

The Honorable Ricardo S. Martinez

FILED ENTERED  
LODGED RECEIVED

MAY 18 2005 ES

BY AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON DEPUTY



05-CV-00877-RCPT

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

PAUL LEHTO, individually, JOHN WELLS,  
individually;

Plaintiffs,

vs.

SEQUOIA VOTING SYSTEMS, INC. and  
SNOHOMISH COUNTY;

Defendants.

Case No. C05-0877-RSM

**SEQUOIA'S MOTION TO DISMISS OR,  
ALTERNATIVELY, TO STRIKE PORTIONS  
OF COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
THEREOF; JOINDER IN SNOHOMISH  
COUNTY'S MOTION TO DISMISS**

Noted on Motion Calendar:  
Friday, June 10, 2005

**I. MOTION**

Defendant Sequoia Voting Systems, Inc. ("Sequoia") brings this Motion to Dismiss the Complaint filed by Plaintiff Paul Lehto ("Lehto") and Plaintiff John Wells ("Wells") collectively "Plaintiffs") pursuant to Federal Rule of Civil Procedure 12(b). Sequoia moves to dismiss the Complaint, and separately each cause of action alleged therein, on the grounds that Plaintiffs failed to file suit within statute of limitations, Plaintiffs lack standing, Plaintiffs fail to present a justiciable controversy, and Plaintiffs otherwise fail to state a claim upon which relief can be granted.

SEQUOIA'S MOTION TO DISMISS OR, ALTERNATIVELY, TO  
STRIKE PORTIONS OF COMPLAINT Page 1  
NO. C05-0877-RSM

HARRIS, MERICLE & WAKAYAMA, P.L.L.C.  
999 THIRD AVENUE, SUITE 3210  
SEATTLE, WASHINGTON 98104  
(206) 621-1818

1 In the alternative, Sequoia brings a Motion to Strike portions of the Complaint pursuant  
2 to Federal Rule of Civil Procedure 12(f).

3 These motions are based on this Motion, Memorandum of Points and Authorities, the  
4 Request for Judicial Notice, and the pleadings on file with the Court.<sup>1</sup>

5  
6 **II. INTRODUCTION**

7 Plaintiffs' Complaint is an expression of their opposition to the policy decision of the  
8 Washington State Legislature to allow electronic voting. Likewise, the Complaint reflects  
9 Plaintiffs' disagreement with the Secretary of State's certification of Sequoia's electronic voting  
10 machines for the 2004 election and the finding that Sequoia's machines comply with Washington  
11 law. Nevertheless, Plaintiffs do not directly challenge the legislature's decision or the Secretary  
12 of State's findings as no conceivable ground exists.

13 Instead, Plaintiffs attempt to indirectly attack both by purporting to challenge a July 2002  
14 contract between Sequoia and Snohomish County – a contract for the purchase of electronic  
15 voting machines (the "Contract"). Plaintiffs claim that electronic voting contravenes other  
16 Washington election laws and, therefore, the Contract for the purchase of electronic voting  
17 machines is void. Plaintiffs demand that this Court issue a declaratory judgment stating as much.

18 Plaintiffs, however, fail to allege any cognizable legal claim for obtaining this relief.  
19 First, the statute of limitations bars the Complaint because Plaintiffs' failed to file suit within ten  
20 days of the November 2004 election and failed to file suit within two years of the execution of  
21 the Contract. Second, Plaintiffs have no standing to challenge the Contract to which they are not  
22 a party or a third-party beneficiary. Third, no justiciable controversy exists concerning the  
23 Contract, a fundamental prerequisite to obtaining declaratory relief, because the November 2004

24 \_\_\_\_\_  
<sup>1</sup> Sequoia hereby joins the Motion to Dismiss filed by Defendant Snohomish County concurrently herewith.

1 election has long since ended and certification for the next election has not yet occurred. Fourth,  
 2 the Washington election laws specifically authorize electronic voting and, therefore, Plaintiffs'  
 3 claims that Washington election laws outlaw electronic voting is patently frivolous. Finally,  
 4 each of Plaintiff's separate claims fail to state a claim for a host of other reasons.

5 Accordingly, Sequoia requests that the Court dismiss the Complaint in its entirety.  
 6 Alternatively, Sequoia requests that the Court separately dismiss each cause of action which fails  
 7 to state claim. In addition, Sequoia alternatively requests that the Court separately strike each  
 8 meritless allegation in the complaint.

### 9 III. STATEMENT OF FACTS<sup>2</sup>

#### 10 A. The Parties

11 Sequoia is a Delaware corporation with its principal place of business in California. It provides  
 12 computerized, electronic election systems. *Id.* ¶ 2.5 – 2.6. The County is a chartered County in the  
 13 State of Washington authorized to conduct elections. *Id.* ¶ 2.3 – 2.4. Plaintiffs John Wells and Paul  
 14 Lehto are registered voters, citizens of Washington State, residing in Snohomish County, Washington.  
 15 *Id.* ¶ 2.1 and 2.2.

