Hearing Date: March 24, 2006

Judge Mary Roberts

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

PAUL LEHTO, et al.,

Plaintiffs,

v.

SEQUOIA VOTING SYSTEMS, INC. and SNOHOMISH COUNTY

Defendants.

No. 05-2-11769-9 SEA

DEFENDANT SEQUOIA'S REQUEST FOR JUDICIAL NOTICE OF FACTS IN SUPPORT OF THEIR) MOTION TO DISMISS UNDER CR 12(b)(6)

Defendant Sequoia Voting Systems, Inc. ("Sequoia"), by and through its counsel, hereby requests that this Court take judicial notice of the following documents:

(1) "Provisional Certification of An Central Count Optical Scan System and Direct Recording Electronic Vote Tallying System and Direct Recording Electronic Vote Tallying System" published by the Washington Secretary of State, Elections Division, dated August 18, 2004 attached hereto as Exhibit 1;

(2) "Plaintiffs' Combined Memorandum in Response to the Motions to Dismiss or to Strike from Both Defendants Sequoia and Snohomish County," dated June 6, 2005 attached hereto as Exhibit 2;

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(3) "Plaintiffs' Supplemental Response To the Motions to Dismiss or to Strike from Both Defendants Sequoia and Snohomish County," dated June 27, 2005 attached hereto as Exhibit 3; and

(4) "Plaintiffs' Motion for Remand to State Court Pursuant to 28 USC § 1446," dated June 9, 2005 attached hereto as Exhibit 4.

This request is made in conjunction with Defendant Sequoia's Motion to Dismiss pursuant to CR 12(b)(6). This request is made pursuant to Washington Rule of Evidence 201 and this Court's inherent authority to take judicial notice.

Dated this 27th day of January, 2006.

PIERCE & SHEARER LLP

By: Andrew Pierce, by rsm
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(Cal. State Bar No. 101889)

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EXHIBIT 1

SECRETARY of STATE
Sam Reed

ELECTIONS DIVISION
Voter Registration Services
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PROVISIONAL CERTIFICATION OF AN CENTRAL COUNT OPTICAL SCAN SYSTEM AND DIRECT RECORDING ELECTRONIC VOTE TALLYING SYSTEM

In July 2004 Sequoia Pacific Voting Equipment of Jamestown, New York requested the review and examination of an optical scan electronic vote tallying system and a direct recording electronic system under RCW 29A.12.020, 29A.12.080 and WAC 434-333-107. The hardware and software for this system is marketed under the name Sequoia Pacific AVC Edge DRE and Optech 400-C.

Upon examination of the Sequoia Pacific's WinEDS Election System, the Secretary of State finds that the system satisfies the requirements of Washington State law.

On this date, the Office of the Secretary of State hereby certifies the *"WinEDS Election System"*, submitted by Sequoia Pacific, and provisionally approves it for use by County Governments of the State of Washington in the 2004 Fall Primary and General Election.

This version of the system consists of:

- *Hardware*. comprised of:
  - Optech 400-C,
  - AVC Edge, Precinct Voting Machine (DRE),
  - AVC Edge Card Activator device;

- *Software*. comprised of:
  - WinETP; software version 1.10.2,
  - WinEDS; software version 3.0.132,
  - Card Activator device; firmware version 4.3.302,
  - AVC Edge device; firmware version 4.3.302.

Under the provisions of RCW 29A.12.020 and WAC 434-333-107, the Sequoia Pacific Voting System is approved for use in Washington State, as a direct recording electronic vote tabulation system and central count optical scan system, when used in compliance with the procedures contained in this certification, accompanying Report and Findings, and Washington State law.

Certified on this August 18, 2004

Dan Long, Deputy Secretary of State, on behalf of Sam Reed
SAM REED
Secretary of State

EXHIBIT A

EXHIBIT 2

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

PAUL LEHTO, individually, JOHN WELLS, individually; Plaintiffs, vs. SEQUOIA VOTING SYSTEMS, INC. and SNOHOMISH COUNTY; Defendants.	NO. C05-0877 RSM **PLAINTIFFS' COMBINED MEMORANDUM IN RESPONSE TO THE MOTIONS TO DISMISS OR TO STRIKE FROM BOTH DEFENDANTS SEQUOIA AND SNOHOMISH COUNTY** **Noted on Motion Calendar: Friday, June 10, 2005**

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

I. PROCEDURAL BACKGROUND.

This case was filed in King County Superior Court and a case schedule was issued on April 7, 2005. Notices of appearance were made by defendants Snohomish County and Sequoia Voting Systems, Inc. ("Sequoia") on April 22 and April 26, respectively. On April 29, 2005, Plaintiff counsel's Notice of Unavailability for the period of time from May 8, 2005 through June 1, 2005 was filed and served

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upon counsel for Sequoia; Snohomish County acknowledged receipt of the Notice of Unavailability on May 8, 2005. On May 11, 2005, plaintiffs' counsel received Notice to Adverse Party of Removal to Federal Court; on May 13, 2005, plaintiffs received Snohomish County's Joinder in Notice of Removal of Action.

On May 18, 2005, both defendants filed Motions to Dismiss.

This response is submitted in a good faith effort to address voluminous and overlength[1] motion pleadings submitted by defendants despite their having been earlier notified that plaintiffs' counsel was unavailable to respond to motions due, *inter alia*, to a multi-week jury trial in Thurston County, without intending to waive the relief sought in Plaintiffs' Motion to Continue filed separately. Plaintiffs contend such litigation tactics ought not to be permitted to deprive the court of full briefing respecting the issues presented by this case and that an extended briefing period is appropriate.

Plaintiffs will be filing a Motion for Remand shortly and believe that both judicial economy and substantive justice would be best served by delaying consideration of the Motions to Dismiss until the Motion for Remand is considered, as the latter bears upon this court's jurisdiction and how much, if any, of the case ought properly to remain before this Court. Plaintiffs, however, in an earnest effort

[1] United States District Court for the Western District of Washington CR 7 limits submissions in connection with motions to dismiss to twenty-four pages. Yet, Snohomish County seeks that the arguments of Sequoia "be adopted herein by reference and justify dismissal of Plaintiffs' claims against Snohomish County." [Snohomish County Motion to Dismiss, p. 8 f.n. 1]. Likewise, Sequoia joins in Snohomish County's Motion [Sequoia Motion to Dismiss, p. 2 f.n. 1], incorporates by reference the County's briefing [e.g. "See County's Motion to Dismiss for full discussion regarding statute of limitations," "See County's Motion for Dismiss for full discussion regarding Plaintiffs' lack of

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to respond to both motions, which incorporate one another by specific reference, and in an effort to be most helpful to the Court, will be responding with this single brief, which will not exceed the combined page limit for responding to the two motions to dismiss.

