VENABLE LLP
Ellyn S. Garofalo (SBN 158795)
egarofalo@venable.com
Jessica L. Grant (SBN 178138)
jgrant@venable.com
Amir Kaltgrad (SBN 252399)
akaltgrad@venable.com
Nicole N. King (SBN 290204)
nnking@venable.com
2049 Century Park East, Suite 2300
Los Angeles, CA 90067
Telephone: (310) 229-9900
Facsimile: (310) 229-9901

Attorneys for Defendant Ingo Schweder

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF RIVERSIDE

DAVID WICKLINE,

Plaintiff,

v.

INGO SCHWEDER, an individual; JOSEPHINE LEUNG, an individual; GOCO HOSPITALITY GLOBAL OPPORTUNITY LIMITED, a British Virgin Islands company; SPA VENTURE GROUP LIMITED, a British Virgin Islands company; GOCO HOSPITALITY CALIFORNIA, INC., a California corporation; GLEN IVY HOT SPRINGS, a California corporation; and DOES 1 through 20, inclusive,

Defendants.

Case No. RIC1708891

Hon. Randall S. Stamen
Dept. 7

DEFENDANT'S STATEMENT ON SUSPECTED MISCONDUCT BY JUROR AND/OR PLAINTIFF'S COUNSEL; DECLARATION OF JESSICA L. GRANT AND EXHIBITS THERETO

Action Filed: May 17, 2017
Trial Date: February 6, 2019

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2300
LOS ANGELES, CA 90067
310-229-9900

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310-229-9900

I. INTRODUCTION

At 5:40 p.m. on Thursday, April 4, 2019, after three full days of jury deliberations, Plaintiff's lead trial counsel, Paul Derby, contacted counsel for Defendant to advise that he believed Juror No. 10 had engaged in misconduct by, among other things, emailing Plaintiff's counsel at least ***nine*** times, during trial, closing argument and juror deliberations. Mr. Derby has admitted under oath in his Declaration that by April 2—the day the jury began its deliberations—he believed a juror had sent him the emails at issue, many of which commented on the evidence at trial. Yet Mr. Derby failed to immediately disclose his suspicions to the Court or to defense counsel in violation of California's clear ethical rules.

Mr. Derby attempts to whitewash Plaintiff's stunning delay in disclosing the worst juror conduct imaginable, by explaining that he was too busy to read all of his emails during trial, and was uncertain that the emails came from a juror. However, even a cursory review of the subject emails would lead anyone to conclude—particularly a lawyer in the courtroom—that they were sent by a juror. For instance, a March 21 email sent to Mr. Derby at 11:04 a.m. entitled "FYI" contained screen shots from various local news websites and other independent research on Glen Ivy's storm-related mudslides and closures, *and was sent while Defendant's expert, John Luna, was testifying on this very issue and the associated financial impact of the closures*. *See* Exhibit 3 to Declaration of Paul Derby ("Derby Decl."). Another email later that day—at 2:58 p.m.—entitled "[t]his little p#nk is a freaking liar," contains additional screen shots of Twitter and news reports regarding Glen Ivy's operating hours during winter storms and mudslides. *See* Derby Decl., Exh. 3. Another email—sent to Mr. Derby on March 26 at 4:35p.m.—states "Where was your partner today? Not that Mr. O'Kane did a bad job, he did an excellent job." This email corresponds to a day Mr. Skiermont was absent and Mr. O'Kane cross-examined Josephine Leung, the only witness ever examined by Mr. O'Kane during the entire trial. If this were not enough, Mr. Derby concedes that he suspected the emails were from a juror either by April 1 (before the jurors had started deliberating) or on April 2 (the first day of deliberations). Yet, Mr. Derby and his cohorts remained silent, in violation of California's unambiguous ethical rules that require the immediate disclosure of suspected juror misconduct. It is simply inexcusable and unconscionable that Mr. Derby did not

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disclose his suspicions and later knowledge of juror misconduct with this Court on April 1 or 2 (or even on April 4 or 5).

