded materials is Uber’s and Ottomotto’s June 12 letter to Stroz, in which they
 8 state that they “want” Stroz to return the downloaded materials but then state in the next breath
 9 that they “do not have the contractual power to order Stroz to produce such materials to Waymo.”
 10 (Ex. 4 at 2 ¶ 4 (6.12.17 Ltr. from K. Dunn to S. Brown).) The lukewarm and equivocal nature of
 11 this letter is underscored by the final substantive sentence, which states that “if Stroz . . . believes
 12 it is able to produce any Google Information it may have to Waymo based solely on the wishes
 13 expressed by Uber and Ottomotto in this letter, but without the consent of Levandowski, it *may* do
 14 so immediately.” (*Id.* (emphasis added).) For its part, Otto Trucking has made no request to Stroz
 15 at all.

16 Needless to say, this equivocal request falls far short of “exercis[ing] the full extent of
 17 [Defendants’] corporate, employment, contractual, and other authority” to compel Stroz to return
 18 the downloaded materials. Defendants do not, for example, *order* Stroz to return these materials.
 19 They do not say that they will fire Stroz if Stroz fails to comply. They do not say that they will
 20 withhold future business from Stroz if Stroz fails to comply. A lukewarm and equivocal statement
 21 that Defendants “want” Stroz to return the downloaded materials simply does not come close to
 22 discharging Defendants’ obligation to “exercise the full extent of their corporate, employment,
 23 contractual, and other authority” to compel Stroz to return these materials. Thus, Defendants’
 24 violation of the PI Order is “beyond substantial compliance.” *Perez*, 2014 WL 3869935 at *2
 25 (“substantial compliance” standard requires that “every reasonable effort has been made to
 26 comply.”)

27 Defendants’ violation is also beyond substantial compliance for a different reason. Even if
 28 the June 12 letter to Stroz was substantively sufficient to discharge their obligations under the PI

1 Order, this letter was not sent until June 12. Yet the deadline for Defendants to “exercise the full
 2 extent of their corporate, employment, contractual, and other authority” to compel Stroz to return
 3 these materials was May 31. The deadline for Defendants to produce these materials under the
 4 Expedited Discovery Order was March 31. Thus, Defendants violated the Court’s deadlines by
 5 weeks to months, which is far too long a delay to constitute “substantial compliance” —
 6 particularly given the sensitive nature of the documents, the risks that Waymo suffers by having
 7 these documents in others’ hands, and the compressed nature of this litigation. Clearly Defendants
 8 could have sent their letter to Stroz by the Court’s deadlines, had they employed “every reasonable
 9 effort” to do so. *Perez*, 2014 WL 3869935 at *2.

10 **C. Defendants’ Violation Is Not Based on a Good Faith and Reasonable**
 11 **Interpretation of the PI Order or Expedited Discovery Order**

12 There is no good faith reading of the Court’s Orders that would excuse Defendants’
 13 conduct. The lead reason that Defendants offered in correspondence for why they did not ask
 14 Stroz to return the downloaded materials was that these materials are “Mr. Levandowski’s
 15 personal property.” (Ex. 2 at 3 (5.31.17 email from W. Ray to A. Roberts).) This argument is
 16 absurd. The downloaded materials at issue in the PI Order were explicitly defined as “all
 17 materials that Anthony Levandowski downloaded from Waymo and kept upon leaving Waymo’s
 18 employment.” (Dkt. 426 at 22 ¶ 1.) They are not Mr. Levandowski’s property; they are Waymo’s
 19 property. Defendants cannot credibly argue that the materials that Mr. Levandowski *stole* from
 20 Waymo have been somehow transmuted into “Mr. Levandowski’s personal property.” Nor
 21 (needless to say) could any contract between Mr. Levandowski and Stroz convert these materials
 22 from Waymo’s property into Mr. Levandowski’s property.

23 Defendants also stated in correspondence that they would not demand that Stroz turn over
 24 the downloaded materials because “Uber does not have control” of these materials and “Uber
 25 cannot compel a third party to produce documents that it does not control.” (Ex. 2 at 3 (5.31.17
 26 email from W. Ray to A. Roberts); *see also* Ex. 3 at 1 (6.14.17 email from J. Judah to S. Brun).)
 27 But this makes no sense. While Defendants may not presently have physical control over the
 28 materials in Stroz’s possession, they do have the power to direct that Stroz produce these materials

1 and to use their full contractual power to persuade Stroz to follow this directive. The PI Order did
2 not demand impossible or superhuman efforts from Defendants, but it did require Defendants to
3 use “the full extent of their corporate, employment, contractual, and other authority” to persuade
4 or direct Stroz to return these materials. This would include, for example, ordering Stroz to return
5 these materials and/or threatening to cut off business ties with Stroz should Stroz refuse to do so.
6 But as detailed in Section I(B) above, Defendants have exercised far less than their “full authority”
7 to pressure Stroz to return the downloaded materials.

8 Finally, while they have not so far proffered it as a reason for their non-compliance with
9 the Court’s Preliminary Injunction Order, Defendants may argue that the deadline for them to use
10 their “full authority” against Stroz has not yet arrived, given the Court’s order extending the PI
11 compliance deadline from May 31 to June 23 “insofar as compliance would implicate either issues
12 raised by non-party Anthony Levandowski’s motion to modify the May 11 provisional relief order
13 (Dkt. No. 466) or privilege disputes currently pending before Judge Corley.” (Dkt. 499.) Yet this
14 argument would be unavailing as well. Mr. Levandowski’s motion to modify the PI Order
15 addresses whether the Court may order Uber to discipline **Mr. Levandowski** for failing to waive
16 his Fifth Amendment rights; it does not implicate what actions Defendants can or cannot take
17 against Stroz. Moreover, the Court never extended the March 31 deadline in the Expedited
18 Discovery Order, so nothing can excuse Defendants’ failure to try to obtain the downloaded
19 materials from Stroz so that they could be produced by that March 31 deadline.