#### 16 B. The County Contracts for Purchase of Electronic Voting Machines from Sequoia

17 In July 2002, Snohomish County executed the purchase contract for one-thousand (1,000)  
 18 electronic voting machines from Sequoia entitled: "Agreement Between Snohomish County,  
 19 Washington and Sequoia Voting Systems, Inc. for the Purchase of the AVC EDGE Electronic  
 20 Voting System" (the "Contract"). *Id.* ¶ 5.4. The Contract required Snohomish County to pay  
 21 approximately \$5,000,000.00 for the Sequoia DREs and related accessories and spare parts, plus  
 22 a \$40,000 annual software licensing fee. *Id.* ¶ 5.5.

---

23 <sup>2</sup> The following facts are derived from the complaint, the attachments to the complaint, and those materials as to  
 24 which Sequoia is requesting judicial notice. The recitation below of any fact found in the complaint is not intended  
 as an admission, but simply recognizes that in a motion to dismiss and/or strike under Rule 12(b) the facts alleged in  
 the complaint must be accepted as true except to the extent that they are contradicted by matters of which the Court  
 may take judicial notice.

1 The Contract includes a one-year limited warranty for the voting machines. The warranty  
2 provides that the equipment will be free from defects and will conform to the specifications  
3 included in the contract documents and manuals. *Id.* ¶ 5.8 (Contract ¶ 32) The Contract also  
4 provides a one-year warranty for the software running the voting machines. *Id.* ¶ 5.9 (Contract,  
5 Ex. B) If the software malfunctions, the Contract allows the County to have Sequoia replace any  
6 defective-media or correct any errors. *Id.* ¶ 5.10 (Contract Ex. B).

7 The Contract requires the County to protect the confidential information provided by  
8 Sequoia. In particular, it requires that the County notify Sequoia in the event a third party  
9 demands disclosure of information considered to be confidential, propriety or trade secrets.  
10 Complaint ¶ 5.13 (Contract ¶ 26); ¶ 5.14 (Contract ¶ 34).

### 11 **C. Washington's Secretary of State Certifies Use of Sequoia's Electronic Voting 12 Machines**

13 The Secretary of State held a public hearing attended by party observers and members of  
14 the media to address any concerns about the use of Sequoia's electronic voting system in the  
15 November 2004 election. In addition, the Secretary of State performed a series of functional and  
16 volume/stress tests using a large volume of ballots simulating the conditions of the upcoming  
17 election.

18 On August 18, 2004, the Secretary of State of Washington certified and approved  
19 Sequoia's hardware and software "for use in Washington State, as a direct recording electronic  
20 vote tabulation system and central court optical scan system." The Secretary of State found that  
21 "Under the provisions of RCW 29A.12.020 and WAC 434-333-107, the Sequoia Pacific Voting  
22 System is approved for use in Washington State" and "Sequoia's system satisfies the  
23 requirements of RCW 29A.12.080 and WAC 434-333-107," the statutory and administrative

1 provisions governing the certification of electronic voting systems. See Request for Judicial  
 2 Notice, Exhibit "1" (Provisional Certification of An Central Court Optical Scan System and  
 3 Direct Recording Electronic Vote Tallying System at 1, 4-5.)

4 **D. Plaintiffs' Complaints About November 2004 Election**

5 During the November 2004 election, Plaintiff Lehto served as an election day, attorney  
 6 observer. Based on "on information and belief," Plaintiffs allege that ballots cast for the  
 7 Democratic gubernatorial candidate, Christine Gregoire, were attributed to the Republican  
 8 gubernatorial candidate, Dino Rossi, due to alleged errors in Sequoia's voting machines. *Id.* ¶  
 9 4.15. Based "on information and belief," Plaintiffs also allege that Sequoia machines might have  
 10 recorded, modified and/or miscounted previously recorded ballots. *Id.* ¶ 4.16. Again, on allege  
 11 "on information and belief," Plaintiff allege that many voting machines had to be recalibrated on  
 12 election day. *Id.* ¶ 5.26.

13 After the 2004 election, Plaintiff Lehto demanded confidential information from Sequoia and  
 14 the County concerning the operation of the electronic voting machines in the November 2004 election.  
 15 Specifically, Lehto sought to: (1) inspect the source code of the software (2) test the software (3) test  
 16 the electronic voting machines (4) review copies of computer files related to ballot creation, storage,  
 17 counting and reporting, and examine original computer versions of audit log files, other computerized  
 18 data. *Id.* ¶ 4.9 – 4.10. Sequoia and the County declined to provide the confidential and propriety  
 19 information to Lehto. *Id.* ¶ 5.29.

20 **IV. ARGUMENT**

21 **A. The Statute of Limitations Bars All Plaintiffs' Claims and, Therefore, the Entire  
 22 Complaint Fails**

23 Plaintiffs' claim that numerous errors occurred in the 2004 election. However, citizens  
 24 seeking relief based on errors in an election must file suit within ten days of the election

1 certification. See RCW 29.65.020; *Reid v. Dalton* (2004) 124 Wash.App.113, 122. Plaintiffs  
2 cannot avoid the ten-day statute of limitations by pleading an election contest as a complaint for  
3 declaratory relief. See *Reid*, 124 Wash.App. at 121. As Plaintiffs filed the Complaint long after  
4 this period, the statute of limitations bars their claims.

