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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WAYMO LLC,
Plaintiff,
v.
UBER TECHNOLOGIES, INC., et al.,
Defendants.

Case No. [17-cv-00939-WHA](#) (JSC)

**ORDER RE: SCOPE OF UBER'S
SUBJECT MATTER WAIVER**

The Court previously found that Uber waived its attorney-client privilege when it disclosed the contents of a March 29, 2017 conversation between its litigation counsel, its CEO Travis Kalanick, and its executive Anthony Levandowski. (Dkt. No. 1172.) The Court then asked the parties to file supplemental submissions regarding the scope of Uber's waiver and invited Mr. Levandowski to file a submission as well given that he is likely to assert a privilege in conversations that he had that would otherwise be covered by Uber's waiver. The district court subsequently affirmed the Court's finding of Uber's waiver and held that because the waiver came too late in the litigation Uber is barred from offering evidence of the contents of that conversation at trial. (Dkt. No. 1267 at 3.) The district court further held that "Waymo remains entitled to look into the subject matter over which Uber has waived privilege" and thus the scope of Uber's waiver must still be decided. "If, at trial, Waymo ultimately introduces evidence on the waived subject matter, then Uber may in fairness be allowed to respond with its own evidence on the

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1 same.” (*Id.*). Accordingly, the Court addresses the scope of Uber’s waiver below and finds that
2 because Uber cannot waive Mr. Levandowski’s privilege in conversations covered by the subject
3 matter of Uber’s waiver, Uber should not be allowed to offer evidence of the March 29
4 conversation at trial for this additional reason.

5 DISCUSSION

6 The parties agree that the scope of Uber’s waiver is all privileged conversations in which
7 Mr. Levandowski discussed his downloading of Waymo’s files and his decision to invoke the
8 Fifth Amendment, along with Uber’s response. The difficulty is that Mr. Levandowski has
9 asserted his own attorney-client privilege in those conversations, including the March 29
10 conversation that Uber disclosed, pursuant to his and Uber’s Joint Defense Agreement. (Dkt. No.
11 1246.) All parties also agree that Uber cannot waive Mr. Levandowski’s privilege and thus that
12 the Court cannot order Uber to testify as to what was said in the conversations covered by Uber’s
13 waiver. *See, e.g., United States v. Gonzalez*, 669 F.3d 974, 982 (9th Cir. 2012). Finally, Uber and
14 Waymo also agree that Uber should therefore be precluded from offering into evidence the
15 contents of the March 29, 2017 conversation. (Dkt. No. 1249 at 2; Dkt. No. 1248 at 4.) The Court
16 agrees that result makes sense. Thus, Uber’s inability to waive the privilege as to all
17 conversations which in fairness it should disclose is an additional reason to preclude it from
18 offering the March 29, 2017 conversation into evidence.

19 The district court left Waymo the option of nonetheless offering the March 29 conversation
20 into evidence. Discovery closes on August 24, 2017. If Waymo wishes to challenge Mr.
21 Levandowski’s assertion of an individual attorney-client privilege in the March 29 and related
22 conversations it must do so before discovery closes. Should Waymo decide not to do so, this Court
23 will not revisit the scope of Uber’s waiver.

24 Finally, the Court declines Mr. Levandowski’s invitation to this Court to make a factual
25 finding that he has and did not waive an attorney-client privilege in the March 29 conversation
26 disclosed by Uber. That is a matter for future proceedings if and when a party attempts to use
27 those communications against Mr. Levandowski.
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This Order disposes of Docket No. 1246.

IT IS SO ORDERED.

Dated: August 23, 2017



JACQUELINE SCOTT CORLEY
United States Magistrate Judge

United States District Court
Northern District of California