20 Nor does the privilege dispute now resolved by Judge Corley’s Order of June 5 implicate
21 production of the Stroz Due Diligence Report and its attachments. (*See* Statement of Facts § II,
22 *supra*.) Defendants seek to justify their failure to ask Stroz to return the downloaded materials
23 based on the contention that the downloaded materials are somehow Mr. Levandowski’s personal
24 property, **not** based on privilege. And in the privilege briefing before Judge Corley, Defendants
25 never contended that wholesale production of the files that Mr. Levandowski gave to Stroz would
26 implicate any privilege or protection. It follows *a fortiori* that Defendants’ ordering Stroz to
27 return these files would not tread on any privilege or protection.

1 In sum, Defendants' obligation to order Stroz to return the downloaded materials does not
 2 implicate Mr. Levandowski's motion to modify the PI Order, nor does it implicate the privilege
 3 dispute. Thus, the deadline for Defendants to comply with their PI Order obligations via-a-vis
 4 Stroz remains May 31, not June 23. Yet May 31 has come and gone, and Defendants have not
 5 used their "full authority" to direct and pressure Stroz to return the downloaded materials. Thus,
 6 Defendants have violated the PI Order.

7 **II. DEFENDANTS ARE IN CONTEMPT FOR FAILING TO TAKE ALL STEPS TO**
 8 **CAUSE MOFO TO RETURN THE DOWNLOADED MATERIALS**

9 As explained in Statement of Facts § VI, *supra*, BSF has now admitted that MoFo has had
 10 copies of at least some the downloaded materials for months now, as part of the Stroz
 11 investigation. BSF's admission means that MoFo misrepresented to Waymo when it stated on
 12 June 1 that it did *not* possess these materials. It also means that MoFo (who is, after all,
 13 Defendants' agent) violated the PI Order by not returning these materials by the May 31 deadline,
 14 and violated the Expedited Discovery Order by not returning these materials by March 31.
 15 Alternatively, Defendants violated the PI Order by not compelling MoFo to do so.

16 This failure goes far beyond substantial compliance, and there is no good-faith or
 17 reasonable reading of the orders that would excuse it. BSF's June 12 email argued that there were
 18 contractual restrictions that prevented MoFo from turning over the downloaded materials.
 19 (Statement of Facts § VI, *supra*.) But contractual restrictions cannot stymie or overcome the
 20 Court's orders. If they could, then *any* party could relieve itself from a Court order by just
 21 entering into a contract forbidding compliance with the order. Needless to say, this is not the law.

22 **III. DEFENDANTS ARE IN CONTEMPT FOR FAILING TO TIMELY DISCLOSE**
 23 **THE DESTRUCTION OF FIVE DISCS OF DOWNLOADED MATERIALS**

24 As recounted above, the Court's Expedited Discovery Order required Defendants to
 25 disclose, *by March 31*, whether any of the downloaded materials had been destroyed. Defendants
 26 did not disclose any destruction by that date. However, in its *June 8* interrogatory response,
 27 Defendant Uber disclosed that it has known since shortly after *March 11, 2016* that Mr.
 28 Levandowski destroyed five discs containing Google information. Uber's failure to disclose this
 destruction by March 31 is a blatant violation of the Expedited Discovery Order.

1 Again, this failure goes far beyond substantial compliance, and there is no good-faith or
2 reasonable reading of the Expedited Discovery Order that would excuse it. Uber did say in its
3 interrogatory response that it “does not know whether those discs contained any of the
4 ‘DOWNLOADED MATERIALS.’” (Ex. 1 at 4.) Yet Uber knew that these discs contained
5 Google information in Mr. Levandowski’s possession. If Uber’s interrogatory response is to be
6 believed, it also was alarmed enough by these discs to emphasize to Mr. Levandowski that he
7 “should not bring any Google information into Uber and that Uber did not want any Google
8 information.” (*Id.*) Mr. Poetzscher — [REDACTED]
9 [REDACTED]
10 [REDACTED] (Ex. 6 at 253-256 (Poetzscher Depo.)). Even if Uber did not “know” to a certainty that the
11 discs contained downloaded materials, these facts and circumstances raise an exceedingly strong
12 inference that the discs did indeed contain downloaded materials — *i.e.*, materials that Mr.
13 Levandowski downloaded from Waymo before leaving Waymo. It is difficult if not impossible to
14 see any other way that Mr. Levandowski could have come to possess five discs of Google/Waymo
15 information in the first place. Thus, for Uber to fairly honor and obey the Expedited Discovery
16 Order, it needed to disclose this destruction by March 31. By failing to do so, Uber is in contempt
17 of the Expedited Discovery Order.

18 Otto Trucking is in contempt of the Expedited Discovery Order for the same reason. As
19 shown in Uber’s interrogatory response and [REDACTED]
20 [REDACTED]

21 [REDACTED] Yet, like Uber, Otto Trucking failed to disclose this fact by the
22 March 31 deadline under the Expedited Discovery Order.

23 **IV. DEFENDANT OTTO TRUCKING IS IN CONTEMPT FOR FAILING TO TAKE**
24 **ALL CORPORATE STEPS TO PRESSURE MR. LEVANDOWSKI TO RETURN**
25 **THE DOWNLOADED MATERIALS**

26 As noted above, Otto Trucking has failed to take all available corporate steps to pressure
27 Mr. Levandowski to return the downloaded materials. (Statement of Facts § IV, *supra*.)

