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' 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 respond to the Notice of Removal of Action Pursuant to 28 U.S.C. § 1441(b) (Federal Question) by Sequoia Voting Systems, Inc. ("Sequoia") with this Motion for Remand to State Court Pursuant to 28 U.S.C. § 1446.

I. RELEVANT PROCEDURAL HISTORY.

This action was commenced in King County Superior Court and a case schedule was issued on April 7, 2005 and entitled "*Paul Lehto and John Wells v. Sequoia Voting Systems, Inc. and Snohomish County*" under King County Superior Court Case Number 05-2-11769-9. Defendant Sequoia was served on April 13,

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

2005 and Defendant Snohomish County was served on April 14, 2005.[1] Notices of Appearance were made by defendants Snohomish County and Sequoia on April 22 and April 26, respectively. On May 11, 2005, Sequoia filed its Notice of Removal of Action Pursuant to 28 U.S.C. § 1441(b) (Federal Question). On May 11, 2005, plaintiffs' counsel received a "Notice to Adverse Party of Removal to Federal Court."[2]

On May 13, 2005, plaintiffs' counsel received the Joinder in Notice of Removal of Action,[3] which purports to be on behalf of Snohomish County, but which appears on the pleading paper of Harris, Mericle & Wakayama PLLC, attorneys for Sequoia. The Joinder is signed "***Gordon Sivley, by* MSH***"*; "MSH" are the initials of Malcolm S. Harris, of attorneys for Defendant Sequoia. To the best of plaintiffs' knowledge, none of the documents or pleadings filed authorize Malcolm S. Harris, of attorneys for Defendant Sequoia, to sign pleadings on behalf of Defendant Snohomish County, a separate defendant whom he does not represent. There is no other unequivocal, authorized consent to the removal or

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[1] In its Notice of Removal of Action, Defendant Sequoia alleges in ¶ 2 that: "The first date upon which SEQUOIA or any other defendant received a copy of the Complaint in the State Court Action was on or about April 13, 2005, when SEQUOIA was served with a copy of the Complaint and the Summons.

[2] Although the Notice avers that "a Notice of Removal of this action was filed in the United States District Court for the Western District of Washington on May 10, 2005, Case No. C05-0877," the Civil Cover Sheet signed on behalf of Malcolm S. Harris, the averments in the Affidavit of Mailing signed by Mr. Harris referencing the Notice to Adverse Party of Removal and the Notice of Removal of Action, and the receipt stamp of the Clerk of the United States District Court, Western District of Washington affixed to the Notice of Removal of Action, itself, all confirm filing on May 11, 2005.

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

waiver of Snohomish County's Eleventh Amendment defenses against federal jurisdiction as a political subdivision of the State of Washington.

II. REQUIREMENTS OF 28 U.S.C. §§ 1446 AND 1447.

28 U.S.C. § 1446 provides, in pertinent part:

> **(a)** A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
>
> **(b)** The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1447 provides, in pertinent part:

> **(c)** A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

This Motion for Remand has been filed within thirty days of removal; all procedural and jurisdictional objections are timely.

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[3] Curiously, Sequoia has filed two Joinder in Notice of Removal of Action documents (Documents 8 and 9 as filed with the Court), but neither cures the defects which are the

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

III. LEGAL STANDARDS GOVERNING REMOVAL.

A. Federal Question Must be Disclosed Upon the Face of the Complaint; Plaintiff is the Master of the Complaint and May Eschew Federal Claims.

Where, as here, 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." Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112-13, 81 L. Ed. 70, 57 S. Ct. 96 (1936) (noting that the federal question cannot be "merely a possible or conjectural one"). Thus the rule enables the plaintiff, as "master of the complaint," to "choose to have the cause heard in state court" by eschewing claims based on federal law. Calif. ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 839 (9th Cir. 2004). The well-pleaded complaint rule requires that federal question jurisdiction not exist unless a federal question appears on the face of a plaintiff's properly pleaded complaint." Columbia Gas Transmission Corp. v. Drain, 237 F.3d 366, 369-70 (4th Cir. 2001), citing Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986). The Complaint in this matter asserts no federal claims.

