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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

WAYMO LLC,

No. C 17-00939 WHA

Plaintiff,

v.

**OMNIBUS ORDER ON
EXTENT TO WHICH
ACCUSATIONS RE UBER’S
LITIGATION MISCONDUCT
MAY FEATURE AT TRIAL**

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

Defendants.

INTRODUCTION

This lawsuit for trade secret misappropriation suffers from a deluge of accusations by plaintiff that defendants tossed out evidence and engaged in litigation misconduct. This order addresses the extent to which the jury will be allowed to hear those accusations and the proof behind them.

STATEMENT

Plaintiff Waymo LLC commenced this civil action on February 23, 2017. An order dated March 16 set a schedule for expedited discovery (Dkt. No. 61) and another order dated May 11 granted in part Waymo’s motion for provisional relief (Dkt. No. 426). Waymo’s case has since been reduced to claims against defendants Uber Technologies, Inc., and Ottomotto LLC (collectively, “Uber”) for misappropriation of eight alleged trade secrets. The trial date has been continued twice and currently remains set for February 5.¹

¹ For the benefit of the court of appeals and with apologies to the public, all record citations herein are to the unredacted versions of the documents cited.

1 Waymo’s imagination has not slept in conceiving of ways it has been wronged by
2 Uber’s alleged litigation misconduct. Over the course of this action, Waymo’s complaints have
3 provoked multiple motions, motions *in limine*, and various requests for relief. Various motions
4 by both sides have already drawn rulings and those rulings remain operative even though only a
5 few are cross-referenced herein. With the benefit of extensive briefing, multiple hearings, and a
6 clear view of the full constellation of issues implicated by Waymo’s grievances, this order now
7 resolves all remaining issues. Here follows a summary of the relevant events to date.

8 On June 21, 2017, Waymo moved for an order to show cause why Uber should not be
9 held in contempt for three alleged violations of the expedited discovery and provisional relief
10 orders (Dkt. No. 676-4). After briefing on that motion, on August 7, Waymo filed a
11 supplemental brief to complain of yet another alleged violation of the expedited discovery order
12 (Dkt. No. 1095). During the motion hearing on August 16, the undersigned judge explained
13 that he was not inclined to hold anyone in contempt but would consider telling the jury about
14 Uber’s pertinent misconduct, if any, and asked Waymo to propose a non-argumentative
15 instruction (*see* Dkt. No. 1261 at 26:21–27:21, 33:8–18, 45:5–9). On September 10, Waymo
16 proposed an argumentative jury instruction along with a “corrected” supplemental brief that
17 complained of yet three more alleged violations of prior orders and requested both remedial and
18 adverse-inference instructions against Uber (Dkt. Nos. 1501-4, 1501-6). The argumentative
19 jury instruction was unusable and will not be given at trial.²

20 Meanwhile, in June 2017 and pursuant to the discovery referral in this action, Magistrate
21 Judge Jacqueline Corley ordered Uber to produce certain evidence pertaining to a due diligence
22 investigation performed by non-party Stroz Friedberg for Uber before its acquisition of
23 Ottomotto and Otto Trucking (collectively, “Otto”) (Dkt. No. 566). The undersigned judge
24 overruled all objections to that order (Dkt. No. 685). Non-party Anthony Levandowski (but not
25 Uber) then petitioned the Federal Circuit for a writ of mandamus, thereby suspending
26 production of the due diligence materials until the Federal Circuit rejected all his arguments and
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28 ² Some of Waymo’s complaints extended to defendant Otto Trucking LLC and to that extent became moot after Otto Trucking prevailed on summary judgment (*see* Dkt. Nos. 2151 at 8–13, 2161).

1 dismissed his petition on September 13 (Dkt. No. 1733). An avalanche of document production
2 followed. Faced with this belated and bone-crushing production of evidence, on September 16,
3 Waymo moved to continue the trial date then set for October 10 (Dkt. No. 1603-4).

4 Shortly thereafter, on September 28, the parties alerted Judge Corley that Uber had just
5 “discovered” a trove of unproduced documents once belonging to Levandowski (from his time
6 at Ottomotto). The trove contained approximately fifteen thousand emails and 85 gigabytes of
7 other documents (*see* Dkt. No. 1890 at 5:14–7:21). As the owner of the newly-discovered
8 trove, Uber produced it, but the delay damage had been done. That late production piled onto
9 the mountain of unexamined due diligence documents Waymo received on the eve of trial.
10 Under the circumstances and after a hearing on October 3, the undersigned judge felt compelled
11 to grant Waymo its first continuance and postponed the trial date to December 4 (*see* Dkt. Nos.
12 1954, 1965 at 36:22–41:12).

13 On October 23, Waymo filed a second supplemental brief on its contempt motion
14 complaining of another two alleged violations of the expedited discovery and provisional relief
15 orders (Dkt. No. 2053-4). That brief reiterated Waymo’s request for an adverse-inference
16 instruction against Uber.

17 On November 13, Waymo filed a new motion seeking yet another adverse-inference
18 instruction against Uber for spoliation of evidence (Dkt. No. 2197-4).

19 On November 22, while briefing on Waymo’s new motion proceeded and the new trial
20 date approached, the undersigned judge received a letter from the Office of the United States
21 Attorney. The letter explained that, during a pending criminal investigation, the government
22 had interviewed a former Uber employee named Richard Jacobs whose allegations about Uber
23 seemed relevant to the trade secret misappropriation claims in this case. Moreover, Jacobs’s
24 attorney had laid out his allegations in a 37-page demand letter dated May 5, 2017, to Attorney
25 Angela Padilla, Uber’s associate general counsel (Dkt. No. 2383). Prior to that communication
26 from the Office of the United States Attorney, no mention of Jacobs, his allegations, or the letter
27 had surfaced in this civil action despite months of grueling discovery.
28

1 After the Court passed this sensational information on to counsel, Waymo requested a
2 second trial continuance (Dkt. No. 2281-4 at 19–20). The second final pretrial conference
3 previously set for November 28 morphed into a two-day evidentiary hearing featuring
4 testimony from Jacobs and Attorney Padilla, among other witnesses. The evidentiary hearing
5 unearthed the existence of a resignation email that Jacobs had sent to Uber’s leadership on April
6 14, 2017, further detailing his allegations against Uber, and a subsequent confidential settlement
7 agreement between Jacobs and Uber. The demand letter, resignation email, and settlement
8 agreement (collectively, “the Jacobs materials”) contained a barrage of scandalous allegations
9 against Uber ranging from deliberate spoliation and systemic abuse of attorney-client privilege
10 to hacking and corporate espionage. At least some allegations, discussed further below, seemed
11 to bear directly on Waymo’s claims in this case (*see, e.g.*, Dkt. No. 2307-2 at 13). Under the
12 circumstances, the undersigned judge agreed to grant Waymo its second continuance and
13 postponed the trial date to February 5, and further granted supplemental discovery to investigate
14 the sensational Jacobs materials (*see* Dkt. No. 2315).

15 At a further case management conference on December 4, the undersigned judge
16 ordered Waymo to submit a complete offer of proof by January 12 of this year, covering not
17 only any new evidence uncovered in supplemental discovery but also how it related, if at all, to
18 the issues under consideration in this case, including Waymo’s previous accusations that Uber
19 had engaged in litigation misconduct and other bad behavior (*see* Dkt. No. 2342 at 45:14–23;
20 *see also* Dkt. No. 2447). On January 12 of this year, Waymo filed a 47-page offer of proof
21 (Dkt. No. 2466-3). On January 19, Uber filed a 64-page rebuttal (Dkt. No. 2500-4).

22 The instant, comprehensive order is based on Waymo’s offer of proof, Uber’s response
23 thereto, and all prior briefing and oral argument relating to the constellation of issues raised by
24 Waymo’s complaints that Uber engaged in litigation misconduct. (To repeat, however, it does
25 not undo any prior evidentiary ruling.)

26 ANALYSIS

27 An overarching guide for this order should be plainly stated at the outset. This was and
28 remains a civil action based on Uber’s alleged misappropriation of eight trade secrets. The trial

1 will be a trial on Waymo’s claims of trade secret misappropriation, not a trial on Uber’s
2 litigation practices or corporate culture. Of course, evidence of Uber’s litigation misconduct or
3 other bad behavior may be relevant and admissible insofar as it reasonably bears on actual
4 claims and defenses in this case. For example, facts like Uber’s use of ephemeral messaging
5 may be used to explain gaps in Waymo’s proof that Uber misappropriated trade secrets or to
6 supply proof that is part of the *res gestae* of the case (like the due diligence report).³

7 Such evidence will *not* be permitted, however, to the extent that it becomes cumulative,
8 invites improper speculation, vilifies Uber without proving much else, or threatens to
9 overwhelm the trial and distract from the merits of the case. Nor will the Court short-circuit the
10 ordinary process of proof in a jury trial by ushering in such “evidence” through adverse-
11 inference instructions (except as explained below). Both sides will have to prove their cases to
12 the jury the old-fashioned way — by laying the necessary foundation and relying on admissible
13 evidence and properly-designated witnesses. While this order rules that certain instances of
14 “misconduct” will be relevant and admissible at trial, this order does not bless any particular
15 method of proof and the parties must still employ non-objectionable ways to present their
16 evidence at trial.⁴

17 **1. ALLEGED VIOLATIONS OF PRIOR ORDERS.**

18 As stated, Waymo had an opportunity to propose a non-argumentative instruction that
19 would present to the jury relevant facts about shortfalls in Uber’s compliance with the expedited
20 discovery and provisional relief orders. Instead, Waymo proposed an argumentative jury
21 instruction unsuitable for use at trial (*see* Dkt. No. 1501-6). To repeat, that argumentative
22 instruction will not be given to the jury.

23 This order now re-examines each of Waymo’s accusations that Uber violated the
24 expedited discovery and provisional relief orders, denies Waymo’s requests for an adverse-

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26 ³ Waymo previously moved *in limine* to preclude Uber from presenting evidence or argument that
27 Uber relied on the due diligence investigation to prevent trade secret misappropriation. A prior order denied
that motion (Dkt. No. 2493).

