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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: WAYMO'S MOTION TO
COMPEL**

Re: Dkt. No. 321

Waymo has sued Uber for violating federal and state trade secret laws. In particular, Waymo accuses its former employee Anthony Levandowski of downloading thousands of Waymo documents related to its driverless vehicle technology, forming competing driverless vehicle companies Ottomotto and Ottomotto Trucking, and then selling Ottomotto to Uber, all along taking the downloaded documents with him. In March 2016, after Levandowski departed Waymo but before the Ottomotto/Uber transaction closed, Ottomotto and Uber jointly retained an outside forensic expert, Stroz Friedman, to investigate certain Ottomotto employees who were formerly employed by Waymo, including Levandowski and Lior Ron. Stroz interviewed the employees, reviewed their digital devices and cloud storage, and prepared a report, memos and exhibits recording the results of their investigation ("the Stroz Report"). Waymo seeks to compel Uber to produce the Stroz Report and its exhibits in full. (Dkt. No. 321.) After carefully reviewing the record, including an *in camera* review of the Report and its exhibits, and having held oral argument on May 25, 2017, the Court GRANTS the motion to compel. Neither Uber nor Levandowski has met their burden to show that the Report and any of its exhibits are protected by the attorney-client privilege and Uber has waived any claim of attorney work-product. Thus, there is no basis to withhold the Report from Waymo. Waymo's motion to compel must be granted.

United States District Court
Northern District of California

1 **BACKGROUND**

2 Levandowski formed Ottomotto (“Otto”) on January 15, 2016. Twelve days later he
3 resigned from Waymo. On February 1, 2016, he formed Otto Trucking.

4 **A. The Uber/Otto Term Sheet**

5 On February 22, 2016, Uber and Otto signed a Term Sheet. Uber was represented, in part,
6 by Morrison and Foerster (“MoFo”) and Otto by O’Melveny and Myers (“OMM”). The Term
7 Sheet created a process for Uber to potentially acquire 100% ownership of Otto through the
8 execution of a Put Call Agreement. (Dkt. No. 510-3 at 3.¹). Exhibit C to the Term Sheet required
9 Uber to complete certain “Pre-signing Due Diligence” on Otto and certain of its employees in
10 accordance with Attachment A to Exhibit C. (*Id.* at 50, 55-56.) Such due diligence was to be
11 conducted by Stroz, identified in the Term Sheet as “an independent third party digital forensic
12 expert,” and included Stroz’s completion of a Third Party Report. (*Id.* at 50, 53.) The Term Sheet
13 defines the Third Party Report as:

14 the written report(s) produced by the Outside Expert summarizing in
15 detail all of the facts, circumstances, activities or events obtained by
16 the Outside Expert from any Diligenced Employee that the Outside
17 Expert deems reasonably related to any Bad Act of such Diligenced
18 Employee, in each case, based on the interviews, forensic due
19 diligence and other due diligence investigation with respect to all
20 Diligenced Employees conducted by the Outside Expert, as jointly
21 directed by and engaged by [Otto] and [Uber].

22 (*Id.* at 53.) A “Bad Act” means fraud, misappropriation of Waymo’s patents, copyrights,
23 trademarks or trade secrets, breach of a fiduciary duty owed to Waymo, or breach of a non-
24 solicitation agreement with Waymo. (*Id.*)

25 Exhibit C required the initial due diligence of Otto employees, including Levandowski and
26 Ron, to be completed prior to the signing of the Put Call Agreement. (*Id.* at 50.) Also prior to any
27 signing of the Put Call Agreement, each diligenced employee had to certify that he or she had
28 completed the due diligence in good faith and had responded truthfully to Stroz. (*Id.*)

Following the execution of the Put Call Agreement, and regardless of whether the

¹ Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 Uber/Otto transaction actually closed, Uber is required to indemnify Otto and/or any diligenced
2 employee, including Levandowski, for any claim brought by an employee's former employer
3 (Waymo) for a "Bad Act," including misappropriation of trade secrets. (*Id.* at 50-51.) However,
4 the indemnification obligation excludes claims for misappropriation of trade secrets, among other
5 "Bad Acts," committed *before* the signing of the Put Call Agreement if they

6 reasonably arise or result from any facts, circumstances, activities or
7 events that either (x) were not truthfully disclosed by [Otto] and/or
8 the Diligenced Employees to [Stroz] in response to relevant
9 inquiries in connection with the due diligence performed by the
[Stroz], or (y) were not contained or reflected in the due diligence
materials provided by the Diligenced Employees to [Stroz].

10 (*Id.* at 51.) In other words, Uber agrees to indemnify Levandowski and others for Bad Acts
11 committed before Uber entered into the Put Call Agreement, provided the employees disclosed the
12 Bad Acts to Stroz during its pre-signing due diligence; that is, the due diligence conducted before
13 the signing of the Put Call Agreement. Uber's indemnification obligation also excludes certain
14 "Bad Acts" committed after the signing of the Put Call Agreement. (*Id.* at 51-52.)

15 Following the settlement or final adjudication of a diligenced employee's indemnified
16 claim, Uber has the right to dispute through arbitration or a court whether it was obligated to
17 indemnify the employee; for example, to determine whether the indemnification is excluded
18 because it arose from pre-signing Bad Acts that the indemnified employee did not properly
19 disclose to Stroz. (*Id.* at 51.) If the court or arbitrator so concludes, the indemnified employee is
20 required to reimburse Uber for expenses paid in indemnification. (*Id.* at 52.)

21 The Term Sheet did not obligate Uber or Otto to enter into the Put Call Agreement or to
22 eventually close the transaction; that is, Uber was not required to enter into the Put Call agreement
23 regardless of the results of the initial Stroz due diligence. (*Id.* at 13 ("For the avoidance of doubt,
24 no party hereto shall be under any obligation to enter into and deliver any legally binding
25 definitive agreements with respect to the Transaction, and failure to do so shall not impose any
26 liability on any party hereto").) To the contrary, the Term Sheet provides that *if* Uber enters into
27 the Put Call Agreement, its obligation to close the transaction *shall not* be conditioned upon a
28 determination that there were no Bad Acts, including misappropriation, prior to the signing of the

1 Put Call Agreement. (*Id.* at 53.) Thus, if Uber did not want to do the deal because Levandowski or
2 other Otto employees misappropriated Waymo’s trade secrets, that decision had to be made before
3 it entered into the Put Call Agreement.

4 **B. The Stroz Pre-Signing Due Diligence**

5 A few days after the execution of the Term Sheet, Otto and Uber formally engaged Stroz to
6 investigate Levandowski, Ron and other Otto employees, and to create the Third Party Report
7 required by the Term Sheet. (Dkt. No. 370 ¶ 10; Dkt. No. 370-3; Stroz Report, Exh. 4.) Stroz
8 identified its clients as Otto and Uber. (Dkt. No. 370-3.)

