[Submitting counsel below]

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: UBER TECHNOLOGIES, INC., PASSENGER SEXUAL ASSAULT LITIGATION

This Document Relates to:

All Cases

No. 3:23-md-03084-CRB

PLAINTIFFS' BRIEF REGARDING DISPUTED ENTRIES FOR SPECIAL MASTER REVIEW

Judge: Honorable Barbara S. Jones
Date: TBD
Time: TBD
Via: TBD

INTRODUCTION

To date, Uber has asserted privilege over approximately 73,077 documents (prior to Uber removing numerous privilege assertions in response orders from Magistrate Judge Cisneros and per the process described below). Assessing Uber's privilege claims has been a game of whack-a-mole.

The basic problem has been that Uber, on the front-end, designates thousands of documents *en masse*, and only on the back end—after Plaintiffs have been forced to review and object to tens of thousands of log entries in a short time frame—conducts the type of "investigating and speaking with individuals" actually necessary to support a privilege claim. *See* 10/23/24 H'rg Tr. at 39, attached to the March 4, 2025 Declaration of Tiffany Ellis ("Ellis Declaration"), as Exhibit 1 (M. Shortnacy describing Uber's process); *see also id.* at 34 ("[T]he quicker that we're putting logs together, the more conservative we need to be, the less we risk waiver…"). When confronted with particular documents that are plainly not privileged, Uber has withdrawn its privilege claims but failed to fully apply the Court's instructions more broadly and appropriately to the existing privilege logs.

After numerous meet and confers regarding selected log entries, Uber has withdrawn or modified its privilege assertions as to approximately *78%* of Plaintiffs' selected privilege challenges. *See* Privilege Challenge Chart, attached to Ellis Declaration, Exhibit 2. And the Court has found numerous other documents or communications not privileged after in-camera review (and after Uber re-reviewed the documents and still maintained its improper privilege assertions).

Uber's failure to provide sufficient information about the documents it withholds due to specious privilege assertions has led to unnecessary delay, a waste of Plaintiffs' and the Court's

time and resources, and prejudice to Plaintiffs. Now, with depositions underway, Plaintiffs have been deprived of the ability to meaningfully and timely analyze what may be some of the most important materials in this case, which should have been produced at the latest over two months ago, in sufficient time to question those witnesses who may have knowledge of these documents.

BACKGROUND

In order to address privilege log disputes and inefficiencies created by Uber's numerous unsubstantiated privilege assertions, the Court entered Discovery Management Order (ECF No. 1732), which set out a process for challenging Uber's privilege claims. The Court subsequently issued Pretrial Order No. 20 (Modified Schedule and Directives Regarding Production and Privilege Disputes)(ECF No. 1808) which separated custodians into Tranches and streamlined the privilege log dispute process. The Court ordered the parties submit privilege challenges in four separate tranches (based on custodial productions) *via* joint letters, with associated meet and confers to potentially resolve disputed privilege claims.

After numerous meet and confers which took place between October 2024 and January 2025 regarding selected log entries, Uber withdrew or modified its privilege assertions as to approximately *78%* of Plaintiffs' privilege selections. *See* Ellis Declarations at ECF Nos. 1812-1, 1952-1, 2091-1, 2089-1. In the majority of these cases, Uber fully withdrew its privilege claims; in the remainder, it agreed to produce documents with redactions. And this is on top of numerous overruled privilege claims in the Court's Clawback Order (ECF No. 1727) and Privilege Determination Orders (ECF Nos. 1908, 2005, and 2168), all of which only went to the Court *after* Uber re-reviewed the challenged documents to reassess its prior privilege assertions, as described herein.

Since Uber produced its first privilege log on April 16, 2024, it has withdrawn privilege

assertions on approximately 11,799 entries.[1] At bottom, the privilege review process to date shows there is reasonable inference that Uber "has been grossly overbroad on designations" so as to "warrant a comprehensive review of certain categories of documents." *See* 10/23/24 H'rg Tr. at 29, Ellis Declaration, Ex. 1.

A. Tranche 1 Privilege Challenges

Uber initially provided four privilege logs within Tranche 1. The first privilege log, provided on September 14, 2024, contained 4,395 entries regarding Katherine McDonald's custodial file. Plaintiffs challenged 3,282 of these entries because they contained insufficient detail for Plaintiffs to assess Uber's privilege claim and/or because Uber's descriptions did not establish that the document or communication at issue was in fact privileged.

The second Tranche 1 privilege log, provided to Plaintiffs on September 15, 2024, contained 1,183 entries regarding Andi Pimentel's custodial file. Plaintiffs challenged 771 of these entries. The third Tranche 1 privilege log, provided to Plaintiffs on September 20, 2024, contained 2,839 entries regarding multiple custodial files. Plaintiffs challenged 1,886 of these entries. The final Tranche 1 privilege log, provided to Plaintiffs on September 25, 2024, contained 17,122 entries regarding multiple custodial files. Plaintiffs challenged 10,634 of these entries.

The parties submitted multiple rounds of samples during the meet and confer process regarding these privilege logs. After conferring over several selected log entries, Uber withdrew or modified its privilege assertions as to approximately *90%* of Plaintiffs' initial privilege selections (covering 13 log samples), *100%* of Plaintiffs' second round selections (covering five log samples), and nearly *80%* of Plaintiffs' third round selections (covering 33 log samples). *See* Ellis Declaration

[1] After Uber finally provided new and more complete information in its updated Privilege Logs or later production of documents with redactions, Plaintiffs removed challenges to over 4,100 entries prior to this re-review process.

at ECF No. 1812-1 ¶¶ 18, 22. In the majority of these cases, Uber fully withdrew its claim of privilege; in the remainder, it agreed to produce documents with redactions.

Subsequently, Plaintiffs submitted six samples to this Court for *in camera* review. On November 27, 2024, the Court found that *five of these six* samples submitted to the Court were not privileged and needed to be produced in full or in part. (ECF No. No. 1908.)

B. Tranche 2 Privilege Challenges

Uber asserted privilege for approximately 14,292 entries regarding Tranche 2 Custodian documents. Out of 14,292 Tranche 2 privilege log entries, Plaintiffs challenged 5,611 entries. As before, assessing Uber's privilege claims was exceedingly difficult because Uber designates thousands of documents *en* masse, and only after Plaintiffs review and challenge tens of thousands of log entries within a short time span does Uber provide additional information to allow Plaintiffs to ascertain privilege claims.[2]

Regardless, Plaintiffs provided Defendants with 45 entries in dispute per the sampling process laid out in PTO 20. Defendants withdrew their privilege claim in whole or in part to 33 of the 45 samples. (*See* Ellis Declaration at ECF No. 1952-1.) Thus, Uber agreed that approximately *73%* of the Tranche 2 samples were erroneously designated as privileged. Uber made this same concession as to appropriately *84%* of the samples Plaintiffs selected from the Tranche 1 privilege log. (*See* Ellis Declaration at ECF No. 1812 at 1-2.) Again, Plaintiffs challenged 5,611 entries on the Tranche 2 log. Assuming 73% of those are also mis-designated, there are 4,096

[2] The Court noted these issues in its November 27, 2024 Order (ECF No. 1908) whereby the Court ordered Uber to provide updated privilege log entries with additional information regarding certain entries (*id.* at 9) and required Uber to "ensure that its privilege log descriptions are accurate and that attorneys are clearly identified." *Id.* at 10. The Court also noted "systemic errors" in Uber's privilege log entries, stating that log entries indicated that documents were "prepared at the direction of in-house counsel," but Uber did not provide evidence to support those assertions" and failed to properly designate all attorneys involved with the document in the "Privileged Name(s)" column. *Id.* at 15.

documents that Uber is (or was) improperly withholding.

As part of the PTO 20 process, after Uber withdrew privilege claims as described above, Plaintiffs submitted 13 samples to the Court for *in camera* review. On December 21, 2024, the Court found that eight of the thirteen samples were not privileged and must be produced in full or in part, including one sample Uber stated they would produce with redactions in their briefing. (ECF No. 2005.) The Court also ordered the parties to randomly select 20 Tranche 2 entries and 10 Tranche 3 entries for inclusion in the dispute process. (*Id.* at 14.)

C. Tranche 3 Privilege Challenges

Uber asserted privilege for approximately 17,500 entries regarding Tranche 3 Custodian documents. Plaintiffs challenged 8,164 of the 17,579 entries. Plaintiffs also notified Uber of the 60 samples, and three attachments to emails, selected pursuant to PTO 20. The parties met and conferred, resolving certain issues and addressing the samples. Of the 63 samples, Uber agreed to produce 37 documents in full and 15 documents with redactions, while only maintaining its privilege claims to 10 documents. (*See* Ellis Declaration at ECF 2091-1.)

In sum, Uber agreed that approximately *59%* of the Tranche 3 samples were erroneously designated as privileged and altered their stance on approximately *84%* of the samples. Again, Uber made this same concession as to appropriately *84%* of the samples from the Tranche 1 privilege log and approximately *73%* of the samples from the Tranche 2 log. (*See* Ellis Declarations at ECF 1812-1 and at ECF 1952-1.) Plaintiffs challenged 8,164 entries on the Tranche 3 log. Assuming 84% of those are also mis-designated, there are approximately 6,800 documents that Uber previously improperly designated as privileged.

Additionally, on or about December 30, 2024, the parties randomly selected 20 Tranche 2 samples and 10 Tranche 3 samples for privilege review per the Court's prior order. (ECF No. 2087.) Defendants withdrew their privilege claim in whole or in part to *12 of the 20* randomly selected

Tranche 2 samples. (ECF No. 2089-1.) Plaintiffs withdrew their challenges to four of these samples. (*Id.*) As to the randomly selected Tranche 3 samples, Defendants withdrew their privilege claim in whole or in part *to seven of the ten* samples. (*Id.*)

On January 29, 2025, after *in camera* review, the Court held that two of the thirteen Tranche 3 samples and four of the six randomly selected Tranche 2 samples still at issue (and after Uber re-reviewed their privilege assertions as to these documents) were not privileged and must be produced in full or in part. (ECF No. 2168.)

D. Tranche 4 Privilege Challenges

On December 11, 2024, Defendants provided their Tranche 4 privilege log containing 9,968 entries. Plaintiffs challenged 1,893 of these entries. However, on February 7, 2025, the Court granted the parties' stipulation vacating certain deadlines related to Tranche 4. (ECF No. 2307.) Consequently, these entries did not go through the PTO 20 dispute process.

On February 6, 2025, the Court entered an order appointing the Special Master. (ECF No. 2289.) Defendants were also ordered to re-review their Tranche 1-4 privilege logs and produce revised privilege logs. (ECF No. 2357.)

From February 3, 2025 to February 18, 2025, pursuant to the Special Master Order No. 2 ("MO 2"), Uber produced revised privilege logs for eight of the first thirteen custodians as set forth in ECF No. 2344 and Appendix A to MO 2.[3]

On February 24, 2025, Plaintiffs provided the Special Master and Defendants with a list of 372 remaining challenges to the initial disputed privilege log entries for those eight custodians following Defendants' re-review of the disputed entries. During the meet and confer process, Defendants withdrew their privilege claim in full as to 98 entries, which includes a few entries

[3] These custodians are Chad Fogg, Cory Freivogel, Nairi Hourdajian, Kate Parker, David Richter, Megan Joyce, Jenny Luu, and Kayla Whaling.

previously withdrawn before the conferral process. Additionally, Defendants stated they will produce 60 entries with redactions. When Defendants provided an updated revised log for the redacted entries, they withdrew their privilege claim to one additional entry. Plaintiffs also removed challenges to 80 entries. Accordingly, 193 entries for these eight custodians are still in dispute. The spreadsheets Plaintiffs provided Uber and the Special Master on February 27, 2024 and March 3, 2025 provide detailed reasons why Plaintiffs challenge each entry based on the limited information provided by Uber to Plaintiffs.

LEGAL STANDARD

"[I]n a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision." Fed. R. Evid. 501. The parties agree that California law applies to Uber's claim of privilege. (ECF No. 664 at 2, 5, n.7); *see also Holley v. Gilead Scis., Inc*., No. 18-cv-06972, 2021 WL 2371890, at *2 (N.D. Cal. June 10, 2021)(applying California choice-of-law rules to conclude that California privilege law applied in a case with "factual connections to multiple states," where no party introduced evidence of a conflict of laws or another state's governmental interest in applying its own law).

Under California law, the attorney-client privilege is governed by statute and applies to confidential communications between client and lawyer during the course of the attorney-client relationship. *See* Cal. Evid. Code §§ 911, 954, 952. "The party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise." *Costco Wholesale Corp. v. Superior Ct*., 47 Cal. 4th 725, 733 (2009).

"[T]o determine whether a communication is privileged, the focus of the inquiry is the dominant purpose of the relationship between the parties to the communication." *Clark v. Superior Ct*., 196 Cal. App. 4th 37, 51 (2011). Where the "dominant purpose of the relationship between the parties to the communication was one of attorney-client, the communication is protected by the

privilege." *Id*. "[R]outine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." *Zurich Am. Ins. Co. v. Superior Ct*., 155 Cal. App. 4th 1485, 1504 (2007). And a corporation cannot "shield facts, as opposed to communications, from discovery. Any relevant fact may not be withheld merely because it was incorporated into a communication involving an attorney." *Id*. Finally, "the attorney-client privilege is inapplicable where the attorney merely acts as a negotiator for the client, gives business advice or otherwise acts as a business agent." *Chi. Title Ins. Co. v. Superior Ct*., 174 Cal. App. 3d 1142, 1151 (1985)(citing *Aetna Cas. & Sur. Co. v. Superior Ct*., 153 Cal. App. 3d 467, 475 (1984)).

"Under California law, the communications of corporate employees with counsel, or with each other about legal advice, are privileged [] only to communications regarding legal advice, not corporate policy." *OwLink Tech., Inc v. Cypress Tech. Co., Ltd,* No. 21-cv-00717, 2023 WL 4681543, at *2 (C.D. Cal. June 29, 2023)(citing *Zurich*, 155 Cal. App. 4th at 1500-02). Where employees "discuss what business policies [a] corporation[] should pursue in the light of [] legal advice," *AdTrader, Inc. v. Google LLC*, 405 F. Supp. 3d 862, 865 (N.D. Cal. 2019)(citation omitted), such communications are not presumptively privileged. Business communications are not protected merely because they follow the provision of legal advice.

"It is established that otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda." *Zurich*, 155 Cal. App. 4th at 1504 (collecting cases). Communications involving in-house counsel "warrant[] heightened scrutiny because in-house counsel may act as integral players in a company's business decisions or activities, as well as its legal matters." *Wisk Aero*

LLC v. Archer Aviation Inc., No. 21-cv-02450, 2023 WL 2699971, at *4 (N.D. Cal. Mar. 29, 2023) quoting *Oracle Am., Inc. v. Google, Inc*., No. 10-cv-03561, 2011 WL 3794892, at *4 (N.D. Cal. Aug. 26, 2011). Indeed, "a particular transmission of [a] draft directly to an attorney retained to provide legal advice would likely be privileged, but [if] Uber's privilege log and the margin comments on [a] document indicate that the same document was shared contemporaneously with both lawyers and non-lawyers, who edited it for content, style, accuracy, and public relations concerns in addition to assessing legal risk" it is not privileged. (ECF No. 1908 at 6.)

Further, an entire communication may only be deemed privileged "when it contains privileged portions that are so inextricably intertwined with the rest of the text that they cannot be separated." *U.S. v. Christensen*, 828 F.3d 763, 803 (9th Cir. 2015)(citations and internal quotation marks omitted). "If the nonprivileged portions of a communication are distinct and severable, and their disclosure would not effectively reveal the substance of the privileged legal portions, the court must designate which portions of the communication are protected and therefore may be excised or redacted (blocked out) prior to disclosure." *Id*.

Finally, "[i]f a party withholds material as privileged ... it must produce a privilege log that is sufficiently detailed for the opposing party to assess whether the assertion of privilege is justified." *Prado v. Equifax Info. Servs. LLC*, 2019 WL 88140, at *3 (N.D. Cal. Jan. 3, 2019). Pursuant to Federal Rules of Civil Procedure 26(b)(5) and PTO 14, a party must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." If the asserted basis for a withholding or redaction is attorney-client privilege, the privilege log must be sufficiently detailed to allow a party to conclude that the communication was "between attorneys and clients, which are made for the purpose of giving legal advice." *In re Grand Jury*, 23 F.4th 1088, 1091 (9th Cir. 2021)(quoting *U.S. v. Sanmina Corp*., 968

F.3d 1107, 1116 (9th Cir. 2020)). If the asserted basis for a withholding or redaction is work product, the privilege log must be sufficiently detailed to allow a party to conclude that the communications were "prepared by a party or [their] representative in anticipation of litigation." *Sanmina*, 968 F.3d at 1119 (quoting *Admiral Ins. Co. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1494 (9th Cir. 1989)).

ARGUMENT

Plaintiffs' submission to the Special Master details Plaintiffs' basis for challenging remaining privilege log entries still in dispute based on the limited information that Uber has provided to date, and following the immense time and resource consuming efforts detailed above. As to privilege claims still at issue, Uber has not met its burden showing that these documents are privileged. Plaintiffs are not challenging communications made solely with outside counsel or communications that objectively share or discuss attorney advice. Rather, per Uber's limited description as to each communication or document at issue, each was either (i) created primarily for business purposes (as opposed to a legal purpose), (ii) does not appear to seek, convey, or discuss legal advice (and with in-house counsel simply added to an email's cc line), or (iii) was sent to a third party (and privilege was therefore waived).

