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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

RONALD C. WILGENBUSCH and JUDITH A. WILGENBUSCH,

Plaintiff(s),

v.

AMERICAN BILTRITE, INC., et al.,

Defendant(s).

CASE NO. RG19029791

DEFENDANT METALCLAD INSULATION LLC'S MOTION FOR MISTRIAL

Accompanying Documents
1. Declaration of Janelle Y. Walton
2. Declaration of Samuel D. Jubelirer
3. Declaration of Michael E. Sandgren

Dept: 23
Judge: Hon. Brad Seligman

Complaint Filed: August 2, 2019
Trial Date: June 29, 2020

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I. INTRODUCTION

In this now fully remote jury trial, another serious, prejudicial incident has occurred which could and would *never* happen if this case were tried to a jury in person. Outside the presence of the Court and counsel, Plaintiff Ronald Wilgenbusch ("Plaintiff" or "Admiral Wilgenbusch") conversed with two jurors, in the presence of the rest of the jury. Defendant Metalclad Insulation LLC's trial observer, who was present in the same Zoom "room" as the jury saw the incident occur.

On August 6, 2020, Metalclad continued its cross-examination of Admiral Wilgenbusch, the only witness to his allegation that he observed boxes of insulation that bore the name "Metalclad" aboard ships on which he served. In the middle of that examination, the Court initiated a Zoom breakout room for the Court and all counsel, leaving all other trial participants including Admiral Wilgenbusch, the jurors, and Metalclad's observer in the "main" Zoom room. In the "main" room, Metalclad's trial observer observed Admiral Wilgenbusch chatting with two jurors, in the presence of the rest of the jury, regarding the "virtual background" feature of Zoom. He asked for, and received from those two jurors, friendly guidance with setting up this feature on his computer. This was far from a meaningless or de minimus interaction. Indeed, Plaintiff's own words show that he knew it was improper for him to be having any direct interactions with jurors, much less the warm and friendly one he had.

After learning of the incident, Metalclad reported it to the Court. Plaintiffs did not. Nor did Plaintiffs express any type of surprise or dismay upon receiving Metalclad's report, or deny that Admiral Wilgenbusch engaged in such a conversation.

Admiral Wilgenbusch intentionally and subtly created juror empathy by asking for, and receiving, help from two jurors in the presence of the rest. The jurors directly communicated with Admiral Wilgenbusch, outside the record and the presence of the Court or parties. The communication tended to endear Admiral Wilgenbusch to the jurors, and was thus evidence of his likeability and credibility. The law *presumes* incurable prejudice from this kind of misconduct, and places the burden squarely on Plaintiffs to show that no prejudice resulted, which they cannot sustain.

The prejudice to Metalclad cannot be overstated, nor can it be cured by any kind of voir dire or admonition. Now that Admiral Wilgenbusch has endeared himself directly to two jurors, and

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potentially indirectly to the entire of the rest of the jury, there is no way for Metalclad to receive a fair trial. A mistrial is required to protect Metalclad's right to a fair and impartial jury, a fair trial in general and to protect the integrity of this proceeding.

II. FACTS

A. Metalclad arranged for someone to observe the jury in this trial, in part because the Court refused to record it.

When the Court moved this trial to an all-virtual format, Metalclad asked the Court to record the entire proceedings using Zoom's recording function so that a reviewing court could have a verbatim record of events just like this. (Jubelirer Decl., Exh. A, at 20:8-21:10 [7/30 Transcript].) The Court refused, stating that it believed that the Government Code prohibited it from doing so, and that in any event, it would exercise its discretion not to do so. (*Id.*, Exh. B, at 29:6-17; 32:2-22 [7/31 Transcript].)[1] To help alleviate the problem of a difficult-to-reconstruct record, Metalclad asked a paralegal, Janelle Walton, from its counsel's office to observe the jurors throughout the remainder of the evidence portion of the trial, because the attorneys could not easily or effectively observe them while participating in the trial. (Jubelirer Decl., ¶ 5; Exh. D, at 12:12-13:6 [8/3 Morning Transcript].) Metalclad disclosed this in open court, and the Court stated in response, "I should also tell you we have a court attendant that's going to be doing the same thing, which is usually what court attendants do. So the Court itself will be monitoring the jurors both in their attention and their ability to be online [i.e., connected to the Zoom conference]." (*Id.*, Exh. D, at 12:19-25.)

B. Admiral Wilgenbusch and the jurors committed misconduct by communicating during a break in Metalclad's cross-examination.