9 By letter dated March 14, 2016, Levandowski’s personal attorney John Gardner wrote
10 Stroz. (Stroz Report, Exh. 2.) Gardner stated that his firm represents Levandowski “individually,
11 with respect to a proposed examination by Stroz . . . of Mr. Levandowski’s electronic media,
12 personal accounts and related materials, all as described in your joint engagement letter with
13 Morrison & Foerster LLP and its client Uber USA, LLC, and O’Melveny & Myers LLP and its
14 client Ottomotto Inc. (collectively, ‘Clients’), dated March 4, 2016 (‘Stroz Examination’).” (*Id.*)
15 The letter went on to recite how Stroz had requested certain information of Levandowski, and how
16 Levandowski would only disclose such information to Stroz provided Stroz agreed to certain
17 conditions, including not disclosing certain of the information to Otto or Uber. Gardner sent a
18 similar letter to Stroz one week later involving a Stroz request that Levandowski disclose
19 additional information. (Stroz Report, Exh. 3.) In both letters Gardner represented that
20 Levandowski and Otto “share a common legal interest in the subject matter of the Stroz
21 Examination, and in Stroz’s retention through O’Melveny & Meyers, as counsel for Ottomotto
22 Inc., as a related party to Mr. Levandowski.” He made no mention of any purported common
23 interest with Uber. (Stroz Report Exhs. 2, 3.)

24 Stroz interviewed Levandowski, without counsel present, at Stroz’s office on March 22
25 and 23, 2016 and conducted a follow up telephone interview on April 1, 2016. (Stroz Report,
26 Exh. 5.) Prior to the interviews, on March 18, he provided certain information to Stroz via a
27 written questionnaire. Stroz interviewed Ron on March 22, 2016, also without any counsel
28 present, and on April 11 Stroz conducted a follow-up telephone interview. (Stroz Report, Exh. 6.)

1 Stroz interviewed other Otto employees on March 23 and 24, 2016. (Stroz Report, Exhs. 7 & 8.)
2 Stroz also collected and analyzed the interviewees' devices and cloud-based storage. Prior to the
3 commencement of the interviews, Stroz adopted a protocol for its investigation which gave OMM
4 the right to require Stroz to withhold from disclosure to MoFo documents that OMM contends are
5 protected by a privilege from disclosure to MoFo. (Stroz Report, Exh. 1.)

6 In early April 2016, prior to the execution of the Put Call Agreement, and at MoFo's
7 request, Stroz provided MoFo with an interim report; in particular, it provided MoFo with its
8 memos of its interviews of Levandowski, Ron and the diligenced employees; data regarding
9 information found on the diligenced employees' devices; and an oral report regarding certain Stroz
10 fact finding. (Stroz Report at 3-4.) The interview memos were redacted as requested by OMM
11 and Gardner. In August 2016, counsel for the diligenced employees consented to Stroz producing
12 its Report to MoFo, OMM, Gardner and Ron's counsel, Levine & Baker LLP, as well as in-house
13 counsel at Uber and Otto. (Stroz Report at 5.)

14 **C. The Execution of the Put Call and Joint Defense Agreements**

15 At some point Uber and Otto executed the Put Call Agreement, dated April 11, 2016,
16 obligating them to complete the transaction assuming certain conditions were satisfied. (Dkt. No.
17 515-3.) As was stated in the Term Sheet, the Put Call Agreement reiterated that the closing
18 conditions will be deemed satisfied regardless of whether Levandowski or any other diligenced
19 employee committed a Bad Act prior to the signing of the Put Call Agreement. (*Id.* at 39.)

20 Also dated April 11, 2016, is a "Joint Defense, Common Interest and Confidentiality
21 Agreement" among Otto, Otto Trucking, Uber, Levandowski and Ron. (Dkt. No. 370-2 at 2-11.)
22 The first paragraph states that it is entered into "in contemplation of potential investigations,
23 litigation, and/or other proceedings relating to the proposed transactions between Ottomotto, Otto
24 Trucking and Uber and/or any affiliates of Uber." (*Id.* at 2.)

25 Four months later, in August 2016, Stroz issued its final report. That same month, Uber
26 bought Otto for approximately \$680 million and hired Levandowski to lead its self-driving car
27 program. (Dkt. No. 433 at 4:24-25.)

28 This litigation commenced in February 2017. Waymo now moves to compel production of

1 Stroz's August 5 Report and all of its exhibits. (Dkt. No. 321.)

2 **DISCUSSION**

3 Uber contends that the Stroz Report and all of its exhibits are protected from disclosure as
 4 attorney work-product. It also contends that six of the documents comprising the Report and its
 5 exhibits are protected by the attorney-client privilege: (1) the Stroz Report itself, (2) Stroz's
 6 protocol for review of data and devices, (3) Levandowski's side letter agreement with Stroz dated
 7 March 14, 2016, (4) Levandowski's side letter agreement with Stroz dated March 21, 2016, (5)
 8 Stroz's memorandum of its interview of Levandowski, and (6) Stroz's memorandum of its
 9 interview with Ron. Mr. Levandowski, on the other hand, contends that the Stroz Report and all
 10 of the exhibits, even those for which Uber only claims the work-product privilege, are protected
 11 from disclosure by his personal attorney-client privilege. As requested by the district court, the
 12 undersigned has reviewed the Stroz Report and its exhibits *in camera*. (Dkt. No. 271 at 2; Dkt. No.
 13 350.)

14 **A. The Report and its Exhibits are not Protected by the Attorney-Client Privilege**

15 "Issues concerning application of the attorney-client privilege in the adjudication of federal
 16 law are governed by federal common law." *United States v. Ruehle*, 583 F.3d 600, 608 (9th Cir.
 17 2009). "Because it impedes full and free discovery of the truth, the attorney-client privilege is
 18 strictly construed." *Id.* (quoting *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24
 19 (9th Cir. 1981)). "[T]he privilege stands in derogation of the public's 'right to every man's
 20 evidence' and as 'an obstacle to the investigation of the truth,' [and] thus, . . . '[i]t ought to be
 21 strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *United States v. Ruehle*, 583 F.3d 600, 607 (9th Cir. 2009) (quoting *In re Horowitz*, 482 F.2d 72,
 22 81 (2d Cir. 1973)). "[A] party asserting the attorney-client privilege has the burden of establishing
 23 the relationship *and* the privileged nature of the communication." *Ruehle*, 583 F.3d at 607
 24 (internal quotation marks and citation omitted; emphasis in original).
 25

26 An eight-part test determines whether information is covered by the attorney-client
 27 privilege:

- 28 (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating

1 to that purpose, (4) made in confidence (5) by the client, (6) are at
 2 his instance permanently protected (7) from disclosure by himself or
 by the legal adviser, (8) unless the protection be waived.

