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The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

VIRACON, INC., QUANEX IG SYSTEMS,
INC., and TRUSEAL TECHNOLOGIES, INC.,

Defendants.

Civil Action No. 2:19-cv-508-BJR

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
VIRACON’S MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

I. INTRODUCTION

Plaintiff King County (“King County”) instituted this action against Defendants Viracon, Inc. (“Viracon”), Quanex IG Systems, Inc. (“Quanex IG Systems”), and Truseal Technologies, Inc. (“Truseal”), alleging common law fraud and violations of Washington’s Consumer Protection Act and Washington’s Product Liability Act based on the construction of a building located in downtown Seattle that is own by King County. *See* Dkt. No. 12. King County seeks compensatory as well as punitive damages and further asserts that Defendants are jointly and severally liable for its damages. *Id.*

1 Currently before the Court is Viracon's motion to dismiss King County's first amended
2 complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). Dkt. No. 29.¹ Viracon
3 argues that King County's claims under the Washington Product Liability Act, for joint and
4 several liability, and punitive damages failed to state a claim on which relief can be granted and
5 therefore are subject to dismissal under Rule 12(b)(6). Viracon also argues that King County's
6 common law fraud and Washington Consumer Protection Act claims are subject to dismissal
7 under Rule 9(b) because the claims are not pled with particularity. King County opposes the
8 motion. Dkt. No. 35. Having reviewed the motion, the opposition thereto, the record of the case,
9 and the relevant legal authorities, the Court will grant Viracon's motion to dismiss the
10 Washington Products Liability Act claim pursuant to Rule 12(b)(6), strike King County's request
11 for punitive damages as premature, and deny the motion as to the common law fraud and
12 Washington Consumer Protection Act claims. The reasoning for the Court's decision follows.

13 II. BACKGROUND

14 King County is a government entity and political subdivision of the State of Washington.
15 Dkt. No. 12 at ¶ 1.1. Viracon is incorporated and headquartered in Minnesota and in the business
16 of manufacturing insulating glass units (“IGUs”) for distribution and sale throughout the United
17 States. *Id.* at ¶ 1.2. At the center of this lawsuit is an office building—“the Chinook Building”—
18 located in Seattle, Washington that is owned by King County. *Id.* at ¶ 5.1. The Chinook Building
19 has what the parties refer to as a “curtainwall” exterior—an exterior comprised of IGUs that were
20 manufactured and sold by Viracon. *Id.* at 5.2. The IGUs consist of double paned windows with a
21 hermetically sealed air space between the panes of glass that provides thermal and acoustical
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26 ¹ Quanex IG Systems and Truseal moved to dismiss the first amended complaint in a separate
27 motion. *See* Dkt. No. 32. This Court granted the motion on October 29, 2019. Dkt. No. 53.
Therefore, Viracon is the only remaining Defendant in this action.

1 insulation. *Id.* at 5.3. Polyisobutylene-based sealant (“PIB-based sealant”) is used to seal the
2 window panes. *Id.* at ¶ 5.4.

3 King County alleges that the PIB-based sealant Viracon used to create the IGUs’ hermetic
4 seal is failing, causing a film to migrate “into the sightlines and glass of the [IGUs].” *Id.* at 5.10.
5 The County alleges that the film impairs visibility and affects the overall appearance of the
6 Chinook Building. *Id.* According to King County, the film “is present with varying degrees of
7 severity on all of the Building’s nearly 3,000 [IGUs].” *Id.* at 5.9. King County further asserts that
8 the industry standard is to use black PIB-based sealant in IGUs because the black sealant
9 “include[s] an ingredient called carbon black that protect[s] the PIB from degrading in sunlight.”
10 *Id.* at 5.12. However, King County alleges, instead of using black PIB-based sealant in the IGUs
11 for the Chinook Building, Viracon sealed the IGUs with gray PIB-based sealant that was
12 manufactured by Quanex I.G. Systems and Truseal. According to King County, Viracon, Quanex
13 I.G. Systems, and Truseal knew that the gray PIB-based sealant was “defective and its
14 performance [] inferior to that of [b]lack PIB” and, as such, the use of gray PIB-based sealant
15 would render the IGUs “[un]suitable for their intended purpose[.]” on the Chinook Building. *Id.* at
16 5.13.
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19 Indeed, King County claims, at the time that the IGUs with the gray PIB-based sealant
20 were installed on the Chinook Building, each of the Defendants knew of other buildings that had
21 Viracon-manufactured IGUs with gray PIB-based sealant that were experiencing the same issues
22 that the Chinook Building is now experiencing. *Id.* at 5.14. King County alleges that Viracon was
23 aware of these issues at least two years before the IGUs were installed on the Chinook Building.
24 *Id.* at 5.13. Therefore, King County charges, Viracon “understood and knew that the types of
25 damages King County complains of [in this lawsuit] were likely to occur, more likely to occur
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1 than if standard [b]lack PIB were [sic] used in the [IGUs], and did nothing to prevent the [g]ray
2 PIB from reaching the marketplace, or prevent the installation on the Building of [IGUs] using the
3 [g]ray PIB.” *Id.* at 5.15. Lastly, King County alleges that it could do nothing to avoid its damages,
4 by negotiation or otherwise, because only Defendants “knew of the defect and covered it up with
5 their misrepresentations and nondisclosure.” *Id.* at 5.15.
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7 **III. STANDARD OF REVIEW**