Ms. Walton began observing the jury on August 3, 2020, when the all-virtual portion of this trial commenced. (Walton Decl., ¶ 2.) Admiral Wilgenbusch testified on August 6, 2020, and was

[1] The Court made this order despite having previously ruled that the Judicial Council's Emergency Rule 3 allowed all manner of other deviations from normal practices. (Jubelirer Decl., Exh. C.) The rule provides that "[n]otwithstanding *any other law*," courts may "require that judicial proceedings and court operations be conducted remotely," which includes "the use of remote reporting *and electronic recording to make the official record of an action or proceeding*." (Judicial Council of California, Emergency Rule 3(a)(3), available at https://www.courts.ca.gov/documents/appendix-i.pdf [added italics].)

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connected to the trial's Zoom conference with the judge, attorneys, and jurors for that purpose. During Metalclad's questioning that day of Admiral Wilgenbusch, shortly after the morning break, Judge Seligman asked all counsel to join him in a Zoom "breakout room."[2] Judge Seligman, the Plaintiffs' attorneys, Metalclad's attorneys, the court clerk, and the court reporter all disappeared from her screen at that time. Ms. Walton remained in the "main[3]" room with the jurors and Plaintiff Ronald Wilgenbusch. (Walton Decl., ¶ 3.)

Someone in the "main" room then stated, "Mr. Draper…Mr. Draper." Mr. Draper is a juror in this case. Once the speaker had Mr. Draper's attention, the same speaker asked, "Are you in a courtroom?" Ms. Walton had previously observed Mr. Draper using a "virtual backdrop" on Zoom of what appeared to be a judge's bench in a courtroom. (Walton Decl., ¶ 4.) In a joking manner, Mr. Draper responded, "Well, I'm in my courtroom." The previous speaker then asked, "Where are you?" Mr. Draper jokingly responded, "I can be wherever I want to be," and explained what the previous speaker was seeing was a virtual backdrop. Mr. Draper then proceeded to show three additional backdrops. (*Id.*, ¶ 5.) The first backdrop appeared to be the inside of a spaceship. Ms. Walton cannot recall the second backdrop. The third backdrop was the Golden Gate Bridge. At that point, jurors were smiling and sounds of "oooh" and "ahhh" could be heard. (*Id.*, ¶ 6.)

Then, unbelievably, Admiral Wilgenbusch himself began to participate in the conversation. He said, "I've been trying to do that but I can't figure it out." Admiral Wilgenbusch then addressed Mr. Draper and said, "Can you tell me how to do that?" (Walton Decl., ¶ 7.) Mr. Draper responded to Admiral Wilgenbusch and said, "Well, it depends if you are on a PC or a Mac." Admiral Wilgenbusch responded to this comment, but Ms. Walton was unable to hear it because Mr. Dent, another juror, began speaking at the same time. (*Id.*, ¶ 8.) Mr. Draper and Mr. Dent then began to

---

[2] "Breakout rooms are sessions that are split off from the main Zoom meeting. They allow the participants to meet in smaller groups, and are completely isolated in terms of audio and video from the main session." (Zoom, Inc., *Participating in breakout rooms*, available at https://support.zoom.us/hc/en-us/articles/115005769646 [last visited August 9, 2020; Jubelirer Decl., Exh. E].)

[3] For purposes of this motion, and to provide a full record, the "main" room is the room on the Zoom platform where the main trial proceedings occur. The "breakout" room is a room on Zoom allowing the parties and the Court to have conversations outside the presence of the jury. (Jubelirer Decl., ¶ 8.)

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describe to Admiral Wilgenbusch how to install virtual backdrops. The three of them continued to engage in a conversation regarding virtual backdrops for several minutes. (*Id.*, ¶ 9.) Either Mr. Dent or Mr. Draper eventually said, "Yeah, because of COVID, I work from home, and now this is my life." (*Id.*, ¶ 10.)

Admiral Wilgenbusch then thanked Mr. Draper and Mr. Dent for the instructions. (Walton Decl., ¶ 11.) He then said, "I'm going to get out now before the judge comes back." A few seconds later, he said, "This is our family room." Ms. Walton heard more than one juror laugh at that comment but she is not able to identify them. (*Id.*, ¶ 12.) Having perceived the entire interaction among Admiral Wilgenbusch, Mr. Draper, Mr. Dent, and the rest of the jury, it appeared to Ms. Walton to be warm, friendly, and familiar. (*Id.*, ¶ 13.)

Approximately one minute later, after Admiral Wilgenbusch's last comment, Judge Seligman, all counsel, the clerk, and the court reporter returned to the main Zoom conference from the breakout room. Ms. O'Gara then resumed questioning Admiral Wilgenbusch. (Walton Decl., ¶ ¶ 14.)

