Hearing Date: March 24, 2006

Judge Mary Roberts

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

PAUL LEHTO, et al.,

Plaintiffs,

v.

SEQUOIA VOTING SYSTEMS, INC. and SNOHOMISH COUNTY,

Defendants.

Case No. 05-2-11769-9 SEA

DEFENDANT SEQUOIA'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER CR 12(b)(6) AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

I. RELIEF REQUESTED

Defendant Sequoia Voting Systems, Inc. ("Sequoia") brings this Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted against Paul Lehto ("Lehto") and John Wells ("Wells") (collectively, the "Plaintiffs"), pursuant to CR 12(b)(6). Sequoia moves to dismiss the Complaint, and separately each cause of action alleged therein, on the grounds that

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Plaintiffs fail to state claims upon which relief can be granted, Plaintiffs lack standing, and Plaintiffs' claims are all either moot or not ripe.

Accordingly, Sequoia requests that the Court dismiss the Complaint in its entirety. Alternatively, Sequoia requests that the Court separately dismiss each cause of action which fails to state a claim.

II. STATEMENT OF FACTS[1]

A. The County Contracts for Purchase of Electronic Voting Machines from Sequoia in 2002

In July 2002, Snohomish County executed a purchase contract for 1,000 electronic voting machines from Sequoia entitled: "Agreement Between Snohomish County, Washington and Sequoia Voting Systems, Inc. for the Purchase of the AVC EDGE Electronic Voting System" (the "Contract"). *See* Plaintiffs' Complaint for Declaratory Judgment and Other Relief ("Complaint") ¶ 5.4, Ex. 1 (Contract). The Contract required Snohomish County to pay approximately $5,000,000 for the Sequoia voting machines and related accessories, plus a $40,000 annual software licensing fee. *Id.* at ¶ 5.5, Ex. 1 (Contract, Ex. A).

The Contract includes a one-year limited warranty. The warranty provides that the equipment will be free from defects and will conform to the specifications included in the contract documents and manuals. Compl. ¶ 5.8, Ex. 1 (Contract ¶ 32). The Contract also provides a one-year warranty for the software running the voting machines. *Id.* at ¶ 5.9, Ex. 1 (Contract, Ex. B). The County is not obligated to continue receiving services under the Contract after July 2003 unless it chooses to do so. *Id.*, Ex. 1 (Contract ¶¶ 4, 18).

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[1] This factual statement is derived from Plaintiffs' Complaint, the attachments to the Complaint, and those materials as to which Sequoia is requesting judicial notice. The recitation below of any fact found in the Complaint is not an admission, but recognizes that, in the context of a motion to dismiss, the facts alleged in the Complaint must be

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The Contract contains a standard provision requiring the County to protect the confidential information provided by Sequoia. In particular, it requires that the County notify Sequoia in the event a third-party demands disclosure of information considered to be confidential, proprietary or a trade secret. *Id.* at ¶¶ 5.13, 5.14, Ex. 1 (Contract ¶¶ 26, 34).

The Contract does not specify that the Sequoia machines must be used or how they are to be used. It does not authorize Sequoia personnel to have any specific role in Snohomish County elections.

B. Washington's Secretary of State Certifies Use of Sequoia's Electronic Voting Machines

The Secretary of State held a public hearing attended by party observers and members of the media to hear any concerns about the use of Sequoia's electronic voting system prior to the November 2004 election. In addition, the Secretary of State performed a series of functional and volume/stress tests using a large volume of ballots simulating the conditions of the upcoming election. *See* Request for Judicial Notice ("RJN"), Ex. 1 (Provisional Certification of A Central Count Optical Scan System and Direct Recording Electronic Vote Tallying System at 4-5.)

On August 18, 2004, the Secretary of State certified and approved Sequoia's hardware and software "for use in Washington State, as a direct recording electronic vote tabulation system and central court optical scan system." The Secretary of State found that Sequoia's system "satisfies the requirements of RCW 29A.12.080 and WAC 434-333-107," the statutory and administrative provisions governing the certification of electronic voting systems. *Id.*

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accepted as true except to the extent that they are contradicted by matters of which the Court may take judicial notice.