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. *See* Pan American Petro. Corp. v. Superior Court, 366 U.S. 656, 662-63, 81 S.Ct. 1303, 1307-08, 6 L.Ed.2d 584 (1961) (stating that "the party who brings a suit is master to decide what law he will rely upon") (quoting Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33

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subject of this Motion.

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

S.Ct. 410, 411-12, 57 L.Ed. 716 (1913)). A plaintiff "may avoid federal jurisdiction by exclusive reliance on state law." Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987); *see also* Ethridge v. Harbor House Restaurant, 861 F.2d 1389, 1395 (9th Cir.1988) ("If the plaintiff may sue on either state or federal grounds, the plaintiff may avoid removal simply by relying exclusively on the state law claim").

The Ninth Circuit held in Harris v. Provident Life & Acc. Ins. Co., 26 F.3d 930, 933-34 (9th Cir. 1994):

> Ordinarily, "federal 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); *accord Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1393 (9th Cir.1988).

B. In Absence of Federal Subject Matter Jurisdiction, Case will be Remanded; Remand Cannot be Waived, nor Federal Jurisdiction Created by Stipulation of Parties.

The right to secure a remand of the action to state court when there is no federal subject matter jurisdiction basis for removing the action to a federal court cannot be waived by either party. Albingia Versicherungs A.G. v. Schenker Int'l Inc., 344 F.3d 931 (9th Cir. 2003), *as amended in other respects* 350 F.3d 916, *cert. denied* 124 S.Ct. 2162, 541 U.S. 1041, 158 L.Ed.2d 730 (2004). Nor may parties confer jurisdiction over the subject matter of an action on a federal court by consent. Parks v. Montgomery Ward & Co., 198 F.2d 772 (10th Cir. 1952); Office of Hawai'ian Affairs v. Department of Education, 951 F.Supp. 1484 (D. Hawaii 1996).

C. The Court Must Satisfy Itself that Federal Subject Matter Jurisdiction is Proper Before Making Rulings on the Merits.

The district court must be certain that federal subject matter jurisdiction is proper before entertaining a motion by the defendant under Federal Rule 12 to

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

dismiss the plaintiff's complaint for failure to state a claim upon which relief may be granted. *See, e.g.,* Akhlaghi v. Berry, 294 F.Supp.2d 1238 (D. Kan. 2003) (remanding, concluding it better practice to rule on motion to remand before motion to dismiss for failure to state a claim); Thompson v. Fritsch, , 966 F.Supp. 543 (D. Mich.1997)(must establish removal jurisdiction before granting summary judgment); Ren-Dan Farms, Inc. v. Monsanto Co., 952 F.Supp. 370 (D. La.1997) (must determine subject matter jurisdiction before personal jurisdiction or venue); National Union Fire Ins. Co. v. Liberty Mut. Ins. Co., 878 F.Supp.199 (D. Ala.1995). This Court correctly deferred consideration of pending Motions to Dismiss until removal jurisdiction could be established.

If the district court at any time determines that it lacks jurisdiction over the removed action, it must remedy the improvident grant of removal by remanding the action to state court. 28 U.S.C. § 1447; *see, e.g.* ARCO Envtl. Remediation, LLC v. Dep't of Health and Envtl. Quality, 213 F.3d 1108, 1113 (9th Cir. 2000). Because the existence of federal subject matter jurisdiction is a constitutional requirement, there is substantial case law[4] to the effect that the district court may remand a removed case in which the lack of subject matter jurisdiction is discovered at any time prior to the entry of judgment. 28 U.S.C. § 1447. Although this motion is filed

[4] Caterpillar Inc. v. Lewis, 117 S.Ct. 467, 519 U.S. 61, 136 L.Ed.2d 437 (1996) (Ginsburg, J.); Avitts v. Amoco Production Co., 53 F.3d 690 (5th Cir. 1995) (vacated and remanded at appellate level); Casas Office Machs., Inc. v. Mita Copystar America, Inc., 42 F.3d 668 (1st Cir. 1994), *rehearing and suggestion for rehearing en banc denied* (1995) (remand may be raised on appeal).