5 The two-year statute of limitations for challenges to public contracts also bars the entire  
6 Complaint. All Plaintiffs' claims challenge the Contract between Sequoia and the County.  
7 Citizens challenging public contracts must file suit within two years of the Contract's execution.  
8 See RCW 4.16.130; *Constable v. Duke*, 144 Wash. 263, 266, 257 P. 637 (1927); *Northern Grain*  
9 *& Warehouse Co. v. Holst*, 95 Wash. 312, 315, 163 Pac. 775 (1917). Here, Plaintiff admits  
10 Sequoia and the County entered into the Contract in July 2002, more than two and half years  
11 before Plaintiffs filed suit. As such, for this reason alone, the statute of limitations bars the entire  
12 complaint. (See County's Motion to Dismiss for full discussion regarding statute of limitations).

13 **B. Plaintiffs Have No Standing to Challenge the Contract Between the County and**  
14 **Sequoia and, Therefore, the Entire Complaint Fails**

15 Plaintiffs are not parties to the Contract between Sequoia and the County. Nor are  
16 Plaintiffs in privity with the contracting parties. And Plaintiffs are not third-party beneficiaries  
17 as they do not and cannot allege that Defendants intended to specifically benefit them. See  
18 *Rowan Northwest Decorators, Inc. v. Washington State Convention & Trade Center*, 78  
19 Wash.App. 322, 332-333 (1995). Likewise, Plaintiffs fail to allege any facts establishing  
20 standing as taxpayers. See *Reiter v. Wallgren*, 28 Wash.2d 872, 874 (1947).

21 As Plaintiffs have no standing to challenge the Contract, and every cause of action  
22 asserted by Plaintiffs challenges the Contract, the entire complaint fails. (See County's Motion  
23 to Dismiss for full discussion regarding Plaintiffs' lack of standing).

1 **C. No Justiciable Controversy Exists for Purposes of Declaratory Relief and,**  
2 **Therefore, Plaintiffs' Entire Complaint Fails**

3 All Plaintiffs' claims seek declaratory relief. Indeed, in summarizing the object of the  
4 Complaint, Plaintiffs state that they "make claims under the Uniform Declaratory Judgments Act  
5 [RCW 7.24.0101 et seq.] for specific declarations respecting the Contract and its provisions and  
6 for such other relief as may be necessary or proper." (Complaint ¶ 1.1.) In each cause of action,  
7 Plaintiffs request declarations that the Contract is void, that the Contract violates certain laws, or  
8 that Sequoia's software is not a trade secret.

9 However, it is well established that courts do not provide advisory opinions. Rather,  
10 under federal and Washington state law, to obtain declaratory relief, the Plaintiff must  
11 demonstrate "(1) an actual, present and existing dispute, or the mature seeds of one, as  
12 distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2)  
13 between parties having genuine and opposing interests, (3) which involves interests that must be  
14 direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial  
15 determination of which will be final and conclusive." *To-Ro Trade Shows v. Collins*, 144  
16 Wash.2d 403, 414-15, 27 P.3d 1149 (2001); *Diversified Indus. Dev. Corp. v. Ripley* (1973) 82  
17 Wash.2d 811, 815, 514 P.2d 137.

18 "Inherent in these four requirements are the traditional limiting doctrines of standing,  
19 mootness, and ripeness, as well as the federal case-or-controversy requirement." *To-Ro Trade*  
20 *Shows*, 144 Wash.2d at 414-15. A Plaintiff must satisfy all these factors "to ensure that the court  
21 will be rendering a final judgment on an actual dispute between opposing parties with a genuine  
22 stake in the resolution." *Id.*

1 Any declaratory relief concerning the November 2004 election is purely academic. The  
 2 election has long since concluded and the time period for challenging the results has long since  
 3 expired. Declaratory relief would have no impact on the election results. As such, it would not  
 4 finally or conclusively resolve anything regarding that election. To the contrary, it could only  
 5 serve to undermine the finality of the results. For these same reasons, no actual or present  
 6 dispute exists regarding the electronic voting in the 2004 election. *See Reid v. Dalton* (2004) 124  
 7 Wash.App.113, 122 (refusing to provide declaratory relief concerning "overall fairness of a  
 8 certified election").

9 Nor would declaratory relief provide a final, conclusive resolution to disputes concerning  
 10 future elections. The Secretary of State has not certified electronic voting machines for the next  
 11 election, which will involve the application of additional and different criteria. Therefore, no  
 12 actual and present dispute exists concerning the future use of electronic voting machines.  
 13 Moreover, Plaintiffs are entitled to participate in the future hearings concerning the testing and  
 14 certification of Sequoia's machines. Only if the Secretary of State certifies Sequoia's machines  
 15 in the future, and only if Plaintiff has grounds for claiming that the certification is unlawful, then  
 16 Plaintiffs may challenge the certification in a proper and timely complaint. Until then, any  
 17 dispute is purely hypothetical. *See To-Ro Trade Shows*, 144 Wash.2d at 414-15 (claim not  
 18 justiciable when event at issue has not yet occurred or remains matter of speculation).<sup>3</sup>

19  
 20  
 21 <sup>3</sup> See also *Diversified Indus. Dev. Corp.*, 82 Wash.2d at 815 (where claim against lessor remained "an unpredictable  
 22 contingency," matter was "not ripe for declaratory relief"); *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92  
 23 Wash.2d 789, 806, 597 P.2d 383 (1979) (no declaratory relief where agencies' future actions on certain contract  
 24 rights "appear [ed] to be founded on a hypothetical factual situation"); *DiNino v. State ex rel. Gorton*, 102 Wash.2d  
 327, 331, 684 P.2d 1297 (1984) (no declaratory relief where party who was neither pregnant nor terminally ill  
 challenged statute nullifying health care directive of pregnant or terminally ill patient); *Lawson v. State*, 107  
 Wash.2d 444, 460, 730 P.2d 1308 (1986) (where railroad had not abandoned right of way and county had expressed  
 SEQUOIA'S MOTION TO DISMISS OR, ALTERNATIVELY, TO  
 STRIKE PORTIONS OF COMPLAINT Page 8  
 NO. C05-0877-RSM



1 As Plaintiffs present nothing more than free-floating, theoretical Constitutional and  
2 statutory questions, the entire Complaint fails.

