MILES EHRLICH (Bar No. 237954)
miles@ramsey-ehrlich.com
ISMAIL RAMSEY (Bar No. 189820)
izzy@ramsey-ehrlich.com
AMY CRAIG (Bar No. 269339)
amy@ramsey-ehrlich.com
RAMSEY & EHRLICH LLP
803 Hearst Avenue
Berkeley, CA 94710
(510) 548-3600 (Tel)
(510) 291-3060 (Fax)

Attorneys for Non-Party Anthony Levandowski

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., *et al.*,

Defendants.

Case No.: 3:17-cv-00939-WHA

NON-PARTY ANTHONY LEVANDOWSKI'S NOTICE OF MOTION AND MOTION FOR MODIFICATION OF COURT'S ORDER DATED MARCH 16, 2017 (DKT. #61)

Hearing Date: To be determined by court
Time: To be determined by court
Courtroom: 8, 19th Floor
Judge: The Honorable William H. Alsup

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at a date and time selected by this Court, in the courtroom of the Honorable William H. Alsup at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, non-party Anthony Levandowski will and hereby does move for an order modifying the Court's March 16, 2017 Order (Dkt. #61) and prohibiting Defendant Uber Technologies, Inc. ("Uber") from disclosing any information provided by Mr. Levandowski in the course of the Joint Defense and Common Interest Agreement entered into by Mr. Levandowski and Uber, and specifically prohibiting the disclosure of information concerning the due diligence review conducted by a third party under that agreement, including but not limited to the identity of the third party who conducted any such due diligence review, whether Mr. Levandowski possessed any documents that were reviewed by the third party, and the identity of any of Mr. Levandowski's possessions that may have been reviewed.

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the supporting declaration of John Gardner, and accompanying exhibit, the pleadings, files and records in this case, as well as other written or oral argument which may be presented at the hearing.

DATED: April 4, 2017

RAMSEY & EHRLICH LLP

By */s/ Amy Craig*
Miles Ehrlich
Ismail Ramsey
Amy Craig

Counsel for Non-Party Anthony Levandowski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Anthony Levandowski is not a party to this action, and we have no basis to believe that he is presently under criminal investigation. But given the explosive nature of the accusations raised against him in this case, and the possibility that an investigation could be initiated at some later date, any prudent person in Mr. Levandowski's circumstances would be wise to ensure that his constitutional rights remain fully protected. As the Supreme Court has emphasized for decades, the core purpose of the Fifth Amendment's guarantee is not to shield the guilty, but "to protect innocent men . . . 'who otherwise might be ensnared by ambiguous circumstances.'" *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957)). Further, because the Fifth Amendment's protections turn not "upon the *likelihood*, but upon the *possibility*, of prosecution," *In re Master Key Litig.*, 507 F.2d 292, 293 (9th Cir. 1974), the Fifth Amendment can be implicated even in a civil lawsuit when no criminal investigation has been—or ever will be—initiated.

Mr. Levandowski is requesting a modification of the Court's standing privilege log requirement. If applied in its usual fashion, the Court's requirement would improperly compel Uber to disclose information protected by a common interest privilege and thereby undermine Mr. Levandowski's Fifth Amendment right against compelled production as recognized by the Supreme Court in *United States v. Hubbell*, 530 U.S. 27 (2000), and *Fisher v. United States*, 425 U.S. 391 (1976). In making this request, Mr. Levandowski relies upon the following well-settled principles of law:

- A client's confidential communications with his attorney are protected by the attorney-client privilege. *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960).
- A client's potentially incriminatory communications to his attorney, whether explicit or implicit, are further protected against compelled disclosure by the Fifth Amendment. *Fisher*, 425 U.S. at 405.

- The Fifth Amendment prohibits a court from compelling a person to produce records or information if that act of production would tacitly communicate a "link in a chain" to evidence a prosecutor might use to build a case. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Doe v. United States*, 487 U.S. 201, 208 n. 6 (1988); *Hubbell*, 530 U.S. at 38.
- When an attorney shares his client's potentially incriminatory communications in the context of a joint defense agreement creating a common interest privilege, all counsel who are parties to that agreement must maintain the confidentiality of those communications. *United States v. Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012).

The immediate issue before the Court is precisely how detailed Uber's counsel must be in listing on its privilege log the "due diligence report prepared by a third party that *may (or may not)* have referenced the collection of allegedly downloaded documents." Dkt. #132 at 1:16-18 (emphasis added). In reliance on his rights under *Hubbell* and *Fisher*, Mr. Levandowski asks that Uber's counsel—because of its common interest confidentiality obligations to Mr. Levandowski—be relieved of any obligation to provide detail concerning (1) the identity of the third-party who conducted any such due diligence review, (2) whether Mr. Levandowski possessed any documents that were reviewed by the third party, or (3) the identity of any of Mr. Levandowski's possessions that may have been reviewed.

This is necessary for two reasons. First, ordering public disclosure of these facts on the privilege log would impair Mr. Levandowski's attorney-client privilege because it would compel disclosure of confidences shared by Mr. Levandowski with his own counsel that were later communicated with other counsel as part of an enforceable joint defense and common interest privilege agreement. Second, requiring disclosure of these facts would separately violate Mr. Levandowski's Fifth Amendment right not to be compelled to reveal the existence, location, possession, or identity of any documents that might furnish a link in a chain of possible incrimination.

In similar circumstances, courts have recognized that it is improper to compel a degree of detail in a privilege log where, as here, such detail would tacitly disclose testimony protected by

the privilege against self-incrimination. *See United States SEC v. Chin*, Civil Action No. 12-cv-01336-PAB-BNB, 2012 U.S. Dist. LEXIS 182252, at *16-17 (D. Colo. Nov. 29, 2012) (finding that the Fifth Amendment and *Hubbell* prohibit requiring a respondent to submit a privilege log that lays out the tacit testimony inherent in production); *In re Syncor ERISA Litig.*, 229 F.R.D. 636, 649 (C.D. Cal. 2005) (rejecting a motion to compel a privilege log because "requiring defendant [] to produce a privilege log listing responsive documents may incriminate defendant [] by forcing him to 'admit that the documents exist, are in his possession or control, and are authentic.'").