8 The court construes the complaint in the light most favorable to the non-moving party
9 when considering a motion to dismiss under Rule 12(b)(6). *Livid Holdings Ltd. v. Salomon Smith*
10 *Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded
11 allegations of material fact as true and draw all reasonable inferences in favor of the plaintiff. *See*
12 *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). “To survive a
13 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a
14 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting
15 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the
16 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 663.
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19 In addition, Rule 9(b) requires that, when fraud is alleged, “a party must state with
20 particularity the circumstances constituting fraud....” Fed.R.Civ.P. 9(b). Thus, a party alleging
21 fraud must “set forth more than the neutral facts necessary to identify the transaction.” *In re*
22 *GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir.1994), superseded by statute on other
23 grounds. “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of
24 the misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)
25 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997)). “Rule 9(b) serves three purposes:
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1 (1) to provide defendants with adequate notice to allow them to defend the charge and deter
2 plaintiffs from the filing of complaints ‘as a pretext for the discovery of unknown wrongs’; (2) to
3 protect those whose reputation would be harmed as a result of being subject to fraud charges; and
4 (3) to ‘prohibit [] plaintiff[s] from unilaterally imposing upon the court, the parties and society
5 enormous social and economic costs absent some factual basis.’” *Kearns v. Ford Motor Co.*, 567
6 F.3d 1120, 1125 (9th Cir. 2009) (quoting *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 (9th
7 Cir.1996) (internal quotations omitted, brackets in original)).

9 IV. DISCUSSION

10 As stated above, Viracon moves to dismiss each of King County’s claims against it; this
11 order addresses each claim in turn.

12 A. The Washington Product Liability Act Claim Is Barred by the Economic Loss 13 Exclusion

14 King County alleges that Viracon is strictly liable for the County’s damages caused by
15 Viracon’s allegedly defective product—the IGUs—pursuant to the Washington Product Liability
16 Act (“WPLA”). The WPLA “creates a single cause of action for product-related harms that
17 supplants previously existing common law remedies.” *Wash. Water Power Co. v. Graybar, Elec.*
18 *Co.*, 774 P.2d 1199, 1207 (Wash. 1989). A party may sue under the WPLA for “any claim or
19 action brought for *harm* caused by the manufacture, production, making, construction,
20 fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions,
21 marketing, packaging, storage or labeling of the relevant product.” *Staton Hill Winery Co., Ltd. v.*
22 *Collons*, 980 P.2d 784, 786 (Wash. App. 1999) (emphasis in original) (quoting RCW
23 7.72.010(4)). A plaintiff may recover for harm caused by defective products but cannot recover
24 for economic losses. RCW 7.72.010(6); *Touchet Valley Grain Growers, Inc. v. Opp & Seibold*
25 *General Const., Inc.*, 831 P.2d 724, 733 (Wash. 1992). Thus, the WPLA “confines recovery to
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1 physical harm of persons and property and leaves economic loss, standing alone, to the Uniform
2 Commercial Code.” *Id.*