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

within thirty days to preserve procedural objections, any issues respecting jurisdictional infirmities remain open for consideration until entry of judgment.

D. The Burden of Establishing Removal Jurisdiction is On the Party Seeking Removal, *Not* the Party Seeking Remand to State Court.

It is also well-settled under the case law that the burden is on the party seeking to preserve the district court's removal jurisdiction (here defendants Snohomish County and Sequoia), not the party moving for remand to state court (here, Plaintiffs), to show that the requirements for removal have been met.[5] Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). 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); *see also,* Fellhauer v. Geneva, 673 F.Supp. 1445, 1447 (N.D.Ill.1987). "The district court, in a challenged case, may retain jurisdiction only where its authority to do so is clear." Gorman v. Abbott Laboratories, 629 F.Supp. 1196, 1203 (D.R.I.1986). "The removing party bears the burden of showing that removal was proper." Medical College of Wisconsin Faculty Physicians &

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[5] *See, e.g.,* Sanchez v. Monumental Life Ins. Co., 102 F.3d 398 (9th Cir. 1996); Duncan v. Stuetzle, 76 F.3d 1480 (9th Cir. 1996); Office of Hawai'ian Affairs v. Department of Educ., , 951 F.Supp. 1484 (D. Haw. 1997); Schwartz v. FHP International Corp., 947 F.Supp. 1354 (D. Ariz.1996); Lavadenz de Estenssoro v. American Jet, S.A., 944 F.Supp. 813 (D. Cal.1996).

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

Surgeons v. Pitsch, 776 F.Supp. 437, 439 (E.D.Wis.1991). "This extends not only to demonstrating a jurisdictional basis for removal, but also necessary compliance with the requirements of the removal statute." Albonetti v. GAF Corporation-Chemical Group, 520 F.Supp. 825, 827 (S.D.Tex.1981).

E. Removal Jurisdiction Cannot be Maintained Where the Federal Question is "Collateral," "Merely Possible," or "Attenuated"; The Federal Question Must be "Direct and Essential."

Courts have articulated a number of formulations to determine whether a state claim depends on the resolution of a federal question to such an extent as to trigger subject matter jurisdiction. Is the federal question "basic" and "necessary" as opposed to "collateral" and "merely possible?" Gully v. First Nat'l Bank, 299 U.S. 109, 118, 81 L. Ed. 70, 57 S. Ct. 96 (1936). Is the federal question "direct and essential" as opposed to "attenuated?" Smith v. Grimm, 534 F.2d 1346 at 1346, 1350-51 (9th Cir. 1976).

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, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033, 1044-1045 (9th Cir. 2003).

An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

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

IV. SUMMARY OF GROUNDS FOR REMAND.

A. Procedural Grounds.

1. *Removal Requires Unanimity Among Defendants.*

The procedural requirements for removal under 28 USC § 1446 are strictly enforced. These requirements include, *inter alia*, the unanimity requirement of joinder by all defendants, and the signature requirement created by express incorporation into § 1446 of FRCP 11. This unanimity requirement is based on 28 U.S.C. § 1441(a) which provides that "the defendant or the defendants" may remove the case. The courts have read these words to mean that if there is more than one defendant, then the defendants must act collectively and unanimously to remove the case. *See*, *e.g.* Hewitt v. City of Stanton, 798 F.2d 1230, 1232 (9th Cir. 1986) ("All defendants must join in a removal petition with the exception of nominal parties. 28 U.S.C. § 1446(b)"). In Hewitt, this meant that both the police officer and his former employer, The City of Stanton, had to be named. Counsel's argument that the City was just a nominal party was rejected and CR 11 sanctions were upheld.