Rule 3.5 of the California Rules for Professional Conduct could not be more clear in prohibiting a lawyer connected with the case from communicating directly or indirectly with any juror and mandating that a member "shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge." *See* Rule 3.5(e) and (j). Plaintiff's counsel hardly needed a "former" prosecutor to opine on whether the disclosure of an errant juror is required. And, it defies credulity that a former federal prosecutor or any member of the California bar advised Plaintiff's counsel that notwithstanding Rule 3.5, there was no duty to disclose suspected juror misconduct.

No can there be any dispute that Plaintiff's lawyers knew they were being contacted by a juror, ***biased in their favor***, by April 2, and likely earlier. Plaintiff's counsel appears to have made a calculated decision to conceal the facts, believing that they and their client would benefit from misconduct that should have been immediately disclosed. It was not until the evening of April 4, after the jury had sent a note regarding Questions #5 and #11 indicating that the jury may be leaning in Defendant's favor that Plaintiff's counsel finally disclosed to defense counsel (*but not the Court*) what they had known for days, if not weeks. Plaintiff's counsel should not be rewarded for their misconduct – and unthinkable violation of the Rules of Professional Conduct and their ethical duties as officers of this Court – by a mistrial that might give Plaintiff a second bite at the apple with a more favorable panel. Rather, as explained below, the Court should remove Juror 10 and allow the remaining eleven jurors to proceed to verdict or, in the alternative, the Court should seat an alternative juror to commence new deliberations with a full panel. The Court should also set an evidentiary hearing to expose all of the facts relating to Juror No. 10's misconduct, and what amounts to nothing short of a fraud on this Court by Plaintiff's counsel. Once the facts are

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determined, the Court should take actions appropriate to censure counsel, and cure the harm caused to Defendant, including a referral of this matter to the State Bar of California for disciplinary review.[1]

II. THE FACTS PRESENTLY KNOWN TO DEENDANT.

A. The Emails Sent To Plaintiff's Counsel from Suspected Juror #10.

Below are the emails sent to Plaintiff's counsel in chronological order, along with a notation to reflect what was occurring at trial when the emails were sent to Plaintiff's counsel:

- **March 19, 2019 @12:10p.m. Subject: The big Pink elephant in the room has been spotted; no worries:** The email states that "Ultimate Drone Vision has sent you an email via Gmail confidential mode: The big Pink elephant in the room has been spotted;) no worries . . . you can open it by clicking the link below. This link will only work for pderby@skiermontderby.com" and there is a link for "view the email." (Defense expert John Luna examined by Paul Derby and Jessica Grant; defense witness Michael Costello examined by Paul Skiermont and Ellen Garofalo)

- **March 21, 2019 @11:04a.m. (Subject "FYI"):** Sent collection of statements from local news websites regarding mudslides and evacuations, with circles around the "November 28, 2018" and "November 30, 2018" reports. (Continued examination of defense expert John Luna by Paul Derby and Jessica Grant)

- **March 21, 2019 @2:58p.m. (Subject "That little p#nk is a freaking liar"):** Collection of additional statements from local news websites and Twitter regarding closures of Glen Ivy Hot Springs, with circle around "the grotto was closed for maintenance, but everything else was open. ……. 3/19/2019." (Continued examination of defense expert John Luna by Paul Derby and Jessica Grant)

- **March 26, 2019 @4:35p.m. (No subject):** Email to Mr. Derby states: "Where was your partner today? Not that Mr. O'Kane did a bad job today, he did an excellent job." (Paul Skiermont absent from trial proceedings; Josephine Leung examined by Jessica Grant and Johnny O'Kane, the only witness Mr. O'Kane ever examined during the entire trial).

- **March 28, 2019 @5:16p.m. (No subject):** Email to Mr. Derby states: "Would you get me your cell number? I would like to speak with you after the trial. Is that ok?" (Counsel presented closing arguments).

- **March 29, 2019 @7:05a.m. (Re: no subject):** Mr. Derby responds "Who is this? Not clear form the email address. Thanks." (Day after closing arguments; no trial)

[1] Paul Derby is a member of the California and District of Columbia bars. His co-counsel, Paul Skiermont, is a member of bars in the States of Texas and Illinois, and was admitted to this case *pro hac vice*. Mr. Derby and Mr. Skiermont are collectively referred to as "Plaintiff's counsel."

