The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PAUL LEHTO, individually, JOHN WELLS, individually; Plaintiffs, vs. SEQUOIA VOTING SYSTEMS, INC. and SNOHOMISH COUNTY; Defendants.	NO. C05-0877 RSM **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR REMAND TO STATE COURT PURSUANT TO 28 USC § 1446** **Noted on Motion Calendar: July 8th, 2005**

Plaintiffs John Wells and Paul Richard Lehto, by and through their attorney, Randolph I. Gordon of GORDON EDMUNDS ELDER PLLC, hereby submit Plaintiffs' Reply to both Defendant Sequoia's Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Remand and Defendant Snohomish County's Joinder in Sequoia's Response.

I. REPLY.

A. Defendants' Concede that the Plaintiffs' Complaint Does Not State Federal Claims on its Face Because They Propose Re-writing It.

1. ***Federal Question Based on Face of Complaint***. Defendants do not and cannot deny that where, as here, federal jurisdiction arises as a result of a

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

"federal question," the question "must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112-13, 81 L. Ed. 70, 57 S. Ct. 96 (1936); Harris v. Provident Life & Acc. Ins. Co., 26 F.3d 930, 933-34 (9th Cir. 1994) ("[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987). In addition to citing Merrell Dow, plaintiffs cited in their motion for remand Rains v. Criterion Systems, Inc., 80 F.3d 339, 344 (9th Cir. 1996), holding that the party who brings a suit is master to decide what law he will rely upon and may avoid federal jurisdiction by exclusive reliance on state law.

Defendants' Responses reveal the assertion of removal jurisdiction to be untenable in this case because to establish jurisdiction the defendants must, in effect, (1) allege relief not available under the Magnuson Moss Warranty Act claim in the pleadings (the full refund of $5 million in the limited warranty context presented by the complaint in light of Magnuson Moss) and (2) rewrite Plaintiffs' Complaint by asserting or implying causes of action not in the pleadings (§1983) but necessary to state a claim under HAVA, and (3) ignore the Eleventh Amendment issues presented by the face of plaintiffs' complaint now that it was intentionally removed by Sequoia into federal court.

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

2. *Defendants Seek to Rewrite Plaintiffs' Complaint to Assert a Federal Cause of Action under HAVA.*

Here, in order to make out a federal cause of action and to establish the predicate for assertion of federal jurisdiction, defendants seek to redraft plaintiff's complaint to add a cause of action under 42 USC §1983 to Plaintiffs' Complaint - because without §1983 HAVA does not even state a cause of action, as defendants apparently concede. There is no private right of action created by the Help America Vote Act, *itself*. Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1078 (D. Fla., 2004) ("HAVA does not itself create a private right of action.") Only through the vehicle of §1983 is certain parts of HAVA actionable. Id. Here, there is no claim asserted in the Complaint under HAVA. Rather than relying on Plaintiffs' well-drafted Complaint, Defendants must be seeking to rewrite the Complaint so as to create a federal cause of action under HAVA by importing a claim under 42 U.S.C. §1983 never asserted by plaintiffs.[1]

As previously noted, HAVA was never even put forward as a claim by Plaintiffs, but was merely adverted to as articulating a standard referenced by Washington State law, or one of many ways of determining malfunction and/or misrepresentation; HAVA includes a body of NIST standards for testing of electronic voting machines giving rise to a state law based claim relating to

[1] Plaintiffs did not plead §1983 for another reason: 9th Circuit case authority in Kruse v Hawaii held: "In the instant case, the district court did not remand the claims against the State and the officials in their official capacities because under Will v. Michigan, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989), they are not "persons" as defined by § 1983, and thus the [state] defendants could not be sued in state court either." Kruse v. Hawaii, 68 F.3d 331, 334 (9th Cir., 1995).

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

compliance with Washington State election laws, thus not creating a federal issue or cause of action. See Rains v. Criterion Systems Inc., 80 F.3d 339, 344 (9th Cir.1996) (in wrongful termination action, direct and indirect references to Title VII were not sufficient to establish federal jurisdiction); Greene v. General Motors, 261 F.Supp.2d 414 (2003) (reference to Magnuson Moss Warranty Act as establishing a standard of conduct did not create a federal claim and the case was remanded); Hill v. Marston, 13 F.3d 1548, 1550 (11th Cir. 1994) ("violation of a federal standard as an element of a tort recovery does not change the state tort nature of the action").

Sequoia may know it is in violation of HAVA or fear it is, but when only state law claims are pled, plaintiffs are entitled to forsake the direct HAVA federal cause of action via §1983.