28 ⁴ One reason this order cannot bless any particular method of proof is that Waymo, in its most recent
offer of proof, failed to explain how particular witnesses would sponsor particular items of evidence without
running into hearsay objections, as discussed further below (*see* Dkt. No. 2470-36).

1 inference and remedial instruction, and explains the extent to which Waymo may attempt to
 2 present the relevant facts to the jury (assuming, of course, that Waymo can do so through
 3 admissible and properly-designated evidence).

4 **A. Original Contempt Motion.**

5 In its contempt motion, Waymo claims Uber violated two provisions of the expedited
 6 discovery and provisional relief orders. *First*, Paragraph 4 of the expedited discovery order
 7 provided (Dkt. No. 61 at 2):

8 By March 31, defendants shall produce for inspection all files and
 9 documents downloaded by Anthony Levandowski, Sameer
 10 Kshirsagar, or Radu Raduta before leaving plaintiff's payroll and
 11 thereafter taken by them. Defendants shall also produce for
 12 copying the card reader, thumb drive, or other media used for the
 13 downloads, as well as all subsequent emails, memoranda,
 14 PowerPoints, text messages, or notes that have forwarded, used, or
 15 referred to any part of said downloaded material. If any part of
 16 said downloaded material has been deleted, destroyed, or modified,
 17 then defendants shall state the extent thereof and produce all
 18 documents bearing on said deletion, destruction, or modification.

14 *Second*, Paragraph 2 of the provisional relief order provided (Dkt. No. 426 at 23):

15 Defendants must immediately and in writing exercise the full
 16 extent of their corporate, employment, contractual, and other
 17 authority to (a) prevent Anthony Levandowski and all other
 18 officers, directors, employees, and agents of defendants from
 19 consulting, copying, or otherwise using the downloaded materials;
 20 and (b) cause them to return the downloaded materials and all
 21 copies, excerpts, and summaries thereof to Waymo (or the Court)
 22 by **MAY 31 AT NOON**.

19 As now explained, however, this order concludes that Uber, for the most part,
 20 substantially complied with the foregoing provisions; that the extent of Uber's noncompliance
 21 may be presented to the jury through admissible evidence and percipient witnesses (including
 22 lawyers if properly designated); and that no jury instruction will be given as a substitute for
 23 evidence on this issue, with the sole exception that the Court will inform the jury as to the
 24 existence of the aforementioned orders and as to two particular violations of the expedited
 25 discovery and provisional relief orders.⁵

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 28 ⁵ To be clear, "downloaded materials," as used in prior orders and herein, is *not* synonymous with
 "alleged trade secrets." A device, server, or document might contain some of the former but none of the latter.
 And, some or all of the alleged trade secrets may fail to qualify for trade secret protection under the law. Of

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(1) *Stroz Friedberg.*

Waymo contends Uber violated Paragraph 2 of the provisional relief order by failing to compel Stroz to return the downloaded materials in its possession even though Stroz has been acting as Uber’s agent and providing e-discovery and digital forensics services in this litigation (Dkt. No. 676-4 at 4–5). Waymo acknowledges that Uber’s counsel wrote to Stroz in a letter dated June 12, 2017, stating (Dkt. No. 677-5):

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 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.

course, Waymo may present evidence and argument to the jury about the downloaded materials as a step in proving Uber’s alleged misappropriation of trade secrets, but Waymo must take care not to conflate these issues.

1 Waymo argues, however, that this letter was “plainly less than the full extent of Uber and
2 Ottomotto’s authority” because it explains near the end that “Uber and Ottomotto do not have
3 the contractual power to order Stroz” to comply with the directives in the letter (Dkt. No. 676-4
4 at 5, 9). This is a non sequitur. It is not “less than the full extent” of Uber’s authority for Uber
5 to acknowledge the limits of that authority. Significantly, Waymo does not dispute that Uber
6 had no contractual authority to order Stroz to produce documents it had obtained from
7 Levandowski under a separate agreement between Stroz and Levandowski. Instead, Waymo
8 faults Uber for being “lukewarm and equivocal” in the June 12 letter (*id.* at 10). But this is
9 merely Waymo’s subjective characterization of the letter. This order declines to find any
10 violation of the provisional relief order based on the mere fact that Uber, in Waymo’s view,
11 should have used more zealous wording.

12 Waymo further contends Uber could have threatened Stroz with termination or
13 withholding of future business “as another lever to pressure Stroz” to comply with Uber’s
14 demands. This contention fails to come to grips with Uber’s point that the requests it made of
15 Stroz in the June 12 letter exceeded Uber’s actual *authority* in the first instance. Waymo
16 essentially faults Uber for failing to exercise the full extent of its bargaining, pressuring, or
17 persuasive powers over Stroz (*see* Dkt. Nos. 676-4 at 10, 886-3 at 5). But Paragraph 2 of the
18 provisional relief order required Uber to exercise the full extent of its “corporate, employment,
19 contractual, or other *authority*,” not any and all non-authoritative *influence* it could bring to
20 bear. What Waymo really seems to be arguing is that Uber was less than enthusiastic in
21 pressuring Stroz to voluntarily turn over materials it received from Levandowski, and that this
22 lack of zeal indicates reluctance to reveal evidence probative of Waymo’s claims. But Waymo
23 may make that argument to the jury with qualified witnesses and evidence, instead of asking the
24 Court to carry Waymo’s water by repeating its message with an instruction simply stating
25 outright that Uber “disobeyed” orders (*see* Dkt. No. 1501-6 at 1–2).

26 Waymo also points out that Uber’s June 12 letter to Stroz came *after* the provisional
27 relief order’s May 31 deadline (Dkt. No. 676-4 at 10–11). Waymo vaguely complains that this
28 delay violated the order because of “the sensitive nature of the documents, the risks that Waymo

1 suffers by having these documents in others' hands, and the compressed nature of this
 2 litigation" (*id.* at 11). These abstract buzzwords insinuate but fail to actually show that Uber's
 3 twelve-day delay in sending the June 12 letter to Stroz really prejudiced Waymo so as to require
 4 a remedial jury instruction. Under these circumstances, the better course is for Waymo, if it
 5 wishes, to simply tell the jury through admissible evidence that Uber missed a deadline by
 6 twelve days and to make its point, if any, to the jury based on that evidence.⁶

7 (2) *Morrison & Foerster.*

8 Also on June 12, 2016, Uber's counsel at Boies Schiller Flexner LLP emailed Waymo
 9 to, among other things, clarify that (Dkt. No. 677-8):

10 [Uber's counsel at Morrison & Foerster LLP] does not have any
 11 downloaded materials (or any copies, excerpts or summaries
 12 thereof), except to the extent that any such material may appear:
 13 (1) excerpted in or as an exhibit to the Stroz Report, which is
 14 privileged; and (2) in certain materials AL and other persons
 15 provided to Stroz to which MoFo was given limited access during
 16 the Stroz investigation pursuant to the terms of the AL-Stroz
 17 contract and the protocol governing the investigation, and under
 18 strict conditions preventing MoFo from sharing those materials
 19 with anyone, including Uber.

20 Waymo contends Uber violated both the expedited discovery and provisional relief orders
 21 because it failed to compel MoFo to return the downloaded materials in its possession (Dkt. No.
 22 676-4 at 7–8, 13). As Uber points out, Waymo's argument is unpersuasive as to the first
 23 category of downloaded materials because that category remained subject to privilege issues
 24 pending before the Federal Circuit at the time. As to the second category identified in BSF's
 25 June 12 email, MoFo subsequently "confirmed that it does not have any such materials in its
 26 possession or control other than as included as exhibits to the Stroz Report, which already is
 27 covered by the first category" (Dkt. No. 885 at 14–15).

28 ⁶ Occasionally, Waymo's brief strays from arguing that Uber violated the provisional relief order to
 arguing that Uber also violated the expedited discovery order with respect to Stroz (*see* Dkt. No. 676-4 at
 11–12). This serves only to muddy up Waymo's arguments, which in any event enjoy greater force as to the
 provisional relief order. The gravamen of Waymo's complaint with respect to Stroz remains that Uber
 supposedly failed to exercise the full extent of its "corporate, employment, contractual, [or] other authority" as
 required by the provisional relief order. This order therefore focuses on that issue notwithstanding Waymo's
 inconsistent references to the expedited discovery order.

1 In its opposition brief, Uber revealed it had learned for the first time on July 11, 2017,
2 that “MoFo has some materials that Levandowski provided to Stroz, and that Levandowski
3 authorized Stroz to provide to MoFo *in its former role as personal counsel for Levandowski*
4 *since the inception of the arbitrations brought by Google* (and not from the Stroz diligence
5 investigation or anything else preceding this litigation)” (*id.* at 15 (emphasis in original); *see*
6 *also* Dkt. No. 883 ¶¶ 6–8, 21–23). In its reply, Waymo complained at length that Uber’s new
7 discovery was inconsistent with BSF’s June 12 email and with other communications between
8 counsel. Even based on Waymo’s own arguments, however, the worst that can be said of
9 Uber’s counsel is that they had to correct certain representations to opposing counsel as this
10 litigation progressed and did so within about a month.

11 Waymo also baldly asserts that “MoFo was obliged to produce these materials in
12 response to the Expedited Discovery Order” but fails to explain why (*see* Dkt. No. 886-3 at
13 3–4). This order agrees with Uber that it did not violate the expedited discovery and
14 provisional relief orders by failing to compel MoFo to produce copies of downloaded materials
15 that, unbeknownst to Uber, MoFo had received and retained in its *former role as Levandowski’s*
16 *counsel in separate arbitration proceedings*.

17 In short, no jury instruction is warranted based on Waymo’s claim that Uber violated
18 orders by failing to compel MoFo to produce the downloaded materials. Nor do the underlying
19 facts described above bear any reasonable nexus to any issues relevant to the claims and
20 defenses in this case. Their probative value, if any, is substantially outweighed by their
21 likelihood of confusing the issues, misleading the jury, and consuming undue time at trial.
22 They are therefore excluded under Federal Rule of Evidence 403.