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

As a general matter, the sufficiency of a complaint filed in federal court is governed by Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a)2) provides that a complaint must set forth only "a short and plain statement of the claim showing that the pleader is entitled to relief." Given this "simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

This court reviews *de novo* a district court's decision regarding a motion to dismiss, pursuant to FRCP 12(b)(6), because the district court decision is based purely on the legal sufficiency of a plaintiff's case. Memphis, Tennessee Area Local, American Postal Workers Union, AFL-CIO v. City of Memphis, 86 Fed. Appx. 137, Slip Copy, 2004 WL 103000 (6th Cir. 2004); Barrett v. Harrington, 130 F.3d 246, 251 (6th Cir. 1997). Under the liberal notice pleading rules, a complaint need

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standing," at Sequoia's Motion to Dismiss, p. 6] and submits an additional pleading (Defendant Sequoia's Request for Judicial Notice).

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only put a party on notice of the claim being asserted against it to satisfy the federal rule requirement of stating a claim upon which relief can be granted. Fed.R.Civ.P. 8(a); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (holding that a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations). A complaint need not anticipate every defense and accordingly need not plead every response to a potential defense. Poe v. Haydon, 853 F.2d 418, 424 (6th Cir.1988) (stating that a civil rights plaintiff need not anticipate an affirmative defense which must be pleaded by the defendant). A court must construe the complaint in the light most favorable to the plaintiffs and accept as true all well-pleaded factual allegations. Cooper v. Parrish, 203 F.3d 937, 944 (6th Cir.2000).

III. DEFENDANTS MISUNDERSTAND THE ESSENTIAL CLAIMS IN THE COMPLAINT.

A. THE GRAVAMEN OF PLAINTIFFS' COMPLAINT.

Plaintiffs identified in their Complaint comprehensive, detailed and specific facts establishing individualized, particularized, and concrete injury to plaintiffs. They also identified alternative legal grounds justifying the relief sought. Plaintiffs will not undertake to recharacterize all of those claims here for reasons of economy and clarity. Nonetheless, the gravamen of Plaintiffs' Complaint may be set forth quite simply:

> ***May a government "outsource" [delegate] core governmental functions to a private company such that both the government and the private company are freed from the Constitutional and statutory limitations on their freedom of action as would be imposed upon the***

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government itself?

Specifically, may Snohomish County delegate the conduct of its elections to Sequoia such that the transparency of elections is concealed beneath private claims of "trade secret" and proprietary information, elections are rendered inaccurate and unverifiable, plaintiffs are deprived of access to information to which they are entitled, thereby resulting in injury to plaintiffs?

Plaintiffs have taken care in their Complaint to set out elements of the Constitutional and statutory scheme respecting the public's right to know and the right of each voter and citizen to an accurate, transparent, and verifiable electoral process.

This gravamen of plaintiff's Complaint is well-founded in law. As the Washington State Supreme Court held in South Center Joint Venture v. National Democratic Policy Committee, 113 Wash.2d 413, 780 P.2d 1282 (1989): "If private actors assume the role of the state by engaging in these governmental functions then they subject themselves to the same limitations on their freedom of action as would be imposed upon the state itself." In United Chiropractors of Washington , Inc. v. State, 90 Wash.2d 1, 578 P.2d 38 (1978), the Court held:

> We are equally concerned with the preservation of the 'essential concepts of a democratic society' when the power delegated is the authority to make appointments to a committee exercising governmental functions. The power to select those who make public decisions is too vital a part of our scheme of government to be delegated ...."

The right to vote is, even more so, too vital to be delegated. As the United States Supreme Court held in Wesberry v. Sanders, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to

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vote is undermined."

RCW 42.30.010 sets forth a Legislative Declaration which forms an integral part of the public policy of Washington State, holding:

> The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Article I, §19 of the Washington State Constitution provides: "All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The Supreme Court has held that Article I, Section 2 of the Constitution "gives persons qualified to vote a constitutional right to vote *and to have their votes counted.*" *Wesberry v. Sanders,* 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964). It follows directly from the above that, under the Washington State Constitution, no power, civil or military, shall at any time interfere with the free and proper counting of the vote, in the absence of which the right of suffrage is rendered illusory.

Defendants, however, appear to misunderstand the magnitude of the issues at stake and, it seems, can barely bring themselves to acknowledge the Constitutional ramifications before them. Snohomish County, for instance, states:

> Although Plaintiffs allege twelve separate causes of action, all twelve seek the rescission of a contract between Snohomish County and Sequoia because it is violative of *some law* or public policy. [Citation omitted.] Accordingly, Plaintiffs' Complaint is really just a taxpayer suit presenting one claim: namely that the government's contract is illegal (based on twelve different sources of law) and should be avoided. [Motion, p. 5.][Emphasis added.]

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Ironically, although misunderstanding the basis of plaintiffs' standing and the remedies sought, discussed *infra* at III.C., Snohomish County is correct that many of the "causes of action" hold in common an assertion that the Contract, as applied, is Constitutionally and statutorily defective. What defendants miss, however, is an appreciation that this necessarily means that arguing on narrow and inconsistent grounds cannot cure the overarching Constitutional infirmities identified. For instance, of what matter is it whether trade secrets have been waived or not, where the vindication of Sequoia's desire for secrecy (even if not waived) unconstitutionally contravenes public's right to a transparent and verifiable election? Can an electoral regime which eliminates Constitutional requirements of reviewability, transparency, and verifiability of elections by the public, be defended simply by eliminating election officers and election boards and stating that the Open Meetings Act RCW 42.30 *et seq.* is inapplicable because all meetings have been replaced by secret electronic transactions?

Plaintiffs have both set forth clear legal grounds and sought appropriate remedies by seeking access to information specifically requested and denied to Plaintiff Lehto in furtherance of the Constitutional mandates and in mitigation of the specific damages sustained by both Plaintiffs Wells and Lehto as voters.

B. SPECIFIC INJURY SUSTAINED BY PLAINTIFFS.

The facts set forth in Plaintiffs' Complaint and the Report entitled "Election Irregularities in Snohomish County, Washington, General Election 2004" incorporated by reference into the Complaint must be taken as verities.