3 **D. Sequoia's Voting Machines Comply with Washington Law Governing Electronic**  
4 **Voting and, Therefore Plaintiffs' Complaint Fails**

5 The Washington legislature has specifically authorized electronic voting systems. The  
6 Washington legislature also established statewide standards for the testing and certification of  
7 electronic voting systems. And the Washington Secretary of State specifically approved the  
8 use of Sequoia's electronic voting system after reviewing all modifications made for  
9 Snohomish County.

10 In 2002, when the County purchased the System, Washington statutes specifically  
11 authorized direct recording electronic voting systems. Former RCW § 29.01.200 defined a  
12 "voting device" as "a piece of equipment used for the purpose of or to facilitate the marking of  
13 the ballot to be tabulated by a vote tallying system or a piece of mechanical or electronic  
14 equipment used to directly record votes and to accumulate results [.]"

15 The current statutory scheme (which will substantially change again prior to the 2006  
16 elections) provides that votes may be cast, registered, recorded or counted by means of voting  
17 systems that have been approved by the Secretary of State. RCW 29A.12.010 and 29A.12.020.  
18 There are specific statutory standards for approval. RCW 29A.12.080. The statute also  
19 requires programming tests for all vote tallying systems. RCW 29A.12.130.

20 The Washington legislature delegated to the Secretary of State rule making authority for  
21 the approval of electronic voting systems. *See, e.g.*, RCW 29A.04.610 (12) (authorizing the

22  
23 no intent to acquire it, property owners' challenge to statutes permitting recreational public use of rights of way was  
"premature").

1 Secretary of State to issue regulations to cover situations where voting devices fail); RCW  
 2 29A.04.610 (32) (authorizing regulation of testing of vote tallying software programming); RCW  
 3 29A.04.610 (49) and (51) (authorizing Secretary of State to issue regulations implementing Help  
 4 America Vote Act); RCW 29A.04.611 (4) (authorizing the Secretary of State to issue regulations  
 5 concerning examination and testing of voting systems for certification.) The legislature further  
 6 authorized the use electronic voting systems in RCW 29A.44.160, which refers to voting  
 7 equipment capable of direct tabulation of each voter's choices.

8 Pursuant to his rulemaking authority, the Washington Secretary of State has adopted  
 9 specific requirements, both procedural and substantive, for certification of electronic voting  
 10 systems. *See* Washington Administrative Code Ch. 434-333. The Code requires specific and  
 11 detailed tests (WAC 434-333-030), a public hearing (WAC 434-333-035), culminating in the  
 12 certification of specific systems (WAC 434-333-040). The Code also include rigid testing  
 13 requirements for all electronic voting systems, as required by RCW 29A.12.130 and as  
 14 implemented in WAC 434-333-063 *et seq.*

15 It is undisputed that the Secretary of State specifically approved the Sequoia System  
 16 pursuant to RCW 29A.12.080. (RJN Ex. 1) It is also undisputed that Plaintiffs have undertaken  
 17 no effort to challenge that decision, any of the regulations issued by the Secretary of State, or the  
 18 constitutionality of any of the state statutes described above.

19 Many of Plaintiffs' claims allege that electronic voting systems violate Washington's  
 20 Election Code. Specifically,

- 21 • The Second Cause of Action includes an allegation that electronic voting systems  
 22 do not comply with the requirement that "the tabulation of ballots, paper or  
 23 otherwise, shall be open to the public[.]" RCW 29A.44.250.

- 1
- 2       • The Third Cause of Action claims that electronic voting systems contravene the
- 3       authority of the “election board” under RCW 29A.04.049, and the election
- 4       “policy” of protecting “the integrity of the electoral process” as provided in RCW
- 5       29A.44.205.
- 6
- 7       • The Sixth Cause of Action alleges that electronic voting violates the “chain of
- 8       custody” requirements in “RCW 29A et seq.”
- 9
- 10      • The Seventh Cause of Action alleges that electronic voting systems violate RCW
- 11      29A.64.041(1) (defining “ballot”), RCW 29A.04.115 (regarding accepting and
- 12      counting ballots), and RCW 29A.12.150 (requiring “separate” ballots).
- 13
- 14      • The Tenth Cause of Action alleges that electronic voting systems violate RCW
- 15      29A.44.190 which allows for periodic inspection of voting systems.