First, Plaintiffs challenge entries because the documents or communications at issue appear to have a dominant business purpose. These documents involve in-house counsel but, from the descriptions provided, contain both legal and non-legal purpose, and appear to have a dominant business purpose. And while "a particular transmission of [a] draft directly to an attorney retained to provide legal advice would likely be privileged, [if] Uber's privilege log and the margin comments on [a] document indicate that the same document was shared contemporaneously with both lawyers and non-lawyers, who edited it for content, style, accuracy, and public relations concerns in addition to assessing legal risk" it is not privileged. (ECF No. 1908.)

Second, Plaintiffs challenge entries where it is not apparent legal advice was sought or provided, and it appears Uber in-house counsel was simply added to an email's cc line.[4] Of course, sending documents to in-house counsel does not automatically render them privileged. *See Murray v. Mayo Clinic*, 2016 WL 10646315, at *3 (D. Ariz. July 20, 2016)("communications do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer.")(citation omitted)); *see also* ECF No. 1908 ("Multiple log entries indicated that documents were "prepared at the direction of in-house counsel," but Uber did not provide evidence to support those assertions. Uber therefore must review all entries that assert a document was prepared at the direction of counsel to determine whether they are accurate."). And "[m]erely copying or 'cc-ing' legal counsel, in and of itself, is not enough to trigger the attorney-client privilege. Instead, each element of the privilege must be met when the attorney-client privilege is being asserted." *Stirratt v. Uber Techs., Inc.*, 2024 WL 1723710, at *3 (N.D. Cal. Apr. 19, 2024)(internal citation omitted).

For example, for numerous log entries it appears an in-house counsel was simply cc'd on an email along with numerous non-attorneys, with no legal advice sought or given provided -- not only on the individual log entry, but for every entry Defendants logged for a particular email chain. Hence, there are numerous entries with multiple non-attorney email recipients, but with only one in-house counsel on a cc line. Such communications are likely not privileged. *See, e.g., In re Chase Bank USA, N.A. "Check Loan" Contract Litigation*, No. 09–md–2032, 2011 WL 3268091, at *4

[4] According to one former senior executive, Uber employees were apparently instructed "to conceal documents [] by attempting to 'shroud' them with attorney-client privilege or work product protections. [I]f they marked communications as 'draft,' asked for a legal opinion at the beginning of an email, and simply wrote 'attorney-client privilege' on documents, they would be immune from discovery." *See Waymo LLC v. Uber Techs., Inc.*, Case No. 3:17-cv-00939-WHA, Dkt. 2401-1, at 6-7 (Dec. 15, 2017), Ellis Declaration, Exhibit 3. So while the mere stamping of a document privileged does not make it so as a general matter, the Court should be especially skeptical of the prima facie validity of such assertions here.

(N. D. Cal. July 28, 2011)("Merely labeling a communication as an 'attorney-client privileged draft' ... or adding an attorney as a recipient are insufficient to confer privilege when the communication is not otherwise for the purpose of facilitating legal advice or services."); *Oracle Am., Inc. v. Google Inc.*, 2011 WL 5024457, at *4 (N. D. Cal. Oct. 20, 2011)(finding that nothing in the content of an email indicated that it was prepared in anticipation of litigation or to further the provision of legal advice, where email was from an engineer, the salutation of the email addressed only a non-attorney, the attorney was "at most, was a mere 'To' " recipient, and "there was no evidence that the [attorney] actually read or responded to the email, much less used it in constructing any legal advice"); *U.S. v. ChevronTexaco Corp.*, 241 F.Supp.2d 1065, 1074–76 (N.D. Cal. 2002)("[b]ecause in-house counsel may operate in a purely or primarily business capacity in connection with many corporate endeavors, the presumption that attaches to communications with outside counsel does not extend to communications with in-house counsel.").

Third, Plaintiffs challenge Defendants' privilege log entries where no attorney is associated or involved with the communication or document at issue. If the asserted basis for withholding or redaction is attorney-client privilege, the privilege log must be sufficiently detailed to allow Plaintiffs to conclude that the communication was "between attorneys and clients, which are made for the purpose of giving legal advice." *In re Grand Jury*, 23 F.4th at 1091 (internal citation omitted). In numerous instances, without an attorney denoted, Plaintiffs cannot conclude that the communication was actually between an attorney and clients where legal advice was sought or provided. Such entries include where Uber denoted a non-attorney as the person providing legal advice.

And for privilege log entries where Defendants did not denote any attorneys, but simply listed "Uber Legal Department", Defendants must amend these entries. *See* ECF No. 1908 (Uber's references only to "Uber Legal Department" are "unhelpful[ly]" ECF. No. 1908 at 15 ("Multiple

log entries failed to list all attorneys involved in a document in the "Privileged Name(s)" column despite the apparent involvement of one or more attorneys, or failed to designate all attorneys listed in other fields with an asterisk. Uber shall review all log entries that do not include any attorneys in the "Privileged Name(s)" column to determine whether the lack of names in that column is accurate and whether any attorneys listed in other columns for those entries are properly designated."); *see also Palmer v. Cognizant Tech. Solutions Corp.*, 2021 WL 3145982, at *9, 12 (C.D. Cal. July 9, 2021)(ordering defendant to amend privilege log when "Cognizant Legal Department" is the only listed basis for privilege).

Fourth, Plaintiffs challenge entries where the communication included a third party. When Defendants include a third party on a document or communication, the attorney-client relationship no longer exists. "Under the attorney-client privilege, it is a general rule that attorney-client communications made 'in the presence of, or shared with, third parties destroy the confidentiality of the communications and the privilege protection that is dependent upon that confidentiality.' Similarly, as discussed below, the work-product privilege may be waived by disclosure to third parties which results in disclosure to an adversary party." *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (quoting 1 Paul R. Rice, Attorney–Client Privilege in the United States § 4:35, at 195 (1999 ed.)). These challenged third party entries involve parties that Defendants did not identify on its "Third Party Digest" which it provided Plaintiffs on December 14, 2024 and, as such, no attorney-client relationship exists.

Finally, Plaintiffs challenge entries where Defendants claim work product privilege, but the document or communication at issue was not created by an attorney or in anticipation of litigation. F.R.C.P. 26(b)(3) shields attorney work product from discovery that is prepared by or for a party or its representative in anticipation of litigation. Generally, a document must be "deemed prepared in anticipation of litigation" if, "in light of the nature of the document and the factual situation in

the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation." *In re Grand Jury Subpoena*, 357 F.3d at 907 (internal citation omitted). "When it is clear that documents would have been prepared independent of any anticipation of use in litigation (i.e., because some other purpose or obligation was sufficient to cause them to be prepared), no work product protection can attach." *First Pacific Networks, Inc. v. Atlantic Mut. Ins. Co.*, 163 F.R.D. 574, 582 (N.D. Cal. 1995). Here, Plaintiffs challenge entries where Uber claimed work product privilege but did not support its assertions with details showing the document was created in anticipation of litigation by an attorney.

CONCLUSION

For the reasons stated herein and in Plaintiffs' other submissions to the Special Master, Uber has not met its burden showing that disputed documents or communications at issue are privileged and such documents or communications should be immediately produced.

Dated: March 4, 2025

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2025, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send notification of the filing to all counsel of record.

By: /s/Roopal Luhana

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: UBER TECHNOLOGIES, INC., PASSENGER SEXUAL ASSAULT LITIGATION

This Document Relates to:

ALL CASES

Case No. 23-md-03084-CRB

DECLARATION OF TIFFANY ELLIS IN SUPPORT OF PLAINTIFFS' BRIEF REGARDING DISPUTED ENTRIES FOR SPECIAL MASTER REVIEW

Judge: Honorable Barbara S. Jones

I, Tiffany Ellis, hereby declare as follows:

1. I am a partner of Peiffer Wolf Care Kane Conway & Wise, an attorney licensed in the States of Michigan and Illinois and duly admitted to practice before this Court, representing Plaintiffs in the above caption action.

2. I submit this declaration in support of Plaintiffs' Brief Regarding Disputed Entries for Special Master Review.

Exhibits

3. Attached as **Exhibit 1** is a true and correct copy of the transcript of the October 23, 2024 discovery hearing.

4. Attached as **Exhibit 2** is a true and correct copy of Plaintiffs' Privilege Challenge Chart.

5. Attached as **Exhibit 3** is a true and correct copy of a letter that was filed on and pulled from the docket at ECF No. 2401-1 in *Waymo LLC v. Uber Techs., Inc*., Case No. 3:17-cv-00939-WHA (Dec. 15, 2017).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 4th day of March, 2025 in Detroit, Michigan.

/s/ *Tiffany R. Ellis*
Tiffany R. Ellis

Pages 1 - 51

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Lisa J. Cisneros, Magistrate Judge

IN RE: UBER TECHNOLOGIES, INC., PASSENGER SEXUAL ASSAULT LITIGATION.

NO. 3:23-md-03084-CRB (LJC)

San Francisco, California
Wednesday, October 23, 2024

~~TRANSCRIPT OF PROCEEDINGS BY ZOOM WEBINAR~~

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~~**Wednesday - October 23, 2024** **9:41 a.m.**~~

~~**P R O C E E D I N G S**~~

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THE CLERK: The U.S. District Court is now in session. The Honorable Magistrate Judge Lisa J. Cisneros presiding.

We are calling 23-md-03084, In Re: Uber Technologies, Inc.

We'll start with counsel for the plaintiffs. Please state your appearances, and we'll start with Ms. Luhana.

MR. LUHANA: Good morning, Your Honor. Roopal Luhana, Chaffin Luhana, for the plaintiffs. Nice to see you.

THE COURT: Okay. Good morning.

MS. ABRAMS: Good morning, Your Honor. Rachel Abrams from Peiffer Wolf for the plaintiffs.

THE COURT: Okay. Good morning.

MS. GOLDENBERG: Good morning, Your Honor. Marlene Goldenberg from Nigh Goldenberg Raso & Vaughn for the plaintiffs.

THE COURT: Good morning.

MS. ELLIS: Good morning. Tiffany Ellis from Peiffer Wolf for the plaintiffs.

THE COURT: Good morning.

MR. STANLEY: Good morning. Bret Stanley with Johnson Law Group for the plaintiffs.

THE COURT: Okay. Good morning.

MR. ABRAMSON: Good morning. Brian Abramson with

Williams Hart & Boundas for the plaintiffs.

THE COURT: Okay.

THE CLERK: And then we'll start with the defendants. We'll go with Mr. Shortnacy.

MR. SHORTNACY: Good morning, Your Honor. Michael Shortnacy from Shook, Hardy & Bacon appearing today for the Uber defendants. I have with me my colleagues from Shook, Veronica Gromada and Patrick Oot; as well as my colleagues from the Paul Weiss firm, Marc Price Wolf and Louis Murray.

THE COURT: Okay. Good morning, everyone.

So I want to start by talking about the production schedule and the schedule for privilege log disputes and start there.

So to begin with, you know, discovery is an iterative process, so I don't see any problem with my revising what I ordered previously in terms of schedule for privilege log productions and the submission of disputes. Especially I may need to modify what the original plans were in those earlier orders in light of how many disputes -- or I don't know exactly how many disputes plaintiffs may wish to submit but, you know, now that we have a bigger sense of the number of privilege log entries, you know, it's quite significant so I think we'll have to adjust accordingly.

But I am concerned that the approach that plaintiffs seem to be proposing, which is let's have all of the privilege log

disputes resolved before depositions begin, is not -- is not going to be practical to the extent that JCCP, they've got a discovery cutoff in January, January 15th. So it just may not be feasible to -- it's not likely to be feasible that all of the dispute -- the privilege log disputes will be resolved for depositions before particular individuals are taken.

So all of that said, I think the trouble I'm having with Uber's proposal is it seems to -- I don't know if this order in terms of which custodians or in which tranche have been informed at all by plaintiffs.

Plaintiffs should have some say as far as what witnesses they're prioritizing. And then, you know, plaintiffs should have an opportunity to depose again for those -- to the extent there's witnesses who don't have their privilege log disputes resolved entirely before their deposition, I think plaintiffs are in a strong position to ask for a second deposition if there are ultimately documents that are dedesignated that they didn't have an opportunity to question the witness about.

So anyhow, there's a lot of moving pieces here, but I'm going to formulate some sort of order that's probably a -- that is -- takes some of the ideas and the concerns that parties on both sides have and then also gives me enough time to resolve the disputes.

It should go without saying that any dispute that I've resolved thus far as the sample of privilege log disputes, in

order for that exercise to be useful, Uber is going to have to take my order and should have taken the order from the -- on the clawback issue and applied it to all of the -- all of the privilege log entries, you know, that kind -- that present a similar type of issue.

So I don't know that Uber was really disputing what plaintiffs were saying in that regard, but if there was a dispute, you know what my thinking is now. You know, take my order and use that as a basis for understanding how I'm viewing how the privilege applies here and ensure that it's consistently applied to all of the custodians' records and the document discovery more generally.

MR. SHORTNACY: Would you like --

THE COURT: So --

MR. SHORTNACY: Judge, would you like me to speak to that or would you -- I didn't want to interrupt your flow as you're teeing up issues.

THE COURT: Well, I guess what I wanted to ask the plaintiffs is: The way -- you know, it sounds like you-all were potentially in a good position for at least the second tranche. Nine have been produced. The custodial records for nine individuals have been produced based on what I read that was filed yesterday. That new discovery letter seems to suggest that nine -- that there's been a production of the nine but the individuals Matt Baker to Kate Parker, this is -- so I

think -- I just want to know what the status is as far as what productions were going to happen this week because Matt Baker, Cory Freivogel -- there are a group of nine individuals who Uber was prepared -- or who had proposed producing on October 21st.

So what's the status? I didn't impose an order to do that, but it sounds like Uber was in a position to do that.

MR. SHORTNACY: Yeah, Judge. Michael Shortnacy speaking for Uber.

Subject to being corrected on this phone call, I believe that Uber did make a production yesterday that included those tranche custodians. And to clarify --

THE COURT: That would have been a second tranche; right?

MR. SHORTNACY: Correct, the second tranche.

THE COURT: Okay.

MR. SHORTNACY: And to clarify, those tranches were established with coordination with plaintiffs. In other words, they were, I think, originated with the JCCP counsel, but I think every of the counsel of the leadership on MDL have now bought in to sort of a common terminology. So the tranches in priority are not set by Uber but have been the process of an ongoing meet and confer on both sides, JCCP and MDL, and are at least within the tranche agreed upon across all sides.

THE COURT: Okay.

MR. SHORTNACY: And if I -- could I make one other point, Judge?

We had -- we were before Judge Schulman yesterday for a status conference, and so I think he expressed some willingness to provide some movement to the cutoff date in January and encouraged the parties to meet and confer on that.

And so I wanted to just raise that to the Court's attention right away because I think some of the competing provisions from both sides sort of kind of swirl around the sun of a sacrosanct January 15th deadline in the JCCP that would be driving elements of cooperation and coordination, and I think -- I wanted the Court to be aware that there is the possibility of some slight movement to that that may kind of decompress some of the disputes swirling around kind of the November, December, January time period that we're dealing with; and that development just happened yesterday morning and, you know, wanted you to be aware of it.

THE COURT: Okay.

MR. LUHANA: Judge, Roopal Luhana for the plaintiffs.

Can I address some of the things you've raised?

What the plaintiffs have proposed is two schedules. The first schedule is not only addressing the privilege log disputes but resolving them and providing a timeline to do so.

And then the second critical part that we've raised is a timeline for Uber to dedesignate privilege log designations

across the board before the prior logs as well as future logs importantly.

So our timeline, the way it would work is we would tee up on a monthly basis privilege log disputes to the Court; and if the Court is agreeable, within three weeks of that timeline to hear us and potentially, you know, issue an order to which Uber 10 days later would dedesignate documents in time two weeks before the deposition.

And the critical issue here is, what we're seeing right now with the productions, and we put it in Exhibit A to the JSR we filed on October 17th, the productions as we're seeing them are extremely anemic. Right? We had anticipated hundreds of thousands of documents being produced in light of the initial numbers that were presented to us previously.

However, what you're seeing is thousands -- so they go through the documents -- the documents go through the process of, like, the search terms being applied, this cloak process of TAR that we're going to get transparency on, hopefully, later, and then they come into a pool of documents. And then what we're seeing, even the pool of documents, which is thousands of documents, sometimes tens of thousands of documents, 30 percent of those documents are being placed on the log.

And these documents based on the scorecard that we've been keeping since we've been teeing up these issues with the defendants are largely improperly designated. Every time we

raise this with Uber, and your clawback order is an example, 100 percent of those documents were dedesignated by Uber that were teed up.

Then going forward we had other disputes. There was a September 25th log that Uber had submitted and we had challenge; and if you look at that, 60 percent of the documents were dedesignated and they're reassessing 40 percent.

Frankly, even the dispute that we're teeing up for this Friday for you, we submitted ten documents to Uber and nine of them have been dedesignated. Then we sent them replacements, five replacements, just yesterday or today; five of them have been dedesignated. All of them, 100 percent.

So what's going on right now is there are a lot of designations that have been done and they're improper. And what we're seeing importantly, like, if you look at our schedule, Exhibit A, that we included, if you look at Jill Hazelbaker, she was at Uber for about nine years. They produced less than 3,000 --

THE COURT: I want to -- I think you've made your concerns very clear, and I understand your -- the plaintiffs' skepticism about many of these privilege log entries, but I think that what I want to focus on is: What is a realistic schedule?