3 *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 n.2 (9th Cir. 1992) (quoting *United States v.*
 4 *Margolis (In re Fischel)*, 557 F.2d 209, 211 (9th Cir. 1977)). The attorney-client privilege may
 5 extend to communications with third parties who have been engaged to assist the attorney in
 6 providing legal advice. See *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011) ““What is
 7 vital to the privilege is that the communication be made in confidence for the purpose of obtaining
 8 legal advice from the lawyer.”” *Id.* at 566, n.3 (quoting *United States v. Gurtner*, 474 F.2d 297,
 9 299 (9th Cir. 1973) (emphasis in original)).

10 **1. Levandowski’s Attorney-Client Privilege**

11 As a preliminary matter, the Court grants Levandowski’s motion to intervene for the
 12 limited purpose of opposing Waymo’s motion to compel the Stroz Report. (Dkt. No. 371.) As the
 13 district court already directed that Levandowski may file an opposition (Dkt. No. 270), he has
 14 done so (Dkt. No. 379), and he claims an attorney-client and attorney work-product privilege in
 15 the documents, the limited motion is granted. His additional request, however, to provide the
 16 Court with an ex parte declaration in support of his privilege assertion is denied in the exercise of
 17 the Court’s discretion. (Dkt. No. 382.) The cases he cites in support of his request involve a court
 18 reviewing the withheld privileged materials *in camera*, which the Court has done here; none state
 19 that in a civil case a court may entertain an ex parte declaration from a witness who is refusing to
 20 provide any discovery or testimony in the case.

21 Levandowski contends that the Stroz Report and all of its exhibits are protected by *his*
 22 attorney-client privilege. Not so. The record is clear that Uber and Otto alone engaged Stroz to
 23 conduct the due diligence required by the Term Sheet. First, the Term Sheet provides that Otto and
 24 Uber will engage Stroz. (Dkt. No. at 510-3 at 50 (Exhibit C).) Second, Uber’s own counsel
 25 attests that Uber and Otto engaged Stroz. (Dkt. No. 370, Tate Decl. ¶ 9.) Third, the Stroz
 26 engagement letter likewise identifies Stroz’s clients as Uber and Otto. (Dkt. No. 370-3.) It also
 27 states that Uber and Otto will direct Stroz’s efforts. Fourth, Levandowski’s personal attorney
 28 acknowledged as much in his side letter agreements with Stroz. The letters recite that Stroz’s

1 clients are Otto and Uber with no mention of Levandowski or his attorney Gardner being a Stroz
2 client. (Stroz Report, Exhs. 2, 3.) Fifth, the Stroz Report itself, which the Court has reviewed *in*
3 *camera*, recites that the Stroz protocol was revised on April 11, 2016 to clarify that Uber’s outside
4 lawyers MoFo and Otto’s outside lawyers OMM were directing the Stroz investigation and
5 “making all legal determinations.” (Stroz Report at 4.) Thus, the rule that the attorney-client
6 privilege may extend to third parties who have been engaged to assist the lawyer in providing
7 advice to his client, *see Richey*, 632 F.3d at 566, does not apply to Levandowski and Stroz.
8 Levandowski’s attorney did not engage Stroz.

9 While Levandowski was an Otto executive, this position did not give him a personal
10 attorney-client relationship with Otto’s counsel OMM, who did engage Stroz (along with Uber’s
11 counsel MoFo).

12 [I]ndividual corporate officers or employees seeking to assert a
13 personal claim of attorney-client privilege must affirmatively show
14 five factors: First, they must show they approached counsel for the
15 purpose of seeking legal advice. Second, they must demonstrate that
16 when they approached counsel they made it clear that they were
17 seeking legal advice in their individual rather than in their
18 representative capacities. Third, they must demonstrate that the
19 counsel saw fit to communicate with them in their individual
20 capacities, knowing that a possible conflict could arise. Fourth, they
21 must prove that their conversations with counsel were confidential.
22 And fifth, they must show that the substance of their conversations
23 with counsel did not concern matters within the company or the
24 general affairs of the company.

19 *United States v. Graf*, 610 F.3d 1148, 1159–60 (9th Cir. 2010). Applying the first two factors,
20 there is nothing in the record that even remotely suggests that OMM was acting as Levandowski’s
21 personal counsel at the time Levandowski gave his personal devices and interview to Stroz in
22 March 2016; to the contrary, Levandowski retained Gardner as his personal counsel from as early
23 as January 2016. (Dkt. No. 381 ¶ 2.) Further, the record demonstrates that Levandowski was
24 complying with the Term Sheet, rather than seeking OMM’s legal advice, when he participated in
25 Stroz’s investigation. Gardner’s side letter agreements confirm that Levandowski’s participation
26 was pursuant to the Term Sheet’s requirement that he cooperate with Stroz’s due diligence and the
27 Term Sheet establishes that his cooperation was a precondition to his receiving any personal
28 indemnification from Uber should the parties enter into the Put Call Agreement. As for the third

1 factor, there is nothing in the record that suggests OMM communicated with Levandowski as
2 attorneys giving him advice in his individual capacity, let alone that they did so knowing that a
3 conflict could arise. The fifth requirement is also not satisfied: the Court's *in camera* review of
4 the Stroz Report and its exhibits establishes that the matters on which he gave evidence to Stroz
5 concerned him personally, although there could be some spillover effect on Otto. The fourth
6 element is satisfied as Levandowski attempted to keep his conversations and disclosures to Stroz
7 confidential generally, and partially confidential from Uber and Otto. However, as all five factors
8 must be shown, Levandowski has not met his burden.

9 Since Gardner did not retain Stroz to assist with Gardner's provision of legal advice to
10 Levandowski, and Levandowski did not have an attorney-client relationship with OMM in his
11 individual capacity, it follows that the documents Levandowski gave Stroz by providing Stroz
12 with his personal digital devices and cloud storage are not protected by Levandowski's attorney-
13 client privilege. While they might be so protected if provided to a third party retained by Gardner
14 and privileged in and of themselves, for example, if they are incriminating and therefore protected
15 by the Fifth Amendment privilege, *see Fisher v. United States*, 425 U.S. 391, 410 (1976), Stroz
16 was not so retained. The case cited by Levandowski is not to the contrary. *See Segerstrom v.*
17 *United States*, No. C 00-0833 SI, 2001 WL 283805, at *2 (N.D. Cal. Feb. 6, 2001) ("confidential
18 communications passing through persons acting as the attorney or client's agent are also covered
19 by the privilege. The privilege also covers papers prepared by the attorney or by a third party at
20 the attorney's request for the purpose of advising the client, insofar as the papers are based on and
21 would tend to reveal the client's confidential communications.").