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- **March 30, 2019 @1:22p.m. (Re: no subject)**: Email response to Mr. Derby: "I'm the one that you stare [sic] most of the time….lol.can u guess? [smiley face; eye roll emojis]." (Saturday, no trial)

- **April 3, 2019 @4:34p.m. (Subject "STRESSED"):** Email to Mr. Derby staring "Man, all I got to say is, I didn't expect this to be so stressful." (Day #2 of jury deliberations)

- **April 3, 2019 @4:36p.m. (Subject "Nice seen [sic] your team again this afternoon, at the courthouse"):** No email content. (Day #2 of jury deliberations)

- **April 4, 2019 @3:22p.m. (Subject "Re: thoughts"):** Email to Mr. Derby: "You are most likely wondering what the heck is going on……. right??" (Day #3 of jury deliberations)

B. Plaintiff's Belated Disclosure of Suspected Juror Misconduct.

On Thursday, April 4, 2019 at 5:40 p.m., after day three of jury deliberations, Plaintiff's lead trial counsel Paul Derby contacted lead trial counsel for Defendant, Jessica Grant, to alert her about his long-standing suspicion of juror misconduct. *See* Declaration of Jessica Grant ("Grant Decl."), ¶¶ 2 and 3. During their conversation, Mr. Derby told Ms. Grant that:

- During the trial, Mr. Derby received numerous emails from "Ultimate Drone Vision," whose email address is "mydronevision@gmail.com." (*See* Grant Decl., ¶3)

- Mr. Derby ignored the first email and deleted it without reading its contents. (*Id.* at ¶4)

- Presumably because he suspected that the emails might be from a juror, Mr. Derby retained a private investigator ("PI") who was former FBI agent, to investigate the identity of the individual associated with the email address. (*Id.* at ¶5)

- Plaintiff's counsel paid the PI "between $4,000 and $5,000 for his services," and that the PI worked on this matter "for a while." (*Id.* at ¶5)

- Mr. Derby consulted with an unidentified "former prosecutor" from the "Orange County Office of the United States Attorney" to inquire "whether Plaintiff's counsel had a duty to disclose their suspicions of juror misconduct and was advised that he had no such duty." (*Id.* at ¶6)

- When Ms. Grant asked Mr. Derby when he first reviewed all of the emails from the suspected juror, he stated it was "early last week while he was catching up on emails," which would have been approximately March 30 – April 2. (*Id.* at ¶7) Mr. Derby stated that he opened those emails and reviewed them substantively, including an email he received during the examination of the defense expert witness, John Luna that stated "this guy is such a liar." (*Id.* at ¶7) Mr. Derby also told Ms. Grant that the emails included screenshots of Glen Ivy Hot Springs Resort being open, when testimony from that day's court proceedings indicated that the resort was closed. (*Id.*)

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- Mr. Derby next related that on Thursday, April 4, 2019, he received another email from the same person. The email stated that it was "good to see [Mr. Derby's] team in court that day." According to Mr. Derby, this prompted his partner, Paul Skiermont to "skip trace" the email and link it to a 714 area code in Tustin, California and an auto shop affiliated with Juror No. 10 in the same city, which then led counsel to believe Juror No. 10 was the person who had sent all of the emails. (*Id.* at ¶8)

- Mr. Derby told Ms. Grant he had no knowledge of the content or source of the emails prior to April 4, 2019 and did not suspect they could be from a juror before that time. (*Id.* at ¶9) However, this ***contradicts*** what Mr. Derby attested to in his Declaration dated April 7, 2019, ***in which he states that he reviewed all of the emails at issue on April 1 or April 2***.

C. <u>Mr. Derby Refused to Provide Defense Counsel with Information Critical to Their Ability to Address the Juror Misconduct and the Role of Plaintiff's Counsel in an Apparent Cover-Up</u>.

Following her conversation with Mr. Derby on April 4, Ms. Grant immediately sent an email to Mr. Derby requesting:

- all emails sent by Juror #10, aka "Ultimate Drone";
- the date Plaintiff's counsel first consulted with the former prosecutor regarding a duty to disclose, and the lawyer's name:
- all communications between your law firm personnel and the former prosecutor with whom you consulted about this issue;
- the date on which Plaintiff's counsel first asked his PI to investigate an email from "Ultimate Drone";
- all notes/reports from Plaintiff's PI relating to potential juror misconduct;
- all communications between the Skiermont Derby firm and the PI related to this issue; and
- all skip trace reports/records related to the emails.

