The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PAUL RICHARD LEHTO, individually, and JOHN WELLS, individually **Plaintiffs,** **vs.** **SEQUOIA VOTING SYSTEMS, INC., a Delaware corporation; and SNOHOMISH COUNTY, a political subdivision of the State of Washington;** **Defendants.**	**NO. C05-0877-RSM** **PLAINTIFFS' SUPPLEMENTAL RESPONSE TO THE MOTIONS TO DISMISS OR TO STRIKE FROM BOTH DEFENDANTS SEQUOIA AND SNOHOMISH COUNTY**

Plaintiffs John Wells and Paul Richard Lehto, by and through their attorney, Randolph I. Gordon of GORDON EDMUNDS ELDER PLLC, hereby supplement the document "Plaintiffs' Response to Sequoia's Motion to Dismiss or, Alternatively, to Strike Portions of Complaint and Snohomish County's Motion to Dismiss" in this additional memorandum of law.

I. PROCEDURAL BACKGROUND.

After considering Snohomish County's ten page memorandum in opposition to the continuance of the two motions to dismiss filed by

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defendants[1], together with Sequoia's joinder in opposition to any continuance, Plaintiffs' Motion to Continue was granted by this Court by Minute Order of June 8, 2005. In that minute order, this Motion was continued to July 1, 2005, for consideration without oral argument.

The Court's Minute Order also reflected that it was "preferable" to consider the Motion to Remand before considering the Motions to Dismiss. This Supplemental Response, together with the initial Combined Response to the Motions to Dismiss of both defendants, is still well within the length restrictions imposed by the Local Rules, and timely based on the adjusted motion date in the minute order of June 8, 2005.

II. STANDARD OF REVIEW FOR MOTIONS TO DISMISS UNDER FRCP 12(b)(6).

As previously briefed, Defendants' Motions to Dismiss both mistakenly cite to overruled authority [Plaintiffs' Combined Memorandum in Response, pp. 21-23] in support of their assertion that plaintiffs' claims are properly dismissed pursuant to the state law limitations period of two years. Defendants' errors go further: While statutes of limitations are typically individual based on the various claims being made, defendants implicitly claim one-size-fits-all because they argue dismissal of each and every claim is warranted based on the overruled 2 year catchall statute of limitations.

[1] Of particular concern to the Defendant Snohomish County was the allegation that the motion for continuance based on counsel's three week trial was "strategic" in motivation, which was not the case.

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To give but one example, defendants could not claim (as they did in the notice of removal) a basis to remove this case based on the Magnuson Moss Warranty Act if it's use on the face of the plaintiff's well pleaded complaint did not amount to a cause of action, a subject which defendants undertook to prove by removing this matter. Yet this cause of action has a four year statute of limitations applicable to it. Because the Magnuson-Moss Warranty Act contains no express statute of limitations, the court looks to the most analogous state statute and finds that the statute of limitations for a Magnuson Moss Warranty Act claim is the UCC four year statute of limitations. Hillery v. Georgie Boy Mfg., 341 F. Supp. 2d 1112, 1114 (D. Ariz., 2004).

A motion to dismiss based on a statute of limitations can only be granted when the plaintiff's complaint, read with the required liberality, would not permit the plaintiffs to prove that the statute was tolled. Hillery v. Georgie Boy, 341 F. Supp. 2d at 1114. In addition, plaintiffs wish to bring to the Court's attention long-established Washington case authority which holds: "The statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it. Wickwire v. Reard, 37 Wn.2d 748, 226 P.2d 192 (1951)." Rochester v. Tulp, 54 Wn.2d 71, 337 P.2d 1062 (1959).

III. Defendants Ca*n Not Carry Their Burden and Have Failed to Discharge that Burden in Their Motions.*

In the context of these Motions to Dismiss, defendants must carry both the burden of negating the existence of any issue of material fact and the existence of any viable claim in the Complaint when construed in the light most favorable to the

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Plaintiffs. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) held that a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. A complaint need not anticipate every defense and accordingly need not plead every response to a potential defense. Poe v. Haydon, 853 F.2d 418, 424 (6th Cir.1988). A court must construe the complaint in the light most favorable to the plaintiffs and accept as true all well-pleaded factual allegations. Cooper v. Parrish, 203 F.3d 937, 944 (6th Cir.2000).