And I think the principle that plaintiffs seem to be pushing in how to schedule this is that for any particular

custodian who is deposed, that the privilege log disputes need to be fully resolved. I don't know that that is feasible here, but what I think is feasible is for plaintiffs to identify those custodians that they want at the front of the line.

And I think what I appreciate from the plaintiffs' proposal is giving me some more time to decide the disputes but also clarity for Uber as far as how quickly the dedesignations need to happen before the depositions.

But whether or not that -- it seems we need to all be cognizant of the possibility that there will be some custodians for whom the privilege log disputes might not be finished by the time that the deposition happens, and that's possibly because of the schedule that is bounded by the deadline in the JCCP, but I would be willing to give the MDL plaintiffs an opportunity to do a second deposition.

That's still -- it's still messy. I think I could see problems for both sides, inefficiencies in that regard, so we should try to avoid it.

But what -- can plaintiffs -- if we set the next tranche for production for next month, can plaintiffs select who is most important? Because basically the order that Uber has proposed just seems like the order of which custodians they were agreeable and at the very back end are the ones that I ruled on in my order deeming certain individuals custodians.

So, yeah. And so what I would like to do is tee up, like,

the next tranche. I'm assuming -- the second one got produced, so those -- there should be some privilege logs submitted for them and then there's November. Nothing was proposed in Uber's schedule as far as December productions, but I think we've got to keep this moving. So there's going to have to be productions and privilege log -- a service of privilege logs in December and, you know, a response from plaintiff.

So set the margins. I'm going to set up a sequencing and a timing that makes sense, but it's not going to be easy and that's just the reality of litigation and particularly in complex litigation. So --

MR. SHORTNACY: Judge, can I speak to some issues that have been raised to help clarify a few things?

I think -- I don't want to get into a back and -- I appreciate Your Honor is trying to be pragmatic and solve disputes, but I do feel like I need to respond to a few things Ms. Luhana has said.

There were two documents that Uber withdrew privilege assertions on that were the subject of the clawback; and to say that's 100 percent of two, I suppose that's true, but I want to clarify that.

In connection with that exercise, Uber did go back and has dedesignated out of the log 650 documents that were placed on the log and sort of in light of some of the concepts of to the extent there could be rules gleaned from the clawback order.

So that's something that we are doing and certainly doing going forward. Of course, it's much easier to implement things going forward than to redo, but we're doing it on both sides. So I just want the Court to be aware of that.

Second, we were talking with plaintiffs in a meet-and-confer today just in the minutes before this conference to try to, you know, work together to choose exemplars that the Court may rule on that can give clear guidance.

And it's difficult in some cases because these documents are unique. They turn on very specific factual circumstances that require us to kind of investigate behind the scenes. If a lawyer is not present on the communication, it doesn't make it not privileged; like, it doesn't make it privilege. There are factors that -- and sort of behind the scenes maybe advice was the genesis of the e-mail, and so on and so forth.

And so we were talking with plaintiffs about choosing examples that may provide bright-line rules that could be applied. So that's an idea that we're talking about that I think could be effective for the Court in moving this forward.

And the last thing I want to just clarify is the reason that there appear to be numerous challenges on the front end is at least twofold and maybe three.

One is, there are not as many challenges as plaintiffs say because of the e-mail threading issue. Plaintiffs say there

are 30,000 log entries --

THE COURT: I think you wrote about this in --

MR. SHORTNACY: Okay. Fair. Okay. So there's a numbers issue.

It's also the beginning of the process and like any process, there's continuous improvement. And so with privilege, it is necessary to err on the side of caution lest you risk waiver. So there's going to be more at the beginning, and so this process of exemplar selecting and dedesignation I think is important and contemplated in the pretrial orders.

The last thing I'll say, if you'll permit, is that the reason -- the third reason that there are many privilege log entries is because of the concentration of who the custodians are.

The first custodians to be deposed, the first custodians that the plaintiffs have focused on are the most likely to have interacted with counsel. And so because of their roles and their involvement in the safety report and other aspects of the business, they happen to be heavily involved with counsel in their day-to-day jobs.

And so all of those things sort of swirl together I think to kind of show why we are where we are; and I think to your point, Judge, in sort of moving forward I think we're seeing a process of dedesignation go forward and fewer entries being placed on the log. So I just wanted to clarify that for the

Court.

THE COURT: Thank you.

MR. LUHANA: Judge, can I just say one --

THE COURT: Yeah. My question for you, Ms. Luhana, is: In terms of that schedule that plaintiffs proposed, the sequencing, the order of the custodians across these different tranches, does this reflect -- I was assuming that it doesn't reflect plaintiffs' preferred priority or which custodians you think are the most important on the production, but maybe I'm wrong.

MR. LUHANA: It doesn't. Yeah, what we were thinking is: You've set a deadline for October 25th to proceed, and so that's where the nine custodians. And so how we set it up is depositions for those nine can be scheduled post-December 9th because presumably Uber -- I heard Mr. Shortnacy to say that they're going to apply your orders going forward. However, they need to be applied going back as well because there are categorical privilege designations that they are making.

And so the bright-line rules, once the Court adopts them and agrees with us in terms of dedesignating documents, that has to be done going back and forward. So there has to be a clear process for Uber to dedesignate docs -- documents once it receives guidance from the Court.

In terms of how we were envisioning this process working, Judge, so October 25th, as I said, we've teed up those nine

custodians. That matter would be resolved after -- you know, by December 9th. Uber would produce all the -- by November 25th, Uber would produce all the dedesignated documents and then we have time to review them, and all those depositions proceed by December 9th or thereafter.

And then the next --

THE COURT: And you're talking about just -- you're talking about the nine individuals, Katie McDonald through Nick Silver --

MR. LUHANA: Correct.

THE COURT: -- on this list?

MR. LUHANA: And then, Judge, there haven't been any other logs that have been produced for any of the custodians yet. Uber has said for the two custodians it's going to produce by October 24th, by tomorrow; and then the third tranche, which would be nine custodians, aren't going to be produced till November 15th.

And so then they have logs being produced November 15th, logs being produced for 17 folks December 12th, and then logs being produced further proposed schedule for 18 January 24th.

So as we are envisioning it, every month we tee up privilege log disputes and focus them on individuals we want to depose with the Court.

So November 25th would be another timeline for plaintiffs to submit challenges. December 16th would be another timeline.

January 22nd, February 24th. So on a monthly basis we can submit the proposal, and we'd alter it some in light of some holidays to give all, you know, parties some time and flexibility during the holidays, but that's how we would envision it and teeing up disputes as appropriate for custodians we want to depose.

And the concern, Judge, really for us is we don't want to rush to coordinate to take depositions with incomplete productions to the detriment of --

THE COURT: I understand that. But my question is: For the next group -- you've got the nine and then there's another set of nine --

MR. LUHANA: That won't happen till -- the other set of nine, the two plus nine, they're not producing privilege logs until November 15th.

THE COURT: Right. But that's already underway, so perhaps I don't disturb that group sort of like midway through the process.

But for the December 12th service of privilege logs, and that production would happen on November 26th, that's more than a month away, perhaps for that group plaintiffs select who they think ought to be prioritized.

MR. LUHANA: Sure. And the plan would be by January 22nd to tee up all those, the folks that we want to depose, and tee them up a month later. That gives us time to,

you know, review the logs, meet and confer with defendants. Because at that point by December 12th, you're looking at at least 26, 27 custodians that are in the mix at that point -- right? -- that have been -- privilege logs have been produced for because there are 2 that are being produced October 24th, 9 that are being produced November 15th, and then another 17 that are being produced December 12th.

THE COURT: Okay. But the ones that are produced on December 12th, do you have ready to go a list of people who you would want?

MR. LUHANA: We haven't even received their productions. I mean, we can speculate as to who we want, but those productions are coming in November 26. So this --

THE COURT: Yeah, that's what I mean. The productions are based on kind of a list of people that Uber identified to prioritize for November 26th.

MR. LUHANA: Yes.

THE COURT: Or did -- Mr. Shortnacy is shaking his head.

MR. SHORTNACY: Sorry. No. No.

MR. LUHANA: I mean, it was --

MR. SHORTNACY: We proposed the dates for completion of production, yes, but the tranches in Uber's chart at ECF 1774-2, the blue names are a tranche of custodians that I believe the JCCP counsel had originated are sort of the strata

or tranches, and they have become adopted by the MDL.

Within that, Ms. Luhana may have a priority of the blue -- a subset of the blue custodians, but the genesis of the colors on the chart is the JCCP counsel's priority in selection that has been adopted by MDL.

THE COURT: Okay. Well, JCCP counsel is not running this MDL. Ms. Luhana and her colleagues are.

Are there a different set of custodians that ought to be produced, Ms. Luhana, on November 26th?

MR. LUHANA: Well, now that we have the 18 -- there were 18 custodians that were previously disputed. They're no longer disputed, so I would have to confer with our team and see if there are folks that we want to prioritize earlier on.

THE COURT: Okay.

MR. SHORTNACY: Judge --

THE COURT: Go ahead.

MR. SHORTNACY: -- if I could just say, I mean, the reason that those custodians are last is because they were just resolved by the Court's order; and so some of them were just collected, and so they by default have to be in the tail end. That's not to say we wouldn't consider working with Ms. Luhana about a prioritization, but there's some limits because certain of them were not collected until the order was resolved. And so I just offer that.

And, I mean, again, if we're talking about choosing

priorities within the colored bands, that's certainly something that we're working -- or will be willing to work with plaintiffs on. It's just that those bands were -- when I said they were chosen by the JCCP, I think they have informed a lexicon that both the JCCP and MDL counsel have adopted as sort of a framework to talk about the custodians. That's what I meant.

And I appreciate that the MDL counsel is a unique and separate entity running this litigation, but it has informed all of the parties' discussions to date. So I just didn't want to leave the impression that this is like Uber's prioritization or plan. This is something that we have all been working towards.

THE COURT: Okay. So now you-all know I want to do a sampling approach here, and I issued an order to that effect previously. But, you know, how many -- given the number of log entries for each custodian, I mean, there's thousands, how many log entries are the parties proposing that I address per witness or do I handle it per tranche, you know?

MR. LUHANA: Judge, I believe -- can I speak?

THE COURT: Go ahead, Ms. Luhana.

MR. LUHANA: There were about 30,000 entries, privilege log entries, for the first nine. Plaintiffs have challenged over 17,000 of those entries, and so we can tee --

THE COURT: I can't decide 17,000.

MR. LUHANA: Of course. No, no, no. I understand that. But my point is we've teed up across the board. These are really privilege designations that can be handled across the board. They don't necessarily have to be custodian specific because there are issues that we're seeing that should apply across the board if you decide these documents should be dedesignated.

So currently we have one document in dispute from the plaintiffs' perspective for the October 25th submission because Uber has decided to dedesignate all the documents. And so we continue to reup and send them more submissions; however, we've asked for a simultaneous exchange of the PTO 8 letter by tomorrow in light of the back and forth.

So we can tee up for Your Honor perhaps some bright-line rules for documents that Uber has dedesignated and give you those examples, and you can utilize that to make a decision on where they stand. And hopefully based on your order, Uber can use that to narrow entries going forward as well as reviewing entries of the past to dedesignate.

MR. SHORTNACY: Judge, I would just say, I mean, this is putting a lot on your shoulders and on your plate in a way that's teeing up multitudes of disputes over privilege logs that seem to be being placed as a precondition to getting depositions off the ground.

And I appreciate, Your Honor, what you've said, which is

that, you know, depositions can proceed at our peril if documents are later dedesignated, and I understand that. But to say that we've got to have every deponent a series of disputed documents before a deposition, it just doesn't seem workable to me, and I think that's putting on your shoulders a lot.

And timing. I mean, you know, this is demanding that you issue rulings -- have hearings and issue rulings within two weeks to make the plaintiffs' timeline workable. It just -- it seems untenable to Uber and unnecessary, and I would think that an exemplary process would be the better process to go.

And we tried to lay that out in our chart with actual dates where we had basically adopted the 45-day rule that plaintiffs proposed through the meet-and-confer process and sort of laid out in a very systematic way when challenges can happen, and we would like to think that fewer challenges would be required as this process plays out.

MR. LUHANA: Judge, we're charging ahead because we are working to coordinate depositions, but it should not be to the detriment of this litigation and the plaintiffs here, which number over 1300 at this point and continue to grow. And so all we're asking for in terms of what we're going to tee up --

THE COURT: Ms. Luhana, like, how many disputes that you think is -- should be presented to me? Like, I've said I'm

doing sampling. You haven't said it should be 5. It should be 10. It should be 20. It should be 100.

MR. LUHANA: We were just saying that -- what I was proposing, Judge, is we have made submissions to Uber of ten, and what they've done is they've dedesignated nine. Then we submitted five and they dedesignated all five.

So our proposal is just submitting the dedesignated documents to you and creating hopefully some bright-line rules that can be followed. That's all we're looking for.

THE COURT: It sounds like 10?

MR. LUHANA: Yes.

THE COURT: Okay.

MR. OOT: Your Honor, it's Patrick Oot for the Uber defendants.

One point, and I don't know if now is the time or we could discuss this later on. We have kind of an ongoing draft of the coordination order. I know you asked about it on sort of multiple conferences. I think it would be helpful to get that before the Court. I know the deposition protocol has language around coordination.

We've had some back and forth. I recently sent on October 1st the last version of it back to plaintiffs and don't have a response.

I think we're getting to a point where we can walk and chew gum at the same time. Meaning, that if there are

privilege dedesignations or things that happen that supplement a custodial file later on, I think that there is an agreement that those particular documents could be the subject of further testimony versus, you know, the issue that we're having here where there would be two full depositions.

So -- and seeking -- we were going to attach a draft of that to the joint status report and plaintiffs objected, but we would like to get that issue before the Court.

MR. LUHANA: And, Judge, we're happy to coordinate; however, these issues, longstanding issues, just need to be resolved in terms of a process to move forward.

And the goal and the hope is the order that you, for example, have already issued, the clawback order of October 8th. Hopefully Uber is reviewing that and recognizes that they can't retroactively apply privilege as you said in your order.

So 650 is a small number of entries. There are 30,000 entries that they've designated as privilege. I hope they're applying that across the board. And so going forward, the goal is with the sampling, Judge, that you're doing, that Uber apply your rulings and your guidance and narrow, you know, the privilege entries that they're designating moving forward.

MR. SHORTNACY: And, in fact, we are and I've said that repeatedly in this hearing.

THE COURT: Yeah. I have another question, though,

for Ms. Luhana. I'm trying to understand this idea that she's floating with me is, you know, submitting dedesignated documents.

So these are documents Uber -- once plaintiff came forward with their challenge, Uber dedesignated them, and then I'm supposed to look at this dedesignated document and write some sort of bright-line rule based on the characteristics of the documents and the parties' respective briefings? Am -- what -- how do you envision the dispute actually being presented to me and my coming up with a bright-line rule?

MR. LUHANA: Sure. I would defer to my colleague, Ms. Ellis, who has been very involved in the meet-and-confer process and these privilege log disputes to provide further guidance on this.

MS. ELLIS: Thank you.

This is a conversation that we've been engaged in, as Mr. Shortnacy said, up until the moments before this hearing and asking Uber specifically how they are applying the Court's guidance on the logs that they have produced thus far, and we've gotten no clear-cut answers.

We've -- they've explained to us that they have to look at -- they can look at an individual conversation or document and the documents that surround that for dedesignation; but anything else, there's no systemic way that they're applying this guidance going back.

And so our attempts to propose samples that would make our process for dedesignation and challenge more efficient have proved not to do that. And, quite frankly, we're left to continue a document-by-document exchange with Uber without bright-line rules that in most instances leads to either complete withdrawal of their claim of privilege or production with redactions.

We just received the documents that they produced with redactions to even know in our reviewing those to determine whether the plaintiff agrees with Uber's designations, but this is the issue, Your Honor.

THE COURT: What kind of, like, bright-line rules are you thinking I would impose? Is it, like, if a particular third-party unaffiliated with Uber is in the entry, then by definition that item should be dedesignated? Something like that?

MS. ELLIS: Yes, Your Honor. If there's a third party, then it cannot be attorney-client privilege because then that's waived. If there are no attorneys on the chain or they are -- it's not obvious from it that this is an exception rather than the rule that Uber can designate these documents as attorney-client privilege.

These are things that we discussed. We asked Uber to come up with rules themselves. We've yet to hear what those might be. Instead, it's, again, just been document by document.

THE COURT: Okay. Mr. Shortnacy?

MR. SHORTNACY: Judge, it's because documents that present claims of privilege or work product are factually unique, and so the issue is -- and this is why we explained to Ms. Ellis we have gone back to look, I mean, in applying Your Honor's clawback rule, but the clawback order sort of articulated the precept that just because a document -- I'm loosely paraphrasing -- but just because a document is prepared and then later shared with counsel does not make it privileged. And that is a precept that we certainly have always been applying to the privilege log, although it's not always perfectly implemented with the number of people working on it.

But that is a truism that we've already been applying, but the problem then is you can't then just say no document that doesn't have an obvious genesis of counsel is, therefore, not appropriate to log. And so it's -- those issues present difficulties in making bright-line rules. And so we are taking the Court's orders very seriously.

