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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CHRISTOPH BOLLING, et al.,

11 Plaintiffs,

12 v.

13 MITCHELL H. GOLD, et al.,

14 Defendants.

CASE NO. C13-0872JLR

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS IN PART PLAINTIFFS'  
THIRD AMENDED COMPLAINT

15 **I. INTRODUCTION**

16 Before the court is Defendants Dr. Mitchell H. Gold, M.D., Mr. Gregory T.  
17 Schiffman, and Mr. Hans E. Bishop's (collectively "Defendants")<sup>1</sup> motion to dismiss  
18 portions of Plaintiffs' third amended complaint. (Mot. (Dkt. # 117).) The court has  
19 considered the motion and the submissions of the parties, the balance of the record, and  
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22 <sup>1</sup> Defendant Dendreon Corporation was dismissed from this action on May 7, 2015,  
pursuant to a stipulation and order of dismissal. (Stip. Ord. (Dkt. # 111).)

1 the applicable law. Being fully advised, the court GRANTS in part and DENIES in part  
2 Defendants' motion.<sup>2</sup>

## 3 II. BACKGROUND

4 This is a securities fraud case related to Dendreon Corporation and its only  
5 product, Provenge, which is a medical product designed to fight prostate cancer. (3d Am.  
6 Compl. (Dkt. ## 113 (redacted), 116 (sealed)).) Plaintiffs, who are numerous, all  
7 purchased or otherwise acquired Dendreon's publicly traded securities between April 29,  
8 2010, and November 2, 2011. (*Id.* ¶¶ 1, 27-48.) Plaintiffs assert claims against  
9 Dendreon's Chairman and former President and Chief Executive Officer ("CEO") Mr.  
10 Gold, its former Chief Operating Officer ("COO"), Mr. Bishop, and its Chief Financial  
11 Officer ("CFO"), Mr. Schiffman, for violations of Sections 10(b), 20(a) and 20A of the  
12 Securities Exchange Act of 1934, and common law fraud and negligent  
13 misrepresentation. (*See id.* ¶¶ 49-51, 346-93.)

14 Plaintiffs filed their initial complaint in this action on May 16, 2013 (Compl. (Dkt.  
15 ## 1 (redacted), 7 (sealed))), and their first amended complaint on July 16, 2013 (Am.  
16 Compl. (Dkt. ## 32 (redacted), 33 (sealed))). On August 9, 2013, Defendants filed their  
17 first motion to dismiss (Dkt. # 38). On January 28, 2014, the court granted in part and  
18 denied in part Defendants' motion. (1/28/14 Order (Dkt. # 54).) In its order, the court  
19 dismissed all of Plaintiffs' federal securities fraud claims but allowed Plaintiffs' state law  
20 claims to move forward. (*See generally id.*) Specifically, the court dismissed all of

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22 <sup>2</sup> No party has requested oral argument and the court determines that this motion is  
appropriate for disposition without it.

1 Plaintiffs' federal claims based on forward-looking revenue guidance and patient  
2 treatment predictions under a liability shield contained within the Private Securities  
3 Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-5(c)(1)(A)(i). (See 1/28/14 Order at  
4 15-21.) The court granted Plaintiffs leave to amend their complaint. (*Id.* at 33.)

5 Plaintiffs filed their second amended complaint on February 17, 2014. (2d Am.  
6 Compl. (Dkt. ## 55 (redacted), 56 (sealed)).) Defendants filed their motion to dismiss  
7 Plaintiffs' second amended complaint on March 24, 2014 (Dkt. ## 60 (sealed), 61  
8 (redacted)). On June 5, 2014, the court again dismissed Plaintiffs' federal securities  
9 claims, but this time focused its analysis on the lack of allegations supporting a strong  
10 inference of scienter rather than the PSIRA's safe harbor provisions. (*See generally*  
11 6/5/14 Order (Dkt. # 75).) The court granted Plaintiffs leave to file a motion to amend  
12 within 20 days. (*Id.* at 31-32.) Plaintiffs did not file a motion within that timeframe, and  
13 instead proceeded to discovery on their state law claims.