16       Each and every one of these claims rests on the false premise that paper ballots and  
17 traditional voting systems associated therewith are the only legal form of election in the state of  
18 Washington. However, each and every claim fails because, as established above, the  
19 Washington statutes specifically authorize electronic voting, the Washington Administrative  
20  
21  
22  
23

1 Code specifically authorizes electronic voting, and the Secretary of State specifically authorized  
2 the use Sequoia's electronic voting system in Snohomish County.<sup>4</sup>

3 Moreover, the County and Sequoia are not proper Defendants. Plaintiffs' real complaint is with  
4 the state legislature and Secretary of State, who have approved a system which Plaintiffs, for policy  
5 reasons, oppose. Plaintiffs are free to pursue these issues in the democratic arena, but neither Sequoia nor  
6 the County are proper Defendants in an action seeking to set aside statewide regulations, statutes and  
7 actions of the Secretary of State.

8 **E. Plaintiffs' Individual Causes of Action Fail for Separate and Independent Reasons**

9 Not only do all Plaintiffs' claims fail for lack of standing, for failure to file within the  
10 applicable statute of limitation, for failure to present a justiciable controversy, Plaintiffs' separate  
11 claims fail to state a claim for the following additional reasons.

12  
13 **1. The First Cause of Action for Violation of "Liberty Interests" Fails to State a Claim**

14 Plaintiffs' First Cause of Action appears to seek relief based on a "liberty interest"  
15 argument and an equal protection argument. Courts typically decide cases concerning the right  
16 to vote on equal protection/fundamental rights analysis and not as a "liberty interest." In any  
17 event, the Ninth Circuit has already rejected the precise Constitutional challenge brought by  
18 Plaintiffs in this case. In *Weber v. Shelley*, 347 F.3d 1101 (9<sup>th</sup> Cir. 2003), the court ruled on a  
19 constitutional challenge to the Sequoia AVC Edge System, the same system at issue in this case,  
20

21  
22 <sup>4</sup> Plaintiffs never filed a timely and proper challenge to the Secretary of State's approval of the Sequoia's machines. As such,  
23 Plaintiffs' claims fail for the additional reason that they failed to exhaust administrative remedies. (See County's Motion to  
Dismiss for full discussion regarding the failure to exhaust).

1 as used in Riverside County, California. As in this case, the Secretary of State approved the  
 2 system pursuant to state election law. *Id.*, 1103. The court held that:

3 We cannot say that the use of paperless, touch-screen voting systems  
 4 severely restricts the right to vote. No balloting system is perfect.  
 5 Traditional paper ballots, as became evident during the 2000  
 6 Presidential election, are prone to overvotes, undervotes, "hanging  
 7 chads," and other mechanical and human errors that may thwart voter  
 8 intent. . . . Meanwhile, touch-screen voting remedies a number of these  
 9 problems, albeit at the hypothetical price of vulnerability to  
 10 programming "worms." The AVC Edge System does not leave  
 11 Riverside voters without any protection from fraud, or any means of  
 12 verifying votes, or any way to audit or recount. The unfortunate reality  
 13 is that the possibility of electoral fraud can never be completely  
 14 eliminated no matter which type of ballot is used. *Id.* at 1106.

15 The court ultimately concluded that:

16 California made a reasonable, politically neutral and non-  
 17 discriminatory choice to certify touch screen systems as an alternative  
 18 to paper ballots. Likewise, Riverside County, in deciding to use such  
 19 a system. Nothing in the Constitution forbids this choice. *Id.*, at 1107

20 Attorneys often claim a case is "directly on point." In this instance, the same voting  
 21 system, adopted in the same way, by another state in this Circuit has already passed  
 22 Constitutional muster. There is no Constitutional issue with regard to the right to vote in this  
 23 case.

24 **2. The Second Cause of Action for Violation of "Policies" Underlying the Public  
 Records Act, Open Meetings Act, and Tabulation Requirements Fails to State a Claim**

Plaintiff's Second Cause of Action is actually three separate claims. Plaintiffs request  
 that the Court void the entire Contract because it allegedly violates: (1) the "policies" underlying  
 the Public Records Act, (2) the "policies" underlying the Open Meetings Act, and (3) the  
 tabulation requirements under RCW 29A.44.250.

1                   **a. Plaintiff's Public Records Act Claim Fails**

2           Plaintiffs essentially concede they cannot plead an actual claim for a violation of the  
3 Public Records Act by alleging that the Contract merely violates the "policies" embodied in the  
4 Act. It is axiomatic that, to state a claim, a Plaintiff at least must allege a violation of a positive  
5 rule of law. No claim exists for a mere violation of a "policy" underlying a rule of law. As  
6 such, Plaintiffs' claim under the Public Records Act fails for this reason alone.

7           In addition, Plaintiffs cannot allege an actual violation of the Public Records Act because  
8 the Act categorically exempts the requested documents from disclosure. Specifically, the Public  
9 Records Act exempts "computer source code" (RCW 42.17.310(1)(h)), valuable trade  
10 information (RCW 42.17.310(bb) and RCW 51.36.120), and business-related information RCW  
11 42.17.310(ff) and RCW 15.86.110).

12           Likewise, it is well recognized that trade secrets are protected from public disclosure  
13 pursuant to RCW 42.17.260(1) and the Uniform Trade Secrets Act, RCW 19.108. *See also*  
14 *Spokane Research and Defense Fund v. City of Spokane* 96 Wash. App. 568, 983 P 2d 676, 683  
15 (Wash.App. 1999); *Concerned Rate Payers Association v. Public Utility District No. 1 of Clark*  
16 *County, Washington* 138 Wash. 2d 950, 963 (technical specifications for turbine to be used in  
17 electrical power plant may be exempt under RCW 42.17.310(1)(h)); *Progressive Animal Welfare*  
18 *Society v. University of Washington*, 125 Wash. 2d 243, 884 P.2d 592, 599 (1995) ("*PAWS*")  
(Public Records Act exempts disclosure of intellectual property).

