No. 17-2130

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WAYMO LLC,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

On Appeal From The
United States District Court For The Northern District of California
No. 3:17-cv-00939-WHA
The Honorable William H. Alsup

DEFENDANTS-APPELLANTS UBER TECHNOLOGIES, INC. AND OTTOMOTTO LLC'S EMERGENCY MOTION TO EXPEDITE PROCEEDINGS

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 2 and Federal Circuit Local Rule 27, Defendants-Appellants Uber Technologies Inc. and Ottomotto LLC ("Defendants") hereby move this Court to set an expedited briefing schedule in this appeal from the District Court's Order denying Defendants' Motion to Compel Arbitration (Dist. Ct. Dkt. No. 425), and respectfully request that the Court schedule oral argument during the next available argument calendar week after the final reply brief has been filed. Pursuant to Federal Circuit Rule 27, Practice Note Concerning Expedited Appeals (Nov. 20, 2014), Defendants also request that the Court order expedited briefing on this Motion.

There is good cause to expedite this appeal and oral argument because: (1) under the District Court's Order, Defendants suffer immediate harm and risk losing altogether the benefits of arbitration, (2) expediting this appeal will not prejudice Plaintiff-Appellee Waymo LLC ("Waymo"), and (3) the appeal is narrowly focused on significant legal issues concerning the conditions under which a non-signatory may compel arbitration of claims asserted by a party to a contract.

Defendants request that the Court set the following briefing schedule: Defendants file their opening brief within 10 calendar days of the filing of this Motion (by June 16, 2017); Waymo files its response brief within 21 calendar days after service of Defendant's brief; and Defendants file their reply brief within 10

calendar days after service of Waymo's response brief.

In light of the proposed streamlined schedule for briefing the appeal itself, Defendants further request that the Court expedite briefing on this Motion by ordering Waymo to file its response by June 9, 2017 and Defendants to file any reply by June 12, 2017. *See* Federal Circuit Rule 27, Practice Note Concerning Expedited Appeals (Nov. 20, 2014).

On May 23, 2017, Defendants requested that Waymo agree to an expedited schedule. On May 24, 2017, Waymo declined and indicated an intent to oppose this Motion. (Hume Decl. ¶ 5.) On May 25, 2017, Defendants presented Waymo with the schedule proposed in this Motion. Waymo declined that proposal on May 25, 2017. (*Id.*)

FACTUAL AND PROCEDURAL BACKGROUND

Anthony Levandowski is an independent inventor who has been pioneering self-driving technology since before he joined Google in or around April 2007.[1] (*See* Dist. Ct. Dkt. No. 24-3 (Droz Decl.) ¶ 3 (describing Levandowski's

[1] Waymo is the entity that was formed out of Google's self-driving car project after Levandowki's departure from the company. Levandowski resigned from Google on January 27, 2016. (*See* Dist. Ct. Dkt. No. 23 (First Amended Complaint ("FAC") ¶ 49.) Google's self-driving car project became Waymo later that year. (*See* Dist. Ct. Dkt. No. 433 at 2 n.1 ("Waymo originated and existed as Google Inc.'s self-driving car project (codename 'Chauffeur') before spinning out into a separate subsidiary under the same parent company, Alphabet, in December 2016").) Because Waymo is unquestionably Google's successor-in-interest, the change in company name is not material for purposes of this appeal. The parties

work at 510 Systems, LLC since 2006); Dist. Ct. Dkt. No. 138 at 11, 19 (Google's arbitration demand against Levandowski, stating that Google hired Levandowski as an engineer in April 2007, and entered into an employment agreement with him in 2009).)

