UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL LEHTO, individually, JOHN WELLS, individually;

Plaintiffs,

v.

SEQUOIA VOTING SYSTEMS, INC. and SNOHOMISH COUNTY;

Defendants.

CASE NO. C05-0877RSM

ORDER GRANTING PLAINTIFFS' MOTION FOR REMAND

I. INTRODUCTION

This matter comes before the Court on plaintiffs' Motion for Remand to State Court Pursuant to 28 U.S.C. § 1446.[1] (Dkt. #21). Plaintiffs argue that remand is necessary because removal was improperly effectuated by defendants for three reasons. First, plaintiffs argue that the procedural requirements for removal under 28 U.S.C. § 1446 have not been met. Second, plaintiffs argue that the Court lacks subject matter jurisdiction to hear the case because the original complaint filed in King County Superior Court does not raise a federal question. Lastly, plaintiffs contend that immunity of the state under the eleventh amendment is implicated, and therefore remand is appropriate because plaintiffs' claims are potentially barred at the federal level under Snohomish County's right to sovereign immunity.

Defendants argue that remand is improper because this Court has federal jurisdiction over

[1] Plaintiffs also seek remand pursuant to 28 U.S.C. § 1447(c), but do not mention the statute in their caption.

plaintiffs' claims. Defendants contend that plaintiffs' complaint pleads federal claims and that federal question jurisdiction arises based on plaintiffs' ninth and tenth causes of action.[2] Defendants also contend that the procedural requirements of removal were proper.

For the reasons set forth below, the Court disagrees with defendants, and GRANTS plaintiffs' motion for remand to state court.

II. DISCUSSION

A. Background

Plaintiffs Paul Lehto and John Wells, residents of Snohomish County, originally filed this action in King County Superior Court on April 7, 2005. (Dkt. #2 at 4). In their complaint, plaintiffs allege that defendants Sequoia Voting Systems, Inc. ("Sequoia") and Snohomish County failed to provide information regarding the efficacy of electronic voting machines during the November 2004 election despite repeated requests by plaintiffs to secure such information. (Dkt. #2 at 9-10). In addition, plaintiffs allege that "ballots cast by Washington citizens for the Democratic gubernatorial candidate, Christine Gregoire, were illegally, unconstitutionally, and faithlessly attributed to the Republican gubernatorial candidate, Dino Rossi, due to systematic errors of . . . voting machines sold by Sequoia to Snohomish County." (Dkt. #2 at 12).

Furthermore, plaintiffs allege twelve causes of action in their complaint, two of which refer to federal statutes. The ninth cause of action alleges that defendants violated the Magnuson-Moss Warranty Act [3] ("MMWA"), which prohibits tying provisions that purport to waive warranty or service contract provisions based on the failure to meet specific preconditions. (Dkt. #2 at 35). Plaintiffs contend that less than $50,000 is at issue for their MMWA claim. *Id.* The relevant language reads:

> 7.9 Ninth Cause of Action: Violation of Magnuson-Moss Warranty Act.

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[2] Defendants mistakenly refer to plaintiffs' ninth cause of action as plaintiffs' eighth cause of action throughout its response.

[3] The MMWA was a response by Congress to the widespread misuse by merchants of express warranties and disclaimers. The Act represents the first federal entry to the law governing express and implied warranties and disclaimers. In general, it mandates certain guidelines in connection with written warranties, and invalidates attempts to disclaim implied warranties. 15 U.S.C. § 2308.

* * *

7.9.3 The Magnuson-Moss Act prohibits tying provisions that purport to waive warranty or service contract provisions based on the failure to meet specified preconditions.

7.9.4 Sequoia claims that a subsequent service contract that Snohomish County entered into subsequent to the purchase contract, would be void if any instruments, testing, or examination is performed on the machines without Sequoia's permission, threatening it would "void" the "warranty." *This constitutes a "tying" provision violative of the Magnuson-Moss Warranty Act with less than $50,000 at issue under this claim.* This tying provision was used, in whole or in part, to deny plaintiff Lehto the right to conduct any testing of the Sequoia machines whatsoever, without Sequoia's express permission, which has not been forthcoming and operates to conceal the operations of the election machines denying the public access to a transparent, free, equal and open election, subject to view, review, oversight, and verification by the public.

7.9.5 Plaintiffs are entitled to all remedies under the Magnuson-Moss Warranty Act including attorneys fees, costs, and all legal, equitable and restitutionary remedies.

(Dkt. #2 at 35) (Emphasis added). Additionally, plaintiffs allege in their tenth cause of action that the contract between defendants Sequoia and Snohomish County is invalid and illegal under traditional state law contract principles. (Dkt. #2 at 36). Plaintiffs allege that defendants failed to comply with the requirements of the Help America Vote Act of 2002 [4] ("HAVA"). The relevant language reads:

7.10 Tenth Cause of Action: Contract Invalid and Illegal as Applied. The Contract is invalid and illegal in that its implementation is contrary to the statutory scheme for elections:

[4] After the 2000 presidential election, Congress enacted HAVA in order to establish a program to provide federal funds to states for activities to improve administration of elections. 42 U.S.C. § 15301 *et seq.*; *see also* 148 Cong. Rec. S10488-02 (2002).

