

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

CASE NO.: _____

WAYMO, LLC

Plaintiff,

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

v.

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

Defendants.

_____ /

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

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

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

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

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

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

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. LEGAL ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. CONCLUSION

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

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

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

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

Respectfully Submitted:

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CERTIFICATE OF SERVICE

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

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