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 Smith court undertook a comprehensive and well-reasoned

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

examination of the strict procedural requirements of unanimous joinder, which requirements include an unambiguous manifestation of consent by an authorized representative of each party. The incorporation of CR 11 into the removal statute emphasizes the requirement that each party be bound by its counsel of record. The full inclusion of the Smith court's analysis is too lengthy and the deletion of the rich body of supporting authority has been necessary, but key language provides:

> As a general rule, all defendants must join in a removal petition in order to effect removal. [Citations omitted.] … [T]the case law firmly establishes this requirement, which is known as the "rule of unanimity." [Citations omitted.] Although it is not necessary that all defendants sign the notice of removal, each defendant who has been served must at least ***communicate its consent to the court*** no later than thirty days from the day on which the first defendant was served. 28 U.S.C. § 1446(b); Getty Oil Corporation v. Insurance Company of North America, 841 F.2d 1254, 1262-63 (5th Cir.1988)….
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> ***[T]he reference in the statute to "a notice of removal signed pursuant to Rule 11," 28 USC § 1446(a), suggests that a defendant's communication of his or her consent to removal must be in a writing signed by that defendant or by his or her attorney.*** *Creekmore [v. Food Lion, Inc.,* 797 F.Supp. 505, 508 (E.D.Va.1992)] Fed.R.Civ.P. 11. ***The Fifth Circuit Court of Appeals has held that there must be a timely filed written indication from each served defendant, or from some person purporting to formally act on his/her behalf and with the authority to do so, that he/she has actually consented to removal.*** Getty Oil, 841 F.2d at 1262 n. 11. ….
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> **"[T]he mere assertion in a removal petition that all defendants consent to removal[6] fails to constitute a sufficient joinder."**

[6] This is precisely the allegation here. The Notice of Removal states in ¶ 5: "All other defendants who have been served with the Summons and Complaint have joined in this Notice of Removal, as evidenced by the joinder of Defendant SNOHOMISH COUNTY filed concurrently herewith." In fact, the Joinder in Notice of Removal was not filed concurrently (on the 11th), but two days later – and not signed by Snohomish County or its attorney, but by Sequoia's lawyer, without any averment of authority to do so appearing anywhere. The mere assertion in the Notice of Removal fails as a matter of law; the Joinder likewise fails under the CR 11 signature requirements incorporated into 28 U.S.C. § 1446.

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

Production Stamping, 829 F.Supp. at 1076. In Production Stamping, ***there was no allegation in the notice of removal that the filing defendant or its attorney had been authorized by the co-defendant to speak on its behalf on the removal issue. In granting the plaintiff's motion to remand, the court noted that requiring each defendant to formally and explicitly consent to removal is sound policy, and prevents one defendant from choosing a forum for all.*** Production Stamping, 829 F.Supp. at 1076 [Citation omitted]…. "To allow one party, through counsel, to bind or represent the position of other parties without their express consent to be so bound would have serious adverse repercussions, not only in removal situations but in any incident of litigation." Creekmore, 797 F.Supp. at 509. One of the primary reasons that separate parties have separate counsel is so that each can independently present their position to the court. Id., at n. 9. ***Requiring an independent statement of consent from each defendant ensures that the Court has a clear and unequivocal basis for subject matter jurisdiction before taking the serious step of wrestling jurisdiction from another sovereign....*** Id. at 1077. ***Furthermore, Fed.R.Civ.P. 11 does not authorize one party to make representations or file pleadings on behalf of another. Rather, Rule 11 requires that each pleading, motion or other paper submitted to the court be signed by the party or its attorney of record, if represented.*** Creekmore, 797 F.Supp. at 508. ....

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. ….***

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 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.]