During his employment by Google, Levandowski signed two employment contracts ("Levandowski Agreements") that required arbitration of "any and all controversies, claims, or disputes with anyone . . . arising out of, relating to, or resulting from [Levandowski's] employment with the Company," which is broadly defined to include "Google Inc., its subsidiaries, affiliates, successors or assigns." (Dist. Ct. Dkt. No. 138 at 35-45, 47-57.) Those agreements also set forth Levandowski's rights and obligations with regard to, *inter alia*: the acquisition, use and disclosure of confidential information (including trade secrets); the retention, licensing and assignment of inventions; the limits on engaging in conflicting employment; the return of company information upon separation from employment; and the solicitation of other employees upon separation from employment. (*See id.*)

Levandowski resigned from Google on January 27, 2016, and set up a competing business that ultimately was named Ottomotto. (FAC ¶ 49.) In August 2016, Uber acquired Ottomotto, and Levandowski became an Uber

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and the District Court have used the entity names essentially interchangeably throughout the proceedings below, and Defendants continues to do so here.

employee. (Dist. Ct. Dkt. No. 177 at 4.)

Waymo began investigating Levandowski's activities almost immediately following his resignation from the company in January 2016. (*See* Dist. Ct. Dkt. 115-2 at 17.) By October 2016, Google concluded that Levandowski had downloaded over 14,000 files containing purported trade secret information. (Dist. Ct. Dkt. No. 333 at 10.) In that same month, Google initiated two arbitrations against Levandowski based on his alleged solicitation of Google employees, but strategically chose not to mention the supposed theft of 14,000 files containing alleged trade secrets. (Dist. Ct. Dkt. No. 138 at 9-29; Dist. Ct. Dkt. No. 115-3 at 8-20.)

On February 23, 2017, Waymo—the newly formed entity that spun off from Google two months earlier—filed a lawsuit in federal district court against Defendants Uber Technologies, Inc. and Ottomotto LLC, and Otto Trucking LLC, seeking a preliminary injunction as well as a permanent injunction and damages based on Levandowski's purported theft of the 14,000 files containing trade secret information. (Dist. Ct. Dkt. No. 1.) Waymo contends that Levandowski was able to misappropriate this information by virtue of his employment at Waymo. (FAC ¶¶ 41-49.)

In order to hold Defendants liable for actions that Levandowski supposedly took months before he was hired by Uber, Waymo alleged a concerted course of

conduct between Defendants and Levandowski—a conspiracy that Waymo claims began while Levandowski worked for it. For example, the operative complaint describes a "calculated theft" (FAC ¶ 1) designed to benefit Levandowski and Defendants, complete with clandestine "meetings with high-level executives at Uber's headquarters" (FAC ¶ 48) and the "stealth mode" launch of a competing venture (FAC ¶ 49), which served to "lay[] the foundation for Defendants to steal Waymo's intellectual property." (FAC at 11.) Waymo claims that Levandowski engaged in this wrongdoing "all while still a Waymo employee" (FAC ¶ 42) and thereafter continued to violate the confidentiality obligations in his employment agreements by allegedly using and disclosing Waymo's confidential information in connection with his work for Defendants. (*See* FAC ¶¶ 58-61.)

Waymo's claims were premised on Levandowski's actions before and after he was an employee that, if proven, would clearly violate the terms of the Levandowski Agreements. (*See* Dist. Ct. Dkt. 138 at 35-41, 47-53 (limiting Levandowski's use of Company Information and Inventions, limiting Levandowski's right to engage in alternative employment, requiring the return of Company Documents upon separation from employment, requiring general adherence to the Company's Code of Conduct).) Waymo's complaint also relied expressly on the company's "confidentiality agreements" with its employees, including Levandowski, to show that it took reasonable steps to maintain the

secrecy of company information, which is a required element of its trade secret claims. (FAC ¶¶ 72, 82.)

On March 27, 2017, Defendants moved to compel arbitration of this matter. (Dist. Ct. Dkt. No. 115.) Defendants have suggested that the claims be heard by the same panel of arbitrators presiding over Google's arbitrations against Levandowski. (Dist. Ct. Dkt. No. 243 at 1.) At the hearing on that Motion, the District Court recognized that Waymo's lawsuit is entirely "based upon something that Levandowski did . . . the key thing is that he downloaded 14,000 files . . . while he was at [Waymo]." (Hume Decl., Ex.1 (4/27/17 Hearing Transcript) at 38:17-19.) The court likewise noted that Waymo was in fact alleging "substantially interdependent and concerted misconduct" by Uber and Levandowski. (*Id.* at 13:8-12.) It also observed that Waymo and Levandowski had entered into the "broadest possible arbitration agreement," which contained a "reciprocal obligation" to resolve in arbitration any disputes that arose with "anyone." (*Id.* at 39:21-40:6.)

