

# Was Uber's Deal With Otto Out of the Ordinary?

By **Jennifer Williams-Alvarez** | August 18, 2017

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(Photo: Diego M. Radzinski/ALM)

Ex-Uber Technologies Inc. CEO **[Travis Kalanick's deposition](http://www.corpcounsel.com/id=1202794996270/Uber-former-CEOs-Deposition-Shows-InHouse-Lawyers-Involvement-in-Waymo-Battle?slreturn=20170717104615)** (<http://www.corpcounsel.com/id=1202794996270/Uber-former-CEOs-Deposition-Shows-InHouse-Lawyers-Involvement-in-Waymo-Battle?slreturn=20170717104615>), released earlier this month in the **[legal dispute](http://www.legaltechnews.com/id=1202779985032?keywords=uber&LikelyCookieIssue=true)** (<http://www.legaltechnews.com/id=1202779985032?keywords=uber&LikelyCookieIssue=true>) over driverless car technology with Alphabet Inc. subsidiary Waymo, makes it clear that being a leader in the autonomous vehicle space is considered critical to Uber's future.

And so it's no surprise that the ride-hailing company was eager to bring on self-driving car engineer Anthony Levandowski and others formerly from Google "while staying within certain legal constructs," as Kalanick put it in his July 27 deposition, despite recognizing the possibility that there might be an "emotional response" from Google.

But did the company's determination result in an unusual deal? Certain aspects of the **agreement with Otto** (<https://assets.documentcloud.org/documents/3934359/Agreement.pdf>) may raise eyebrows, such as a clause indemnifying Uber against some pre-signing bad acts, but it really depends on which part of the deal is being considered, according to attorneys who are not involved with this lawsuit.

Uber declined to provide a comment on the deal. Waymo did not comment specifically about the deal but **reiterated** (<https://www.recode.net/2017/8/10/16128028/uber-benchmark-alphabet-waymo-lawsuits-travis-kalanick-bill-gurley-deposition>), via a statement, allegations against Uber.

### **Indemnification**

Starting around December of 2015, Kalanick was brought into discussions with Levandowski about the idea that Levandowski would leave Google and move to Uber, according to Kalanick's deposition. Levandowski left Waymo in January 2016, recruited away a number of former Google employees and publicly launched his own company in May 2016 called Otto. Uber acquired this company that August for \$680 million.

Much of what's included in Uber's deal with Otto seems fairly standard, such as provisions on pending litigation, intellectual property and the financial condition of Otto. Perhaps not quite as typical, however, is mention of "pre-signing bad acts," defined as any bad act, which includes trade secret misappropriation, committed before the agreement date.

Per the agreement, pre-signing bad acts would be disregarded when considering whether closing conditions for the deal were satisfied. What's more, only those pre-signing bad acts that were either not truthfully disclosed in the diligence process or were not reflected in the **due diligence report** (<http://www.law.com/sites/almstaff/2017/07/03/10-uber-in-house-attorneys-saw-due-diligence-report-in-battle-with-alphabet/>) are excluded from indemnified claims.

Kalanick, who said in the deposition that the company hasn't done many M&A transactions, noted he'd be surprised if the deal didn't include general indemnification clauses, but he didn't go so far as to say whether he'd be surprised if Uber indemnified

Levandowski for committing prior bad acts with respect to Google. But in a [July 12 filing](https://assets.documentcloud.org/documents/3934713/Nina.pdf) (<https://assets.documentcloud.org/documents/3934713/Nina.pdf>) in the lawsuit, it's pointed out that former Uber corporate development manager Nina Qi, who was at the company for nearly two years, testified that this was the first deal she'd worked on that included provisions for "bad acts around indemnification."

It seems as though Otto had a good amount of bargaining power in this deal, which may explain some of the provisions, said [Jon Klassen](http://www.corpcounsel.com/id=1202791038495) (<http://www.corpcounsel.com/id=1202791038495>), corporate partner at firm Kunzler Law Group, who was previously executive vice president, general counsel and secretary at life science-focused real estate company BioMed Realty Trust Inc. But Klassen noted that the provisions are "not out of the realm of reasonableness."

David Gurnick, attorney at Los Angeles firm Lewitt Hackman, agreed that it's not out of the question that an acquiring company would take on certain liabilities from a seller.

But he added the provisions on pre-signing bad acts are somewhat unique. "Typically, it works like this: The seller wants to be indemnified for everything from the day of the acquisition forward and the buyer usually wants to be indemnified from the day of the acquisition backward," so the buyer is not usually responsible for anything that happened before the acquisition, he said.

### **Acquisition Instead of Hiring One by One**

It's not uncommon for a company in certain circumstances to look at acquiring a company with a group of people, as opposed to hiring employees one by one, according to attorneys, but it does pose some risks.

Kalanick pointed out in his deposition that by structuring the deal so that Levandowski first formed his own company, this allowed Uber to bring on a team of people who were used to working together and who would be able to "build and innovate faster."

It's really attractive in some cases to bring in a team that's already assembled, said Klassen, as it eliminates some concerns about creating well-operating divisions. But he pointed to a downside—it will likely cost more to do it this way.

And there can also be more risk in acquiring a group as opposed to hiring individuals, Gurnick said. "You may be acquiring bad things that you don't know about, whereas

if you recruit people individually, create your own team, you can create your own positive culture," he offered as one example. "And if you're acquiring from a competitor, all things being equal, you do have an increased risk that you are going to be accused of taking someone's technology."

While the concept of acquiring a group the way Uber did is not unique, in and of itself, Gurnick said there are "some interesting, unique and perhaps suspicious aspects" to the transaction.

For one, there's the timing of the transaction, because if someone wants to leave Google to strike out on their own or for some other reason, Gurnick explained, it's an interesting change to then move to Uber shortly after forming a company. There's also the technology at issue, he said, because both Google and Uber are known to be interested in this cutting-edge driverless technology.

### **The Stroz Report**

Ahead of its acquisition of Otto, Uber hired forensic firm Stroz Friedberg to prepare a **due diligence report** (<http://www.corpcounsel.com/id=1202792086536/10-Uber-InHouse-Attorneys-Saw-Due-Diligence-Report-in-Battle-With-Alphabet>). As part of the diligence investigation, Stroz imaged and analyzed employee devices, including Levandowski's personal devices.

Kalanick was questioned in the deposition about whether this is uncommon, and though he couldn't point to an example, he said "general chatter in Silicon Valley in the industry" is this is not unheard of.

Because of the nature of this deal, this level of diligence doesn't seem unusual, said Scott Whittaker, a member at firm Stone Pigman Walther Wittmann, who is also chair of the American Bar Association's mergers and acquisitions committee. "It's very reasonable, given the circumstances," he said. "It's also a very obvious risk to Uber in making this acquisition that Google might claim that there was theft of intellectual property or improper use of Google IP ... so it indicates that this was a known risk."

Klassen agreed and added that, from the looks of it, Uber tried to make sure the company knew what it was getting into. "There's more risk, so going through the extra steps of investigating makes sense and it seems smart," he said. "If they wanted to pursue driverless technology and they wanted to poach a competitor's employees ... going

through all of this diligence would make sense, so you know what's going on and don't just say, 'Well, we'll just take the risk.'"

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