23 (3) ***The Five Discs.***

24 On June 8, 2017, Uber responded to one of Waymo’s interrogatories as follows (Dkt.
25 No. 677-2 at 4):

26 On or about March 11, 2016, Mr. Levandowski reported to Mr.
27 Kalanick, Nina Qi and Cameron Poetzscher at Uber as well as Lior
28 Ron that he had identified five discs in his possession containing
Google information. Mr. Kalanick conveyed to Mr. Levandowski
in response that Mr. Levandowski should not bring any Google
information into Uber and that Uber did not want any Google

1 information. Shortly thereafter, Mr. Levandowski communicated
2 to Uber that he had destroyed the discs. Uber never received those
3 discs, and does not know whether those discs contained any of the
4 “DOWNLOADED MATERIALS.”

5 Poetzscher, who remains Uber’s vice president of corporate development, also confirmed in his
6 deposition on June 19 that he had known since March 2016 about the supposed destruction of
7 the five disks (*see* Dkt. No. 676-14 at 259:1–260:7).

8 Waymo contends Uber’s failure to sooner disclose the supposed destruction of the five
9 discs violated Paragraph 4 of the expedited discovery order because “these facts and
10 circumstances raise an exceedingly strong inference that the discs did indeed contain
11 downloaded materials” (Dkt. No. 676-4 at 13–14). Uber does not dispute that it should have
12 sooner disclosed the supposed destruction of the five discs and expresses regret for its
13 “oversight” (Dkt. No. 885 at 3). Uber insists, however, that it did not intentionally conceal that
14 information from Waymo (*see id.* at 15–18). According to Uber, it withheld the information as
15 “privileged” for months until the Court ordered it to decide by June 1 whether or not it would
16 waive any privilege. Only then did Uber revisit its assertions of privilege and conclude that the
17 information about the five discs was not privileged after all, leading to the belated disclosure of
18 that information to Waymo (*see id.* at 17).

19 Uber’s vague hand-wringing about the “difficult privilege issues raised in this case” fails
20 to explain how there could have been any confusion on the specific question of whether or not
21 the information about the five discs was privileged. Clearly, it was not. Even a generous
22 reading of this record suggests that Uber liberally asserted privilege over broad swaths of
23 information at the outset of this litigation and only bothered to closely examine the validity of
24 those assertions when faced with the possibility that it would not be able to use information
25 favorable to its own defense absent a timely waiver. In other words, insofar as Uber claims
26 simple carelessness as its excuse, that carelessness proved suspiciously convenient to Uber and
27 its defense strategies.

28 In a similar vein, Uber rationalizes that it “devoted enormous resources” and “conducted
a massive investigation” to comply with the expedited discovery order (*see* Dkt. No. 885 at 4–6,
16–17). These protestations miss the point. The five discs hardly constituted needles in a

1 haystack but stood out as a vital element in the narrative at the core of this case, plainly bearing
2 on the crucial question of whether or not Levandowski funneled Waymo's trade secrets to Uber.
3 It was and remains known to Uber's leadership, including Travis Kalanick, Nina Qi, and
4 Cameron Poetzscher, who all learned about the five discs and their supposed destruction from
5 Levandowski himself. Under these circumstances, Uber's failure to timely disclose the five
6 discs and their supposed destruction — even viewed through the excuse that Uber's counsel
7 apparently let frivolous assertions of privilege go conveniently unchecked for months —
8 constituted a violation of the expedited discovery order. At trial, the Court will inform the jury
9 of these facts and will instruct the jury that it may, but need not, draw any adverse inference
10 therefrom. It will remain up to the jury to decide what inference, if any, to draw.

11 **B. Waymo's First Supplemental Brief on Contempt Motion.**

12 On August 4, 2017, Uber's in-house counsel Attorney Padilla submitted a declaration
13 describing a meeting that took place on March 29, 2017, between her, Kalanick, and
14 Levandowski. According to Padilla, Levandowski revealed to her and Kalanick during that
15 meeting that he had downloaded and deleted Waymo files (Dkt. No. 1082-1 ¶ 6). In its first
16 supplemental brief, Waymo pointed to this declaration and meeting as further evidence that
17 Uber violated the expedited discovery order by failing to timely disclose Levandowski's
18 destruction of downloaded materials (Dkt. No. 1095).

19 Significantly, Kalanick testified about the contents of the March 29 meeting at his
20 deposition on July 27. Uber then insisted the March 29 meeting was *not* privileged to begin
21 with, this to avoid subject-matter waiver as a result of Kalanick's testimony. Judge Corley
22 disagreed, finding that the meeting had been privileged — but that Uber had waived privilege as
23 to the subject matter of that testimony. The undersigned judge overruled Uber's objections to
24 Judge Corley's ruling (Dkt. Nos. 1172, 1267). As even Waymo recognizes, however, this also
25 means the March 29 meeting was indeed privileged in the first instance, so Uber's failure to
26 disclose information from that meeting could not have constituted a violation of the expedited
27 discovery order. Under these circumstances, the appropriate remedy for Uber's actions was
28

1 Judge Corley’s ruling of subject-matter waiver, not a jury instruction that Uber violated the
2 expedited discovery order.

3 **C. Waymo’s “Corrected” Supplemental Brief on Contempt Motion.**

4 During a prior hearing on July 26, 2017, the undersigned judge set forth certain ground
5 rules pertaining to Levandowski’s expected invocation of his Fifth Amendment privilege at
6 trial. In relevant part, the ground rules would instruct the jury that it may, but need not, infer
7 that the testimony Levandowski refused to give would be adverse *to him*. Whether or not that
8 would further lead to an adverse inference against *Uber*, however, would be up to the jury to
9 decide based on all the evidence and argument in the case (*see* Dkt. No. 1050 at 99:3–100:8).

10 Not content with this ruling and the opportunity to propose a non-argumentative
11 instruction about Uber’s alleged violations of orders, Waymo filed a “corrected” supplemental
12 brief urging the Court to extend any adverse inference against Levandowski to include Uber “as
13 an additional sanction” for said violations (*see* Dkt. No. 1501-4 at 1). While Waymo left
14 ambiguous how exactly this “extension” would occur, Waymo’s arguments suggest it wants to
15 instruct the jury that any adverse inference drawn against Levandowski must automatically
16 extend to Uber as well. The sanction Waymo proposes would pose a serious risk of invading
17 the fact-finding province of the jury and hampering the resolution of this action on the merits,
18 particularly since any nexus between Uber’s alleged violations of orders and the substance of
19 Waymo’s misappropriation claims remains tenuous at best. In its “corrected” supplemental
20 brief, Waymo complains that Uber violated prior orders in three additional ways but ultimately
21 provides no reason or authority why such drastic relief is warranted, as now addressed.

22 **(1) Levandowski’s Devices.**

23 Waymo contends Uber violated both the expedited discovery and provisional relief
24 orders by failing to disclose that Stroz had received and possessed approximately one hundred
25 hard drives from Levandowski in connection with the due diligence investigation. Waymo cites
26 Paragraph 4 of the expedited discovery order and Paragraph 2 of the provisional relief order
27 (both discussed above), and further claims Uber violated Paragraph 4 of the provisional relief
28 order, which provided (Dkt. No. 426 at 24):

1 With respect to all other persons, including those with Stroz
2 Friedberg, defendants shall conduct a thorough investigation and
3 provide a detailed accounting under oath setting forth every person
4 who has seen or heard any part of any downloaded materials, what
5 they saw or heard, when they saw or heard it, and for what
6 purpose. . . . The accounting shall not be limited to downloaded
7 materials that happened to make their way into some due diligence
8 report but shall cover any and all downloaded materials. The
9 accounting shall also identify the complete chains of custodians for
every copy of any downloaded materials or due diligence report
referencing downloaded materials. Defendants must also use the
full extent of their authority and influence to obtain cooperation
with the foregoing procedure from all involved. For example, if a
potential custodian refuses to cooperate, then defendants'
accounting shall set forth the particulars, including all efforts made
to obtain cooperation. The accounting must be filed and served by
JUNE 23 AT NOON.

10 Insofar as Waymo's "corrected" supplemental brief simply riffs on its complaint that Uber
11 could have done more to pressure Stroz to turn over materials it received from Levandowski, it
12 does not warrant any further relief for the reasons stated above (Dkt. No. 1501-4 at 2-3).

13 With respect to Paragraph 4 of the provisional relief order, Waymo accuses Uber of
14 misrepresentation because Uber's accounting disclosed that Stroz "collected *and imaged*
15 Anthony Levandowski's personal devices for the purpose of preparing a due diligence report"
16 but did not also specifically call out devices that Stroz collected *but never imaged* (*see id.* at
17 3-4; Dkt. No. 715 at 2 (emphasis added)). On this record, however, the worst that can be said
18 of Uber is that it left ambiguous whether Stroz imaged every device collected from
19 Levandowski and failed to provide a detailed list of those devices — details not explicitly
20 required by the provisional relief order in the first place (*see* Dkt. No. 426 ¶ 4 (requiring an
21 accounting of "every person who has seen or heard any part of any downloaded materials, what
22 they saw or heard, when they saw or heard it, and for what purpose"))).

23 Waymo's real point seems to be that Stroz's failure to image certain devices from
24 Levandowski is probative of Waymo's misappropriation theory because it undermines Uber's
25 narrative that it quarantined Levandowski's devices in a "vault" to keep any purloined trade
26 secrets away from Uber (*see* Dkt. No. 1501-4 at 4). Of course, this point goes to the merits of
27 the case and Waymo may try to present its argument through evidence admissible at trial. This
28

1 does not further show, however, that Uber violated the provisional relief order. The adverse-
2 inference instruction sought by Waymo remains unwarranted on this basis.

3 (2) *Communications Log.*

4 In its “corrected” supplemental brief, Waymo further contends Uber violated Paragraph
5 5 of the provisional relief order, which provided (Dkt. No. 426 at 25):

6 Also by **JUNE 23 AT NOON**, defendants shall provide Waymo’s
7 counsel and the Court with a complete and chronologically
8 organized log of all oral and written communications — including,
9 without limitation, conferences, meetings, phone calls, one-on-one
10 conversations, texts, emails, letters, memos, and voicemails —
11 wherein Anthony Levandowski mentioned LiDAR to any officer,
12 director, employee, agent, supplier, or consultant of defendants.
13 The log shall identify for each such communication the time, place
14 (if applicable), mode, all persons involved, and subjects discussed,
15 as well as any and all notes or records referencing the
16 communication.