C. <u>Metalclad notified the Court, and Plaintiffs' counsel responded without denying that misconduct occurred.</u>

The next morning, Metalclad's counsel emailed the Court's clerk and all counsel to notify them of the incident, and requested a conference at the Court's earliest opportunity. (Jubelirer Decl., Exh. F, p. 4.) Plaintiffs' counsel's immediate response to Metalclad was not "I am shocked to hear that this happened," or "I am certain that this did not happen." Rather, only after the Court agreed to hold a conference that afternoon, Plaintiffs' counsel responded with an email stating, "I imagine you will want to file something, we should agree to a briefing schedule." (*Id.*, Exh. F, p. 1.)

The Court held a conference with Plaintiffs' counsel and Metalclad's counsel on the afternoon of August 7. Metalclad advised the Court what it had learned had occurred. (Jubelirer Decl., Exh. G, at 5:24-8:24 [8/7 Transcript].) It moved for a mistrial, identifying the prejudice created by the "nature of this contact" as "significant, when you're reaching and you're sort of being self-deprecating. It's a warmth – it's an ability to generate a relationship" [between Admiral Wilgenbusch and the jurors]. (*Id.*, Exh. G, at 5:18-20; 8:25-9:22.)

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The Court then gave Plaintiffs' counsel an opportunity to respond. Again, rather than stating that he did not know that this interaction occurred, or claiming that it was not improper, Plaintiffs' counsel instead said, "I haven't heard any actual claim here. I haven't heard any citation to relevant authority," and went on to baselessly attack and accuse Metalclad of "fulfilling [a] promise that it would be obstructionist" in this case. Plaintiffs' counsel then resorted to intimidation and threats, demanding "service information for any witness it relies upon for – in support of any evidence it's going to present," in order to "get any, you know, depositions we need done[.]" (Jubelirer Decl., Exh. G, at 9:24-10:5; 10:15-24 [8/7 Transcript].) Then, again, rather than express shock, dismay, or any other response that might be expected from someone learning about this for the first time, Plaintiff's counsel claimed, "I haven't heard any prejudice alleged here. I haven't heard any undue influence alleged here." (*Id.*, Exh. G, at 11:4-6.)

The Court declined to rule on the motion at that time and ordered briefing. (Jubelirer Decl., Exh. G, at 11:9-14 [8/7 Transcript].) The Court also stated that "based on the E-mail that was sent to the Court, which indicated that something untoward happened the prior morning, I checked with our court attendant who did not report anything to me. But I'm going to listen to whatever evidence there is." (*Id.*, Exh. G, at 11:15-20.) The Court had previously promised that the court attendant was "monitoring the jurors[.]" (Jubelirer Decl., Exh. D, at 12:19-25 [8/3 Morning Transcript].)

III. DISCUSSION

The significance of Admiral Wilgenbusch's conversation with the jurors cannot be understated. In a matter of minutes, he utilized classic techniques of how to subtly influence others. These are the same techniques that Dale Carnegie wrote about many decades ago. They are interpersonal skills likely deeply engrained in Admiral Wilgenbusch, a man who ascended to one of the highest ranks of the military over many years, likely in large part due to his ability to, for lack of a more direct description, "win friends and influence people." (Carnegie, Dale Carnegie's Lifetime Plan for Success: How to Win Friends & Influence People and How to Stop Worrying & Start Living (1998) ["Carnegie"].)[4] These techniques include:

[4] The book includes the revised edition of Dale Carnegie's book "How to Win Friends and Influence People," copyright 1981. For purposes of citations to this book, all passages come from "How to Win Friends and Influence People."

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From the section on *Fundamental Techniques in Handling People* – Principle 2: Give honest, sincere appreciation. (Carnegie, p. 43.) **Admiral Wilgenbusch thanked the jurors for their assistance.**

From the section on *Six Ways to Make People Like You*:

Principle 1: Become genuinely interested in other people (Carnegie, p. 72), and Principle 4: Be a good listener. Encourage others to talk about themselves. (*Id.* at p. 94.) **Admiral Wilgenbusch asked for help from the jury, and somehow the conversation resulted in a juror telling him, "Yeah, because of COVID, I work from home and this is my life."**

Principle 6: Make the other person feel important – and do it sincerely. (*Id.* at p. 108.) Notably, this last principle comes from the chapter, "How to Make People Like You Instantly," wherein Carnegie discussed that the law is "[a]lways make the other person feel important," because "[t]he deepest principle in human nature is the craving to be appreciated. (*Id.* at pp. 100.) **Admiral Wilgenbusch made the jury feel like they were in on a "secret" or something "taboo," when he told them he was "going to get out now before the judge comes back," and implied the jurors were part of some kind of "family," when he stated "This is our family room."**