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Plaintiff Lehto has been specifically damaged by the contract's secrecy provisions because in the course of investigating and publishing regarding the electronic voting process, he has been denied any and all direct data on the operation of the counting process itself, despite his personal presence at the polls after closing on Election Day. Instead of the County sharing information about vote counting procedures, such information is now literally owned by Sequoia under the claim of trade secrecy – a property interest claim. Snohomish County, based upon its contract with Sequoia, justifies a lack of transparency in the election process by its provision to a private contractor, Sequoia, of a monopoly on the information respecting vote counting. Snohomish County actually pledged under ¶ 34 of its Contract with Sequoia to join with Sequoia to resist production of information Sequoia regards as proprietary. This uniquely impacts Lehto's ability to publish and complete papers on electronic voting, forcing him to undertake more expensive, time-consuming and circuitous routes using indirect data, and dilutes his fundamental right to vote as specifically alleged in the Complaint:

> 4.14 The denial of the ability to view, inspect, examine and have access to the above information and other observational and testing data and opportunities for meaning oversight of elections has damaged Plaintiff Lehto personally and directly in that he has been forced to obtain significantly more data of an indirect nature, such as subtotals for ballot propositions from each voting machine, in an attempt to do additional statistical analysis in significant part as a substitute for the denied information. In turn, this indirect method requires recruitment of extra volunteers for data entry and extra study, instead of interacting with the services of a volunteer expert on computer voting regarding the secret software. On information and belief, Lehto has also been denied direct copies of even the limited computer audit log files that have

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been released, with the County providing files in a .pdf form that strips the file of any meta-data such as editing information and much other forensically useful information, even though original file formats were specifically requested.

4.15 Because of the denial and withholding of information pursuant to the contract's trade secret and other provisions, Lehto has incurred damages in the form of additional financial expense to purchase and/or scan paper-based voting records, additional parking costs to visit the Auditor's office for this purpose, has incurred many hours of time and inconvenience, and has been frustrated in delayed in completing his work. Moreover, both Sequoia and Snohomish County, pursuant to the express contractual provision authorizing their mutual "cooperation" in defeating third party requests for discovery of information deemed by Sequoia to be "proprietary," have forced plaintiffs to commence this lawsuit to gain discovery to information bearing upon the free and meaningful exercise of their right to vote.

The Complaint alleges, at ¶ 5.14, that Paragraph 34 [Subpoena] of the Contract between Snohomish County and Sequoia provides that "[i]n the event that a subpoena or other legal process issued by a third party in any way concerning the Equipment or Related Services provided pursuant to this Agreement is served upon CONTRACTOR or COUNTY... [the parties] agree to cooperate with the other party in any lawful effort by the such other party to contest the legal validity of such subpoena or other legal process commenced by a third party." [Emphasis added.] This provision of the Complaint is one of a number of provisions whereby the Contract allies Snohomish County and Sequoia in protection of Sequoia's "trade secrets," at the expense of the public's right to know. Plaintiff Lehto was personally impacted by this contractual regime when his efforts to obtain information for his research were denied and rendered more

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cumbersome and expensive.

In addition, the Complaint specifically sets forth the reasonable basis upon which Plaintiffs believe that they have been specifically and personally injured by the dilution of each of their votes, including the information contained in the Report appended to the Complaint and incorporated therein and related statistical analyses establishing that such injury has almost certainly occurred:

> 4.17 On information and belief, substantiated by both voter reports and statistical analyses attached and incorporated into this Complaint, it appears that Sequoia machines may well record, modify and/or miscount previously recorded ballots. Consequently, plaintiffs Wells and Lehto have good reason to believe that their past and future votes are subject to unlawful dilution, unlawful miscalculation and that the meaningful exercise of their right to vote has been subject to interference. Plaintiffs have been denied the reliable verifiability provided by human observers and required by law, the Washington Constitution, and democratic traditions and practice.

For the purposes of these Motions, plaintiffs' specific allegations must be taken to be verities; these verities include, but are not limited to, particularized and direct financial injury from the interference with plaintiff Lehto's work, injury in fact arising from inability to obtain information, and dilution of the unique and individual vote of the plaintiffs. These injuries are "concrete and particularized," "actual or imminent," causally connected to and arising directly from Defendants' claim of secrecy and able to be redressed by this Court by, *inter alia*, requiring disclosure of the information requested by Plaintiff Lehto, but refused by Defendants. These injuries are actual and not merely speculative. As such, they meet all the standards required under Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62,

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112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). Federal Election Com'n v. Akins, 524 U.S. 11, 25, 118 S. Ct. 1777 (1998) (Identifying the same three elements for standing: that there be a sufficiently "concrete" "injury in fact," that it be "fairly traceable" [causally connected] to the Defendants' actions, and that the courts can "redress" the "injury in fact.")

C. THE SPECIFIC INJURY ALLEGED PROVIDES PLAINTIFFS WITH STANDING.

Both Snohomish County (Motion, pp. 1, 2, 5, 7, 8, 9, 16-18) and Sequoia (Motion, pp. 1, 6) imply that plaintiffs lack standing because they have not pleaded "taxpayer" standing and because they are not parties to the Contract. They have failed to address plaintiffs' standing as voters and citizens and even the cases they *have* cited support plaintiffs being afforded standing here.[2] Snohomish County relies heavily on a line of inapposite state law cases involving disappointed bidders on public contracts. [County's Motion, pp. 17-18]. These cases, on review, however, support voter standing being granted to vindicate the sorts of claims put forth here.[3]

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[2] Snohomish County argues (Motion, pp. 15-16) that plaintiffs lack standing because they are a "stranger" to the Contract, but on page 17 cites Mincks v. Everett, 4 Wn. App. 68, 73, 480 P.2d 230 (1971) where a taxpayer who was not a party to the contract entered between a private party and the City of Everett is held to have standing: "[E]very taxpayer will be fairly presumed to be injured when a municipal corporation undertakes to enter an illegal contract." Clearly, being a taxpayer in Mincks and a voter in this case provide a basis for standing whether or not a party to a contract. Briefing suggesting a lack of standing to a nonparty to the Contract between Sequoia and Snohomish County are irrelevant where, as here, there is standing on the basis of being a voter and citizen.

[3] "Bidder standing" to challenge a contract award is limited on the grounds that the public policy of saving money through competitive bidding would not be served by allowing disappointed bidders to sue for damages. Dick Enterprises v. King County, 83 Wn. App. 566, 570, 922 P.2d 184 (1996) (citing Peerless Food Prods., Inc. v. State, 119 Wn. 2d 584, 591, 835 P.2d 1012 (1992)). Dick Enterprises held that taxpayers themselves would be the best litigants to vindicate the underlying purpose of the competitive bidding statutes to save taxpayer funds, and thus specifically approved of

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In Thorsted v. Gregoire, 841 F. Supp. 1068, 1072-74 (W.D. Wash. 1994), this Court recognized an expansive standing for voters as voters:

> The plaintiffs allege injury to their rights as voters and/or as candidates, and to their rights of free association and political expression. Some assert standing based upon harm to public projects that are being supported by certain incumbents. The latter category need not be analyzed because plaintiff Foley's standing as a member of Congress who plans to seek re-election, and the other plaintiffs' standing as registered voters,[4] are enough.
>
> The Supreme Court has listed three elements of standing to sue: the plaintiff must have suffered an "injury in fact" (an invasion of a legally-protected interest which is "concrete and particularized" and is "actual or imminent"); there must be a "causal connection" between the injury and the conduct complained of; and it must be "likely," and not merely "speculative," that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, ----, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).
>
> If one plaintiff has standing, it does not matter whether the others do. *Bowsher v. Synar*, 478 U.S. 714, 721, 106 S.Ct. 3181, 3185, 92 L.Ed.2d 583 (1986); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160, 102 S.Ct. 205, 212, 70 L.Ed.2d 309 (1981); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264 n. 9, 97 S.Ct. 555, 563 n. 9, 50 L.Ed.2d 450 (1977).
>
> In this case, however, the voter plaintiffs have standing as well. ...