3. *Defendants Seek to Rewrite Plaintiffs' Complaint to Assert a Claim Under the Magnuson-Moss Warranty Act to Establish a Federal Claim.*

In Rains v. Criterion Systems, Inc., 80 F.3d 339, 344 (9th Cir. 1996), the Ninth Circuit wrote: "Rains chose to bring a state claim rather than a Title VII claim, and was entitled to do so." So too, here Plaintiffs never pleaded any claim under 42 U.S.C. §1983. Likewise, federal jurisdiction under the Magnuson-Moss Act requires that claims of damages be above $50,000 and Plaintiffs expressly waived any such claim in excess of $50,000, evidencing a direct intention to avoid invoking federal jurisdiction in their Complaint as follows:

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

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.** [Emphasis added.]

Most Magnuson Moss Warranty Act cases are state court cases, and the statute grants federal court jurisdiction for non-class actions *only if the amount in controversy is $50,000 or more.* 15 USC § 2310 (d) (3)(B). Defendants who are attempting to remove Magnuson Moss Warranty Act claims must meet this same jurisdictional threshold. Boyd v. Homes of Legend, Inc., 188 F.3d 1294 (11th Cir. 1999). This burden of proof the defendants have failed to meet, and only attempt to do so by claiming relief pleaded and available under other claims should be forced onto or cobbled onto the Magnuson Moss claim.

It has been observed that, unlike cases of full warranty, the Magnuson Moss Act does not provide for the refund of the purchase price of a contract under a limited warranty such as present in this case, though the consumer may seek that remedy separately under the Uniform Commercial Code [UCC] [*see* Ventura v. Ford Motor Co., 180 N.J. Super. 45, 433 A.2d 801 (App. Div. 1981). The UCC is not in the pleadings here. It follows that only a full warranty and not the limited warranty provided by Sequoia would lead to refund of the $5 million purchase price via

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

rescission, the claim upon which the defendants hinge the whole of their jurisdictional argument.

Here, the "tying" arrangement pleaded under the Magnuson Moss Act claim involves only a refusal to allow testing of the machines. This claim is discrete and does not arise from a common nucleus of fact shared with other claims, nor is a failure to allow testing specifically alleged to be fatal to the contract overall. Plaintiff's "equitable" remedies pled under Magnuson Moss would include an order allowing such testing, but not an order of rescission and full refund. Defendants, therefore, assert federal jurisdiction by disregarding the clear intent on the face of the Complaint to avoid such jurisdiction by limiting claims to the denial of testing only, which is thus under the $50,000 jurisdictional limit, and by attempting to imply a refund/rescission remedy not available under the Magnuson Moss Warranty Act, though it is available under other causes of action not pleaded here.

4. Removal Jurisdiction is Disfavored with the Burden of Establishing Federal Jurisdiction being Placed Upon the Party Seeking Removal. The removal statute is strictly construed against removal and the burden of establishing federal jurisdiction falls to the party invoking the statute. Ethridge v. Harbor House Rest., 861 F.2d 1389, 1393 (9th Cir. 1988). When there is doubt as to the right to removal in the first instance, ambiguities are to be construed against removal. Samuel v. Langham, 780 F. Supp. 424, 427 (N.D. Tex. 1992). An order of remand is not appealable.

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

First of all, before reaching the rule that remand is disfavored, it is clear that when all claims would be barred under the Eleventh Amendment doctrines remand is appropriate. *See* e.g. Kruse v. Hawaii, supra. Here, unlike the cases of *Schacht* and *Lapides*, there are no state employees suable under §1983 for the court to retain jurisdiction on. Each and every claim involves Snohomish County. For this reason alone, unless the defendants have succeeded in their burden of proving jurisdiction and the lack of a bar to the claims herein, the Court must remand.

In addition, as briefed in plaintiffs' opening motion, there is essentially a "gap" between joinder in removal and the clear and unequivocal waiver contemplated for Eleventh Amendment immunity.[2]

Jurisdiction of the federal courts ought not to be invoked to obtain unfair advantages not present in state court.

B. Procedural Defects in Removal are Not "Hypertechnical," but Go Directly to the Issue of Federal Jurisdiction and Eleventh Amendment Immunity. As the district court in Production Stamping v. Maryland Casualty Co., 829 F. Supp. 1074 (E.D.Wis.1993), held:

> [T]he view that technical flaws in a removal petition "can be swept away like so much dust seriously misunderstands the conditions

[2] Nor should the Court conclude that Eleventh Amendment issues are not part of the knowledge of defendants counsel in this case. A simple LEXIS search will show Malcolm Harris as counsel in a year-long published case involving Eleventh Amendment issues in part. Class Plaintiffs v. City of Seattle, 955 F.2d, 1268, 1272 (9th Cir. 1992). While not cited as authority for this case, counsel Andrew F. Pierce received an unpublished 9th Circuit opinion holding that a local school district was the state and there could be no *Ex Parte Young* exception to the rule of sovereign immunity because Pierce had not named an individual school district defendant to which *Ex Parte Young* could apply. Zasslow v. Menlo Park School District, *60 Fed. Appx. 27, *; 2003 U.S. App. LEXIS 3616 (2003).* Plaintiffs here should not be forced to face the same fate in the 9th Circuit as the Zasslows with immunity raised for the first time on appeal.

