1 2 3 4 5 6 7 8	QUINN EMANUEL URQUHART & SULLIVAN Charles K. Verhoeven (Bar No. 170151) charlesverhoeven@quinnemanuel.com David A. Perlson (Bar No. 209502) davidperlson@quinnemanuel.com Melissa J. Baily (Bar No. 237649) melissabaily@quinnemanuel.com John Neukom (Bar No. 275887) johnneukom@quinnemanuel.com Jordan Jaffe (Bar No. 254886) jordanjaffe@quinnemanuel.com 50 California Street, 22 nd Floor San Francisco, California 94111-4788 Telephone: (415) 875-6600 Facsimile: (415) 875-6700	N, LLP
9	Attorneys for WAYMO LLC	
10		DISTRICT COURT
11		ICT OF CALIFORNIA
12		SCO DIVISION
13	WAYMO LLC,	CASE NO. 3:17-cv-00939
14	Plaintiff,	WAYMO'S RESPONSE TO ORDER RE LETTER FROM UNITED STATES
15	VS.	ATTORNEY (DKT. 2261)
16	UBER TECHNOLOGIES, INC.; OTTOMOTTO LLC; OTTO TRUCKING LLC,	
17	Defendants.	Judge: The Honorable William Alsup
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19		REDACTED VERSION OF DOCUMENT SOUGHT TO BE FILED UNDER SEAL
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01980-00104/9703937		
		WAYMO NOTICE OF U.S. ATTORNEY LETTER

1	Throughout this case, Uber has been trumpeting its alleged exhaustive search for Waymo
2	documents and that nothing has been found on Uber's servers. It now appears that,
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6	On November 22, seven days before the parties are to pick a jury, the Acting U.S. Attorney for
7	the Northern District of California informed the Court
8	previously disclosed to the Court or Waymo, that
9	Specifically,
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18	The heavily redacted copy of the Jacobs Letter, finally produced by Uber at 11:54 p.m. on November
19	24, and only after the Court's Notice, is attached as Ex. 1. The information in the U.S. Attorney Letter
20	and Jacobs Letter
21	Letter reveals,
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26 27	
27	Not even then shit
28	Yet, even though it <i>at issue in this case</i> , was <i>responsive to multiple</i>
01980-00104/9703937	-1- WAYMO NOTICE OF U.S. ATTORNEY LETTER

Waymo discovery requests and Court orders, and was sent more than six months ago, to an in-house
 Uber lawyer who was deposed in this very action, Uber hid the Jacobs Letter and

3 from the Court and Waymo. Uber has so far not disputed that the Jacobs letter and documents and information regarding Uber's conduct described therein was responsive to 4 5 Waymo's discovery requests or Court Orders. Nor could it. Among other things, as detailed further below, Waymo's document requests sought all documents regarding the Ottomotto acquisition and all 6 7 documents and communications regarding the misappropriated materials. Waymo also served an 8 interrogatory seeking Uber's "policies and practices with respect to the retention and/or destruction 9 of" documents, "including without limitation emails, instant messages, electronically stored 10 information, and hard copies), from 2014 to the present." The Court's Preliminary Injunction Order required Uber to provide "a complete and chronologically organized log of all oral and written 11 12 communications — including, without limitation, conferences, meetings, phone calls, one-on-one 13 conversations, texts, emails, letters, memos, and voicemails — wherein Anthony Levandowski mentioned LiDAR to any officer, director, employee, agent, supplier, or consultant of defendants" (Dkt. 14 426 at 25, ¶ 5), and the March 16 Expedited Discovery Order ordered Uber to "produce all documents" 15 16 bearing on [the] deletion, destruction, or modification" of any part of downloaded materials. (Dkt. 61 17 at 2.) Yet, Uber produced nothing regarding the Jacobs Letter

18 So Waymo has literally zero information about them other than the heavily redacted Jacobs
19 Letter it got late Friday night. Indeed, the letter would have remained

20 concealed altogether had the Acting U.S. Attorney

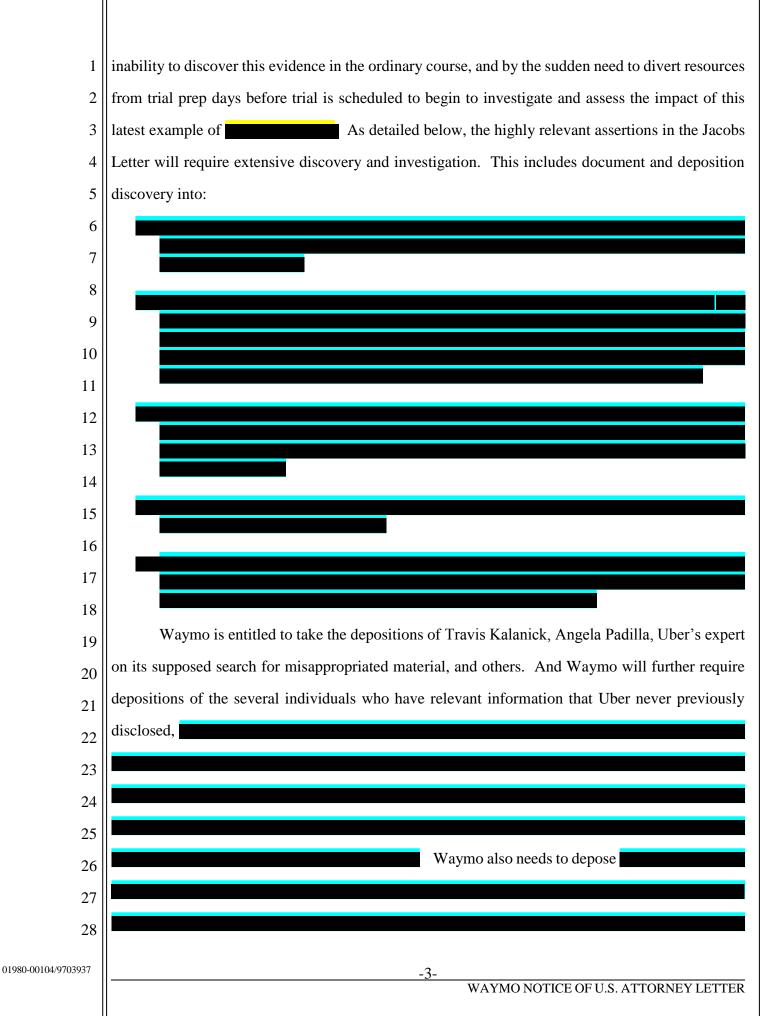
sufficiently material as to warrant an entirely unprompted letter to the Court on the eve of
trial. The only possible conclusion is that Uber intentionally withheld the Jacobs Letter and related
materials to prevent Waymo from discovering material evidence in this case.