28 Specifically, [REDACTED]
[REDACTED] — should he fail to return the

1 downloaded materials. (*Id.*) Yet Otto Trucking has refused to take this step. (*Id.*) By failing to
 2 take this significant step, Otto Trucking has failed to comply with the PI Order or Expedited
 3 Discovery Order, and its failure falls well short of “substantial compliance.”

4 Nor has Otto Trucking proffered any good faith or reasonable interpretation of the Orders
 5 that would excuse its failure. As noted above, Otto Trucking’s only proffered excuse is to say that
 6 it cannot take this step [REDACTED]

7 [REDACTED] But this
 8 excuse makes no sense. If Mr. Levandowski — [REDACTED]

9 [REDACTED] that would simply mean that Otto Trucking
 10 (through its Managing Members) has refused to take all steps to compel return of the downloaded
 11 materials. In other words, Mr. Levandowski’s recalcitrance would simply be what puts Otto
 12 Trucking in contempt of the PI Order. [REDACTED]

13 [REDACTED]
 14 [REDACTED] By refusing to exercise this power, Otto Trucking is in
 15 contempt of the PI Order and Expedited Discovery Order.

16 CONCLUSION

17 For the foregoing reasons, Waymo respectfully requests that the Court issue an Order to
 18 Show Cause why Defendants should not be held in civil contempt of the PI Order and Expedited
 19 Discovery Order.³

20
 21 DATED: June 21, 2017

QUINN EMANUEL URQUHART & SULLIVAN,
 LLP

22
 23 By */s/ Charles K. Verhoeven*

24 Charles K. Verhoeven
 25 Attorneys for WAYMO LLC

26
 27 ³ Should the Court ultimately find Defendants in contempt, Waymo requests that Waymo be
 28 permitted to propose remedies for contempt commensurate with the Court’s findings, which could
 include further provisional relief, evidentiary sanctions, and/or adverse inferences.

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Charles K. Verhoeven (Bar No. 170151)

2 charlesverhoeven@quinnemanuel.com

David A. Perlson (Bar No. 209502)

3 davidperlson@quinnemanuel.com

Melissa Baily (Bar No. 237649)

4 melissabaily@quinnemanuel.com

John Neukom (Bar No. 275887)

5 johnneukom@quinnemanuel.com

Jordan Jaffe (Bar No. 254886)

6 jordanjaffe@quinnemanuel.com

50 California Street, 22nd Floor

7 San Francisco, California 94111-4788

Telephone: (415) 875-6600

8 Facsimile: (415) 875-6700

9 Attorneys for WAYMO LLC

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

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

18 Defendants.

CASE NO. 3:17-cv-00939

**DECLARATION OF PATRICK
SCHMIDT IN SUPPORT OF PLAINTIFF
WAYMO LLC'S NOTICE OF MOTION
AND MOTION FOR ORDER TO SHOW
CAUSE WHY DEFENDANTS SHOULD
NOT BE HELD IN CONTEMPT OF THE
PRELIMINARY INJUNCTION ORDER
(Dkt. 426) AND EXPEDITED
DISCOVERY ORDER (Dkt. 61)**

Date: July 27, 2017

Time: 8:00 a.m.

21 Ctrm: 8, 19th Floor

Judge: Honorable William H. Alsup

22 Trial Date: October 10, 2017

1 I, Patrick Schmidt, hereby declare as follows.

2 1. I am a member of the bar of the State of California and an associate with Quinn
3 Emanuel Urquhart & Sullivan, LLP, counsel for Plaintiff Waymo LLC (“Waymo”). I make this
4 declaration of personal, firsthand knowledge, and if called and sworn as a witness, I could and
5 would testify competently as follows.

6 2. Attached hereto as Exhibit 1 is a true and correct copy of an excerpt from
7 Defendants’ Responses to Waymo’s First Set of Expedited Interrogatories Pursuant to Paragraph
8 Six of the May 11, 2017 Preliminary Injunction Order (Nos. 1-9).

9 3. Attached hereto as Exhibit 2 is a true and correct copy of email correspondence
10 between my office and counsel for Defendants spanning May 31, 2017 to June 1, 2017.

11 4. Attached hereto as Exhibit 3 is a true and correct copy of email correspondence
12 between my office and counsel for Defendants spanning June 7, 2017 to June 14, 2017.

13 5. Attached hereto as Exhibit 4 is a true and correct copy of two letters sent by
14 Defendants and forwarded to my office on June 12, 2017.

15 6. Attached hereto as Exhibit 5 is a true and correct copy of excerpts from the
16 transcript of the June 19, 2017 deposition of Lior Ron in this matter (cover page incorrectly reads
17 “April 19”).

18 7. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from the
19 transcript of the June 19, 2017 deposition of Cameron Poetzsch in this matter.

20 8. Attached hereto as Exhibit 7 is a true and correct copy of email correspondence
21 between my office and counsel for Defendants spanning May 31, 2017 to June 12, 2017.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 I declare under penalty of perjury under the laws of the State of California and the United
2 States of America that the foregoing is true and correct, and that this declaration was executed in
3 Los Angeles, California, on June 21, 2017.

4
5 DATED: June 21, 2017

/s/ Patrick Schmidt
Patrick Schmidt

6
7
8 **SIGNATURE ATTESTATION**

9 Pursuant to Local Rule 5-1(i)(3), I attest under penalty of perjury that concurrence in the
10 filing of this document has been obtained from Patrick Schmidt.
11

12 /s/ Charles K. Verhoeven
13 Charles K. Verhoeven
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28

EXHIBIT 2

Patrick Schmidt

From: Melissa Baily
Sent: Thursday, June 01, 2017 9:51 PM
To: 'Ray, Wendy J.'
Cc: Andrea P Roberts; 'John Cooper'; 'Matthew Cate'; 'UberWaymoMoFoAttorneys';
"BSF_EXTERNAL_UberWaymoLit@bsflp.com"
(BSF_EXTERNAL_UberWaymoLit@bsflp.com); 'nchatterjee@goodwinlaw.com';
'rwalsh@goodwinlaw.com'; 'sbrun@goodwinlaw.com'; 'bschuman@goodwinlaw.com';
QE-Waymo
Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

Hamish, Wendy,

We write follow up on issues related to the contract executed by Eric Friedberg on behalf of Stroz Friedberg and John Gardner on behalf of Mr. Levandowski.