22 Levandowski also argues that his confidential communications with his attorney Gardner
23 are protected by the attorney-client privilege unless waived. Agreed. The Stroz Report, however,
24 is based on Levandowski's communications with Stroz during two days of in-person interviews
25 and one follow up call at which Gardner was not present; indeed, no attorney was present. (Stroz
26 Report, Exh. 5.) Similarly, there is no evidence that Gardner provided Levandowski's devices and
27 passwords and the like to Stroz; rather, the Term Sheet directs that such information is to come
28 directly from the diligenced employee. (Dkt. No. 510-3 at 56, Term Sheet, Exh. C, Attch. A.;

1 Stroz Report at 6.) If Gardner had provided Levandowski's statement and documents to Stroz, the
2 Court would have to determine whether counsel giving that information to Stroz waived any
3 attorney-client privilege; but since there is nothing in the record to support such a finding, and
4 abundant evidence to support the opposite, the Court does not have to reach that question.

5 2. Uber's Attorney-Client Privilege

6 Uber contends that the six documents it has identified as attorney-client privileged are
7 protected because "[c]ommunications between a client and attorney's agent or representative are
8 also covered by the privilege." (Dkt. No. 369 at 10:21-23 (citing *U.S. v. Christensen*, 828 F.3d
9 763, 802 (9th Cir. 2016)).) *Christensen*, however, merely held that conversations between a
10 lawyer and an investigator retained by the lawyer about the lawyer's client were privileged. Just
11 as MoFo and OMM were not Levandowski's attorneys, neither was Levandowski the client of
12 MoFo or OMM. Thus, the memo regarding Stroz's interview of Levandowski is not protected by
13 an attorney-client privilege held by Uber or Otto. Again, the Term Sheet and Gardner's side
14 agreements with Stroz establish that Stroz's interview of Levandowski was performed in
15 Levandowski's individual capacity, and not as an Otto executive. The same is true of the Ron
16 interview memo; there is no evidence that he had an attorney-client relationship with OMM in his
17 individual capacity. Uber has therefore not met its burden of showing that those interviews are
18 protected by Uber's attorney-client privilege, even assuming that Uber may now assert an
19 attorney-client privilege previously held by Otto.

20 In any event, Uber has not proven that it has a protectable attorney-client privilege in any
21 of the six identified documents given that it retained Stroz jointly with Otto. At the time Uber and
22 Otto engaged Stroz, and directed its investigation, Uber and Otto were on the opposite sides of a
23 proposed transaction represented by separate counsel. MoFo did not represent Otto and OMM did
24 not represent Uber. Uber cites no case, and the Court is aware of none, that holds that
25 communications between separate parties with separate counsel on opposite sides of a proposed
26 transaction are protected by the attorney-client privilege. Thus, those separate counsel's joint
27 communications with an independent expert are likewise not protected by an attorney-client
28 privilege. While Uber represented in its opposition brief that the Term Sheet was "an agreement

1 in principle” (Dkt. No. 369 at 21), once the Term Sheet was produced (by Waymo, not Uber), it
2 became apparent that there was no such agreement; to the contrary, the Term Sheet explicitly
3 disclaims that it creates an obligation on Uber or Otto to proceed with the transaction. (Dkt. No.
4 510-3 at 13.) It obligated Uber and Otto to certain terms, such as confidentiality and exclusivity
5 with respect to negotiating, but it did not in any way obligate them to consummate the
6 contemplated transaction. Thus, at the time they jointly retained Stroz they were parties to a
7 potential acquisition, and nothing more. Two clients represented by separate counsel do not create
8 an attorney-client relationship by jointly retaining an agent. Such a result would run contrary to
9 the rule that the attorney-client privilege is to be strictly construed. *See United States v. Ruehle*,
10 583 F.3d 600, 607 (9th Cir. 2009).

11 Uber insists that Waymo has waived any argument that these particular documents are not
12 protected by the attorney-client privilege. Not so. It is Uber’s burden, not Waymo’s, to prove that
13 they are privileged from discovery. *Ruehle*, 583 F.3d at 607. Moreover, Waymo argued that Uber
14 had not met its burden because its privilege log is inadequate. And Waymo does not have the
15 benefit of *in camera* review of the documents as does the Court. Further, at the time Waymo filed
16 its motion to compel, Uber had withheld from Waymo many of the documents central to
17 evaluation of Uber’s argument, including the Term Sheet, the Stroz engagement letter, and the Put
18 Call Agreement. Waymo has not waived a challenge to Uber’s assertion of the attorney-client
19 privilege and neither Uber nor Levandowski has met their burden to show that the privilege
20 applies.

21 3. A Purported Common Interest Does not Create an Attorney-Client Privilege

22 Uber and Levandowski appear to be contending that because they assert that they along
23 with Otto and Ron had a common interest in preparing for potential litigation against Waymo,
24 Levandowski’s communications with OMM and MoFo, or more precisely, communications with
25 their agent Stroz, are protected by the attorney-client privilege. They thus highlight the Stroz
26 engagement letter’s statement that “Stroz Friedberg’s communications with Clients, Uber,
27 Ottomotto, (and Messrs. Levandowski and Ron (including their respective counsel), Stroz
28 Friedberg’s work product, and all information and data received from Clients, Uber, and

1 Ottomotto (including its employees and/or their respective counsel) are covered by common
2 interest, attorney-client privilege and/or attorney work-product doctrine.” (Dkt. No. 370-3 at 3.)
3 The Court disagrees.

4 The common interest/joint defense doctrine does not make a document or communication
5 privileged; rather, it is a doctrine that prevents waiver of a pre-existing privilege if the privileged
6 information is shared only with those with a common legal interest. Thus, it “is not technically a
7 privilege in and of itself but instead constitutes an exception to the rule on waiver where
8 communications are disclosed to third parties.” *Holmes v. Collection Bureau of Am., Ltd.*, No. C
9 09-02540 WHA, 2010 WL 143484, at *2 (N.D. Cal. Jan. 8, 2010). As one court has explained:

10 Therefore, a party seeking to rely on the common interest doctrine
11 does not satisfy its burden to justify a claim of privilege simply by
12 demonstrating that a confidential communication took place
13 between parties who purportedly share a common interest. Rather,
14 the party seeking to invoke the doctrine must first establish that the
15 communicated information would otherwise be protected from
16 disclosure by a claim of privilege. For example, the content of the
17 communication may comprise information shared in confidence by a
18 client with his or her attorney, a legal opinion formed and advice
19 given by the lawyer in the course of the attorney-client relationship,
20 or a writing reflecting an attorney’s impressions, conclusions, or
21 theories. The next step in the analysis is to determine whether
22 disclosing the information to a party outside the attorney-client
23 relationship waived any applicable privileges.