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

In Baker v. Ford Motor Company,[7] 1997 WL 88260 (N.D.Miss.1997), counsel for one defendant, Grumman Allied Industries, removed to federal court and Ford filed a joinder four days after the deadline. Grumman's notice of removal, however, contained the statement that Ford, through its counsel, was joining in the removal. In opposing a motion to remand, Ford's counsel filed an affidavit stating that "he authorized Grumman's counsel 'to include affiant's name in the Notice of Removal and to bind Ford Motor Company in the Notice of Removal.' " The affidavit further stated that the separate joinder was a " 'redundant formality ... to confirm the already-established fact that [Ford] joined in the Notice of Removal filed December 3, 1996.' " Id. at *1. The argument was rejected:

> The notice of removal does not state that Grumman was authorized to represent that Ford had consented to the removal, and no document was filed at the time of removal or within the prescribed 30-day period showing that the representation in the notice of removal was even authorized. ….The court noted that Rule 11 "does not authorize one party to make representations or file pleadings on behalf of another."

Baker v. Ford Motor Company, 1997 WL 88260 (N.D.Miss.1997) as quoted in Smith v. Union Nat'l Life Ins. Co., 187 F. Supp. 2d 635, 641-647 (D. Miss., 2001). *See also* Sims v. Ward, 2001 WL 1104636 (E.D. La. 2001) (Following the expiration of the 30-day period for removal, the defendants filed a joint motion for leave to amend the notice of removal, claiming that the original notice inadvertently failed to allege that the Department had consented to removal through its attorney; the court

[7] Baker was extensively quoted by Smith, a published opinion, and all references to Baker are derived from that published opinion.

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

held that expiration of the 30-day period was fatal to the attempt to amend the notice of removal.)

2. *Joinder was Improperly Executed under FRCP 11*.

FRCP 11 expressly requires the original signature of the "attorney of record." Under the controlling authority cited above, defendants' Notice of Removal and Joinder in Notice of Removal are defective as a matter of law. There is neither any evidence of unequivocal election of removal jurisdiction by the party, nor even from any person purporting to act on its behalf with the apparent (or even claimed) authority to do so in the record during the relevant time period.

The Notice of Removal contains a mere assertion that all defendants "have joined" without evidence of authority – which has been held in Production Stamping, *supra,* 829 F.Supp. at 1076, to be legally insufficient. Here, just as in Production Stamping, there has been no allegation in the notice of removal that the filing defendant or its attorney had been authorized by the co-defendant to speak on its behalf on the removal issue. As in Smith, Sims, Baker, all cited *supra*, it is too late now to file such an affidavit.

Federal Rule of Civil Procedure 11 is specifically jurisdictional here because it is incorporated into 28 USC § 1446. "[Every paper signed by] a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, … each paper shall state the signer's address and telephone number, if any." FRCP 11. The Joinder in Notice of Removal has been submitted on pleading paper of counsel for Sequoia and purports to sign for a

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

separate party defendant, Snohomish County. The only address given is that of counsel for Sequoia. The Joinder is signed "***Gordon Sivley, by*** **MSH**," but nowhere even goes so far as to claim that the execution is "pursuant to authorization." No faxed signature is attached; no affidavit of authority is submitted. It even fails to state Gordon Sivley is an attorney for anyone, the signature merely states "Gordon Sivley" and on the second line "Snohomish County Prosecutor's Office." Although it may be reasonably deduced that the initials "***MSH***" are those of Malcolm S. Harris, whose address and telephone are set forth on the Joinder, Mr. Harris is the attorney for Sequoia.[8]

3. ***Immunity of the State under the Eleventh Amendment is Implicated and Must be Waived.***

The Eleventh Amendment to the Constitution governs, among other things, whether a sovereign State must submit to federal 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):

> Given the latitude accorded the States in raising the immunity at a late stage, however, a rule of waiver may not be all that obvious. The Court has said the Eleventh Amendment bar may be asserted for the first time on appeal, so a State which is sued in federal court does not waive the Eleventh Amendment simply by appearing and defending on the merits...