In Klossner v. San Juan County, 21 Wash.App. 689, 693, 586 P.2d 899 (1978) the court held in the summary judgment context:

> Upon the moving party's failure, however, to meet its initial burden of proof, it is unnecessary for the nonmovant to submit any evidence and the motion must be denied. Jacobsen v. State, 89 Wash.2d 104, 110, 569 P.2d 1152 (1977); Preston v. Duncan, 55 Wash.2d 678, 682-83, 349 P.2d 605 (1960).

With respect to all of the individual claims, the defendants (while purporting to point to certain possible defenses or doctrines) have failed to show why the plaintiff's complaint can not possibly state a claim. Instead, the defendants have contented themselves with showing how they might win the case, such as with a trade secrets defense. However, these types of arguments appeal only to the defendants' own prejudices regarding the case, and fail to show why the complaint taken as a whole can not possibly state a claim.

III. DEFENDANTS MISUNDERSTAND THE ESSENTIAL CLAIMS IN THE COMPLAINT.

Defendants have failed to meet their initial burden of proof negating the existence of causes of action in Plaintiffs' Complaint. Sequoia has put forward some brief arguments, however, in apparent opposition to each of Plaintiffs'

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claims. The arguments get shorter and shorter as they number up to twelve, with some only a couple sentences long. Such argument cannot suffice to negate the existence of claims, particularly where, as here, all facts asserted by Plaintiffs must be regarded in the light most favorable to Plaintiffs as the non-moving party, and plaintiffs attached a detailed scientific study as well as the offending contract itself, obliging Snohomish County to defend any claims Sequoia may have "in any way regarding" its equipment. Such a contractual term is not only remarkable standing alone, it alone would likely create a fact issue as to the credibility of Snohomish's opposition here were this motion a summary judgment.

Nonetheless, Plaintiffs' have put forward evidence supportive of each and every claim.

Defendants' Cannot Defend an Unconstitutional Electoral Regime by Claiming the Legislature Approved It.

Defendants have advanced a series of cursory and hyper-technical arguments in response to Plaintiffs' claims. The narrow, unsubstantiated and inconsistent grounds argued cannot cure the overarching Constitutional infirmities identified. Can an electoral regime which eliminates Constitutional requirements of reviewability, transparency, and verifiability of actions of elections by the public, be defended simply by eliminating election officers and election boards and stating that the Open Meetings Act RCW 42.30 *et seq.* is inapplicable because all meetings have been replaced by secret electronic transactions, and the plaintiffs can therefore point to no "meeting" that was not

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Open?

The intent of the Contract is plainly to institute a type of electronic voting which (contrary to claims of a blanket legislative authority) also fails to meet with legislative enactments respecting reviewability and verifiability. (See Plaintiffs State Election Law Claim). The legislature mandated, for instance, periodic inspections for tampering, but did not explicitly contemplate what would or would not be susceptible to such inspection respecting the Sequoia-type electronic voting machine. In short, the Legislature never approved "secret vote counting" of the type instantiated by the Sequoia system.

Even had direct action been taken by a legislature fully cognizant of the technical aspects of the electronic voting machines in questions, as well as the effect of instituting secret vote counting and eliminating election checks and balances, such legislative action would not be immune from judicial review as to conformance with Constitutional requirements or even interpretation as to the effect of inconsistent statutory requirements. Thus, the claim heavily relied upon by Defendants that the Legislature has approved of something when used as a reason to file a Rule 12 motion is without basis in law.

Standing Based Upon Vote Dilution. Although Plaintiffs have articulated additional robust grounds for standing based upon actual damages and voter standing in its main response to the motions to dismiss, it is worth noting that the Complaint, on its face, also establishes standing based upon vote "dilution." Saratoga County Chamber of Commerce Inc. v. Pataki, 275 A.D.2d 145, 156, 712 N.Y.S.2d 687 (2000) held: "Voter standing arises when the right to

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vote is eliminated or votes are diluted [cites omitted]."