24 *OXY Res. California LLC v. Superior Court*, 115 Cal. App. 4th 874, 890, 9 Cal. Rptr. 3d 621, 635
25 (2004), *as modified* (Mar. 4, 2004); *see also Lennar Mare Island, LLC v. Steadfast Ins. Co.*, No.
26 2:12-CV-2182 KJM KJN, 2014 WL 1366252, at *5 (E.D. Cal. Apr. 7, 2014) (“The common
27 interest doctrine does *not* mean there is an expanded attorney-client relationship encompassing all
28 parties and counsel who share a common interest.”) (internal quotation marks and citation
omitted); *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 248 F.R.D. 532, 536 (N.D. Ohio
2008) (explaining that the common interest/joint defense doctrine “is not an independent source of
privilege or confidentiality. If a communication or document is not otherwise protected by the
attorney-client privilege or work-product doctrine, the common interest doctrine has no
application.”); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) (“The
joint defense and common interest doctrines are not privileges in and of themselves. Rather, they

1 constitute exceptions to the rule on waiver where communications are disclosed to third parties.”).

2 In all of the cases cited by Uber and Levandowski, the document or communication was
3 protected by the attorney-client privilege before counsel provided it to another party. The
4 circumstances here are different. Levandowski, without his attorney present, gave an interview in
5 his individual capacity to Stroz, an agent for Otto’s separate counsel and Uber’s separate counsel.
6 As is explained above, Stroz was not an agent for Levandowski’s attorney and thus
7 Levandowski’s communications with Stroz are not protected by the attorney-client privilege. That
8 Otto, Uber, Levandowski and Ron purportedly shared a common legal interest at the time of
9 Levandowski’s communications does not make Levandowski’s communications with Uber’s
10 attorney’s agent an attorney-client privileged communication. To hold that the common interest
11 creates a privilege in these circumstances would be unprecedented and violate the long-standing
12 rule that the attorney-client privilege shall be strictly construed. *Ruehle*, 583 F.3d at 607.

13 Finally, that the attorneys for Levandowski and Ron provided input as to the protocol Stroz
14 implemented, and the preconditions for their clients’ cooperation with Stroz, does not make OMM
15 and MoFo (and their agent Stroz) the attorneys for Levandowski and Ron any more than an
16 attorney-client relationship is created when an attorney for the government negotiates a
17 cooperation agreement with a defendant’s counsel. No one, including Levandowski, claims that
18 Levandowski’s and Ron’s personal attorneys retained Stroz. No attorney-client privilege attached
19 to the Stroz Report or any of its exhibits.

20 **B. Uber Waived any Attorney Work-Product Privilege**

21 The attorney work-product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3),
22 protects “from discovery documents and tangible things prepared by a party or his representative
23 in anticipation of litigation.” *Admiral Ins. Co. v. United States Dist. Court for the Dist. Ariz.*, 881
24 F.2d 1486, 1494 (9th Cir. 1989). “The doctrine provides an attorney working on a case ‘with a
25 certain degree of privacy’ so that he may ‘prepare his legal theories and plan his strategy without
26 undue and needless interference.’” *Elan Microelectronics Corp. v. Apple, Inc.*, No. C 09-01531
27 RS PSG, 2011 WL 3443923, at *2 (N.D. Cal. Aug. 8, 2011) (quoting *Hickman v. Taylor*, 329 U.S.
28 495, 511 (1947)). “The doctrine aims to balance the promotion of an attorney’s preparation in

1 representing a client” and “society’s general interest in revealing all true and material facts to the
2 resolution of a dispute.” *Phoenix Techs. Ltd. v. VMware, Inc.*, 195 F. Supp. 3d 1096, 1101 (N.D.
3 Cal. 2016) (quoting *In re Seagate Tech., LLC*, 497 F.3d 1360, 1375 (Fed. Cir. 2007)). The
4 doctrine applies to documents created by investigators working for attorneys, provided the
5 documents were created in anticipation of litigation. *In re Grand Jury Subpoena (Mark Torf/Torf*
6 *Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004). Uber, as the party resisting discovery, bears the
7 burden of proving that the Stroz documents are attorney work-product. *See, e.g., United States v.*
8 *ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1069 (N.D. Cal. 2002). The work-product privilege,
9 like the attorney-client privilege, can be waived by disclosure to a third party. *Hernandez v.*
10 *Tanninen*, 604 F.3d 1095, 1100 (9th Cir. 2010).

11 Assuming the Stroz investigation qualifies as Uber’s attorney work-product, the question is
12 whether Uber waived any privilege by disclosing the work product to Otto. MoFo and OMM
13 together engaged Stroz to conduct the Term Sheet’s required due diligence, although Uber alone
14 paid for it. And they directed Stroz to jointly and simultaneously communicate the investigation’s
15 factual findings to MoFo and OMM. Thus, the Stroz work product was simultaneously disclosed
16 to Otto at the time it was created. Uber contends that its work-product privilege was nonetheless
17 not waived because Otto and Uber shared a common legal interest in defending against claims by
18 Waymo.

19 **1. The Common Interest Doctrine does not Apply**

20 As was explained in connection with the attorney-client privilege argument, the “joint
21 defense” or “common interest” privilege is an exception to the rule that a claim of privilege is
22 waived by disclosure to a third party.

23 The concept applies where parties are represented by separate
24 counsel but engage in a common legal enterprise. The interests of
25 the parties involved in a common defense need not be identical, and,
26 indeed may even be adverse in some respects. The joint-defense
exception, however, protects *only* those communications that are
part of an on-going and joint effort to set up a common defense
strategy.

27 *Holmes v. Collection Bureau of Am., Ltd.*, No. 09-02540 WHA, 2010 WL 143484, at *2 (N.D.
28 Cal. Jan. 8, 2010) (internal citation omitted) (emphasis in original). Thus, for non-waiver of a

1 privilege to apply, the parties must have a common legal interest and the communications sought
2 to be shielded from discovery must have been in furtherance of a joint strategy in support of that
3 legal interest. *Nidex Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 579 (N.D. Cal. 2007); *see also*
4 *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (for the common interest doctrine
5 to apply, “a shared desire to see the same outcome in a legal matter is insufficient to bring a
6 communication between two parties within this exception. Instead, the parties must make the
7 communication in pursuit of a joint strategy in accordance with some form of agreement—
8 whether written or unwritten.”). Uber argues that as soon as it and Otto signed the Term Sheet
9 they had a common legal interest in jointly developing a strategy to defend potential litigation by
10 Waymo; therefore, their joint retention of Stroz did not waive the attorney work-product privilege.
11 The Court disagrees.