3 This is referred to as the “economic loss” exclusion under WPLA. *Mensonides Dairy, LLC*
4 *v. Agri-King Nutrition*, 2017 WL 8777386, *3 (E.D. Wash. December 27, 2017) (citing *Touchet*,
5 831 P.2d at 733). The economic loss exclusion “marks the boundary between the law of
6 contracts—designed to enforce expectations created by agreement—and the law of torts—
7 designed to protect citizens and their property by imposing a duty of reasonable care on others.”
8 *Hofstee v. Dow*, 36 P.3d 1073, 1076 (Wash. App. 2001). “Particular damages may be remediable
9 in tort as well as in contract, but if the damages fall on the contract side of the line and more
10 properly remediable in contract, tort recovery is precluded.” *Id.* (citing *Berschauer/Phillips*
11 *Constr. Co. v. Seattle Sch. Dist. No.1*, 881 P.2d 986, 990 (Wash. 1994)).
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14 Washington courts have adopted a “risk of harm” analysis to determine whether a
15 plaintiff’s damages fit within the economic loss exclusion. *Id.* at 1077. Under this analysis, courts
16 consider the nature of the defect, the type of risk it posed, and the manner in which the injury
17 arose to determine whether “the safety-insurance of tort law or the expectation-bargain protection
18 of contract law is most applicable.” *Id.* In performing the risk of harm analysis, Washington
19 courts employ two tests—a “sudden and dangerous” test and an “evaluative approach”— to
20 determine whether the harm is actionable under the WPLA or barred by the economic loss
21 exclusion. *Touchet*, 831 P.2d at 733; *Moodie v. Remington Arms Company, LLC*, 2013 WL
22 12191352, *7 (W.D. Wash. 2013).
23

24 King County claims to satisfy only the “evaluative approach” test, so the Court will focus
25 its analysis on it. Under the “evaluative approach,” a court considers (1) the nature of the defect,
26 (2) the type of risk, and (3) the manner in which the injury arose. *Touchet*, 831 P.2d at 733. As to
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1 the first element—the nature of the defect—courts consider “whether the product failed to meet
2 the purchaser’s expectations, such as a gradual internal deterioration, or whether [the product]
3 was generally defective; that is, whether it suddenly leaked, exploded, or came apart, such as a
4 violent collision.” *Nobl Park. LLC of Vancouver v. Shell Oil Co.*, 95 P.3d 1265, 1271 (Wash. Ct.
5 App. 2004) (citing *Staton Hills*, 980 P.2d at 788).

6
7 King County describes the nature of the alleged defect in the IGUs as follows:

8 Due to the performance malfunction, the [gray PIB-based sealant]
9 **has gradually and progressively** formed a film migrating into the
10 sightlines and glass of the [IGUs] **impairing their ability to**
11 **function as a window and the overall appearance of [the]**
12 **Building exterior.** The film appears in various ways such as a
dramatic expansion or stretching, a bubbling from the spacer onto the
panes’ interior surfaces, long solitary icicles, or a dripping band of
seepage.

13 Dkt. No. 12 at ¶ 5.10 (emphasis added). King County alleges that it first noticed this alleged
14 defect ten years after the IGUs were installed and that as a result of this film, the IGUs “[do] not
15 perform as an ordinary consumer would have expected them to perform ...” Dkt. No. 12 at ¶ 6.8;
16 ¶ 5.6. These allegations are textbook failure-to-meet-expectation claims that fall on the “contract
17 side of the line”. See *Polygon Northwest Co. LLC v. Louisiana-Pacific Corp*, 2012 WL 2504873,
18 *3 (W.D. Wash. June 28, 2012) (holding that allegations that building siding “suffered from
19 distortion, deformation, and fading” implicates the expectation-bargain policies of contract law,
20 not tort law); *Staton Hills*, 980 P.2d at 787 (“[T]ort law policies are not applicable where a
21 product’s defect is merely its failure to meet the purchaser’s expectation.”).

22
23 Further, King County claims that the alleged defect occurred a decade after the IGUs were
24 installed and that the defect is spreading “gradually and progressively.” Dkt. No. 10 at ¶ 5.10. In
25 other words, there has been no sudden and dangerous failure of the IGUs. Once again, these
26 allegations fall on the “contract side of the line.” See *Trinity Glass Intern. Inc. v. LG Chem, Ltd.*,