On behalf of Mr. Levandowski, we respectfully ask for the same accommodation here.

II. PROCEDURAL BACKGROUND

A. Court order to Uber to produce documents from Mr. Levandowski

In April 2016, Anthony Levandowski, Ottomotto LLC, Otto Trucking LLC, Lior Ron, Uber Technologies, Inc., and their respective attorneys entered into a "Joint Defense, Common Interest and Confidentiality Agreement" in connection with Uber's proposed acquisition (at that time) of Ottomotto and Otto Trucking. Declaration of John Gardner at ¶ 3 & Ex. A. Under the agreement—which establishes a common interest privilege that Mr. Levandowski now asserts—a due diligence report was produced by a third party. *Id.* at ¶ 4; *see also Gonzalez*, 669 F.3d at 978 (9th Cir. 2012).

In March 2017, Waymo sued Uber, Ottomotto, and Otto Trucking, alleging among other things that Mr. Levandowski stole trade secrets when he stopped working for Waymo and went to work for Uber in its autonomous-driving car program. Dkt. #23 at ¶10. Waymo sought expedited discovery and a preliminary injunction. Dkt. #24. The Court ordered expedited discovery, and specifically ordered Uber to produce, among other things, "all files and documents downloaded by Anthony Levandowski . . . before leaving plaintiff's payroll and thereafter taken by them." Dkt. #61 at 3, ¶ 4.

B. This Court's requirements of a detailed privilege log

To the extent that Uber intends to assert any privilege over documents, Federal Rule of Civil Procedure 26(b)(5) and this Court's standing orders requires prompt production of a privilege log containing the following information:

> Privilege logs shall be promptly provided and must be sufficiently detailed and informative to justify the privilege. *See* FRCP 26(b)(5). No generalized claims of privilege or work-product protection shall be permitted. With respect to each communication for which a claim of privilege or work product is made, the asserting party must at the time of assertion identify:
>
> (a) all persons making or receiving the privileged or protected communication;
>
> (b) the steps taken to ensure the confidentiality of the communication, including affirmation that no unauthorized persons have received the communication;
>
> (c) the date of the communication; and
>
> (d) the subject matter of the communication.
>
> Failure to furnish this information at the time of the assertion will be deemed a waiver of the privilege or protection. The log should also indicate, as stated above, the location where the document was found.

Supp. Order to Setting Initial Case Management Conference in Civil Cases Before Judge William Alsup at ¶ 16; *see also* FED. R. CIV. PROC. 26(b)(5).

On March 29, 2017, the undersigned advised the Court that a privilege log in this form would violate Mr. Levandowski's Fifth Amendment right against self-incrimination, as interpreted by the *Hubbell* and *Fisher* line of cases. 3/29/17 Trans. at 5-6, 9-10. Specifically, the undersigned noted that a privilege log in this form would reveal the existence, location, or

possession of evidence that Mr. Levandowski may possess and control that is of relevance to this action. *Id.*

The undersigned further noted that, to the extent Uber received information protected from disclosure by the Fifth Amendment, the company cannot disclose it because "counsel who acquires knowledge as part of a common interest agreement stands in the same shoes as counsel for an individual." *Id.* at 25:6-12. Arturo Gonzalez, counsel for Uber, echoed this concern, stating he wanted to discuss how to provide a privilege log "without infringing upon a Fifth Amendment right." *Id.* at 12-13. Mr. Gonzalez noted that Uber intended to identify a due diligence report on the privilege log, but was unsure whether to name the third party who prepared it. *Id.*

The undersigned asked to brief the question. *Id.* at 25:19-21. He also asserted Mr. Levandowski's "Fifth Amendment [act of] production rights under *United States v. Hubbell*," and made clear that Mr. Levandowski objected "to the disclosure of any confidential information that was acquired as part of a common interest privilege." *Id.* at 26:18-23.

This Court's March 31, 2017 order followed; it allows Mr. Levandowski to move under the Fifth Amendment to "suspend the production or the privilege log requirement.[1]" Dkt. #132.

III. ARGUMENT:

THE FIFTH AMENDMENT PROTECTS MR. LEVANDOWSKI FROM HAVING HIS LAWYERS—WHETHER DIRECT OR JOINT DEFENSE—REVEAL CONFIDENCES THAT MIGHT INCRIMINATE HIM.

A. Under The Fifth Amendment A Person May Not Be Compelled To Testify Against Himself.

The Fifth Amendment privilege not to be a witness against oneself is a central tenet of our democracy. *Quinn v. United States*, 349 U.S. 155, 161 (1955). "[A]ny compulsory

[1] In response to this Court's Order of March 31, 2017, counsel for Mr. Levandowski has briefed the application of the Fifth Amendment (which, here, arises from a common interest privilege) to the production of the third party report and any required privilege log notations for this report. This motion does not brief any other privileges that may apply to the production of all or any portion of the third party report, all of which are expressly reserved.

discovery by extorting the party's oath . . . to convict him of crime . . . is contrary to the principles of a free government . . . . It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom." *Malloy v. Hogan*, 378 U.S. 1, 9 n.7 (1964).

1. This Fifth Amendment protections are broadly construed and apply to any testimony that could provide a link in the chain of evidence.

Given its importance to our criminal justice system, "[t]his provision of the [Fifth] Amendment must be accorded liberal construction in favor of the right it was intended to secure." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). A person can invoke the Fifth Amendment's protections in any proceeding—be it "civil, criminal, administrative, judicial, investigative or adjudicatory." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000). In the civil context, "the invocation of the privilege is limited to those circumstances in which the person invoking the privilege reasonably believes that his disclosures could be used in a criminal prosecution, or could lead to other evidence that could be used in that manner." *Id.* The "privilege against self-incrimination does not depend upon the *likelihood*, but upon the *possibility*, of prosecution and also covers those circumstances where the disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence." *Id.* (emphasis in original).