[8] It is hard to conceive of less adequate evidence of Snohomish County's election to remove. If Mr. Sively were to deny authority, there would be no direct evidence to contradict it. Even under traditional Rule 11 case authority, Mr. Sivley would not have been subject to any sanctions for the pleading as it has been held that only the individual attorney who actually signed a court paper could be sanctioned because of its contents. Triad Sys. Corp. v Southeastern Express Co. 64 F3d 1330 (9th Cir. 1995) *cert. den* 516 U.S. 1145, 134 L Ed 2d 96, 116 S Ct 1015 (1996).

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

> Our precedents have treated the Eleventh Amendment as "enacting a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 267, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) (slip op., at 5); see also E. Chemerinsky, Federal Jurisdiction § 7.6, p. 405 (2d ed. 1994) (noting that allowing waiver of the immunity "seems inconsistent with viewing the Eleventh Amendment as a restriction on the federal courts' subject matter jurisdiction").
>
> It is true as well that the Court's recent cases have disfavored constructive waivers of the Eleventh Amendment and have required the State's consent to suit be unequivocal. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 246-247, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985); Edelman v. Jordan, 415 U.S. at 673. ....These questions should be explored. If it were demonstrated that a federal rule finding waiver of the Eleventh Amendment when the State consents to removal would put States at some unfair tactical disadvantage, perhaps the waiver rule ought not to be embraced.... Since the issue was not addressed either by the parties or the Court of Appeals, the proper course is for us to defer addressing the question until it is presented for our consideration, supported by full briefing and argument, in some later case. Id. at 396-97.

Snohomish County, a political subdivision of the State of Washington, has suggested in its Motion to Dismiss (at pp. 2, 7, 18-20) that the Secretary of State is an “indispensable party” to this legal action (with which plaintiffs disagree). Is this to be taken as a clear, unequivocal statement that the State of Washington is waiving its Eleventh Amendment immunity from federal jurisdiction?

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; or (iv) waive the Eleventh Amendment immunity from suit of Snohomish County as a subdivision of the State of Washington. In addition, we must ask

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

whether Snohomish County was authorized to waive the Eleventh Amendment immunity from suit in federal court of the State of Washington.

In 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), the Supreme Court held that: "We conclude that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity--though, as we have said, the District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state courts for determination."

We raise this issue because judicial economy would not be served should it be determined at some point that Snohomish County did not effectively waive its (or the State of Washington's) Eleventh Amendment immunity and that the court lacked subject matter jurisdiction. Given the rigorous procedural requirements, plaintiffs believe that the Notice of Removal is procedurally defective.

B. Lack of Subject Matter Jurisdiction.

In their Motion to Dismiss, Snohomish County claimed: "Although Plaintiffs allege twelve separate causes of action, all twelve seek the rescission of a contract between Snohomish County and Sequoia because it is violative of some law or public policy." (Motion, p. 5). This statement, taken at face value, is an admission that there is no "basic" and "necessary" or "direct and essential" federal claim. Gully v. First Nat'l Bank, 299 U.S. 109, 118, 81 L. Ed. 70, 57 S. Ct. 96 (1936); Smith v. Grimm, 534 F.2d 1346 at 1346, 1350-51 (9th Cir. 1976). As previously

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

noted, 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, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033, 1044-1045 (9th Cir. 2003):

> During oral argument, Lippitt's counsel stated that his client would not amend the complaint to add a federal claim upon remand of the action to state court. We remand in reliance that Lippitt will adhere to this promise, as well as to the characterization of the complaint which he offered to us, since judicial estoppel "bars a party from taking inconsistent positions in the same litigation." United States v. Baird-Neece Packing Corp., 151 F.3d 1139, 1147 (9th Cir. 1998). Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033, 1046 (9th Cir., 2003).

Having recognized that the gravamen of Plaintiffs' claims lies in State Law, defendant Snohomish County ought not to be permitted to claim now that federal claims predominate or are central to this case. In fact, as will be seen, Plaintiffs took care to avoid any federal questions in the Complaint and the only basis for federal jurisdiction is speculative and attenuated.