And I would say further, you know, to the example of the third party, that could be a situation, but then it would be difficult to make that into, like, a 100 percent bright-line rule because you can imagine there are work product protections that third parties would not necessarily waive if they're working as an agent or sort of a vendor. Right?

And so there are all these different factual scenarios,

and so we can choose examples that may have the most likelihood to present bright-line rules, but they're never going to be perfectly bright-line rules.

I mean, even Ms. Ellis is suggesting a rule that when counsel is not present on an e-mail, just as it doesn't make it not privilege, it doesn't make it privilege; it goes both ways. And so it's very difficult to make that into a bright-line rule.

MS. ELLIS: Your Honor, if I --

THE COURT: So right now we're talking about, you know, how parties intend to raise these issues with me. You know, we covered for a while what the scheduling and sequencing might be and how I could handle that potentially, and now we're kind of digging into how these are going to be actually presented to me.

You know, it strikes me from what I've seen so far, Uber relied on third parties, consultants, partnerships with other organizations for a variety of functions and purposes and reasons.

It may be -- one approach maybe we ought to consider is, you know, presenting if there's a particular person who's from an outside organization, you know, there's agreements about what their scope of work is, what their role is. You know, there are certainly case law that talks about dominant purpose and then, you know, engagement with public relation companies

that are outside.

So I think maybe if we approach it by third-party relationship, that gives you enough guidance. It's not going to be perfect because everything is its own particular set of facts, but it's not all necessarily a unique set of facts. There's patterns of engagement.

But there might be multiple different ways in which a third party was engaged, and some of which might be privileged; and then there's the other issues that Mr. Shortnacy started to flag, which I don't -- I'm not in a position to really judge right now.

So I think that if there is evidence, though, that, you know, there's -- Uber has been grossly overbroad on designations, then, you know, that might warrant a comprehensive rereview of certain categories of documents.

So but this is an iterative process and so, you know, there's going to be a certain amount of dedesignation that happens as a matter of course; but I think that, you know, there's -- there's certain extremes that might present themselves, but I hope not.

So, in any event, I think that I've heard enough about how these issues will be presented. The only piece that I haven't heard about is: You know, is there going to be a systematic submission of documents for me for in-camera review? What do you think about that issue?

MR. SHORTNACY: I think there has to be, Judge, and I think that's going to be burdensome to yourself and the clerk, but I don't know that there's another way to do it, which is what I see as a problem for these serial challenges for every deponent --

MS. ELLIS: Your Honor --

MR. SHORTNACY: -- which is why a fewer number of exemplars is a more pragmatic approach.

MS. ELLIS: Your Honor, if I may, a couple of points.

Of the documents that we have provided to Uber to discuss, all but one have been -- they've withdrawn their privilege claims entirely or in part, and so we --

THE COURT: You're pointing out privilege log entries. You're not giving --

MS. ELLIS: Correct. Correct, the privilege log entries. All but one document they've withdrawn in part or involved their privilege assertion. So we know that there is overdesignation.

I think we've got two issues here. One is our submission to the Court this Friday and how we are going to present these issues for Your Honor to rule upon, and two is what our process looks like going forward.

Plaintiffs suggest that we will produce documents where we have reached an impasse. We have a few that we believe are ready. Some -- most of them are defense picks. But we also

suggest that as part of that submission, we are going to include our suggestions for what these bright-line rules can be both going forward and for entries that are already on the log.

And we would ask that Your Honor -- and we would ask that Uber submit the same, and that Your Honor provide an order by which -- which includes a time frame in which Uber has to review their logs, dedesignate, and produce the documents within that time frame.

Going forward for future logs, if Mr. Shortnacy's statements are accurate, we would expect that these future logs for deponents that -- or custodians that may not have been involved as -- as involved in these types of discussions, that these logs hopefully will be smaller and the disputes will get smaller as we go forward.

That being said, we won't -- we don't know until we receive them. All we know is that we only have one log for one deponent so far that is under a thousand -- or 750 documents or under a thousand documents.

And so going forward, perhaps it's a tiered approach that we adopt. If logs include over a certain number of entries, we will submit to the Court a certain percentage of those entries or a number based on that tier, and that do that on a regular basis, and we could bake in an in-camera review into that process.

MR. SHORTNACY: Your Honor, can I just stress again,

to say that all but one have been dedesignated I think leaves out the fact that they have selected from thousands of entries, you know, ones that they believe are most likely to be -- you know, to least likely to involve counsel or the most likely to be candidates for dedesignation from the first log that was prepared under a short time period.

So in some sense, it's not surprising, and that's part of the iterative process that Your Honor has pointed out, that this is revealing, I think, process improvement points that we're working on.

It is also true that 40 percent of the plaintiffs -- of the exemplars that Uber has provided plaintiffs, plaintiffs withdrew their objections to. So it goes both ways. Plaintiffs are objecting to log entries that are from lawyers that say "Legal Advice" in the subject line. So it's a problem of both sides that I think an iterative process that we've engaged in is helping to inform.

And so I would just say I would also object to providing, you know, dedesignated documents as indicative of anything. It's indicative of a process improvement.

So I just wanted to make that point.

THE COURT: Okay.

MS. ELLIS: Just --

THE COURT: You know, this is a new phase of discovery for us. I mean, there's different pieces of it that we've been

tackling together, you know, since I was assigned the discovery judge here. So we're digging into privilege log issues now. So this may just need to be an area where we iterate depending on how things play out.

So I'm prepared to be adaptable, but my goal is, you know, let's do this as efficiently as possible. And, you know, of course, where things are not actually privileged, we're dealing with so many documents, there's going to have to be probably additional efforts to go over what was initially thought to be privileged to make sure that those calls are right or correct them if they weren't.

So anyhow, I don't think -- there's so much information that's at play. As I get deeper into these issues in the first -- you know, I'm going to get the October 25th presentation of the disputes. If it's not presented to me in a particularly helpful way or I think I need something a little bit different, I'll let the plaintiffs know.

But you-all have thought about this for a while and there's been a lot of meet and confers back and forth, so we'll just -- we'll start with whatever you present on August 25th. If I find it's not working, I'll let the parties know that I need something different.

But then I'm going to set a schedule for the productions and the tranches. I'm going to have plaintiffs give their input and selections as far as what productions, what

custodians need to be prioritized.

And I think we've spent an hour in this area, but I'm just -- everyone here is professional, I believe working in good faith, and so I think, you know, we'll just -- we'll take it from here and then see how things play out, and I'm going to react based on what I actually see in the filings in the calls I'm making.

There's a lot of other --

MR. SHORTNACY: Can I make one point on timing just as you're departing this topic?

I wanted to circle back. The parties -- the JCCP plaintiffs and counsel for defense are set to meet and confer in connection with what Judge Schulman raised about the possibility of moving deadlines on that end. I just leave you with that thought when you're thinking about the deadlines here.

I think there's some movement on that side that may foster coordination on this side, so -- and then the final thing I'll say is compressed deadlines for perfecting these disputes are actually -- can be counterproductive because the quicker that we're putting logs together, the more conservative we need to be, the less we risk waiver, the harder it is to grapple with a number of challenges, and so forth.

It actually, I think, can be counterproductive, and so I would just leave the Court with that thought in terms of when

you're considering the timelines that both sides have presented.

THE COURT: Okay.

MR. LUHANA: Judge, can I just say one thing to what Mr. Shortnacy just said?

THE COURT: And I want to say one thing.

MR. LUHANA: Okay. I would just say, in terms of the schedule they proposed, for the most part we're okay with it, recognizing that we may not be able to coordinate with these depositions as we don't have a trial date.

So we don't want to rush for the sake of rushing and for the sake of pseudo-coordination, which has happened with some of those depositions because they're nonconsecutive dates.

So if the MDL, which has over 1300 cases filed, and, as I said, it's growing and it's national, we don't have to be dictated by the JCCP's schedule. And so we're happy to let this play out and work through the process, and of course not overwhelm the Court, and move forward, but we can't rush to do it at a detriment to our clients and this litigation. Leadership just can't do that.

THE COURT: Okay.

MR. OOT: Your Honor, Patrick Oot for the Uber defendants.

Just a point is that 70 percent of the inventory is now represented by the JCCP plaintiffs' lawyers in this MDL. So

our position here is we can walk and chew gum at the same time.

Essentially there's going to be some depositions, sure, where there will have to be more than one sitting; but in this instance, you know, I think that we're -- I think the Court was suggesting in the beginning of this conference was there may be some outlier documents that may come in later on that need to be addressed.

We've been pushing for this coordination order, as I mentioned previously. We'd like a date that we would either submit to Your Honor or -- either opposing or an agreed-upon order related to coordination because it's -- there's been this kind of ongoing shift of the willingness to coordinate and there's just a tremendous amount of efficiencies, at least with some of the witnesses here, that we shouldn't blow up the opportunity to comply with Rule 1 just because of a few documents that might come in after.

THE COURT: Okay. I will think about that further and address it at a later order.

Let me -- as far as what's being filed on the 25th, if plaintiff has brought some challenges and then Uber dedesignated, are there another set of challenges that are being briefed? I mean --

MR. SHORTNACY: Yeah. Judge, I can speak to that.

I mean, the issue that we had is that I think both sides -- your order -- Your Honor entered an order two weeks

ago, I think, setting the 25th, and the parties have had probably three or four meet and confers in the intervening time, and we had both proposed picks and selections and dedesignations happened, withdrawals of challenges have happened on the plaintiffs' side.

And where we're at right now is I believe we have eight live impasses, if you will, and I think that plaintiffs have today proposed sort of backfilling documents to fill slots that have fallen away.

The issue is the briefing is due on Friday. So we're not --

THE COURT: Well, I can extend that --

MR. SHORTNACY: Okay.

THE COURT: -- by a week if -- so that way if there's some additional disputes, and then I can move the 25th.

What does plaintiff think about that?

MR. LUHANA: Judge, that's acceptable, I believe, to us. It's just going to move the timeline further obviously for these issues and for the depositions to be taken down the road, yes.

THE COURT: I mean, do you want to just, instead of moving it by a week, just move it by a few days?

MR. LUHANA: I will defer to Ms. Ellis.

MS. ELLIS: A week is fine, Your Honor. That would be -- that's sufficient.

THE COURT: Is it too much?

MR. SHORTNACY: I mean, from my perspective -- from Uber's perspective, I don't think it is. I think what -- I recognize that everything has ripple effects down the chain, which is really what Your Honor is driving at.

But I think we want to try to get this right in the front end, and I think it will pay dividends down the line and that will be more important than the ripple -- the potential ripple effects into the schedule. So I do think it's appropriate.

And I do think that Ms. Ellis and I and our respective teams have worked cooperatively on this process. I think we need to just be mindful that we need to stop the backfilling and lock a set in to brief. I think both sides in this process kind of allowed ourselves to play that forward a little too far, a little too close to the briefing in good faith, and so now I think with the extra week, we'll bake in the appropriate time to get the briefing appropriately situated so that this is a meaningful exercise for the Court.

MS. ELLIS: Your Honor, I agree.

And I will just add that as part of this process, we will be proposing our sort of categorical lessons from these documents, but I think that we'll at least have a number of documents to bring to your attention.

THE COURT: Okay. I mean, maybe there's random selections that can be done to get a better sense of, like, if

there's a systemic issue.

MS. ELLIS: And in producing the documents to Uber that we did, identifying those documents, we did not choose the ones that we thought were most likely to be dedesignated. We chose ones that we thought were exemplary of categories of issues that we see on their logs; and we also chose documents that were representative of all of the custodians in the first nine logs that we received.

And so we have attempted to randomize these documents in a way that would give us broader lessons to carry forward and apply backwards, and we're going to continue to do that.

THE COURT: Okay. Can you get the briefing done by the 30th rather than -- a week from the 25th but a week from today?

MS. ELLIS: I think if we can use this week to conference and do our exchanges of briefing Monday and Tuesday, I think that that probably works, yes.

MR. SHORTNACY: I think from my perspective, from Uber's perspective, Judge, the issue that we have is that, as I said before, these challenges frequently are situations where counsel is not present and so it requires us to actually do a little investigating and speaking with individuals in many cases.

And so I think if Your Honor would permit the full week to the -- what is the full week? I guess it's the 1st.

THE COURT: Well, a full week from today. Now you know what the new deadline is. They backfilled already. So I just -- I don't want to add a week and add a week and -- you're getting almost a week, so --

MS. ELLIS: Your Honor, we believe that -- I mean, we would be ready to submit on Friday, and so we're happy to submit on Monday, provide a draft -- or provide a draft to Uber on Monday so that we can do our exchange.

You know, but I think Mr. Shortnacy's point is a good one, that they do need to talk to these folks to assess the privilege, and that's exactly what we would expect them to do before they put these documents on the log; and, unfortunately, it appears that that's just not what's happening.

MR. SHORTNACY: Well, that's not correct, of course.

THE COURT: Okay.

MR. SHORTNACY: But I hear what Your Honor is saying and we would abide by your timing.

THE COURT: Yeah, let's -- the deadline that's currently for October 25th is October 30th. Okay. That's a week from today.

MR. SHORTNACY: Thank you, Your Honor.

THE COURT: Okay.

All right. Now let's talk about a couple of other issues and the status report.

As far as fact sheets go -- and I'm talking about

defendants' fact sheets -- so my understanding is plaintiffs want Uber to certify the DF -- the defendants' fact sheet productions are complete at a point where the Uber defendants are confident that they're complete. On the other hand, Uber would like to keep the conferrals more informal.

How -- this is a question for the plaintiffs, but how are the background checks and the tax summaries and the prior incidents factoring into putting groups of cases into different liability buckets? I mean, it does make sense that you're trying to group -- you've got so many cases, you probably want to group them in some ways. And that type of information you think is necessary?

MS. ABRAMS: Yeah. Rachel Abrams, Your Honor. I can address that.

We used approximately 100 cases, like the first DFSs that were produced, in -- as sort of a test of seeing what -- on a global basis what issues we were seeing. It's kind of devolved to an individual meet and confer on these cases, but what we have seen is there are --

THE COURT: I'm having a hard time hearing.

MS. ABRAMS: I'm sorry.

THE COURT: Can you speak up a little?

MS. ABRAMS: Yeah. Sorry. Can you hear me now? Better?

THE COURT: Yes.

MS. ABRAMS: Sorry about that.

But what we are doing now is we are assessing where we're seeing holes in productions, so what we thought was complete, and taken those DFS and the information we're gathering and utilizing it for our benefit going forward. We're now getting new productions for those DFSs. We're getting more information, including tax summaries and other information from defendants.

So we need to know when these cases are complete so that we know that this production is complete for all DFSs going forward.

So that's what we've suggested. This is a little premature. We are still meeting and conferring about a process, but right now we do seem to be at an impasse, but I would say it's not ripe for Your Honor yet.

THE COURT: Okay. So do Mr. Oot or Mr. Shortnacy want to respond? So don't take any action on this particular issue? You-all are meeting and conferring to sort it out?

MS. ABRAMS: Your Honor, yes. I believe right now we have had several meet and confers, and we're narrowing the issues; but --

THE COURT: I think, Mr. Shortnacy, did you want to say something? I wasn't sure if I detected a shake of the head.

MR. SHORTNACY: Thank you, Your Honor.

I was going to defer to my colleague Ms. Gromada to address that issue, but she may be having audio issues.

Can you speak? I think she's having audio issues here with the headset.

(Pause in proceedings.)

MS. GROMADA: This is Veronica Gromada for Uber.

Yeah, so it is premature, Your Honor. We have not reached an impasse.

I think the issue is we have made quite a bit of progress in working through a number of issues during the conferral discussions that we've had to date, and what we've done is we've continued to do these very individualized collections for each of the DFS responses for each of the drivers that requires us to really take advantage of a bit of a learning curve.

For example, some of the things that we have learned through this process is that some individuals may have had a background check from Uber Eats work as opposed to Uber rideshare-related work, and so it's those types of things that we've been solving for.

So what we have proposed to allay any concerns that plaintiffs have about there being any gaps or oversights is, on a going-forward basis, as we identify any DFS where we think we need time to do additional discrete research based on the situation of a particular driver or whatever circumstance, we will flag that upfront when we provide the DFS response and

production, and let them know that we are continuing to research certain nuanced discrete issues. So that should allay their concerns, but otherwise we don't believe that there's a reason to deviate from the current PTO 10 process.

THE COURT: Okay. Thank you.

So -- and I was able to hear you just fine.

As far as the plaintiffs' fact sheets, my understanding is that there is going to be a PTO 8 letter that's coming by October 28th.

Are you able to give me sort of a preliminary sketch of what some of the issues are perhaps? To the extent there are certain PFS-related issues, we can talk about them now and perhaps eliminate the need to brief all of those issues in case it's helpful for you-all to simplify the dispute.

MR. MURRAY: Yes. Hi, Your Honor. Louis Murray for Uber defendants.

That's right. That is the schedule we have outlined. We have sent our letter to plaintiffs regarding our PFS disputes, and the plan is to send a PTO 8 letter to Your Honor on Monday.

But just to give Your Honor a brief sketch of what we think will be disputed, of course waiting to see final word from plaintiffs, is, first, an issue about verifications about whether plaintiffs must submit amended verifications when providing amended answers to a fact sheet.

The second issue is about -- is about third-party contact

information in the plaintiff fact sheets. The plaintiff fact sheet asks for this information and plaintiffs are asking to provide it at a later time.

And then the third issue will be about "Will supplement," whether plaintiffs may answer "Will supplement" for questions -- or the answers within their control.

That's our perspective.