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C. Plaintiffs' Complaints About the November 2004 Election

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

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

Plaintiffs initially filed their Complaint in Washington Superior Court on April 7, 2005. On May 10, 2005, Defendants removed the Complaint to federal court on the grounds that it presented a federal question. Shortly thereafter, Defendants filed a Motion to Dismiss the Complaint in federal court for failure to state a claim. Plaintiffs filed a Motion to Remand on August 8, 2005. The federal court granted Plaintiffs' motion and remanded the matter to this Court.

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Plaintiffs' filings in federal court contained important clarifications as to the scope of their claims. In particular, Plaintiffs clarified that they are not challenging either the 2004 election itself or the Secretary of State's decision to certify the Sequoia machines and software for use in this state. RJN, Ex. 2 (Plaintiffs' Combined Memorandum in Response to the Motions to Dismiss or to Strike from Both Defendants Sequoia and Snohomish County) at 17:21 – 24, 18: 25 – 19:13). Because the case was remanded, the federal court never ruled on Defendants' Motion to Dismiss.

III. STATEMENT OF ISSUES

Whether the Court should dismiss Plaintiffs' claims against Sequoia because Sequoia's voting machines comply with Washington law governing electronic voting and, therefore, Plaintiffs' entire Complaint fails.

Whether the Court should dismiss Plaintiffs' claims against Sequoia because Plaintiffs have no standing to challenge the Contract to which they are not a party or a third-party beneficiary.

Whether the Court should dismiss Plaintiffs' claims against Sequoia because Plaintiffs' claims are either moot or unripe and, therefore, Plaintiffs' entire Complaint fails.

Whether the Court should dismiss Plaintiffs' claims against Sequoia because each of Plaintiffs' separate claims fails to state a claim for which relief can be granted based on a host of additional independent reasons.

IV. EVIDENCE RELIED UPON

(a) Exhibits 1, 2, 3 and 4 to the Request for Judicial Notice

(b) the Plaintiffs' Complaint

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V. AUTHORITY AND ARGUMENT

A. Sequoia's Voting Machines Comply with Washington Law Governing Electronic Voting and, Therefore the Entire Complaint Fails

Plaintiffs' Complaint is a polemical expression of their opposition to the policy decision of the Washington State Legislature to authorize electronic voting. The Complaint also reflects Plaintiffs' objection to the Secretary of State's certification of Sequoia's DRE voting machines and his finding that Sequoia's machines comply with Washington law. Nevertheless, Plaintiffs concede that they are not challenging the legislature's decision or the Secretary of State's findings. Instead, Plaintiffs attempt to indirectly attack both by purporting to attack a July 2002 contract between Sequoia and Snohomish County for the purchase of electronic voting machines (the "Contract").

The Legislature has specifically authorized electronic voting systems and has established statewide standards for the testing and certification of electronic voting systems. The Secretary of State specifically approved the use of Sequoia's electronic voting system after reviewing the modifications made for Snohomish County. *See* RJN, Ex. 1.

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

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The current statutory scheme provides that votes may be cast, registered, recorded or counted by means of voting systems that have been approved by the Secretary of State. RCW 29A.12.010-29A.12.020. Parties to contracts for voting systems must show that the equipment is the same as that certified by the Secretary of State and that the equipment operates correctly as delivered to the County. RCW 29A.12.070. The statute also requires programming tests for all vote tallying systems. RCW 29A.12.130.

The Legislature delegated to the Secretary of State rulemaking authority for the approval of electronic voting systems. *See, e.g.,* RCW 29A.04.610(12) (authorizing the Secretary of State to issue regulations to cover situations where voting devices fail); RCW 29A.04.610(32) (authorizing regulation for the testing of vote tallying software programming); RCW 29A.04.610(49) and (51) (authorizing Secretary of State to issue regulations implementing Help America Vote Act); RCW 29A.04.611(4) (authorizing the Secretary of State to issue regulations concerning examination and testing of voting systems for certification); RCW 29A.44.160 (referencing voting equipment capable of direct tabulation of each voter's choices).

Pursuant to its rulemaking authority, the Secretary of State adopted specific requirements, both procedural and substantive, for certification of electronic voting systems. *See* Washington Administrative Code ("WAC") 434-335. The Code requires specific and detailed tests (WAC 434-335-030), a public hearing (WAC 434-335-100), culminating in the certification of specific systems (WAC 434-335-130). The Code also includes rigid testing requirements for all electronic voting systems, as required by RCW 29A.12.130 and as implemented in WAC 434-335-020 to 434-335-120.