Courts have found that the privilege applies when an answer could:

- "[P]rovide an indirect link to incriminating evidence[.]" *Doe ex rel. Rudy-Glanzer*, 232 F.3d at 1263.
- "[P]rovide a lead or clue to evidence having a tendency to incriminate." *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980).
- Disclose "a fact that could serve as a link in a chain of circumstantial evidence from which guilt might be inferred" or a "fact" that "might furnish a lead to a bit of evidence useful to the prosecution." *Maffie v. United States*, 209 F.2d 225, 228 (1st Cir. 1954).

- "[G]ive a prosecutor a starting point from which he might proceed step by step to link the witness with criminal offenses." *J.C. Penney Life Ins. Co. v. Houghton,* Civ. A. No. 86-2637, 1986 WL 14732, at *3 (E.D.Pa. Dec. 24, 1986).

In short, the link-in-the-chain test is "broadly protective," *United States v. Chandler*, 380 F.2d 993, 1000 (2d Cir. 1967), and must be "liberally construed" by the courts. *Id*. at 997.

2. *Fisher* and *Hubbell* make clear that the Fifth Amendment protects implicit testimony inherent in the act of producing documents in response to a court order or a subpoena

In *Fisher v. United States*, the Supreme Court ruled that an individual can invoke the Fifth Amendment privilege in responding to a request for the production of documents. The Court held that, even when the content of a document itself is not privileged, the act of producing the document may be, because the act of producing evidence in response to a subpoena "has communicative aspects of its own, wholly aside from the contents of the papers produced." 425 U.S. 391, 410 (1976). In other words, when producing documents, a person tacitly testifies about (1) the actual existence of the papers demanded, (2) their possession or control by the witness, as well as the location of the documents, and (3) the witness's belief that the papers are those described in the subpoena. *Id*. The Supreme Court reaffirmed this holding and the act-of-production privilege in *United States v. Hubbell*, 530 U.S. 27, 32-36 (2000) (holding that, in response to a subpoena for documents, the subpoenaed party may refuse to produce because "the act of production itself may implicitly communicate statements of fact," such as an admission that "the papers existed, were in the [witness's] possession or control, and were authentic").

The Fifth Amendment's protection regarding an act of production applies with equal force even if the witness himself no longer possesses the documents sought, but rather has turned the documents over to his attorneys and their agents in order to get legal advice. *Fisher,* 425 U.S. at 405 (holding that "the papers, if unobtainable by summons from the client, are unobtainable by summons directed to the attorney by reason of the attorney-client privilege."). "The thrust of the Fifth Amendment is that 'prosecutors are forced to search for independent evidence instead of relying upon proof extracted from individuals by force of law.'" *United States v. Judson*, 322

F.2d 460, 466 (9th Cir. 1963) (*quoting United States v. White*, 322 U.S. 694, 698 (1944)). "'It follows, then, that when the client himself would be privileged from production of the document, either as a party at common law . . . or as exempt from self-incrimination, the attorney having possession of the document is not bound to produce.'" *Fisher*, 425 U.S. at 404. The fact that an individual furnished documents to his lawyer to obtain effective representation does not create an independent source from which to obtain those documents; rather, the lawyer stands in the shoes of his client when it comes to invoking the Fifth Amendment privilege. Absent a grant of immunity, a court cannot compel an individual, or his attorney, to make a production that could be used to build a case against him. *Hubbell*, 530 U.S. at 45 ("Given our conclusion that respondent's act of production had a testimonial aspect, at least with respect to the existence and location of the documents sought by the Government's subpoena, respondent could not be compelled to produce those documents without first receiving a grant of immunity under § 6003.")

B. The Attorney-Client Privilege And The Duty Of Confidentiality Preclude An Attorney From Revealing Incriminating Communications That His Client Has Revealed In Confidence.

Confidential communications between an attorney and his client are privileged. *Fisher*, 425 U.S. at 403 (citing 8 J. Wigmore, Evidence § 2292 (McNaughton rev. 1961)). An attorney must keep these communications secret unless a client waives the privilege. *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 459-60 (N.D. Cal. 1978).

This Court also requires that all lawyers practicing before it adhere to the California Rules of Professional Conduct, *see* NDCA Civil Local Rule 11-4 (requiring that any attorney practicing in the court be "familiar and comply with the standards of professional conduct required of members of the State Bar of California"), which even more broadly obligate attorneys to resist disclosing any "confidences" or "secrets" of their clients. Both California statutory law and the California Rules of Professional Conduct mandate that lawyers "maintain inviolate the confidence, and at every peril to himself or herself . . . preserve the secrets, of his

or her client." Cal. Bus. & Prof. Code § 6068(e)(1) (emphasis added); accord Cal. Rules of Prof'l Conduct R. 3-100(A) ("A member shall not reveal information protected from disclosure by Business & Professions Code § 6068(e)(1) without the informed consent of the client.").

The duty not to disclose client "confidences" and "secrets" is virtually absolute and much broader in scope than privilege. *See* Vapnek *et. al*., CAL. PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group 2016) §7:26; *see also* Cal. State Bar Formal Opn. No. 2003-161 (a California attorney's ethical duty of confidentiality under §6068(e) protects "all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which would likely be harmful or embarrassing to the client.") In short, if a client does not permit disclosure, then disclosure must be avoided unless an appropriate court order is obtained by the requesting party. CAL. PRACTICE GUIDE: PROFESSIONAL RESPONSIBILITY, at §§ 7:86, 7:103-106. To avoid violating the duty of confidentiality, a lawyer must not disclose any client confidences unless and until the court has determined that an exception to §6068(e)(1) applies. *Id*. at § 7:88.

C. A Common-Interest Privilege Extends The Attorney-Client Privilege And Duty Of Confidentiality To Counsel Representing Third Parties

In general, the disclosure to a third party of attorney-client communications destroys any privilege that might otherwise attach to such communications. But that rule does not hold when the privilege holder and the third party share a common legal interest with respect to the subject matter of the communication and enter into their own agreement of confidentiality. *See, e.g*, *Gonzalez*, 669 F.3d at 978. This extension of the attorney-client privilege, known as a "common interest privilege," "applies where (1) the communication is made by separate parties in the course of a matter of common interest; (2) the communication is designed to further that effort; and (3) the privilege has not been waived." *United States v. Bergonzi*, 216 F.R.D. 487, 495 (N.D. Cal. 2003); *see also United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000) (existence of a joint defense agreement extends the attorney-client privilege to create an implied attorney-client relationship between the codefendants and their counsel).