1. *Federal Question Jurisdiction Does Not Arise under the Magnsuon Moss Warranty Act as Pleaded Where, As Here, the Federal Jurisdictional Requirements of Claims Over $50,000 were Specifically Waived by Plaintiffs in their Complaint.*

Plaintiffs' Complaint includes a Ninth Cause of Action under the Magnuson Moss Warranty Act, relating to an allegedly improper "tying" agreement, purporting to waive warranty provisions based on examination or testing of the equipment without Sequoia's permission. Yet, federal jurisdiction under the Magnuson Moss Act requires that claims be above $50,000 and Plaintiffs

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

expressly waived any such claim in excess of $50,000, evidencing a direct intention to avoid invoking federal jurisdiction.

> The Complaint provides in pertinent part:
>
> 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.

Though the Magnuson Moss Act is composed of federal statutes, typical jurisdiction lies in any state court of competent jurisdiction. 15 U.S.C § 2310(d) (1),(3). It 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). 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. Mathews v.

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

Fleetwood Homes, 92 F.Supp.2d 1285 (S.D. Ala. 2000); Grubbs v. Pioneer Housing, Inc., 75 F.Supp. 2d 1323 (M.D. Ala. 1999).

To evaluate the amount in controversy the court looks to the complaint. Whether the jurisdictional amount is met is measured "exclusive of interest and costs" under 15 USC § 2310 (d) (3)(B) and has been held to exclude interest, costs, and attorney fees. Ansari v. Bella Automotive Group, 145 F.3d 1270 (11th Cir. 1998. Incidental and consequential damages can not be used to satisfy the jurisdictional amount if their amount is unknown. Gabriel v. Mitsubishi Motor Sales of Am. Inc., 976 F.Supp. 1154 (N.D. Ill 1997) (holding damages too vague and speculative do not count toward amount in controversy). Damages awardable only under other supplemental claims do not count toward the amount in controversy under the Magnuson Moss Warranty Act. Ansari v. Bella Automotive Group, 145 F.3d 1270 (11th Cir. 1998); Poindexter v. Morse Chevrolet, Inc., 270 F.Supp.2d 1286 (D. Kan. 2003) (holding punitive damages for pendent fraud claim not counting). Merely referring to the Magnuson Moss Warranty Act as setting a standard of care or conduct for a state law claim does not create federal jurisdiction regardless of whether the jurisdictional amount is met. Greene v. Gen. Motors Corp., 261 F.Supp.2d 414 (W.D.N.C. 2003).

Plaintiffs have specifically pled that, under the Magnuson-Moss Warranty Act claim, that there is "less than $50,000 at issue under this claim." Complaint, ¶7.9.4. Moreover, the thrust of the entire complaint is a series of Declaratory Judgment actions, seeking to set aside those provisions of the Contract incompatible with the

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

transparency, openness, and verifiability of elections mandated under the Washington Constitution. Under Greene v. Gen. Motors Corp, utilizing the Magnuson Moss Warranty act to set a standard of care or conduct relevant to the prayer for relief of voiding the contract will not state a federal claim. Greene v. Gen. Motors Corp, 261 F.Supp.2d 414 (W.D.N.C. 2003).

The only act pleaded to violate the federal Magnuson Moss Warranty Act in the Complaint for Declaratory Judgment is the illegal "tying" arrangment based upon the refusal of Sequoia to allow testing of its election computers on the grounds that such testing would "void" the warranty. This "tying" provision is alleged to have been used to justify denial of access to plaintiff Lehto for the right to conduct any testing of the Sequoia machines, and similarly denies the public any right to observe or verify election results.

Plaintiff Lehto's personal damages for not being able to test the Sequoia machines are less than $50,000. The plaintiff, as "master of the complaint" has chosen to have the cause heard in state court by eschewing claims based on federal law. *See* case authority at p. 4, *infra.* On the face of the Complaint there is no federal question raised; to the contrary, the Complaint specifically waives damages on its only claim under the Magnuson Moss Warranty Act to avoid the possibility of federal jurisdiction.