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taxpayer standing over bidder standing holding: "the best way to ensure that lawsuits are brought in the public interest is to restrict standing to those whose rights are at stake – the taxpayers." Here, of course, the bidder standing line of cases cited by Snohomish and Sequoia are inapposite: (i) the Sequoia contract in question was never competitively bid at all, so "bidder standing" cases are inapplicable (in fact, Snohomish County's attorney in this case, Gordon Sivley, was personally involved sole sourcing to Sequoia, over the opposition of the then-existing voting supplies for Snohomish County, who wished to compete; *See* Decl. of Paul Lehto); (ii) consistent with Dick Enterprises, here the public interest is best served by granting standing to those whose rights are at stake – the voters.

[4] Both Plaintiffs Wells and Lehto have specifically alleged that they are "registered voters." Complaint, ¶¶ 2.1, 2.2. Note also that standing based upon harm to public projects, the Court concluded, did not require analysis; in other words, voter standing, not taxpayer standing, was appropriate.

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> [T]hreatened injury is enough to confer standing; the plaintiffs are not required to wait until the injury has actually occurred. Babbitt [v. United Farm Workers Nat'l Union, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (1979)]; *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1515 (9th Cir.1992).

Courts have not been loathe to extend voter standing to vindicate voters' rights to protect the franchise.[5]

In Federal Election Com'n v. Akins, 524 U.S. 11, 21, 118 S. Ct. 1777 (1998), the United States Supreme court found standing for voters to challenge the Federal Election Commission's decision not to proceed against AIPAC [a public affairs committee] where voters had been unable to obtain information legally required to be made public:

> ***The "injury in fact" that respondents have suffered consists of their inability to obtain information***--lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures--that, on respondents' view of the law, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) to evaluate candidates for public

[5] Thorsted v. Gregoire, 841 F. Supp. 1068, 1072-74 (W.D. Wash. 1994) provides additional authority: "The rights of voters and those of candidates are related and "do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Anderson v. Celebrezze,* 460 U.S. 780, 786, 103 S.Ct. 1564, 1568, 75 L.Ed.2d 547 (1983), *quoting Bullock v. Carter,* 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). In *Anderson* and *Bullock,* the Court allowed suits by voter plaintiffs or intervenors challenging state ballot access requirements. The Ninth Circuit, interpreting *Anderson,* has upheld voter standing to challenge a candidate eligibility requirement since "basic constitutional rights of voters as well as those of candidates" are implicated. *Erum v. Cayetano,* 881 F.2d 689, 691 (9th Cir.1989), *citing Baker v. Carr,* 369 U.S. 186, 206, 82 S.Ct. 691, 704, 7 L.Ed.2d 663 (1962). The Circuit has also upheld a voter's standing to challenge a state election law write-in provision. *Burdick,* 927 F.2d at 472." The Supreme Court has held that a write-in opportunity "is not an adequate substitute for having the candidate's name appear on the printed ballot." *Anderson,* 460 U.S. at 799 n. 26, 103 S.Ct. at 1575 n. 26, *citing Lubin v. Panish,* 415 U.S. 709, 719 n. 5, 94 S.Ct. 1315, 1321 n. 5, 39 L.Ed.2d 702 (1974).

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> office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election. Respondents' injury consequently seems concrete and particular. **Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.** *Public Citizen v. Department of Justice,* 491 U.S. 440, 449, 109 S.Ct. 2558, 2564, 105 L.Ed.2d 377 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). See also *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 373-374, 102 S.Ct. 1114, 1121-1122, 71 L.Ed.2d 214 (1982) (deprivation of information about housing availability constitutes "specific injury" permitting standing).

Plaintiff Lehto has specifically been denied access to information about the way the votes were counted and thwarted in his personal research. The Supreme Court in Federal Election Commission v. Akins, Id. at 24-25, held:

> We conclude that, similarly, the informational injury at issue here, directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts.

Plaintiffs here have experienced a concrete, particularized, injury in fact, relating to the failure to provide information directly related to voting and arising under the Washington Constitution.

Saratoga County Chamber of Commerce Inc. v. Pataki, 275 A.D.2d 145, 156, 712 N.Y.S.2d 687 (2000) held: "Voter standing arises when the right to vote is eliminated or votes are diluted (*see, Rudder v. Pataki, supra,* at 281, 689 N.Y.S.2d 701, 711 N.E.2d 978; *see also, Schulz v. State of New York,* 84 N.Y.2d

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231, 240-241, 616 N.Y.S.2d 343, 639 N.E.2d 1140, *cert. denied* 513 U.S. 1127, 115 S.Ct. 936, 130 L.Ed.2d 881)." Once again, despite the fact that dilution of votes is alleged on the face of the Complaint, defendants failed to apprise the court of voter standing based upon dilution. Saratoga also noted, at p. 154, that "A plaintiff has standing to maintain an action when that plaintiff has suffered an injury in fact and such injury falls within the zone of interests to be protected by the statute or constitutional provision involved (*see, Society of Plastics Indus. v. County of Suffolk,* 77 N.Y.2d 761, 772-773, 570 N.Y.S.2d 778, 573 N.E.2d 1034)." That is precisely the case where, as here, the Constitutional right to vote is implicated, together with the strong policy in Washington respecting transparency and accountability of government.

Farris v. Munro, 99 Wn.2d 326, 330, 662 P.2d 821 (1983) provides yet another basis for standing under Washington law: standing liberally granted to permit the adjudication of important issues or the vindication of rights of those less able to advance them. In Farris v. Munro, plaintiff did not have personal standing, but this court liberally found standing in order to allow the important issue of the constitutionality of the state lottery act to be resolved); *See also* Vovos v. Grant, 87 Wn.2d 697, 701, 555 P.2d 1343 (1976) (allowing public defender to raise an issue of public importance to juveniles who would have "difficulty . . . [in] vindicat[ing] their rights on their own").