12 The Term Sheet required the Stroz investigation and Uber and Otto did not have a common
13 legal interest at the time they entered into it. At that time, Otto and Uber were on the opposite
14 sides of a proposed acquisition with no obligation to consummate the transaction. Uber and Otto
15 could only have a common legal interest in pursuing a defense of a possible lawsuit by Waymo
16 once Uber was obligated (if certain conditions were met) to acquire Otto and thus inherit or create
17 any liabilities to Waymo. If Uber did not acquire Otto and hire Otto’s former Waymo employees,
18 Uber and Otto did not have a common legal interest. But as the Term Sheet demonstrates, no
19 acquisition obligation existed until the subsequent execution of the Put Call Agreement. Thus,
20 Uber and Otto did not share a common legal interest and therefore Uber’s sharing of its work
21 product with Otto waived any work-product privilege.

22 Moreover, even if Otto and Uber shared a common legal interest notwithstanding the lack
23 of any acquisition agreement, the common legal interest doctrine prevents waiver only if the
24 communications at issue were “designed to further *that* [legal] effort.” *Nidex*, 249 F.R.D. at 579
25 (internal quotation marks and citation omitted). The Term Sheet itself is the best evidence of the
26 purpose of the Stroz investigation: it calls for the investigation, sets its parameters, and even in
27 detail describes what information the diligenced employees must give to Stroz. The Term Sheet
28 reveals two purposes of the Stroz investigation: (1) to allow Uber to conduct due diligence into

1 certain Otto employees prior to making a decision to sign the Put Call Agreement, and (2) to
2 create a record that will control whether any diligenced employees have to reimburse Uber for
3 indemnification expenses should Waymo sue the diligenced employees. Neither of these purposes
4 is in furtherance of some common interest in defending against potential litigation by Waymo.

5 Stroz's interim disclosure to MoFo of its investigation findings just before Uber signed the
6 Put Call Agreement is further evidence that the purpose of the Stroz investigation was to enable
7 Uber to evaluate whether to purchase Otto rather than to develop a joint strategy regarding
8 Waymo litigation. There is no reason for Uber to receive that interim report other than to evaluate
9 whether to sign the Put Call Agreement. And, indeed, it appears that within days of receiving the
10 interim Stroz report Uber did just that.

11 Uber's reliance on *Rembrandt Patent Innovations, LLC v. Apple Inc.*, 2016 WL 427363
12 (N.D. Cal. Feb. 4, 2016), is misplaced. There, privileged communications regarding a patent were
13 shared after Rembrandt obtained an exclusive option to purchase the patent from the named
14 inventors. Following the option purchase, Rembrandt hired the inventors as consultants and they
15 jointly obtained an attorney to provide legal advice regarding patent ownership. Rembrandt
16 subsequently exercised the option and filed suit against an alleged infringer. The district court held
17 that once Rembrandt had acquired an exclusive option to purchase the patent, "it was already
18 'engage[d] in a common legal enterprise' with the named inventors and communications between
19 them were 'part of an on-going and joint effort to set up a common ...strategy' for perfecting title
20 in the patent and enforcing it through litigation." *Id.* at *7. The court added that his review of the
21 withheld documents *in camera* confirmed that once Rembrandt purchased the exclusive option the
22 "the parties' interests aligned and they began to pursue joint legal interests." *Id.*

23 Here, in contrast, the Court's review of the Term Sheet, the Stroz Report, and its exhibits
24 confirms the opposite: Uber and Otto's interests were not aligned. The interviewees were required
25 to "attest" to the truth of what they reported to Stroz and to "certify" that they had complied with
26 Uber's due diligence in good faith. The protocol set up an elaborate process to ensure that Stroz
27 did not share Otto's attorney-client privileged communications with Uber. And, most
28 significantly, whether Uber decided to go forward with the acquisition depended in part on what it

1 learned from the Stroz pre-signing due diligence. Thus, Otto’s interest was in Uber not learning
 2 anything that would cause it not to sign the Put Call Agreement, whereas Uber’s interest was in
 3 learning as many facts as possible before it committed to the Put Call Agreement. Accordingly,
 4 Uber and Otto’s interests, legal or otherwise, were not aligned. This is why on March 14 and
 5 March 21, Levandowski’s counsel told Stroz that Levandowski shared a common legal interest
 6 with Otto, but did not also claim to share a common interest with Uber. (Stroz Report, Exhs. 2, 3.)
 7 Uber and Otto were on opposite sides of a proposed transaction.

8 The Court’s review of the Term Sheet, the Stroz Report and its exhibits also shows that
 9 Uber was not “engage[d] in a common legal enterprise” with Otto and their joint communications
 10 with Stroz were not “part of an on-going and joint effort to set up a common . . . strategy.”
 11 *Rembrandt*, 2016 WL 427363, at *7. Instead, the Stroz investigation was a process designed to
 12 allow Uber to discover facts relevant to its acquisition decision and to create a record to control
 13 reimbursement of indemnification expenses to Uber.

14 Some district courts have held that so long as parties are contemplating a merger or similar
 15 transaction they share a common interest sufficient to avoid waiver through the sharing of
 16 privileged documents. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308
 17 (N.D. Cal. 1987). These cases, however, involve the sharing of already privileged information,
 18 and not the joint production of purportedly privileged work product. Uber does not cite any case
 19 in which parties on opposing sides of a proposed transaction were allowed to claim attorney work-
 20 product for due diligence jointly conducted by the parties. But, to the extent the *Hewlett-Packard*
 21 analysis could be extended to the joint creation of work product, this Court simply disagrees.

22 “Such an exception would remove the common interest doctrine far from its historical antecedent,
 23 the joint defense doctrine.” *Nidec Corp.*, 249 F.R.D. at 580. Thus, the Court finds that Otto and
 24 Uber did not share a common legal interest at the time they jointly engaged Stroz to conduct a
 25 factual investigation into certain Otto employees and the Stroz investigation was not designed to
 26 further a joint defense strategy.² The common interest/joint defense doctrine therefore does not

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28 ² The outcome might be different after the signing of the Put Call Agreement. At that point Uber and Otto, and perhaps even Levandowski and Ron, arguably shared a common legal interest.

1 prevent Uber’s waiver of any work-product privilege in the Stroz Report.

2 Uber relies on the Stroz engagement letter and the written joint defense agreement as
3 evidence of the parties’ common legal interest. Once again it emphasizes that the letter recites that
4 the “purpose of the Engagement is to enable Uber, Otto, Anthony Levandowski and Lior Ron
5 (who are parties to a Joint Defense and Common Interest Agreement), along with respective
6 counsel, to understand certain factual matters potentially related to potential litigation,” and that
7 the “Joint Defense, Common Interest and Confidentiality Agreement” states that it is in
8 contemplation of potential litigation. (Dkt. No. 369 at 13.) None of this evidence is persuasive.