One party to a joint defense agreement "cannot unilaterally waive the privilege for other holders." *Gonzalez*, 669 F.3d at 982; *In re Grand Jury Subpoenas*, 902 F.2d 244, 250 (4th Cir. 1990) (holding that all documents related to common claim "are subject to a joint defense privilege that [one party] may not waive unilaterally"). Courts recognize that allowing unilateral waiver of confidential communications by one party without the consent of the others "would likely severely undermine the rationale for the joint defense privilege in the first place." *Gonzalez*, 669 F.3d at 983.

A common interest or joint defense agreement is permissible in many circumstances. It does not need to be in writing; it "may be implied from conduct and situation, such as attorneys exchanging confidential communications from clients who are or potentially may be codefendants or have common interests in litigation." *Gonzalez*, 669 F.3d at 979 (internal citations omitted). Nor does it matter whether the litigation in question is civil or criminal, or even whether the parties would align on the same side of the pleadings. *Id*. (*citing In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). Indeed, the joint defense privilege applies even if litigation is not in the offing at the time of the agreement between the parties. *Nidec Corp. v. Victor Co.*, 249 F.R.D. 575, 578 (N.D. Cal. 2007) ("The protection of the privilege under the community of interest rationale [] is not limited to joint litigation preparation efforts. It is applicable whenever parties with common interests join forces for the purpose of obtaining more effective legal assistance."). In all of these circumstances, it is sufficient that the legal interests of the parties invoking the privilege are aligned. *See Holmes v. Collection Bureau of America Ltd.*, No. C 09-02540 WHA, 2010 U.S. Dist. LEXIS 4253, 2010 WL 143484 (N.D. Cal. Jan. 8, 2010) (finding joint defense privilege where "counsel for both defendants submitted sworn declarations that they agreed to pursue a joint defense strategy . . . and to communicate with each other regarding their shared legal interests").

Courts have expressly held that information shared between individuals and companies in the context of a potential acquisition can fall within the ambit of a common interest privilege's protections. *See, e.g., Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308, 310, 312

(N.D. Cal. 1987) (no waiver of attorney-client privilege when defendant, Bausch & Lomb, disclosed a patent opinion letter to a nonparty during negotiations for the purchase of a division of Bausch & Lomb); *OXY Res. Cal. LLC v. Superior Court*, 115 Cal. App. 4th 874, 898-899 (2004) (the common interest "nonwaiver principle" applies to information disclosed in pre-acquisition communications). The determinative factor is whether the communication was "designed to further a joint legal effort" or "in the course of formulating a common legal strategy." *See Nidec Corp*., 249 F.R.D. at 579 (discussing *Hewlett-Packard Co. v. Bausch & Lomb, Inc*.); *see also OXY Res. Cal. LLC*, 115 Cal. App. 4th at 898-99.

Here, there is no question that a valid joint defense agreement exists between Mr. Levandowski and Uber. It was memorialized in writing and is attached as Exhibit A to the Declaration of Mr. Levandowski's attorney, John Gardner. That agreement was entered into for the express purpose of protecting communications made in the course of an ongoing joint effort to defend against "potential investigations, litigation, and/or other proceedings relating to the proposed transaction between Ottomotto, Otto Trucking and Uber and/or any affiliates of Uber." Ex. A to Gardner Declaration at 1. In keeping with that purpose, the agreement contains an unconditional promise that the signatories would keep any documents shared under the agreement secret. *Id.* ¶¶ 2-5.

D. Requiring A Detailed Privilege Log Here Would Violate Mr. Levandowski's Fifth Amendment Privilege

The basic purpose of a privilege log is to provide information sufficient for other parties and the court to assess whether an asserted privilege applies, but without actually disclosing the information protected by the privilege itself. Thus, Federal Rule of Civil Procedure 26(b)(5)(ii) provides that privilege logs must "describe the nature of the documents, communications, or tangible things not produced or disclosed . . . *without revealing information itself privileged* or protected . . . ." (emphasis added).

In the ordinary case, where no Fifth Amendment act-of-production right has been invoked, the detailed information required by this Court's standing order can be provided

without revealing the privileged or protected content of the information for which protection is sought. But the situation presented here is different—because public disclosure of even such commonplace details as whether a document exists, who may have possessed it, or where it is located would divulge information that the Fifth Amendment protects. *See Fisher*, 425 U.S. at 410.

Accordingly, courts hold that the requirement of a detailed privileged log must yield to the constitutional right to be free from forced self-incrimination. *See Chin*, 2012 U.S. Dist. LEXIS 182252, at *26; *In re Syncor ERISA Litig.*, 229 F.R.D. at 649; *see also In re Fustolo*, No. 13-12692-JNF, 2015 WL 9595421, at *1, 5 (Bankr. D. Mass. Dec. 31, 2015) (implicitly accepting argument that a privilege log would undermine right against self-incrimination by modifying the privilege log requirement).

As the Court noted in its March 31, 2017 order, Uber's counsel has already indicated in open court that, "prior to the acquisition of Otto Trucking LLC and Ottomoto LLC, Uber Technologies, Inc. obtained a due diligence report prepared by a third party that *may (or may not)* have referenced the collection of allegedly downloaded documents." Dkt. #132 at 1:16-18 (emphasis added). Adding further detail to this disclosure is precisely what threatens Mr. Levandowski's *Hubbell* and *Fisher* rights. To the extent that Mr. Levandowski *may have* produced any documents for review by a third party hired by counsel for the common purpose of obtaining legal advice, his doing so would have conveyed the same *implicit testimony* that accompanies every act of production—namely, a tacit assertion that documents exist, that they were within his possession, and that they were responsive to a request or question posed as part of the privileged due diligence effort.

