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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE, INC., a California corporation,)	Case No.: 11-CV-01846-LHK
)	
Plaintiff,)	ORDER RE: JUROR MISCONDUCT
v.)	
)	
SAMSUNG ELECTRONICS CO., LTD., A)	
Korean corporation; SAMSUNG)	
ELECTRONICS AMERICA, INC., a New York)	
corporation; SAMSUNG)	
TELECOMMUNICATIONS AMERICA, LLC,)	
a Delaware limited liability company,)	
)	
Defendants.)	

On August 21, 2012, a jury returned a verdict that Samsung was liable to Apple for infringement and dilution of a range of patents and trade dresses. ECF No. 1890. Samsung has now filed a motion for a new trial. ECF No. 2013 ("Motion") at 3. Samsung alleges that the jury foreperson, Velvin Hogan, gave dishonest answers during voir dire, and that statements he made in interviews given after the verdict show that he was biased. *Id.* at 2-3. Specifically, Samsung claims that Mr. Hogan lied about his involvement nineteen years ago in a lawsuit with Seagate, a company in which Samsung is, as of 2011, a 9.6% shareholder. Samsung also argues that Mr. Hogan improperly presented extraneous prejudicial information during jury deliberations. *Id.* at 3.

1 For the reasons explained below, Samsung's request for an evidentiary hearing and a new trial on
2 these grounds is DENIED.

3 **I. BACKGROUND**

4 Jury selection in this case took place on July 30, 2012. The Court conducted extensive voir
5 dire, and then allowed counsel for each side to question prospective jurors for an additional twenty
6 minutes each. Transcript of Proceedings held on July 30, 2012 ("Tr.") at 212:1-4. The Court
7 asked a number of questions to elicit factual information from prospective jurors about their
8 experiences and potential relationships with the parties and the issues in the case. The Court also
9 repeatedly questioned jurors as to their ability and willingness to be fair and impartial, and to
10 follow the law as it was given to them.

11
12 Initially, the Court instructed jurors to "raise your hand if you have such strong feelings
13 about this case, the parties, what the charges and the claims are that you could not be fair and
14 impartial." Tr. at 45:5-9. Five prospective jurors raised their hands and were questioned further,
15 but Mr. Hogan was not among them. The Court then asked whether any prospective juror knew
16 any of the parties, witnesses, or attorneys in the case. Again, Mr. Hogan did not raise his hand.
17 The Court then again asked prospective jurors to "raise your hand if what you have read or heard
18 about this case would affect your ability to be fair and impartial to both sides." Tr. at 100:13-16.
19 Mr. Hogan did not raise his hand. The Court went on to ask "if you've basically already formed an
20 impression in your mind about – and this is for everybody – if you've basically already formed an
21 impression in your mind about who you think ought to win this case based on what you've read."
22 Tr. at 100:24-101:4. Two prospective jurors raised their hands, but Mr. Hogan did not. The Court
23 continued its questioning, instructing prospective jurors: "If you cannot keep an open mind and you
24 cannot decide this case based solely on the evidence that's admitted during this trial, based on what
25 you've read previously about this case, raise your hand." Tr. at 101:13-17. Mr. Hogan did not
26 raise his hand. The Court then asked "if you have any belief or feeling towards any of the parties,
27
28

1 any of the lawyers, any of the witnesses that would make it difficult to be fair and impartial. If so,
2 would you raise your hand?" Tr. at 101:24-102:3. Mr. Hogan did not raise his hand. The Court
3 then asked, "does anyone else have any special interest, financial or otherwise, in the outcome of
4 this trial?" Tr. at 102:7-9. Again, Mr. Hogan did not raise his hand.

5 The Court then moved on to the question of prospective jurors' ability to follow the law:

6 Now, many of you may have your own views about what our laws should be, but I
7 just need to ask you one more time whether you would accept the instructions on the
8 law that I give you and not insert and substitute your own personal views of what
9 the laws should be. Whether you disagree or disagree with what I tell you the law
is, will you accept it? If you cannot do that, will you please raise your hand?

10 Tr. at 103:16-25. Mr. Hogan did not raise his hand.

11 The Court then asked whether the prospective jurors had "been negatively impacted
12 by the recent economic downturn?" Tr. at 104:2-4. Here, Mr. Hogan did raise his hand.

13 He then had the following exchange with the Court:

14 The Court: Let me start with Mr. Hogan. Go ahead, please.

15 Mr. Hogan: When the economy – excuse me – went south, I was trying to establish
a start-up, and it went belly up and, in the course of events, I diminished all savings
that I had and subsequently, through foreclosure, lost my house."

16 The Court: I'm sorry to hear that.

17 Mr. Hogan: So that was a negative impact. But in terms of anything else, I feel
totally impartial to the proceedings.

18 The Court: Okay. Would you – you've seen the number of days that this trial would
require, correct?

19 Mr. Hogan: Yes.

20 The Court: Would it be a hardship for you to serve this many days?

21 Mr. Hogan: No, not at this time.

22 The Court: Okay. All right. And nothing about your experience – I'm very sorry to
hear about it – that would make you feel resentful to one of these parties here today?

23 Mr. Hogan: Of course not.

24 The Court: Okay. Thank you.

25 Tr. at 104:12-105:11.

26 The Court then asked prospective jurors, "[H]ave you or a family member or someone very
27 close to you ever been involved in a lawsuit, either as a plaintiff, a defendant, or as a witness?" Tr.
28 at 148:18-21. Mr. Hogan answered that "[i]n 2008, after my company went belly up, the
programmer that worked for me filed a lawsuit against me and ultimately, across the next few
months, it was dismissed and in such a fashion that neither one of us could sue the other one for

1 that matter.” Tr. at 148:25-149:5. The Court then elicited a few further details, before asking
2 whether there was “anything about that experience that would affect your ability to be fair and
3 impartial to both sides in this case?” Tr. at 148:14-16. Mr. Hogan responded, “I don’t believe so.”
4 Tr. at 149:17.