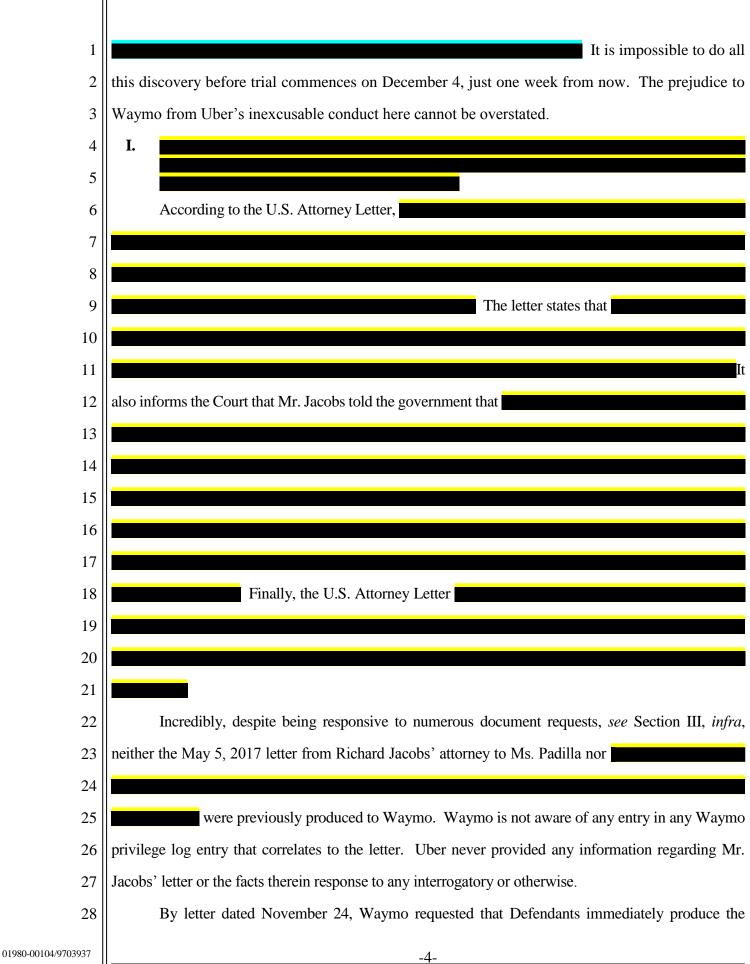
We are now seven days from trial in this action and Waymo has only just learned – from
information *discovered and provided to the Court by the Acting U.S. Attorney for the Northern District of California* – of new evidence that

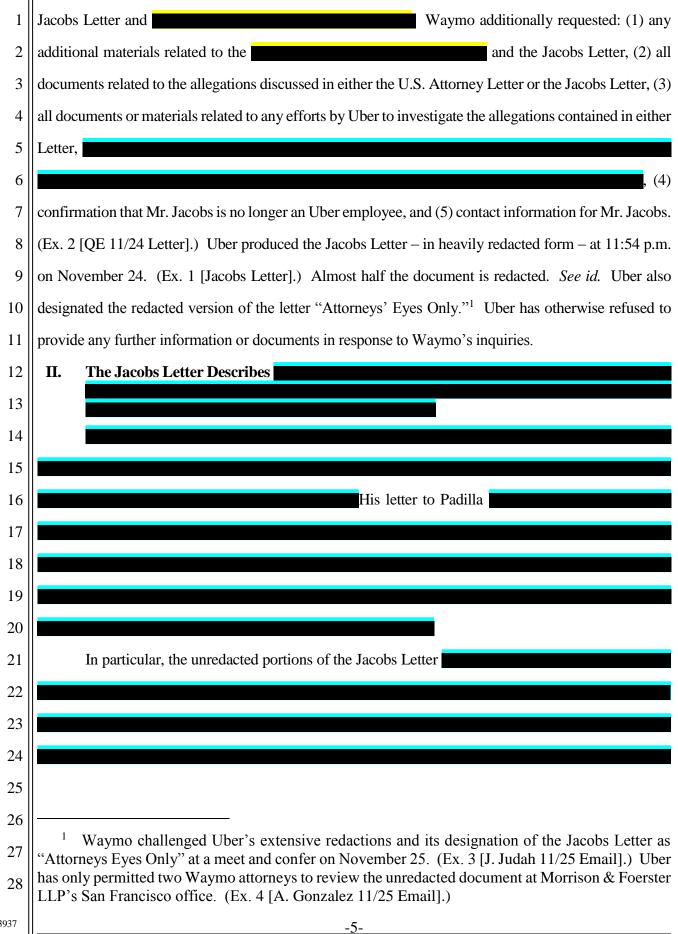
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27 28