What the *Hubbell* and *Fisher* line of cases teach, at bottom, is that there is no meaningful constitutional difference between "saying something" with words and "saying something" with the act of production. Hence, any testimonial communications that Mr. Levandowski made through his act of production to his own counsel, and then to any other counsel bound by a common interest privilege, are twice-protected against court-ordered disclosure. These

communications are protected by the attorney-client privilege, as extended through the common interest privilege here, and they are protected further under the Fifth Amendment. The Court cannot, consistent with the Fifth Amendment, order Mr. Levandowski—or *any counsel owing obligations of attorney-client confidentiality to him*—to disclose information that could furnish a "link in the chain" to the existence, possession, location, or identity of evidence that may be used in any possible criminal prosecution of Mr. Levandowski.

Plaintiffs are certainly free to use any legitimate tools of civil discovery to locate evidence they deem relevant to their civil lawsuit. But they are not free to use the power and authority of this Court to order disclosures that are protected under Mr. Levandowski's Fifth Amendment rights. Thus, absent an order granting Mr. Levandowski immunity coextensive with 18 U.S.C. § 6002 or a showing by the government that it already knew of the existence, location, possession, and identity of such documents with a degree of particularity rendering each question a "foregone conclusion," any order compelling Uber's counsel to disclose these confidential testimonial communications on a privilege log would run afoul of the Fifth Amendment. *See United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010) (It is only "[w]here the existence and location of the documents are a foregone conclusion and the individual adds little or nothing to the sum total of the Government's information by conceding that he in fact has the documents . . . that enforcement of the summons' does not touch upon constitutional rights.").

E. This Court Should Modify Its Order To Suspend The Requirements Of A Privilege Log For Any Documents Protected By The Fifth Amendment.

The Court's order to Uber—which by its terms would require the company to produce any documents (to the extent it received any) that Mr. Levandowski produced under a common-interest privilege—would violate Mr. Levandowski's Fifth Amendment rights. With respect to any such documents, this Court should modify its order to require only disclosure of information sufficient to establish (a) the existence of a common-interest agreement between Mr. Levandowski and Uber, and (b) that Mr. Levandowski provided information to the third-party conducting due diligence under the agreement. Uber should not be required to disclose

information regarding the location of any protected document, including the name of the third-party vendor, or the subject matter beyond noting "due diligence report." Requiring Uber to provide this information would violate the Fifth Amendment as those details could serve as a link in the chain for the government to obtain the report and use it in any criminal investigation of Mr. Levandowski. *Hubbell*, 530 at 45 (information regarding "the existence and location of the documents sought" is protected by the Fifth Amendment).

To the extent the Court requires additional information from Mr. Levandowski relating to Fifth Amendment privilege issues, Mr. Levandowski is prepared to submit the information *in camera* and *ex parte*, a procedure that is approved by the Ninth Circuit. *See, e.g., United States v. Drollinger*, 80 F.3d 389, 393 (9th Cir. 1996).

///

///

///

///

///

///

///

///

///

///

///

///

IV. CONCLUSION

To properly protect Mr. Levandowski's Fifth Amendment rights, this Court must modify the normal requirements of a privilege log with respect to the third-party due diligence report. Without this requested accommodation, this Court will be compelling Mr. Levandowski to disclose information that he shared in confidence with his lawyers under an attorney-client and common-interest privilege, in violation of *Hubbell* and *Gonzalez*. If Mr. Levandowski is forced to do so, his implicit testimony will surely be used against him later, should a criminal investigation develop.

Date: April 4, 2017

Respectfully submitted,

/s/

Miles Ehrlich
Ismail Ramsey
Amy Craig
Ramsey & Ehrlich LLP
803 Hearst Avenue
Berkeley, CA 94710
Tel: (510) 548-3600
Fax: (510) 291-3060

miles@ramsey-ehrlich.com
izzy@ramsey-ehrlich.com
amy@ramsey-ehrlich.com

Counsel for Non-Party Anthony Levandowski

I, John Gardner, declare and affirm as follows:

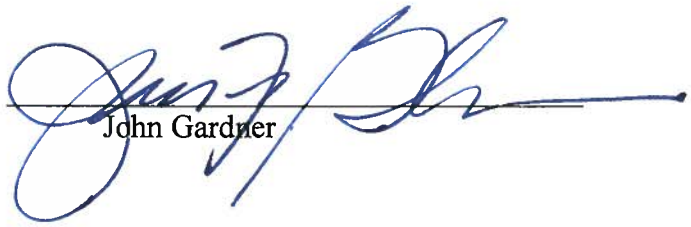
1. I am a partner at the law firm of Donahue Fitzgerald LLP and am licensed to practice law in the State of California. The facts stated herein are of my own personal knowledge and, if sworn as a witness, I could and would testify competently thereto.

2. I represented Anthony Levandowski in connection with Uber's acquisition of Ottomotto LLC in 2016.

3. In connection with this transaction, Ottomotto LLC, Otto Trucking LLC, Uber Technologies, Inc., Anthony Levandowski and Lior Ron, and their respective attorneys, including me, entered into a Joint Defense, Common Interest and Confidentiality Agreement ("Joint Defense Agreement"), a true and correct copy of which is attached as Exhibit A.

4. Thereafter, a third party prepared a due diligence report that may (or may not) have referenced documents reviewed pursuant to the common interest privilege created by the Joint Defense Agreement.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on this 3rd day of April, 2017 at Walnut Creek, California.



John Gardner

EXECUTION

JOINT DEFENSE, COMMON INTEREST AND CONFIDENTIALITY AGREEMENT

This JOINT DEFENSE, COMMON INTEREST AND CONFIDENTIALITY AGREEMENT (this "Agreement") is hereby entered into by and among Ottomotto LLC ("Ottomotto"), Otto Trucking LLC ("Otto Trucking"), Anthony Levandowski ("Levandowski"), Lior Ron ("Ron") and Uber Technologies, Inc. ("Uber"), and their respective attorneys (hereinafter referred to individually as a "Party" and collectively as the "Parties"), in contemplation of potential investigations, litigation, and/or other proceedings relating to the proposed transactions between Ottomotto, Otto Trucking and Uber and/or any affiliates of Uber (hereinafter termed as the "Transaction").