The Secretary of State specifically approved the Sequoia System pursuant to RCW 29A.12.080. RJN, Ex. 1. Plaintiffs have expressly waived any challenge to that decision,

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stating: "Defendants . . . mistakenly assert that Plaintiffs' claims seek to challenge the Secretary of State's certification of the electronic voting machines . . . nowhere is there a claim seeking to overturn the Secretary of State's certification or any cause of action relying on such a finding." RJN, Ex. 2 (Plaintiffs' Combined Memorandum in Response to the Motions to Dismiss or to Strike from Both Defendants Sequoia and Snohomish County) at 18:27 – 19:4.

Many of Plaintiffs' claims allege that electronic voting systems violate Washington's Election Code. All these claims rest on the false premise that paper ballots and vote counting systems associated therewith are the only legal form of election in the State of Washington. However, each and every claim fails because, as established above, the Washington statutes specifically authorize direct electronic voting, the Washington Administrative Code specifically authorizes electronic voting, and the Secretary of State specifically authorized the use of Sequoia's electronic voting system in Snohomish County. Plaintiffs never brought a challenge to the Secretary of State's approval of Sequoia's machines. As such, Plaintiffs' claims fail for the additional reason that they failed to exhaust administrative remedies.

Moreover, the County and Sequoia are not the proper defendants. Plaintiffs' real complaint is with the Legislature and the Secretary of State, which have approved a system which Plaintiffs, for policy reasons, oppose. The County has no authority to certify or approve electronic voting systems. It may only use systems that meet state standards and have been approved by the Secretary of State. RCW 29A.12.050. Neither Sequoia nor the County are proper defendants in an action seeking to set aside statewide regulations, statutes and actions of the Secretary of State.

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

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Plaintiffs are not parties to the Contract between Sequoia and the County. Plaintiffs are not third-party beneficiaries as they do not and cannot allege that Defendants intended to personally benefit them. *See Rowan Northwest Decorators, Inc. v. Washington State Convention & Trade Center*, 78 Wash.App. 322, 332-333, 898 P.2d 310 (1995).

Plaintiffs asserted in federal court that they had standing as voters. In addition, they claimed that they had standing with respect to information they sought that was not provided by the County. Had Plaintiffs brought a constitutional challenge to the Washington election laws, perhaps their argument for voter standing would have merit. Their insurmountable problem is that they are suing for declaratory relief with respect to a contract to which they are not parties. Nothing in the Contract requires the County to use the machines or to use them in any particular manner. The County is free to resell the machines and indeed may well do so. The County's use of the machines, which in practice has been sanctioned by state law and the Secretary of State, is a completely different topic from the question of the enforceability of the Contract as between Sequoia and the County or the interpretation of the Contract. Indeed, the Plaintiffs have not cited any particular provision of the Contract that they believe requires interpretation by the court. It is as if one were to oppose the death penalty by suing to set aside the contract between the provider of an electric chair and a state prison. There is no standing for declaratory relief under the Contract and, therefore, all or virtually all of the claims in the litigation must fail.

Plaintiffs also claim standing because they allegedly sought information from the County. At best this claim is relevant to only the Fourth Cause of Action, which deals with trade secrets. Here again, it is unclear how Plaintiffs could have any standing with respect to Sequoia. If Plaintiffs made a request for information in the possession of the County of Snohomish that is in the public record, they would have standing to bring that claim. They do not have standing, as a

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non-party to the Contract, to attack a routine trade secret protection clause, of the type found in any well-drafted software license when the source code never became the property or was even made available to the County of Snohomish. The State of Washington undoubtedly has many computers that run Microsoft programs. However, the fact that a government computer uses a Microsoft program does not make Microsoft's source code a matter of public record or make Microsoft a proper defendant in a Public Records Act suit.

C. Plaintiffs' Claims Are Either Moot or Unripe and, Therefore, the Entire Complaint Fails

All of Plaintiffs' claims seek declaratory relief. Each cause of action requests a declaration that the Contract is void or that the Contract violates certain laws.

To obtain declaratory relief, Plaintiffs must demonstrate: "(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 414-15, 27 P.3d 1149 (2001); *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

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

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Any declaratory relief concerning the November 2004 election is moot. The election has long since concluded. The time period for challenging the results has long since expired. *See* RCW 29A.68.030. Declaratory relief would have no impact on the election results. As such, it would not finally or conclusively resolve anything. For these same reasons, no actual or present dispute exists regarding the use of electronic voting in the 2004 election. *See Reid v. Dalton* 124 Wn.App.113, 122, 100 P.3d 349 (2004) (refusing to provide declaratory relief concerning "overall fairness of a certified election").