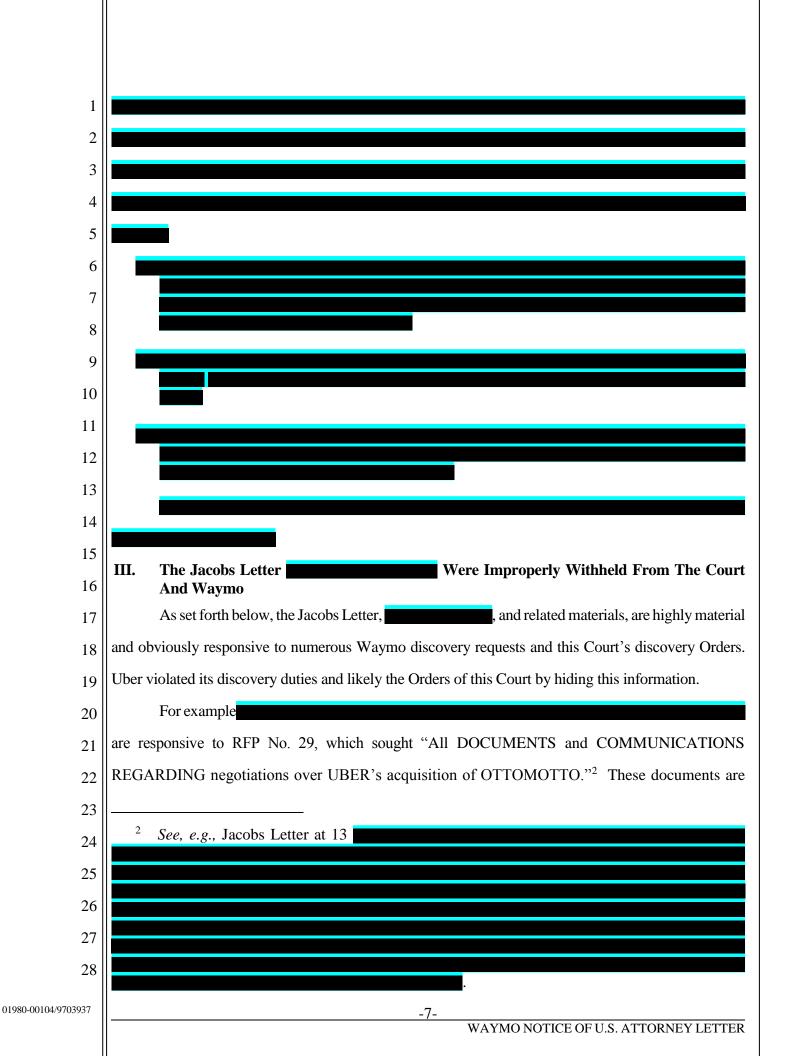
Waymo has been severely prejudiced by its











1	also responsive to RFP No. 73, which requested "All DOCUMENTS AND COMMUNICATIONS
2	REGARDING the MISAPPROPRIATED MATERIALS, INCLUDING but not limited to (i)
3	DOCUMENTS containing any information derived from the MISAPPROPRIATED MATERIALS,
4	(ii) any electronic media that contains or contained the MISAPPROPRIATED MATERIALS, and
5	(iii) any DOCUMENTS REGARDING any meetings or discussions REGARDING the substance
6	of the MISAPPROPRIATED MATERIALS outside of WAYMO." More broadly, documents
7	regarding Uber's polices or practices regarding the
8	
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10	should have been disclosed in response to
11	Waymo's Common Interrogatory No. 8, which asked Uber to "Describe in detail YOUR policies
12	and practices with respect to the retention and/or destruction of DOCUMENTS (including without
13	limitation emails, instant messages, electronically stored information, and hard copies), from 2014
14	to the present."
15	Documents related to Example 1 Jacobs Letter, including
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17	
18	would also be responsive numerous discovery requests.
19	For example, evidence of
20	(Ex. 1 [Jacobs Letter], at 13) should have been disclosed in response to at least the
21	following Waymo requests:
22	• RFP No. 29. All DOCUMENTS and COMMUNICATIONS REGARDING negotiations
23	over UBER's acquisition of OTTOMOTTO.
24	• RFP No. 30. ALL DOCUMENTS REGARDING any consulting work by LEVANDOWSKI for UBER'S acquisition of OTTOMOTTO.
25	Further, evidence regarding the substance of the Jacobs Letter should have disclosed in
26	response to at least the following Waymo requests:
27	• RFP No. 28 . All DOCUMENTS and COMMUNICATIONS REGARDING UBER's due
28	diligence of OTTOMOTTO.
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	WAYMO NOTICE OF U.S. ATTORNEY LETTER