(*See* Grant Decl., ¶11; Exhibit A).

Mr. Derby did not respond to Ms. Grant's April 4 email. (*See* Grant Decl., ¶11). Accordingly, on Friday, April 5, 2019, Ms. Grant again asked Mr. Derby to immediately provide copies of the emails from Juror No. 10, so that defense counsel could evaluate the emails and develop a recommendation to the Court for how to proceed. (*Id.* at ¶13; Exhibit B). Mr. Derby

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responded that he was "putting together a declaration" that would be shared and filed with the Court. (*Id.* at ¶14; Exhibit C). Ms. Grant immediately reiterated her request for the emails so that defense counsel could independently evaluate the situation and formulate a recommendation for the Court. (*Id.* at ¶15; Exhibit D).

D. Mr. Derby's Vague and Misleading Declaration.

More than two and a half days after Ms. Grant requested the subject emails from Plaintiff's counsel, Mr. Derby provided declaration on Sunday, April 7 that omits: (1) information relating to the private investigator's retention; (2) any private investigator report; (3) any reference whatsoever to discussions with a prosecutor; and (4) Mr. Skiermont's April 4, 2019 Google search results or "skip trace" information that purportedly enabled him (but not the PI who is a former FBI agent) to determine that the email address belonged to Juror #10. In fact, the Declaration appears pieced together to skirt the evidence that may disclose counsel's misconduct. The identity of the "former prosecutor" allegedly consulted is missing. Emails described to Ms. Grant on April 4 are omitted including the email in which Juror No. 10 called Mr. Luna a liar. Critical dates are missing.

Despite the overly clever crafting of Mr. Derby's Declaration, the facts that have been revealed thus far undisputedly establish not only juror misconduct, but counsel's stunning breach of their ethical obligations. According to Mr. Derby, the first email he noticed from mydronevision@gmail.com was on March 28, 2019, stating "I would like to speak with you after the trial." (Declaration of Paul Derby ("Derby Decl."), ¶ 2). When Mr. Derby responded by asking who was writing to him, the sender responded "I'm the one that you stare at most of the time. . . lol.can u guess?" (*Id.* at ¶ 4). Mr. Derby admits that at this time—March 30, 3019—he "did not rule out the possibility" that the sender was a juror. (*Id.*).

Rather than comply with Rule 3.5(j) by immediately disclosing his suspicion to the Court and defense counsel, Mr. Derby instead contacted a private investigator. (*Id.*). Mr. Derby also told Ms. Grant that he had consulted with a former prosecutor "a week or so ago" to determine whether he had a duty to disclose his suspicions of juror misconduct the Court – ***a fact missing from his***

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Declaration. (*See* Grant Decl., at ¶ 4). Mr. Derby admits that he reviewed his emails "likely on April 1[2] or 2, 2019," including the following:

- On March 19, 2019, when Defendant's witnesses, Mr. Luna and Mr. Costello testified, Mr. Derby received an email stating that "The big Pink elephant in the room as been spotted." (*See* Derby Decl., Ex. 3.)

- On March 21, 2019, during Mr. Luna's re-examination, Mr. Derby was sent emails circling external sources, such as ABC-7.com regarding the evacuation and closure of Glen Ivy, one major dispute in the trial proceedings, and an email stating "that little p#nk is a freaking liar." (*Id.*).

- On March 26, 2019, when Mr. O'Kane examined Josephine Leung, Mr. Derby received an email stating: "where was your partner today? Not that Mr. O'Kane did a bad job today, he did an excellent job." (*Id.*).

No one other than a juror could know these details. Mr. Derby's ***own*** declaration demonstrates that he *suspected* that "Ultimate Drone Vision" was a juror no later than March 30, 2019, and *knew* he was a juror as of "April 1 or 2." (*See* Derby Decl. at ¶ 5). Yet, Mr. Derby and Plaintiff's team of lawyers remained silent as the jury began deliberations on April 2.