7.10.1 Election officials administering touch screen voting are unable to "periodically examine the voting devices to determine if they have been tampered with" in violation of RCW 29A.44.190 and are unable to have any meaningful access to the machines as presently designed;

7.10.2 *Sequoia touch screens do not comply with the requirements of Help America Vote Act of 2002* (HAVA), 42 U.S.C. § 15301 *et. seq.*, and the technical standards incorporated therein, in that Sequoia touch screens lack the ballot accuracy required; they can only be used in elections under the questionable waiver of the Washington State Secretary of State of compliance with these requirements.

7.10.3 The testing and certification requirements of RCW 29A.12.101 properly applied would assure that multiple voting be disallowed, that voters not be issued ballots of other jurisdictions besides their polling place[,] that votes not be changeable or erasable after being initially recorded, that voting systems be resistant to fraud and require that voting systems meet all other requirements of any other certified voting technologies. The Sequoia machine falls to meet statutory standards when properly applied.

(Dkt. #2 at 36) (Emphasis added). On May 11, 2005, defendant Sequoia filed a timely notice of removal to this Court pursuant to the provisions of 28 U.S.C. § 1441(b). (Dkt. #1 at 2). Defendant Snohomish County filed a joinder in notice of the removal on May 13, 2005. (Dkt. #9). The joinder was signed by Malcolm Harris, attorney for defendant Sequoia, and on the pleading paper of "Harris, Mericle & Wakayama PLLC," attorneys for defendant Sequoia. *Id.* Shortly thereafter, each defendant filed a motion to dismiss on May 18, 2005 on the grounds that the claims alleged in plaintiffs' complaint are not legally cognizable. (Dkts. #10 and 11). Plaintiffs moved to continue the hearing date on the motions to dismiss, and this Court granted plaintiffs' motion, finding it preferable to rule on a motion for remand before considering the motions to dismiss. (Dkt. #20). Plaintiffs now move to remand the case to state court pursuant to 28 U.S.C. §§ 1446 and 1447(c).

B. Federal Question Jurisdiction

Federal judicial power extends to "[c]ases, in law and equity, *arising under* [the] Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority[.]" U.S. Const. art. III, § 2 (Emphasis added).[5] Whether a case is one arising under the Constitution or the laws or treaties of the United States is tested by the "well-pleaded complaint" rule, where federal courts determine jurisdiction by considering only what "necessarily appears in the plaintiff's statement of his own claim in the bill of declaration, unaided by anything alleged in anticipation of avoidance of defenses which is thought the defendant may interpose." *Taylor v. Anderson*, 234 U.S. 74, 75-76, 34 S.Ct. 724 (1914); *see also Gully v. First Nat'l Bank in Meridian*, 299 U.S. 109, 112-113, 57 S.Ct. 96 (1936) (holding that where federal jurisdiction arises as a result of a federal question, the question "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal").

Whether a case "arises under" federal law does not depend upon matters raised in the answer. *See Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830-831, 122 S.Ct. 1889 (2002) (rejecting proposals that the answer as well as the complaint may be considered before determining whether federal question jurisdiction exists). Further, "a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10, 103 S.Ct. 2841 (1983). Therefore the "well-pleaded complaint" rule makes plaintiff the master of the claim, and plaintiff may avoid federal jurisdiction by exclusive reliance on state law. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425 (1987).

In addition, courts have formulated a distinction between controversies that are basic and necessary as opposed to collateral and merely possible. *See Gully*, 299 U.S. at 118. Moreover, it is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813, 106 S.Ct. 3229 (1986). However, federal question jurisdiction may exist where the

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[5] It is undisputed that diversity jurisdiction is not at issue in the instant case.

state claim "necessarily depend[s] on resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 27-28; *But see City of Huntsville v. City of Madison*, 24 F.3d 169, 172-174 (11th Cir. 1994) (recognizing that cases are generally not decided on this ground as finding a substantial federal question in claims created by state law is unusual).