THE COURT: Okay.

MS. ABRAMS: Your Honor, Rachel Abrams.

That is correct that the briefing schedule Mr. Murray had laid out, we are submitting the dispute to Your Honor on Monday. We have narrowed the issues to these three for the PFS issues, and -- but I do believe Mr. Murray mischaracterized some of the issues particularly regarding the third-party contact information.

We had stated to contact the plaintiffs' counsel in regards to that issue, not to provide it at a later date; and that we were meeting and conferring, and we did believe there would be a process that we could come to, but Uber did not believe that we could -- could continue -- should continue to meet and confer for a process that would work and wanted to bring the dispute before Your Honor.

As to the "Will supplement," we believe this is a case-by-case individualized firm issue that everyone's meeting and conferring on, including my firm, and there are a very

small subset of cases involved with "Will supplement." And I think that is a proper response for a PFS in a few questions where a plaintiff may need to look up or find some information, and we don't believe this should be raised before Your Honor but we are prepared to address it.

THE COURT: What exactly -- like, the plaintiffs need to provide some more information to amend their response and --

MS. ABRAMS: Yes. I mean, I believe -- sorry --

THE COURT: -- then that amendment would be verified? Like, what's -- why is that a dispute?

MS. ABRAMS: The third issue, which I jumped to, is the "will supplement." It's that plaintiffs have to find information. If they, say, look up an old account information -- I mean, it depends on the question. Sometimes it's regarding getting information that they have to look up; or, you know, I'm speaking again basically regarding my firm's meet-and-confer process with Uber and my cases, which are substantial, but we're -- it is in one or two questions for the majority of these cases where a plaintiff who has verified the fact sheet has written "Will supplement."

And, you know, based on what Uber has said in meet and confers, they would prefer us to write "I don't know," and then maybe they'll get information and then it would be substantially complete. But by putting just the language "Will supplement," that somehow makes it deficient.

And, again, we're not talking about multiple "will supplements." We're talking about a question or two within the fact sheet that they're now alleging that makes it deficient.

But I did want to address the --

MR. MURRAY: Your Honor?

MS. ABRAMS: Okay. Go ahead.

MR. MURRAY: If I could just speak on that.

We don't think that that fairly characterizes the issue. We have stated we are very willing to grant extensions, to meet and confer where there are situations where information is not within plaintiffs' control; but, quite candidly, the Court created this PFS and the parties negotiated, so the information is almost always within plaintiffs' power, possession, or control.

And what we're seeing very often is "will supplements" to basic information: Education, employment, what happened in the incident occasionally. And plaintiffs are stating that's not a deficiency; and our position is, if the information is within their possession, power, or control, they should provide it within 30 days after receiving a letter.

THE COURT: Okay. All right. I've heard enough on that.

As far as cases where Uber is not locating a matching trip, the parties are meeting and conferring about that.

I guess what I'm wondering is if plaintiffs aren't able to

provide additional information about these trips, then I could imagine it's difficult for Uber to identify information that they need to provide as part of the defense fact sheets. So I would --

MR. MURRAY: We do think that's a shared issue to your point, Your Honor. We want to provide fulsome defense fact sheets, and we obviously need information from plaintiffs in order to locate the trip that's at the source of plaintiffs' claims.

And I can say that Ms. Abrams and I met and conferred about this. We are working through a process where we may get to a point where the parties cannot find a trip. Plaintiffs have given all the information they can, which in many instances, unfortunately, is not very specific and there's an impasse. And I think the parties will -- are discussing what to do in that situation, but we do agree that with these cases there needs to be further communications, additional information, additional searching.

THE COURT: How many cases have this issue?

MR. MURRAY: It's quite substantial, particularly with the new cases coming in. There's -- we estimate that there will be hundreds, unfortunately, of cases where Uber is not able to locate a trip.

And one issue that is raised in the JSR that I do want to bring to the Court's attention is part of why this is important

for Uber is not just to confirm, of course, that it was an Uber and not a taxi, not a Lyft, because that, unfortunately, does happen where plaintiffs submit claims about other entities, but there are instances we're seeing where submissions appear to be doctored, appear to be potentially fraudulent.

And that's something, of course, we are meeting and conferring, but it does -- it's something that informs our concern about the vast majority of these unsubstantiated cases just because it may not be as brazen.

THE COURT: Yeah. All right. Go ahead.

MS. ABRAMS: Leadership has only been informed of 75 cases that were unconfirmed by Uber, and many of those have not even been met and conferred and alerted to plaintiffs' counsel to provide more information to try to confirm those rides.

So as of now, leadership only knows about 75 cases and at the time of filing of this JSR, only knew about one alleged potential fraudulent issue with one case that they were meeting and are meeting and conferring with plaintiffs' counsel on.

So this issue, again, you know, is being made into a bigger issue, which we aren't -- we have no knowledge of as leadership to speak about. And if they have these -- more information on these cases that they want to share, we are willing to continue, but these are individualized issues with regards to the individualized cases that need to be met and conferred with plaintiffs' counsel.

THE COURT: Okay.

All right. I just have another minute with you-all, but I want to touch on this final piece regarding contacting former Uber employees. I know plaintiffs have their perspective and Uber's asked me to do certain things.

You know, here the former employees that plaintiff contacts should indicate whether they're represented by Uber or other counsel. You know, Plaintiffs' Counsel, you're obligated to ask whether or not they're represented.

I don't think there's any need for a court order that plaintiffs preclear with Uber whom they contact, and I don't think there is any need for court order for Uber to disclose the list of former employee -- Uber employees whom they represent. So I'm not going to issue that order in either direction.

But, you know, plaintiffs' counsel, you know, must inquire when they're reaching out to these former employees whether or not they're represented by counsel, and so I think that's clear enough.

We've, you know, spent more than an hour and I've got another court setting at 11:00, so we're done for the day. But I will get my order out as soon as I can on the production schedule and how to present the privilege log disputes, the scheduling in that regard.

MR. LUHANA: Thank you, Your Honor.

MR. SHORTNACY: Thank you.

THE COURT: Okay. Thank you, everyone.

THE CLERK: Court is now adjourned.

(Proceedings adjourned at 10:55 a.m.)

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~~CERTIFICATE OF REPORTER~~

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, October 24, 2024

Kelly Shainline, CSR No. 13476, RPR, CRR
U.S. Court Reporter

Defendants' Privilege Entry Submissions

Tranche	Entries in Tranche	Entries Plaintiffs Initially Challenged	Entries Defendants Withdrew Privilege Claim in Full*	Entries Defendants Withdrew Privilege Claim in Part*
Tranche 1	22,700	16,573	6,999	3,013
Tranche 2	14,292	5,611	1,936	1,398
Tranche 3	17,579	8,164	2,465	946
Tranche 4	9,968	1,893	399	361
Total	**64,147**	**32,241**	**11,799**	**5,718**

**Defendants withdrew Privilege claim in full or in part to some entries not challenged by Plaintiffs.*

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May 5, 2017

RULE 408 CONFIDENTIAL COMMUNICATION
FOR SETTLEMENT PURPOSES ONLY VIA EMAIL
AND U.S. MAIL

Angela Padilla
Associate general Counsel, Litigation & employment
Angela.padilla@uber.com

Re: Richard Jacobs v. Uber

Dear Ms. Padilla:

During our communications last week you requested that we make our client available for an interview to assess the scope of our client's allegations and the facts supporting them. I indicated to you that we did not intend to produce our client but that we would be happy to provide additional information.

Specifically, you said that you are interested in fully investigating the conduct our client observed at Uber that he feels was illegal or improper. Even more specifically, you indicated that our client's assertions regarding destruction, spoliation and manipulation of discovery documents were of particular concern. That is because this type of conduct would be contrary to your own directives to managers and lawyers with whom you deal for purposes of litigation holds. Finally, you said that you wanted to have a clearer understanding of what happened to give rise to our client's employment-related claims.

With this understanding of what you are seeking, we provide the information below. We begin with a brief summary of Richard Jacobs' background and expertise, followed by an overview of the organizational structure relevant to understanding his experiences. This is

followed by a description of illegal conduct observed at the company or believed to be occurring. Included in this description is an identification of at least some of the civil and criminal laws believed to be violated and sufficient detail to illuminate Uber's exposure and areas needing investigation. The next section provides an overview of Jacobs' employment experience, with a focus on the disclosures he made of illegal conduct and the retaliation he experienced.

Our hope is that this information will provide the basis for addressing the illegal conduct and resolving Jacobs' claims related to his employment.

I. Relevant Background

A. Richard Jacobs

Plaintiff Richard Jacobs served as Uber's Manager of Global Intelligence from March 14, 2016, until he was unlawfully demoted on February 14, 2017, for raising objections to and refusing to participate in unlawful activity. He was constructively terminated on April 14, 2017. Jacobs primarily worked out of Uber's headquarters located at 1455 Market Street and Uber's 555 Market Street location in San Francisco, California.

After earning his Maaster of Arts degree in Latin American and Hispanic Studies at Penn, Jacobs was recruited into the Defense Intelligence Agency. There, he worked in counter-narcotics operations and studied Colombian counterdrug policy. In these early years, Jacobs spent approximately 50 percent of his time between Cartagena and Bogotá, [redacted]. Shortly after the Iraq War began, Jacobs volunteered for two consecutive battlefield assignments in Iraq, supporting Special Operations Forces. During these assignments, [redacted]

Recognized for excellence and his record of success, [redacted]

Jacobs later decided to marry, change pace, and leave the demands of government service behind. He relocated to Seattle, Washington, where he was quickly able to apply his counterterrorism expertise as a consultant to the Bill & Melinda Gates Foundation. [redacted].

After two years, Jacobs was recruited to Uber Technologies for his unique mix of geopolitical and threat intelligence, overseas experience, and his ability to build and scale an intelligence program. Jacobs was struck by the incredibly talented people at the company, the unmatched level of challenges and threats they faced, and energized by the opportunity to build a holistic intelligence team, across the spectrum of threat intelligence, geopolitical analysis, and strategic insights. He would go on to build capabilities to serve a constantly growing community of interest at Uber, and deliver insights to shape engagement strategies, advise business decisions, and continually protect his colleagues and the community of riders and drivers they served in cities across the globe.

B. Uber's Relevant Corporate Structure

Jacobs' direct supervisor at the time of hire was Mat Henley, Uber's Director of Threat Operations (ThreatOps). Jacobs also reported to Joe Sullivan, Uber's Chief Security Officer. Jacobs additionally followed orders from Craig Clark, Uber's Legal Director for ThreatOps, who later became a direct report to Sullivan, though Clark was not a part of Jacobs' direct management chain.

This narrative describes unlawful activities within Uber's ThreatOps division, which resides at the 555 Market Street location. ThreatOps was divided into different teams, each with distinct roles. For purposes of this letter, only relevant teams are listed below:

i. Global Intelligence (Intel) – Responsible for intelligence analysis. This team serves Uber's physical security (PhySec) team and other Uber internal customers, primarily the city teams and regional policy, legal and management officials. The team's

product lines span protective intelligence, geopolitical analysis, market entry/launch, and strategic intelligence on regulatory issues, opposition, and competitive risks.[1]

ii. Strategic Services Group (SSG) – Responsible for human intelligence (HUMINT) collection through Uber in-house personnel or outside vendors. This team supports the Intel, Investigations, and Marketplace Analytics teams. It also receives confidential assignments from its manager Nick Gicinto. In addition, Henley, Clark, Sullivan, and Uber's senior executives (A-team) task SSG with assignments. As described below, SSG frequently engaged in fraud and theft, and employed third-party vendors to obtain unauthorized data or information.

iii. Investigations – Responsible for handling accusations of abuse of Uber's internal data and tools, leaks, criminal complaints, defense against aggressive competitor attacks, and other missions as assigned by Henley, Sullivan, and the Director of PhySec, Jeff Jones.

iv. Law Enforcement Outreach – Responsible for proactively building relationships with the law enforcement community to train them on how to interact with Uber, request data related to criminal investigations, and build productive relationships with foreign and domestic markets to support Uber's requests from law enforcement.

v. Marketplace Analytics (MA)[2] – Under its Senior Manager, Kevin Maher, MA exists expressly for the purpose of acquiring trade secrets, codebase, and competitive intelligence, including deriving key business metrics of supply, demand, and the function of applications from major ride-sharing competitors globally. Henley and Sullivan also task MA with assignments. MA grew rapidly during Jacobs' tenure, from only two original employees when Jacobs joined the company to at least ten.

vi. Counter Intelligence – in March 2017, ThreatOps formed a new "counter intelligence" team for the express purpose of identifying aggressive operations targeting Uber and to strike back at competitors.

Sections II through VI provide information about the illegal activity Jacobs observed.

[1] In mid-February, 2017, when Henley Henley demoted Jacobs and took away his team management responsibilities, Global Intelligence was merged with the Strategic Services Group. The new team is called "Strategic Intelligence."

[2] Formerly "Competitive Intelligence" or "COIN" team that has been in the press as of late.

II. Sarbanes-Oxley Violations, Evidence Spoliation, and Other Discovery Abuses

The Sarbanes-Oxley Act of 2002 states that

> whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Sarbanes-Oxley Act of 2002, Pub. L. 107-204, § 802, 116 Stat. 745, 800 (2002). Codified at 18 U.S.C. § 1519, this provision applies to private companies and has a broad reach that is not limited to commenced litigation. Section 1519 "covers conduct intended to impede any federal investigation or proceeding *including one not even on the verge of commencement*." *Yates v. United States*, —— U.S. ——, 135 S.Ct. 1074, 1087 (2015) (emphasis added). Similarly, California Rule of Professional Conduct 5-2320 prohibits members of the bar from suppressing evidence that the member or the member's client has a legal obligation to produce.

Uber has knowingly violated 18 U.S.C § 1519 and continues to do so. Craig Clark, Uber's Legal Director for ThreatOps, and Mat Henley, Uber's Director of Threat Operations (ThreatOps), led Uber's efforts to evade current and future discovery requests, court orders, and government investigations in violation of state and federal law as well as ethical rules governing the legal profession. Clark devised training and provided advice intended to impede, obstruct, or influence the investigation of several ongoing lawsuits against Uber and in relation to or contemplation of further matters within the jurisdiction of the United States.

Early in his tenure, Jacobs advocated for a secure and encrypted centralized database to ensure confidentiality and recordkeeping but provide access to intelligence for ThreatOps personnel. He presented a draft proposal to managers Henley and Clark. However, discussions broke down immediately because they objected to preserving any intelligence that would make preservation and legal discovery a simple process for future litigants. Clark emphasized that this was "exactly what we don't want to do . . . create [a paper trail] that could later be discoverable." Clark noted the errors of past collections where Uber was forced to turn over documents. He

alluded to the lessons learned from the "Ergo Investigation" and noted that encryption alone was not enough to avoid discovery. Gicinto added his own objections, stating that while his team would be willing to share some details on collections, including sources and methods of collections on the ground in foreign countries, they were not willing to preserve the raw intelligence on Uber's network.

Jacobs then became aware that Uber, primarily through Clark and Henley, had implemented a sophisticated strategy to destroy, conceal, cover up, and falsify records or documents with the intent to impede or obstruct government investigations as well as discovery obligations in pending and future litigation. Besides violating 18 U.S.C. § 1519, this conduct constitutes an ethical violation

A. Destruction and Concealment of Records Using Ephemeral Communications

Clark and Henley helped implement and directed the almost-exclusive use of ephemeral and encrypted communications software, including WickrMe (and later Wickr SCIF), to communicate sensitive information within ThreatOps. Wickr Inc. is a San Francisco-based company that describes its product as a "communications platform designed to empower greater control over data security… [using] multilayers of peer-to-peer encryption."[3] Henley and Clark implemented this program of ephemeral and encrypted communications for the express purpose of destroying evidence of illegal or unethical practices to avoid discovery in actual or potential litigation. The Wickr application uses robust encryption which prevents the information from being viewed by anyone except the intended recipient, but more importantly, programs messages to self-destruct in a matter of seconds to no longer than six days. Consequently, Uber employees cannot be compelled to produce records of their chat conversations because no record is retained. Such a policy is inherently violative of the Sarbanes-Oxley Act, 18 U.S.C. section 1519, and similar laws.

Further, Clark and Henley directly instructed Jacobs to conceal documents in violation of Sarbanes-Oxley by attempting to "shroud" them with attorney-client privilege or work product protections. Clark taught the ThreatOps team that if they marked communications as "draft," asked for a legal opinion at the beginning of an email, and simply wrote "attorney-client

[3] See https://www.wickr.com/security.

privilege" on documents, they would be immune from discovery. What Clark failed to teach the team, however, is that there is no attorney-client privilege, no "seal of secrecy," if the communications were made for the purpose of enabling the commission of a crime or fraud. *U.S. v. Zolin* 491 U.S. 554, 563(1989); *see also* Cal. Evid. Code § 956. For example, Clark enabled illegal activities and gave legal advice designed to impede investigations by directing the hacking of the [redacted], and by directing the destruction of evidence related to eavesdropping against opposition groups in [redacted], as discussed below. Given the ongoing criminal and fraudulent activities within Uber, the crime-fraud exception to privilege applies, and all of Clark's communications in furtherance of these schemes would be fair game in discovery. His attempt to pre-emptively conceal them under attorney-client privilege is illegal, unethical, and improper.