14 On February 23, 2015, Plaintiffs filed a motion to amend their second amended  
15 complaint. (Mot. to Amend (Dkt. ## 101 (redacted), 102 (sealed)).) Plaintiffs attached a  
16 red-lined version of their proposed third amended complaint to their motion. (Red-lined  
17 3d Am. Compl. (Dkt. # 102-1 (sealed)).) Plaintiffs argued that as a result of the  
18 discovery they obtained from Defendants on the state law claims, they had discovered  
19 direct evidence that Defendants knew their public statements were false or misleading—  
20 supplying the previously missing element of scienter. (Mot. to Amend at 1.)  
21 Accordingly, Plaintiffs argued that they were entitled to amend their complaint once  
22 more to re-allege their federal securities claims. (*See generally id.*)

1 The court granted Plaintiffs’ motion to amend on May 19, 2015, finding that  
2 discovery conducted on Plaintiffs’ state law claims had “changed the landscape” with  
3 respect to Plaintiffs’ federal securities fraud claims. (*See* 5/19/15 Order (Dkt. # 112) at  
4 14.) Plaintiffs filed their third amended complaint ON May 22, 2015. (*See* 3d Am.  
5 Compl.) The third amended complaint expands the relevant period of Defendants’  
6 alleged fraud from April 29, 2010 through August 3, 2011 to April 29, 2010 through  
7 November 2, 2011. (*Compare* 2d Am. Compl. ¶ 2 *with* 3d Am. Compl. ¶ 1.)

8 On June 8, 2015, Defendants filed the present motion to dismiss portions of  
9 Plaintiffs’ third amended complaint. (*See generally* Mot.) Defendants assert that  
10 Plaintiffs have improperly revived certain portions of their federal securities claims—  
11 namely portions related to Dendreon’s 2011 revenue guidance and its 2000-patient  
12 forecast—that the court previously dismissed under the PSLRA’s safe harbor provision.  
13 (*Id.* at 3-6.) Defendants argue that these claims cannot be revived through amendment.  
14 (*See id.*)

15 In addition, Defendants move to dismiss Plaintiffs’ new claims based on  
16 statements made after August 3, 2011, as time-barred and as inadequately pleaded under  
17 the heightened standards of the PSLRA. (*Id.* at 6-9.) Defendants also move to dismiss  
18 Plaintiffs’ new claim under Item 303 of Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii),  
19 arguing that violations of Item 303 cannot form the basis of a private federal securities  
20 fraud claim. (Mot. at 9-10.) Finally, Defendants move to dismiss Plaintiffs’ new claim  
21 for punitive damages as prohibited under Washington law. (*Id.* at 10.) Plaintiffs oppose  
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1 each portion of Defendants’ motion. (*See generally* Resp. (Dkt. ## 124 (redacted), 126  
2 (sealed)).) The court addresses each issue in turn.

### 3 III. ANALYSIS

#### 4 A. Dendreon’s 2011 Revenue Guidance

5 In their third amended complaint, Plaintiffs revive federal claims based on two  
6 statements related to Dendreon’s revenue guidance made on April 7, 2011 (*see* 3d Am.  
7 Compl. ¶¶ 135, 216, 270, 344; *see also* Dkt. ## 39-20, 62-11) and June 7, 2011 (*see* 3d  
8 Am. Compl. ¶¶ 281, 344; *see also* Dkt. # 62-12). The court had previously dismissed  
9 these federal claims based on the PSLRA’s safe harbor provision contained in 15 U.S.C.  
10 § 78u-5(c)(1)(A)(i). (*See* 1/28/14 Order at 20, n.4.) This PSLRA liability shield protects  
11 securities fraud defendants from claims related to forward-looking statements that are  
12 identified as such and accompanied by meaningful cautionary language. *See In re Cutera*  
13 *Sec. Litig.* 610 F.3d 1103, 1111 (9th Cir. 2010).

14 Defendants argue that the court’s previous ruling applying the PSLRA’s safe  
15 harbor provision to these two statements forecloses Plaintiffs from reasserting these  
16 claims in the third amended complaint. (*See* Mot. at 3-5.) Plaintiffs respond that the  
17 allegations in their third amended complaint are more comprehensive and that the more  
18 detailed allegations render the claims based on the two revenue statements viable upon  
19 re-pleading. (Resp. at 3-4.) In addition, Plaintiffs argue that the PSLRA’s safe harbor  
20 provision simply does not cover the statements at issue because Defendants did not  
21 identify these two statements as “forward-looking” and did not accompany these  
22 statements with any cautionary language. (Resp. at 5-6; *see* Dkt. ## 39-20, 62-11, 62-