1 2010 WL 5071295 (W.D. Wash. December 7, 2010) (holding that plaintiff’s WPLA claim was
2 barred by the economic loss exclusion because “[t]here was no sudden and dangerous failure of
3 the product alleged in the pleadings, nor was there a sudden and calamitous event”); *Staton Hills*,
4 980 P.2d at 788 (noting that the product “did not leak, explode, or come apart” rather it failed to
5 “fulfill contract requirements” thus the defect “implicates the ‘expectation-bargain protection’
6 policies of contract law and does not implicate the safety insurance policies of tort law”); *Stuart v.*
7 *Coldwell Banker Comm’l Group, Inc.*, 745 P.2d 1284, 1291 (Wash. 1987) (“Defects of quality are
8 evidenced by internal deterioration, and designated as economic loss, while loss stemming from
9 defects that cause accidents involving violence or collision with external objects is treated as
10 physical injury.”). Thus, the nature of the IGUs alleged defect weighs in favor of finding King
11 County’s alleged harm as a purely economic loss.
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14 The second factor courts consider—the type of risk—also weighs in favor of finding that
15 King County’s alleged harm is an economic loss. Under this factor, this Court must consider “the
16 magnitude of risk the product’s defect posed to itself, to other property, or to persons,” whether
17 the risk was foreseeable, whether King County had bargaining power to reduce the risk. *Staton*
18 *Hills*, 980 P.2d at 788. Here, there was no reasonable risk of harm to people or property. King
19 County has not alleged any risk to persons or significant risk to property. Rather, it primarily
20 alleges damage to the IGUs themselves and potential damages that may be incurred when
21 removing and replacing the defective IGUs. King County’s allegations stand in stark contrast to
22 cases in which courts have determined that the risk caused by the defect did implicate tort
23 policies. *See, e.g., Touchet*, 831 P.2d at 734 (“The risk of structural collapse posed a real,
24 nonspeculative danger of physical injury to any persons walking in or about the flathouse
25 building.”); *Moodie v. Remington Arms Company, LLC*, 2013 WL 12191352, *7 (W.D. Wash.
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1 August 2, 2013) (“[T]he risk that the gun fires without a trigger pull ... is precisely the type of
2 safety risk that underlies the safety-insurance concerns of tort law (which allocated the
3 responsibility for avoiding such risks to the manufacturer, who is in the best position to detect and
4 eliminate them.”). Furthermore, this Court finds that a defect that impairs visibility through a
5 window is exactly the type of risk associated with windows and was, therefore, foreseeable. *See*
6 *Agri-King Nutrition*, 2017 WL 8777386, *4-5 (E.D. Wash. December 27, 2017) (product was
7 designed to assist fermentation so its failure to boost fermentation was a foreseeable risk);
8 *Polygon Northwest*, 2012 WL 2504873, *3 (W.D. Wash. June 28, 2012) (warping was a
9 foreseeable defect of the siding). Thus, this factor—the type of risk—also weighs in favor of
10 finding that King County’s harm is purely an economic loss.
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12 The final element courts consider—the manner in which the injury arose—asks “whether
13 the injury arose as the result of a calamitous and sudden event.” *Hofstee*, 36 P.3d at 1078; *Agri-*
14 *King Nutrition*, 2017 WL 8777386, *3, *5 (E.D. Wash. December 27, 2017) (noting that this
15 factor asks whether the products failure is “the result of a sudden and dangerous event”). As
16 previously stated, King County alleges that defect in the IGUs—*i.e.* “the film migrating into the
17 sightlines and glass”—has occurred “gradually and progressively”. Dkt. No. 12 at ¶ 5.10. This is
18 the opposition of “calamitous and sudden”, thus this element also weighs in favor of finding that
19 the County’s harm is purely an economic loss.
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21 For the foregoing reasons, this Court concludes that King County’s claim of harm is
22 purely economic. The County’s WPLA claim is dismissed because it falls under the WPLA’s
23 economic loss exclusion.
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1 **B. King County Pled the Common Law Fraud and Washington Consumer**
2 **Protection Act Claims with Particularity**

3 As stated above, under the Federal Rule of Civil Procedure 9(b) pleading standard,
4 “[a]verments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the
5 misconduct charged.” *Vess*, 317 F.3d at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th
6 Cir. 1997)). Even if the elements of a claim do not include fraud, an allegation of a “unified
7 course of fraudulent conduct” requires that “the pleading of that claim as a whole must satisfy the
8 particularity requirement of Rule 9(b).” *Id.* at 1103–04. The Rule 9(b) standard is relaxed in
9 fraudulent omission cases. *Zwicker*, 2007 WL 5309204, at *4 (W.D. Wash. July 26, 2007). In
10 such cases, a plaintiff may “not be able to specify the time, place, and specific content of an
11 omission as precisely as would a plaintiff in a false representation claim.” *Falk v. Gen. Motors*
12 *Corp.*, 496 F. Supp. 2d 1088, 1098–99 (N.D. Cal. 2007).

14 Here, King County alleges that Viracon committed fraud against it in the form of (1)
15 fraudulent omission and (2) fraudulent misrepresentation. The alleged fraudulent omission and
16 misrepresentation are also the basis for King County’s claim under the Washington Consumer
17 Protection Act (“WCPA”). Thus, both the fraud and the WCPA claims must satisfy the Rule 9(b)
18 heightened pleading requirement. *See Vess*, 317 F.3d at 1103-04. For the reasons set forth below,
19 this Court concludes that King County’s common law fraud and WCPA claims meet Rule 9(b)’s
20 particularity requirement.