Any declaratory relief concerning any future election is unripe. Indeed, presumably for this reason, Plaintiffs do not even request an injunction to prevent the use of electronic voting systems in future elections. The Washington Secretary of State has not certified any electronic voting system for the 2006 elections, a process which will involve compliance with an entirely new set of standards under the Help America Vote Act ("HAVA"). *See, e.g.*, 42 U.S.C. §§ 15302(a)(3)(B), 15481(d), 15483(d); WAC 434-335-040(f) (requiring paper receipts), WAC 434-335-250. Moreover, Plaintiffs are entitled to participate in the future hearings concerning the testing and certification of Sequoia's machines. Only if the Secretary of State certifies Sequoia's machines in the future, and only if Plaintiffs have grounds for claiming that the certification is unlawful, then Plaintiffs may challenge the certification in a proper and timely complaint. Until then, no claim challenging use of Sequoia's equipment for 2006 is ripe. *See To-Ro Trade Shows*, 144 Wn.2d at 414-15 (claim not ripe when event at issue has not yet occurred or remains matter of speculation).[2]

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[2] *See also Diversified Indus. Dev. Corp.*, 82 Wn.2d at 815 (where claim against lessor remained "an unpredictable contingency," matter was "not ripe for declaratory relief"); *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wn.2d 789, 806, 597 P.2d 383 (1979) (no declaratory relief where agencies' future actions on certain contract rights "appear [ed] to be founded on a hypothetical factual situation"); *DiNino v. State ex rel. Gorton*, 102 Wn.2d 327, 331, 684 P.2d 1297 (1984) (no declaratory relief where party who was neither pregnant nor terminally ill challenged

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In addition, a court injunction or declaration concerning electronic voting, before the Secretary of State reviews, tests and certifies particular systems, would usurp the powers of another branch of government. *See* RCW 29A.12.010, 29A.12.020, and 29A.12.080.

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

D. Plaintiffs' Individual Causes of Action Fail for Separate and Independent Reasons

As already mentioned, Plaintiffs' claims fail because: (1) the Legislature specifically approved electronic voting, (2) Plaintiffs lack standing, and (3) they are either moot or unripe. Moreover, Plaintiffs' individual causes of action fail to state a claim for the following additional reasons: (1) a violation of "liberty interests," (2) violations of public record and open meeting "policies," (3) impermissible delegation of governmental function, and (4) the non-existence of a trade secret in Sequoia's software source code.

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

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

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

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As in this case, the California Secretary of State had approved the system pursuant to state election law. *Id.* at 1103. The court held:

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

The court ultimately concluded that:

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

Plaintiffs may argue that *Weber* does not apply because it interprets the United States Constitution, not the Washington State Constitution. Plaintiffs, however, cannot explain how the result could be any different under the state constitution. "Absent such an argument, [the Washington Supreme] Court will interpret the Washington constitution coextensively with its parallel federal counterpart." *In Re Dyer* 143 Wn.2d 384, 394, 20 P.3d 907 (2001). Case law establishes that the Washington State Constitution provides no more extensive rights for challenging elections than the United States Constitution. *See Becker v. County of Pierce* 126 Wn.2d 11, 21, 890 P.2d 1055 (1995). Article 1, Section 32 of the Washington State Constitution regarding "fundamental principles" which plaintiffs cite in their complaint (¶ 7.1.4) provides no substantive rights at all. *See Brower v. State*, 137 Wn.2d 44, 69, 969 P.2d 42 (1998); *Becker,* 126 Wn.2d at 21.

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Attorneys often claim a case is "directly on point." In this instance, the exact same voting system has already passed Constitutional muster. There is no Constitutional issue with regard to the right to vote in this case.

2. The Second Cause of Action for Violation of "Policies" Underlying the Public Records Act, Open Public 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 certain provisions of tabulation requirement under RCW 29A.44.250. They apparently contend that routine provisions in the Contract protecting Sequoia's software source code and other trade secrets are illegal. *See* Compl. ¶3.12, 4.10, 4.11.

a. Plaintiff's Public Records Act Claim Fails

Plaintiffs concede they cannot plead an actual claim for a violation of the Public Records Act by alleging that the Contract merely violates the "policies" embodied in the Act. Plaintiffs cannot allege any actual violation because the Public Records Act categorically exempts the requested documents from disclosure. Specifically, the Public Records Act exempts "computer source code" (RCW 42.17.310(1)(h)), valuable trade information (RCW 42.17.310(bb) and RCW 51.36.120), and business-related information (RCW 42.17.310(ff) and RCW 15.86.110).