B. Concealment and Destruction of Records Using Non-attributable Hardware

Clark, Gicinto, and Henley acquired "non-attributable" hardware and software with which SSG and select members of ThreatOps planned and executed intelligence collection operations. Specifically, Henley and members of the MA team use computers not directly purchased by Uber that operate only on MiFi devices—so that the internet traffic would not appear to originate from an Uber network—virtual public networks (VPNs), and a distributed and non-attributable architecture of contracted Amazon Web Services (AWS) server space to conduct competitive-intelligence collections against other ride-sharing companies.

Likewise, Gicinto and the SSG team had similar non-attributable devices purchased through vendors and sub-vendors where they conducted virtual operations impersonating protesters, Uber partner-drivers, and taxi operators. SSG used the devices to store raw information collected by their operatives from politicians, regulators, law enforcement, taxi organizations, and labor unions in, at a minimum, the U.S., [redacted].

By storing this data on non-attributable devices, Uber believed it would avoid detection and never be subject to legal discovery. This is because a standard preservation of evidence order typically focused on Uber work laptops, Uber networks, and Uber mobile devices. Non-attributable devices were deemed as not reasonably subsumed by any such preservation order

and the team could, and did, "legally" (not so) dispose of any evidence or documentation held on these devices in the intervening period before knowledge of the devices' existence could be uncovered. Likewise, members of the ThreatOps team, notably Matt Henley, were known to use personal computers to conduct substantial Uber-related work for the purpose of evading discovery.

C. Concealment, Cover-up, and Falsification of Records through the Abuse of Attorney-Client Privilege Designations

Clark developed training on how to use attorney-client privilege to further conceal activities described in any non-ephemeral communication channel. Specifically, he developed a training using innocuous legal examples and the "lawyer dog" meme to produce a slide deck that taught the ThreatOps team how to utilize attorney-client privilege to impede discovery.

While the presentation slides themselves did not depict or explain any unethical or illegal practices involving attorney-client privilege, Plaintiff observed Clark's presentation first-hand. During the presentation, Clark verbally coached the participants on how to use attorney-client privilege to ensure sensitive intelligence collection activities would not surface in litigation. Clark also answered specific questions from employees on the minimum standards required to claim privilege for the purpose of shielding information. This "legal training" was particularly noteworthy because it surprisingly bears no Uber-branding; it does not even mention Uber, which is startling in a company with strong branding and adherence to process.

Clark said that Uber needed to "shroud these work products in attorney-client privilege." Accordingly, Clark instructed Jacobs himself and others to address all emails on sensitive intelligence collection to him and ensure the emails were marked as "ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL," to mark any work product as "DRAFT" regardless of its actual status, and, on every communication, to specifically ask a question or request legal advice on some issue—even if no legal advice was needed or warranted. Likewise, he advised that Jacobs and others that they should communicate almost exclusively via phone, video teleconference ("Zoom"), or via the Wickr app, in that order of preference based on the record and audit trail each communications medium creates. Clark explained that the intent was to

prevent disclosure of such communications if Jacobs was ever put on legal hold or his communications were ever subject to a preservation of evidence order.

In reality, Jacobs observed that many communications camouflaged as privileged merely contained a pro forma request for Clark's legal advice, even though no legal advice or direction was actually being solicited. For example, between December 14 and 16, 2016, while Uber CEO Travis Kalanick was travelling in [redacted], SSG collected information from a WhatsApp group "penetration."[4] They learned [redacted]. Jacobs was the only person present with Clark at 555 Market Street, San Francisco, at the time, and he asked Clark if he could share the information directly with Kalanick's protection team in [redacted]. Clark snapped and said to write "double-secret A/C Priv" on the document. Jacobs complied and the information was relayed to Kalanick and other Uber executives in [redacted]. In the end, [redacted] but Clark's directions plainly demonstrate abuse of privilege.

* * * *

In sum, Uber has directly violated the document destruction, concealment, cover-up, and falsifications provisions of Sarbanes-Oxley in an effort to obstruct or impede active and future government investigations through the (1) acquisition and use of ephemeral communications programs; (2) the acquisition and use of non-attributable hardware and software; and (3) the wholesale abuse of attorney-client privilege designations.

Clark and Henley's directives described above specifically implicate ongoing discovery disputes, such as those in Uber's litigation with Waymo. Specifically, Jacobs recalls that Jake Nocon, Nick Gicinto, and Ed Russo went to Pittsburgh, Pennsylvania to educate Uber's Autonomous Vehicle Group on using the above practices with the specific intent of preventing Uber's unlawful schemes from seeing the light of day. Jacobs' observations cast doubt on Uber's representation in court proceedings that no documents evidencing wrongdoing can be found *on Uber's systems* and that other communications are actually shielded by the attorney-client privilege. Aarian Marshall, *Judge in Waymo Dispute Lets Uber's Self-driving Program Live—for*

[4] Penetration means unauthorized access, typically through impersonation of a partner-driver or taxi operator.

Now, wired.com (May 3, 2017 at 8:47 p.m.) ("Lawyers for Waymo also said Uber had blocked the release of 3,500 documents related to the acquisition of Otto on the grounds that they contain privileged information. . . . Waymo also can't quite pin down whether Uber employees saw the stolen documents or if those documents moved anywhere beyond the computer Levandowski allegedly used to steal them. (Uber lawyers say extensive searches of their company's system for anything connected to the secrets comes up nil.)"), *available at* https://www.wired.com/2017/05/judge-waymo-dispute-lets-ubers-self-driving-program-live-now/.

III. Illegal Intelligence Gathering

Uber has engaged, and continues to engage, in illegal intelligence gathering on a global scale. This conduct violates multiple laws, including some that are extra-territorial in scope.

A. Theft of Trade Secrets

The Economic Espionage Act of 1996, as amended by the 2016 Defend Trade Secrets Act, makes it unlawful to misappropriate and steal trade secrets. Defend Trade Secrets Act, Pub. L. 114-153, § 2(b)(1), 130 Stat. 376 (2016). This statute is extra-territorial in scope. "Trade secrets" under the Economic Espionage Act, as amended, is broadly defined and includes "all forms and types of financial, business, . . . technical, economic, or engineering information, including patterns, plans, compilations, methods, techniques, processes, procedures, programs, or codes," if the owner (1) has taken reasonable measures to keep such information secret and (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information. "Misappropriation" includes but is not limited to "the acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means." It also includes the disclosure or use of a trade secret of another without express or implied consent by a person who (1) had used improper means to acquire knowledge of the trade secret or (2) had reason to know that the knowledge of the trade secret was derived from a person who had used improper means to acquire the trade secret or from a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret. "Improper means" includes "theft, bribery, *misrepresentation, breach or inducement of a duty to*

maintain secrecy, or espionage through electronic or other means." These definitions hew closely to other trade secrets laws, including the California Uniform Trade Secrets Act. Cal. Civ. Code § 3426, *et seq*.

The theft of trade secrets is also a criminal violation under federal law. 18 U.S.C. § 1832. One is criminally liable if, among other things, one (1) steals, or *without authorization appropriates*, takes, carries away, or conceals, *or by fraud, artifice, or deception obtains a trade secret*; (2) without authorization *copies, duplicates, downloads* or uploads a trade secret; or (3) *attempts or conspires with one or more persons to commit engage in such conduct*. Like the Uniform Trade Secret Act, the California Uniform Trade Secrets Act prohibits "misappropriation" of trade secrets and provides certain remedies. In addition, California law also allows for criminal penalties for stealing trade secrets. Cal. Civ. Code § 3426, *et seq*; Cal. Penal Code §§ 499c, 502.

Section 3 of the Defend Trade Secrets Act also amended section 1961 under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–68. The amendment added economic espionage and, particularly pertinent here, theft of trade secrets to the list of predicate offenses that may be considered "racketeering activity" under RICO. Defend Trade Secrets Act, Pub. L. 114-153, § 3(b), 130 Stat. 382 (2016); *see* 18 U.S.C. § 1961(1). RICO applies extraterritorially where the underlying predicate statute is itself extraterritorial. *RJR Nabisco, Inc. v. European Community*, 130 S. Ct. 2090, 2103 (2016). The intracorporate conspiracy doctrine, which holds that a corporation cannot conspire with its own officers while the officers are acting in their official capacity, does not apply to section 1962(c) of RICO. *Cedrick Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 166 (2001) (holding that an employee who conducts his corporation's affairs through illegal acts comes within section 1962(c)'s terms forbidding any "person" to unlawfully conduct an "enterprise"). In any event, it is clear that Uber has conspired with multiple other business entities to participate in a pattern of racketeering activity at home and abroad. *See* 18 U.S.C. § 1962(d).

California prohibits "unlawful, unfair, or fraudulent business acts and practices." California Bus. & Prof. Code § 17200, *et seq*. Uber has violated, and continues to violate, Code § 17200 through its unlawful attainment of trade secrets, and additional unlawful conscribed throughout this letter.

Uber's Marketplace Analytics (MA) team, exists expressly for the purpose of acquiring trade secrets, codebase, and competitive intelligence–including deriving key business metrics of supply, demand, and the function of applications–from major ridesharing competitors globally.

Jacobs is aware that the MA team fraudulently impersonates riders and drivers on competitor platforms, hacks into competitor networks, and conducts unlawful wiretapping (each tactic discussed in additional detail below). These tactics are used to obtain trade secrets about:

- the function of competitor's apps;
- vulnerabilities in the app, including performance and function;
- vulnerabilities in app security;
- supply data, including unique driver information;
- pricing structures and incentives.

These tactics were employed clandestinely through a distributed architecture of anonymous servers, telecommunications architecture, and non-attributable hardware and software. This setup allows the MA team to make millions of data calls against competitor and government servers without causing a signature that would alert competitors to the theft. For instance, a sophisticated competitor [redacted] would set thresholds when they see devices attempting to request rides by the hundreds or thousands in a short period of time. However, if the data calls are diversified across what appear to be multiple devices and a broader time period, filters would not detect the anomaly.

In the summer of 2016, SSG specifically hired Ed Russo to further develop its intelligence program. Russo is a retired government employee Uber identified as having language skills and cultural insights that would be be effective at gathering intelligence for Uber in the [redacted] region. His official title was Senior Risk and Threat Analyst, but he was actively engage in HUMINT and identifying market penetration opportunities for Uber in [redacted] specifically. Part of his role was to enable competitive intelligence and the theft of trade secrets by recruiting sources within competitor organizations. He vetted insiders, and identified those who were willing to provide Uber with competitive trade secrets. Jacobs is aware that Uber used the MA team to steal trade secrets at least from Waymo in the

U.S., [redacted]

Waymo

Shortly after the Otto "acquisition," Ed Russo presented a "fictionalized" account of SSG's recent contributions to Uber employees, including Jacobs. He asked his audience to consider a situation in which the CEO of a large company sought to acquire a smaller startup with industry-changing technology in the large company's field. Russo boasted that SSG, using ex-CIA field operatives skilled in counter-surveillance, could ensure the secrecy of meetings between the companies' CEOs for months before any acquisition was announced or finalized. Given the timing of this presentation, immediately following Otto's acquisition, when Jacobs and others heard Russo's so-called fictionalized account, they assumed Russo was alluding to the actual events surrounding the Otto acquisition.

Of course, by the time of its acquisition, Otto was just eight months old. Nevertheless, Uber acquired this eight-month-old company at an estimated cost of $680 million. Then, as stated above, shortly after the acquisition and just three weeks before the rollout of Uber's Autonomous Vehicle Group in Pittsburgh, Russo, Gicinto, and Nocon travelled to Pittsburgh and educated the team on using ephemeral communications, non-attributable devices, and false attorney-client privilege designations with the specific intent of preventing the discovery of devices, documents, and communications in anticipated litigation. These facts corroborate Google's legal theory in pending litigation that Otto was simply a shell company whose sole purpose was to dissemble Uber's conspiracy to steal Waymo's intellectual property.

[redacted]

[redacted], Uber worked to unlawfully obtain trade secrets from [redacted] MA 1) remotely accessed confidential [redacted] corporate communications and data, 2) impersonated riders and drivers on [redacted] platform to derive key functions of [redacted] rider and driver apps, 3) stole supply data by identifying possible drivers to boost Uber's market position, and 4) acquired codebase which allowed MA to identify code used by [redacted] to understand in greater detail how [redacted] app functioned.

By credibly impersonating both riders and drivers, the MA team could request thousands of rides in a given geographic area to study the responsiveness and capability of [redacted] app, price quotes, and disposition of available drivers. MA further impersonated prospective customers to ascertain the identity of drivers through their names, license plate numbers, and make/model of their vehicles. Uber then used this information to recruit competitors to Uber's platform. MA also obtained key technical details about how [redacted] would troubleshoot issues in comparison to Uber, and then used that data to develop contingencies to slow or impede [redacted] business operations.

Not only was Uber able to obtain [redacted] trade secrets, but used the data it obtained to inflate the ultimate valuation of Uber [redacted], Travis Kalanick explained in a company all-hands meeting that [redacted], a value that was inflated by data Uber had unlawfully obtained through the tactics described above.

[redacted]

[redacted] became the next logical target of MA and SSG activities after the [redacted]. MA again employed tactics to obtain [redacted] trade secrets, with a focus on stealing key supply data to boost Uber's pool of drivers, the function of the app and its vulnerabilities, and then used that data to develop an aggressive "counter intelligence" campaign to slow [redacted] efforts.

[redacted] Upon arrival, Jacobs delivered the envelope to MA's Senior Manager, Kevin Maher, and subsequently learned that SIM cards within the envelope would be used to collect intelligence on [redacted] trade secrets. The use of SIM cards [redacted]

Specifically, the SIM cards were used to fraudulently impersonate customers on [redacted] rider and driver applications. By credibly impersonating riders and drivers, the MA team could: (i) develop processes to conduct thousands of data calls to reverse engineer products; (ii) identify and recruit supply (i.e. partner drivers); (iii) and derive key competitive business metrics to understand subsidies, available supply, processes for managing surge, and competitive market position. For instance, MA would be able to study key technical details of how [redacted] had engineered solutions to common problems ride-sharing providers have at scale, and in the context of dense population centers like [redacted]. Uber would then use that data to identify possible improvements, gain competitive advantages, or exploit weaknesses of [redacted] platform.

One tactic used by Uber to obtain trade secrets was by capturing "virtual walk-ins"—a term for a source who contacts an organization through the Internet to volunteer insider information and is prepared to provide Uber with trade secrets. On at least one occasion in fall 2016, Ed Russo vetted a purported virtual walk-in with information regarding [redacted] maintains an active HUMINT source in [redacted] senior leadership team. Here, SSG vetted the virtual walk-in source by sending the intelligence collected to [redacted]. To date, Jacobs is aware Uber still benefits from at least one well-place HUMINT source with access to [redacted] executives and their collective knowledge of [redacted] on-going business practices.

[redacted]

[redacted] has been the MA and SSG focus in [redacted] over the past six months. Notably, the MA team identified a vulnerability in [redacted] and collected comprehensive supply data, including the license, name, and contact information for every single [redacted] driver around October/November 2016. Similarly, MA targeted not only the supply data from [redacted], but also key business metrics, business strategy information and basic functionality of [redacted] and security of their data. Targeting this trade secret data was all aimed to gain unfair advantage for Uber.

[redacted]—a senior software engineer on the MA team—delivered these collections directly to Kalanick. In November 2016, [redacted] continued his competitive

intelligence activities on the ground against the [redacted]. Like a "scalp" collected, the MA team proudly has a [redacted] nailed to the wall in their workplace to signify their successful theft of [redacted] trade secrets.

[redacted] proposed that if Uber headquarters could hack the database and collect all driver information, it would have a perfect set of possible drivers for Uber's platform and could boost supply by targeting these operators and convert them to drivers for Uber.

Wanting to keep Uber's unlawful tactics under the radar, Clark directed Jacobs to get the initial information over to [redacted] and the MA team, but not to inform Uber's [redacted] team that Uber had an in-house team of engineers capable of conducting this type of work. After initial investigation, [redacted] advised that the database in question requires users to individually enter the license plate number of a known taxi-driver and enter a Captcha,[6] to access the driver's record. [redacted] explained that he could program a dispersed architecture of non-attributable servers to conduct the data calls over a period of weeks and extract the information without the website's administrators realizing that Uber had extracted the entire dataset. He was given the "green light" to proceed with his plan.

The data calls needed to be distributed over a network of computers unaffiliated with Uber. It would take approximately four million calls for data to cover the full spectrum of possible [redacted] taxi-license variations. [redacted] also explained that he would need to write or purchase a code to defeat the Captcha on this particular website. Within a few days, [redacted] had overcome these hurdles and began running the program.

Within approximately two months, Uber had successfully obtained [redacted] trade secrets with the complete download of its driver database by

[5] [redacted]

[6] A program or system intended to distinguish human from machine input.

[redacted]. It contained approximately 35,000 taxi driver records. The database was built into a dashboard to be provided to the [redacted] team, but was not immediately delivered. Uber learned of ongoing legal trouble at its [redacted] location and concerns about an unexpected visitor (UEV) event—a term describing situations when local authorities might raid an office or show up unexpectedly to request data or seize media—that could expose the hack to government authorities. Consequently, [redacted] maintained control of the data stolen from the [redacted] taxi website.

B. Impersonation

As discussed above, Uber used driver and customer impersonation to steal competitor trade secrets. This conduct not only violated the trade secrets law discussed above but also wire fraud law at 18 U.S.C § 1343, and California Penal Code § 528.5. Under this section, it is unlawful to knowingly and without consent, credibly impersonate another actual person through the Internet or email, in order to harm, intimidate, threaten, or defraud someone. This conduct further exposes a company to civil liability under Section 528.5(e). This impersonation was intended to fraudulently steal business and was an "unlawful, unfair, or fraudulent business act[] and practice[]." California Bus. & Prof. Code § 1720. It is also in violation of the CFAA and related laws, discussed below in § C.