Defendants efforts to deny standing, while failing to provide the Court with authority on point, are not well-taken.

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D. THE CLAIMS PRESENTED BY PLAINTIFFS ARE JUSTICIABLE.

Plaintiffs' Complaint alleges at ¶¶ 4.21 and 4.24 (by way of example only):

> 4.21 The allegations set forth in this Complaint for Declaratory Judgment, under all the circumstances, show that there is substantial controversy, between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.
>
> 4.24 The allegations set forth herein, the facts and evidence to be adduced in proceedings before the court, and the unique and special nature of the right to vote, and the contractual requirement of the defendants to cooperate to oppose "by all lawful means" requests for information from citizens, establish that plaintiffs have effectively exhausted all lawful remedies within the existing organs of government charged with administering elections.

The Uniform Declaratory Judgments Act allows a party whose "rights, status or legal relations" are affected by a statute or contract to determine any question of construction or validity and to ask the court to determine the constitutionality or declare the rights of parties thereunder. RCW 7.24.010, .020 RCW; Superior Asphalt and Concrete Co. Inc. v. Washington Department of Labor & Industries, 121 Wn. App. 601, 605, 89 P.3d 316 (2004). Where, as here, there is an issue of broad overriding public import, the requirement that there be evidence of a justiciable controversy may be relaxed:

> [U]nless an issue is of broad overriding public import, the parties must present evidence of a justiciable controversy before the jurisdiction of a particular court may be invoked. *To-Ro Trade Shows v. Collins,* 144 Wash.2d 403, 411, 27 P.3d 1149 (2001).

Superior Asphalt and Concrete Co. Inc., at 605-606.

> A justiciable controversy is an actual, present, and existing dispute, or the mature seeds of one, which is distinguishable

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> from a possible, dormant, hypothetical, speculative, or moot disagreement. *To-Ro*, 144 Wash.2d at 411, 27 P.3d 1149. To be justiciable, a dispute must be between parties that have genuine and opposing interests, which are direct and substantial and not merely potential, theoretical, abstract, or academic; and a judicial determination of the dispute must be final and conclusive. *Id.* "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *Id.* The purpose of these requirements is to ensure the court will render a final decision on an actual dispute between opposing parties with a genuine stake in the court's decision. *Id.*

Superior Asphalt and Concrete Co. Inc., at 606.

Plaintiffs have presented a justiciable claim. "In any action under the Uniform Declaratory Judgments Act, the standing requirement tends to overlap the justiciable controversy requirement. [To-Ro Trade Shows v. Collins, 144 Wash.2d 403, 411 n. 5, 27 P.3d 1149 (2001)]" Superior Asphalt and Concrete Co. Inc., at 606.

Defendant Sequoia mischaracterizes the Plaintiffs' claim as "purely academic" and as being "declaratory relief concerning the 2004 election." [Sequoia's Motion, p. 8]. These descriptions do not control the Complaint as actually drafted. The evidence of inaccuracy as manifested in the 2004 election is not provided in an effort to belatedly undertake an election contest. That matter has already been concluded by a Chelan County Superior Court judge. The evidence provided by Plaintiffs' Complaint, however, taken as true, weighs heavily in the balancing test of Weber v. Shelley, *infra*, when considering the propriety of the electoral regime versus its impact on fundamental rights.

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Defendants mischaracterizations notwithstanding, Plaintiffs Lehto and Wells have specifically alleged actual, direct harm occasioned by the confidentiality provisions invoked by Sequoia and enforced by both Sequoia and Snohomish County against him. After repeated requests for the information, Mr. Lehto has exhausted his remedies.

IV. RESPONSE TO SYSTEMATIC ERRORS IN DEFENDANTS' MOTIONS.

A. Defendants Motions to Dismiss are Based on Five Key Mistakes.

Defendants' Motions to Dismiss are predicated upon five key mistaken assertions or willful misapprehensions respecting the nature of Plaintiffs' claims. Once this webwork of mischaracterization is swept aside, it becomes readily apparent that much of the argument and legal authority cited by defendants is simply beside the point. The following five corrections eliminate much of defendants' argument.

Correction 1: This is NOT an Election Contest.

Defendants Snohomish County (Motion pp. 1, 2, 9, 10-12) and Sequoia (Motion pp. 1, 2, 5-6, 8) mistakenly assert that Plaintiffs' claims are an election contest barred under the ten-day limitations period governing such contests. In fact, Plaintiffs assert no claim and seek no remedy under RCW 29A.68, governing contests of elections. Such a ground for dismissal is without basis in fact or law and mischaracterizes Plaintiffs' claims.

Correction 2: Plaintiffs are NOT Challenging Certification.

Defendants Snohomish County (Motion pp. 2, 7-8, 18-20) and Sequoia (Motion pp. 2, 3, 4-5, 8-10, 12) mistakenly assert that Plaintiffs' claims seek to challenge the Secretary of State's certification of the electronic voting machines.

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Although plaintiffs do believe that such certification was improvident both at the time and in light of subsequent performance issues, nowhere is there a claim seeking to overturn the Secretary of State's certification or any cause of action relying upon such a finding. Plaintiffs believe that defendants overstate the significance of such certification which, on its face, is "provisional" and which qualifies its approval for use: "approved for use in Washington State ... *when used in compliance with* the procedures contained in this certification, accompanying Report and Findings, *and Washington State law*." [Defendant Sequoia's Request for Judicial Notice, Exh. A; emphasis added].[6] Overturning the Secretary of State's certification is neither a claim asserted by Plaintiffs, nor an issue dispositive of any claims; the Secretary of State is not a party to the contract between defendants, nor necessary to the adjudication of the issues arising under the Constitution presented. It follows that Secretary of State Sam Reed is not an indispensable party necessary to the maintenance of the litigation as contended by Snohomish County (Motion pp. 18-20).

Defendants place altogether too much reliance on a superficial reading of Weber v. Shelley, 347 F.3d 1101 (9th Cir. 2003) (*see, e.g.* Sequoia's Motion, pp. 12-13). Weber, it must be noted, is claim in which certification by the California Secretary of State was challenged. It has only limited bearing on this case arising under the Washington State Constitution and law and which does not challenge certification. A closer reading of Weber, however, reveals that it stands for the modest proposition that the courts ought to exercise restraint,

[6] Such a certification no more assures that the Voting System as operated passes Constitutional or statutory muster than a certification from the Supreme Court that one is qualified to engage in the practice of law in one's Bar certificate immunizes practitioners from professional negligence claims. Plaintiffs have, by separate pleading, filed Objections to Defendant Sequoia's Request for Judicial Notice in which Sequoia seeks to argue that the certain facts about the performance of its product are verities based upon the certification by the Secretary of State.