5 After questioning another prospective juror about lawsuit experience, the Court then
6 returned to Mr. Hogan:

7 The Court: So I want to make sure that both Mr. Hogan, and [the other prospective
8 juror], that you would apply the law as I instruct you and not based on your
9 understanding of the law based on your own cases. Is that correct, Mr. Hogan?

10 Mr. Hogan: Yes.

11 Tr. at 152:25-153:5.

12 There was, however, an additional lawsuit in Mr. Hogan’s past that Mr. Hogan did not
13 disclose during this exchange: Mr. Hogan was sued by his former employer, Seagate, in 1993
14 (*Seagate Tech., Inc. v. Hogan*, Case No. MS-93-0919 (Santa Cruz Mun. Ct. Filed June 30, 1993)).
15 Nor did he mention that he filed for personal bankruptcy six months after being sued by Seagate
16 (*In re Velvin R. Hogan and Carol K. Hogan*, Case No. 93-58291-MM (Bankr. N.D. Cal. Dec. 27,
17 1993)), which appears, at least in part, to be due to that lawsuit. RT 148:25-150:11; Estrich Decl.,
18 Exs. A, B.

19 Next, the Court questioned prospective jurors about their experiences with the patent
20 system. Mr. Hogan indicated that he had a patent for video compression software, which had been
21 issued in 2008, and a second patent application that was currently pending. Tr. at 163:19-24. After
22 hearing about another prospective juror’s patent experience, the Court then asked both of them
23 together:

24 The Court: You all have a lot of experience, but will you be able to decide this case
25 based solely on the evidence that’s admitted during the trial?

26 Mr. Hogan: Yes.

27 The Court: Okay. Mr. Hogan says yes.

28 Tr. at 165:14-18. The Court then asked the entire pool of prospective jurors, “If you have strong
feelings or strong opinions about either the United States patent system or intellectual property
laws, would you raise your hand, please?” No prospective jurors raised their hands.

1 The last portion of the Court’s voir dire involved each prospective juror responding to a
2 series of demographic and biographical questions about their education, profession, families, and
3 hobbies. When Mr. Hogan’s turn came, he said: “I was in the hard drive industry for 35-plus years
4 as an electrical engineer. I worked for companies like Memorex, Digital Equipment Corporation to
5 name a few, seven altogether.” Tr. at 190:19-23. The Court then asked Mr. Hogan to list the seven
6 companies. He responded:

7 Okay. To begin with, I worked for a company that no longer exists called Caylis
8 memories; then Memorex Corporation; then Storage Technology Corporation in
9 Colorado; Digital Equipment Corporation in Colorado Springs; I worked for
10 Seagate Technology; and the last company was – and then Micropolis Corporation,
11 which no longer exists. And Quantum.”

12 Tr. at 191:20-192:2. The Court engaged in no further questioning of Mr. Hogan, and turned
13 the questioning over to the attorneys. Counsel for Samsung, William Price, asked Mr.
14 Hogan several detailed questions:

15 Mr. Price: Mr. Hogan, would – were you actively involved in the prosecution of
16 your patent? That is, obviously you had an attorney?

17 Mr. Hogan: Yes.

18 Mr. Price: And my understanding is yours was not for your company, but it was
19 actually you?

20 Mr. Hogan: Yes.

21 Mr. Price: So how – how active were you in that process of working with the patent
22 office?

23 Mr. Hogan: We spoke almost every day until we got it penned and submitted. Very
24 active.

25 Mr. Price: And you –

26 Mr. Hogan: Even when the office actions came back, I was active in – with my
27 attorney to settle those.

28 Mr. Price: Okay. And so you have a lot of back and forth? Was it like a six-year
period, I think?

Mr. Hogan: From 2001 when – 2002, excuse me, until 2008 when it was actually
issued. So yes.

Mr. Price: Okay. Now, does that experience give you any bias for or against, for
example, the patent office?

Mr. Hogan: No, not really. Although I will say that I was glad to hear that they
opened – that they’re contemplating opening up an office here in town to speed the
process along. It took me seven years to get my patent, and that seemed like a long
time to wait, you know?

Mr. Price: And did you go to D.C.?

Mr. Hogan: No, no, no. It was all done over the phone and through correspondence.
But seven years seemed like a long time, and the first four years of that, there was
no activity from the patent office whatsoever.

1 Mr. Price: And I wasn't exactly clear then, what was the technology that your patent
was on?

2 Mr. Hogan: Video compression.

3 Mr. Price: That's your hobby, too. That's your hobby, also I think you said?

4 Mr. Hogan: Yes.

5 Mr. Price: Anything else that you have as a hobby? No? Okay.

6 Tr. 228:19- 230:18. Though this exchange included questions about Mr. Hogan's experiences with
7 the patent system and his hobbies, Samsung's counsel expressed no concerns about Mr. Hogan's
8 past employment at Seagate.

9 The basis for Samsung's present motion, however, is a relationship between Samsung and
10 Seagate. In April 2011, Seagate purchased Samsung's hard disk drive-manufacturing division for
11 \$1.375 billion in cash and stocks, which resulted in Samsung holding approximately 9.6% of
12 Seagate's stock and becoming Seagate's single largest direct shareholder. Motion at 2; ECF No.
13 2013, Declaration of Susan Estrich in Support of Samsung's Rules 50 and 59 Motion ("Estrich
14 Decl."), Exh. C at 1. Despite this relationship, counsel for Samsung did not ask Mr. Hogan about
15 his relationship with Seagate, and did not seek to elicit any information about whether that
16 relationship might influence Mr. Hogan's view in any way.