A. Jurors are required to avoid any contact with witnesses, parties, or counsel, and doing so is per se misconduct.

CACI Instruction No. 100, "Preliminary Admonitions"—the very first instruction in the entire official CACI instruction document of more than 3,400 pages[5]—states in no uncertain terms, "***You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case.***" (CACI No. 100, fourth paragraph [emphasis added].) The jury was instructed with CACI No. 100 on July 21, 2020. (Sandgren Decl., ¶ 2.)[6] The Judicial Council's "Sources and Authority" section of CACI No. 100 states, "Jurors are required to avoid discussions with parties, counsel, or witnesses." (CACI No. 100, Sources and Authority, eighth bullet.) Neither the instruction itself nor the Judicial Council's analysis qualifies that requirement by limiting the prohibition to communications "about the case." "Any contact" is prohibited, period. Jurors are required to "avoid discussions" with parties and witnesses, period.

It has been the law of California for over 120 years that jurors communicating with parties is grossly inappropriate. The Judicial Council continues to cite *Wright v. Eastlick* (1899) 125 Cal.517

[5] https://www.courts.ca.gov/partners/documents/Judicial_Council_of_California_Civil_Jury_Instructions.pdf is the entire set of CACI instructions and verdict forms available from the Judicial Council. The document is 3,420 pages long.

[6] Due to a technical problem with audio transmission to the Court reporter, the reading of many of the preliminary instructions was not transcribed, however, there is no dispute that CACI No. 100 was read to the jury as written. (Sandgren Decl., ¶ 3.)

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as authority for this rule. While the facts of the case were almost literally out of the "Wild West"—an "action involv[ing] a contest regarding a line dividing mining claims in Siskiyou County" (125 Cal. at p. 517)—the holdings are no less applicable now than they were in 1899. .

In *Wright*, a juror (a Mr. Neville) was seen during the trial attending a dance with one of the defendants: "They went together in the same conveyance to the dance, and returned in like manner to Yreka. During the night of the dance at Hawkinsville they drank and got drunk together; were 'partners,' and frequently walked alone from the dancehall to the saloon and appeared to be quite intimate." Then, after the trial ended in a defense verdict, the juror said to the defendant, "Well, old man, I brought in a verdict for you all right." (*Wright*, 125 Cal. at p. 519.) Responding to the charge of jury misconduct, the Court noted that "The conduct of these two jurors . . . is not controverted by respondent's counsel, but they seek to extenuate the same." (*Ibid.*) So too here. Plaintiffs' counsel, despite having multiple opportunities to "controvert" what happened, instead sought to "extenuate" Admiral Wilgenbusch's and the jurors' misconduct by immediately claiming he "ha[d]n't heard any prejudice alleged here."

Certainly, the misconduct in *Wright* leading to the reversal of the denial of the motion for new trial was almost comically egregious. But its rules are no less applicable now than they were then:

> It is to be presumed that when jurymen are selected and sworn to try a cause . . . they realize the obligation of their oath, and their duty as good citizens toward the community, and act accordingly. In the early [18]'60's a district judge in this state . . . was impeached on the ground, among others, that during the trial of a cause he left the bench and visited a saloon and there drank and caroused with witnesses and the parties, or one of the parties. If a judge may not do these things, why should the jury, or member of the jury, be allowed to do so? By the constitution trial by jury is secured to all, and the judge is prohibited from charging the jury with respect to matters of fact; and by the law of the state the jury 'are the judges of the effect and weight of evidence.' [Citation.] The jury, therefore, while engaged in the trial of a cause, forms a very important part of the tribunal. A wrong verdict, resulting from prejudice or misconduct of the jury, or members thereof, is more detrimental to a party litigant than an error of law committed by the trial judge; an error at law can readily be corrected on appeal, whereas if the testimony appears to be substantially conflicting the verdict must be allowed to stand, although resulting from secret or undiscovered prejudice or misconduct.

(*Wright*, 125 Cal. at pp. 519-520.) This case involves an element not present in *Wright* that compounds the prejudice. While in *Wright* the offending juror "caroused with" the defendant by himself, here, Mr. Wilgenbusch asked for and received assistance from Mr. Draper and Mr. Dent *in*

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1 *the presence of the rest of the jury*. The other jurors were thus witnesses to the conversation and
2 warm, friendly interaction among them. The taint of this misconduct thus spread to jurors in a way
3 that was not possible in *Wright*—which still resulted in a reversal of the order denying a new trial.