Then, after deliberations continued on April 3, 2019 (day #2), Mr. Derby received two additional emails from Ultimate Drone Vision—one entitled "STRESSED" that states "Man, all I got to say is, I didn't expect this to be so stressful," and a second email that states it was "nice to see [Mr. Derby's] team again this afternoon, at the courthouse." (*See* Derby Decl., Ex. 4). Remarkably and inexcusably, Plaintiff's counsel still did not disclose these communications to the Court. Mr. Derby's claim that he "still had not seen any evidence linking any juror to the email address at issue" is simply not credible given the timing and content of the emails.

Plaintiff's counsel received *three more emails* on April 3 and 4, 2019 and again consulted with their PI before placing defense counsel on notice (but not the Court). (*Id.* at ¶ 6). It was not until April 4, 2019 when Mr. Skiermont allegedly "reviewed a Google search result"—which still has not been not produced—that enabled him to "skip trace" the emails to Juror No. 10 by telephone

[2] The Court was closed on April 1, 2019 for Cesar Chavez day, so jury deliberations began on April 2.

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number and geographical location. (*See* Derby Decl. at ¶ 7). Even after finding this information, Plaintiff's counsel's excuse for the delay in notifying defense counsel was that they "still have not [] definitively established these emails are from Juror No. 10…" (*Id.* at ¶ 8).

The evidence strongly suggests that Plaintiff's counsel, believing that Juror No. 10 was biased in their favor, deliberately concealed the emails they had been receiving for over ten days. Indeed, the timing could not be more suspect. Mr. Derby only contacted defense counsel (but not the Court) a few hours *after* the jury sent a question on the afternoon of April 4 that appeared to favor Defendant. Mr. Derby admits in his Declaration that he reviewed all of the subject emails by April 1 or 2 *at the latest*—but he waited to disclose these emails and his belief that a juror had sent them until after the jury sent a note which clearly indicated that they might be leaning towards a defense verdict.

Courts will not tolerate the concealment of juror misconduct. *See, e.g.*, *Apple, Inc. v. Samsung Elecs. Co.*, 2012 WL 6574785, at *10 (N.D. Cal. Dec. 17, 2012) (a party "cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct.").[3] Had Plaintiff's counsel notified the Court and defense counsel when he "substantively" reviewed all of the emails by April 1 or 2, an investigation by the Court would have exposed Juror No. 10, allowing him to be excused before or right after the jury began its deliberations. *See Edwards v. Hyundai Motor Mfg. Alabama, LLC*, 701 F. Supp. 2d 1226, 1234 (M.D. Ala. 2010) ("the court must ask whether [the suspecting party's] attorneys unreasonably failed to discover the evidence" of the juror's misconduct). Plaintiff should not profit from keeping

[3] *Accord*, *United States v. Bolinger*, 837 F.2d 436, 438 (11th Cir. 1988) (same); *United States v. Gootee*, 34 F.3d 475, 479 (7th Cir. 1994) (same); *United States v. Jones,* 597 F.2d 485, 488 n. 3 (5th Cir.1979) (same); *United States v. Brown*, 108 F.3d 863, 866 (8th Cir. 1997) (same).

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plaintiff-friendly Juror No. 10 on the jury for as long as possible without having to disclose his misconduct to the Court.

Plaintiff's counsel's assertion that Juror No. 10's actions constituted "newly discovered" information, apparent only at the time there was "circumstantial evidence" is disingenuous and irrelevant.[4] Counsel made the improper and unethical decision to "investigate" their suspicions without disclosure to the Court. *See People v. Seaton* 26 Cal.4th 598, 676 (2001) ("specific procedures to follow in investigating an allegation of juror misconduct are generally a matter for the trial court's discretion"). Mr. Derby, to this day, represents that despite the content and timing of the nine emails he received, he and his team supposedly "[have] not definitively confirmed that these emails are from Juror 10, [but] given what we have learned we think the only prudent course is for the Court to make an inquiry into whether Juror 10 is the sender of these emails." (*See* Derby Decl., ¶ 8)). This is not the correct standard for disclosure under Rule 3.5 of the California Rules for Professional Conduct or applicable case law. ***Plaintiff's counsel was required to immediately disclose even suspicions of juror misconduct***, not wait until their investigation equivocally established which juror had sent the emails in question.