17 Samsung asserts that it learned of Mr. Hogan's lawsuit with Seagate from Mr. Hogan's
18 bankruptcy file, which Samsung reviewed only after the trial had concluded.¹ ECF No. 2022,
19 Supplemental Declaration of Michael T. Zeller in Support of Samsung's Rules 50 and 59 Motion
20 ("Zeller Decl.") at ¶ 5. Though Samsung learned of the bankruptcy through its own research on
21 July 30, 2012, the day of voir dire, *see id.*, Samsung did not request the bankruptcy file, which
22 mentions Mr. Hogan's litigation with Seagate, until September 4, 2012, five days after the verdict
23 in Apple's favor. *Id.* ¶¶ 4-5, 9. Samsung received the bankruptcy file on September 10, 2012, and
24 discovered the lawsuit. *Id.* ¶ 5. Samsung also learned on September 12, 2012, that the lawyer who
25 filed the Seagate lawsuit against Mr. Hogan is the husband of a partner in the law firm of Quinn
26 Emanuel. *Id.* ¶ 10. Although Quinn Emanuel represents Samsung in the present case, the partner
was not a part of the trial team, nor has she worked on any part of this litigation. *Id.*

27 ¹ Samsung filed a motion to compel Apple to disclose when and how Apple learned of the Seagate
28 lawsuit. ECF No. 2108. As Apple voluntarily filed such a disclosure on November 30, 2012, ECF
No. 2176, Samsung's motion to compel is DENIED as moot.

1 In post-verdict interviews, Mr. Hogan made several comments on the case and his
2 involvement as the jury foreperson. He stated that he “expected to be dismissed from the jury
3 because of [his] experience,” but was “very grateful to have been part of this case.” Estrich Decl.,
4 Ex. H. at 2. He also said, “[e]xcept for my family, it was the high spot of my career. You might
5 even say my life.” *Id.*, Ex. I at 1. Mr. Hogan was pleased that he was selected for the jury
6 “because [he] wanted to be satisfied from [his] own perspective that this trial was fair, and
7 protected copyrights and intellectual property rights, no matter who they belonged to.” *Id.* In other
8 interviews, he disclosed that “[t]he jury ‘wanted to send a message to the industry at large that
9 patent infringing is not the right thing to do, not just Samsung,’” and that the “message [they] sent
10 was not just a slap on the wrist.” *Id.*, Exs. J at 1, K at 1.

11 In addition to these sentiments, Mr. Hogan also commented on the deliberation process
12 itself, and what legal tests he and the other jurors applied during that process. He explained,
13 among other things, his view that whether design patents infringe depends on the “look and feel” of
14 the device, and that a prior art reference is not invalidating unless it is “interchangeable.” *Id.*,
15 Exhs. L at 2-3, N at 2.

16 Samsung now argues that this Court should hold a hearing with all jurors to fully examine
17 Mr. Hogan’s conduct during voir dire and jury deliberations. Motion at 3. Samsung contends that
18 a new trial is warranted based on Mr. Hogan’s conduct because it shows that he was a biased juror
19 who lied in order to obtain a seat on the jury, and that he inappropriately introduced extraneous
20 prejudicial information to jury deliberations. *Id.* at 2.

21 Apple opposes Samsung’s request for an evidentiary hearing. ECF No. 2050, Apple’s
22 Opposition to Samsung’s Rules 50 and 59 Motion (“Opposition”) at 4. Apple argues that Samsung
23 waived its right to object to Mr. Hogan’s alleged dishonesty during voir dire by gambling on a
24 favorable verdict despite having the opportunity to investigate the matter, and only raising the issue
25 after an unfavorable verdict. *Id.* at 1-2. Apple also argues that statements made by Mr. Hogan in
26 post-verdict interviews regarding the allegedly “incorrect and erroneous standards” applied during
27 jury deliberations and cited by Samsung are barred by Federal Rule of Evidence 606(b), and thus
28 cannot form the basis for a new trial. Opposition at 3-4.

II. DISCUSSION

Samsung's argument is based on two contentions. First, Samsung claims that Mr. Hogan's bias should be presumed because he deliberately concealed his lawsuit with Seagate during voir dire when he gave an incomplete answer to the Court's question about prior lawsuits. Samsung alleges that this lie was motivated by a desire to secure a seat on the jury. Motion at 2. Second, Samsung argues that Mr. Hogan improperly introduced incorrect and erroneous standards during the jury deliberation process. *Id.* at 3.

A. Waiver

Samsung has waived its claim for an evidentiary hearing and a new trial based on Mr. Hogan's alleged dishonesty during voir dire. Prior to the verdict, Samsung could have discovered Mr. Hogan's litigation with Seagate, had Samsung acted with reasonable diligence based on information Samsung acquired through voir dire, namely that Mr. Hogan stated during voir dire that he had worked for Seagate.

1. Legal Standard

The right to challenge the partiality of a jury verdict based on a juror's alleged misconduct during voir dire may be waived. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 at 551 n. 2 ("It is not clear . . . whether the information stated in Greenwood's affidavit [about the juror] was known to respondents or their counsel at the time of the voir dire examination. If it were, of course, respondents would be barred from later challenging the composition of the jury when they had chosen not to interrogate [the] juror . . . further upon receiving an answer which they thought to be factually incorrect." (citing *Johnson v. Hill*, 274 F.2d 110, 115-16 (8th Cir. 1960))); *see also City of Richmond v. Madison Mgmt. Grp., Inc.*, 918 F.2d 438, 459 (4th Cir. 1990) ("If the right to challenge a juror is waived by failure to object at the time the jury is empanelled if the bases for objection might have been discovered during voir dire, such a right surely is waived if the basis could have been discovered before voir dire.") (citation and internal quotation marks omitted).