4 Most importantly, *Wright* held that "[i]t goes for nothing that the jurymen in this case say
5 that their verdict was uninfluenced by the misconduct complained of. As said in *People v. Stokes*
6 [1894] 103 Cal. 196 [citation]: 'A juror is not allowed to say: 'I acknowledge to grave misconduct;
7 I received evidence without the presence of the court, but those matters had no influence upon my
8 mind when casing my vote in the jury-room.' The law, in its wisdom, does not allow a juror to purge
9 himself in that way.'" (*Wright*, 125 Cal. at p. 520.) Indeed, it is *irrelevant* what a juror might say
10 about whether the contact with a party did or did not influence any verdict:

11 It is not necessary for us to find that this conduct had *any effect* upon the verdict in order
12 to sustain this motion for a new trial. It is enough to say that it is *calculated* to do so. . .
. There is no practical method to so analyze the mental operations of the jurors as to
13 determine whether, in point of fact, the verdict would have been the same if the trial had
been conducted as both parties had the right to expect, according to law and upon the
evidence in court. The court should set aside the verdict in justice to itself as well as to
14 the parties, so that the trial may be conducted fairly, so that the verdict, when rendered,
may be entitled to the respect of both parties and the confidence of the court.

15 (*Ibid.* [citations and quotations omitted, italics added].) Thus, the Court cannot usefully voir dire the
16 offending jurors, or indeed *any* jurors who witnessed the interaction, because there is no reasonable
17 way for them to put either the interaction itself (for Mr. Draper and Mr. Dent), or the good feelings
18 for Mr. Wilgenbusch engendered by having participated in or witnessed the interaction (for all the
19 jurors) out of their minds when deciding the case. *Wright* concluded: "We cannot be too strict in
20 guarding trials by jury from improper influences. This strictness is necessary to give due confidence
21 to parties in the results of their causes; and everyone ought to know that for any, even the least,
22 intermeddling with jurors a verdict will be set aside." (*Wright*, 125 Cal. at p. 521.)

23 Simply put, the interaction between Admiral Wilgenbusch and the two jurors, in the entire
24 jury's presence, is "calculated" to have an effect upon the verdict, for two reasons. First, it is
25 essentially the reception by the jury of new, extrinsic evidence of Admiral Wilgenbusch's friendly,
26 self-deprecating, honest, and solicitous character, rather than only "the evidence in court." Second,
27 the jury is now irreparably tainted because at least two of them have formed a positive *relationship*
28

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1 with Admiral Wilgenbusch, and the rest of the jury saw it happen.

2 **B. The law presumes Metalclad has been prejudiced by the misconduct, and**
3 **Plaintiffs cannot overcome that presumption with evidence.**

4 There is no question that Mr. Draper and Mr. Dent's communication ran afoul of this Court's
5 instruction to avoid contact with the parties and meets the definition of juror misconduct as defined
6 by the case law. "When the overt event is a direct violation of the oaths, duties, and admonitions
7 imposed on actual or prospective jurors . . . the event is called juror misconduct." (*In re Hamilton*
8 (1999) 20 Cal.4th 237, 294.) Moreover, the improper contact was initiated by Admiral Wilgenbusch
9 who also committed misconduct by communicating directly with them. "'It is well settled that a
10 presumption of prejudice arises from any juror misconduct. . . . However, the presumption may be
11 rebutted by proof that no prejudice actually resulted.'" (*People v. Honeycutt* (1977) 20 Cal.3d 150,
12 156.) "Misconduct by a juror, *or a nonjuror's tampering contact or communication with a sitting*
13 *juror,* usually raises a rebuttable 'presumption' of prejudice. [Citations]. The presumption aids
14 parties who are barred by statute from establishing the actual prejudicial effect of the incident under
15 scrutiny [citations], and accommodates the fact that the external circumstances of the incident are
16 often themselves reliable indicators of underlying bias." (*In re Hamilton*, 20 Cal.4th at p. 295 [added
17 italics].) The presumption applies here, because the character of the interaction tended to show only
18 good things about Admiral Wilgenbusch's penchant for friendliness, self-deprecation, and honesty.
19 Metalclad will be deprived "thorough consideration" of its case based on the evidence presented in
20 court, rather than on what the jurors may now think of the plaintiff personally. The law recognizes
21 the "obvious principle that a litigant in a jury trial has a constitutional right to a fair trial by 12
22 impartial jurors," and again, "[t]he occurrence of jury misconduct raises a rebuttable presumption of
23 prejudice." (*Tapia v. Barker* (160 Cal.App.3d 761, 765.) Metalclad's right in that regard has been
24 irreparably harmed, and Plaintiffs cannot overcome that presumption. Nor can the Court determine
25 through further voir dire on the question of whether the jury may now be prejudiced, because there
26 can be no inquiry into "unreliable proof of jurors' thought processes," but rather the *only* competent
27 evidence to rebut the presumption is evidence of "proof of overt conduct, conditions, events, [or]
28 statements." (*People v. Hutchinson* (1969) 71 Cal.2d 342, 349 [citing Evid. Code, § 1150].) The

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Court has already apparently inquired with its own observer and obtained no information on this incident, and Plaintiffs' counsel was unquestionably not present during the misconduct, either.