9 The engagement letter attached to Uber’s opposition (and provided with its *in camera*
10 submission) is not evidence of the parties’ intent when MoFo and OMM engaged Stroz. The
11 engagement letter does not appear to be the version that was operative when Stroz began its
12 investigation and, specifically, when it interviewed Levandowski and Ron and received their
13 devices in March 2016 and when it provided its interim report to MoFo in early April
14 2016. Instead, there appears to be an earlier version of the letter which Uber has not
15 produced. Although the version Uber produced is dated “as of March 4, 2016,” Uber’s
16 authenticating witness does not provide any evidence as to when that version of the letter was
17 created. (Dkt. 370 ¶ 12.) The objective evidence suggests it was not created on March 4, and was
18 instead drafted or modified around the time of the April 11 execution of the Put Call Agreement
19 and Joint Defense Common Interest and Confidentiality Agreement.

20 On March 14 and March 21, Levandowski’s counsel Gardner writes Stroz regarding
21 Levandowski’s upcoming examination by Stroz “pursuant to the engagement letter”; thus, there
22 seems to have been some engagement letter that was written prior to those dates. Counsel also
23 states, however, that his client Levandowski shares a common interest with Otto, but he does not
24 state that Levandowski shares a common interest with Uber. Nor does he disclose the existence of

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Once the Put Call Agreement was signed Uber had an indemnification obligation and the parties could bind one or the other to the sale, provided certain conditions were met. Uber’s only argument to the Court, however, is that the common legal interest arose upon the signing of the Term Sheet and, in any event, the Stroz investigation began well before the Put Call Agreement was signed.

1 a “Joint Defense and Common Interest Agreement.” This omission directly contradicts the “as of
2 March 4, 2016” engagement letter’s statement that Uber, Otto, Levandowski and Ron are parties
3 to a “Joint Defense and Common Interest Agreement.” If as of March 14 Levandowski had
4 entered into such an agreement, Gardner would have certainly referenced that in his
5 communication with Stroz, rather than simply stating that Levandowski shares a common interest
6 with Otto and not with Uber. Further, the written “Joint Defense and Common Interest
7 Agreement” was not entered into until April 11, 2016, weeks after the purportedly “as of March 4”
8 engagement letter.

9 Finally, the Court’s *in camera* review of the Stroz Report reveals that the Stroz
10 investigation protocol was revised on April 11, 2016, but then given the date of “as of March 4,
11 2016.” (Stroz Report at 4.) The protocol is an exhibit to the engagement letter, and both are
12 attached as Exhibit 4 to the Stroz Report and both dated “as of March 4, 2016.” The Court thus
13 finds that the engagement letter, like the protocol, was most likely revised on April 11, 2016 and
14 then given the date “as of March 4, 2016.” It is thus not evidence of the parties’ intent when Stroz
15 began its investigation in early March 2016. What might be probative is the engagement letter, if
16 any, Stroz actually sent MoFo and OMM on March 4, but Uber has chosen not to place such
17 document in the record.

18 The engagement letter’s probative value as to Uber’s intent in retaining Stroz is further
19 undermined by what is missing from the “as of March 4” letter; namely, any reference whatsoever
20 to the very Term Sheet which required the hiring of Stroz in the first instance and set forth in
21 detail Stroz’s duties and responsibilities. The Term Sheet also dictated that the Stroz investigation
22 would create a record to determine whether an employee, such as Levandowski, must reimburse
23 Uber for indemnification, should Uber incur an indemnification obligation. Yet, the engagement
24 letter is silent as to the existence of the Term Sheet.

25 The written Joint Defense, Common Interest and Confidentiality Agreement also does not
26 persuade the Court that Uber and Otto retained Stroz to further a common legal interest in
27 litigation with Waymo. The Agreement was entered into at the same time as the signing of the Put
28 Call Agreement and primarily references that Agreement and the need for the parties to cooperate

1 in the “proceedings” that are likely to occur as a result of the acquisition. The February 24, 2016
2 email among counsel for Uber and Otto referencing discussions about a “JDA” is insufficient to
3 support a finding that Stroz was engaged to further a common legal interest in defending against
4 litigation brought by Waymo rather than the purposes set forth in the Term Sheet. The email may
5 have been referencing the “JDA” that would be entered into upon the signing of the Put Call
6 Agreement, exactly what happened here. And, in any event, parties cannot create a common legal
7 interest where none exists merely by entering into a joint defense agreement.

8 Counsel’s declarations are also not persuasive evidence that Otto and Uber retained Stroz
9 to pursue a common legal strategy. MoFo, for example, declares that it and OMM engaged Stroz
10 “to aid MoFo and OMM in providing legal advice to their respective clients about litigation risks
11 and potential claims that could be brought by Google in connection with Uber’s acquisition of
12 Otto.” (Dkt. No. 370 ¶ 9.) Nowhere in the declaration, however, or even in Uber’s opposition, is
13 it disclosed that MoFo retained Stroz as required by the Term Sheet to enable Uber to conduct due
14 diligence before deciding whether to enter into the Put Call Agreement. Nowhere in the
15 declaration is it disclosed that the Stroz investigation would control whether an employee, such as
16 Levandowski, would be required to reimburse Uber for indemnification expenses as determined
17 by an arbitrator or a court. And nowhere in the declaration does it disclose that the Term Sheet did
18 not obligate either party, even conditionally, to close the transaction. The only objective
19 contemporaneous evidence as to the purpose of the Stroz engagement—Exhibit C to the February
20 22, 2016 Term Sheet—is omitted from all of the counsel declarations. Accordingly, the Court
21 accords them little weight.

22 In sum, the Court finds that Uber and Otto did not share a common legal interest when
23 they jointly retained Stroz and that the Stroz investigation was not in furtherance of any common
24 legal strategy. Thus, the common interest/joint defense doctrine does not prevent Uber’s
25 disclosure of its work product to Otto from waiving Uber’s work-product privilege. It also
26 appears that the Stroz Report, or at least portions of it, were disclosed to Levandowski and Ron
27 before the execution of the Put Call Agreement. (Stroz Report at 4.) Levandowski/Ron also did
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1 not share a common legal interest with Uber for the same reasons as Otto. This is an additional
2 reason the common interest doctrine does not prevent waiver of Uber's work-product privilege.

3 **2. Uber Disclosed the Stroz Investigation to an Adversary**

4 "Unlike for the attorney-client privilege, waiver of attorney work-product protection
5 requires more than the disclosure of confidential information, it requires an act inconsistent with
6 the adversary system." *Great Am. Assur. Co. v. Liberty Surplus Ins. Corp.*, 669 F. Supp. 2d 1084,
7 1092 (N.D. Cal. 2009); *see also United States v. Bergonzi*, 216 F.R.D. 487, 497 (N.D. Cal. 2003).
8 (work-product protection is waived when the privileged documents are disclosed to a third party
9 and that disclosure enables an adversary to access the information).

