

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF VENTURA  
VENTURA DIVISION**

**TENTATIVE RULINGS**

EVENT DATE: 07/21/2016  
JUDICIAL OFFICER: Kevin DeNoce

EVENT TIME: 08:20:00 AM

DEPT.: 43

CASE NUM: 56-2015-00465460-CU-BC-VTA  
CASE TITLE: AEROVIRONMENT INC VS. TORRES

CASE CATEGORY: Civil - Unlimited

CASE TYPE: Breach of Contract/Warranty

EVENT TYPE: Motion To Quash - the notice of videotaped depositions of Katie McAllister & Shannon Benbow  
CAUSAL DOCUMENT/DATE FILED: Motion to Quash, 06/14/2016

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**The morning calendar in courtroom 43 will begin at 9 a.m. Cases including *ex parte* matters will not be called prior to 9 a.m.**

**Please check in with the courtroom clerk by no later than 8:45 a.m. If appearing by CourtCall, please call in between 8:35 and 8:45 a.m.**

With respect to the below scheduled tentative ruling, no notice of intent to appear is required. If you wish to submit on the tentative decision, you can send an email to the court at: Courtroom43@ventura.courts.ca.gov or send a telefax to Judge DeNoce's secretary, Christine Schaffels at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending a telefax. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence. This case has been assigned to Judge DeNoce for all purposes.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

For general information regarding Judge DeNoce's rules and procedures for law and motion matters, *ex parte* matters, telephonic appearances, trial rules and procedures, etc., please visit: <http://www.ventura.courts.ca.gov/Courtroom/C43>

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**The court's tentative ruling is as follows:**

Grant Defendants' Motion to Quash the Notice of Videotaped Depositions of Katie McAllister and Shannon Benbow.

**Discussion:**

*Were non-witnesses Ms. McAllister and Ms. Benbow properly served?*

It is undisputed that both Ms. McAllister and Ms. Benbow are non-party witnesses, Washington state residents (as well as the wives of two named defendants, Justin McAllister and Gabriel Torres, respectively.) In the Reply, page 5, lines 8-19, Defs contend that Plaintiff failed to comply with the procedural requirements of either California or Interstate Depositions and Discovery Act because Plaintiff did not provide a deposition subpoena. According to moving def's, since Ms. McAllister and Ms. Benbow are not parties to the action, CCP 2026.010(c) as well as the Uniform Interstate Deposition and Discovery Act ("UIDDA") requires PI to issue and serve a deposition subpoena from the state where the deposition is to be held. Defs contend that PI has failed to do either. Instead, Defs contend that PI merely provided

Notices of Depositions for both witnesses, which is procedurally deficient (and also contends that PI further mischaracterizes these notices in its Opposition, referring to them as "deposition subpoenas") (See Opposition, page 6, lines 13-14.) Therefore, in addition to being substantively deficient, Defs contend that the depositions are procedurally invalid.

AV contends that the subpoenas were properly served. They point to page 5, lines 8-19 of the reply, where defs claim AV never served Washington deposition subpoenas on Katie McAllister or Shannon Benbow. AV contends that def's moving papers belies their position. In the motion, Page 4, lines 5, Defs state that "Plaintiff refuses to withdraw the subpoenas", declarations of Katie McAllister (page 2, lines 11-12 – "I was served with a copy of the Notice of Videotaped Deposition of Katie McAllister and Shannon Benbow and the deposition subpoena on June 3, 2016") and Shannon Benbow (page 2, lines 11-13 – "I was served with a copy of the Notice of Videotaped Depositions of Katie McAllister and Shannon Benbow and the deposition subpoena on June 8, 2015, at approximately 10:30 a.m. in Seattle, Washington.") [emphasis added.] See also, Crain declaration, ¶¶ 3-6, Ex. A, B, C, D.

CCP 2026.010(c) provides:

*(c) If the deponent is not a party to the action or an officer, director, managing agent, or employee of a party, a party serving a deposition notice under this section shall use any process and procedures required and available under the laws of the state, territory, or insular possession where the deposition is to be taken to compel the deponent to attend and to testify, as well as to produce any document, electronically stored information, or tangible thing for inspection, copying, testing, sampling, and any related activity.*

CCP section 2026.010(c) applies since the depositions are supposed to be taken in Seattle, Washington.

#### *Spousal Privilege.*

The parties dispute whether either non-party witness serves to have an "immediate benefit" within the meaning of Ev. Code 973(b), above. AV contends that as Ms. McAllister and Ms. Benbow are the wives of defendants McAllister and Torres, this action is not for their "immediate benefit." AV contends that "immediate benefit" has been interpreted broadly, and applies to situations like the one here, where pending litigation places community property at stake. AV cites *Hand v. Superior Court (Boles)* (1982) 134 Cal.App.3d 436, 441, where the court considered whether a husband's personal injury action was a proceeding for the "immediate benefit of the wife." The court held that it was, because any recovery would be community property, to which the wife had a "present interest and entitlement to a share." (*Id.* at 442.) AV contends there here, its claim against defendants Torres, McAllister and the business they created directly affect Ms. Benbow's and Ms. McAllister's community property interests, and they certainly have a "present interest and entitlement" in retaining the value of that business. AV contends that the fact that defs moved to Washington State does not change Ms. Benbow's or Ms. McAllister's ongoing community property interest. AV cites authority that some nine states, including California and Washington, have adopted the community property system. (See opposition, page 7, fn 1, citing Internal Revenue Manual, part 25, Ch. 18, Section 1.2.2.)