"Some of the factors to be considered [whether there is a reasonable probability of actual prejudice] are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*Elsworth v. Beech Aircraft Corp.* (1984) 37 Cal.3d 540, 557.) Here, the jurors explicitly engaged in a friendly conversation *with the Plaintiff himself, in the middle of Metalclad's cross-examination*, providing him with help after he requested it from them. Far from a "reasonable probability" that there was no actual prejudice from this interaction, this misconduct tilts the balance heavily in Plaintiffs' favor.

The Court must also consider the fact that this case turns almost entirely on Admiral Wilgenbusch's credibility. As he has repeatedly testified, he is the sole identifiable witness to the presence of a "Metalclad"-marked product in his presence, which would support the indispensable element of exposure to a Metalclad-supplied product. (*McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103.) Admiral Wilgenbusch affirmatively *enhanced* his credibility by soliciting help from the jury.

Caliendo v. Warden of California Men's Colony (9th Cir. 2004) 365 F.3d 691 is instructive. In that case, a detective was the key witness for the government. He "was overheard talking to three jurors in the hallway outside the courtroom for approximately twenty minutes" during a recess. (*Caliendo*, 365 F.3d at p. 693.) The subjects of the conversation were "baseball, eating, a juror's neighbor, [the detective's] exercise habits and equipment, and his heavy police workload." (*Ibid.*) The government had a "heavy burden" of rebutting the presumption of prejudice because the detective "was a critical prosecution witness and his interaction with multiple jurors lasted for twenty minutes. Although the conversation did not directly concern the trial, it went beyond 'a mere inadvertent or accidental contact involving only an exchange of greeting in order to avoid an appearance of discourtesy.'" (*Id.* at p. 698.) Because the case "turned on the detective's credibility," even the "jurors' claims that the encounter would not influence them did not suffice to meet the government's heavy burden of proving harmlessness. The prejudicial effect of an extrinsic contact 'may be substantial even though it is not perceived by the juror, and 'a juror's good faith cannot

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counter this effect.'" (*Id.* at pp. 698-699 [citations omitted].)

C. Though a Zoom trial is a new concept, this kind of serious misconduct is not.

There is no law on what constitutes misconduct in an all-virtual jury trial conducted over Zoom. But this kind of serious interference with the jury by a party is far from novel. Indeed, other courts addressing this type of misconduct have held it to irreparably taint the jury. *Rinker v. County of Napa* (9th Cir. 1983) 724 F.2d 1352, a civil case, involved the defendant's claim that the plaintiff "tampered with and prejudiced the jury by communicating directly with a juror in the hallway of the courthouse," telling the juror "if she had any questions about the case he would be glad to answer them for her." (724 F.2d at p. 1354.) The Ninth Circuit held that "[a]ny unauthorized communication between a party or an interested third person and a juror creates a rebuttable presumption of prejudice." (*Ibid.*) That is what happened here. "Rebuttal requires a strong contrary showing. Therefore, such communications, even if only 'possibly prejudicial,' can only be acceptable where 'their harmlessness is made to appear,' after an investigation by the trial court.'" (*Ibid.* [citing *Mattox v. United States* (1892) 146 U.S. 140, 150].)

The trial court found that no prejudice resulted from the contact, but the Ninth Circuit reversed. "More than possible intimidation, however, must be considered in evaluating jury prejudice here. *The harm inherent in deliberate contact or communication can take the form of subtly creating juror empathy and reflecting poorly on the jury system.*" (*Ibid.* [added italics].) That is precisely what happened here. Admiral Wilgenbusch "subtly creat[ed] juror empathy" by professing ignorance of how to use the Zoom virtual background feature, soliciting and receiving help from two jurors, and doing all this—a warm, direct interpersonal interaction—in the presence of the rest of the jury. It even appears Admiral Wilgenbusch knew he was committing some kind of misconduct at the time as evidenced by his statement that he was "going to get out now before the judge comes back." That, too, was significant to the Ninth Circuit: "First, the presumption of prejudice here was bolstered by the cumulative prejudicial effect of Rinker's misconduct followed by the juror's misconduct in deciding not to bring the issue to the trial court's attention." (*Ibid.*) "Second, by Rinker's counsel's own representation, it appears that both he, an officer of the court, and a United States Marshal witnessed the misconduct of Rinker and never advised the magistrate." (*Id.* at pp.