22 King County alleges that it “entered into a public private partnership with Goat Hill
23 Properties to have the Chinook Building constructed on King County’s property” and that Goat
24 Hill, in turn, contracted with another entity to “act as the developer” on the project. Dkt. No. 12 at
25 ¶ 5.1. King County further alleges that Chinook Building’s exterior is comprised of IGUs
26 manufactured by Viracon and that these IGUs used gray PIB-based sealant instead of black PIB-
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1 based sealant. King County claims that at the time of the installation of the IGUs on the Chinook
2 Building, Viracon knew the gray sealant was “defective and its performance [] inferior to that of
3 [black sealant].” *Id.* at ¶ 5.13. King County further alleges that concurrently with the installation
4 of the IGUs on the Chinook Building, Viracon was aware of other buildings experiencing defects
5 with IGUs that used gray PIB-based sealant but failed to notify King County of these issues.
6 Instead, King County alleges, Viracon “disseminated product literature indicating the [gray PIB-
7 based sealant] performed as well as the [black PIB-based sealant] and could be used
8 interchangeably with identical results.” *Id.* at ¶ 5.15. Finally, King County asserts that had it
9 known of the issues with the gray PIB-based sealant, it would not have allowed IGUs with gray
10 sealant to be installed on the Chinook Building. Thus, King County claims, it relied on Viracon’s
11 alleged fraudulent omissions and misrepresentation to its detriment.
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14 The Court finds that these allegations satisfy the particularity requirement of Rule 9(b).
15 King County has sufficiently alleged who (Viracon), what (product literature indicating that gray
16 PIB-based sealant is as effective as black PIB-based sealant), where (the marketplace), and how
17 (Viracon allegedly allowed this misrepresentation to enter the marketplace even though it was
18 aware that gray PIB-based sealant does not perform as well as black PIB-based sealant). These
19 allegations satisfy the general purpose behind Rule 9(b)’s heightened pleadings requirements—
20 they place Viracon on notice of the specific misconduct of which it is charged. Therefore, the
21 motion to dismiss is denied as to the common law fraud and WCPA claims.
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23 C. King County’s Claim for Punitive Damages

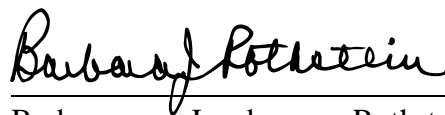
24 The Amended Complaint alleges punitive damages against Viracon under Minnesota law.
25 Dkt. No. 12 at ¶ 11.2. Under Minnesota law, a plaintiff may not state a claim for punitive
26 damages in its original pleadings; rather, the plaintiff must make a motion to amend its pleading
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1 to include punitive damages. *Gamma-10 Plastics, Inc. v. American President Lines, Ltd.* 32 F.3d
2 1244, 1255 (8th Cir. 1994), *certiorari denied*, 513 U.S. 1198 (1994); *Freeland v. Financial*
3 *Recovery Services, Inc.*, 790 F. Supp. 2d 991, 994 (D. Minn. 2011). The purpose of this law is to
4 prevent frivolous punitive damage claims by allowing a court to determine first if punitive
5 damages are appropriate. *Gamma-10 Plastics*, 32 F.3d at 1255; *Bougie v. Sibley Manor, Inc.*, 504
6 N.W.2d 493, 499 (Minn. App. 1993) (purpose of the statute setting forth procedure for making
7 claim for punitive damages is to ensure that punitive damages are only pleaded in those cases
8 where such damages are appropriate). Thus, King County’s claim for punitive damages is
9 premature and must be dismissed.²

11 **V. CONCLUSION**

12 For the foregoing reasons, the Court HEREBY GRANTS in part and DENIES in part
13 Viracon’s motion to dismiss [Dkt. No. 29]. The WPLA claim is dismissed with prejudice, the
14 punitive damages claim is dismissed as premature, and the motion is denied as to King County’s
15 common law fraud and WCPA claims.

17 Dated this 4th day of December 2019.

18 
19 _____
20 Barbara Jacobs Rothstein
21 U.S. District Court Judge

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26 ² Viracon also moves to dismiss King County’s assertion that the Defendants in this action are
27 jointly and severally liable. Because the Court has already dismissed the claims against the other
Defendants in this action, it is not necessary for the Court to address this issue.