With regard to vote dilution, the Complaint specifically incorporates by reference App. B entitled, "Election Irregularities in Snohomish County General Election 2004," which, at p. 19, sets forth specific facts relating to vote dilution including, but not limited to, the evidence that nineteen Sequoia machines with observed malfunctions severe enough to warrant them being taken out of service early during Election Day collectively reflected statistically improbable vote counts. To be precise, the collective total of the nineteen machines showed 50% more votes for Dino Rossi than for Christine Gregoire, in one of the closest gubernatorial races in history. This result is at variance with both statewide results and results at the polling places in question.

For purposes of this motion to dismiss, it must be taken as a verity that Sequoia machines both malfunction in significant numbers, that they are observed by voters and officials to do so, and that the effect of those malfunctions is not party-neutral and candidate-neutral. This surely states a claim for voter dilution standing, and that the representations of Sequoia to the contrary that its systems are accurate are misrepresentations and breaches of express warranty that the machines comply with all state and federal laws (since the Contract recites at paragraph 14 that it is subject to all laws rules and regulations, state and federal, and this evidences the parties intent to comply with all law).

DEFENDANTS HAVE THE BURDEN OF ESTABLISHING A TRADE SECRET.

Sequoia further argues that a Public Disclosure Act claim can not be

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stated because of Sequoia's trade secrets. This merely states a possible defense that Sequoia might assert in its answer, but does not indicate that plaintiffs failed to state a claim particularly when, as here, plaintiffs pled that trade secrets were waived or are otherwise inapplicable.

In any event, the party seeking remedies for breach of a trade secret must first establish the existence of the trade secret. *See, e.g.,* Pacific Aerospace & Electronics, Inc. v. Taylor, 295 F.Supp.2d 1188 (E.D. Wash., 2003). It is instructive to note that Snohomish County counsel Douglas Morrill is of counsel on this case in his previous career as a Davis Wright Tremaine associate. Accordingly, Snohomish County is aware that the party asserting rights under a trade secret is required to establish its existence. To assume Sequoia has such enforceable trade secrets would be to draw all inferences in the wrong direction – in the favor of the defendants.

PLAINTIFFS HAVE PLED AN OPEN MEETINGS ACT CLAIM.

Plaintiffs have also pled an open Meetings Act claim. Plaintiffs' complaint refers to the election board at Penny Creek Elementary School, where plaintiff Lehto was stationed. Washington statutes provide the date of the general election for the election boards to meet, and to count votes in the presence of witnesses. Snohomish and Sequoia contracted to intentionally and purposely change the regime of vote counting to make it a trade secret, thus satisfying the element of knowing violation. It would be entirely possible for touch screen machines to allow public observation of vote counting: the MarkSense technology is one such example because the touch screen prints out a paper ballot which the voter

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inspects and which can also be subject to witnessing by observers.

DEFENDANTS FAIL TO MEET THEIR BURDEN ON THE MOTION REGARDING INDISPENSABLE PARTIES.

Although defendants argue that Secretary of State Sam Reed is an indispensable party, they fail to assert what specific "interest" the Secretary of State must defend, since as an ostensibly neutral regulator he should be neutral as to whatever voting technologies are used by counties. Presumably, the Secretary of State is not made a party to the County decisions presently being made to switch to vote by mail. Accordingly, he should not be a party to a cancellation of a contract that might indirectly result in vote by mail.

In addition, the defendants fail to cite or brief why "equity and good conscience" require dismissal of the action under FRCP 19(b) instead of simply joining Secretary of State Reed as a necessary party under FRCP 19(a). In the absence of such a showing, the defendants have failed to carry their burden of stating why Secretary of Reed is not only necessary, but why he is indispensable and unavailable to be joined in federal court.

Alternatively, were the Court to entertain granting the motion regarding indispensable parties, this would create "immediate and substantial hardship" that is grounds for remand in the first place. Therefore, there is no situation or set of facts where defendants 12(b)(7) motion could be properly granted, particularly where, as here, defendants have claimed a basis for indispensability but failed to identify it.

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IV. CONCLUSION.

Defendants' Motions to Dismiss ought to be denied. Finally, this matter ought to be deferred for consideration until the Plaintiffs' motion for remand can be considered.

DATED this 27th day of June, 2005.

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By: */s/ Randolph I. Gordon*

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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
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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 27th day of June, 2005.

/s/ Randolph I. Gordon
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