Along with the theft of trade secrets, Jacobs observed SSG personnel, through their LAT[7] operatives and their vendors, knowingly impersonate actual people over the Internet in order to to keep tabs on competitors and opposition groups by accessing closed social media groups. This impersonation had the purpose of fraudulently stealing business and gaining a competitive advantage.

During the summer of 2016, Jacobs learned that city teams in other locations impersonated partner-drivers or taxi operators to gain access to private WhatsApp group messaging channels. Jacobs further investigated this conduct by searching Uber's internal

[7] LAT operatives are CIA-trained case officers fielded by Gicinto. They are capable of collecting foreign intelligence in priority locations for Uber. They are commercially covered, deeply back-stopped business persons with established reasons to travel to high priority locations important to Uber on little notice. They conduct business meetings, but collect intelligence for Uber on the side. Around early-to-mid 2016, they quickly became Uber's stable of non-official cover operatives. These independent contractors were given the meaningless acronym "LAT" to protect discussions about this resource and poke fun at Tal Global, a former vendor who provided intelligence collection support to Uber. LATs were seen as the opposite of Tal, who Uber had discontinued working with due to their low quality work.

network, TeamDot. He discovered a playbook created for the [redacted] operations team on how to infiltrate such closed social media groups. Jacobs immediately advised Clark of the documentation, removed the document from TeamDot,and admonished the city team not to conduct such activities.

In late October 2016, in a regularly-scheduled Sync (one-on-one) meeting with Clark and Gicinto, Jacobs once again raised concerns about the legality and ethics of using impersonation tactics to gather the data that Uber was utilizing to monitor private groups. In one instance, SSG had begun using a vendor and LAT operative in [redacted]. This individual was tasked with penetrating opposition groups, and collecting information about local political figures and parties, including virtual penetrations in WhatsApp. Jacobs reported that infiltrating WhatsApp groups was unlawful and would get Uber kicked out of [redacted]. His concerns were ignored.

In another instance, in early January 2017, Jacobs received an email from [redacted] This playbook was a guide to combatting regulatory and enforcement activities slowing Uber's operations in [redacted]. The presentation–which was shared across [redacted] operations teams–was intended to capitalize on the lessons learned in [redacted] and share practices across the region.

The PowerPoint presentation included a section on "intel gathering," a slide on driver chat group infiltration, and a link to the specific procedures for infiltrating driver-partner chat groups (including the impersonation of actual driver-partners) to collect information on growing discontent and possible opposition activities. Upon receipt, Jacobs disclosed the playbook to Clark, who replied, "Do I want to know what it is?" Jacobs voiced concern as to its legality, noting that it encouraged "intel gathering" and described how to penetrate WhatsApp groups. Clark only replied that "this is happening everywhere and I'm not ready to deal with it." Clark did not investigate the presumed criminal violation.

In late January and early February 2017, as part of SSG's virtual operations capability (VOC), SSG brought in [redacted] by posing as a sympathetic protestor interested in participating in actions against Uber. By doing this, [redacted] illegally gained access to closed Facebook groups and chatted with protesters to attempt to understand their nonpublic plans and intentions.

To the last point, in mid- March 2017, Jacobs learned through members of his former team that Henley leveraged [redacted] to access and investigate closed or private Facebook protest groups in [redacted] to understand who might protest against Uber [redacted]. This access represents at least a violation of Facebook privacy standards and unethical [redacted].

C. Unlawful Surveillance

1. Illegal Wiretapping under California Law

During his employment, Jacobs observed conduct that violated the California Penal Code Section 631 and Section 632. Section 632 prevents a person or entity from intentionally using any kind of machine or instrument to tap into or make an unauthorized connection into a telephone line. It also disallows willfully reading or trying to read the contents of any message that has passed over a wire, unless there is permission from all parties to the message. It bars the use, attempted use, or communication of any information gained in this way. And lastly, it makes it illegal to aid or conspire to do any of the above. The California Penal Code Section 632 makes it illegal to intentionally, without the consent of all parties to the communication, use a device to amplify or record a conversation.

Uber's surveillance and collections operations against [redacted] executives, discussed below, also apparently violate the federal Wiretap Act. 18 U.S.C. § 2510 *et seq.* Sections 2510 and 2511 prohibits the interception, attempted interception, and use of oral communications—those communications uttered by a person having a reasonable expectation of privacy in the communication.

Over a two-to-three week period beginning early June 2016, Henley, Gicinto, and Sullivan coordinated multiple surveillance and collections operations against [redacted]. This included recording of mobile phone video and/or photography during private events in [redacted].

To do this, multiple surveillance teams infiltrated private-event spaces at hotel and conference facilities that the group of [redacted] executives used during their stay. In at least one instance, the LAT operatives deployed against these targets were able to record and observe

private conversations among the executives—including their real time reactions to a press story that Uber would receive $3.4 billion dollars in funding from the Saudi government. Importantly, these collection tactics were tasked directly by Sullivan on behalf of Uber's CEO, Travis Kalanick. Upon information and belief, these two Uber executives, along with other members of Uber's executive team, received live intelligence updates (including photographs and video) from Gicinto while they were present in the "War Room" [redacted]

[redacted]. As proof or perhaps to gloat about the surveillance, Gicinto later showed Jacobs pictures and screen captures from the unlawfully recorded content.

As a part of this surveillance, Gicinto asked Jacobs to develop targeting packages on [redacted] leaders to improve SSG efforts to collect intelligence on these figures and work to develop a mole or internal source of information among the [redacted] leadership team. Jacobs had concerns over the legality of this assignment and ultimately chose not to respond to the request. Instead, he began developing his own strategy for intelligence gathering that did not involve tactics which Jacobs believed to be illegal.

Additionally, Uber violated California Penal Code Section 632, and likely the federal Wiretap Act, by improperly recording [redacted] call following allegations of sexual harassment by a former Uber employee. Uber did not tell the participants that the call was being recorded and accordingly had not received permission from the call participants to record it, as required by California law. This was a particularly egregious violation given the sensitive subject of the call and the stated objective to hold anonymous and candid Listening Sessions. Not only did Uber unlawfully record the call, but the Investigations team, [redacted] used the recording, along with other egregious and purposeful violations of personal privacy to identify a [redacted]. This employee subsequently separated from Uber.

2. Illegal Hacking in violation of Computer Fraud and Abuse Act

The Computer Fraud and Abuse Act (CFAA) outlaws accessing certain computers or computer systems without authorization or in excess of authorization, with the intent to defraud. 18 U.S.C. §1030(a)(4), (e)(2) says:

> (a) Whoever ... (4) knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period ... shall be punished as provided in subsection (c) of this section.... (e) As used in this section ... (2) the term 'protected computer' means a computer – (B) which is used in or affecting interstate or *foreign commerce or communication, including a computer located outside the United States* that is used in a manner that affects interstate or *foreign commerce* or communication of the United States. (Emphasis added.)

Accordingly, the CFAA has extraterritorial reach.

California Penal Code Section 502 bars similar behavior. Part 1 makes it illegal to knowingly access and without permission, alter or use any data or computer system or network, to devise or carry out a plan to defraud, deceive, or extort, or to wrongfully control or obtain money, property, or data. Part 2 makes it illegal to knowingly access and without permission, take or use data from a computer or network, or take any supporting documentation, whether internal or external to a computer or network. Part 3 makes it illegal to knowingly and without permission use computer services or cause them to be used. Part 5 makes it illegal to cause a disruption in service to an authorized user. Part 6 makes it illegal to knowingly and without permission help someone else access a computer in a manner that violates this law. And Part 7 makes it illegal to knowingly and without permission access or cause to be accessed any computer, computer system, or computer network.

As discussed above, Jacobs was aware of many instances where computer hacking tactics were deployed to obtain trade secrets and to infiltrate closed social media groups. Two specific

instances are reiterated here to illustrate how the conduct violates the laws discussed in this section.

[redacted]. Uber's intent in accessing this protected computer database was to lure these drivers away to work for Uber instead. As noted above, the database was protected by "Captcha" to prevent the sort of automated downloading that Uber's MA team intended to carry out. MA was ultimately successful in hacking the system and obtaining the driver database. Because Uber knowingly accessed a protected computer in order to fraudulently capture its valuable contents to gain a competitive advantage, the hack violates the CFAA, as well as California Penal Code Section 502.

[redacted] As noted above, Uber used SIM cards [redacted]. The SIM cards allowed Uber to hack into the [redacted]. Through Uber's hack it was able to learn how [redacted] system operated, steal ideas, exploit any identifiable weaknesses and identify drivers in order to recruit them to Uber.

3. Unlawful Phone Toll Analysis

At the beginning of July, 2016, SSG, with the support of Clark and the planning of Gicinto, began mobile-phone collections in [redacted]. One of Gicinto's LATs had a "new technical capability" to conduct collections of mobile-phone call records and mobile-phone link analysis on opposition figures, politicians, and government regulators in [redacted]. To do this, the LAT operative collected mobile-phone metadata either directly through signal-intercept equipment, hacked mobile devices, or through the mobile network itself. The information eventually shared with Jacobs and others included call logs, with time and date of communications, communicants' phone numbers, call durations, and the identification of the mobile phone subscribers. The subsequent link-analysis of this metadata occurred on U.S. soil

and revealed previously unknown, non-public relationships between Uber opposition figures, politicians, and regulators with unfavorable views on Uber and the ride-sharing industry.

At the beginning of September, 2016, Jacobs met with Gicinto and Clark and raised the issue of mobile phone collections in [redacted]. Specifically, Jacobs challenged Gicinto and Clark on the legality of SSG's intelligence collections, citing the mobile phone collections that occurred in [redacted] as a prime example. Clark discounted Jacobs' concerns, claiming that [redacted] laws are different. Certainly, such activities were not lawful and violated at least the CFAA.

VI. Other Likely Illegal Conduct

During the course of Jacobs' employment he observed Uber engage in targeted business practices aimed at gaining the support of government officials in foreign countries. Many of these efforts involved similar surveillance conduct to that discussed above and likely involve violations of foreign government civil and criminal laws. Its conduct further exposed Uber personnel to personal and professional harm.

A. Espionage

[redacted]

[redacted]

Specifically, the LAT operative collected details on [redacted], including: information on these firms' connections to political and regulatory officials, their data sharing agreement and connection to the [redacted], their efforts to replace Uber in [redacted], and their investments in the taxi sector in [redacted]. These facts demonstrate that vendors, directed by Uber employees, conducted foreign espionage against a sovereign nation despite Jacobs's objections.

[redacted]

[redacted]

[redacted]. SSG wanted to determine which political figures may have been supporting opposition groups in the taxi/transport sector, and those who had issued orders to the [redacted] to begin targeting Uber vehicles for harassment and impoundment.

The intelligence collected identified the political connections of each person or group and detailed the size of their stake in the taxi [redacted]. Information on their government connections provided insight into whom among the group might have the political clout and motivation to direct aggressive enforcement activity against Uber, and who might be compelled to end costly enforcement activities or partner with Uber to unblock the market and open up the supply of partner-drivers out of shared financial incentive.

[redacted]

[redacted] was trying to gather threat intelligence on taxi groups, unions, and agitators harassing Uber partner-drivers in the area. To do this, [redacted] used undercover agents to collect intelligence against the taxi groups and local political figures. The agents took rides in local taxis, loitered around locations where taxi drivers congregated, and leveraged a local network of contacts with connections to police and regulatory authorities.

[redacted]

[redacted]

[redacted]. SSG had collected intelligence on opposition groups in [redacted]

[redacted]

to attempt to verify threats from taxi union officials against [redacted], and to investigate arson attacks on Uber partner-driver vehicles.

SSG then tasked a LAT operative, with an active intelligence source network in [redacted], to begin HUMINT collections on opposition groups, taxi union officials, and government leaders. The goal was to determine the plans and intentions of union groups, the veracity of physical threats to Uber employees, the identification of political leaders who were pushing an anti-Uber agenda, and what political leaders may be persuaded to stop any opposition. SSG used these collections as an opportunity to introduce their LAT virtual operations capacity.

That is, a U.S. based LAT operative impersonated a taxi driver who was sympathetic to Uber opposition in [redacted], established bona fides with the administrator of a private WhatsApp chat group administered by [redacted], and was eventually admitted into the group, through which the LAT could monitor private communications to identify persons involved in Uber opposition, as well as their plans and intentions.

Moreover, between August and November 2016, SSG tasked a LAT operative to collect intelligence on [redacted] government officials to determine if a senior political official would be willing to push a ride-sharing agenda through the city or national government. Similarly, between October 2016 and January 2017, [redacted] or one of the LAT operatives he managed, maintained access from the U.S. to closed and private [redacted] taxi groups and communications channels. This access meant SSG had screenshots of communications, and could interact with drivers through chat. These collections identified the names of taxi operators most adamantly opposed to Uber's operations, included pictures of these individuals, and provided warning of possible incidents and protests.

Worse yet, in January 2017, [redacted] contacted Jacobs on Wickr and advised they "had a bug in a meeting with transport regulators," and that they "needed help cleaning up the audio." Jacobs immediately contacted Clark and informed him of the unlawful request. Clark instructed Jacobs to tell the city team that Uber did not have the technical capabilities to assist, encourage them not to transmit the audio, and convince them to "make it go away." Clark did not investigate the presumed criminal violation.

B. FCPA – 15 U.S.C § 78dd-2

The Foreign Corrupt Practices Act (FCPA) prohibits an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official, or to any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official for the purposes of influencing any act or decision, or to use their influence affect any act or decision of a foreign government.

During the course of his employment, Jacobs heard about the practice of bribing foreign government officials. Based on his knowledge of targeting foreign officials to identify those with influential power, and the rapid insights into new markets without longer-term HUMINT development he observed in several occasions, Jacobs reasonably believed that bribery of foreign officials was taking place. Specifically, he believed this conduct to be going on in multiple areas including [redacted]. Jacobs believes that violations of the FCPA took place and would likely be shown through discoverable evidence. Jacobs was aware that Uber was targeting government officials in order to learn:

- who might be compelled to end costly enforcement activities or partner with Uber to unblock the market;
- what local network of contacts has connections to police and regulatory authorities;
- what political leaders may be persuaded to stop any opposition; and
- if senior political officials would be willing to push a ride-sharing agenda through the city or national government.

Additionally, Jacobs is aware of Uber paying foreign third party vendors inflated wages, the excess of which could be used to purchase information. With this information in mind, we anticipate that discovery will confirm Jacobs' reasonable beliefs bribes were being offered to government officials to benefit Uber.

VII. Jacobs' Employment Experiences and Uber's Retaliation Against Him

A. Jacobs Is Quickly Introduced to ThreatOps' Disturbing Corporate Culture but Sets a Positive and Successful Course for Global Intelligence

Two or three days after he was hired as Uber's Manager of Global Intelligence, Jacobs was called into an unscheduled meeting with [redacted]

Jacobs declined to participate, artificially chalking up his reticence to being new and not understanding the limits of what was appropriate to pursue. This introduction to Uber's corporate culture within ThreatOps was disturbing to Jacobs.

Nonetheless, Jacobs proceeded to lead the team for which he was responsible, Global Intelligence, in a manner that caused it to grow from a small narrow focus to a much more sophisticated, developed and organized team that effectively worked towards its team goals and provided substantial support to ThreatOps. He was respected by his reports and peers and did not receive any critiques or warnings from any of his managers – until it became clear to Uber that he would not participate in Uber's ongoing illegal schemes.

B. Jacobs Discloses and Objects to Illegal Conduct in the Summer of 2016

Through the first three months of Jacobs' tenure, he had worked to develop his own intelligence program to distance the intelligence analysis function from SSG's illegal intelligence

collections. Jacobs' program was inherently safer than SSG's HUMINT collection mechanisms, because it would employ only reputable, overt, and long-standing vendors. In contract, SSG's growing HUMINT collection capabilities needlessly exposed Uber and its employees to severe risk–including the likely termination of Uber's operations and possible imprisonment of its employees–should capable security services in many overseas locations discover Uber's espionage.

To that end, Intel was developing in ways where it could work with city teams and regional leadership, flesh out intelligence requirements and attempt to resolve these requirements with open source research, or other overt vendor services, limiting the need to use SSG resources. Similar or better results were obtained through enhanced social media analysis, web scraping, improved vendor services in the area of network analysis and geopolitical analysis, and consulting services. Over time, Intel could develop professional networks to benchmark, get ground-truth and produce all-source intelligence analysis without resorting to covert HUMINT collections. This suite of tools and services would lower Uber's overall spend, expedite the delivery of insights, and eliminate risk. Despite these compelling arguments, Jacobs was rebutted at every step and ordered to make use of SSG resources.