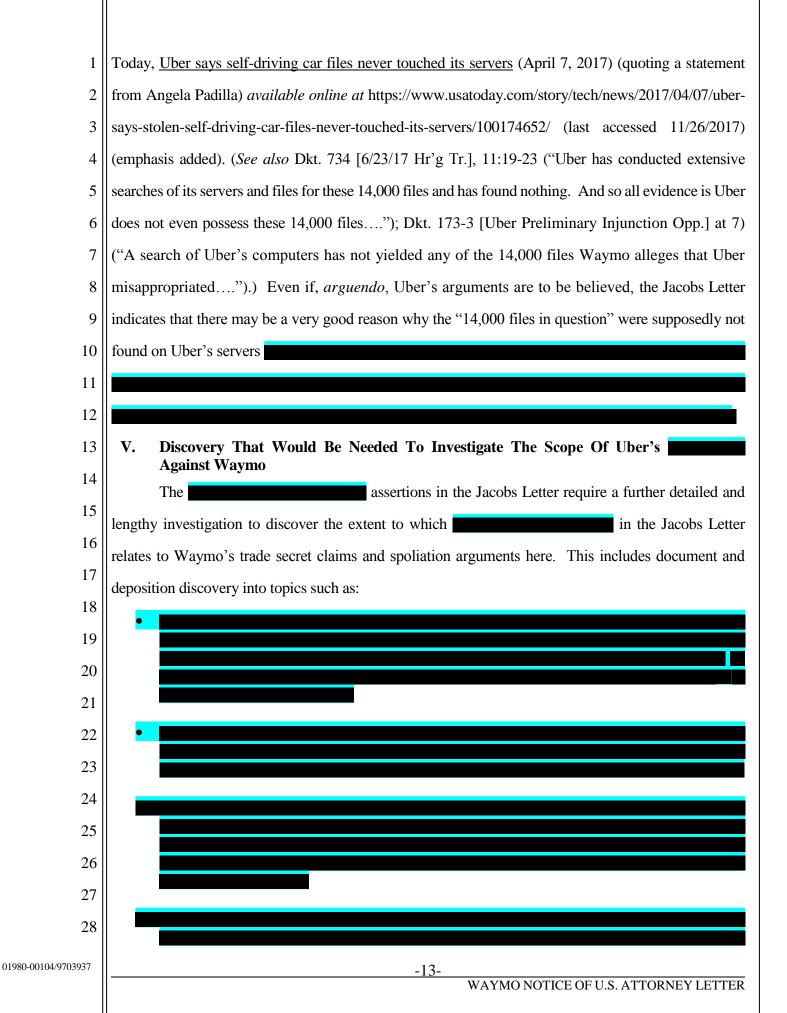
1 2 3	• RFP No. 72 . All DOCUMENTS REGARDING DEFENDANTS' policies regarding employees' use of personal computers or other devices while working at or for DEFENDANTS. ³
4 5 6 7	• RFP No. 73 . All DOCUMENTS AND COMMUNICATIONS REGARDING the MISAPPROPRIATED MATERIALS, INCLUDING but not limited to (i) DOCUMENTS containing any information derived from the MISAPPROPRIATED MATERIALS, (ii) any electronic media that contains or contained the MISAPPROPRIATED MATERIALS, and (iii) any DOCUMENTS REGARDING any meetings or discussions REGARDING the substance of the MISAPPROPRIATED MATERIALS outside of WAYMO.
8	• Expedited RFP No. 17 . All COMMUNICATIONS between Travis Kalanick and any PERSON REGARDING, LEVANDOWSKI, OTTOMOTTO or OTTO TRUCKING before August 23, 2016.
10 11 12	• Expedited Interrogatory No. 3 . IDENTIFY all Uber Devices and Non-Uber Devices (as those terms are defined in UBER00006444) that LEVANDOWSKI has used to access any of DEFENDANTS' Networks (as that term is defined in UBER00006444), or that LEVANDOWSKI could have used to access any of DEFENDANTS' Networks (as that term is defined in UBER00006444). ⁴
13 14 15	• Common Interrogatory No. 8 . Describe in detail YOUR policies and practices with respect to the retention and/or destruction of DOCUMENTS (including without limitation emails, instant messages, electronically stored information, and hard copies), from 2014 to the present.
16	Despite these repeated requests, however, Uber has refused to provide any explanation as to why
17	these materials were withheld from the Court and Waymo. Nor does Uber dispute that these materials
18	would have continued to be concealed from Waymo had the Acting U.S. Attorney not felt compelled to
19	inform the Court of the information contained in them.
20	Uber also likely violated Court Orders by concealing information about
21	The Court's April 4 Order
22	Re Discovery Hearing (Dkt. 144) required Defendants to bring "[a] list of all servers (and their locations)
23	used at any time in any way for defendants' LiDAR-related activities" and expressly instructed
24	
25	³ During a July 5, 2017 most and confer Wayma arread to limit the same of this request
26	³ During a July 5, 2017 meet-and-confer, Waymo agreed to limit the scope of this request (without prejudice) to Levandowski's use of a personal computer while working at or for Uber or Ottomotto.
27	⁴ UBER00006444 is Uber's "Network & Device Acceptable Use Policy." It defines "Uber
28	Devices" as "Devices owned and/or issued by Uber" and "Non-Uber Devices" as "Devices owned by persons or parties other than Uber."
01980-00104/9703937	-9- WAYMO NOTICE OF U.S. ATTORNEY LETTER
	WAYMO NOTICE OF U.S. ATTORNEY LETTER