We first learned of that contract when Defendants referred to it and characterized it – but did not submit it to the Court – in their opposition to Waymo’s motion to compel the due diligence materials. During today’s discussion, Defendants stated that they are relying on the same contract as the sole justification for declining to ask their agent Stroz to return documents taken from Waymo by Mr. Levandowski. Defendants’ position – as stated this morning – is that: “with respect to Anthony, anything he might have provided [to Stroz] was his personal property and he put very tight restrictions on the ability even of Stroz to share that with anyone, including Uber.” In other words, Defendants’ position is that Waymo’s proprietary files, stolen by Mr. Levandowski, are his personal property, such that Defendants need not facilitate their return.

As you know, until 1:56 p.m. Pacific today, Defendants had not produced even a redacted version of the Stroz/Levandowski contract. Even after Mr. Levandowski’s counsel stated yesterday evening that he had no objection to the production of that contract by Stroz in response to Waymo’s subpoena, Defendants took the position that they “had not produced the contractual agreement between Mr. Levandowski and Stroz Friedberg because it contains attorney-client privileged and work product information.” This morning, Defendants confirmed that position, while also stating that the privilege issues were not something “anyone had given attention to prior to yesterday.”

Defendants’ redactions to the Stroz/Levandowski contract – as it was produced this afternoon – are improper on their face.

As an initial matter, Defendants cannot assert that the contract supports their position that Waymo’s stolen files are Mr. Levandowski’s personal property while redacting key definitions of terms relevant to that contention (and other critical information). This is an example of the very sword/shield problem that Judge Alsup was seeking to address by requiring Defendants to disclose any trial theories that might implicate a waiver of privilege by noon today. Having disclosed none, Defendants cannot now rely on cherry-picked portions of a contract to support their positions in this case while simultaneously claiming the remainder of the contract is privileged.

Moreover, the asserted privilege claims are obviously baseless. A contract between Mr. Levandowski and Stroz simply cannot be covered by Uber’s attorney/client privilege. Even Defendants conceded that “it’s unusual for a contract to be subject to a privilege issue.” And the fact that Mr. Levandowski is not objecting to the production of the contract reveals that it is not covered by his attorney/client privilege and it is not subject to a common legal interest that could somehow turn Waymo’s proprietary documents into Defendants’ work product.

For the same reasons that Magistrate Judge Corley ordered that the February 22 term sheet be produced without redaction, the Levandowski/Stroz contract needs to be produced without redaction.

Defendants have committed to producing either an un-redacted version of the Levandowski/Stroz contract or an explanation for any remaining redactions by 2 p.m. tomorrow. If the latter is provided, we expect that the assertions of privilege will be described in "bone-crushing detail" so that Waymo can immediately bring a motion regarding these issues.

Thanks,
Melissa

From: Melissa Baily
Sent: Thursday, June 01, 2017 9:35 AM
To: Ray, Wendy J. <WRay@mofo.com>
Cc: Andrea P Roberts <andreaproberts@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>; UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>; 'BSF_EXTERNAL_UberWaymoLit@bsfllp.com' (BSF_EXTERNAL_UberWaymoLit@bsfllp.com) <BSF_EXTERNAL_UberWaymoLit@bsfllp.com>; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com; QE-Waymo <qewaymo@quinnemanuel.com>
Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

Wendy and John,

We will be prepared to discuss this on the call at 11.

Melissa

From: Ray, Wendy J. [<mailto:WRay@mofo.com>]
Sent: Thursday, June 01, 2017 9:32 AM
To: Melissa Baily <melissabaily@quinnemanuel.com>
Cc: Andrea P Roberts <andreaproberts@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>; UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>; 'BSF_EXTERNAL_UberWaymoLit@bsfllp.com' (BSF_EXTERNAL_UberWaymoLit@bsfllp.com) <BSF_EXTERNAL_UberWaymoLit@bsfllp.com>; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com; QE-Waymo <qewaymo@quinnemanuel.com>
Subject: Re: Waymo v. Uber Meet and Confer Follow-Up

John and Andrea,
As I mentioned yesterday, I cannot join a call at 10. I will be on the call at 11 and can discuss then.

Best,
Wendy

Wendy J. Ray
Morrison & Foerster LLP
707 Wilshire Blvd., Ste. 6000
Los Angeles, CA 90017-3543
213-892-5446

On Jun 1, 2017, at 9:20 AM, Melissa Baily <melissabaily@quinnemanuel.com> wrote:

John,

We request that this issue be added to the agenda for our call at 10 a.m.

Thank you,
Melissa

From: Ray, Wendy J. [<mailto:WRay@mofo.com>]

Sent: Wednesday, May 31, 2017 11:21 PM

To: Andrea P Roberts <andreaproberts@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>; UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>; 'BSF_EXTERNAL UberWaymoLit@bsfllp.com' (BSF_EXTERNAL UberWaymoLit@bsfllp.com) <BSF_EXTERNAL UberWaymoLit@bsfllp.com>; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com

Cc: QE-Waymo <gewaymo@quinnemanuel.com>

Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

Andrea and John,

We have not produced the contractual agreement between Mr. Levandowski and Stroz Friedberg because it contains attorney-client privileged and work product information, but we are continuing to analyze this issue, which is closely related to issues before Magistrate Judge Corley.