10 This additional hurdle does not save Uber's waiver here. Uber disclosed the Stroz
11 investigation to its then adversaries Otto, Levandowski and Ron. Before the signing of the Put
12 Call Agreement, Otto was Uber's adversary because they were on opposite sides of a potential
13 transaction. Further, Uber engaged Stroz to investigate Otto and its employees and the results of
14 that investigation could have caused Uber to not proceed with the acquisition. In *Bergonzi*, for
15 example, a company disclosed to the government its internal investigation into its officers'
16 securities fraud. After the government sued the officers, the officer defendants sought discovery
17 from the company of the internal investigation. The district court held that the company waived
18 any work-product privilege in the investigation by disclosing it to the government; the government
19 was its adversary since it was investigating the company. 216 F.R.D. at 498. Similarly, here,
20 Uber was investigating Otto and the results of that investigation could have resulted in no
21 acquisition. Otto was Uber's adversary.

22 Levandowski and Ron were also Uber's adversaries as Uber was investigating them too.
23 The investigation results could have led to Levandowski and Ron losing millions of dollars if Uber
24 decided not to sign the Put Call Agreement because of what it learned. Or, the investigation could
25 lead to Levandowski or Ron having to reimburse Uber for indemnification expenses if an
26 arbitrator or court finds that they were not truthful with Stroz. Levandowski and Ron were Uber's
27 adversaries with respect to the Stroz investigation and thus Uber's disclosure of its work product
28 to Levandowski and Ron waived any work-product privilege.

1 Once a party has disclosed work product to one adversary, it waives work-product
2 protection as to all other adversaries. *See Bergonzi*, 216 F.R.D. at 498 (holding that since the
3 company had disclosed its work product to the government, an adversary, the company had to
4 disclose it to the officer defendants). As Uber disclosed its Stroz work product to its adversaries
5 Otto, Levandowski and Ron, it must disclose the same work product to Waymo.

6 **C. Waymo has a Substantial Need for Parts of the Stroz Report**

7 Even if the Stroz Report and exhibits are non-waived attorney work-product, some of the
8 documents must nonetheless be produced to Waymo. Ordinary fact work product is discoverable
9 when the moving party has a substantial need for the documents. *See Fed. R. Civ. P.*
10 26(b)(3)(A)(ii). Opinion work product, in contrast, “receives greater protection than ordinary work
11 product and is discoverable only upon a showing of rare and exceptional circumstances.” *Tennison*
12 *v. City & Cnty. Of San Francisco*, 226 F.R.D. 615, 623 (N.D. Cal. 2005) (citation omitted); *see*
13 *also Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (“A party
14 seeking opinion work product must make a showing beyond the substantial need/undue hardship
15 test required under Rule 26(b)(3) for non-opinion work product.”). Opinion work product reveals
16 an attorney’s or the attorney’s representative’s mental impressions, conclusions, opinions or legal
17 theories. *Holmgren*, 976 F.2d at 577. To the extent that an investigator’s interview reports reflect
18 essentially verbatim witness statements, they are only factual work product that are discoverable
19 based on a showing of substantial need. *See In re Convergent Technologies Second Half 1984*
20 *Secs. Litig.*, 122 F.R.D. 555, 559 (N.D. Cal. 1988).

21 Waymo has made a showing of a substantial need for Levandowski’s interview memo and
22 the documents retrieved from his devices and cloud storage. The district court has already found
23 that Levandowski downloaded 14,000 Waymo files shortly before decamping for Otto; thus, he is
24 the key witness in this trade secret litigation. However, he has refused to testify or produce any
25 documents on Fifth Amendment grounds, including any documents he may have taken from
26 Waymo. Thus, the Stroz investigation is the only way for Waymo to obtain this relevant
27 information; Waymo has thus met its burden of showing a substantial need for these documents.
28 *See, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2003 WL 1867908, at *1 (D. D.C. Jan. 24,

1 2003).

2 Having reviewed the documents and the memo *in camera*, the Court finds that they are
3 ordinary fact work product. The memo is nearly a verbatim recitation of what Levandowski told
4 Stroz and in the end he even attests to the truth of what he reported. Levandowski, or at least his
5 counsel, also reviewed the memo before Stroz disclosed it to OMM and MoFo. (Stroz Report at
6 5.) It does not contain any Stroz impressions, conclusions, opinions or legal theories. Much of the
7 Report itself, in contrast, reflects Stroz’s “findings and methodology” and thus, may be opinion
8 work product.

9 The exhibits, which are documents Stroz retrieved rather than created, are also, at best, fact
10 work product. The Court rejects Uber’s argument that ordering the documents produced will
11 reveal Stroz’s mental impressions and opinions in deciding which documents to attach to the
12 Report. As neither the Court nor Waymo has access to all of the documents Stroz reviewed,
13 producing these pre-existing documents will not reveal Stroz’s strategies or opinions. *Compare*
14 *with Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (holding that an attorney’s binder of a few
15 documents used to prepare his client for deposition out of the thousands produced in the litigation
16 was opinion work product).

17 Because the Court has concluded that the entire Stroz Report and its exhibits must be
18 produced as they are not protected by attorney-client privilege and any work-product privilege has
19 been waived, the Court will not in this Order identify with specificity which documents or
20 portions of documents are ordinary fact work product for which Waymo has demonstrated a
21 substantial need. The Court will do so when and if needed.

22 CONCLUSION

23 Neither Uber nor Levandowski has met its/his burden of showing that the Stroz Report and
24 any of its exhibits are protected from discovery in this civil action by an attorney-client privilege.
25 As there is no separate “common interest privilege” that protects documents from discovery that
26 are not otherwise privileged, that is the end of the Court’s inquiry on the attorney-client privilege
27 question. To the extent the Report and its exhibits are Uber’s attorney work-product, Uber waived
28 any privilege by disclosing, indeed jointly creating, that work product with Otto and later to

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Levandowski and Ron. Waymo’s motion to compel is therefore GRANTED.

Any party wishing to file an objection to this Order with the district court in accordance with N.D. Cal. Civil L.R. 72-2 must file its objection on or before Thursday, June 8, 2017. In the meantime, the Court STAYS this Order until further order of the district court or unless or until no objection is filed.

This Order disposes of Docket Nos. 321, 371, 382.

IT IS SO ORDERED.

Dated: June 5, 2017



JACQUELINE SCOTT CORLEY
United States Magistrate Judge

United States District Court
Northern District of California