The Supreme Court recently reiterated that constitutional rights can be waived, even in complex cases:

1 We have recognized “the value of waiver and forfeiture rules” in “complex” cases, *Exxon*
 2 *Shipping Co. v. Baker*, 554 U.S. 471, 487-88, n.6 (2008), and this case is no exception. In
 3 such cases, as here, the consequences of “a litigant ... ‘sandbagging’ the court—remaining
 4 silent about his objection and belatedly raising the error only if the case does not conclude
 5 in his favor,” *Puckett v. United States*, 556 U.S. 129, [134] (2009) (some internal quotation
 6 marks omitted)—can be particularly severe. . . . Pierce repeatedly stated to the Bankruptcy
 7 Court that he was happy to litigate there. We will not consider his claim to the contrary,
 8 now that he is sad.

9 *Stern v. Marshall*, 131 S.Ct. 2594, 2608 (2011).

10 The waiver doctrine as explicated in *McDonough* and *Stern* reflects courts’ disfavor of
 11 litigants who fail to act on information in their possession only to claim later that such information
 12 resulted in a violation of their rights. For example, in *United States v. Brazelton*, 557 F.3d 750,
 13 755 (7th Cir. 2009), counsel for the defendant did not challenge for cause a juror who was the
 14 second cousin to the victim of a shooting by the defendant, which led to the defendant’s arrest on
 15 the drug and weapons charges for which he was on trial. On appeal, the defendant argued that he
 16 was denied his right to an impartial jury, which he claimed was not waivable. The Seventh Circuit
 17 disagreed:

18 In this circuit, there is no ambiguity on the question whether the right to an impartial jury
 19 can be waived. We have held that “[t]he Sixth Amendment right to an impartial jury, like
 20 any constitutional right, may be waived.” *United States v. Zarnes*, 33 F.3d 1454, 1472 (7th
 21 Cir. 1994); accord *United States v. Joshi*, 896 F.2d 1303, 1307 (11th Cir. 1990).
 22 *Brazelton*’s on-the-record decision to pass up not one, but two opportunities to ask that
 23 Juror Number Four be struck for cause was a waiver. If a defendant is allowed to twice
 24 forego challenges for-cause to a biased juror and then allowed to have the conviction
 25 reversed on appeal because of that juror’s service, that would be equivalent to allowing the
 26 defendant to “plant an error and grow a risk-free trial.” *United States v. Boyd*, 86 F.3d 719,
 27 722-23 (7th Cir. 1996).

28 *Brazelton*, 557 F.3d at 755.

The discussion in *United States v. Bolinger*, 837 F.2d 436, 438-39 (11th Cir. 1988), is
 similarly instructive. In *Bolinger*, on a weekend break in the middle of jury deliberations, an
 attorney for the defense learned from a relative of a juror’s neighbor that the juror had purportedly
 formed a view of the defendant’s guilt prior to the close of evidence. The jury did not return a
 verdict until three days later. Rather than inform the court of what he had learned, defense counsel

1 filed a post-verdict motion for a new trial based on the juror's bias and purported misconduct. The
2 Eleventh Circuit upheld the district court's denial of the new trial motion, explaining:

3 Our cases teach that "a defendant cannot learn of juror misconduct during the trial,
4 gamble on a favorable verdict by remaining silent, and then complain in a post-
5 verdict motion that the verdict was prejudicially influenced by that misconduct."
6 *United States v. Jones*, 597 F.2d 485, [488] n.3 (5th Cir. 1979). In *Jones*, the court
7 explained that a motion for new trial based on juror misconduct is a form of new
8 trial motion for newly discovered evidence. *Id.* at 488. As such, the motion must be
9 supported by proof that the evidence of misconduct was not discovered until after
10 the verdict was returned. In the particular context of juror misconduct, this rule
11 serves to ensure that the trial court is given every available opportunity to attempt to
12 salvage the trial by ridding the jury of prejudicial influences. Thus, where the
13 defendant or defense counsel knows of juror misconduct or bias before the verdict is
14 returned but fails to share this knowledge with the court until after the verdict is
15 announced, the misconduct may not be raised as a ground for a new trial. *Id.*; see
16 also *United States v. Edwards*, 696 F.2d 1277, 1282 (11th Cir. 1983) (no abuse of
17 discretion in refusing to interrogate jury about alleged juror misconduct where
18 defendant waited to hear the verdict before contesting jury's impartiality); *United*
19 *States v. Dean*, 667 F.2d 729, 732-34 (8th Cir. 1982) (en banc) (untimely
20 notification of juror misconduct waives right to new trial even where actual
21 prejudice can be shown).

22 *Bolinger*, 837 F.2d at 438-39 (footnote and subsequent history omitted).

23 Further, actual knowledge of misconduct is not required. Ultimately, parties waive their
24 right to challenge the jury's impartiality if they are aware of the evidence giving rise to the motion
25 for a new trial or fail to exercise reasonable diligence in discovering that evidence. See *Bolinger*,
26 837 F.2d at 439 ("Although the June 10 telephone call did not disclose the full extent of [the
27 juror's] misconduct, enough information was relayed that counsel should have contacted the
28 district court for instructions while counsel continued his investigation. . . . [The defendant's]
decision to gamble on the jury rather than inform the court of the problem in time to allow the
court to determine if corrective action was possible prior to verdict is fatal to his claims regarding
juror Hunter.").

To be sure, actual knowledge of facts establishing juror bias is an absolute bar to any
challenge to that juror after a verdict. *McDonough*, 464 U.S. at 551 n.2. But a litigant cannot
consciously avoid learning the truth in the hope the jury verdict will be in his favor. See *Johnson*,

1 274 F.2d at 115-16. In *Johnson*, a decision on which the Supreme Court relied in *McDonough*, the
2 Eighth Circuit explained:

3 The right to challenge the panel or to challenge a particular juror may be waived,
4 and in fact is waived by failure to seasonably object. It is established that failure to
5 object at the time the jury is empanelled operates as a conclusive waiver if the basis
6 of the objection is known *or might have been known or discovered through the*
exercise of reasonable diligence, or if the party is otherwise chargeable with
7 knowledge of the ground of the objection.