WHEREAS, the Parties and their respective legal counsel have recognized and have discussed that certain third parties may be notified of the Transaction and such parties may conduct investigations and proceedings (collectively, "Potential Proceedings") that may require submission of additional information. The purpose of this Agreement is to confirm terms and conditions for the Parties' common interest in opposing, and, if necessary, engaging in a joint defense against Potential Proceedings; and

WHEREAS, the Parties have undertaken and may undertake factual, legal and economic research, investigation and analysis (including any such analysis performed by third parties), and the Parties are of the opinion that it is in the best interests of the Parties to exchange certain information, pool individual work product, and cooperate in connection with any filings, submissions, or Potential Proceedings; and

WHEREAS, cooperation in such a joint defense and/or common interest effort necessarily involves the exchange of confidential business, financial, technical and other information, as well as information that is otherwise a privileged attorney/client communication and/or attorney work product; and

WHEREAS, the Parties have confidential and proprietary documents containing financial, operating and planning data, which they have shared with each other and may wish to disclose to retained lawyers, economists and/or consultants for the Parties; and

WHEREAS, the Parties recognize that they share a common interest in resolving any issues concerning the Transaction under all applicable laws and that a joint defense effort will promote evaluation and preparation of their respective defenses; and

WHEREAS, the Parties by their joint defense and common interest efforts (i) do not intend to diminish in any way the confidentiality of any materials exchanged between the Parties and (ii) intend to rely on the joint defense and common interest exceptions to the waiver of the attorney/client and attorney work product privileges; and

WHEREAS the Parties wish to pursue their common interests and to avoid any suggestion of waiver of the confidentiality or immunity of communications and documents protected by the attorney-client privilege, the attorney work product doctrine, or any other

applicable privileges or immunities under applicable statutes, rules, regulations and common law.

NOW, THEREFORE, in consideration of the mutual terms and covenants herein, the Parties memorialize their pre-existing understanding and oral agreement and further agree as follows:

1. All non-public information, documents, data, opinions, strategies or other materials in any form, including oral, written or electronic communications, exchanged or communicated in the past or future by whatever means between or among the Parties in connection with the joint defense efforts pursuant to and in connection with any Potential Proceedings, the defense of the Transaction and any actions related to or arising out of the Transaction (hereinafter referred to collectively as "Joint Defense Information"), shall be deemed subject to the terms of this Agreement. Wherever possible, the party providing the Joint Defense Information (the "Producing Party") shall label the materials "Joint Defense Information - Privileged and Confidential," although materials may be Joint Defense Information subject to the terms of this Agreement even if not labeled.

2. Each Party affirms that Joint Defense Information includes information that has been communicated to counsel in confidence, by one or both of the Parties, for the purpose of securing legal advice and representation and attorney-work product and that all such Joint Defense Information is therefore subject to the attorney/client and/or work product privilege belonging to the client or an attorney, which privilege may not be waived by any Party without the prior written consent of the client or attorney entitled to assert such privilege. Any disclosure, whether inadvertent or purposeful, by any Party of information exchanged pursuant to this Agreement shall not constitute a waiver of any privilege or protection of any other Party. No Party has or will have authority to waive any applicable privilege or doctrine on behalf of another Party.

3. The Parties hereby agree that to the extent that Joint Defense Information is disclosed to them (the "Receiving Party"), it will be kept confidential and disclosed by the Receiving Party only to the following persons who will maintain its confidentiality: (i) the signatories to this Agreement and the partners, associates, staff and other employees of their respective law firms who are working on the joint defense effort and/or any Potential Proceeding in connection with the Transaction; (ii) experts retained by any Party to assist in the joint defense effort and any related Potential Proceeding in connection with the Transaction; (iii) any outside copying service or other outside vendor retained by any Party that is necessary to assist in the joint defense effort and any related Potential Proceeding in connection with the Transaction, so long as such outside copying service or other outside vendor is subject to a written obligation to not use or disclose Joint Defense Information other than for the purpose of assisting the Parties in a Potential Proceeding in connection with the Transaction; (iv) except as provided in Paragraph 4, each other Party; and (v) subject to Paragraph 7, as required by law. It is expressly understood that, except as expressly provided for herein, Joint Defense Information shall not be further disclosed to any other person, unless authorized in writing by the Producing Party.

4. Nothing in this Agreement shall preclude any Producing Party from designating material "Outside-Counsel Only" or "Attorneys Eyes Only." The term "Outside Counsel" shall refer to any law firm that is or may become a signatory to this Agreement. Joint Defense Information provided on an "Outside-Counsel Only" basis may be exchanged among outside counsel, attorneys within the outside counsel's law firm, and employees or agents of such firm, and may be provided to any experts or vendors (and including any employees or agents of their firms) retained in connection with the Transaction, but shall not be divulged to any other person. All Joint Defense Information that a Producing Party intends to be provided on an "Outside-Counsel Only" basis shall be clearly marked or otherwise designated "Outside-Counsel Only." The term "Attorneys Eyes Only" shall include (i) Outside Counsel, including employees or agents of such firm; (ii) in-house lawyers for the Parties; and (iii) any experts and vendors (and including any employees or agents of their firms) retained in connection with the Transaction so long as such experts and vendors are subject to a written obligation to not use or disclose Joint Defense Information other than for the purpose of assisting the Parties in a Potential Proceeding in connection with the Transaction.

5. Except as otherwise provided for herein, Joint Defense Information will be used by the Receiving Party only for purposes of the joint defense effort and any Potential Proceeding in connection with the Transaction, as identified above, and shall not be used for any other purpose without the prior written consent of the Producing Party. Notwithstanding the foregoing, in any proceeding between the Parties, the fact that a Party provided the other Party with information or a document as Joint Defense Information under this Agreement will not (i) preclude or limit in any way the Producing Party's ability to reference or use such information or documents; or (ii) affect the discoverability or use of such information or documents by the Receiving Party, provided that (a) such information or documents would otherwise have been subsequently discoverable or obtainable from the Producing Party without asserting that there has been a waiver of attorney client privilege or attorney work product protection for such documents or information as a result of being provided to the Receiving Party as Joint Defense Information; or (b) is otherwise obtained by the Receiving Party from other sources outside of this Agreement without violating this Agreement.