On June 15, 2016, Jacobs held a meeting with Henley, Clark, and Kieu Lam—at the time Jacobs' supporting project manager—in San Francisco while Gicinto attended via Zoom. The purpose of the meeting was to discuss the establishment of a central intelligence database to preserve information, intelligence, research, and finished reports. Jacobs emphasized that a central repository of information would enable Uber's analysts to quickly familiarize themselves with previous work done where Uber operates. Jacobs thus advocated for a secure and encrypted database to ensure confidentiality and presented a draft proposal to the group. Discussions broke down immediately as the group objected to preserving any intelligence that would make preservation and legal discovery a simple process for future litigants. Clark emphasized that this was "exactly what we don't want to do . . . create [a paper trail] that could later be discoverable." Clark highlighted the errors of past collections where Uber was forced to turn over documents. He alluded to the lessons learned from the "Ergo Investigation" and noted that encryption alone was not enough to avoid discovery. Gicinto added his own objections, stating that while his team would be willing to share some details on collections, including sources and methods of

collections on the ground in foreign countries, they were not willing to preserve the raw intelligence on Uber's network.

Jacobs then objected and proffered that if what Uber was doing was actually legal, there should be no problem having a central database so long as unauthorized personnel cannot inadvertently access it. However, the other meeting participants were firm in their objections, remained fixed on using HUMINT collection mechanisms, and repeatedly emphasized the requirement for Intel and SSG to work together. Jacobs' idea was effectively gutted. On June 16, 2016, Gicinto, Lam, and Jacobs met to review requirements for the intelligence database in light of the previous day's discussion. Jacobs again raised objections to engaging in activities that were deemed too confidential to document in any way, and noted that without preservation of the raw intelligence there was no need for an intelligence database.

As described above, June of 2016 was also the time when Henley, Gicinto and Sullivan coordinated multiple illegal surveillance and collections operations against [redacted]. As proof of his prowess or perhaps to gloat about the surveillance, Gicinto later showed Jacobs pictures and screen captures from the unlawfully recorded content. When Gicinto asked Jacobs to develop targeting packages on [redacted] leaders, Jacobs expressed concerns over the legality of this assignment, delayed any response, and ultimately ignored the request.

On June 29, 2016, Jacobs and Pooja Ashok, Sullivan's Chief-of-Staff, had a one-on-one meeting where Jacobs presented his intelligence program strategy, which used ethical, legal, open-source methods. Jacobs' goals were to diversify intelligence vendors, reduce risk and expense by using publicly-available information sources instead of covert intelligence collection, and working threats proactively to provide long-range forecasting instead of tactical responses to existing threats.

Per Henley's instructions, Jacobs' presentation included a slide with blocks representing the different sources of information the Intel team used to conduct analysis. The blocks, which were color-coded from white to black representing overt to covert collection, respectively, depicted two blocks where no specific vendor or capability was named. One represented LAT collections and the other represented mobile phone collections. Ashok asked, "Why do we have vendors we can't even put on a slide deck?" Jacobs used the question as an opening to raise

objections about Gicinto's recent surveillance and collection against [redacted]. Ashok appeared to share those concerns. She asked Jacobs if the [redacted] collections were worth the risk, and if they accomplished anything more than "addressing the paranoia of executives." Jacobs replied that it was just paranoia and "we should not be doing it."

On July 5, 2016, emboldened by his earlier discussions with Ashok, Jacobs raised objections regarding unethical and unlawful intelligence collections and further described his outlook for the Intel team to Henley. Jacobs described the changes he would make and how evolution would take Uber into proactive and strategic work that could be handled internally, and would eliminate the need to outsource collections through SSG.

For example, Jacobs explained that his approach would enable Intel to conduct due diligence on potential fleet partners to identify reputable companies who already had constructive relationships with local authorities in foreign countries. This was a way to boost Uber supply in foreign countries, rather than stealing supply data virtually or through HUMINT collections targeting politicians and business persons to identify a similar set of candidate firms. Additionally, Jacobs described how his team could conduct "influencer mapping," to describe for the business how decisions are made in a local context, who truly holds power over the regulatory and enforcement activities affecting Uber, and how Uber should target its engagement strategy for the best long-term success for business growth. This was a legitimate way for Uber to find out who controlled foreign markets and who Uber should negotiate with, instead of getting information through unlawful collection methods.

Discounting Jacobs' approach, Henley only emphasized, "You need to continue working with Nick [Gicinto] as one team." Jacobs heard this response as telling him not to resist Gicinto's illegal methods of collecting information.

C. Jacobs Discloses and Objects to Illegal Phone Collections and Other Illegal Conduct in the Fall of 2016

On September 1, 2016, Jacobs held a Sync (one-on-one) with Gicinto and Clark and raised the issue of mobile phone collections in [redacted]. Jacobs had earlier become aware of this conduct and believed it was critical to eliminate or at least limit the Intel team's involvement with anything related to those types of illegal data collections. Specifically, Jacobs questioned the legality of collecting intelligence necessary for the analysis, which targeted [redacted]

politicians, regulators, and taxi union officials. Clark offered the excuse that "the laws are different in [redacted]" Discounting Jacobs' concerns, Gicinto suggested that while he and the LAT operatives had conducted espionage in their previous careers they were "all Boy Scouts now."

After raising objections to the legality of these practices, Jacobs was not privy to additional collections of this type. But Clark initiated a weekly one-on-one meeting with Jacobs to "align on legal questions." Jacobs understood this to be a reaction to him questioning the ethics and legality of Uber's practices, and an effort by Clark to ensure he had an adequate pulse on Jacobs' concerns with the work Clark was attempting to keep hidden.

In their first such meeting, Jacobs reiterated the risk of continuing these types of intelligence collections. He further voiced concern with the technical collections as described in [redacted] as well as identical collections undertaken in [redacted] against opposition figures and government officials. Clark used the discussion as an opportunity to emphasize the security practices he had developed, specifically around the need to communicate via phone, Zoom or Wickr, and ostensibly abuse attorney-client privilege to protect those practices from disclosure.

On October 27, 2016, in a regularly-scheduled Sync meeting with Clark and Gicinto, Jacobs once again raised concerns about the legality and ethics of the intelligence collection tactics being employed by Uber in [redacted], as discussed above, specifically, using impersonations to infiltrate private groups. Both Gicinto and Clark responded as they always had, dismissed his concerns, and defended their actions.

D. Jacobs Discloses and Objects to Illegal Conduct in Early 2017

The new year did not yield a new and more legal approach to the work of ThreatOps. Its teams continued to engage in illegal conduct and Jacobs continued to try to steer the boat another way. In January 2017, Jacobs informed Clark, as discussed above, that a [redacted] team member had illegally bugged a meeting. Clark did nothing.

In early January 2017, Jacobs became aware of the [redacted] discussed above and reported it to Clark. Although it promoted illegal intel gathering Clark dismissed Jacobs' concern and did nothing about it.

During a March 8, 2017, meeting between Jacobs and Gicinto, Jacobs questioned the hiring of two additional people who were allocated to the newly-formed Strategic Intelligence team, discussed below. Gicinto said the two positions were intended to support Uber's Autonomous Technology Group ("ATG"), but because of the recent lawsuit by Waymo against Uber, Strategic Intelligence would keep them off the ATG books while litigation was ongoing. Gicinto, working with both Clark and Henley, said this would enable Uber's competitive intelligence efforts to remain hidden and protected from discovery or any legal proceedings. Jacobs understood this to be yet another effort to obscure the actual structure and function of ThreatOps from possible litigation, given that the existence of a team designed to steal competitor data (MA), and human-intelligence experts (SSG) engaging in theft and fraud to access unauthorized data, would be detrimental to any pending litigation.

E. Uber Retaliates

On January 19, 2017, during the monthly ThreatOps Leads meeting, Henley publically embarrassed Jacobs by divulging negative feedback (a "B" or one of Jacobs' "Bottom" qualities needing improvement) intended for Jacobs' performance review. Referencing Jacobs' upcoming review, Henley stated, "[Jacobs] hasn't heard this yet, but when I get feedback that there are missteps between ThreatOps and PhySec and we need to improve process, I know we need to work on our communications across security."

To downplay the inappropriateness of Henley's disclosure of this confidential information, Jacobs asked facetiously, "I'm going to assume that's an excerpt of one of my T's (a term used to describe a "Top" quality or favorable attribute of an individual)?" The other leaders at the meeting had no reason to know about Jacobs' performance review, and he experienced the disclosure as retaliation for Jacobs' disclosing of and resistance to engaging in illegal conduct.

On February 14, 2017, Henley and Jacobs met to discuss Jacobs' performance review. He received a rating of Zone 2, which is below meeting expectations. This was a complete shock for Jacobs because nothing negative about his performance had been communicated to him prior to that day. Henley's main criticisms revolved around what he called the "gap" between Intel and SSG. He criticized Jacobs for not working enough with SSG and shielding his team from SSG. Henley cited meetings with customers and stakeholders in [redacted]

[redacted], where Intel did not involve SSG personnel or resources, as a sign of the "gap" which could not continue. Moreover, although Clark was not in Jacobs' direct management chain, he was present at the meeting and was quoted multiple times in the performance review. Henley claimed that Jacobs was not working with legal enough and needed to further "protect information from discovery." Finally, Henley said that Jacobs focused too much on the Threat Map, despite giving Jacobs direction to make this a priority for the last two months of 2016.

Then Henley abruptly demoted Jacobs. He ordered that going forward, all of Jacobs' employees would report directly to Gicinto, who would have direct responsibility for both SSG and Intel, in a claimed realignment of the organization. The new team was named "Strategic Intelligence." Henley then suggested that Jacobs should be removed from management entirely, but left that ultimate decision to Jacobs and Gicinto to work out.

Jacobs expressed that he was "floored" by the negative review and that it was a "gut punch." He repeatedly questioned Henley about why he had not received any previous negative feedback, as it would have been in everyone's interest to give him an opportunity to correct any perceived deficiencies. Further, it would have kept Jacobs' career on-track. Henley's only response was that he shouldn't have to tell Jacobs how he was doing and that the events themselves should have provided that information to him.

Jacobs experienced this review and demotion as pure retaliation for his refusal to buy into the ThreatOps culture of achieving business goals through illegal conduct even though equally aggressive legal means were available to achieve the same end. Jacobs had repeatedly disclosed and objected to this illegal conduct to his supervisors and others with the authority to investigate, discover, or correct the violations of law at issue, but nothing changed. He resisted requests to engage in illegal conduct and directed his team to avoid utilizing SSG whenever possible to protect them from professional and personal harm. Jacobs proposed alternative methods of intelligence collection that were legal and effective. He repeatedly disclosed to Henley, Clark, and Gicinto that SSG's and MA's collection methods were unethical, illegal, costly, time-consuming, and risky to the company's personnel and reputation. Their primary response—work more closely with Gicinto and his SSG team. In other words, Uber would allow no "gap" between Jacobs and ThreatOps' illegal conduct, and when Jacobs resisted, he was punished.

At the end of Jacobs' performance review meeting, Henley had said he was open to a follow-up session to discuss options for Jacobs. That said, Henley subsequently cancelled two separate meetings to further discuss Jacobs' performance, without explanation. It was thus left to Gicinto's to determine what Jacobs' new role would be, if any.

The following day on February 15, 2017, Gicinto met with Jacobs to discuss the organizational changes. Jacobs asked Gicinto—in this meeting and two subsequent meetings—why Henley and Sullivan felt this change was needed, what the objectives of the change were, and what exactly Uber was trying to remedy. Gicinto replied that he was not told the purpose behind the organizational change. Likewise, Jacobs attempted to discuss what his new role would be at the company. Gicinto said that was between Jacobs and Henley. Jacobs explained that Henley told him the exact opposite, and that he and Gicinto were supposed to work out his new responsibilities.

Within about three days, Jacobs received a Wickr message from Gicinto explaining that he had spoken with Henley and still did not have any clarity on what Jacobs' role should be. Further, he did not know what the objectives of the newly-formed "Strategic Intelligence" team were, but that for the "foreseeable future everyone will be reporting to me."

On February 16, 2017, Henley emailed Jacobs regarding how to best notify Jacobs' team of the structural changes. Henley stressed that he "supported" Jacobs and did not want to "step on [Jacobs'] message." Jacobs did his best to remain positive and supportive, stating that he wanted to "cause as little disruption for the team as possible." However, Jacobs said that he could not deliver a message to his former team without first knowing the details of his new role. Henley replied that the main decision was whether Jacobs would be okay with his role as a non-manager and stated: "If you're not wanting that role, we should talk about what's next whether that's looking for other opportunities within Security, Uber, or elsewhere." Jacobs replied that he would accept a new role if it gave him the "opportunity to excel and is messaged in a way that enables [him] to be effective." Henley never replied.

Contrary to his previous representations, Henley announced the changes to ThreatOps without any input from Jacobs. On February 27, 2017, during a ThreatOps all-hands meeting with at least 30 attendees, Henley explained the new organizational structure. He highlighted that "[Jacobs] takes the hit here seeing the color of his bubble change," effectively making it clear to

all present that Jacobs was being demoted and sending a message about the consequences of resisting ThreatOps' corporate culture.

On March 8, 2017, Jacobs and Gicinto had a one-on-one meeting where Jacobs described a possible future role for himself since maintaining his management role was not an option. Jacobs first detailed this possible role and his objections in email. In an email that day, Jacobs wrote, "Hi Nick, I've been thinking about a job description for my role in Strategic Intelligence, and would like to discuss during our 1:1 today, time permitting. My preference is to remain the global intel manager and evolve the program to align with the new objectives Joe has for our team, in partnership with you. Understanding that may not be allowable, below is an outline of where I can contribute as an IC (individual contributor)." Jacobs proposed a job description followed with a newly-proposed title of Manager, Strategic Analysis. Gicinto and Henley consulted with HR and later explained that the title would not be acceptable. Instead, they assigned Jacobs the title of Senior Analyst for Strategic Intelligence.

Demoted, effectively ostracized, and unable to continue working Jacobs sent his constructive termination letter to Uber on April 14, 2017. You have seen the letter. Directed to members of Uber's A-team, it details various instances of unlawful conduct and pleads for constructive change at the company. Since his termination, Jacobs has learned that, rather than conduct a legitimate investigation, CEO Travis Kalanick informed several of the implicated parties about Jacobs' claims prior to any legitimate investigation. This is largely the reason that Jacobs does not feel Uber has acted in good faith, and why he does not wish to sit down for a formal interview.

Jacobs' demotion and constructive discharge violated California Labor Code section 1102.5, which prohibits retaliation when an employee discloses or opposes information that he reasonably believes violates state or federal statute, or local, state, or federal rules or regulations. *See* Cal. Labor Code § 1102.5. Based on the laws identified above and the conduct he observed, Jacobs had reasonable cause to believe he was disclosing and opposing violations of law in every instance described above. In fact, the activities he disclosed and opposed as illegal were actual violations of law, so his reasonable belief was also true.

Jacobs' protected activities individually and collectively constituted a substantial motivating factor in Uber's decision to take adverse employment actions against him, ultimately causing his constructive termination.

This is also a case where punitive damages are appropriate and will be sought. We do not hesitate in believing that clear and convincing evidence will show that Uber's treatment of Jacobs subjected him to oppression and malice.

F. Impact of Retaliation on Jacobs

Jacobs had high expectations of himself and believed he was making substantial contributions to Uber, even though the conflicts regarding illegal activity created significant stress in his life. His demotion and construction termination brutally undercut the objective evidence of his success in developing the Global Intelligence team, causing emotional distress and serious reputational harm that are ongoing.

Jacobs is also experiencing economic damages, including lost wages and benefits, limited job growth and future earnings potential based on the stark and cruel demotion from directing a successful team to individual contributor.

Jacobs' base salary was $130,000. His initial equity grant was 4,098 restricted stock units ("RSUs"), of which one quarter would vest on Jacobs' anniversary and then 1/36 per month until he was fully vested at four years. At the time of Jacobs' hire, Uber explained to him that the value of those RSUs was $48 per unit, or $196,704, bringing Jacobs' annual compensation to $179,176 assuming full vesting and no further equity grants.

In addition, Jacobs was eligible for an annual performance bonus. In his offer letter, the bonus was described as up to $270,000 for the highest performers. That value would again be given in equity. However, based on feedback from his colleagues, Jacobs believes that, for 2017, the highest bonus available to employees performing at "Zone 6" is $360,000. Furthermore, Uber's Senior Recruiting Lead Andrew Cesarz told Jacobs at the time of his hire that the "top tier bonus paid in 2015 at your level is now worth $1,000,000."

Certainly, the compensation was one reason why Jacobs accepted the position at Uber, ultimately to his detriment. Instead of receiving anything remotely amounting to the above, Jacobs' annual bonus after his demotion was $12,000, which was paid 20% cash and 80% RSUs

vested over 36 months. Effectively, he only received $2,400 in cash and one bonus equity vesting of 7 RSUs after completing his thirteenth month at Uber.

The demotion in title also affects Jacobs' earning potential and competitiveness in applying for other positions. In addition to the public humiliation he experienced, Jacobs remains out of work and has been unsuccessful in attaining comparable future employment

VI. Next Steps

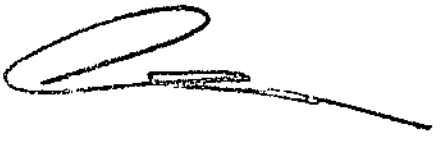
This letter was prepared to respond to your request for more detailed information about the illegal conduct Jacobs observed during his employment and the retaliation he experienced at Uber. While long, this letter does provide what we believe is useful information that will allow Uber to investigate Jacobs' allegations.

In his termination letter Jacobs wrote: "While working conditions have become intolerable for me, my hope with this letter is to effect useful change within the company culture, end these illegal practices, and assure reassignment of my former team to work under better leadership." He offers the information in this letter with the same hope and purpose.

Once you have discussed this communication with your client, please let us know how Uber would like to proceed.

Very truly yours,

HALUNEN LAW



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