8 274 F.2d at 115-16 (quoting *Batsell v. United States*, 217 F.2d 257, 260 (8th Cir. 1954)) (emphasis
9 added, internal citations omitted); *see also Gray v. Hutto*, 648 F.2d 210, 212 (4th Cir. 1981) (“In
10 short, however strong Gray’s case for a mistrial might have been had the court been immediately
11 notified, counsel’s deliberate inaction amounted to a conscious decision to find out what the jury
12 was going to do.”); *Burden v. CSX Transp., Inc.*, No. 08-CV-04-DRH, 2001 WL 3793664, at *8-9
13 (S.D. Ill. Aug. 30, 2011) (“The Court agrees because all the information about Juror Nos. 2 and 9
14 submitted by defendant was found in public documents, primarily by internet searches, consistent
15 with *McDonough*, *Johnson*, and *Stanczak v. Penn. RR Co.*, 174 F.2d 43, 48-49 (7th Cir. 1949)] the
16 Court finds that defendant waived its present objections because the basis of the objections might
17 have been known or discovered through the exercise of reasonable diligence. Defendant gambled
18 with the possibility of a verdict and now raises questions it might have raised earlier.”).

19 The facts of *Johnson* are also illustrative. In a personal injury case arising from a multi-car
20 accident, prospective jurors were asked whether they or their family members were involved in
21 accidents of any kind. Juror Harry Strege answered “no” to those questions, when in fact his son
22 had been in a car accident, and Strege had acted as a guardian ad litem in a property damage claim
23 arising from the accident. In affirming the district court’s rejection of the motion for a new trial,
24 the Eighth Circuit noted that defense counsel, having “information from two sources that an
25 individual by the name of ‘Harry’ or ‘Harris’ Strege had been involved in a property damage suit in
26 Richland County ... was possessed of information which was sufficient to put him on notice as to
27 the prior Strege incident.” *Johnson*, 274 F.2d at 116. Defense counsel “made no request of the
28 court for a further interrogation.” *Id.* The *Johnson* court further noted that the trial spanned a

1 week, “which certainly afforded counsel ample time and opportunity to apprise the court of his
2 knowledge with respect to juror Strege.” *Id.*

3 As *Johnson* and subsequent cases make clear, litigants and their counsel must act with
4 reasonable diligence based on information about juror misconduct in their possession, or they will
5 be deemed to have waived their right to challenge the verdict based on that juror misconduct.
6 Delay is of special concern where it appears that a party may have been taking a calculated risk that
7 the concealed information would turn out to work in that party’s favor.

8 **2. Lack of Reasonable Diligence**

9 Samsung asserts that Mr. Hogan’s dishonesty during voir dire “prejudicial[ly] impair[ed]
10 [its] right to the exercise of peremptory challenge.” Motion at 2 (internal quotations and citations
11 omitted). Apple argues, and the Court agrees, that waiver is appropriate here because of
12 Samsung’s lack of reasonable diligence in investigating Mr. Hogan’s relationship with Seagate.
13 Opposition at 1-2.

14 As an initial matter, it is not clear whether Mr. Hogan was intentionally dishonest. Neither
15 party has conclusively shown whether Mr. Hogan intentionally concealed his lawsuit with Seagate,
16 or whether he merely forgot to mention it when asked by the Court whether he was ever involved
17 in a lawsuit, or whether he believed that the answer he gave had sufficiently responded to the
18 Court’s question. Further, it is not even clear that Mr. Hogan knew of any relationship between
19 Seagate and Samsung. Mr. Hogan left Seagate’s employment in 1993, and his lawsuit against
20 Seagate was nearly two decades ago. Further, as detailed above, Mr. Hogan repeatedly stated that
21 he had no bias toward either party, and could be a fair and impartial juror. However, because the
22 Court finds that Samsung waived its right to object to Mr. Hogan’s answer even if it was dishonest,
23 no evidentiary hearing or factual finding regarding Mr. Hogan’s state of mind during that portion
24 of voir dire is required.

25 Samsung argues that the issue can be raised now because the Seagate lawsuit was not
26 discovered until after the verdict. ECF No. 2131, Samsung’s Reply in Support of Rules 50 and 59
27 Motion (“Reply”) at 4. Samsung further contends that it was post-verdict events which brought to
28 light the potential for bias, and thus the basis for Samsung’s investigation did not exist before the

1 verdict. *Id.* However, the record shows that Samsung had the chance to investigate the matter on
2 its own or pursue further questioning in voir dire.

3 First, Samsung admits that it knew about Mr. Hogan’s bankruptcy on the day of jury
4 selection on July 30, 2012. Zeller Decl. ¶ 9. According to Samsung, it took a week after making
5 the request to obtain Mr. Hogan’s bankruptcy file, and Samsung discovered his lawsuit with
6 Seagate in Mr. Hogan’s bankruptcy file on the same day Samsung received the file. *Id.* ¶¶ 4-5.
7 Had Samsung requested the bankruptcy file on July 30, 2012 and received it one week later,
8 Samsung would have had nearly three weeks to look over the file, discover the potential bias, and
9 alert the Court before the jury reached a verdict on August 24, 2012. Thus, Samsung certainly had
10 the *ability* to learn about the Seagate lawsuit before the verdict.