AV concludes that def Torres and McAllister's defense against AV's claims inures to the immediate benefit of both of their spouses.

Note: In fn 2 of the opposition, on page 8, AV cites a case it contends has found that "immediate benefit" is not quite so broad, but argues that that case, *Duggan v. Superior Court* (1981) 127 Cal.App.3d 267, is distinguishable. *Duggan* involved a dispute over partnership assets. An applicable statute provided that any recovery by the petitioner in that case would not be community property. As a result, the court held that petitioner's spouse had no present, immediate, or direct interest in the partnership assets, and so the action was not being prosecuted for the immediate benefit of the spouse. On that basis, the court found that the spousal privilege applied, and did not allow the petitioner's wife to be deposed. (*Duggan* at 272.) Because the *Duggan* court's analysis was driven by unique rules limiting the spouse's community property interest so AV contends it is inapplicable here.

In Reply, moving defs contend that PI AV fails to establish that the spousal privilege does not apply. They contend that Ev. Code 973(b) does not apply because neither Katie McAllister nor Shannon Benbow receive an immediate benefit from litigation. They concede that Ev. Code 973(b) serves as an exception to sections 970 and 971, but contend PI has not established that either witness has an immediate benefit.

Under the *Duggan* and *Diepenbrock* cases, a potential community property interest is not enough to invoke the privilege. It appears that more is required – the married person must obtain a benefit from the spouse's litigation because of a right the married person holds directly. The requisite direct right has not been established here and the privilege does not apply.

*Washington law, 5.60.060 provides, in relevant part:*

A spouse or domestic partners shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or domestic partnership. The above creates two distinct privileges and both bars one spouse from testifying against the other (the broader marital testimonial privilege) and protects confidential communications between spouses (the confidential communications privilege.) (See *Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 155-156 (Wash. Ct. App. 2005).

The marital testimonial privilege, unless waived, allows the communicating spouse to prevent the hearing or receiving spouse from being called as a witness on any topic without her consent. (*Id.* at 157.) The marital privilege says, in effect, that no spouse shall be examined as a witness for or against the other spouse without the consent of such other spouse. (*Swearingen v. Vik*, 51 Wn2d 843, 847 (1958.)) Once the privilege is asserted, one spouse is then incompetent to testify for or against the other as to all matters, and the restriction is not limited merely to confidential communications between them. (*State v. Tanner*, 54 Wn.2d 535, 537 (1959.)

Note that the non-party witnesses have a privilege not to testify under Ev. Code 971 an RCW 5.60.060 based on the simple fact that their husbands are parties to this action.

*Marital Communication privilege under Ev. Code 980.*

AV assures the court in its opposition that it has no intention of examining Ms. Benbow or Ms. McAllister about confidential one-on-one conversations with their husbands. (See Opposition, page 1, lines 25-26.) PI also cites *People v. Cleveland* (2005) 32 Cal.4<sup>th</sup> 704, 743 in the opposition, in support of its argument that if PI is seeking the spouses' observation, it does not violate Ev. Code 980. (See Opposition, p. 7, lines 6-9.) According to defs, neither Ms. McAllister nor Ms. Benbow are raising the privilege of Ev. Code 980, so the above does not apply. Defs contend that MicaSense's notice of its motion very clearly articulates that both Ms. McAllister and Ms. Benbow are invoking their Spousal Privilege pursuant to Cal. Ev. Code 970 and 971. (See Motion, p. 2, lines 24-26.) These privilege prevent a spouse from testifying against their spouse in any proceeding. Defs contend that PI has failed to dispute that PI is attempting to call Ms. McAllister and Ms. Benbow to testify against their spouses. Any argument re: confidentiality of communication is irrelevant for purposes of this motion. Defs are correct – the issue of Ev.Code 980 is not raised in this motion.

*Which state's law applies?*

Micasense's involvement in California is irrelevant.

In the moving papers, defs cite California and Washington State law on spousal privilege as justification to quash the subpoenas. They cite Cal. Ev. Code 970 and 971, as well as Washington RCW 5.60.060. PI contends that Washington law does not apply at all, because this is a CA case, and all events at issue occurred in CA. Also, even though the depositions will occur in WA, Pls contend that this is irrelevant, since AV is accommodating Ms. Benbow and Ms. McAllister by travelling to WA for their depositions, just as it did for the named defs. (Crain decl, ¶3. Ex. A.) The privilege applies, and the motion should be granted regardless as to whether CA or WA law is applies.