We have not directed Stroz to do anything with respect to any allegedly downloaded files because Uber does not have control over Mr. Levandowski's personal property, including any property he may have provided to Stroz. Uber cannot compel a third party to produce documents that it does not control. Uber directed Mr. Levandowski to return any downloaded files under his control, which would include any files that Stroz may have. To date, he has not complied and therefore he has been terminated.

In addition to the JDA, work product privilege may apply.

Esther sent the search terms in a separate communication.

Best,
Wendy

From: Andrea P Roberts [<mailto:andreaproberts@quinnemanuel.com>]

Sent: Wednesday, May 31, 2017 10:06 PM

To: John Cooper; Matthew Cate; UberWaymoMoFoAttorneys; 'BSF_EXTERNAL UberWaymoLit@bsfllp.com' (BSF_EXTERNAL UberWaymoLit@bsfllp.com); nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com

Cc: QE-Waymo

Subject: Waymo v. Uber Meet and Confer Follow-Up

- External Email -

John,

I write regarding the items discussed during this afternoon's meet and confer for which Defendants committed to providing responses today, and for which we have not yet received the promised information. To the extent that Defendants do not provide this information tonight as promised, or to the extent issues remain from these responses, let's add these issues on the call tomorrow at 11 am so we can promptly bring these issues to the Court.

- Defendants were supposed to get back to us today to let us know whether Defendants have produced the contractual agreement between Levandowski and Stroz Friedberg that Defendants contended on the call today (as they have previously including in representations to the Court) preclude Uber from instructing Stroz to return any copies of the downloaded materials, and if not, they were to produce the agreement absent a basis not to. And if there was a basis, they would provide it.
- Defendants were to get back to us as to whether they instructed Stroz Friedberg to return all of the downloaded materials pursuant to the PI Order and, if not, the basis for not doing so.
- Defendants were to let us know today whether Defendants are relying on anything other than the original JDA to shield communications between Defendants and Stroz Friedberg regarding responding to the subpoena on Stroz.
- Defendants were to provide us with the list of search terms Defendants agree to run on the emails being made available for inspection. This was to include the approximately 19 that Defendants are already running, and the 160 search terms from the PI phase.

We look forward to receiving this information.

Thanks,
Andrea

Andrea Pallios Roberts
Of Counsel,
Quinn Emanuel Urquhart & Sullivan, LLP

555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
650-801-5023 Direct
650.801.5000 Main Office Number
650.801.5100 FAX
andreaproberts@quinnemanuel.com
www.quinnemanuel.com

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=====

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Exhibit 3

FILED UNDER SEAL

EXHIBIT 4



June 12, 2017

VIA ELECTRONIC MAIL

Mr. Anthony Levandowski
c/o Ismail Ramsey, Esq.
Miles Erlich, Esq.
Ramsey & Erlich LLP
803 Hearst Avenue
Berkeley, CA 94710
(izzy@ramsey-erlich.com)
(miles@ramsey-erlich.com)

Re: *Waymo LLC v. Uber Technologies, Inc. et al.*, Case No. C 17-00939 WHA

Dear Anthony:

As stated in Salle Yoo's May 26, 2017, letter informing you of your "Termination for Cause," you have failed to comply with the directives sent to you in Uber's letter dated May 15, 2017, and those failures to date have not been cured.

Among those directives was an instruction that you either cause "every person that you have reason to believe may be in possession of any downloaded material to provide those files to our outside counsel at Morrison & Foerster, who will provide them to Waymo's lawyers or the Court (and not to keep any copies thereof)," or that you certify that any such "downloaded material" has previously been destroyed. As explained in the May 15 letter, the phrase "downloaded material" is defined very broadly in the Court's May 11 Order, and Uber made clear that its definition included any materials you may have provided to Stroz Friedberg LLC ("Stroz"). Thus, the instruction to you in the May 15 letter quite clearly requires you to, among other things, immediately instruct Stroz to provide to Waymo (or counsel for Waymo) any downloaded materials that are in its possession, as is your sole right to do in accordance with a March 21, 2016 letter agreement between Stroz and your attorney, John Gardner. Alternatively, you may instruct Stroz to provide these materials to Uber's outside counsel at Morrison & Foerster LLP, who will immediately provide them to Waymo's lawyers and the Court.

We have separately sent a letter to Stroz today (attached here) making clear to Stroz that Uber and Ottomotto LLC do not want Stroz to retain any "downloaded material" or any other material you may have provided to Stroz, and that any material that may arguably belong to Google or Waymo (or that even refers in any way to Google) must be returned to Waymo immediately.

Sincerely,

/s/Karen L. Dunn

CC: Scott Brown (General Counsel, Stroz Friedberg, LLC)
Special Master John Cooper
Charles Verhoeven (Lead Counsel for Waymo)

Attachment

BOIES SCHILLER FLEXNER LLP



June 12, 2017

VIA ELECTRONIC MAIL

Scott Brown
General Counsel
Stroz Friedberg, LLC
2 Oliver Street
11th Floor
Boston, MA 02109
(sbrown@strozfriedberg.com)
(charlesverhoeven@quinnemanuel.com)

Re: Waymo LLC v. Uber Technologies, Inc. et al., Case No. C 17-00939 WHA

Dear Scott:

In March of last year, Stroz Friedberg, LCC ("Stroz") was engaged by Morrison & Foerster ("Morrison"), on behalf of Uber Technologies, Inc. ("Uber"), and O'Melveny & Myers ("O'Melveny"), on behalf of Ottomotto, LLC ("Ottomotto").