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

> under which the formidable power of the federal judiciary can--and should--be invoked." [Citation omitted.] These considerations are certainly more substantive than the simplistic notion that procedural flaws should be overlooked merely because they are procedural. Production Stamping, 829 F.Supp. at 1077-78. [Bold italics added for emphasis.]

The defendants' opposition to remand fails generally to grasp the difference between jurisdictional prerequisites and remand procedures (which are strictly enforced) with non-jurisdictional rules that are subject to lesser enforcement. The recent declarations filed in opposition to the Motion for Remand reveal the objective deficiency of the initial removal. These belated reports of subjective intention by the attorneys of record for Snohomish County do not meet the strict standards for removal mandated by statute and case authority. In Smith v. Union Nat'l Life Ins. Co., 187 F. Supp. 2d 635, 641-647 (D. Miss., 2001), the court held that expiration of the 30-day period was fatal to the defendants' attempt to amend the notice of removal where, as here, there was not clearly expressed authority by the parties that the attorney for one could bind the other.

> The error here is substantive, not merely mechanical. United's failure to join in or consent to removal renders the Notice of Removal procedurally defective. Union National's Notice of Removal does not constitute an independent and unambiguous joinder or consent by United. Having failed to communicate its joinder or consent to the Court during the 30-day period, United cannot now show the Court that it authorized its attorney to file a joinder on its behalf. .... Id.

In this case, unlike Becker v. Montgomery (cited by Defendants) the CR 11 signature requirement is an express part of the strictly enforced removal statute. Further, it should be noted that Federal Rules decisions have held that a rubber stamp "signature" apparently by the attorney in fact did not constitute

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

compliance with Rule 11(a). It follows that for removal purposes, the signature of another party's attorney will not suffice.

C. Immunity of the State under the Eleventh Amendment is Implicated and Must be Waived. Defendants do not address the central issue identified by plaintiffs in their moving papers of the requirement that there be a clear and unequivocal waiver of the Eleventh Amendment before a state entity submits itself to federal court jurisdiction. Justice Kennedy summarized the state of the law in his concurring opinion in Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 393-395, 118 S. Ct. 2047, 141 L.Ed.2d 364 (U.S., 1998) (Kennedy, J., concurring) and noted that Eleventh Amendment issues were permitted to be raised for the first time on appeal, raising grave concerns about unfairness and oppression in the intersection of immunity and removal issues.

The Notice of Removal and Joinder pleadings nowhere set forth any authority for Sequoia's counsel to: (i) sign for the attorney for Snohomish County; (ii) sign for Snohomish County; (iii) elect removal jurisdiction for Snohomish County; (iv) waive the Eleventh Amendment immunity from suit of Snohomish County as a subdivision of the State of Washington; (v) waive the Eleventh Amendment immunity from suit in federal court of the State of Washington. The defendants can not point to rules for subsequent electronic filings to claim that the jurisdictional prerequisites for removal specifically on point have been satisfied.

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

Defendants' claim in their motions to dismiss that the Secretary of State is an "indispensable party", this raises the risk of dismissal of plaintiffs' claims under federal court practice should they be found to have failed to join such a party.

Defendants intentionally sought to defeat the plaintiffs reasonable request for jurisdiction to be decided first, because in federal court the joinder of the Secretary of State would be very likely to lead to FRCP 19(b) dismissal, while in state court where this action came from, the court would be most likely to simply order that the Secretary of State be joined as a party. Thus, precisely as Justice Kennedy feared in *Schacht* and as the *Lapides* court enshrined into its rule of waiver, federal court is being set up as a field whereby the government intentionally obtains privileges and immunities it would otherwise not be entitled to, and creates unfairness and oppression in the process. Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 624, 122 S.Ct. 1640, 152 L.Ed.2d 806, (2002) (holding the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity—though suggesting remand since only state-law issues remained).

In light of the procedural shortcomings of removal in this case and the incorporation of CR 11 signatures as an express jurisdictional requirement of the remand statute, along with the complete absence of any declaration at the time of removal confirming Snohomish County's assent to removal and confirming the authority of Sequoia to represent Snohomish County respecting such removal and confirming Snohomish County's waiver of its (or the Secretary of State of

GORDON EDMUNDS ELDER PLLC
1200 112TH AVENUE NE, SUITE C-110
BELLEVUE, WASHINGTON 98004
425-454-3313
FAX 425-646-4326

Washington's) Eleventh Amendment immunity, plaintiffs believe that remand is both necessary and appropriate.

DATED this 7th day of July, 2005.

GORDON EDMUNDS ELDER PLLC

By: Randolph I Gordon
Randolph I. Gordon, WSBA #8435
Attorney for Plaintiffs
GORDON EDMUNDS ELDER PLLC
1200 112th Avenue, NE, Suite C110
Bellevue, WA 98004
(425) 454-3313 Fax (425) 646-4326
Email: rgordon@gee-law.com