At that hearing, Waymo sought to distance itself from the Levandowski Agreements by disclaiming any future reliance on them to prove its claims at trial, "provided that Uber does not open the door by reference to these agreements or lack thereof of those agreements, which is something that we would just have to

address down the road."[2] (*Id.* at 5:18-24.) Waymo also left open the possibility of filing claims against Levandowski in arbitration – including breach of contract claims – based on his alleged misappropriation of trade secrets, if the District Court were to grant Defendants' Motion to Compel. (*Id.* at 11:13-15.)

On May 11, 2017, the District Court denied Defendants' Motion to Compel Arbitration and granted in part Waymo's motion for preliminary injunction. (Dist. Ct. Dkt. No. 425, 433.) In denying the Motion to Compel Arbitration, the District Court held that Defendants had not met either circumstance under which equitable estoppel applies as set forth in *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1128-29 (9th Cir. 2013), because it found that Waymo did not rely on Levandowski's employment agreements. As summarized below, however, the District Court did not address important elements of each circumstance, either of which standing alone would be sufficient to compel arbitration.

Moreover, the District Court's Preliminary Injunction Order itself relies on conduct by Levandowski during his employment at Google/Waymo that related directly to his confidentiality obligations under the Levandowski Agreements. For example, the Order states that "Uber hired Levandowski even though it knew or should have known that he possessed over 14,000 confidential Waymo files likely

[2] As Defendants explained, this exception is so vague and broad that, even if Waymo's disclaimer were a valid way to avoid arbitration (it is not), the exception swallows that disclaimer.

containing Waymo's intellectual property." (Dist. Ct. Dkt. No. 433 at 17; *see also id.* at 7 (Defendants "do not deny that he took over 14,000 files from Waymo, that Uber lured him with the possibility of acquisition as soon as (and before) he left Waymo . . . Waymo has made a strong showing that Levandowski absconded with over 14,000 files from Waymo, evidently to have them available to consult on behalf of Otto and Uber."); *id.* at 2 ("Levandowski resigned without prior notice from his position at Waymo under highly suspicious circumstances with over 14,000 confidential Waymo files in tow . . . ").)

On May 18, 2017, Defendants filed a Notice of Appeal of the District Court's Order denying its Motion to Compel Arbitration. (Dist. Ct. Dkt. No. 464.) On May 19, 2017, Defendants filed a Motion to Stay additional discovery and trial in the District Court pending this appeal. (Dist. Ct. Dkt. No. 476.) The Motion to Stay does not seek to stay the enforcement of the preliminary injunction, nor of expedited discovery efforts that the District Court ordered through its grant of provisional relief. (*Id.* at 1, 9.) Although the District Court has expedited the motion to stay and has scheduled a hearing on it for June 7, 2017, it is uncertain how and when the District Court will ultimately rule on that motion. (*See* Dist. Ct. Dkt. No. 481.) On June 6, 2017, the Federal Circuit opened this appeal docket. (Dkt. 1.)

Trial is currently set for October 2017. (Dist. Ct. Dkt. No. 544.) Expedited

and regular discovery is currently proceeding in the District Court. As of the time of this filing, Waymo has already issued 26 requests for production and 20 special interrogatories as part of expedited discovery, as well as 265 requests for production as part of regular discovery. (Hume Decl. ¶ 6.) To date, the parties have taken 21 depositions. Waymo is entitled to take 6 more depositions as part of expedited discovery, and the District Court has not yet determined the number of depositions allowed to the parties as part of regular discovery. (*Id.*) In the absence of an expedited appeal, Defendants will be required to undergo the expense and delay of additional discovery, pretrial preparations, and possibly trial before the appeal is resolved.

ARGUMENT

A motion to expedite an appeal under Federal Rule of Appellate Procedure 27 is "appropriate where the normal briefing and disposition schedule may adversely affect one of the parties." Fed. Cir. R. 27, Practice Note Concerning Expedited Appeals (Nov. 20, 2014). Good cause exists to expedite this appeal. If this appeal is not expedited, Defendants will suffer immediate harm because they will not have a meaningful chance to exercise their appellate rights authorized by the Federal Arbitration Act.

Federal law reflects a strong policy interest in favor of arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *Shearson/Am. Exp.*,

Inc. v. McMahon, 482 U.S. 220, 225 (1987). Consistent with this policy, Congress gave a party whose motion to compel arbitration was denied by a district court the right to take an immediate interlocutory appeal. 9 U.S.C. § 16. Defendants' statutory right to appeal the denial of a motion to compel arbitration—and the benefits of arbitration that federal policy favors—will be undermined if this appeal does not proceed quickly, as the parties would be forced to engage in pretrial discovery, dispositive motion practice, pretrial motion practice, trial preparation, and possibly trial during the pendency of this appeal.

For that reason, courts have found that proceeding with litigation while a denial of a motion to compel arbitration is appealed causes irreparable harm. *See, e.g.*, *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (noting that if a party "must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever."); *Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988) (same); *Conners v. Gusano's Chicago Style Pizzeria*, 779 F.3d 835, 839 (8th Cir. 2015) (same); *Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985) (denial of motion to compel arbitration "has serious consequences that can only be challenged by immediate appeal"); *Zaborowski v. MHN Gov't Servs., Inc.*, No. C 12-05109 SI, 2013 WL 1832638, at *2 (N.D. Cal. May 1, 2013) (motions to compel arbitration are

"unique" in that "monetary expenses incurred in litigation" are generally "considered irreparable harm"); *Gray v. Golden Gate Nat. Recreational Area,* No. C 08–00722, 2011 WL 6934433, *3 (N.D. Cal. Dec. 29, 2011) (if "defendants are forced to incur the expense of litigation before their appeal is heard, the appeal will be moot, and their right to appeal would be meaningless"). That is especially true here where trial is imminent and the District Court's Order denying Defendants' Motion to Compel Arbitration is incomplete and contrary to precedent.

The questions presented on appeal relate to the precise circumstances under which a nonsignatory can use California's doctrine of equitable estoppel to compel arbitration of claims that are asserted by a party to a contract that contains a broadly inclusive and enforceable arbitration provision. Both parties and the District Court agree that the applicable standard is drawn from *Kramer,* 705 F.3d at 1128-29, which identifies two circumstances under which equitable estoppel applies.[3] The District Court declined to compel arbitration under either

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[3] Under *Kramer*, equitable estoppel applies:

> (1) [W]hen a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are "intimately founded in and intertwined with" the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and "the allegations of interdependent misconduct [are] founded in or intimately connected with the

circumstance based principally on its determination that Waymo is not relying on the Levandowski Agreements in its claims. (Dist. Ct. Dkt. No. 425 at 4-6.) As will be detailed in Defendants' appeal briefs, the District Court erred.

For example, in holding that Waymo's claims do not rely on the Levandowski Agreements, the District Court relied on Waymo's oral argument statement that "expressly foreswore reliance" on the Levandowski Agreements. (Dist. Ct. Dkt. No. 425 at 4.) But the California Court of Appeal opinion cited by the Ninth Circuit has noted that courts "examine the facts alleged in the complain[t]" to evaluate whether equitable estoppel applies, *Goldman*, 173 Cal. App. 4th at 230, and it is undisputed that Waymo's complaint relied on the confidentiality provisions in Levandowski's employment agreements in asserting its misappropriation of trade secret claims against Defendants. The District Court's reliance on Waymo's disclaimer was also in error because the disclaimer itself was qualified by a broad reservation of rights that rendered it hollow. (Hume Decl., Ex. 1 at 5:18-24.)

As another example, the District Court erred because its denial of equitable estoppel did not depend on separate analyses of whether, under the first *Kramer* circumstance, Waymo's claims are "intimately founded in and intertwined with"

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obligations of the underlying agreement."

Id. (quoting *Goldman v. KPMG LLP*, 173 Cal. App. 4th 209, 219, 221 (2009)).

the Levandowski Agreements, or, whether under the second *Kramer* circumstance, Waymo's allegations are "founded in or intimately connected with the obligations of the underlying agreement." (Dist. Ct. Dkt. No. 425 at 4-6.) Such analyses must be included under the applicable legal framework, which directs courts to compel arbitration even in the absence of reliance. *See, e.g.*, *Metalclad Corp. v. Ventana Envtl. Organizational P'ship*, 109 Cal. App. 4th 1705, 1717 (2003) (compelling arbitration after noting: "Although Sunkist does not rely exclusively on the license agreement to support its claims, each claim presumes the existence of such an agreement. We find that each counterclaim maintained by Sunkist arises out of and relates directly to the license agreement."); *see also QED Holdings, LLC v. Block*, No. CV 15-2390-GW(JEMX), 2015 WL 12659935, at *9 (C.D. Cal. June 11, 2015) (compelling arbitration under the second circumstance with no mention of "reliance").) Thus, the District Court failed to conduct a full analysis of the independent bases for compelling arbitration under *Kramer*, and its resulting Order is contrary to law.

As noted above, Defendants filed a Motion to Stay in the District Court. If that is denied, Defendants plan to file a Motion to Stay in this Court. (Hume Decl. ¶ 3.) But expediting this appeal is warranted regardless of whether those stay requests are granted or denied. Even if the stay is granted, prompt resolution of this appeal is critical to allowing the parties to resolve a significant underlying

dispute, which is interfering with Defendants' endeavors to develop autonomous vehicle technology capable of making driving safer for the public. Defendants are presently subject to a preliminary injunction, and they have not sought to stay the enforcement of the preliminary injunction, including the accounting and expedited discovery outlined therein.

Waymo's prayer for injunctive relief and damages could have and should have been submitted to an arbitration panel in the first place. If Defendants' Motion to Stay before the District Court is denied, it might become impossible at that point to expedite the appeal with sufficient speed to avoid permanently denying Defendants some or all of the benefits of arbitration because trial is scheduled for October of this year. Further, the prompt resolution of this appeal is necessary to ensure that lasting and irreversible harm is not done to Defendants' development efforts by a District Court Order that is at odds with binding precedent and deprives Defendants of the efficiencies of arbitration.

By contrast, Waymo faces no identifiable risk of harm or prejudice if this appeal were to receive expedited treatment. Waymo has repeatedly complained of and made baseless accusations regarding the risk of delay between now and the conclusive resolution of this dispute. (*See, e.g.*, Dist. Ct. Dkt. No. 440 at 2; Dist. Ct. Dkt. No. 283 at 9:10-12.) Waymo has twice recently briefed the legal issues presented on appeal. (Dist. Ct. Dkt. Nos. 204, 260.) It cannot now reasonably

maintain that it will be prejudiced by this Court's timely consideration and resolution of this appeal.

In short, these issues deserve to be heard and resolved by this Court on an expedited basis so that the relief this Court grants is not undermined by the need to prepare for a rapidly-approaching trial that may be rendered altogether unnecessary by this Court's decision.

PRAYER FOR RELIEF

Defendants request that the Court order the following schedule for briefing this appeal:

Appellants' Opening Brief	June 16, 2017
Appellees' Responsive Brief	July 7, 2017
Appellants' Reply Brief	July 17, 2017

Defendants further request that the Court order oral argument during the first available argument calendar week after the Reply Brief is filed.

Dated: June 6, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
PER FEDERAL CIRCUIT RULE 27(d)(2)(A)

The undersigned hereby certifies that the foregoing Motion, which was prepared on a computer word processing program, not counting the cover page, table of contents, table of authorities or this certificate, is 3,402 words in length, as determined by the word count function of the word processing program.

Dated: June 6, 2017

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