Pursuant to that engagement, Stroz received certain devices and electronic files from Anthony Levandowski ("Levandowski"). Levandowski's provision of that material to Stroz is governed by a letter agreement Levandowski entered into with Stroz on March 21, 2016 ("March 21 Levandowski-Stroz Agreement"). That agreement refers to certain materials Levandowski provided to Stroz as "Aspen Information," and generally prohibits Stroz from disclosing that Aspen Information to any third party including Uber, Ottomotto, or any of their respective law firms.

As you know, Waymo, Inc. ("Waymo") has sued Uber and Ottomotto in part based on the allegation that Levandowski deliberately downloaded over 14,000 files of proprietary information from his former employer, Google, Inc. ("Google"), an affiliate of Waymo.

We are sending this letter to Stroz to make the following points abundantly clear:

1. Uber and Ottomotto do not want Stroz to retain possession of *any* materials it gathered from Levandowski. Uber and Ottomotto are therefore instructing Stroz not to retain any such materials.
2. Uber and Ottomotto do not want Stroz to destroy or delete any materials it gathered from Levandowski. Uber and Ottomotto are therefore instructing Stroz not to destroy or delete such materials.
3. Uber and Ottomotto want Stroz to produce to Waymo any materials that it gathered from Levandowski that may constitute or contain any Google information, or that might possibly contain or reference any Google information, whether reasonably considered "proprietary" information or not ("Google Information"). The term "Google Information" should be interpreted as broadly as possible to include any document that

BOIES SCHILLER FLEXNER LLP



Scott Brown
Stroz Friedberg, LLC
June 12, 2017

was created at Google (or any affiliate) or that refers to Google (or any affiliate) or anything created at Google (or any affiliate).

4. While we want to see the actions described in items 1-3 above happen, we appreciate that based on the March 21 Levandowski-Stroz Agreement, it appears that Uber and Ottomotto do not have the contractual power to order Stroz to produce such materials to Waymo. For that reason, we are writing to Levandowski today to confirm that if he wishes to cure his failure to cooperate with Uber and Ottomotto's prior directives, he must instruct Stroz to produce these materials to Waymo. We attach a copy of that letter to this letter. Of course, if Stroz takes a different view of its contractual obligations under these circumstances, and believes it is able to produce any Google Information it may have to Waymo based solely on the wishes expressed by Uber and Ottomotto in this letter, but without the consent of Levandowski, it may do so immediately.

Please let us know if you wish to discuss anything in this letter.

Sincerely,

/s/Karen L. Dunn

cc: Anthony Levandowski (c/o Counsel Ismail Ramsey and Miles Ehrlich)
Special Master John Cooper
Charles Verhoeven (Lead Counsel for Waymo)

Attachment

Exhibit 5

FILED UNDER SEAL

Exhibit 6

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EXHIBIT 7

Patrick Schmidt

From: Jessica Phillips <JPhillips@BSFLLP.com>
Sent: Monday, June 12, 2017 6:20 PM
To: James Judah; David Perlson; 'Ray, Wendy J.'; John Cooper
Cc: Andrea P Roberts; Matthew Cate; UberWaymoMoFoAttorneys;
BSF_EXTERNAL_UberWaymoLit; nchatterjee@goodwinlaw.com;
rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com; QE-Waymo
Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

James –

In response to your June 2 email below, we want to be sure the record is clear and accurate. In general, the statements are correct with the following caveats and clarifications:

1. BSF does not have any downloaded materials (or any copies, excerpts or summaries thereof) except to the extent any such material may appear as an exhibit to the Stroz Report, which is privileged.
2. MoFo does not have any downloaded materials (or any copies, excerpts or summaries thereof), except to the extent that any such material may appear: (1) excerpted in or as an exhibit to the Stroz Report, which is privileged; and (2) in certain materials AL and other persons provided to Stroz to which MoFo was given limited access during the Stroz investigation pursuant to the terms of the AL-Stroz contract and the protocol governing the investigation, and under strict conditions preventing MoFo from sharing those materials with anyone, including Uber.
3. Defendants are not able to confirm what Stroz has because Defendants have never had full access to everything Stroz received from Levandowski (per the terms of the AL-Stroz contract). In addition, Defendants are still asserting privilege over the Stroz report and investigation, as shown in the appeal of the Magistrate Judge's Order. We can say that we have sent letters simultaneously to Levandowski and Stroz to emphasize Uber's desire that Stroz should be returning to Waymo any Google material that Levandowski may have given to it, and should not be retaining it. Likewise, Uber's letter to Levandowski reiterates that Levandowski should have already directed Stroz to do this, and must do so now if he wishes to have any chance of curing his failures to comply with Uber's directives. While Levandowski is the person with the legal power to require that, Uber has sent these letters to make its position abundantly clear.
4. With respect to the following statement: "Counsel of record for Defendants confirmed that, other than Defendants' litigation expert Stroz Friedberg, none of Defendants' litigation experts have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials" – a better and more precise formulation would be: "Counsel of record for Defendants confirmed that, while it is unable to say what Stroz Friedberg may have, none of Defendants' other litigation experts have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials."

Jessica E. Phillips
Counsel

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From: James Judah [mailto:jamesjudah@quinnemanuel.com]
Sent: Friday, June 02, 2017 4:51 PM
To: David Perlson; 'Ray, Wendy J.'; John Cooper
Cc: Andrea P Roberts; Matthew Cate; UberWaymoMoFoAttorneys; BSF_EXTERNAL_UberWaymoLit; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com; QE-Waymo
Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

John and Counsel –

I write to memorialize parts of our discussion from yesterday morning. I also write to request a call today with the Special Master regarding Defendants' failure to answer Mr. Cooper's question: "Does Uber know if Stroz has all or some of the Downloaded materials."