2. *Federal Question Jurisdiction Does Not Arise By Reference to the Help America Vote Act (HAVA) Where, As Here, (i) No Cause of Action Arises under HAVA and (ii) Mere Reference to a Federal Statute under a State Law Claim Does Not Create Federal Question Jurisdiction.*

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425-454-3313
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The Tenth Cause of Action alleges that the contract is invalid and illegal as applied under traditional state law contract principles. The pertinent language of the Complaint provides:

> 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:
>
> 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.

First, it must be noted that 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." It follows that there can be no claim asserted thereunder in the Complaint. This, by itself, negates the possibility of any federal claim giving rise to removal jurisdiction simply by mentioning HAVA.

Merely referencing a federal statute is not sufficient to establish federal jurisdiction. 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). Here, NIST [National Institute of Standards and Technology] established standards for electronic voting which were

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

incorporated into HAVA; HAVA is simply adverted to as a body of standards for testing of electronic voting machines, giving rise to a state law based claim relating to compliance with Washington State election laws regarding testing and accuracy. In Greene v. General Motors, 261 F.Supp.2d 414 (2003) reference to a federal statute [Magnuson Moss Warranty Act] as establishing a standard of conduct did not create a federal claim and the case was remanded. Federal question jurisdiction does not arise when a state court plaintiff alleges that a federal statute provides a standard of care or conduct, or otherwise refers to federal authority as evidence that a defendant violated state law. *See*, e.g., ARCO Envtl. Remediation, L.L.C. v. Dep't of Health and Envtl. Quality of Montana, 213 F.3d 1108, 1113 (9th Cir. 2000) ("the fact that ARCO's complaint makes repeated references to CERCLA does not mean that CERCLA creates the cause of action under which ARCO sues"); Hill v. Marston, 13 F.3d 1548, 1550 (11th Cir. 1994) (the "violation of a federal standard as an element of a state tort recovery does not change the state tort nature of the action").

In Kravitz v. Homeowners Warranty Corp., 542 F. Supp. 317, 319-20 (E.D. Pa. 1982), plaintiff homeowners contended that the defendant's failure to comply with Magnuson-Moss warranty standards entitled them to contract rescission under state law, the court held that the plaintiffs' cause of action "was rooted in" state law and that the state courts "[were] fully competent to interpret the Magnuson-Moss" warranty standards, finding little justification for assertion of federal question jurisdiction.

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

3. *The Federal Courts Should Decline Jurisdiction Where, as Here, the Issues Present Novel Issues of State Law Requiring Interpretation of Washington State Courts.*

Title 28 U.S.C. §1367 instantiates the federal judicial policy that a district court decline to exercise supplemental jurisdiction over cases which present novel and complex issues of State law; where the district court has dismissed all causes of action over which it has original jurisdiction; where the State law claims predominate over those over which the district court has original jurisdiction. This case implicates the Washington State Constitution and, ultimately, by certification or otherwise ought properly to be considered by Washington State courts.

V. CONCLUSION.

Plaintiff's Motion for Remand ought to be granted: the procedural defects justify remand; the absence of federal law claims justifies remand. The court has properly refrained from ruling on any substantive motions in the case until the threshold issue of federal court jurisdiction is resolved.

DATED this 9th day of June, 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

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

1. Malcolm S. Harris @ mharris@hmwlaw.com; and
2. Andrew F. Pierce @ andrew@pierceshearer.com; and
3. Douglas J. Morrill @ dmorrill@co.snohomish.wa.us; and
4. Gordon W. Sivley @ gsivley@co.snohomish.wa.us

And I hereby certify that I sent the document by messenger service to the following non CM/ECF participants: Aaron Blake Lee (Harris, Mericle & Wakayama; 999 Third Ave., #3210, Seattle, WA 98104.

Dated at Bellevue, Washington this 9th day of June, 2005.

/s/ 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

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