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deferring to elected officials charged with conducting elections, rather than thrusting themselves into the mechanics of conducting elections. Significantly, in Weber, at p. 1105, the Court of Appeals specifically found that "there is no indication that the AVC Edge System is inherently less accurate, or produces a vote count that is inherently less verifiable, than other systems." This is at odds with the allegations in Plaintiffs' Complaint, supported by detailed studies, all of which must be taken as verities for the purpose of these Motions to Dismiss.

Weber recognizes, id. at 1105, that: "It is a well established principle of constitutional law that the right to vote is fundamental, as it is preservative of all other rights. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). Weber also recognizes, id. at 1106: "The difficulty is that *every* electoral law and regulation necessarily has *some* impact on the right to vote, yet to strike down every electoral regulation that has a minor impact on the right to vote would prevent states from performing the important regulatory task of ensuring that elections are fair and orderly." Weber proceeds to cite the balancing test established in Burdick v. Takushi, 504 U.S. 428, 433-434, 112 S. Ct. 2059 (D. Hawaii, 1992):

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the ... Fourteenth Amendment[ ] that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights. Under this standard, the rigorous-ness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens ... Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law

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> provision imposes only reasonable, nondiscriminatory restrictions upon the ... Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions. *Id.* at 434, 112 S.Ct. 2059 [citations,internal quotes omitted]

The Burdick balancing test, as applied by Weber, in the face of the allegations of Plaintiffs taken as verities, and taking into account the "character and magnitude of the asserted injury" to Plaintiffs' Constitutional rights would result in a finding of a Constitutional violation based simply upon the inaccuracy of the Sequoia machines. Recall now, the allegations of Plaintiffs at ¶ 5.17:

> The character and magnitude of injury to plaintiffs and to the meaningful exercise of their right to vote and the franchise of the citizenry is such that customary deference to state regulation and regulators is inadequate and inappropriate to protect the people's basic rights, or to police the integrity of the elections that transfer power from the people to the government.

Far from supporting defendants' motions to dismiss, the balancing test of Weber requires that such motions be denied in light of the facts at issue and the requirement that all facts be construed in the light most favorable to Plaintiffs.

Correction 3: Defendants Both Cite to the Same Two Overruled and Inapposite Cases in Order to Lead this Court into the Error of Finding Plaintiffs Claims to be Barred under a Two Year Statute of Limitations Period or Laches.

Defendants argue that the Complaint in this case fails, claiming a public contract is immune from challenge after a two year limitation period or under laches. [Snohomish County Motion to Dismiss pp. 1, 2, 4, 8, 9-10, 12-14; Sequoia Motion to Dismiss pp. 2, 6]. Both defendants misrepresent the state of

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the law when they cite to the same two *overruled* and inapposite cases, Constable and Northern Grain,[7] in order to argue that claims upon a public contract are governed by a two-year "catch all "limitations period under RCW 4.16.130. In fact, defendants analogize to these cases by claiming that the contract in this case implicates a breach of official duty, apparently failing to review the very cases cited. The holdings in the two cases are predicated upon the notion that the claims in the two cases did not arise from contract at all[8], but from tortious breach of duty and upon an antiquated and currently rejected direct-indirect distinction between "trespass" and "[trespass on the] case." Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 718-719, 709 P.2d 793 (1985). Defendants' authority, even if had not been specifically overruled, is inapposite to any claim regarding a contract, public or otherwise.

In fact, RCW 4.16.080(2) properly governs and provides a three-year statute of limitations period for "any other injury to the person or rights of another

---

[7] Curiously, both Sequoia and Snohomish County cite to the same two cases, ***both of which have been expressly overruled on the point for which they were offered.*** Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 709 P.2d 793 (1985) specifically overruled both Constable v. Duke, 144 Wash. 263, 266, 257 P.637 (1927) and Northern Grain & Warehouse Co. v. Holst, 95 Wash. 312, 315, 163 Pac. 775 (1917) holding that the three-year statute of limitation, RCW 4.16.080(2), rather than two-year "catch-all" statute of limitation, RCW 4.16.130, applied to causes of action claiming both direct and indirect injuries to the person or rights of another not enumerated in other limitation sections. Neither case cites to RCW 4.16.130 (they cite to a predecessor Rem. Code §165) and RCW 4.16.130 does not even mention "public contracts." (These joint inaccurate citations to overruled and inapposite authority provide one more cogent justification for the continuance requested by plaintiffs, so that plaintiffs will have sufficient time within which to provide thorough briefing to this Court. It also reveals a troubling collaboration between Snohomish County and Sequoia.)

[8] RCW 4.16.040 provides a six-year limitation period for actions arising from written contracts; RCW 4.16.080(3) provides for a three-year limitation period for actions arising out of unwritten contracts. In order for the court to apply a two-year limitation period, it necessarily had to find that there was no

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not hereinafter enumerated." Stenberg v. Pacific Power & Light Co., Inc., 104 Wn.2d 710, 709 P.2d 793 (1985) expressly and specifically overruled both cases, applied RCW 4.16.080(2) and held: "When there is uncertainty as to which statute of limitations governs, the longer statute will be applied. *Rose v. Rinaldi,* 654 F.2d 546 (9th Cir.1981); *Shew v. Coon Bay Loafers, Inc.*, 76 Wash.2d 40, 51, 455 P.2d 359 (1969)." The claims in this case arose within the last two years in any case, but even the contract whose constitutionality and legality (as applied) is at issue, was signed under three years ago.

Laches have been defined as an equitable bar, based on a lengthy neglect or omission to assert a right and resulting prejudice to an adverse party. Here, defendants have put forward no showing that plaintiffs delayed at all, that they neglected to promptly pursue any right based on injuries sustained in the 2004 general election, that they had any knowledge that they failed to act upon, or that defendants suffered any prejudice.

Correction 4: Defendants Confuse a Declaration Vindicating Constitutional Rights over Constitutionally Impermissible Contract Provisions with a Challenge to a Public Contract.

Leaving to one side the misleading authority suggesting a statute of limitations of two years, the defendants' motion reflects a misunderstanding of the essence of Plaintiffs' Complaint which concerns the vindication of plaintiffs rights and the supremacy of the Washington Constitution and statute over

liability arising from a contract. Defendants improperly cite to these cases as a basis for asserting a two-year limitations period applicable to government contracts.

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contrary contractual provisions, not a challenge to the public contract as a contract. Defendants' arguments go too far; consider this hypothetical:

> A contract entered between the County and a contractor provided that the County would prohibit any speech or publication critical of the contractor. Ten years later, a citizen unaware of the contract speaks out against the contractor and the County informs the citizen that such speech is prohibited. The citizen sues for a declaratory judgment to vindicate his Constitutional right of free speech and is informed that his suit will be dismissed on the ground that he has challenged a public contract entered more than two years before.