11 Instead, Samsung contends that it had no *reason* to investigate until after the verdict.
12 Samsung argues that it learned facts giving rise to its suspicions only after the verdict, when Mr.
13 Hogan made “public statements after the verdicts that so clearly favored Apple that the press
14 speculated about their possible financial ties.”² Reply at 4. However, the statements cited by
15 Samsung (Motion at 3) neither show that Mr. Hogan favored Apple nor show that he was being
16 deceitful in voir dire. The statements Mr. Hogan made after the verdict only reveal his gratitude
17 for being part of what he considered a “landmark decision.” Estrich Decl., Ex. I at 1. When Mr.
18 Hogan commented on the damages the jury ultimately found in favor of Apple, he specifically
19 stated that the “message” was “to the industry at large” and “not just Samsung.” *Id.*, Ex. J at 1.
20 This is consistent with Mr. Hogan’s repeated confirmation during voir dire that he did not have any
21 bias toward either party, and could be fair and impartial. There was also nothing in the post-verdict
22 statements on which Samsung relies that referred to Seagate, bankruptcy, lawsuits, or any other
23 information Mr. Hogan allegedly concealed.³ Thus, Mr. Hogan’s comments cannot serve to trigger
24 Samsung’s investigation obligations.

25 ² As discussed below, many of Mr. Hogan’s post-verdict statements revealing his sentiments about
26 the case are barred by Federal Rule of Evidence 606(b). *See United States v. Pimentel*, 654 F.2d
27 538, 542 (9th Cir. 1981) (“Testimony of a juror concerning the motives of individual jurors and
28 conduct during deliberation is not admissible”).

³ When Mr. Hogan *did* discuss his voir dire answers in the press, it was after Samsung had done its
investigation and filed its motion, and thus cannot justify undertaking the investigation to begin

1 Samsung, instead, had all the information it needed to uncover Mr. Hogan’s lawsuit against
2 Seagate – the fact of the bankruptcy and the fact that Mr. Hogan had a relationship with Seagate –
3 on the day of jury selection, nearly four weeks before the verdict was reached. Samsung cannot
4 use post-verdict statements unrelated to any potential bias to restart the clock on its obligation to
5 investigate. What changed between Samsung’s initial decision not to pursue questioning or
6 investigation of Mr. Hogan, and Samsung’s later decision to investigate was simple: the jury found
7 against Samsung, and made a very large damages award. This is precisely the situation that courts
8 have consistently found constitutes a waiver of the juror misconduct claim.

9 Second, despite learning through the Court’s initial questioning that Mr. Hogan had once
10 been employed by Seagate, Samsung’s counsel failed to ask any follow-up questions regarding that
11 relationship. Tr. at 191:24-25. After learning that Mr. Hogan had worked for Seagate, Samsung’s
12 counsel was given twenty minutes to ask the prospective jurors any additional questions. But as
13 explained above, Samsung’s counsel questioned Mr. Hogan only about his patents and his hobbies,
14 and did not take the opportunity to delve into the nature of his relationship with Seagate.

15 Samsung’s entire bias theory is premised on the relationship between Samsung and
16 Seagate. If Samsung believes that its relationship with Seagate is close enough that feelings toward
17 Seagate could bias a juror one way or the other toward Samsung, counsel should have pursued the
18 subject during voir dire. Questioning Mr. Hogan about the nature and valence of that relationship
19 also could have led him to reveal his lawsuit with Seagate. The record does not suggest that
20 Samsung’s counsel was running out of time and unable to ask Mr. Hogan about his employment
21 with Seagate. Rather, by not asking Mr. Hogan about his relationship with Seagate, or further
22 investigating that relationship, Samsung either conceded that the relationship was too remote to
23 give rise to a serious claim of bias, or took a calculated risk. If Mr. Hogan had a positive
24 relationship with Seagate, then Samsung might have stood to benefit by having Mr. Hogan on the
25 jury. Now that an unfavorable verdict is in, Samsung cannot cry foul on grounds that bias ran the
26 other way. *See Stern*, 131 S.Ct. at 2608 (find waiver where litigant was “sandbagging the court—
27 with. *See Reply* at 2 (citing interview given on September 25, 2012). Samsung’s motion was filed
28 on September 21, 2012. ECF No. 1990-3.

1 remaining silent about his objection and belatedly raising the error only if the case does not
2 conclude in his favor” (internal quotations and citation omitted)); *Bolinger*, 837 F.2d at 438 (“[A]
3 defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by
4 remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially
5 influenced by that misconduct.” (internal quotations and citation omitted)).

6 “It is established that failure to object at the time the jury is empaneled operates as a
7 conclusive waiver if the basis of the objection is known [or] might have been known or discovered
8 through the exercise of reasonable diligence, or if the party is otherwise chargeable with
9 knowledge of the ground of the objection.” *Johnson*, 274 F.2d at 116. Samsung could have
10 uncovered the Seagate lawsuit, or at least Mr. Hogan’s feelings regarding Seagate, had it exercised
11 reasonable diligence in questioning Mr. Hogan during its allotted time in voir dire. Moreover, even
12 without asking Mr. Hogan directly, Samsung could have exercised reasonable diligence outside of
13 trial and could have discovered the lawsuit by requesting the bankruptcy file, exactly as Samsung
14 did later, when it became motivated to do so. Samsung had twenty-five days between jury
15 selection and when the verdict was reached to investigate the matter and inform the Court.
16 Because Samsung failed to exercise reasonable diligence, Samsung’s argument pertaining to Mr.
17 Hogan’s dishonesty is waived.⁴ Samsung’s request for an evidentiary hearing or a new trial on this
18 ground is DENIED.

19 **B. Extraneous Prejudicial Information**

20 Samsung argues that an evidentiary hearing and a new trial are also warranted based on Mr.
21 Hogan’s post-verdict interviews, which show that he introduced “incorrect and extraneous legal

22 ⁴ Samsung also suggests that possible bias can be shown from the fact that the lawyer who filed the
23 Seagate lawsuit against Mr. Hogan in 1993 was a Quinn Emanuel partner’s husband. Motion at 2.
24 Given that counsel for Samsung – themselves Quinn Emanuel lawyers – did not even know about
25 this relationship until weeks after the trial, it is implausible to suppose that Mr. Hogan would know
26 a Quinn Emanuel lawyer who is not working on the Apple v. Samsung case, and know that that
27 lawyer is married to a lawyer who represented Seagate nineteen years ago. Samsung does not
28 provide this as a separate ground for holding an evidentiary hearing or having a new trial. *See id.*
at 2-3. In any event, because Samsung’s probing of the Seagate relationship could have uncovered
any potential bias against Samsung because of Mr. Hogan’s relationship with Seagate or with
Seagate’s counsel, the Court’s finding that Samsung waived its right to object to Mr. Hogan’s
allegedly dishonest answer also results in Samsung’s waiver of juror bias claims based on the
Seagate lawyer’s marriage.

standards” to jury deliberations. Motion at 3. These statements, however, are barred by Federal Rule of Evidence 606(b).

1. Legal Standard

“[T]he law presumes that jurors carefully follow the instructions given to them.” *Caudle v. Bristow Optical Co., Inc.*, 224 F.3d 1014, 1023 (9th Cir. 2000). The Supreme Court has explained that this is a “crucial assumption underlying [the] system.” *Parker v. Randolph*, 442 U.S. 62, 73 (1979), *abrogated on other grounds by Cruz v. New York*, 481 U.S. 186 (1987). Thus, courts do not disturb jury verdicts because of allegations that the jury may not have fully understood the judge’s instructions.

This rule is given effect in part through evidentiary rules protecting the deliberative process. “The near-universal and firmly established common law rule in the United States flatly prohibited the admission of juror testimony to impeach a verdict.” *Tanner v. United States*, 483 U.S. 107, 107 (1987); *McDonald v. Pless*, 238 U.S. 264, 267 (1915) (“[T]he weight of authority is that a juror cannot impeach his own verdict.”). Federal Rule of Evidence 606(b) is an embodiment of this longstanding policy, strongly disfavoring the admission of juror testimony to impeach a verdict. It states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror’s mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

Fed. R. Evid. 606(b).

Rule 606(b) applies not only to testimony, but any statement made by a juror after the verdict has been reached. *See Hard v. Burlington N. R. Co. (Hard II)*, 870 F.2d 1454, 1461 (9th Cir. 1989). When such evidence is submitted, the Court must review the statements under the same standard as would be applied were the statement spoken live, in court. *Id.*

1 In deciding whether an evidentiary hearing will be required to determine the necessity of
2 retrial, the Court must consider only that portion of the affidavit or testimony which would be
3 admissible under Rule 606(b). *Hard II*, 870 F.2d at 1461. To that end, the Court “may not
4 consider jurors’ testimony addressing the jury’s deliberative process unless the testimony ‘bear[s]
5 on extraneous influences on the deliberation.’” *Harrison v. Gillespie*, 640 F.3d 888, 896 n.4 (9th
6 Cir. 2011) (quoting *United States v. Pimentel*, 654 F.2d 538, 542 (9th Cir. 1981)).

7 The question then becomes what constitutes an extraneous influence. A “juror’s personal
8 knowledge constitutes extraneous prejudicial information where the juror has personal knowledge
9 regarding the parties or issues involved in the litigation.” *Hard v. Burlington N. R.R. (Hard I)*, 812
10 F.2d 482, 486 (9th Cir. 1987). Jurors are expected to bring their own personal experiences with
11 them into the courtroom, and may generally rely on their personal knowledge or past experiences
12 when hearing the evidence, deliberating, and deciding their verdict so long as they do not have
13 knowledge related to the specific case they are deciding. *Id.*

14 However, “[a]fter a verdict is returned a juror will not be heard to impeach the verdict
15 when his testimony concerns his misunderstanding of the court’s instructions,” even where a juror
16 would be able to “testify, objectively, of incidents tending to indicate that other jurors may have
17 misunderstood the court’s instructions on the elements of the offense,” as “the inquiry would still
18 concern the mental processes by which the jurors reached their decision and would therefore be
19 barred by the nonimpeachment rule.” *United States v. Stacey*, 475 F.2d 1119, 1121 (9th Cir. 1973).
20 Thus, a juror’s understanding of the Court’s instructions is not considered extraneous prejudicial
21 information, and the Court cannot receive testimony on how the jurors understood or followed
22 instructions. To do so would be to undermine the “crucial assumption” necessary for the
23 functioning of our jury system. *Parker*, 442 U.S. at 73.

24 Should there be any portion of a juror’s statement to the court which is eligible for
25 consideration, the court must then determine whether the information contained in the juror’s
26 admissible statement is sufficient to justify an evidentiary hearing. “An evidentiary hearing is
27 justified only when these materials are sufficient on their face to require setting aside the verdict.
28 Where a losing party in a civil case seeks to impeach a jury verdict, it must be shown by a

1 preponderance of the evidence that the outcome would have been different. Unless the affidavits
 2 on their face support this conclusion, no evidentiary hearing is required. Unless such a showing is
 3 made at the evidentiary hearing, no new trial is required.” *Hard*, 870 F.2d at 1461.