19           Indeed, the Washington Supreme Court in *PAWS* case made clear that the "Public  
20 Records Act is simply an improper means to acquire knowledge of a trade secret." The Court  
21 emphasized that the "Legislature...recognizes the protection of trade secrets, other confidential  
22 research, development, or commercial information concerning products or business methods  
23 promotes business activity and prevents unfair competition[.]" The Court further noted that, as a

1 result, “the legislature declare[d] that a matter of public policy that the confidentiality of such  
2 information be protected and its unnecessary disclosure be prevented.” *Id* at 601; *see also*  
3 *Confederated Tribes of the Chehalis Reservation v. Johnson* 135 Wash. 2d 734, 958 P.2d 260,  
4 266-267 (Wash. 1998) (Public Records Act exempts disclosure of trade secret).

5 Here, because the exemptions for computer source code, valuable trade information,  
6 business-related information, and trade secrets categorically prohibit the disclosure of the  
7 documents Plaintiffs seek, Plaintiffs cannot state a claim for a violation of the Public Records  
8 Act.

9 **b. Plaintiff’s Open Meetings Act Claim Fails**

10 Again, Plaintiffs essentially concede they cannot plead an actual claim under Open  
11 Meetings Action because they merely allege that the Contract violates the “policies” embodied in  
12 the Act.

13 In addition, Plaintiffs cannot allege a violation of the Open Meetings Act. To state a  
14 claim, Plaintiff must at least allege “(1) members of a governing body (2) held a meeting of that  
15 body (3) where that body took action in violation of OPMA, and (4) the members of that body  
16 had knowledge that the meeting violated the statute.” *Washington Public Trust Advocates v. City*  
17 *of Spokane* 120 Wash.App. 892, 86 P.3d 835 (Wash.App. 2004); RCW 42.30.030 and  
18 42.30.020(1)(4).

19 Plaintiffs fail even to identify any public “meeting.” Nor do they identify the relevant  
20 governing body and its members. Again, Plaintiffs do not identify the location of the meeting.  
21 And, of course, Plaintiffs do not allege how unidentified members of an unidentified  
22 governmental body knew the unidentified meeting violated the Open Meetings Act.

23 Furthermore, it is undisputed that the meetings to review and certify Sequoia’s voting  
24 machines were open to the public. In fact, Washington’s Secretary of State held a public

1 meeting specifically to address the use of Sequoia's voting machines in Snohomish County for  
2 the November 2004 election. Likewise, the Secretary of State publicly tested the machines for  
3 use in the same County in the same election, which Plaintiffs now challenge. (RJN Ex. 1)

4 For these reasons as well, Plaintiff's claim under the Open Meetings Act must fail.

5 **c. Plaintiff's Tabulation Claim Fails**

6 Plaintiffs also include an allegation that electronic voting systems do not comply with  
7 RCW 29A.44.250 which states that "the tabulation of ballots, paper or otherwise, shall be open  
8 to the public" and WAC 434-261-010 which requires vote counting centers be open. Plaintiffs  
9 do not allege that the collection of voting data from the machines occurs in private, only that the  
10 use of electronic voting machines themselves inherently violates the requirements of the statute.  
11 In doing so, Plaintiffs in effect ask this Court to find that the Washington legislature intended to  
12 outlaw electronic voting. Of course, as demonstrated above, the Washington legislature  
13 specifically authorized electronic voting and promulgated a comprehensive scheme regulating its  
14 use. See, e.g., RCW 29A.12.130; 29A.44.160. As such, Plaintiffs' tabulation claim fails.

15  
16 **2. Plaintiffs' Third Cause of Action for Impermissible Delegation of  
Governmental Function Fails to State a Claim**

17 Plaintiffs' Third Cause of Action claims that the Contract constitutes an impermissible  
18 delegation of authority of the "election board" under RCW 29A.04.049 because "Sequoia, with  
19 its ongoing maintenance and support of its own machines, is the functional equivalent of the  
20 election division of the Auditor's office." (Complaint ¶ 7.3.3)

21 RCW 29A.04.049 simply defines what an election board is – "a group of election  
22 officers serving one precinct or a group of precincts in a polling place." Plaintiffs do not allege



1 any particular statutory right exclusive to election boards that is being usurped, nor does the  
2 statute they cite set forth any such "core functions." Moreover, it is inconceivable that the  
3 County's \$40,000.00 contract with Sequoia for maintaining and supporting \$5,000,000.00 worth  
4 of voting machines could arise to the level of an impermissible delegation of government  
5 authority.

6 Furthermore, any contract for electronic voting machines will likely include a provision  
7 for maintaining and servicing the machines. As such, Plaintiffs again in effect claim that the  
8 legislature, through various election code provisions, intended to outlaw electronic voting. And  
9 again, the specific State statutes authorizing electronic voting, and authorizing the Secretary of  
10 State to inspect and improve such systems put this argument to rest.

11 **3. Plaintiffs' Fourth Cause of Action Regarding Trade Secrets Fails to State a**  
12 **Claim**

13 Plaintiffs' Fourth Cause of Action seeks a free-floating, advisory opinion declaring that  
14 Sequoia's software is not a trade secret. Plaintiffs' allegations confirm just the opposite.

15 Plaintiffs allege claim that Sequoia's software does not receive trade secret protection  
16 because the difficulty in decompiling the source code provides adequate protection from  
17 disclosure. However, proprietary information does not lose its trade secret status through use of  
18 additional security measures. To the contrary, preventing disclosure establishes and maintains  
19 the trade secret protection. Thus, in *Q-Co. Industrites, Inc. v. Hoffman*, 625 F.Supp. 608 (1985  
20 S.D.N.Y.), the Court held that computer software constituted a trade secret precisely because the  
21  
22  
23

1 public could not access its source code.<sup>5</sup> Indeed, under Plaintiffs' theory, trade secret protection  
2 would not apply to "any software." See ¶ 7.4.1.

3 Plaintiffs further allege that the use of Sequoia's software by public agencies strips it of  
4 trade secret status. As established above, the Public Records Act and Washington case law  
5 establish the exact opposite. See *Progressive Animal Welfare Society ("PAWS") v. University of*  
6 *Washington*, 125 Wash. 2d 243, 884 P.2d 592, 599 (1995) (holding that trade secrets disclosed to  
7 public entity retains full protection from disclosure).

8 Plaintiffs also allege that Sequoia's software is not a trade secret because it does not  
9 provide a competitive advantage. This allegation is belied by the remainder of their complaint.  
10 Plaintiffs admit that other voting systems compete with Sequoia in the market, Sequoia obtained  
11 a \$5 million contract from the County, and that Sequoia protects its source code from public  
12 disclosure. Trade secret protection does not require a showing that the propriety information is  
13 the best product on the market.

14 Plaintiffs allege that Sequoia exposed its software to the public by placing it in escrow in  
15 New Mexico. Placing the source code in escrow protects the software licensee in case the  
16 software vendor files for bankruptcy or suffers other calamities. It does not waive trade secret  
17 protection. See *E.G. Computer Associates International v. Bryan* 784 F.Supp. 982 (E.D.N.Y.  
18 1992). Rather, the use of escrow protects the source code from disclosure. And Plaintiffs admit  
19 in their complaint Sequoia escrowed its software and included contractual provisions to protect  
20 disclosure of its software secrets.

---

21 <sup>5</sup> See also *Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.* 732 F.Supp. 370; affd. 920 F.2d  
22 171 ( Cir, 1990) (software was a trade secret where company maintained secrecy of source codes); *Cmax*  
23 *Cleveland, Inc. v. UCR, Inc.* (1992), M.D.GA. 804 F.Supp. 337 (trade secret established by,inter alia, requirement  
24 that employees shred copies of source code); *Computer Associates International v. Quest Software, Inc.* 333 F.Supp.  
2d 688 (N.D. Ill. 2004) (trade secret protection requires reasonable efforts to protect source code).

1 As such, Plaintiffs' request for an advisory opinion concerning the trade secret statute of  
2 Sequoia's software must fail.

3  
4 **4. Plaintiffs' Fifth Cause of Action for Misrepresentation and Breach of  
Warranty Fails to State a Claim**

5  
6 Plaintiffs' Fifth Cause of Action contains two separate claims: one for misrepresentation  
7 and another for breach of warranty, neither of which have an merit.

8 **a. Plaintiffs' Misrepresentation Claim Fails**

9 Plaintiffs allege that Sequoia represented that its voting machines were accurate, lawful  
10 and fit for use in elections. Plaintiffs allege that Sequoia then inserted "a contractual provision  
11 purporting to waive the implied warranties of merchantability and fitness for a particular purpose  
12 through a contract provision." Plaintiffs then request a declaration that the warranty disclaimers  
are not effective. Complaint ¶ 7.5.1.

13 Plaintiffs' misrepresentation claim fails for no less than ten independent reasons.  
14 Plaintiffs do not identify the actual speakers. Plaintiffs do not identify the listeners. Nor do  
15 Plaintiffs identify the time or place of the representations. Indeed, Plaintiffs do not even allege  
16 falsity, or the speaker's knowledge of falsity, or the listener's ignorance of its falsity; or the  
17 listener's reliance on the representation, or the damages suffered by Plaintiffs. *See Stiley v.*  
18 *Block*, 130 W.2d 486, 505, 925 P.2d 194 (1996) (elements of misrepresentation claim); *Sun Sav.*  
19 *& Loan Assoc. v. Dierdorff*, 825 F.2d 187, 196 (9th Cir.1987) (heightened pleading standard for  
20 misrepresentation claim); *Fidelity Mortgage Corp. v. Seattle Times Co.*, 213 F.R.D. 573, 575  
21 (W.D.Wash.2003) (same). Furthermore, the parole evidence rule bars Plaintiffs' attempt to use  
extrinsic statements to contradict the express terms of the Contract.

22 For all these reasons, Plaintiffs' misrepresentation claim fails.

1                   **b. Plaintiffs' Claim for Breach of Warranty Fails**

2           Likewise, Plaintiffs' breach of warranty claim fails for numerous, independent reasons.  
3           First, Plaintiffs do not even allege a breach of any warranty. Second, Plaintiffs do not allege how  
4           the unidentified breach occurred. Third, Plaintiffs never allege how a breach caused them  
5           damage. *See Seattle Flight Serv., Inc. v. Auburn*, 24 Wash.App. 749, 751, 604 P.2d 975 (1979)  
6           (elements for breach of warranty claim). Fourth, Plaintiffs allege no basis for invalidating a  
7           disclaimer of warranty it was contained in a public contract executed upon legal advice and  
8           signed by not only the County executive, but by its attorney.

9           For all these reasons, Plaintiffs' breach of warranty claim fails.

10                   **5. Plaintiffs' Sixth Cause of Action For Violation of "Chain of Custody" Rules  
11                   Fails to State a Claim**

12           Plaintiffs' Sixth Cause of Action requests a declaration that the Contract fails to comply  
13           with "chain of custody" rules as allegedly required by "RCW 29A *et seq.*" Plaintiffs decline to  
14           identify any specific provision of the Election Code which the Contract purportedly violates.  
15           And the term, "chain of custody" appears nowhere in RCW 29A.

16           Moreover, this claim, like many others, asserts that electronic voting in general violates  
17           some unspecified provision of the Washington election code.<sup>6</sup> As Washington legislature  
18           specifically authorized electronic voting and enacted a comprehensive scheme for regulating  
19           electronic voting, Plaintiffs' claim that the Washington legislature intended to outlaw electronic  
20           is baseless.

---

21           <sup>6</sup> Indeed, Plaintiffs do not even allege that the absence of a chain of custody for the memory cartridge containing the  
22           recorded votes. They simply contend that the memory cartridge is "not reasonably free from tampering during  
23           election day like paper ballots in a locked box." Complaint ¶ 7.62 Apparently Plaintiffs are unfamiliar with the  
24           long history of ballot box tampering that is one of the strongest policy elements in favor of electronic voting. *Cf.*  
*Weber v. Shelley, supra*, 347 F.3d at 1106 (9<sup>th</sup> Cir. 2003)

1           **6. Plaintiffs' Seventh Cause of Action for Violation of Voting Secrecy Fails to**  
2           **State a Claim**

3           Plaintiffs' Seventh Cause of Action, like many of their others, claims that electronic  
4           voting systems violate RCW 29A.64.041(1) (defining "ballot"), RCW 29A.04.115 (regarding  
5           accepting and counting ballots), and RCW 29A.12.150 (requiring "separate" ballots). Again,  
6           these claims fail because the legislature specifically authorizes electronic voting.

7           **7. Plaintiffs' Tenth Cause of Action for Violation of Voting Secrecy Fails to**  
8           **State a Claim**

9           Plaintiffs' Tenth Cause of Action alleges that electronic voting systems violate RCW  
10          29A.44.190 which allows periodic inspection of voting systems. Again, this claim fails as well  
11          because the legislature specifically authorized electronic voting.

12          **8. Plaintiffs' Eleventh Cause of Action For Relief Additional Relief Fails to**  
13          **State a Claim**

14          Plaintiffs' Eleventh Cause of Action is a vague request for equitable relief, in addition to  
15          declaratory relief, under the Declaratory Judgment Act. As established above, Plaintiffs have no  
16          standing to seek declaratory relief. Likewise, Plaintiffs fail to allege any justiciable controversy,  
17          a fundamental prerequisite to any declaratory relief action. Having failed to state a claim for  
18          declaratory relief, Plaintiffs have no basis for seeking other relief the Declaratory Judgment Act.  
19          Relief.

20          **9. Plaintiffs' Twelfth Cause of Action for Disgorgement and Restitution Fails to**  
21          **State a Claim**

22          Plaintiffs' Twelfth Cause of Action asks the Court to force Sequoia to refund the  
23          \$5,000,000.00 that the County for the voting machines at the time of sale in July of 2002.

1 Plaintiffs fail to state any substantive claim supporting this incredible request for relief. For this  
2 reason alone, the claim fails

3 In addition, the County used Sequoia's machines in two subsequent elections. The  
4 Secretary of State approved their use. The County is in the possession of the machines. And the  
5 County has made no complaint. If it did, it would be their right to seek disgorgement or  
6 restitution, not Plaintiffs'.


7 Furthermore, in light of the above, even if Plaintiff could convince a court in the future to  
8 accept their novel theories of Washington statutory and Constitutional law and to find that the  
9 current configuration of the Sequoia system to be improper, no justification for restitution or  
10 disgorgement would exist. And Sequoia did not guarantee that its machines would satisfy  
11 Washington's election laws without modifications or adjustments. Indeed, the contract itself  
12 expressly disclaims any such representation. As such, there is no basis in the contract, contract  
13 law, or equity, or the declaratory judgment statute for ordering restitution.

14 **V. CONCLUSION**

15 Accordingly, Sequoia requests that the Court dismiss the Complaint in its entirety.  
16 Alternatively, Sequoia requests that the Court separately dismiss each cause of action which fails  
17 to state claim. In addition, Sequoia alternatively requests that the Court separately strike each  
18 meritless allegation in the complaint.

19 Dated: May 18, 2005

HARRIS MERICLE & WAKAYAMA

20 By:   
21 Aaron B. Lee, WSBA #30739,  
22 Malcolm S. Harris, WSBA #4710  
23 Attorneys for the Defendant,  
24 Sequoia Voting Systems, Inc.