Likewise, it is well recognized that trade secrets are protected from public disclosure pursuant to RCW 42.17.260(1) and the Uniform Trade Secrets Act, RCW 19.108. *See also Spokane Research and Defense Fund v. City of Spokane*, 96 Wn. App. 568, 983 P.2d 676 (1999); *Concerned Rate Payers Association v. Public Utility District No. 1 of Clark County, Washington*,

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138 Wn.2d 950, 963, 983 P.2d 635 (1999) (technical specifications for turbine may be exempt); *Progressive Animal Welfare Society v. University of Washington,* 125 Wn.2d 243, 884 P.2d 592 (1995) (*"PAWS"*) (Public Records Act exempts disclosure of intellectual property).

Indeed, the Washington Supreme Court in *PAWS* made clear that the "Public Records Act is simply an improper means to acquire knowledge of a trade secret." The Court emphasized that the "Legislature...recognizes the protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition[.]" The Court further noted that, as a result, "the legislature declare[d] that as a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented." *Id.* at 601; *see also Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260, 266-267 (Wash. 1998) (Public Records Act exempts disclosure of trade secret).

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

b. Plaintiffs' Open Public Meetings Act Claim Fails

Again, Plaintiffs essentially concede they cannot plead an actual claim under Open Public Meetings Act because they merely allege that the Contract violates the "policies" embodied in the Act.

In addition, Plaintiffs cannot allege a violation of the Open Public Meetings Act. To state a claim, Plaintiffs must at least allege "(1) members of a governing body (2) held a meeting of that body (3) where that body took action in violation of OPMA, and (4) the members of that

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body had knowledge that the meeting violated the statute." *Washington Public Trust Advocates v. City of Spokane*, 120 Wn. App. 892, 86 P.3d 835 (2004); RCW 42.30.030 and 42.30.020(1)(4).

In opposition papers filed in federal court, Plaintiffs identify the Election Board of the Penny Creek Elementary School as the body whose meeting was not open. (RJN Ex. 3, Plaintiffs' Supplemental Response In Opposition To Motions to Dismiss by Both Defendants Sequoia and Snohomish County at 8:20–24). Plaintiffs, however, never assert that they were barred from any meeting or that the Election Board made any decision or took any action in violation of the law. Moreover, the counting of ballots does not fall within the purview of the OPMA. *See Loeffelholz v. C.L.E.A.N.,* 119 Wn. App. 665, 674, 703-704, 82 P.3d 1199 (2004) (County canvassing Board is subject to OPMA, but not election workers who count ballots). The *Loeffelholz* decision conclusively rebuts Plaintiffs' contention that the OPMA gives them the right to participate in the electoral process outside the scope of a designated meeting. In any event, neither the County, nor Sequoia, are members of the Penny Creek Elementary School Election Board.

Furthermore, it is undisputed that the meetings to review and certify Sequoia's voting machines were open to the public. In fact, the Secretary of State held a public meeting specifically to address the use of Sequoia's voting machines in Snohomish County for the November 2004 election. Likewise, the Secretary of State publicly tested the machines for use in the same County in the same election, which Plaintiffs now challenge. RJN Ex. 1. Plaintiffs have no claim under the Open Public Meetings Act.

c. Plaintiffs' Tabulation Claim Fails

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Plaintiffs also include an allegation that electronic voting systems do not comply with RCW 29A.44.250, which states that "the tabulation of ballots, paper or otherwise, shall be open to the public" and WAC 434-261-010, which requires vote counting centers be open. Plaintiffs do not allege that the collection of voting data from machines occurred in private, only that the use of electronic voting machines themselves inherently violate the requirements of the statute. In doing so, Plaintiffs in effect ask this Court to find that the Legislature intended to outlaw electronic voting. Of course, as demonstrated above, the Legislature specifically authorized electronic voting and promulgated a comprehensive scheme regulating its use. Plaintiffs' tabulation claim must fail.