III. JUROR NO. 10 MUST BE EXCUSED FOR MISCONDUCT.

There is no dispute that Juror No. 10 committed "serious misconduct" in this case. Indeed, when "a juror contacts an outside attorney for advice during deliberations . . . he is guilty of egregious misconduct. Such conduct in clear violation of the trial court's admonitions interjects outside views into the jury room and creates a high potential for prejudice." *People v. Honeycutt*, 20 Cal. 3d 150, 157, (1977) (reversing judgment when jury foreman contacted outside counsel for

[4] Albeit in a criminal case, "any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer v. United States*, 347 U.S. 227, 229, (1954).

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advice regarding criminal counts during deliberations); *In re Hamilton*, 20 Cal. 4th 273, 294 (1999), *as modified* June 30, 1999 (a juror commits misconduct when there is a "direct violation of the oaths, duties, and admonitions imposed on actual or prospective jurors, such as when a juror conceals bias on voir dire, consciously receives outside information, discusses the case with nonjurors, or shares improper information with other jurors, the event is called juror misconduct.").

Deliberations may continue with the remaining jurors, or with an alternate to salvage the extensive time and resources devoted to this trial. The Court may proceed with the remaining 11 jury members who have been present throughout the course of the trial. "If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes sick or otherwise unable to perform the juror's duty and has been discharged by the court as provided in this section, the trial may proceed with only the remaining jurors." Cal. Civ. Proc. Code § 233*; see e.g., People v. Patterson*, 169 Cal. App. 2d 179, 186 (1959) (with the parties' consent, the trial continued with the remaining eleven jurors to resume deliberations when a juror was excused for illness). California federal courts are in accord. In *United States v. Brown*, 784 F.3d 1301, 1301–02 (9th Cir. 2015), during deliberations, the jury asked five substantive questions and the court and parties had spent significant time considering and responding to them. When one of the jurors was excused for illness, the district court directed the 11–person jury to continue its deliberations and the 9th Circuit confirmed its discretion to do so. *Id.* at 1305; *see also United States v. Egbuniwe*, 969 F.2d 757 (9th Cir. 1992) (affirming trial court's decision to proceed with 11 jurors when juror was excused during deliberations).

Alternatively, the Court may replace Juror No. 10 with an alternate. "When juror misconduct is discovered before a verdict is reached, the trial court has a choice among several remedies, one of which is to discharge the offending juror and replace the juror with an alternate." *Rufo v. Simpson*, 86 Cal. App. 4th 573, 613 (2001). The authority to substitute an alternative juror

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for good cause—which is undoubtedly present here—is provided by the Code of Civil Procedure and precedent:

> [i]f, before the jury has returned its verdict to the court, a juror becomes sick or, upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged.

Cal. Civ. Proc. Code § 233; *Garden Grove Sch. Dist. of Orange Cty. v. Hendler*, 63 Cal. 2d 141, 144–145 (1965) (judge had the discretion to dismiss the jury foreman for his misconduct of having had talked, during a recess at trial, with plaintiff's counsel). As a verdict has not been reached, the Court may replace Juror No. 10 with an alternate. *See Rufo,* 86 Cal. App. 4th at 613 ("Ordinarily the less drastic remedy is preferable to requiring a whole new trial; the remedy of mistrial is for those rare cases where the trial court in its discretion concludes the misconduct of the juror has already caused such irreparable harm that only a new trial can secure for the complaining party a fair trial.").

In cases where jury misconduct is alleged, the Court may conduct an evidentiary hearing "to determine the truth or falsity of allegations of jury misconduct and to permit the parties to call jurors to testify at such a hearing." *People v. Hedgecock*, 51 Cal. 3d 395, 419, (1990). This hearing should include an interview of the offending juror, and any other person potentially involved in order for the court to make an informed decision about whether discharge is appropriate (there is no evidence that any others were involved with Juror No. 10's communications). *Shanks v. Dep't of Trans*., 9 Cal. App. 5th 543, 556, (2017). The Court should thoroughly examine Juror No. 10 to determine whether any other juror—including the alternate jurors—have been tainted by Juror No. 10's misconduct. If a single juror's misconduct did not affect the other jurors, the Court need not waste conducting additional investigations. *See People v. Mora & Rangel*, 5 Cal. 5th 442, 483–484 (2018), *as modified on denial of reh'g* (Aug. 22, 2018), *cert. denied sub nom. Rangel v. California.*, 2019 WL 888188 (U.S. Feb. 25, 2019), and *cert. denied sub nom. Mora v. California*, 2019 WL 318418 (U.S. Mar. 25, 2019) ("The court was not obliged to evaluate whether Juror No. 7's