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1354-1355.) Only Metalclad reported this incident to the Court; not Admiral Wilgenbusch, not Plaintiffs' counsel, and not the court attendant who was supposedly tasked with monitoring the jurors.[7] "Third, regardless whether Rinker intended to intimidate [the juror], he did approach and attempt to influence a juror." (*Id.* at p. 1455.) Admiral Wilgenbusch did "approach" the jury and ask for help. The Ninth Circuit reversed the verdict in *Rinker* "on the issue of jury tampering." (*Ibid.*)

The California Supreme Court upheld a disbarment order for an attorney who, during his own criminal trial (which led to the disbarment) "approach[ed] and convers[ed] with a juror," citing *Rinker* with approval. "Even though petitioner did not discuss the merits of his case with the juror, the record amply supports the trial judge's conclusion that petitioner attempted indirectly to influence her. *By initiating a friendly conversation*, buying drinks, and discussing his personal history and religious beliefs, *petitioner attempted to arouse sympathy on his behalf.* 'The harm inherent in deliberate contact or communication can take the form of subtly creating juror empathy with the party . . . .'" (*In re Possino* (1984) 37 Cal.3d 163, 170 [citing *Rinker*, 724 F.2d at p. 1354], added italics].) Again, that is precisely what happened here: Admiral Wilgenbusch "approach[ed] and convers[ed] with Messrs. Draper and Dent, "initiat[ed] a friendly conversation" not on the merits of his case, and thereby "attempted to arouse sympathy on his behalf."[8]

Similarly, the Fifth Circuit in *United States v. Harry Barfield Co.* (5th Cir. 1966) 359 F.2d 120, cited with approval in *Rinker* (at 724 F.2d, p. 1354), held it was reversible error not to grant a new trial after the defendant's president—"a principle witness for the taxpayer [the defendant] at the trial"—approached and talked to two jurors on an elevator just before the case was submitted to the

[7] Metalclad's counsel discharged their affirmative duty, which all California lawyers have, under the Rules of Professional Conduct to "reveal promptly to the court improper conduct by a person* who is . . . a juror, or by another toward a person* who is . . . a juror . . . of which the lawyer has knowledge." (California Rules of Professional Conduct, rule 3.5(j).)

[8] The California Supreme Court in *In re Possino* also noted that "Petitioner's conduct may have in itself have been criminal." (*In re Possino*, 37 Cal. 3d at p. 171 [citing Pen. Code, § 95].) Penal Code section 95 states, in relevant part: "Every person who corruptly attempts to influence a juror . . . in respect to his or her verdict in, or decision of, any cause or proceeding, pending, or about to be brought before him or her, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 [regarding punishment for felonies], if it is by means of any of the following: (a) Any oral or written communication with him or her except in the regular course of proceedings."

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jury. "It was clear that there was no discussion of the case[.] . . . it is clear that the taxpayer president approached the jurors. They did not approach him. He sought to identify with juror Lockhart through the fact of knowing about his drug[store] business. He then sought to cement the identity by giving the juror his wife's name which led to a conversation regarding his wife's family." (*United States v. Harry Barfield Co.* (1966) 359 F.2d 120, 123.) Yet again, that is what happened here. Admiral Wilgenbusch "approached the jurors" by asking them for help with his Zoom virtual background, and "they did not approach him."

Just as the Fifth Circuit noted in *Harry Barfield Co.*, "'[s]uch conduct is not only inexcusable, it is clear grounds for the setting aside of a conviction' [citing *Pekar v. United States* (5th Cir. 1963) 315 F.2d 319]. That decision was founded on the impropriety of a social contact which resulted in a *long but random conversation during a recess between a juror and the Assistant United States Attorney prosecuting the case* relating to the juror's business. . . . We treated the conduct as being prejudicial *per se* and not subject to being overcome by a showing of harmlessness." (*Harry Barfield Co.*, 359 F.2d at pp. 124-125 [added italics].) Admiral Wilgenbusch's interaction with the jurors was the same kind of "long but random conversation" that had nothing to do with the case, but still required a reversal under all circumstances. The Fifth Circuit concluded:

> Here, the president of the taxpayer corporation deliberately sought to identify himself with one of the jurors in a way that would have been impossible through an inadvertent or accidental meeting. It required the effort of first inquiring about the drugstore, and then letting the juror know to whom he was married. This conduct cannot be excused.
>
> . . .
>
> In *Mattox v. United States*, 1892, 146 U.S. 140, [citations], the Supreme Court said:
>
> 'It is vital that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated.'
>
> [W]e think the harm is inherent in the deliberate contact or communication which exists under the facts of this case. Every case of this kind turns on its own peculiar facts, but the harm here appears to a degree which may not be overcome; and thus prejudice or harm appears as a matter of law. The conduct here was deliberate and intentional as distinguished from a mere inadvertent or accidental contact involving only an exchange of greeting in order to avoid an appearance of discourtesy. [Citation].
>
> *Pekar* and *Mattox* are criminal cases but the integrity of the jury system is no less to be desired in civil cases. Our system of trial by jury presupposes that the jurors be accorded a virtual vacuum wherein they are exposed only to those matters which the presiding

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> judge deems proper for their consideration. This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence. Any conduct which gives rise to an appearance of evil must be scrupulously avoided. What occurred in this case exceeded the bounds of propriety and will not do. The case must be reversed for a new trial.