Do defendants contend that a citizen upholding his First Amendment right to free speech and seeking a declaration that the contractual provision *as applied* is unconstitutional and unenforceable is barred because the claim was not raised until more than two years after the public contract was signed (and eight years before the citizen spoke)? The Complaint forthrightly asserts claims under Washington State Constitution and law:

> 1.3 Based on the Constitutional, statutory, and public policy defects inherent in the Contract ... Plaintiffs make the claims further enumerated below under the Uniform Declaratory Judgments Act [RCW 7.24.010 *et seq.*], asking for specific declarations respecting the legality of the Contract and its provisions, and for such other and further relief as may be necessary or proper.
>
> 1.4 Plaintiffs Wells and Lehto, as citizens and voters, object to provisions of the contract between Snohomish County and Sequoia Voting Systems, Inc. that are attempting to shield from the plaintiffs' view ... the means and procedures by which votes are recorded, counted, tabulated, and reported. The primary objections raised by defendants for refusing to disclose this information are the "contractual obligations" of defendant Snohomish County to preserve the "trade secret," "confidential," or "proprietary" materials of defendant Sequoia. Plaintiffs contend, among other things, that the provisions of the Contract ought properly to be set aside based on well-established

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contractual, statutory, Constitutional and public policy grounds.

Thus, the question presented is not whether a public contract can only be challenged within two years of its execution, but whether Washington Constitution and law is powerless to protect its citizens' rights from specific damage caused thereafter.

Correction 5: Defendants Confuse the Date of the Contract being Entered with the Date the Injury to Plaintiffs Occurred.

Plaintiffs' damage claims are specific and personal to them. They did not arise at the time of the contract being entered but arose from the application of the Contract during and in the months following the 2004 general election. Under any version of the statute of limitations, harm to Plaintiffs accrued only recently with the denial of information justified by the contract provisions at issue.

V. CONCLUSION.

Defendants' Motions to Dismiss ought to be denied. They have failed to meet their burden. All allegations in the Complaint, including the appendices incorporated by reference therein, must be construed in the light most favorable to Plaintiffs. Plaintiffs renew their request for additional time to respond fully to the over-length submissions of Defendants filed during a time period when Plaintiffs' counsel had previously advised counsel of record in writing of his unavailability. The issues presented in this case are of critical public importance and their thoughtful adjudication ought not to be compromised by litigation tactics limiting the ability of counsel to respond fully. The citation by both counsel for Snohomish County and Sequoia to overruled authority and their collective failure to bring to the

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attention of the court controlling authority regarding, *inter alia*, the statutes of limitation and standing suggest a heightened need for additional briefing.

The evident collaboration between a governmental entity, Snohomish County, and a private contractor, Sequoia, in this case against citizens and voters ought, itself, to give one pause. The fundamental rights of Washington citizens are at stake and it is clear that their County government charged with the responsibility of enforcing voting laws are poorly situated to be their guardian where, as here, they have bound themselves contractually to support proprietary methods of counting the vote in opposition to the public's right to know.

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

DATED this 6th day of June, 2005.

GORDON EDMUNDS ELDER PLLC

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CERTIFICATE OF SERVICE

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

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

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

Dated at Bellevue, Washington this 6th day of June, 2005.

/s/ Randolph I. Gordon
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From: ECF@wawd.uscourts.gov
Sent: Monday, June 06, 2005 4:53 PM
To: ECF@wawd.uscourts.gov
Subject: Activity in Case 2:05-cv-00877-RSM Lehto et al v. Sequoia Voting Systems, Inc et al "Response to Motion"

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U.S. District Court

WESTERN DISTRICT OF WASHINGTON

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Case Name: Lehto et al v. Sequoia Voting Systems, Inc et al
Case Number: 2:05-cv-877
Filer: Paul Lehto
John Wells
Document Number: 17

Docket Text:
RESPONSE, by Plaintiffs Paul Lehto, John Wells, to [10] MOTION to Dismiss, [11] MOTION to Dismiss. (Attachments: # (1) Proposed Order)(Gordon, Randolph)

The following document(s) are associated with this transaction:

Document description: Main Document
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Electronic document Stamp:
[STAMP dcecfStamp_ID=1035929271 [Date=6/6/2005] [FileNumber=1252874-0] [65677134ec844c40d729b43881afc19a60f736cbcbdeb528b74d782ef6e428aaea80 4062483f0c07858d035a97403d50736464eeddbf58421f3b7181cd2bd5a1]]
Document description: Proposed Order
Original filename:n/a
Electronic document Stamp:
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EXHIBIT 3

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

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

I. PROCEDURAL BACKGROUND.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. DEFENDANTS MISUNDERSTAND THE ESSENTIAL CLAIMS IN THE COMPLAINT.

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

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

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

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

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

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Open?

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

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

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

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

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

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

DEFENDANTS HAVE THE BURDEN OF ESTABLISHING A TRADE SECRET.

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

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

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

PLAINTIFFS HAVE PLED AN OPEN MEETINGS ACT CLAIM.

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

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

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

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

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

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

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IV. CONCLUSION.

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

DATED this 27th day of June, 2005.

GORDON EDMUNDS ELDER PLLC

By: */s/ Randolph I. Gordon*
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CERTIFICATE OF SERVICE

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

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

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

Dated at Bellevue, Washington this 27th day of June, 2005.

/s/ Randolph I. Gordon
Randolph I. Gordon, WSBA #8435
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EXHIBIT 4

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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

Plaintiffs John Wells and Paul Richard Lehto, by and through their attorney, Randolph I. Gordon of GORDON EDMUNDS ELDER PLLC, hereby respond to the Notice of Removal of Action Pursuant to 28 U.S.C. § 1441(b) (Federal Question) by Sequoia Voting Systems, Inc. ("Sequoia") with this Motion for Remand to State Court Pursuant to 28 U.S.C. § 1446.

I. RELEVANT PROCEDURAL HISTORY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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III. LEGAL STANDARDS GOVERNING REMOVAL.

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

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

In Rains v. Criterion Systems, Inc., 80 F.3d 339, 344 (9th Cir. 1996), the Ninth Circuit wrote:

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

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subject of this Motion.

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

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

> Ordinarily, "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987); *accord Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1393 (9th Cir.1988).

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

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

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

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

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

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

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

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

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

It is also well-settled under the case law that the burden is on the party seeking to preserve the district court's removal jurisdiction (here defendants Snohomish County and Sequoia), not the party moving for remand to state court (here, Plaintiffs), to show that the requirements for removal have been met.[5] Richmond, Fredericksburg & Potomac R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). The removal statute is strictly construed against removal and the burden of establishing federal jurisdiction falls to the party invoking the statute. Ethridge v. Harbor House Rest., 861 F.2d 1389, 1393 (9th Cir. 1988).