12 Waymo points out that, despite the June 23 deadline, Uber continued to supplement its
13 communications log until September 5, and further complains that even Uber’s latest
14 supplementation failed to capture many LiDAR-related communications between Levandowski
15 and Uber personnel (Dkt. No. 1501-4 at 4–11). Uber responds that it was simply doing the best
16 it could under the “blazingly fast discovery schedule in this case,” that Waymo itself prioritized
17 some document productions while delaying others, and that innocent explanations exist for the
18 specific un-logged communications complained of by Waymo (Dkt. No. 1591-4 at 2–3).

19 As stated, the Court will inform the jury as to aspects of the provisional relief order.
20 Uber does not and cannot dispute that it provided an incomplete log prior to June 23 and then
21 proceeded to supplement that log until September 5 (*see* Dkt. No. 1469). The Court will also
22 inform the jury of that fact. Waymo will not, however, be allowed to waste time at trial by
23 unnecessarily parading dozens of examples of communications that arguably fell within the
24 scope of the provisional relief order, as it did in briefing on this issue (*see* Dkt. No. 1501-4 at
25 5–10). While individual examples of un-logged communications may prove relevant to the case
26 in other ways and to that extent may be presented to the jury, generic flyspecking would add
27 little, if any, probative value to the core point that Uber simply did not provide a complete
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1 communications log by June 23. If Waymo attempts to go down the latter path at trial, it will
2 likely be excluded under FRE 403.

3 Possibly, as Uber argues, its belated supplementation reflected nothing more than the
4 understandable consequences of a compressed discovery schedule. By contrast, it was also
5 possibly symptomatic of something more sinister. Under these circumstances, however, the
6 question of whether and to what extent Uber’s belated supplementation indicated its liability
7 should be answered by the jury, not decided via an adverse-inference instruction imposed as a
8 “sanction” for imperfect logging of voluminous communications.

9 **(3) *Sword-and-Shield Disputes.***

10 Finally, in its “corrected” supplemental brief, Waymo complains that Uber has been
11 using privilege as both a sword and a shield throughout this litigation, both with its own
12 assertions of privilege and with Levandowski’s assertions of his Fifth Amendment privilege
13 (Dkt. No. 1501-4 at 11–14). Setting aside for the moment Waymo’s conflation of two very
14 different privileges asserted by different parties, its grievance has no discernible nexus to its
15 requested relief. Aside from a single nebulous and conclusory comment that Uber’s alleged
16 abuse of privilege “adds to the pattern of intentional non-compliance with this Court’s orders,”
17 Waymo offers no explanation as to how these allegations, even taken as true, show that Uber
18 violated any order. Waymo’s familiar sword-and-shield complaints are quintessentially
19 discovery disputes that should have been brought before Judge Corley for resolution. Waymo,
20 of course, knows this, having done so — and prevailed — before (*see, e.g.*, Dkt. No. 1267).
21 Waymo’s regurgitation of these issues in its “corrected” supplemental brief fails to justify any
22 jury instruction, much less the adverse-inference instruction requested by Waymo.

23 Insofar as this argument also implicates Waymo’s motion *in limine* regarding the subject
24 of Levandowski’s cooperation (or non-cooperation) with Uber, it is addressed further below.

25 **D. Waymo’s Second Supplemental Brief on Contempt Motion.**

26 Waymo also filed a second supplemental brief in furtherance of its quest for a jury
27 instruction and adverse inference against Uber. Waymo’s second supplemental brief raises two
28 additional issues, neither of which justifies the relief requested by Waymo.

1 (1) *Levandowski's Laptops.*

2 Levandowski first asserted his Fifth Amendment privilege in this action on March 29,
3 2017. At the same time, Uber's counsel mentioned that they did not have access to
4 Levandowski's personal devices (*see* Dkt. No. 131 at 5:14–18, 11:25–12:3). On April 20,
5 Uber's in-house counsel Attorney Padilla emailed Levandowski to demand that he turn over for
6 inspection and imaging two personal laptops he had used for Uber work, citing “internal
7 company policies” requiring his compliance (Dkt. No. 2053-5). Levandowski refused through
8 his personal counsel at Goodwin Procter LLP. (Uber later cited this refusal as a ground for
9 terminating his employment (*see* Dkt. No. 519-2).) Uber's counsel then asked Goodwin, as an
10 alternative, to run search terms on Levandowski's personal computers and provide the results to
11 Uber. Goodwin did not share any details about the actual searches with Uber but on May 17
12 transmitted the purported results of those searches to Uber's counsel, who then turned the
13 results over to Waymo (Dkt. No. 2018-3).⁷

14 Waymo contends this handling of the situation with Levandowski's two personal laptops
15 violated the expedited discovery and provisional relief orders. *First*, Waymo seems to complain
16 that Uber's counsel did not do enough to look for the downloaded materials despite obtaining
17 search results from Goodwin. Waymo points to no actual evidence that those search results
18 were incomplete but nevertheless speculates that the requested search parameters could have
19 missed the downloaded materials in various ways — for example, if said materials “were stored
20 in certain types of encrypted, container-type files” (Dkt. No. 2053-4 at 11–12). This argument
21 misses the point. The request between counsel for Uber and counsel for Levandowski was just
22 that — a request between counsel. It was not made pursuant to any “corporate, employment,
23 contractual, and other authority” of Uber's. Levandowski himself made that abundantly clear
24 when, as an Uber employee, he refused Padilla's unequivocal demand to turn over those laptops
25 for inspection and imaging. In short, there is no merit to Waymo's suggestion that Uber
26 somehow failed to exercise its authority over Levandowski just because Uber's counsel did not
27 persuade Levandowski's counsel to voluntarily run more exhaustive searches.

28 _____
⁷ By this point, MoFo no longer represented Levandowski in his personal capacity (Dkt. No. 883 ¶ 6).

1 *Second*, Waymo states in conclusory terms that Uber did not use “the full extent of [its]
2 authority to cause Mr. Levandowski and his agents to return any downloaded materials on the
3 two laptops to Waymo or the Court” (Dkt. No. 2053-4 at 12). This assertion is meritless for the
4 same reasons stated above.

5 To be clear, Waymo may, of course, try to prove to the jury that it sought to inspect
6 Levandowski’s personal laptops but was refused, just as Waymo may try to prove that Uber
7 allowed Levandowski to use those laptops for work despite the very real possibility that he
8 could consult any misappropriated trade secrets stored thereon while guiding the development
9 of Uber’s self-driving technology. Uber, for its part, may try to prove that it asked
10 Levandowski to turn over his laptops but was refused and may also try to prove to the jury
11 MoFo’s efforts to run searches on the laptops through Goodwin. These facts are unquestionably
12 germane to the merits of the case. But, to repeat, in pursuit of these points, both sides must lay
13 the necessary foundation and rely on admissible evidence and witnesses properly designated for
14 trial, including, if necessary, attorneys from MoFo, Goodwin, and Quinn Emanuel Urquhart &
15 Sullivan, LLP. For example, if Uber tries to go down this path, it must prove that the laptops
16 searched by Goodwin were in fact the same personal laptops used by Levandowski for his work
17 at Uber. (Without testimony from Levandowski, this may prove difficult.) Unless and until
18 Uber lays the full foundation, it may *not* claim before the jury that it obtained and turned over
19 search results from the latter (though it may describe its efforts to do so) or otherwise exceed in
20 argument the scope of what admissible evidence and percipient witnesses will support.

21 Waymo’s instant motion, however, does not concern whether or not both sides may
22 present the foregoing narratives to the jury. Rather, it concerns Waymo’s contention that Uber
23 violated orders so as to justify an adverse-inference instruction against Uber. As explained, this
24 order denies such relief with respect to Uber’s handling of Levandowski’s personal laptops.

25 *Third*, Waymo complains that Uber’s accounting pursuant to Paragraph 4 of the
26 provisional relief order did not refer to any efforts to obtain Levandowski’s laptops from his
27 personal counsel at Goodwin, nor did the accounting disclose the two laptops in a section titled
28 “Other Potentially Downloaded Materials” (*id.* at 12–14). Again, Paragraph 4 of the

1 provisional relief order required an accounting of “every person who has seen or heard any part
2 of any downloaded materials, what they saw or heard, when they saw or heard it, and for what
3 purpose.” The accounting also had to “identify the complete chains of custodians for every
4 copy of any downloaded materials or due diligence report referencing downloaded materials.”
5 As Uber points out, however, the Goodwin searches unearthed no downloaded materials.
6 Waymo does not contend otherwise but nevertheless suggests Uber should have included the
7 searches and laptops in its accounting because some downloaded materials could have slipped
8 past the search parameters. This argument rests on speculation and fails to show Uber violated
9 the provisional relief order such that an adverse-inference instruction would be warranted.

10 This issue also ties in to Waymo’s motion *in limine* regarding the subject of
11 Levandowski’s cooperation (or non-cooperation) with Uber and to that extent is addressed
12 further below.

13 (2) ***Due Diligence Materials.***

14 Uber previously moved to exclude evidence or argument about assertions of attorney-
15 client or work-product privilege in this litigation, even those that were ultimately rejected by
16 final court order (*see, e.g.*, Dkt. No. 1546). This case, however, does not present mere
17 assertions of privilege that ultimately failed. As described further below in the context of the
18 spoliation issue, the underlying story about the Otto acquisition and its elaborate setup —
19 including the due diligence investigation and a carefully constructed artifice of interlocking
20 privileges intended to shroud the whole affair in a fog of secrecy — remains vital to the story of
21 the whole case. It cannot simply be excised for fear of revealing to the jury how that elaborate
22 artifice of “privilege” was actually invoked in this litigation. For fairness and balance,
23 however, the undersigned judge ruled that, if Waymo mentions to the jury Uber’s assertion of
24 privilege over the due diligence investigation, then Uber may also tell the jury about Waymo’s
25 assertions of privilege ultimately rejected by final court order (*e.g.*, the Sasha Zbrozek story) —
26 notwithstanding Waymo’s protestations, like Uber’s, that it acted in good faith (*see* Dkt. No.
27 1863 at 24:17–30:12). Uber would thus be able to defend itself against insinuations that it
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1 wrongfully asserted privilege to conceal damning evidence by retorting that Waymo itself
2 asserted privilege in the same way.