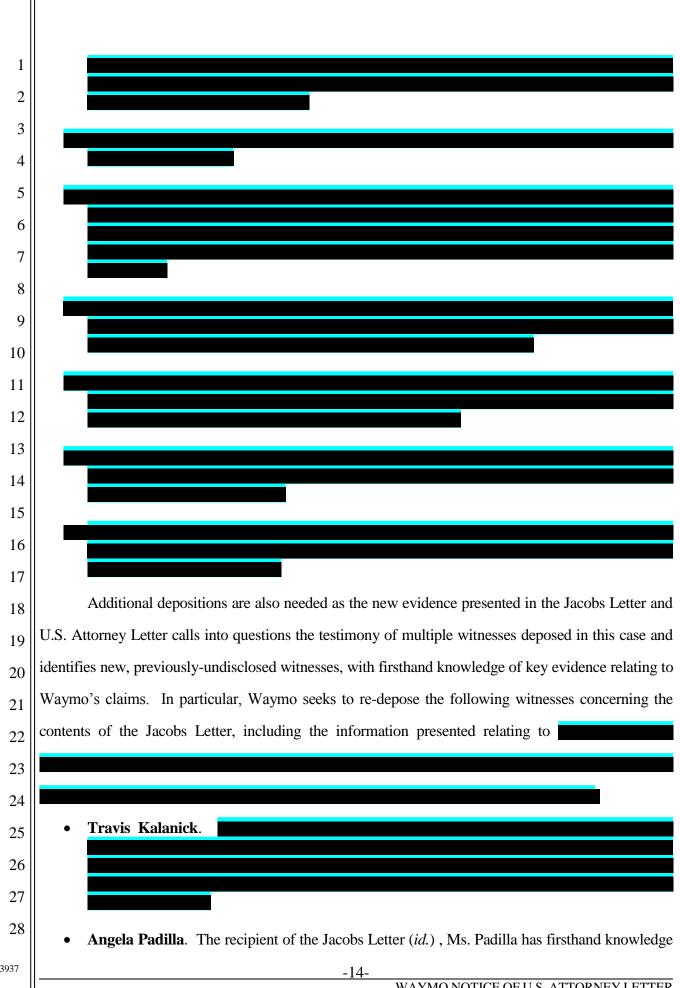
1	Defendants to "not leave anything off the list merely because some other server supposedly houses the
2	same materials." (Dkt. 144 at 1.) The Jacobs Letter indicates that shortly after the Ottomotto acquisition,
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4	
5	(Ex. 1 [Jacobs Letter],
6	at 9-10, 13.) It is very likely
7	at some time and in some way in connection with LiDAR-related activities, but no
8	such were disclosed in Uber's response to the April 4 Order. (Ex. 6 [Response to Dkt. 144].)
9	Moreover, the Court's Preliminary Injunction Order provided that "Waymo's counsel and one expert
10	may inspect any and all aspects of defendants' ongoing work involving LiDAR" (Dkt. 426 at 25, ¶ 6),
11	yet Waymo was never permitted to inspect any such work conducted through
12	
13	Uber's compliance with the Court's March 16 Expedited Discovery Order (Dkt. 61) is also
14	called into question by the revelations in the Jacobs Letter. The Court ordered Uber to "produce all
15	documents bearing on [the] deletion, destruction, or modification" of any part of downloaded materials.
16	(Dkt. 61 at 2.) The Jacobs Letter and should
17	have been disclosed pursuant to Uber's continuing obligation to comply with the Order, as would
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20	Further, the Court's Preliminary Injunction Order required Uber to provide "a complete and
21	chronologically organized log of all oral and written communications — including, without limitation,
22	conferences, meetings, phone calls, one-on-one conversations, texts, emails, letters, memos, and
23	voicemails — wherein Anthony Levandowski mentioned LiDAR to any officer, director, employee,
24	agent, supplier, or consultant of defendants." (Dkt. 426 at 25, \P 5.) Waymo has uncovered evidence of
25	meetings between Travis Kalanick and Anthony Levandowski wherein LiDAR was discussed, but that
26	have never been included on Uber's Paragraph 5 Log. One example, raised in Waymo's Supplemental
27	Brief in support of a Motion for Order to Show Cause, is the January 3, 2016 white-boarding session
28	between Mr. Levandowski, Mr. Kalanick, and Jeff Holden. (Dkt. 1501-4 at 8; Dkt. 1501-8.) Uber