When there is doubt as to the right to removal in the first instance, ambiguities are to be construed against removal. Samuel v. Langham, 780 F.Supp. 424, 427 (N.D.Tex.1992); *see also,* Fellhauer v. Geneva, 673 F.Supp. 1445, 1447 (N.D.Ill.1987). "The district court, in a challenged case, may retain jurisdiction only where its authority to do so is clear." Gorman v. Abbott Laboratories, 629 F.Supp. 1196, 1203 (D.R.I.1986). "The removing party bears the burden of showing that removal was proper." Medical College of Wisconsin Faculty Physicians &

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

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

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

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

It is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033, 1044-1045 (9th Cir. 2003).

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

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IV. SUMMARY OF GROUNDS FOR REMAND.

A. Procedural Grounds.

1. *Removal Requires Unanimity Among Defendants.*

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

In Smith v. Union Nat'l Life Ins. Co., 187 F. Supp. 2d 635, 641-647 (D. Miss., 2001), the court held that expiration of the 30-day period was fatal to the defendants' attempt to amend the notice of removal where, as here, there was not clearly expressed authority by the parties that the attorney for one could bind the other. The Smith court undertook a comprehensive and well-reasoned

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

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

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

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

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

As the district court in Production Stamping [v. Maryland Casualty Co., 829 F.Supp. 1074 (E.D.Wis.1993)], held:

> [T]he view that technical flaws in a removal petition "can be swept away like so much dust seriously misunderstands the conditions under which the formidable power of the federal judiciary can--and should--be invoked." [Citation omitted.] These considerations are certainly more substantive than the simplistic notion that procedural flaws should be overlooked merely because they are procedural. Production Stamping, 829 F.Supp. at 1077-78. [Bold italics added for emphasis.]

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

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

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

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

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

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

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

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

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

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

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

The Eleventh Amendment to the Constitution governs, among other things, whether a sovereign State must submit to federal jurisdiction. Justice Kennedy summarized the state of the law in his concurring opinion in Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 393-395, 118 S.Ct. 2047, 141 L.Ed.2d 364 (U.S., 1998) (Kennedy, J., concurring):

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

---

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

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

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

The Notice of Removal and Joinder pleadings nowhere set forth any authority for Sequoia's counsel to: (i) sign for the attorney for Snohomish County; (ii) sign for Snohomish County; (iii) elect removal jurisdiction for Snohomish County; or (iv) waive the Eleventh Amendment immunity from suit of Snohomish County as a subdivision of the State of Washington. In addition, we must ask

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

In Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 624, 122 S.Ct. 1640, 152 L.Ed.2d 806, (2002), the Supreme Court held that: "We conclude that the State's action joining the removing of this case to federal court waived its Eleventh Amendment immunity--though, as we have said, the District Court may well find that this case, now raising only state-law issues, should nonetheless be remanded to the state courts for determination."

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

B. Lack of Subject Matter Jurisdiction.

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

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noted, it is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction," Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 808, 106 S.Ct. 3229, 92 L.Ed.2d 650 (1986); Lippitt v. Raymond James Fin. Servs., 340 F.3d 1033, 1044-1045 (9th Cir. 2003):

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

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

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

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

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

> The Complaint provides in pertinent part:
>
> 7.9.3 The Magnuson-Moss Act prohibits tying provisions that purport to waive warranty or service contract provisions based on the failure to meet specified preconditions.
>
> 7.9.4 Sequoia claims that a subsequent service contract that Snohomish County entered into subsequent to the purchase contract, would be void if any instruments, testing, or examination is performed on the machines without Sequoia's permission, threatening it would "void" the "warranty." **This constitutes a "tying" provision violative of the Magnuson-Moss Warranty Act with less than $50,000 at issue under this claim.** This tying provision was used, in whole or in part, to deny plaintiff Lehto the right to conduct any testing of the Sequoia machines whatsoever, without Sequoia's express permission, which has not been forthcoming and operates to conceal the operations of the election machines denying the public access to a transparent, free, equal, and open election, subject to view, review, oversight, and verification by the public.
>
> 7.9.5 Plaintiffs are entitled to all remedies under the Magnuson-Moss Warranty Act including attorneys fees, costs, and all legal, equitable and restitutionary remedies.

Though the Magnuson Moss Act is composed of federal statutes, typical jurisdiction lies in any state court of competent jurisdiction. 15 U.S.C § 2310(d) (1),(3). It grants federal court jurisdiction for non-class actions only if the amount in controversy is $50,000 or more. 15 USC § 2310 (d) (3)(B). Defendants who are attempting to remove Magnuson Moss Warranty Act claims must meet this same jurisdictional threshold. Boyd v. Homes of Legend, Inc., 188 F.3d 1294 (11th Cir. 1999). If the pleadings expressly limit relief to less than $50,000 this prevents removal unless the removing party proves to a *legal certainty* that the damages are greater. Mathews v.

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

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

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

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

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

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

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

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

> 7.10 Tenth Cause of Action: Contract Invalid and Illegal as Applied. The Contract is invalid and illegal in that its implementation is contrary to the statutory scheme for elections:
>
> 7.10.1 Election officials administering touch screen voting are unable to "periodically examine the voting devices to determine if they have been tampered with" in violation of RCW 29A.44.190 and are unable to have any meaningful access to the machines as presently designed;
>
> 7.10.2 Sequoia touch screens do not comply with the requirements of Help America Vote Act of 2002 (HAVA), 42 U.S.C. §15301 *et seq.*, and the technical standards incorporated therein, in that Sequoia touch screens lack the ballot accuracy required; they can only be used in elections under the questionable waiver of the Washington State Secretary of State of compliance with these requirements.

First, it must be noted that there is no private right of action created by the Help America Vote Act, itself. Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1078 (D. Fla., 2004) "HAVA does not itself create a private right of action." It follows that there can be no claim asserted thereunder in the Complaint. This, by itself, negates the possibility of any federal claim giving rise to removal jurisdiction simply by mentioning HAVA.

Merely referencing a federal statute is not sufficient to establish federal jurisdiction. Rains v. Criterion Systems Inc., 80 F.3d 339, 344 (9th Cir.1996) (in wrongful termination action, direct and indirect references to Title VII were not sufficient to establish federal jurisdiction). Here, NIST [National Institute of Standards and Technology] established standards for electronic voting which were

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

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

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

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

V. CONCLUSION.

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

DATED this 9th day of June, 2005.

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CERTIFICATE OF SERVICE

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

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

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

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

/s/ Randolph I. Gordon
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WESTERN DISTRICT OF WASHINGTON

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Filer: Paul Lehto
John Wells
Document Number: 21

Docket Text:
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