3. Plaintiffs' Third Cause of Action for Impermissible Delegation of Governmental Function Fails to State a Claim

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

To state a claim for impermissible delegation, Plaintiffs must allege that a public agency delegated core government functions to a private entity without retaining sufficient oversight and review. *See* RCW 29A.12.010, *et seq.*; *see also Entertainment Industry Coalition v. Tacoma-Pierce County Health Dept.*, 153 Wn.2d 657, 664-65, 105 P.3d 985 (2005) (legislation allowing private business to designate smoking areas did not violate non-delegation doctrine); *City of Auburn v. King County* 114 Wn.2d 447, 451-53, 788 P.2d 534 (1990) (legislation requiring private arbitrator to settle dispute between city and county did not violate non-delegation doctrine).

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Here, the Legislature and Secretary of State have established an elaborate set of standards and procedures governing the certification and use of electronic voting machines. The statute cited by Plaintiffs, RCW 29A.04.049, simply defines what an election board is – "a group of election officers serving one precinct or a group of precincts in a polling place." Plaintiffs do not allege any particular statutory right exclusive to election boards that is being usurped, nor does RCW 29A.04.049 set forth any such "core functions." Moreover, the Contract itself only calls for the sale of DRE machines, which took place once, in 2002. How those machines are used is not specified in the Contract and not controlled by Sequoia. The only ongoing aspect of the Contract is an optional annual $40,000 software license and related routine support services. It is inconceivable that the County's $40,000 Contract with Sequoia for maintaining and supporting $5,000,000 worth of voting machines could arise to the level of an impermissible delegation of government authority.

4. Plaintiffs' Fourth Cause of Action Regarding Trade Secrets Fails to State a Claim

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

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

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could not access its source code.[3] Indeed, under Plaintiffs' theory, trade secret protection could never apply to software. *See* Compl. ¶ 7.4.1.

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

Plaintiffs also allege that Sequoia's software is not a trade secret because it does not provide a competitive advantage. This allegation is belied by the remainder of their complaint. Plaintiffs admit that other voting systems compete with Sequoia in the market (*Id.* at ¶ 5.27, 7.8.2), that Sequoia obtained a $5 million contract from the County (*Id.* at ¶ 3.9, 5.5), and that Sequoia protects its source code from public disclosure (*Id.* at ¶ 4.10, 7.4.5).

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

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

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[3] *See also Integrated Cash Management Services, Inc. v. Digital Transactions, Inc.* 732 F. Supp. 370; *aff'd,* 920 F.2d 171 (2nd Cir. 1990) (software was a trade secret where company maintained secrecy of source codes); *CMAX Cleveland, Inc. v. UCR, Inc.*, 804 F. Supp. 337 (M.D. Ga. 1992) (trade secret established by, *inter alia*, requirement 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).

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

a. Plaintiffs' Misrepresentation Claim Fails

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

Plaintiffs' misrepresentation claim fails for a number of independent reasons. Plaintiffs do not identify who made any representation. Plaintiffs do not identify the listeners. Nor do Plaintiffs identify the time or place of the representations. Indeed, Plaintiffs do not even allege falsity, or the speaker's knowledge of falsity, or the listener's ignorance of its falsity, or the listener's reliance on the representation, or the damages suffered by Plaintiffs. *See Stiley v. Block*, 130 Wash. 2d 486, 505, 925 P.2d 194 (1996) (elements of misrepresentation claim); *Fidelity Mortgage Corp. v. Seattle Times Co.*, 213 F.R.D. 573, 575 (W.D.Wash. 2003) (heightened pleading standard for misrepresentation claim). Furthermore, the Parol Evidence rule bars Plaintiffs' attempt to use extrinsic statements to contradict the express terms of the Contract. Plaintiffs concede that the Contract expressly states in writing that there is only a limited warranty. No one could have been misled.

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b. Plaintiffs' Claim for Breach of Warranty Fails

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

6. Plaintiffs' Sixth Cause of Action For Violation of "Chain of Custody" Rules Fails to State a Claim

Plaintiffs' Sixth Cause of Action requests a declaration that the Contract fails to comply with "chain of custody" rules as allegedly required by "RCW 29A *et seq.*" Plaintiffs decline to identify any specific provision of the Election Code which the Contract purportedly violates. The term "chain of custody" is not used in the Election Code.