3 In its second supplemental brief, however, Waymo seeks to do more than just present
4 the complete due diligence story to the jury. It wants an adverse-inference instruction based on
5 Uber violating the accounting requirement in the provisional relief order with respect to the due
6 diligence materials — including by failing to disclose information or produce materials that
7 remained subject to pending issues of privilege at the time. Waymo’s actual complaints,
8 however, bear little or no relation to the accounting requirement it cites.

9 *First*, Waymo criticizes various representations made by Uber and its counsel that,
10 according to Waymo, did not fully reflect the truth that the due diligence report and its exhibits
11 contained some downloaded materials. For example, Waymo faults Uber for saying that MoFo
12 viewed “potentially” downloaded materials and Levandowski “allegedly” downloaded a
13 spreadsheet even though the due diligence report and its exhibits would have put both
14 equivocations to rest (Dkt. Nos. 2053-4 at 16–17). Significantly, however, Uber made all the
15 complained-of representations while the due diligence materials remained subject to privilege
16 issues pending before the Federal Circuit. This helps explain ambiguities in Uber’s
17 representations at the time. On this record, the worst that can be said of Uber is that it
18 temporized and occasionally used slick rhetoric to gloss over pending privilege issues and
19 potentially unfavorable facts. Once Uber and Levandowski lost on the privilege issues, Uber
20 came clean. These circumstances are not so egregious as to warrant an adverse inference
21 instruction (though Waymo remains free to put in its proof on this point to the jury).

22 *Second*, Waymo points out that Stroz possessed a Relativity database with data extracted
23 from Levandowski’s personal devices, including downloaded materials. On April 4, 2017,
24 Stroz sent a copy of the database to John Gardner, Levandowski’s personal counsel, apparently
25 pursuant to a separate agreement between Stroz and Gardner. Since then, Uber apparently
26 made no attempt to recover the Relativity database from Gardner or to prevent him from sharing
27 it with Levandowski. Waymo apparently sees this as a violation of Paragraph 2 of the
28 provisional relief order, which required Uber to prevent Levandowski from “consulting,

1 copying, or otherwise using the downloaded materials” (*id.* at 17–18). Yet Waymo makes no
2 attempt to show that Stroz acted as Uber’s agent when it sent Gardner the Relativity database,
3 that Uber had any “corporate, employment, contractual, [or] other authority” to prevent Stroz
4 from doing so, or that Uber had any “corporate, employment, contractual, [or] other authority”
5 to compel Gardner to return the Relativity database.⁸

6 *Third*, Waymo again dissects various comments made by Uber and its counsel and
7 essentially argues that said comments were misleading, incomplete, or otherwise undermined by
8 certain evidence in the due diligence materials (*id.* at 18–20). This rehashes Waymo’s first
9 point and similarly fails to warrant an adverse-inference instruction. Waymo also revives its
10 complaints about Uber’s failure to sooner disclose the five discs (*see id.* at 20–21). That
11 grievance, however, has already been addressed above.

12 Importantly, of course, counsel should not mislead the Court, mislead opposing counsel,
13 or misstate the record. The instant complex of motions and supplements, however, is not an
14 unfettered forum to lodge all manner of complaints about counsel’s half-truths and other slick
15 litigation conduct (of which both sides have been guilty).⁹

16 The problem remains that Waymo fails to explain how Uber’s counsel’s comments in
17 hearings, even if misleading, constituted a violation of the expedited discovery or provisional
18 relief orders such that an adverse-inference instruction is warranted. Yes, buried in the complex
19 of motions and supplements lurk some legitimate criticisms of Uber and its counsel. But it also
20 must be said that Waymo has whined — often without good reason — at every turn in this case,
21 making it hard to separate the wheat from the chaff. Countless hours of time have gone into
22 sorting these issues instead of the merits. Less time would have been consumed had Waymo
23 focused on its best examples of misconduct instead of piling on every miscellaneous grievance.

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25
26 ⁸ Relativity is a software company and platform that provides tools for e-discovery.

27 ⁹ It bears repeating that neither side in this contentious litigation has been above using exaggeration,
28 spin, or other misleading rhetorical flourishes to advance their cause. If the Court were to issue an adverse-
inference instruction for every time that a lawyer for either side, including Waymo, told a half-truth, the merits
of this case would never see the light of day (*see, e.g.*, Dkt. No. 1965 at 10:7–16).

1 To repeat, the central issue in this case remains whether or not Uber misappropriated
2 Waymo's trade secrets, not whether or not Uber is an evil corporation. Waymo's decision to
3 devote so much time and effort to pursuing matters with so little connection to the merits raises
4 the troubling possibility that Waymo is unwilling or unable to prove up a solid case on the
5 merits and instead seeks to inflame the jury against Uber with a litany of supposed bad acts.
6 This order remains sensitive to this concern while also allowing certain facts about Uber's
7 misconduct to go before the jury insofar as they may actually help explain that weak spots in
8 Waymo's case may well be the result of Uber's spoliation or obstruction of discovery.

9 **E. Summary re Alleged Violations of Orders.**

10 In summary, the jury will be instructed as to relevant aspects of the expedited discovery
11 and provisional relief orders and the obligations they imposed on Uber. The jury will also be
12 instructed that, despite Paragraph 4 of the expedited discovery order, Uber did not timely
13 disclose information in its possession regarding the supposed destruction of the five discs.
14 Similarly, the jury will be instructed that, despite Paragraph 5 of the provisional relief order,
15 Uber did not provide a complete communications log by June 23 but continued to supplement
16 that log through September 5. The jury will *not* further be directed to draw any adverse
17 inference against Uber based on these facts but will be free to do so (or not) of its own accord.

18 In addition, Waymo may adduce proof before the jury about Uber's June 12 letter to
19 Stroz and may argue that timing and tone of that letter reflected a reticence to turn up relevant
20 evidence, if Waymo believes such argument is worth its time at trial. Again, Waymo must lay
21 the necessary foundation and rely on admissible evidence and percipient witnesses properly
22 designated for trial. Waymo may *not*, however, further argue that Uber or MoFo violated prior
23 orders by failing to disclose information or produce materials that, at the time, remained subject
24 to privilege issues pending before the Federal Circuit. Nor may Waymo present evidence or
25 argument regarding MoFo's receipt or possession of materials from Levandowski in its role as
26 Levandowski's personal counsel and without Uber's knowledge. *See* FED. R. EVID. 403.

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1 **2. MOTION RE SPOILIATION.**

2 All of the foregoing dealt with Waymo’s contempt motion and supplements thereto
3 based on Uber’s alleged violations of earlier orders. We now turn to Waymo’s separate motion
4 for relief for spoliation.

5 Waymo moves under both Federal Rule of Civil Procedure 37(e) and the Court’s
6 inherent authority for an adverse-inference instruction against Uber on the basis that Uber
7 spoliated evidence (Dkt. No. 2197-4). Because the evidence in question consists of
8 electronically-stored information, FRCP 37(e), not inherent authority, supplies the controlling
9 legal standard. *See* F.R.C.P. 37(e) Advisory Committee’s Note to 2015 Amendment (FRCP
10 37(e) “authorizes and specifies measures a court may employ if information that should have
11 been preserved is lost, and specifies the findings necessary to justify these measures. It
12 therefore forecloses reliance on inherent authority or state law to determine when certain
13 measures should be used”); *see also Regeneron Pharms., Inc. v. Merus N.V.*, 864 F.3d 1343,
14 1364 n.7 (Fed. Cir. 2017) (relying on the Advisory Committee’s Notes to construe FRCP
15 37(e)’s supersession of prior case law).

16 FRCP 37(e) provides:

17 If electronically stored information that should have been
18 preserved in the anticipation or conduct of litigation is lost because
19 a party failed to take reasonable steps to preserve it, and it cannot
20 be restored or replaced through additional discovery, the court:

21 (1) upon finding prejudice to another party from loss of the
22 information, may order measures no greater than necessary
23 to cure the prejudice; or

24 (2) only upon finding that the party acted with the intent to
25 deprive another party of the information’s use in the
26 litigation may:

27 (A) presume that the lost information was
28 unfavorable to the party;

 (B) instruct the jury that it may or must presume
 the information was unfavorable to the party; or

 (C) dismiss the action or enter a default judgment.

1 **A. Anticipation of Litigation.**

2 “Many court decisions hold that potential litigants have a duty to preserve relevant
3 information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law
4 duty.” F.R.C.P. 37(e) Advisory Committee’s Note to 2015 Amendment. Spoliation is the
5 destruction or material alteration of evidence or the failure to preserve property for another’s
6 use as evidence in pending or reasonably foreseeable litigation. *Apple Inc. v. Samsung Elecs.*
7 *Co., Ltd.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. Aug. 21, 2012) (Judge Lucy Koh) (quoting
8 *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001)). “This is an objective
9 standard, asking not whether the party in fact reasonably foresaw litigation, but whether a
10 reasonable party in the same factual circumstances would have reasonably foreseen litigation.”
11 *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011); *see also Hynix*
12 *Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1345–47 (Fed. Cir. 2011) (litigation does
13 not need to be certain or imminent to be reasonably foreseeable). As the Federal Circuit
14 explained in *Micron*:

15 When litigation is “reasonably foreseeable” is a flexible
16 fact-specific standard that allows a district court to exercise the
17 discretion necessary to confront the myriad factual situations
18 inherent in the spoliation inquiry. This standard does not trigger
19 the duty to preserve documents from the mere existence of a
20 potential claim or the distant possibility of litigation. However, it
21 is not so inflexible as to require that litigation be “imminent, or
22 probable without significant contingencies.”

23 645 F.3d at 1320 (citations omitted).

24 Here, the record clearly shows (and this order finds) not only that a reasonable party in
25 Uber’s circumstances would have reasonably foreseen this litigation in January 2016, but also
26 that Uber *actually* foresaw this litigation in January 2016 when it commenced the process of
27 acquiring Otto. Uber itself previously insisted as much while trying to withhold evidence about
28 the acquisition by arguing to Judge Corley that the parties thereto anticipated, foresaw, and
painstakingly planned for this very litigation so as to give rise to joint-defense and common-
interest privileges between them (*see, e.g.*, Dkt. No. 1414 at 82:4–7). But now, facing
accusations of spoliation, Uber has reversed course and, in a performance deserving of an
Academy Award, claims the exact opposite — that it did *not* reasonably foresee this litigation in

1 2016 and thus supposedly had no duty to preserve evidence (*see* Dkt. No. 2240-4 at 6–13).
 2 Uber’s own statements show otherwise.