4 **2. Mr. Hogan’s Post-Verdict Statements Do Not Suggest Extraneous**
 5 **Prejudicial Information, and Are Therefore Barred by Federal Rule of**
 6 **Evidence 606(b)**

7 Samsung argues that Mr. Hogan’s post-verdict interviews show that he introduced
 8 “incorrect and erroneous legal standards” pertaining to infringement and invalidity issues. Motion
 9 at 3. Mr. Hogan gave several post-verdict interviews in which he recounted the legal standards that
 10 were utilized during deliberations to enable the jury to reach a verdict. *See* Estrich Decl., Exs. L,
 11 M, N, O. These statements, however, all pertain to what occurred during jury deliberations, or to
 12 the jurors’ mental processes – evidence specifically barred by Rule 606(b). Samsung does not
 13 argue that Mr. Hogan introduced any outside knowledge specific to the facts of this case. Even if
 14 the standards related by Mr. Hogan were completely erroneous, those statements would still be
 15 barred by Federal Rule of Evidence 606(b) and cannot be considered in deciding whether to hold
 16 an evidentiary hearing. *Stacey*, 475 F.2d at 1121 (“After a verdict is returned a juror will not be
 17 heard to impeach the verdict when his testimony concerns his misunderstanding of the court’s
 18 instructions”); *Hard II*, 870 F.2d at 1461 (court must decide whether to hold hearing “[l]ooking
 19 only at affidavits and testimony admissible under Rule 606(b)”).

20 Further, Mr. Hogan agreed several times that he would do his best to follow the law as it
 21 was given to him:

22 The Court: So I want to make sure that both Mr. Hogan, and [another prospective
 23 juror], that you would apply the law as I instruct you and not based on your
 24 understanding of the law based on your own cases. Is that correct, Mr. Hogan?

25 Mr. Hogan: Yes.

26 Tr. at 152:25-153:5.

27 The Court: You all have a lot of experience, but will you be able to decide this case
 28 based solely on the evidence that’s admitted during the trial?”

Mr. Hogan: Yes.

The Court: Okay. Mr. Hogan says yes.

Tr. at 165:14-18.

1 The judicial system can ask no more of jurors, who are brought into the case through no
2 initiative of their own and who devote their time as a matter of civic duty, than that they do their
3 best to apply the law as they are instructed. Moreover, at the hearing on post-trial motions,
4 Samsung repeatedly praised the jury, noting the care, precision, and consistency with which the
5 jury calculated damages based on trial damages evidence. Samsung also praised the jury for ruling
6 for Samsung on Apple’s breach of contract and antitrust claims. Samsung cannot credibly claim
7 that the jury’s conduct was simultaneously worthy of such great praise and so biased as to warrant
8 a new trial.

9 Samsung cites several cases in support of its argument that Mr. Hogan’s statements show
10 that extraneous prejudicial information was improperly brought to the jury’s attention, and thus the
11 statements should not be barred. Motion at 3. None of these cases establishes that Mr. Hogan’s
12 statements concerned extraneous prejudicial information. The Court will address each case in turn.

13 In *Hard I*, the Ninth Circuit ruled that the district court should have held an evidentiary
14 hearing after it received jurors’ testimonies revealing that another juror had talked about the
15 defendant’s prior settlement practices during deliberations. *Id.*, 812 F.2d at 485-86. In other
16 words, that juror has specific knowledge about one of the parties, and shared it with fellow jurors.
17 Similarly, in *United States v. Perkins*, 748 F.2d 1519 (11th Cir. 1984), the court held that a new
18 trial was warranted based on prejudicial extrinsic evidence where one of the jurors had personal
19 knowledge of the facts of the case and told other jurors during deliberation. *Id.*, 748 F.2d at 1534.
20 Here, Mr. Hogan had no “personal knowledge regarding the parties or issues involved in the
21 litigation.” *Hard I*, 812 F.2d at 486. Instead, the knowledge he is alleged to have introduced
22 concerned only the general principles of the patent system. Thus, these two cases are inapposite.

23 In *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1981), jurors improperly consulted medical
24 encyclopedias on their own during deliberations. *Id.* at 851-55. The court found that to be
25 extrinsic evidence that could have affected the verdict and therefore granted the petitioner federal
26 habeas relief. *Id.* at 855. Samsung does not suggest that Mr. Hogan improperly consulted another
27 source during jury deliberations, nor that he introduced any factual material whatsoever. Thus,
28

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1 nothing about *Gibson* establishes that any of Mr. Hogan’s statements, which concern legal
2 standards, constitute extraneous prejudicial information.

3 Finally, in *Casanas v. Yates*, No. 08–02991 CW, 2010 WL 3987333 (N.D. Cal. Oct. 12,
4 2010), a juror, surprised to find that his personal conduct could have constituted the same offense
5 for which the defendant was being tried, discussed his personal experience in voir dire to question
6 the wisdom of the law. *Id.*, 2010 WL 3987333 at *6. The court found that this was a proper
7 ground to dismiss the juror for cause before a verdict was reached. *Id.* Because the statements in
8 *Casanas* were made before a verdict was reached, it was not subject to the same Rule 606(b) bar
9 that is relevant here.

10 In sum, the integrity of the jury system and the Federal Rules of Evidence demand that the
11 Court not consider Mr. Hogan’s post-verdict statements concerning the jury’s decision-making
12 process. None of the cases Samsung cites suggests otherwise. Because the Court cannot consider
13 these inadmissible statements in determining whether to hold an evidentiary hearing, there is no
14 evidence properly before the Court to require such a hearing. Instead, the Court must apply the
15 well established presumption that the jury followed the law. *See Caudle*, 224 F.3d at 1023.

16 **III. CONCLUSION**

17 For the reasons explained above, Samsung’s arguments concerning Mr. Hogan’s connection
18 to Seagate are waived. The Court cannot consider Samsung’s evidence concerning the standards
19 applied during jury’s deliberations because that evidence is barred by Federal Rule of Evidence
20 606(b). Accordingly, Samsung’s motion for a new trial is DENIED.

21 **IT IS SO ORDERED.**

22 Dated: December 17, 2012



LUCY H. KOH
United States District Judge