Moreover, this claim, like many others, asserts that electronic voting in general violates some unspecified provision of the Washington Election Code.[4] Since the Legislature specifically authorized electronic voting and enacted a comprehensive scheme for regulating electronic voting, Plaintiffs' claim that the Legislature intended to outlaw electronic voting is baseless.

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[4] Indeed, Plaintiffs do not allege the absence of a chain of custody for the memory cartridge containing the recorded votes. They simply contend that the memory cartridge is "not reasonably free from tampering during election day like paper ballots in a locked box." Compl. ¶ 7.62 Apparently, Plaintiffs are unfamiliar with the long history of ballot box tampering that is one of the strongest policy elements in favor of electronic voting. *Cf. Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003).

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

Plaintiffs' Seventh Cause of Action claims that electronic voting systems violate RCW 29A.64.041(1) (defining "ballot"), RCW 29A.04.115 (regarding accepting and counting ballots), and RCW 29A.12.150 (requiring "separate" ballots). Again, this claim fails because the Legislature specifically authorizes electronic voting.

8. Plaintiffs' Eighth Cause of Action For Conflict of Interest Fails to State a Claim

Plaintiffs' Eighth Cause of Action alleges that there is a "conflict of interest" between the privacy desires of Sequoia and the public nature of elections, which are embodied in the Contract. It also alleges that for unspecified reasons, the County has shown "favoritism" towards Sequoia, based on the statements of two County officials who dare to disagree with Plaintiffs' opinion of the Sequoia technology and have publicly stated that its use has been an unqualified success. Compl. ¶ 7.8.3. The relief sought on this utterly frivolous claim is that the Court should declare the actions of Snohomish County officials as establishing an impermissible conflict of interest. *Id.* at ¶ 7.8.5.

Needless to say, the Complaint does not allege any financial conflict of interest. Apparently, Plaintiffs contend that the mere expression of a public official's support for a voting system that has been used in four elections without any legal challenge gives this court jurisdiction to enter a declaration stating that the public official is incorrect. This goes far beyond any declaratory relief that would be permissible under the Contract and, indeed, would appear to involve a direct violation of separation of powers principles. This cause of action should be dismissed without leave to amend.

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9. Plaintiffs' Ninth Cause of Action for Violation of Magnuson-Moss Warranty Act Fails to State a Claim

Plaintiffs' Ninth Cause of Action alleges that a service contract that the County entered into, subsequent to the original purchase contract, will become void if any instruments, testing or examination is performed on the machines without Sequoia's permission. Plaintiffs cite no specific provision of the Contract. The claim then goes on to allege that "this constitutes a tying provision" that is in violation of an unspecified section of the Magnuson-Moss Warranty Act because it denies Lehto the right to conduct any testing of the Sequoia machines. Presumably, Plaintiffs are referring to 15 U.S.C. § 2302(c) which prohibits warrantors of consumer products from conditioning their warranty on the consumers using any article or service (other than an article or service provided without charge under the terms of the warranty) which is identified by brand, trade or corporate name.

The Magnuson-Moss Act defines the term "consumer product" to mean tangible personal property "which is normally used for personal, family or household purposes." A voting machine is clearly not a consumer product under this definition. Case law holds that commercial fire sprinklers used in commercial buildings are not consumer products under the Magnuson-Moss Warranty Act. *See People v. Central Sprinkler Corp.* 174 F. Supp. 2d 824 (C.D. Ill. 2001). A prosthetic heart valve is not a "consumer product" either. *Kemp v. Pfizer, Inc.* 835 F. Supp. 1015 (E.D. Mich. 1993); *see also, Patron Aviation, Inc. v. Teledyne Indus. Inc.* 267 S.E. 2d 274 (Ga. App. 1980) (airplane engine is not consumer product.) The fact that a product may be used by a person, as is the case with sprinklers when there is a fire, or heart valves after the operation, is not the key – the key is the buyer's status. Obviously, the County of Snohomish is incapable of using a product for personal, family or household purposes.

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Plaintiffs themselves, of course, are not consumers within the meaning of 15 U.S.C. § 2302(3) because they did not purchase the voting machines themselves. Therefore, the Plaintiffs have no standing.

Moreover, the substantive claim itself is clearly frivolous. The warranty itself (paragraph 32 of the Contract) contains no such tying provision. The limited warranty found in paragraph 5 of Exhibit B to the Contract similarly does not contain any such provision. Assuming *arguendo* that the warranty is voided if the machines are tampered with, this would still not be a violation of the Magnuson-Moss Act because the County is not being required to pay for any product, article or service. The Magnuson-Moss Act provision clearly does not apply to maintenance services provided without charge under the terms of a warranty. 15 U.S.C. § 2302(c).

Even if: (1) the voting machines were consumer products; (2) there was a purported violation of the Magnuson-Moss Act; and (3) the Plaintiffs had standing to bring any such claim, declaratory relief would still be improper because there is no actual warranty dispute. The County is not complaining about the warranty and Sequoia has no warranty issues with the County. There is no dispute for which any declaratory relief is required. If the County desired to perform functions that are prohibited by the Contract but arguably permitted by the Magnuson-Moss Act, and raised that issue with Sequoia, Sequoia would undoubtedly give "permission" as Plaintiffs concede they might do in Paragraph 7.9.4 of the Complaint. Thus, there is no warranty dispute, no consumer product, no standing, and no reason for this claim to have been brought.

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10. Plaintiffs' Tenth Cause of Action That The Contract Was Illegal As Applied Fails to State a Claim

Plaintiffs' Tenth Cause alleges a violation of two provisions of the Washington Election Code and the Federal Help America Vote Act ("HAVA").

The HAVA claim has been abandoned. When Defendants removed this matter to federal court, Plaintiffs affirmatively represented, in the course of successfully moving for remand, that there was no federal question because they did not have a claim under HAVA. Specifically, they conceded, and the federal court agreed, that "there is no private right of action created by the Help America Vote Act . . . This, by itself, negates the possibility of any federal claim giving rise to removal jurisdiction simply by mentioning HAVA." RJN, Ex. 4 (Plaintiffs' Motion for Remand to State Court Pursuant to 28 USC § 1446) at 21:16-23. Indeed, the argument heading that precedes this contention baldly states that "Federal Question Jurisdiction Does Not Arise by Reference to the Help America Vote Act (HAVA) Where, As Here, . . . No Cause of Action Arises under HAVA." *Id.* at 20:26-29.

The state law claims found in the tenth cause of action are equally meritless. Plaintiffs claim that the Contract violates RCW 29A.44.190 and 29A.12.101. RCW 29A.44.190 reads in its entirety that "The precinct election officer shall periodically examine the voting devices to determine if they have been tampered with." There is nothing in the Contract that prevents precinct election officers from doing so. The precise procedures carried out at the precinct are not the subject matter of the Contract, nor are they in any way under the control of Sequoia. Moreover, Plaintiffs do not suggest why the machines, which have seals, cannot be inspected to determine if those seals have been tampered with.

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RCW 29A.12.101 sets the standards for the Secretary of State in approving a vote tallying system. Because Plaintiffs have acknowledged that they have no intention of suing the Secretary of State and are not challenging his certification of the Sequoia system, this claim is clearly not properly before the Court even assuming that the Sequoia machines are "vote tallying systems."

11. Plaintiffs' Eleventh Cause of Action For Additional Relief Fails to State a Claim

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

12. Plaintiffs' Twelfth Cause of Action for Disgorgement and Restitution Fails to State a Claim

Plaintiffs' Twelfth Cause of Action asks the Court to force Sequoia to refund the $5,000,000 that the County paid for the voting machines at the time of sale in July of 2002. Plaintiffs fail to state any substantive grounds supporting this overreaching request other than a conclusory assertion that the Contract was "illegal." Compl. ¶ 7.12.

The Complaint concedes that the County used Sequoia's machines in four subsequent elections. The Secretary of State approved their use. The County is in the possession of the machines. And the County has made no complaint. If the County had any complaint, it would be the County that would have a right to seek disgorgement or restitution, not Plaintiffs.

Even if Plaintiffs could convince a court in the future to accept their novel theories of Washington statutory and constitutional law and to find the current configuration of the Sequoia

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system to be improper, there is no justification for restitution or disgorgement. Sequoia did not guarantee that its machines would satisfy Washington's election laws without modifications or adjustments. Indeed, the Contract itself expressly disclaims any such representation. *See* Compl., Ex. 1 (Contract §32). As such, there is no basis in the Contract, contract law, or equity, or the declaratory judgment statute for ordering restitution.

VI. CONCLUSION

Sequoia requests that the Court dismiss the Plaintiffs' Complaint in its entirety. Alternatively, Sequoia requests that the Court separately dismiss each cause of action which fails to state a claim.

Dated this 27th day of January, 2006

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