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conversation affected the other jurors when there was no suspicion that any other juror became unable to impartially serve (or even that another juror became aware of Juror No. 7's conversation...)"). If the Court's examination of Juror No. 10 does not reveal any collusion with other jurors or that jurors have been tainted by improper communications with Juror No. 10, the Court need only discharge Juror No. 10 and replace him with an alternate to continue deliberations. *See id.* at 483; *Omaha Bank,* 305 N.W.2d at 462 (clear error resulted from the failure to replace the offending juror with an alternate after attorney/juror communication).

IV. PLAINTIFF'S COUNSEL VIOLATED THEIR ETHICAL OBLIGATIONS.

In direct violation of Rule 3.5 of the Rules of Professional Conduct, and their ethical obligations as officers of this Court, Plaintiff's counsel responded to an email from someone he suspected to be a juror. Plaintiff's counsel also conducted an out of court investigation of emails they suspected belonged to a juror, and failed to report their suspicion or investigation to the Court, in violation of Rule 3.5(j). They had multiple opportunities to alert the court to the suspected—and later confirmed—misconduct, but failed to do so on each and every occasion. An evidentiary hearing is required to determine the facts related to the conduct of Plaintiff's counsel. Once the facts are determined, the Court (and defense counsel) will be able to determine what remedies are sufficient to cure any prejudice suffered by Defendant, including monetary sums as a result of counsel's "bad faith actions or tactics" of contacting the jury. Cal. Civ. Pro. § 128; *Lind v. Medevac, Inc.*, 219 Cal. App. 3d 516, 523 (1990) (letter sent to jurors regarding setting aside verdicts was deemed improper and monetary sanctions were appropriately awarded). The Court also has the authority to refer this matter to the California State Bar. And depending on the outcome of any evidentiary hearing, civil or criminal contempt may also be appropriate, not merely against the errant juror, but against Plaintiff's counsel.

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V. CONCLUSION

It is axiomatic that Juror No. 10 committed egregious *ex parte* communications. It is also obvious based upon the facts and timing of these emails that Plaintiff's counsel deliberately attempted to shield the misconduct from the Court and opposing counsel. As a result, Juror No. 10 should be excused and deliberations should continue with the remaining jury.

Dated: April 8, 2019

VENABLE LLP

By: _____
Ellyn S. Garofalo
Jessica L. Grant

Attorneys for Defendant Ingo Schweder

VENABLE LLP
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LOS ANGELES, CA 90067
310-229-9900

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

At the time of service, I was over the age of 18 and not a party to this action. My business address is 2049 Century Park East, #2300, Los Angeles, California 90067. On April 8, 2019, I served the following document: **DEFENDANT'S STATEMENT ON SUSPECTED MISCONDUCT BY JUROR AND/OR PLAINTIFF'S COUNSEL** on the person(s) below:

Paul B. Derby, Esq. John J. O'Kane IV, Esq. Mane Sardaryan, Esq. Drew E. Anderson, Esq. Skiermont Derby LLP 800 Wilshire Blvd., Suite 1450 Los Angeles, CA 90017 Telephone: 213 788-4500 Facsimile: 213 788-4545	Attorneys for Plaintiff DAVID WICKLINE *pderby@skiermontderby.com* *jokane@skiermontderby.com* *msardaryan@skiermontderby.com* *danderson@skiermontderby.com*

The documents were served by the following means (specify):

☑ **BY PERSONAL SERVICE (CCP §1011)**: I personally delivered the documents to the persons at the addresses listed above. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not younger than 18 years of age between the hours of eight in the morning and six in the evening.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Date: April 8, 2019

Jessica L. Grant

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2300
LOS ANGELES, CA 90067
310-229-9900