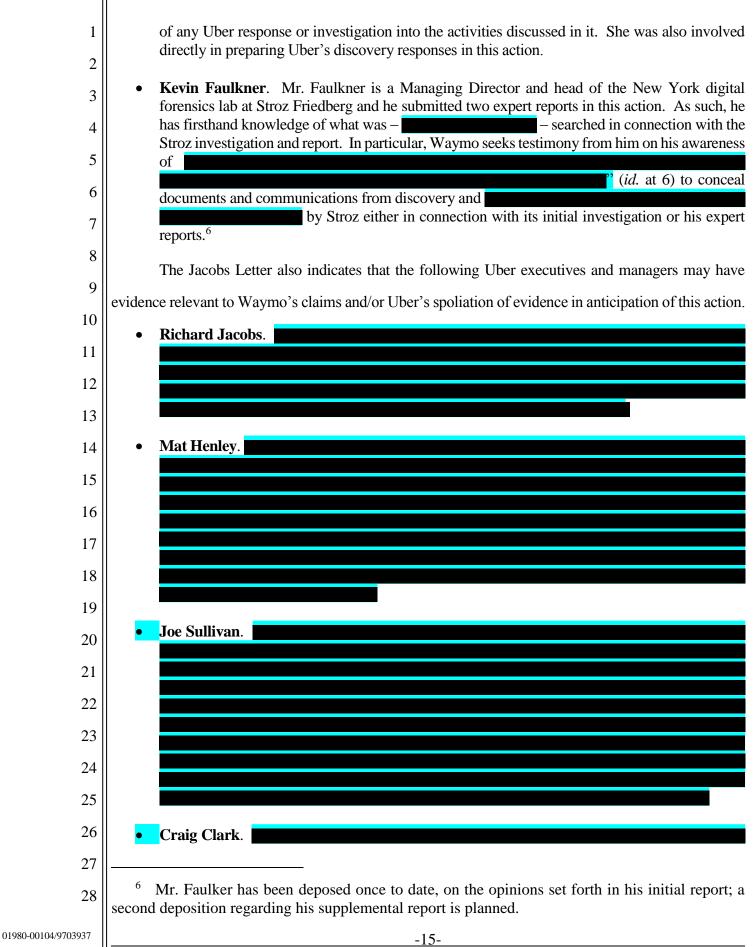
1	argued that omitting this LiDAR-related meeting from its log was excusable because, as explained in a
2	declaration provided by an Uber attorney, "[w]ith respect to the January 3, 2016 white-board session,
3	Mr. Kalanick and Mr. Holden did not remember this meeting and they did not have calendar entries for
4	it that could have been used to refresh their memories." (Dkt. 1592-1 at 2.) The absence of any calendar
5	entries for this meeting, or any other written documentation relating to its scheduling or existence
6	(beyond the white-boarding notes themselves, which were produced by Uber on the final day of fact
7	discovery), suggests that it
8	in response to
9	the Court's Order.
10	Finally, to the extent Uber did not interview
11	, in connection with Paragraph 4 of the Preliminary Injunction, that would be a violation of that
12	portion of the PI Order as well.
13	IV. The Jacobs Letter Is Relevant to Uber's Liability to Waymo And To Its
14	Spoliation of Evidence The evidence set forth in the Jacobs Letter
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16	. As discussed
17	above, <i>see</i> Section II, <i>supra</i> , the Jacobs Letter indicates that:
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26	In addition to providing yet more potential evidence of Uber's serious misconduct –
27	- the Jacobs Letter also raises serious questions about Uber's compliance
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	WAYMO NOTICE OF U.S. ATTORNEY LETTER

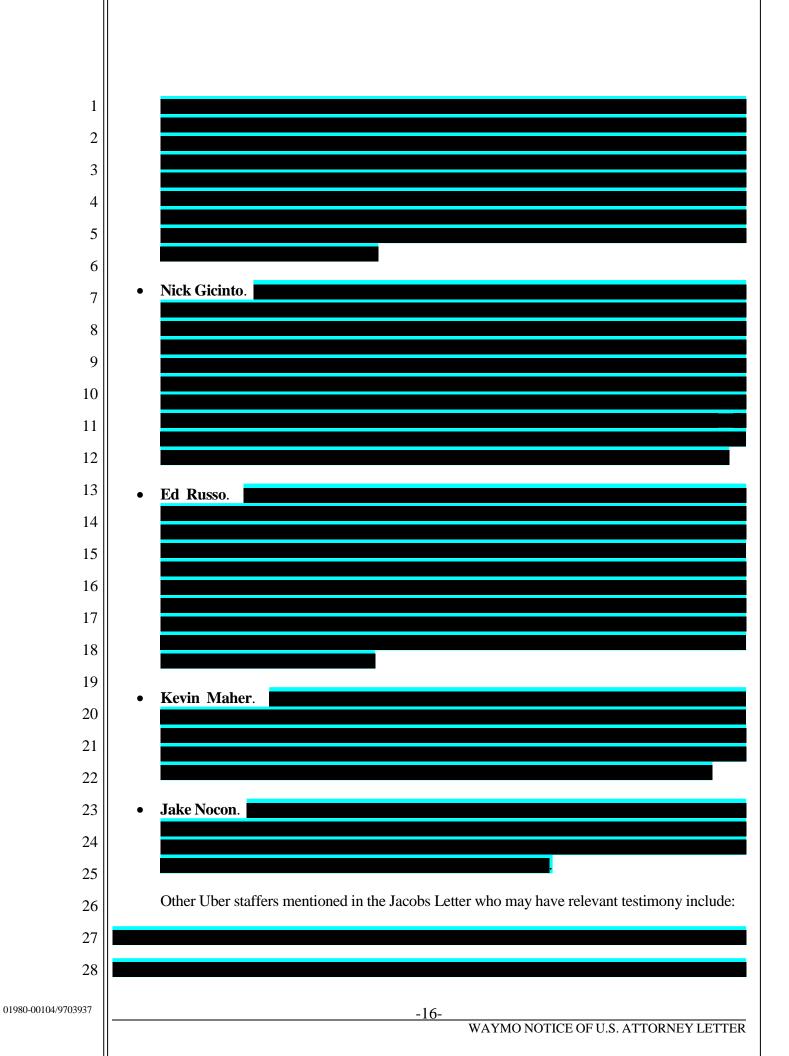
1	with its discovery obligations in this case, and suggests,