3 In January 2016, Uber consulted and retained MoFo as litigation counsel to obtain legal
 4 advice regarding potential liability exposure arising out of its planned acquisition of Ottomotto
 5 and Otto Trucking (collectively, “Otto”), including for potential claims that could be brought by
 6 Waymo specifically. Otto was founded by former Waymo employees Levandowski and Lior
 7 Ron. Like Waymo, Otto focused on self-driving technology. Based on these factors, the parties
 8 to the Otto acquisition entered into a joint-defense agreement by February 2016 (*see* Dkt. No.
 9 378 ¶¶ 2–3, 5–6). Also in February 2016, the parties signed a term sheet that included detailed
 10 indemnity provisions in the event of “super duper litigation” brought by Waymo for certain
 11 “Bad Acts,” including trade secret misappropriation (*see* Dkt. No. 515-14 at 4–5, 50–51).¹⁰

12 In March 2016, in light of the litigation risks presented by the acquisition, Uber also
 13 took the unusual step of retaining Stroz to perform a due diligence investigation that would
 14 facilitate MoFo’s provision of legal analysis and advice (*see* Dkt. No. 378 ¶¶ 9–10). Stroz’s
 15 engagement letter explained that Uber retained its services to ascertain, among other things,
 16 “whether certain current or prospective employees . . . of Ottomotto have improperly retained
 17 on devices or in storage repositories not belonging to former employers, confidential
 18 information belonging to former employers” (Dkt. No. 2197-9 at 1).

19 As it turned out, much of Stroz’s due diligence investigation and report focused on the
 20 possibility that Levandowski and other Otto employees might have retained highly confidential
 21 and proprietary information from Waymo (*see generally* Dkt. No. 1928-24 (due diligence
 22 report)). It has also become clear over the course of this litigation that the purported joint-
 23 defense and common-interest privileges among the parties to the Otto acquisition were an
 24 elaborate artifice carefully and meticulously constructed for the purpose of shrouding the
 25 acquisition and “due diligence” process in secrecy.

26
 27
 28 ¹⁰ Technically, Levandowski and other Otto employees worked for Google Inc. before its self-driving car project spun out to become Waymo, a separate subsidiary under the same parent company. For simplicity, however, this order refers only to Waymo.

1 Uber argues at length that specific fragments of this picture — *e.g.*, the retention of
 2 litigation counsel, the retention of Stroz, and the indemnification and joint-defense agreements
 3 — show at most that Uber anticipated “potential litigation,” not that this litigation was
 4 “reasonably foreseeable” so as to give rise to a duty to preserve evidence (Dkt. No. 2240-4 at
 5 10–13). Uber attempts to split hairs that cannot be split. The elements of the Otto acquisition
 6 must be viewed as a whole because it is simply implausible that the pieces of such an intricate
 7 scheme hatched in isolation. For example, it would strain credulity to suggest that Uber’s
 8 concern over trade secret misappropriation sprung into being when it signed the term sheet in
 9 February 2016 and retained Stroz in March 2016 but did not previously exist when Uber
 10 retained MoFo in January 2016, or that a transaction as anomalous as the Otto acquisition grew
 11 around “the mere existence of a potential claim or the distant possibility of litigation” as
 12 opposed to the “reasonable foreseeability” of litigation. *See Micron*, 645 F.3d at 1320.

13 This order finds that any reasonable party in Uber’s position would have reasonably
 14 foreseen litigation from Waymo for trade secret misappropriation related to the defections of
 15 Levandowski and other Otto employees. *See ibid.* (“When litigation is ‘reasonably foreseeable’
 16 is a flexible fact-specific standard that allows a district court to exercise the discretion necessary
 17 to confront the myriad factual situations inherent in the spoliation inquiry.”). Indeed, the record
 18 indicates Uber *actually* foresaw this litigation and constructed the byzantine architecture of the
 19 Otto acquisition at least in part as a prophylactic measure to defend it. This order concludes,
 20 based on these findings and pursuant to FRCP 37(e), that Uber had a duty to preserve evidence
 21 at least as of January 2016.¹¹

22 **B. Spoliation of Evidence.**

23 Waymo contends Uber failed to take reasonable steps to preserve five categories of
 24 evidence. *First*, hundreds of text messages among Levandowski, Ron, Kalanick, and Qi have
 25 been deleted. *Second*, Levandowski and Ron also deleted their electronic communications,
 26 files, and Slack records. *Third*, as already stated, Levandowski supposedly destroyed five discs.

27
 28 ¹¹ To be clear, these findings are made only to explain the applicability of FRCP 37(e) and the
 appropriateness of the remedies authorized thereunder. These findings are *not* a jury instruction or adverse
 inference to be used against Uber at trial. Counsel shall not argue otherwise.

1 *Fourth*, emails and email archives from Tyto LIDAR, LLC, were apparently deleted after its
2 acquisition by Ottomotto. *Fifth*, Waymo repeats that it was denied access to Levandowski’s
3 personal laptops.¹²

4 Waymo’s “spoliation” argument regarding Levandowski’s personal laptops (Dkt. No.
5 2197-4 at 13–14) can be summarily rejected. Waymo’s point seems to be that Uber “spoliated”
6 evidence on those laptops because it did not make the data on them available to Waymo’s
7 satisfaction. As explained, however, it was Levandowski’s assertion of his Fifth Amendment
8 privilege — not anyone else’s failure to preserve evidence — that shielded his personal laptops
9 from scrutiny in this litigation. And, as far as this record shows, Uber in fact undertook efforts
10 to make available any evidence on those laptops by demanding their production from
11 Levandowski. Even when those efforts failed, Uber’s counsel continued to pursue the matter
12 and apparently convinced Goodwin to run certain searches on what is claimed to have been
13 those laptops. No doubt, those personal laptops — which Uber allowed Levandowski to use for
14 work — rank high as potential archives of downloaded materials, but for spoliation purposes the
15 point remains that Uber never controlled, destroyed, or otherwise failed to preserve the
16 information on those laptops, as least as far as the record shows. No amount of lawyer
17 argument could transform these facts into anything resembling “spoliation.”

18 As to the other four categories of evidence mentioned in Waymo’s motion, Uber does
19 not dispute that such evidence has been lost and cannot be restored or replaced through
20 additional discovery. Instead, Uber contends no sanction is appropriate because (1) Waymo’s
21 motion came too late (Dkt. No. 2240-4 at 1–5), (2) the spoliated evidence was irrelevant (*id.* at
22 19–20), and (3) Uber acted in good faith (*id.* at 20–22).

23 *First*, Uber’s timeliness argument is not well taken. True, Waymo first caught wind of
24 certain instances of spoliation, like the destruction of the five discs, in June 2017. But as
25 Waymo points out, the issue accreted for several months thereafter. Waymo also reasonably
26 expended additional time investigating the circumstances under which evidence had been lost
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28 ¹² Slack is a collection of tools and services — including, for example, chat messages — used to facilitate communication and collaboration in a digital workspace.

1 (see Dkt. No. 2199-4 (production of evidence on August 23, 2017, regarding automatic deletion
2 settings for Kalanick’s cell phone)). And, until the eventual court-ordered production of the due
3 diligence materials in September 2017, Waymo did not even have a clear view of the facts
4 underlying the Otto acquisition. This hindered, for example, Waymo’s ability to assess the
5 significance of the five destroyed discs and the deleted messages between Levandowski, Ron,
6 Kalanick, and Qi. Indeed, the spoliation issue continued to evolve even *after* Waymo filed its
7 motion with the eleventh-hour discovery of the Jacobs materials, discussed further below.
8 Under these circumstances, Waymo did not file its motion too late to obtain relief.

9 *Second*, Uber’s arguments that the spoliated evidence was irrelevant are similarly
10 meritless. Uber posits that the hundreds of deleted text messages among Levandowski, Ron,
11 Kalanick, and Qi would have involved innocuous business matters, not trade secret
12 misappropriation, and points out that other contemporaneous evidence supports its
13 proclamations of innocence. Tell this to the jury. Facts about what transpired between
14 Levandowski, Ron, Kalanick, and Qi in connection with Uber’s acquisition of Otto go to the
15 very heart of this case. Having frustrated its adversary’s attempts to mine these facts for
16 damning evidence, Uber cannot now evade spoliation by speculating that all of the lost
17 information was benign.

18 In this connection, Uber claims the five discs destroyed by Levandowski could not have
19 contained relevant information because they were destroyed before he joined Uber. And, Uber
20 points out, Waymo’s searches of *other* devices and servers have turned up no evidence of any
21 misappropriated trade secrets. The glaring fact remains, however, that those five discs, like
22 Levandowski’s personal laptops, could easily have held Waymo’s alleged trade secrets and
23 could have been a link in the chain showing how Levandowski funneled those trade secrets to
24 Uber (if he in fact did so). And, viewed in context, evidence that Uber itself directed
25 Levandowski to destroy those five discs could potentially support either Uber’s narrative that it
26 was trying to *avoid* misappropriation or Waymo’s narrative that it was trying to *conceal* it.

27 In a similar vein, Uber claims no Tyto emails could be relevant because they predated
28 the Otto acquisition and therefore cannot contain evidence of misappropriation. But Waymo

1 can argue — and has argued — that Levandowski brought its trade secrets to Uber indirectly by
2 developing technology at Tyto and Otto that were later absorbed by Uber via a series of
3 corporate acquisitions. Waymo also can argue — and has argued — that the plot for
4 Levandowski to funnel its misappropriated secrets to Uber predated the Otto acquisition itself.
5 Again, under these circumstances, Uber’s unfounded insistence that the evidence it failed to
6 preserve would have been irrelevant does not bar Waymo’s requests for relief.