(*Harry Barfield Co.*, 359 F.2d at p. 124 [citations omitted].) Little is needed to see the parallels here. This jury will not "pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment," because their judgment is now clouded by having created, or witnessed the creation of, a warm and familiar relationship between Admiral Wilgenbusch and two jurors. This was likewise not "a mere inadvertent or accidental contact involving only an exchange of greeting on order to avoid an appearance of discourtesy," but rather "deliberate and intentional" communication by Admiral Wilgenbusch directly with two jurors. And, putting aside all the other problems in this trial, the jury is certainly no longer operating in a "virtual vacuum wherein they are exposed only to those matters which the presiding judge deems proper for their consideration." Admiral Wilgenbusch's personality, solicitude, honesty, humor, or need for assistance with Zoom virtual backgrounds is no part of the evidence in this case when it was brought out while the Court left him alone, un-muted, with the jury and without any effective oversight. This is unquestionably "conduct which gives rise to an appearance of evil" which could and should and could have been "scrupulously avoided." Because it was not, a mistrial is required.

D. <u>No reasonable alternative will prevent the prejudice from tainting any verdict.</u>

As stated above, the Court cannot cure the prejudice through voir dire of Mr. Draper, Mr. Dent, or other jurors, and the Court should order a mistrial now. However, Metalclad submits the below proposals in the event the Court declines to do so. In no way should Metalclad's offer of measures to defensively lessen the impact of the prejudice created by this trial continuing be taken as acquiescence in any ruling that this trial continue under *any* circumstances. (*Warner Const. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 299-300, fn. 17; *State Compensation Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1130 ["There is no waiver where 'the party alleging error ha[s] strenuously made his objection and then acted defensively to lessen the impact of the error'" [citing *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co.* (1981) 122 Cal.App.3d 834, 857]; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019)

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¶ 8:263 [“Parties do *not* waive error by ‘acquiescence’ when they object to trial court error and then take ‘defensive’ action to lessen the impact,” original italics].)

The Judicial Council’s other cited authority for CACI No. 100 supports, at the very least, immediately dismissing Mr. Draper and Mr. Dent. In *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, the plaintiff’s counsel, rather than a party, talked with the jury foreperson during a recess. The defendant moved for a mistrial, which was denied, and then moved to excuse the juror. The judge asked the plaintiff’s counsel to stipulate to excuse the juror, and he responded that he was not, “adding that he thought the whole thing was ridiculous.” (*Garden Grove*, 63 Cal.2d at pp. 144-145.) The judge, disagreeing that it was “ridiculous,” believed, incorrectly, that he had no discretion to dismiss the juror and refused to do so. The Court of Appeal held that “the judge had the discretion to dismiss the juror for this misconduct and that he erred in failing to do so.” (*Id.* at p. 145.) But dismissing Mr. Dent and Mr. Draper does not go far enough. If the Court denies a mistrial, and excuses Mr. Draper and Mr. Dent, Plaintiffs still have the burden of rebutting the presumption of prejudice to Metalclad as a result of the other jurors observations of this interaction. The Court cannot allow anything but evidence of “objective facts” to carry Plaintiffs’ heavy burden. (*Hutchison*, 71 Cal.2d at p. 351.)

IV. CONCLUSION

There is no question that Admiral Wilgenbusch and the jurors committed grave misconduct that bolstered the jury’s opinion of Admiral Wilgenbusch and his credibility. Prejudice is presumed, and it cannot be rebutted or cured. The Court should order a mistrial for the reasons stated herein.

Dated: August 11, 2020

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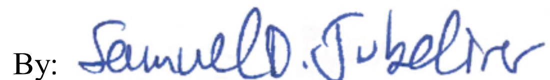
By: 

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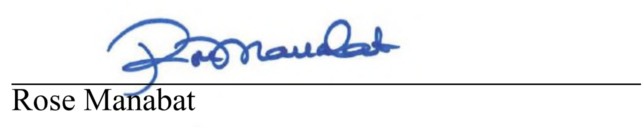

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Metalclad Insulation LLC	Defendant	Jackson, Michelle	Dentons US LLP - San Francisco	Attorney in Charge
Metalclad Insulation LLC	Defendant	Lee, Jennifer	Dentons US LLP - San Francisco	Attorney in Charge

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