2	
3	As detailed elsewhere (Dkt. 2197-5 [Waymo Adverse Inference Opening Brief]; Dkt. 2265-2
4	[Adverse Inference Reply Brief]), even without the Jacobs Letter the evidentiary record was already
5	replete with evidence that
6	
7	
8	Uber's failure to produce these materials is particularly troublesome given Ms. Padilla's
9	testimony subsequent to the Jacobs Letter. Ms. Padilla denied personal knowledge of precisely where
10	Uber searched for responsive materials. ⁵ But she did testify that Uber had searched "everywhere" to
11	comply with its obligations under the Court's Order. (See Ex. 7 [Padilla Tr.], at 45:3-13 (Q. So you
12	can't testify as to what sources within Uber were searched or not searched in – to comply with the court's
13	[expedited discovery] order; is that right? A. I don't know if that impinges on privilege or not. Q. Okay.
14	What sources did Uber search within Uber to comply with the court's order? A. As far as I recall,
15	everywhere. Meaning we took this order very, very seriously and put a ton of people power on the
16	direction here in paragraph 4. And I believe we also retained outside experts to help us and moved
17	heaven and earth to look under every rock and understand the answer to paragraph 4.").)
18	Strikingly, the Jacobs letter reveals Uber's repeated representations to the Court, Waymo and
19	general public that
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21	
22	Uber was loudly proclaiming to this Court and the world that
23	"there is no evidence that any of the 14,000 files in question ever touched Uber's servers." See USA
24	
25	⁵ (<i>See, e.g.,</i> Ex.7 [Padilla Tr.], at 46:10-47:1 ("Q Uber did not search every electronic source of data within Uber in response to the Court's March 16 order? Would you agree with that? A. I don't
26	have a basis to agree or not agree. I'm sure that what we searched was based on identifying the most
27	likely places where any of this information would would be found, if it was there at all. Q. Okay. What areas were searched specifically? A. For that, you would have to ask others on the
28	team or outside counsel and the vendor that helped us. Q. Okay. You don't you don't know that you don't have any personal knowledge of that yourself? A. I really don't.").)
01980-00104/9703937	-12- WAYMO NOTICE OF U.S. ATTORNEY LETTER
	WAYMO NOTICE OF UNATTORNEV LETTER