7 *Third*, Uber argues that there is no evidence of bad faith in its failure to preserve
8 evidence. This argument goes to FRCP 37(e)(2), which requires the Court to find that the party
9 that failed to preserve evidence “acted with the intent to deprive another party of the
10 information’s use in the litigation” before granting certain forms of relief.

11 On this record, there is considerable ground for Waymo to argue that Uber had the
12 requisite intent to warrant relief under FRCP 37(e)(2), particularly in light of evidence
13 stemming from the Jacobs materials discussed further below. At this stage, however, we face a
14 different problem. In advance of Waymo’s offer of proof regarding the Jacobs materials and
15 their relationship to the spoliation and misconduct issues in this case, a prior order specifically
16 asked Waymo to “explain the practical details of how it will implement its offer of proof,
17 including the names of specific sponsoring witnesses and how they will overcome hearsay
18 objections” (Dkt. No. 2447). In response, Waymo provided a bare-bones chart that lists various
19 documents, the names of potential sponsoring witnesses, and boilerplate summaries of rules
20 governing potential hearsay exceptions with no analysis whatsoever of how those exceptions
21 might apply here (*see* Dkt. No. 2470-36). This underscores the recurring problem that Waymo
22 seems unwilling or unable to prove its case at trial with qualified witnesses and evidence and
23 seeks to have the Court fill in the gaps with adverse inferences instead.¹³

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26 ¹³ In yet another example of this recurring problem, Waymo previously sought permission to file yet
27 another “motion for relief based on defendants’ litigation misconduct.” In addition to repeating Waymo’s
28 requests for remedial and adverse-inference instructions, the proposed motion would have sought evidentiary
and terminating sanctions as to Uber’s *liability for trade secret misappropriation*. The proposed motion would
also have argued that “Waymo should be allocated an additional two hours of time at trial, *and Defendants
should be docked two hours*” (Dkt. No. 2472 (emphasis added)). A prior order denied Waymo’s request to file
this proposed motion (Dkt. No. 2494).

1 This order therefore reserves decision on the question of whether or not Uber spoliated
2 evidence with the intent to deprive another party of its use in litigation, and further reserves
3 decision as to whether or not the jury will be instructed that it may or must presume the lost
4 information was unfavorable to Uber. *See* F.R.C.P. 37(e)(2)(B). These questions will be
5 decided after Waymo presents its case-in-chief at trial, during which at least some proof of the
6 facts underlying the spoliation motion (to the extent admissible), and possibly additional
7 evidence on point, will go before the jury anyway. The undersigned judge will use this
8 presentation of proof and any additional evidence on point to supplement the current motion
9 record on the issue of intent for spoliation purposes.

10 **3. OFFER OF PROOF RE JACOBS MATERIALS.**

11 A wholly third universe of Uber’s alleged “misconduct” has flowed from the Jacobs
12 affair. After so many pages, the reader will be forgiven for forgetting that Richard Jacobs was a
13 former Uber employee turned “whistleblower” whose attorney sent Uber a 37-page demand
14 letter dated May 5, 2017, filled with scandalous accusations that led to a jackpot settlement.

15 This order draws three conclusions from Waymo’s lengthy offer of proof regarding the
16 Jacobs materials and Uber’s response thereto, as explained in detail below. *First*, this order
17 rules on Waymo’s request to present certain instances of Uber’s purported “discovery
18 misconduct” to the jury. In that connection, if either side presents evidence or argument
19 regarding the Jacobs letter at trial, the Court will likely inform the jury that Uber withheld the
20 Jacobs letter and explain that the jury may, but need not, draw some adverse inference against
21 Uber based on that fact. *Second*, Waymo may adduce certain facts before the jury to show that
22 Uber sought information about the technical details of Waymo’s self-driving technology, and
23 that Uber sought to minimize its “paper trail” by using ephemeral communications, but other
24 facts and allegations stemming from the Jacobs materials will be excluded under FRE 403.
25 *Third*, the Jacobs materials themselves will be excluded at trial as hearsay, among other things
26 (unless a door is opened), except that they may be used to impeach Jacobs if he testifies at trial.
27 Now follow the details.
28

1 **A. Uber’s “Discovery Misconduct” and Concealment of Jacobs Letter.**

2 The Court agrees with the special master that Uber should have produced the Jacobs
3 letter in discovery (Dkt. Nos. 2396, 2444). Uber’s failure to do so falls into a broader category
4 of “discovery misconduct” complained of by Waymo, as this order now addresses.

5 Waymo previously moved *in limine* to prevent Uber from presenting any evidence or
6 argument that it made good faith efforts to locate the downloaded materials over the course of
7 this litigation (*see* Dkt. No. 913). Uber responded that it should be allowed to adduce facts
8 before the jury showing that Uber (1) conducted extensive searches of its own servers and
9 systems, (2) fired Levandowski for not cooperating with its litigation efforts, and (3) let Waymo
10 conduct eleven inspections of Uber’s facilities and LiDAR designs (*see* Dkt. No. 978). During
11 the motion hearing, the undersigned judge ruled that both sides could present their narratives
12 about Uber’s “good citizen” and “bad citizen” behavior to the jury (*see* Dkt. No. 1050 at
13 72:6–14). Pursuant to that ruling, Waymo submitted a list of 23 instances of Uber’s “discovery
14 misconduct” that Waymo wished to present to the jury, to be vetted before trial (Dkt. No. 1356).
15 This order rules on Waymo’s proposals as follows:

16 1. Uber’s failure to timely disclose 17 the destruction of the five discs.	As stated, the Court will inform the jury of this fact and instruct the jury that it may, but need not, draw any adverse inference from it.
18	
19 2/3. MoFo’s receipt and retention of 20 downloaded materials in its former 21 role as Levandowski’s personal 22 counsel.	Excluded as unfounded and irrelevant to the extent and for the reasons stated herein.
23	
24 4. Uber’s failure to compel Stroz to 25 produce downloaded materials.	Excluded as unfounded and irrelevant to the extent and for the reasons stated herein.
26	
27 5. Stroz’s receipt and retention of 28 unexamined devices from Levandowski.	Excluded as unfounded and irrelevant to the extent and for the reasons stated herein.
29	
30 6/9/10/11/12/13/15/16. Uber’s 31 assertions of privilege throughout this litigation, including over information and materials that were	Permitted to the extent stated in prior rulings but excluded under FRE 403 to the extent stated herein insofar as Waymo just wants to complain to the

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withheld during the pendency of the Federal Circuit appeal and turned over after the Federal Circuit’s decision.

jury that Uber violated prior orders. The latter grievances are largely meritless, offer little to no probative value, risk confusing the issues and unduly consuming time at trial, and are cumulative of other facts that will be presented to the jury regarding said violations.

7. Uber’s supplementation of its communications log after the deadline imposed by the provisional relief order.

As stated, the Court will inform the jury of this fact and instruct the jury that it may, but need not, draw any adverse inference from it.

8/22/23. Waymo’s complaints about Otto Trucking’s conduct.

Excluded as irrelevant because Otto Trucking has been dismissed.

14. Uber’s supplementation of its accounting after the deadline imposed by the provisional relief order.

The Court will inform the jury of this fact for the same reasons and under the same conditions as with Uber’s belated supplementation of its communications log.

17. Imperfections in Uber’s production of text messages between Levandowski and Kalanick that were *not* deleted.

Excluded under FRE 403 because this grievance about text messages that were ultimately produced adds little to no probative value over and above Uber’s failure to preserve other text messages. It would just further distract from the merits and consume undue time at trial.

18. The deletion of text messages between Levandowski and Kalanick.

As stated, Waymo will be allowed to adduce facts showing this to the jury, but this order reserves decision on whether or not to give an adverse-inference instruction as well.

19. Uber’s failure to disclose what Waymo claims to be the connection between Levandowski and Tyto.

Waymo may present evidence and argue before the jury that Uber knew about but concealed Levandowski’s connection to Tyto. Uber may present evidence and argue to the contrary (*see* Dkt. No. 1534 at 6). Such evidence and argument will be allowed while they remain probative of Waymo’s theory that Uber and Levandowski surreptitiously siphoned off trade secrets via a series of corporate transactions, but

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20. Uber produced many documents near the end of discovery, some of which, according to Waymo, seemed relevant to Uber’s defense.

will be excluded if they devolve into more whining about Uber’s supposed obstruction of discovery.

Excluded because this has no discernible relevance to anything in the case. Waymo does not even bother to explain why producing documents near the end of discovery would constitute “misconduct.”

21. Uber’s claim that Levandowski refused to cooperate in this litigation.

This topic is encompassed by and addressed below in the context of Waymo’s motion *in limine*.

In addition to the foregoing, if Waymo uses the Jacobs letter at trial to impeach Jacobs, then the Court will likely inform the jury that Uber should have produced the letter in discovery but failed to do so. Counsel may not reference the letter from the Office of the United States Attorney or the Jacobs materials without prior permission of the Court (but may, of course, reference Jacobs himself).

B. Admissible Evidence Stemming from Jacobs Materials.

Now we turn to certain subjects stemming from the Jacobs materials and the extent to which those subjects (separate and apart from the Jacobs materials themselves) may be pursued via otherwise admissible evidence before the jury.

Uber’s interest in and efforts to collect data about the technical details of Waymo’s self-driving technology for competitive purposes are reasonably probative of Uber’s state of mind regarding competition with Waymo, and therefore of Waymo’s theory that Uber misappropriated Waymo’s trade secrets to improve its own self-driving technology. Waymo will be permitted to present evidence and argument on these issues at trial, provided, of course, that it can do so through qualified witnesses and evidence (*see* Dkt. No. 2466-3 at 12–17). Waymo will not, however, be permitted to further present evidence and argument that Uber also surveilled other competitors because such evidence and argument would be too attenuated from Waymo’s misappropriation claims, substantially more prejudicial than probative, and therefore excluded under FRE 403. If Waymo opens the door, however, by claiming that Uber spied on

1 it, Uber will be allowed to respond with evidence and argument that it spied on everyone and
2 Waymo was not special in that regard. In all events, Uber will be allowed to respond with
3 evidence and argument that its competitive intelligence-gathering efforts were all legitimate and
4 that Waymo itself engaged in similar activities (*see* Dkt. No. 2500-4 at 18–20).

5 Uber’s use of ephemeral communications is also relevant as a possible explanation for
6 why Waymo has failed to turn up more evidence of misappropriation in this case. Waymo will
7 therefore also be permitted to present evidence and argument on this subject at trial, provided
8 that it can do so through qualified witnesses and evidence (*see* Dkt. No. 2466-3 at 20–22). Of
9 course, Uber will be allowed to present its own evidence and argument that its use of ephemeral
10 communications shows no wrongdoing, including by pointing out Waymo’s own use of
11 ephemeral communications (*see* Dkt. No. 2500-4 at 14–18).

12 If Jacobs testifies at trial, then the Jacobs materials themselves, and evidence regarding
13 Jacobs’s settlement with Uber, may be used for impeachment purposes only (*see, e.g.*, Dkt. No.
14 2466-3 at 26 (Waymo’s offer of proof regarding the settlement)). To be clear, such use would
15 only be permissible as to specific passages that actually contradict Jacobs’s testimony at trial.
16 The Jacobs materials as a whole will not sail into evidence under the pretext of impeachment.

17 **C. Inadmissible Evidence Stemming from Jacobs Materials.**

18 Uber’s use of non-attributable devices is excluded under FRE 403 because, as Waymo
19 admits, that problem remained confined to SSG and MA, neither of which are implicated by
20 Waymo’s claims of trade secret misappropriation. The closest Waymo comes to showing any
21 connection is by pointing out that Levandowski used two personal laptops for his work at Uber
22 (*see* Dkt. No. 2466-3 at 17–20). But there is no indication whatsoever that Levandowski’s use
23 of personal laptops had anything to do with Uber’s systemic use of non-attributable devices in
24 the SSG and MA groups. If anything, Waymo’s transparent attempt to conflate two disparate
25 topics by distorting the meaning of the phrase “non-attributable devices” merely confirms that
26 permitting evidence of Uber’s use of non-attributable devices would invite confusion and
27 prejudice Uber without contributing any probative value at trial.
28

1 Uber’s internal policies and practices regarding privilege designations are also excluded
2 under FRE 403. While this information is arguably relevant to show Uber’s efforts to conceal
3 its paper trail, the same point can be made through evidence concerning Uber’s spoliation of
4 evidence and use of ephemeral communications. Its probative value is further diminished
5 because, regardless of how Uber internally designated its documents, its counsel in this
6 litigation separately assessed whether or not to produce those documents. Actual assertions of
7 privilege in this litigation have been hotly contested and examined at length by the special
8 master, Judge Corley, the undersigned judge, and the Federal Circuit. In light of all this, it
9 would be misleading for Waymo to suggest to the jury that Uber’s internal privilege
10 designations translated neatly into obstruction of discovery in this litigation. Finally, allowing
11 Waymo to delve into Uber’s internal privilege designations would invite a counter by Uber that
12 Waymo itself has taken liberties with the appropriate bounds of privilege. We already run the
13 risk that our trial will devolve into finger-pointing over who used the worst litigation gimmicks.
14 The kerfuffle about overbroad internal designations of privilege does not justify further
15 exacerbating this risk.¹⁴

16 Waymo’s offer of proof also strays far out of bounds in describing at length Uber’s
17 consideration of an “Information Governance Initiative to review its process for retaining
18 documents . . . to retain ‘the smallest amount of required data.’” Waymo does not dispute that
19 Uber *never implemented this initiative* but nevertheless insinuates that Uber’s “willingness to
20 consider such a controversial policy, and the internal reaction thereto, raises serious concerns
21 regarding its preservation of relevant data in this case” (*see id.* at 24–26). In other words,
22 Waymo devoted time and effort to describing salacious and inflammatory details about Uber
23 that have no discernible relevance to the claims in this case in an apparent bid to poison the
24 judge, if not the jury, against Uber. This entire narrative is excluded under FRE 403. Indeed,
25 these tactics by Waymo further demonstrate why it remains particularly important in this case to
26 exclude irrelevant and prejudicial evidence and to keep the trial focused on the merits.

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28 ¹⁴ As stated, however, pursuant to a prior ruling, Waymo may present evidence that the due diligence process was shrouded in elaborately-contrived privileges that were ultimately rejected by final court order.

1 Waymo's offer of proof also perpetuates its habit of complaining at length about Uber's
2 supposed obstruction of discovery, including via alleged uses of privilege as both sword and
3 shield (*see* Dkt. No. 2466-3 at 7–12, 36–47). Most of these complaints concern disputes that
4 should have been brought to Judge Corley for resolution in the ordinary course of discovery.
5 No further relief is warranted for such disputes. And, insofar as Waymo's litany of recurring
6 grievances remains relevant only for the single basic point that Uber supposedly obstructed
7 discovery, that point can be more than adequately presented to the jury via the evidence and
8 argument permitted above. The rest of Waymo's laundry list would be cumulative and would
9 offer little to no probative value, while threatening to overshadow the merits. It is therefore
10 excluded under FRE 403. To repeat, Waymo will not be permitted to transform this trial on
11 alleged trade secret misappropriation into a trial on Uber's litigation conduct (or misconduct).

12 Waymo's offer of proof further regurgitates its protests regarding Uber's spoliation of
13 evidence and violations of prior orders (*see id.* at 27–36). Those issues will be dealt with as
14 previously described. No further relief is warranted at this time based on Waymo's offer of
15 proof — although, as stated, this order reserves the possibility of instructing the jury that it may
16 or must presume the evidence Uber failed to preserve would have been unfavorable to Uber.

17 **4. WAYMO'S MIL NO. 14 RE LEVANDOWSKI'S COOPERATION.**

18 One last loose end. Waymo previously moved *in limine* to prevent Uber from
19 presenting evidence or argument that Anthony Levandowski has not cooperated with its defense
20 of this action. Waymo contends Levandowski has in fact cooperated when doing so served his
21 purposes but he and Uber have prevented Waymo from discovering the true degree of
22 cooperation under the guise of privilege, raising a sword-and-shield problem (*see* Dkt. No.
23 1551-4). Insofar as Waymo essentially complains (again) that Uber improperly asserted
24 privilege, this is yet another garden-variety discovery dispute that should have been presented to
25 Judge Corley for resolution.

26 A different problem remains, however, in that Uber's assertions of privilege on this
27 subject, even if proper, still conceal significant swaths of a larger picture from view. It would
28 be misleading and unfair for Uber to make broad representations to the jury about

1 Levandowski's supposed non-cooperation while Waymo remains hamstrung in attempting to
2 counter with evidence of selective cooperation. To mitigate this unfairness, Uber, like Waymo,
3 will be allowed to show non-privileged examples of where Levandowski failed to cooperate but
4 will not be allowed to further argue in general terms that Levandowski rarely or never
5 cooperated, since any such argument would necessarily make implicit representations about the
6 entire field of interactions — privileged or not — on this subject. Should Uber fail to abide by
7 these ground rules at trial, the Court may consider allowing Waymo to adduce before the jury
8 that Uber asserted privilege on this subject, possibly with excerpts of Uber's privilege log to
9 show entries that cast doubt on Uber's claims of non-cooperation. Waymo's motion is
10 **GRANTED** only to the extent stated herein and is otherwise **DENIED**.

11 **5. SUMMARY.**

12 As stated, this order resolves the remaining constellation of issues in this litigation
13 concerning Uber's alleged litigation misconduct and other bad behavior, many of which have
14 waited until now to facilitate a comprehensive and consistent analysis. The subjects addressed
15 herein fall into three categories, which this order now briefly recaps.

16 *First*, the Court itself will inform the jury that, despite the expedited discovery and
17 provisional relief orders, Uber failed to timely disclose the destruction of the five discs and
18 repeatedly supplemented both its communications log and accounting after the ordered
19 deadlines. The Court will instruct the jury that it may, but need not, draw any adverse inference
20 from these facts, and will further explain that the nature of any adverse inference likewise
21 remains up to the jury. To take a hypothetical example, even if the jury infers that Uber
22 deliberately concealed the destruction of the five discs, Uber may argue (and the jury may
23 believe) that it did so not to conceal any misappropriation of trade secrets but for other reasons.
24 (This example is included herein for clarity only and will not be described to the jury.) In
25 addition, please remember that this order reserves the possibility of an adverse-inference
26 instruction pursuant to FRCP 37(e) based on Uber's spoliation of evidence.

27 *Second*, as explained above, evidence of Uber's litigation misconduct or corporate
28 culture may be relevant and admissible insofar as it reasonably bears on the merits of this case.

1 This includes evidence and argument that Waymo has been unable to find stronger proof of its
 2 claims due to Uber's obstruction tactics. But such evidence will not be allowed to consume the
 3 trial to the point that it becomes a distraction from the merits or turns into a public exercise in
 4 character assassination. Again, the point is to maintain a fair balance between allowing Waymo
 5 to reasonably explain any weaknesses in its case on the one hand, and preventing Waymo from
 6 sidestepping its burden of proof by inflaming the jury against Uber on the other.

7 *Third*, all other subjects not expressly ruled out herein (or in earlier orders) may be
 8 pursued via qualified and properly-disclosed witnesses and evidence. Additionally, even
 9 evidence excluded under FRE 403 herein may become admissible if the opposing side opens the
 10 door. In a similar vein, this order is without prejudice to the possibility that, depending on how
 11 events unfold at trial, the balance of considerations may sua sponte shift so as to warrant a
 12 second look at rulings made under FRE 403 herein. But please, no motions for reconsideration.

13 No witness or lawyer in this case may reference this order or any finding herein before
 14 the jury. No opening statement or voir dire question may reference the Court's intention to
 15 inform the jury of certain facts. The Court will do so in due course. The opening statements
 16 may, however, reference counsel's intention to prove up underlying facts, *e.g.*, in connection
 17 with Uber's violations of prior orders.

18 CONCLUSION

19 Plaintiff's requests for relief are **GRANTED** only to the extent stated herein and are
 20 otherwise **DENIED**. Any request for relief by either side arising out of the constellation of issues
 21 discussed herein but not addressed by this or any prior order is hereby **DENIED**.

22
 23 **IT IS SO ORDERED.**

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 25 Dated: January 29, 2018.

26 
 27 WILLIAM ALSUP
 28 UNITED STATES DISTRICT JUDGE