6. Joint Defense Information shall not include documents and information that: (a) were generally publicly available prior to the date hereof; (b) become publicly available subsequent to the date hereof other than through an unlawful act or breach of the Receiving Party under this Agreement; (c) are in the possession of a Party that were lawfully obtained from a source other than the Producing Party; and (d) are obtained from a third party or were received or developed outside of this joint defense effort subsequent to the date hereof without violating this Agreement. Joint Defense Information includes, however, communications between or among the Parties forwarding, discussing, or relating to the information in categories (a)-(d) of this paragraph.

7. If any person or entity requests or demands from a Receiving Party access to Joint Defense Information that the Receiving Party obtained from a Producing Party by subpoena, court order, arbitral order or otherwise, the Party receiving the demand, subpoena or order shall notify the Producing Party in writing within forty-eight (48) hours. Each Party agrees that, except as required by law, the Producing Party shall have the opportunity promptly, and in any event no more than ten (10) days after receiving notice of the subpoena or order, to

assert any rights or privileges against the request to obtain the material, and that the Producing Party and the Party who received the request shall take all steps necessary and appropriate to assist in the assertion of applicable rights and privileges with regard to said Joint Defense Information in the appropriate forum. The Producing Party shall bear the legal costs, including attorneys' fees, in asserting such rights and privileges, subject to Uber's obligation to provide indemnification to Ottomoto, Otto Trucking, Levandowski and Ron pursuant to any written agreement among the Parties. If the return date on the subpoena or order is less than ten (10) days, the Party receiving the subpoena or order shall take all reasonable steps to secure an extension of time for the Producing Party to have a reasonable opportunity to assert any applicable rights or privileges prior to the return date.

8. The existence of this Agreement or of a joint defense or common interest effort in connection with the Transaction shall not be used in any fashion against any of the Parties to this Agreement, except that nothing herein shall prohibit the use of the foregoing to enforce the obligations, rights, and remedies of the Parties under this Agreement. No Party to this Agreement will claim (i) that any counsel is disqualified in such litigation or any other matter by reason of the joint defense or common interest effort or such counsel's access to confidential, privileged, or work product documents or (ii) that this Agreement creates any attorney-client relationship that did not exist prior to the earlier of any prior understanding of the Parties regarding their common interests with respect to the Transaction, or the execution of this Agreement.

9. At any time, any Producing Party may request of any Receiving Party in writing that it return to the Producing Party or destroy any Joint Defense Information provided to the Receiving Party pursuant to this Agreement and the Receiving Party will promptly comply with such request except as prohibited by law, legal duty or legal obligation. Upon request of the Producing Party, a Receiving Party will redact (i.e., permanently delete) from any retained work product all statements and disclosures of Joint Defense Information provided by the Producing Party; provided, however, that each Party's Outside Counsel may retain an original (i.e., non-redacted) copy of any such work product on the condition that it will not provide the original work product to its client without making any necessary redactions unless it has obtained the prior written consent of the Producing Party. The Parties agree that a failure to return, destroy, or redact such materials upon request provides adequate grounds for the Producing Party to seek a court order directing return, destruction, or redaction of the materials. If a Receiving Party is unable to ensure the destruction or redaction of any Joint Defense Information, it will take reasonable measures to make such Joint Defense Information permanently inaccessible to employees of the Receiving Party. Any such destruction or redaction shall, upon the written request of the Producing Party, be certified in writing to the Producing Party by an authorized person supervising the same. Even after the conclusion of the joint defense effort, Joint Defense Information will be treated as confidential. The Parties acknowledge that they and others permitted access to Joint Defense Information pursuant to this Agreement may maintain archived or back-up tapes and other media not accessed in the ordinary course of business but used only to restore inadvertently destroyed or otherwise lost data ("Back-up Systems") that may include such Joint Defense Information. Notwithstanding the foregoing, the Parties acknowledge that it would be burdensome to remove information from such Back-up Systems or to render the information permanently inaccessible. The Parties shall not be required to engage in such steps but agree that they shall take no steps to retrieve such information from

Back-up Systems in the absence of any need to use those Back-up Systems more generally to restore destroyed or lost data. Such Back-up Systems will be erased or destroyed in accordance with the Parties' normal course document preservation and destruction policies. Further, in the event such Back-up Systems are used to restore data destroyed or lost for other reasons, any Joint Defense Information will be removed from such restored systems and destroyed or rendered permanently inaccessible.

10. Nothing in this Agreement shall obligate any Party to provide any information to any other Party or exchange any information with any other Party. The Parties each recognize their respective rights to separately confer, and to elect not to share such communications with the other Party.

11. Nothing in this Agreement shall restrict any Party from using or disclosing in any manner it chooses materials, whether confidential or otherwise, originating with that Party so long as such materials do not contain or disclose Joint Defense Information that was received from another Party.

12. Any Party may withdraw from the Agreement upon written notification (electronic or otherwise) to the other Parties. All Parties agree that in the event any Party withdraws, such Party will promptly return or destroy (pursuant to Paragraph 9) all Joint Defense Information provided by any of the other Parties and any such destruction shall, upon the request of the Producing Party, be certified in writing to the Producing Party by an authorized person supervising the same. The Parties agree that a failure to return or destroy such materials provides adequate grounds for the Producing Party to seek a court order directing return or destruction of the materials. Notwithstanding any withdrawal, each Party remains subject to the provisions of Paragraphs 2-9 and 13-14 of this Agreement.

13. Each Party acknowledges and agrees that money damages would not be a sufficient remedy for any breach of any provision of this Agreement by any Party, and that in addition to such remedies which any non-breaching Party may have, such non-breaching Party shall be entitled to seek specific performance and injunctive or other equitable relief as a remedy for such breach.

14. Each Party agrees to assume liability for any breach of this Agreement by it or any third-party it retains in conjunction with its representation related to the Transaction. Each Party hereby agrees that it assumes liability for any breach of this Agreement.