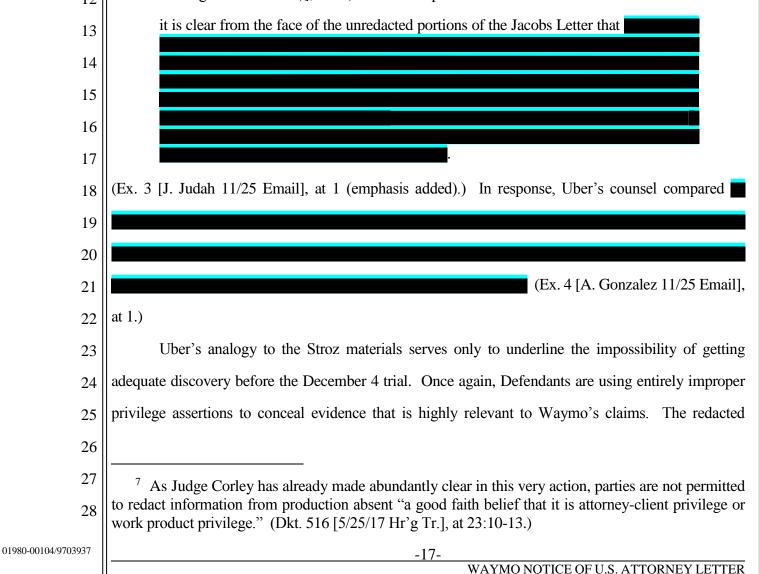


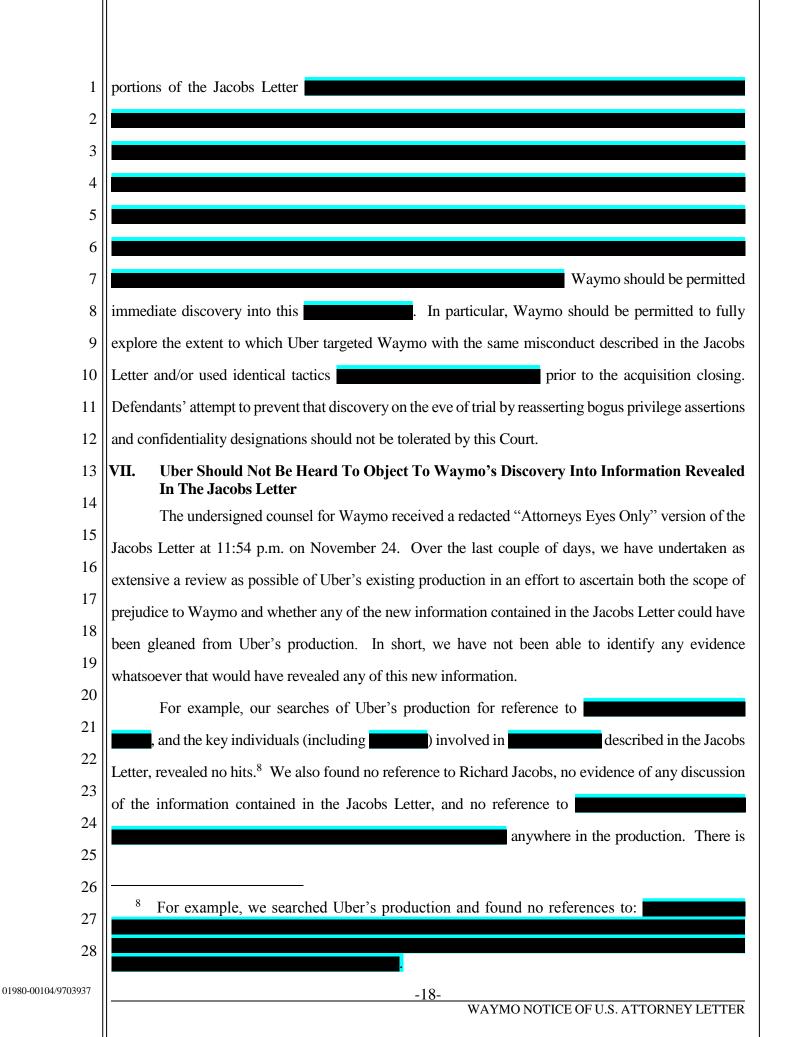
Of course, all Waymo has now is the redacted Jacobs Letter. Full discovery into these issues will no
 doubt reveal further relevant witnesses, documents, and other information.

3

VI. Uber Improperly Redacted and Designated the Jacobs Letter "Attorney's Eyes Only"

Waymo counsel has repeatedly requested that Uber remove its improper "Attorneys' Eyes Only" 4 designation from the Jacobs Letter, including during a meet and confer with the Special Master and in 5 multiple emails sent on November 25. (Ex. 3 [J. Judah 11/25/17 Email]; Ex. 8 [D. Perlson 11/24/17 6 Email.) Yet, Uber has never explained why any portion of the letter qualifies for "Attorneys' Eyes Only" 7 protection under the Protective Order governing production in this case, or any other designation. 8 Further, Uber's approach to redactions for "relevance" mirrors the approach it took when trying to 9 conceal the letter from Uber investors that led to Travis Kalanick's resignation as Uber's CEO - an 10 approach that was rejected out of hand by Judge Corley. (Ex. 8 [D. Perlson 11/24/17 Email (citing 11 7/20/2017 Hr'g Tr. at 4:11-5:2)], at 1.⁷) We further pointed out that: 12





also no mention of the information contained in the Jacobs Letter in any of Uber's interrogatory
 responses.

3	Further, none of Uber's privilege log entries appears to relate to either the contents of the Jacobs
4	Letter or any investigation into the information contained in it. Even if they did, there is nothing
5	remotely privileged about either the Jacobs Letter – a letter from a third party to Uber – or the facts it
6	reveals, and nothing that could have justified Uber's withholding of the letter on privilege grounds even
7	if it had sought to take such a step. ⁹ Thus, even without the skepticism that must now envelope any
8	claim of privilege by Uber in light of
9	
10	(Ex. 1 [Jacobs Letter], at 8-9), any post-hoc privilege assertions
11	should be dismissed out of hand. To the extent any privilege may once have existed, it has long-since
12	been waived.
13	As this Court is aware, Uber has repeatedly – as recently as last week – argued to this Court that
14	its rampant, intentional spoliation of evidence relevant to Waymo's trade secret misappropriation claims
15	was innocent and "Uber did not act in bad faith in connection with any of the instances of alleged
16	destruction of evidence" (Dkt. 2240-4 [Defendants Spoliation Opp.], at 22.) We know now that at
17	the very same time that Defendants were making these representations to the Court, they were
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20	Such Such behavior should not be tolerated by this Court.
21	VIII. A Continuance Is Appropriate To Provide Waymo With Sufficient Time To Fully Evaluate The Malfeasance And Spoliation Described In The Jacobs Letter
22	This case is scheduled to go to trial in one week. Jury selection is in two days. Yet, Waymo has
23	once again been forced to redirect its resources from trial – this time to investigate and respond to the
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28	⁹ As discussed above, <i>see</i> Section VI, <i>supra</i> , Uber's extensive redactions of the document are inappropriate for the same reason.
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2	It is highly unusual for an Acting U.S. Attorney, Example 1 , to	
3	send a letter to a court in a civil proceeding providing information which, if true,	
4	Again, the Jacobs Letter explicitly says	
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6	These letters also cast serious doubt on Uber's claims to have engaged in good faith discovery in	
7	this action; at worst, they provide evidence that	
8		
9	Waymo needs time to get to the bottom of this and to complete the necessary document and	
10	deposition discovery discussed above. Given Uber's consistent failures to meet its discovery obligations	
11	in this case, and apparent misrepresentations to this Court, Waymo has no choice but to seek a	
12	2 continuance of the trial date to enable Waymo to take additional discovery on this new information that	
13	is indisputably relevant to Waymo's trade secret misappropriation claims.	
14		
15	Respectfully submitted,	
16	DATED: November 27, 2017 QUINN EMANUEL URQUHART & SULLIVAN, LLP	
17	By /s/ Charles K. Verhoeven	
18	Charles K. Verhoeven Attorneys for WAYMO LLC	
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