Regarding the 11 AM discussion yesterday:

Morrison & Foerster confirmed that it does not have any of the materials that Anthony Levandowski downloaded from Waymo and kept upon leaving Waymo's employment, regardless of how long he kept them for and whether or not any such materials qualify as trade secrets or proprietary or confidential information (the "downloaded materials"), or any copies, excerpts, or summaries of the downloaded materials.

Boies Schiller & Flexner confirmed that it does not have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials.

Counsel of record for Uber/Ottomotto confirmed that Uber and Ottomotto do not have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials.

Goodwin Procter confirmed that it does not have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials.

We were unclear whether Otto Trucking confirmed that Otto Trucking does not have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials. Please confirm by **5 PM today** that Otto Trucking does not have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials.

Defendants could not confirm that Defendants' agent, Stroz Friedberg, does not have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials. Counsel of record for Defendants said that this information was protected by a common interest privilege. Counsel of record for Defendants also confirmed that they have not asked Defendants' agent, Stroz Friedberg, to return to Waymo (or the Court) any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials.

Counsel of record for Defendants confirmed that, other than Defendants' litigation expert Stroz Friedberg, none of Defendants' litigation experts have any of the downloaded materials, or any copies, excerpts, or summaries of the downloaded materials.

Please let us know if any of the above is inconsistent with your understanding of the yesterday morning's discussions.

Best,
James

From: David Perlson

Sent: Thursday, June 01, 2017 7:13 PM

To: 'Ray, Wendy J.' <WRay@mofo.com>; John Cooper <JCooper@fbm.com>

Cc: Andrea P Roberts <andreaproberts@quinnemanuel.com>; Matthew Cate <MCate@fbm.com>;

UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>; 'BSF_EXTERNAL_UberWaymoLit@bsfllp.com' (BSF_EXTERNAL_UberWaymoLit@bsfllp.com) <BSF_EXTERNAL_UberWaymoLit@bsfllp.com>; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com; QE-Waymo <gewaymo@quinnemanuel.com>

Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

Mr. Cooper and Counsel, I write to memorialize our discussion this afternoon regarding our questions concerning the May 26, 2017 letter to Mr. Levandowski, and to request that Mr. Cooper's question in relation thereto, noted later in this email, be answered by Noon tomorrow.

In relation to the 20 day cure period, we asked what it is that that Uber is asking Mr. Levandowski to "cure" that would result in Mr. Levandowski not being terminated. In response, Defendants stated that Mr. Levandowski is "fired," that he no longer works at Uber. Defendants further stated they do not anticipate he will cure and that they only included the cure provision because it is required in their contract with him. Defendants could not identify anything specific he could do to cure. We pointed out that this appeared inconsistent with the position taken in Mr. Levandowski's Motion to Modify the PI insofar as he pointed to the termination letter and its cure period as a reason to stop enforcement of the PI as it relates to him. Defendants stated that Mr. Levandowski is making his arguments and they do not necessarily agree with them.

We further discussed the statement in the May 26 Letter that:

"Further, in your Employment Agreement, you represented and warranted that "you have returned or destroyed all property and confidential information belonging to any prior employer." Your failure to comply with the Letter gives Uber grounds to allege a breach of the representation and warranty in your employment agreement, and constitutes an additional ground for termination with Cause."

On the call we asked whether "your failure to comply with the Letter" meant that Mr. Levandowski failed to comply because he did not return the Downloaded materials as Uber requested in the Letter, that Uber knew he or Stroz had (supposedly under his control). Defendants wouldn't provide a specific answer as to what this language meant.

However, this prompted the following question by Mr. Cooper: "Does Uber know if Stroz has all or some of the Downloaded materials." We request that Uber (and other defendants) answer this question by noon June 2, or explain the basis for not doing so, including whether answering this question somehow involves privilege, including all information required by the Court's Standing Order to justify an assertion of privilege.

We also discussed the documents requested in Lindsay Cooper's May 30 email. Defendants stated that they will produce, which they hoped to do today, some of the documents we requested. Defendants said they will respond tonight regarding any documents they will not produce.

David

David Perlson
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San Francisco, CA 94111
Direct: (415) 875-6344

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Web: www.quinnemanuel.com

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From: Ray, Wendy J. [<mailto:WRay@mofo.com>]
Sent: Thursday, June 01, 2017 9:32 AM
To: Melissa Baily <melissabaily@quinnemanuel.com>
Cc: Andrea P Roberts <andreaproberts@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>; UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>; 'BSF_EXTERNAL_UberWaymoLit@bsfllp.com' (BSF_EXTERNAL_UberWaymoLit@bsfllp.com) <BSF_EXTERNAL_UberWaymoLit@bsfllp.com>; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com; QE-Waymo <gewaymo@quinnemanuel.com>
Subject: Re: Waymo v. Uber Meet and Confer Follow-Up

John and Andrea,
As I mentioned yesterday, I cannot join a call at 10. I will be on the call at 11 and can discuss then.

Best,
Wendy

Wendy J. Ray
Morrison & Foerster LLP
707 Wilshire Blvd., Ste. 6000
Los Angeles, CA 90017-3543
213-892-5446

On Jun 1, 2017, at 9:20 AM, Melissa Baily <melissabaily@quinnemanuel.com> wrote:

John,

We request that this issue be added to the agenda for our call at 10 a.m.