15. Any modifications to this Agreement must be in writing and signed by all Parties.

16. Any and all disputes concerning the validity, construction, interpretation, and effect of this Agreement shall be resolved under the laws of the State of Delaware applicable to agreements made and to be performed entirely with the State of Delaware, without regard to the conflict of law provisions thereof that would result in the application of the law of any other jurisdiction. Each party hereby irrevocably and unconditionally consents to submit to the exclusive jurisdiction of the Delaware Court of Chancery in and for New Castle County, or in the event (but only in the event) that such Delaware Court of Chancery does not have subject matter jurisdiction over such matter, the United States District Court for the District of Delaware (as

applicable, the "Chosen Court"), for any actions, suits or proceedings arising out of or relating to this Agreement and the transactions contemplated hereby (and each party agrees not to commence any action, suit or proceeding relating thereto except in such courts, and further agrees that service of any process, summons, notice or document by registered mail to such party's address in the notice provision of the Transaction Agreement shall be effective service of process for any action, suit or proceeding brought against it in any such court). Each Party hereby irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

17. The Parties (or any successor entity to such Parties), together with any other signatories thereto, executed a Mutual Non-Disclosure Agreement, dated as of February 1, 2016 (as amended, the "NDA"). This Agreement is intended to supplement, not replace, the NDA and this Agreement should be read consistently with the NDA. To the extent there is any conflict between this Agreement and the NDA, this Agreement shall control.

18. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[signatures only to follow]

JOINT DEFENSE PRIVILEGED

Ottomotto LLC:

By: _____

Date: _____

Otto Trucking LLC:

By: _____

Date: _____

Uber Technologies, Inc.:

By: _____

Travis Kalanick, President, Chief Executive Officer and Secretary

Date: April 11, 2016

Counsel for Ottomotto LLC/Otto Trucking LLC:

By: _____

Eric Amdursky
O'Melveny & Myers LLP

Date: _____

Counsel for Uber Technologies, Inc.:

By: _____

Eric Tate
Morrison & Foerster LLP

Date: _____

Anthony Levandowski:

By: _____

Date: _____

Counsel for Levandowski:

By: _____

John F. Gardner
Donahue Fitzgerald LLP

Date: _____

Lior Ron:

By: _____

Date: _____

JOINT DEFENSE PRIVILEGED

Ottomotto LLC:

By: _____

Date: _____

Uber Technologies, Inc.:

By: _____

Date: _____

Otto Trucking LLC:

By: _____

Date: _____

Counsel for Ottomotto LLC/Otto Trucking LLC:

By: _____
Eric Amdursky
O'Melveny & Myers LLP

Date: _____

Counsel for Uber Technologies, Inc.:

By: Eric Tate by [AR]
Eric Tate
Morrison & Foerster LLP

Date: April 11, 2016

Anthony Levandowski:

By: _____

Date: _____

Counsel for Levandowski:

By: _____
John F. Gardner
Donahue Fitzgerald LLP

Date: _____

Lior Ron:

By: _____

Date: _____

JOINT DEFENSE PRIVILEGED

Ottomotto LLC:

By: _____

Date: April 11, 2016

Uber Technologies, Inc.:

By: _____

Date: _____

Otto Trucking LLC:

By: _____

Date: April 11, 2016

Counsel for Ottomotto LLC/Otto Trucking LLC:

By: _____
Eric Amdursky
O'Melveny & Myers LLP

Date: _____

Counsel for Uber Technologies, Inc.:

By: _____
Eric Tate
Morrison & Foerster LLP

Date: _____

Anthony Levandowski:

By: _____

Date: _____

Counsel for Levandowski:

By: _____
John F. Gardner
Donahue Fitzgerald LLP

Date: April 11, 2016

Lior Ron:

By: _____

Date: April 11, 2016

JOINT DEFENSE PRIVILEGED

Ottomotto LLC:

By: _____

Date: _____

Uber Technologies, Inc.:

By: _____

Date: _____

Otto Trucking LLC:

By: _____

Date: _____

Counsel for Ottomotto LLC/Otto Trucking LLC:

By: Eric Amdursky

Eric Amdursky
O'Melveny & Myers LLP

Date: April 11, 2016

Counsel for Uber Technologies, Inc.:

By: _____

Eric Tate
Morrison & Foerster LLP

Date: _____

Anthony Levandowski:

By: _____

Date: _____

Counsel for Levandowski:

By: _____

John F. Gardner
Donahue Fitzgerald LLP

Date: _____

Lior Ron:

By: _____

Date: _____

JOINT DEFENSE PRIVILEGED

Counsel for Ron:

By: _____

Alisa J. Baker
Levine & Baker LLP

Date: April 11, 2016

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WAYMO LLC,

Plaintiff,

v.

UBER TECHNOLOGIES, INC., *et al.*,

Defendants.

Case No.: 3:17-cv-00939-WHA

[PROPOSED] ORDER GRANTING NON-PARTY ANTHONY LEVANDOWSKI'S MOTION FOR MODIFICATION OF COURT'S ORDER DATED MARCH 16, 2017 (DKT. #61)

Trial Date: October 2, 2017

Upon consideration of Non-Party Anthony Levandowski's Motion for Modification of Court's Order dated March 16, 2017 (Dkt. #61), this Court hereby GRANTS Non-Party Anthony Levandowski's for Modification of Court's Order and ORDERS that order to be modified to prohibit Defendant Uber Technologies, Inc. ("Uber") from disclosing any information provided by Mr. Levandowski in the course of the Joint Defense and Common Interest Agreement entered into by Mr. Levandowski and Uber, and specifically prohibiting the disclosure of information concerning the due diligence review conducted by a third party under that agreement, including but not limited to the identity of the third party who conducted any such due diligence review, whether Mr. Levandowski possessed any documents that were reviewed by the third party, and the identity of any of Mr. Levandowski's possessions that may have been reviewed.

IT IS SO ORDERED.

Dated: _____, 2017

_____
HONORABLE WILLIAM ALSUP
United States District Court Judge