

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

TENTATIVE RULINGS

EVENT DATE: 10/04/2016
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 Strike - Objections and Compel Further Testimony Supporting Memorandum of Points and
CAUSAL DOCUMENT/DATE FILED: Motion to Strike, 04/27/2016

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, Hellmi McIntyre at 805-477-5894, stating that you submit on the tentative. Do not call in lieu of sending an email or 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>

The court's tentative ruling is as follows:

This matter is on for continued hearing on the Motion to Strike Objections and Compel Further Testimony. The Court is inclined to issue an OSC re: Dismissal requiring Plaintiff to respond to the following issues:

- What has Plaintiff done to obtain the necessary affidavit(s) to support the assertion of the state's secret privilege; and
- Can Plaintiff establish standing to bring this action absent the use of classified information?
- Has plaintiff failed to bring in a necessary party within the meaning of CC 389?

Defendants have not provided the court with a proposed OSC order. Defendant is ordered to prepare one to submit to the court forthwith.

Background of this motion.

At the June 3, 2016 hearing on defs' Motion to Compel Further Testimony of Jeff Rodrian and Rick Pedigo, the Court continued the proceedings to allow Plaintiff a second and further opportunity to provide the required governmental affidavit to establish the refused testimony as "classified" as that term is used by the United States Government. The

Court previous tentative ruling for the 6/3/16 hearing stated as follows:

"Overrule objections to Dorny declaration. Continue for requisite declaration by party invoking state secret privilege (i.e., Defendant(s).)

In situations where the confidential information is "classified" pursuant to government categorization, a private party shall not invoke the privilege and must, instead, defer to the government. (See United States v. Reynolds (1953) 345 U.S. 1, 7-8.) In the civil litigation context, the executive branch's power over classified information is embodied in the common-law privilege known as the state secrets doctrine. (Id.) The Supreme Court has instructed in Reynolds that "[t]he privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. (Id. at 7.) The California Court of Appeal has reiterated this standard, indicating that "it is clear that the privilege may be asserted only by the [federal] government itself; neither a private party nor an individual official may seek it aid." (See Rubin v. City of Los Angeles (1987) 190 Cal.App.3d 560, 577, quoting Ellis v. Mitchell, 709 F.2d 51, 56 (1983.)) The formal process was originally outlined in Reynolds and articulated in Rubin as follows:

"The state secrets privilege cannot be asserted by a local governmental entity; it is clear that the privilege "may be asserted only by the [federal] government itself; neither a private party nor an individual official may seek its aid. [Fn. omitted.]" (Ellsberg v. Mitchell, supra, 709 F.2d at p. 56.) We stress that the federal government has not intervened in this action to assert the state secrets privilege; the privilege was raised only by the City. In order to invoke the state secrets privilege, there must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. (United States v. Reynolds, supra, 345 U.S. at pp. 7-8 [97 L.Ed. at pp. 732-733]; Halkin v. Helms [Halkin II], supra, 690 F.2d at p. 991; Kinoy v. Mitchell (S.D.N.Y. 1975) 67 F.R.D. 1, 8-10.) The requirement that a responsible officer assert the state secrets claim "is to assure that the privilege, which in any event is waivable, is not lightly claimed. Hence, the requirement is that the claim be made by someone in a position of sufficient authority and responsibility to weigh prudently the competing considerations of making evidence available in litigation and protecting important government interests."

(Rubin v. City of L.A. supra, 190 Cal. App. 3d 560, 577.)

The requirements set forth above in Reynolds and Rubin have not been satisfied in order to invoke the claimed privilege. This matter should be continued to afford Defendants a sufficient opportunity to claim the privilege."

Having continued this matter to afford Plaintiff an opportunity to properly establish the claimed privilege, Plaintiff has failed to do so. Plaintiff's argument that the court must first examine the relevance and discoverability of the information at issue before ordering discovery of state secret protected material puts the cart before the horse. It must first be established that items are protected by privilege before rules applicable to that privilege are used to shield discovery. If the court were to grant protection to items simply claimed privileged without a proper showing, legitimate discovery would be thwarted. The case law has established how the state secrets privilege must be invoked. This court is doing no more than applying that well established law.