Thank you,
Melissa

From: Ray, Wendy J. [<mailto:WRay@mofo.com>]
Sent: Wednesday, May 31, 2017 11:21 PM
To: Andrea P Roberts <andreaproberts@quinnemanuel.com>; John Cooper <JCooper@fbm.com>; Matthew Cate <MCate@fbm.com>; UberWaymoMoFoAttorneys <UberWaymoMoFoAttorneys@mofo.com>; 'BSF_EXTERNAL_UberWaymoLit@bsfllp.com' (BSF_EXTERNAL_UberWaymoLit@bsfllp.com) <BSF_EXTERNAL_UberWaymoLit@bsfllp.com>; nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com

Cc: QE-Waymo <gewaymo@quinnemanuel.com>

Subject: RE: Waymo v. Uber Meet and Confer Follow-Up

Andrea and John,

We have not produced the contractual agreement between Mr. Levandowski and Stroz Friedberg because it contains attorney-client privileged and work product information, but we are continuing to analyze this issue, which is closely related to issues before Magistrate Judge Corley.

We have not directed Stroz to do anything with respect to any allegedly downloaded files because Uber does not have control over Mr. Levandowski's personal property, including any property he may have provided to Stroz. Uber cannot compel a third party to produce documents that it does not control. Uber directed Mr. Levandowski to return any downloaded files under his control, which would include any files that Stroz may have. To date, he has not complied and therefore he has been terminated.

In addition to the JDA, work product privilege may apply.

Esther sent the search terms in a separate communication.

Best,
Wendy

From: Andrea P Roberts [<mailto:andreaproberts@quinnemanuel.com>]

Sent: Wednesday, May 31, 2017 10:06 PM

To: John Cooper; Matthew Cate; UberWaymoMoFoAttorneys; 'BSF_EXTERNAL_UberWaymoLit@bsflp.com' (BSF_EXTERNAL_UberWaymoLit@bsflp.com); nchatterjee@goodwinlaw.com; rwalsh@goodwinlaw.com; sbrun@goodwinlaw.com; bschuman@goodwinlaw.com

Cc: QE-Waymo

Subject: Waymo v. Uber Meet and Confer Follow-Up

- External Email -

John,

I write regarding the items discussed during this afternoon's meet and confer for which Defendants committed to providing responses today, and for which we have not yet received the promised information. To the extent that Defendants do not provide this information tonight as promised, or to the extent issues remain from these responses, let's add these issues on the call tomorrow at 11 am so we can promptly bring these issues to the Court.

- Defendants were supposed to get back to us today to let us know whether Defendants have produced the contractual agreement between Levandowski and Stroz Friedberg that Defendants contended on the call today (as they have previously including in representations to the Court) preclude Uber from instructing Stroz to return any copies of the downloaded materials, and if not, they were to produce the agreement absent a basis not to. And if there was a basis, they would provide it.
- Defendants were to get back to us as to whether they instructed Stroz Friedberg to return all of the downloaded materials pursuant to the PI Order and, if not, the basis for not doing so.
- Defendants were to let us know today whether Defendants are relying on anything other than the original JDA to shield communications between Defendants and Stroz Friedberg regarding responding to the subpoena on Stroz.

- Defendants were to provide us with the list of search terms Defendants agree to run on the emails being made available for inspection. This was to include the approximately 19 that Defendants are already running, and the 160 search terms from the PI phase.

We look forward to receiving this information.

Thanks,
Andrea

Andrea Pallios Roberts
Of Counsel,
Quinn Emanuel Urquhart & Sullivan, LLP

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Redwood Shores, CA 94065
650-801-5023 Direct
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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

vs.

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

Defendants.

CASE NO. 3:17-cv-00939-WHA

**[PROPOSED] ORDER TO SHOW CAUSE
WHY DEFENDANTS SHOULD NOT BE
HELD IN CONTEMPT OF THE
PRELIMINARY INJUNCTION ORDER
(Dkt. 426) AND EXPEDITED
DISCOVERY ORDER (Dkt. 61) AND
EXHIBITS 3, 5, AND 6 THERETO**

1 Plaintiff Waymo LLC's ("Waymo") has moved for an Order directing Defendants Uber
2 Technologies, Inc.; OttoMotto LLC; and Otto Trucking LLC to appear and Show Cause why they
3 should not be held in contempt of the Court's Preliminary Injunction Order (Dkt. 426) and
4 Expedited Discovery Order (Dkt. 61).

5 Having considered Waymo's motion, the memorandum of points and authorities, and
6 supporting declaration, the Court GRANTS the motion as follows:

7 **TO DEFENDANTS UBER TECHNOLOGIES, INC.; OTTOMOTTO LLC; AND**
8 **OTTO TRUCKING LLC: YOU ARE HEREBY ORDERED TO APPEAR AND**
9 **SHOW CAUSE**

10 on July 27, 2017, at 8:00 a.m. in the United States District Court for the Northern District of
11 California, San Francisco Division, Courtroom 8, 19th Floor, located at 450 Golden Gate Avenue,
12 San Francisco California, if there be any, why the Court should not hold each of the Defendants in
13 civil contempt and issue sanctions for the following:

14 (1) failing to "exercise the full extent of their corporate, employment, contractual, and other
15 authority" to cause their agent Stroz Friedberg to return all materials in Stroz Friedberg's
16 possession that Anthony Levandowski downloaded from Waymo's servers;

17 (2) failing to timely notify Waymo and the Court about the apparent destruction of five
18 discs of downloaded materials;

19 (3) failing to "exercise the full extent of their corporate, employment, contractual, and other
20 authority" to cause their agent, Morrison & Foerster, LLP ("MoFo") to return the
21 downloaded materials; and

22 (4) failing to "exercise the full extent of their corporate, employment, contractual, and other
23 authority" to cause Otto Trucking's officer, Mr. Levandowski, to return the downloaded
24 materials.

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1 Defendants shall file any written response to the Motion for Order to Show Cause no later
2 than _____ a.m./p.m. on _____, 2017.

3
4 **IT IS SO ORDERED.**

5
6 Dated: _____, 2017

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8 HON. WILLIAM ALSUP
9 United States District Court Judge
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