1. Plaintiffs' Ninth Cause of Action - MMWA

Plaintiffs' ninth cause of action avers that defendants are in violation of the MMWA. Under the MMWA, a federal question arises whenever the amount in controversy exceeds "the sum or value of $50,000." U.S.C. § 2310(d)(3)(B). Furthermore, if the pleadings expressly limit relief to less than $50,000, this prevents removal unless the removing party proves to a legal certainty that the damages are greater. *See Mathews v. Fleetwood Homes*, 92 F.Supp.2d 1285, 1288 (S.D. Ala. 2000). Defendants mistakenly argue that they need only show that damages are greater by a preponderance of the evidence in the Ninth Circuit.[6] However, the Ninth Circuit clearly follows the legal certainty test as applied to the MMWA. *See Kelly v. Fleetwood Enterprises, Inc.*, 377 F.3d 1034, 1037 (9th Cir. 2004). Damages awardable only under other supplemental claims do not count toward the amount in controversy under the MMWA. *See, e.g., Ansari v. Bella Automotive Group*, 145 F.3d 1270, 1272 (11th Cir. 1998) (holding that the amount in controversy calculation cannot include damages flowing from any pendent state law claim brought by plaintiff).

Defendants argue that plaintiffs' ninth cause of action for violations of the MMWA create federal question jurisdiction on the grounds that plaintiffs seek restitution in the amount of $5,054,649. Defendants point to this figure based on plaintiffs' demands stated in their twelfth cause of action, paragraph 7.12, which states that "the Contract be declared void, restitution ordered against Sequoia in the amount of $5,054,649, payable to Snohomish County upon return of the Sequoia AVC Edge machines in their present condition." (Dkt. #2 at 37).

However, in the instant case, plaintiffs have specifically pled that there is "less than $50,000 at issue" under the MMWA claim. As masters of their complaint, plaintiffs have expressly waived their

[6] Defendants rely on *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839 (9th Cir. 2002). However, in that case, there is no discussion of the MMWA.

right to obtain $50,000 or more under their MMWA claim. Furthermore, plaintiffs' claim under the MMWA relates only to a "tying" arrangement which prevents plaintiffs from testing defendant Sequoia's machines. Plaintiffs are not seeking full rescission and a refund under the MMWA, but rather under state law contract principles as evidenced by plaintiffs' complaint which includes twelve causes of action, several of which allege that the contract is invalid and illegal pursuant to the Washington State Constitution, the Revised Code of Washington ("RCW"), and the Washington Administrative Code. For example, plaintiffs' first, second, third, sixth, seventh, and eleventh causes of action all allege in great detail that defendants violated both the Washington State Constitution and Washington law by executing their contract.

Therefore defendants are misguided in alleging that the $5,054,649 relates solely to plaintiffs' MMWA claim and have failed to meet their burden to a legal certainty that damages are greater than $50,000 as applied to plaintiffs' MMWA claim. As a result, plaintiffs' ninth cause of action does not create federal question jurisdiction.

2. Plaintiffs' Tenth Cause of Action - HAVA

Defendants contend that plaintiffs' reference to HAVA in plaintiffs' tenth cause of action, which also cites to two RCW's, creates federal question jurisdiction. Defendants cite two cases to support its proposition that HAVA creates federal rights. *See Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004); *Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073 (N.D. Fla. 2004). However, both cases indicate that HAVA creates federal rights which are enforceable only under 42 U.S.C. § 1983. *See Sandusky*, 387 F.3d at 572; *see Hood*, 342 F.Supp.2d at 1078. Furthermore, "HAVA does not *itself* create a private right of action." *Id.* (Emphasis added).

In the instant case, plaintiffs do not assert that HAVA creates a federal right enforceable against state officials under 42 U.S.C. § 1983. Although plaintiffs expressly state that defendant Sequoia's touch screens do not comply with the requirements of HAVA, plaintiffs did not plead 42 U.S.C. § 1983 in order to assert a federal right, and therefore plaintiffs, as masters of their complaint, did not create federal question jurisdiction. Additionally, mere reference to a federal statute does not create federal question jurisdiction. *See, e.g., Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 344 (9th Cir. 1996) (recognizing

that direct and indirect references to a federal statute in two state law causes of action do not make those claims into federal causes of action). The gravamen of plaintiffs' complaint seeks rescission pursuant to state law contract principles. Accordingly, this Court has no subject matter jurisdiction over plaintiffs' tenth cause of action.

C. Procedural Requirements of Removal

Because the Court lacks subject matter jurisdiction, it is not necessary to address plaintiffs' arguments regarding defendants failure to comply with the procedural requirements of removal.

D. Eleventh Amendment Immunity

Likewise, because the Court lacks subject matter jurisdiction, it is not necessary to address plaintiffs' Eleventh Amendment argument.

III. CONCLUSION

Having reviewed plaintiffs' motion for remand (Dkt. #21), defendants' responses (Dkt. #27 and #28), plaintiffs' reply (Dkt. #30), and the declarations in support of those briefs, the Court hereby GRANTS plaintiffs' motion for remand. Accordingly, this case is hereby REMANDED to the King County Superior Court, Cause No. 05-2-11769-9SEA, pursuant to 28 U.S.C. § 1447(c).

The Clerk shall close this file and send a certified copy of this Order to the Clerk of Court for the King County Superior Court.

DATED this 8 day of August, 2005.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE