WAYMO LLC v. UBER TECHNOLOGIES, INC., Appeal Nos. 2017-2235, 2017-2253 (Fed. Cir. September 13, 2017). Before Newman, Wallach, and Stoll. Appealed from N.D. Cal. (Judge Alsup).

Background:

Waymo, a spin-off of Google's self-driving car unit, sued Uber and Ottomotto for patent infringement and violations of federal and state trade secret laws. Waymo alleged that its former employee, Mr. Levandowski, improperly downloaded documents on Waymo's driverless technology prior to leaving the company and founding Ottomotto, which was subsequently acquired by Uber. During discovery, the Magistrate Judge granted Waymo's motion to compel Uber and Ottomotto to produce the Stroz Report, which was prepared for Uber by a cybersecurity firm (Stroz Friedberg LLC) prior to Uber's acquisition of Ottomotto and investigated Ottomotto employees who previously worked at Waymo, including Mr. Levandowski. Waymo subpoenaed Stroz to produce the report and the related communications. Uber, Ottomotto and Mr. Levandowski, as an intervenor, moved to quash the subpoena by arguing that the report was subject to attorney-client privilege. After the Magistrate Judge denied the motion to quash, they filed motions for relief, which were also denied by the District Court. Mr. Levandowski appealed the denial of relief, and, because the orders were not appealable final judgments, Mr. Levandowski presented two theories of jurisdiction to the Federal Circuit: (1) his appeal is a petition for a writ of mandamus, asserting that the discovery orders will violate his Fifth Amendment right against self-incrimination; and (2) he has an immediate right to appeal under the *Perlman* doctrine, which provides that a discovery order directed at a disinterested third party is treated as an immediately appealable final order.

Issues/Holdings:

Did Mr. Levandowski meet the requirements necessary to establish entitlement to a writ of mandamus? No.

Did Mr. Levandowski have an immediate right to appeal the discovery order under the *Perlman doctrine*? No.

Discussion:

With respect to Mr. Levandowski's first argument for jurisdiction based on the writ of mandamus, the Federal Circuit held that Mr. Levandowski failed to meet any of three *Cheney* prerequisites necessary to establish entitlement to the writ. He failed to meet the first prerequisite that the petitioner has no other adequate means to attain the relief he desires because other adequate avenues of review were available to him, including a post-judgment appeal. He failed to meet the second prerequisite that the petitioner's right to the writ is clear and indisputable because the common interest doctrine did not apply. In particular, Mr. Levandowski's interview and disclosures to Stroz did not qualify for attorney-client privilege, and rather than sharing a common interest, Mr. Levandowski and Uber were adversaries in the investigation. He failed to meet the third prerequisite that the issuing court, in its discretion, is satisfied that the writ is appropriate under the circumstances.

With respect to Mr. Levandowski's alternate argument for jurisdiction based on the *Perlman* doctrine, the Federal Circuit held that Mr. Levandowski is not a disinterested third party but rather is closely affiliated with all parties to this litigation. The appeal was dismissed, and production of the report was ordered. The case will proceed in the District Court.