1 12.) Defendants do not challenge these substantive arguments in their reply. (*See*  
2 *generally* Reply (Dkt. # 127) at 3-7.) Rather, Defendants reiterate their position that the  
3 court's prior January 29, 2015, order forecloses the re-pleading of these claims. (*See id.*)

4 With respect to the two revenue statements at issue, the court denies Defendants'  
5 motion and adheres to the ruling contained in its May 19, 2015, order granting Plaintiffs'  
6 motion to amend. (*See* 5/19/15 Order at 10.) As Plaintiffs have repeatedly asserted,  
7 Defendants did not identify these statements as "forward-looking" and did not  
8 accompany the statements with any cautionary language. (*See* Dkt. ## 39-20, 62-11, 62-  
9 12.) As such, they are not entitled to protection under the PSLRA's "safe harbor"  
10 provision. *See* 15 U.S.C. § 78u-5(c)(1)(A)(i).

11 Even if, as Defendants assert, this court's May 19, 2015, ruling (and its present  
12 ruling) is inconsistent with its January 29, 2015, ruling, the court is entitled to rule in  
13 accord with its May 19, 2015, order now. Under Federal Rule of Civil Procedure 54(b),  
14 an interlocutory order, such as the court's January 29, 2015, order, that "adjudicates  
15 fewer than all the claims or the rights and liabilities of fewer than all the parties does not  
16 end the action as to any of the claims or parties and may be revised at any time before  
17 entry of judgment adjudicating all the claims and all the parties' rights and liabilities."  
18 Fed. R. Civ. P. 54(b); *see also* *WPP Luxembourg Gamma Three Sarl v. Spot Runner,*  
19 *Inc.*, 655 F.3d 1039, 1059 (9th Cir. 2011) (holding, in the context of a PSLRA case, that  
20 where some claims survive a motion to dismiss, the district court, in its discretion, has the  
21 power to allow an amended complaint even with regard to claims it earlier dismissed);  
22 *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (9th Cir. 2003) (stating

1 that a district court retains the power to modify rulings on partial dispositive motions);  
2 *United States v. Martin*, 226 F.3d 1042, 1048-49 (9th Cir. 2000) (stating that until final  
3 judgment is entered a district court has the “inherent jurisdiction to modify, alter, or  
4 revoke” interlocutory decisions). The court has explained this principle to the parties  
5 before. *See Bolling v. Gold*, No. C13-0872JLR, 2015 WL 2406487, at \*3 & n.3 (W.D.  
6 Wash. May 19, 2015). Accordingly, Defendants’ motion with respect to the two revenue  
7 statements at issue is DENIED.<sup>3</sup>

### 8 **B. 2000-Patient Prediction**

9 In its May 19, 2015, order, the court ruled that Plaintiffs had sufficiently pleaded  
10 scienter with respect to Defendants’ 2,000-patient prediction in their proposed third  
11 amended complaint. (*See* 5/19/15 Order at 10-11.) As Defendants point out, however,  
12 the court had previously dismissed these claims based on the PSLRA’s safe harbor  
13 provision, 15 U.S.C. § 78u-5(c)(1)(A)(i), and unlike the two revenue statements  
14 discussed above, these statements were all identified as forward-looking and  
15 accompanied by cautionary statements. (*See* Mot. at 5-6.) Defendants therefore assert  
16 that the court should not permit Plaintiffs to revive these claims in their third amended  
17 complaint. (*Id.*)

18 Plaintiffs counter that “[a]s with the 2011 revenue guidance,” the third amended  
19 complaint “adds new facts with respect to Defendants’ 2,000 patients misstatements.”

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21 <sup>3</sup> To the extent that there is any confusion on the issue (*see* Reply at 4), the court clarifies  
22 as follows: All statements related to revenue guidance, except those made on April 7, 2011, and  
June 7, 2011, are immunized under the PSLRA’s safe harbor provision.

1 (Resp. at 6.) Plaintiffs contend that their new allegations are “qualitatively different.”  
2 (*Id.* at 7.) They assert that, “in repeatedly telling Dendreon investors that Dendreon was  
3 still on track with its 2,000-patient target, ‘Defendants misled investors by failing to  
4 admit that they in fact had extended the timeline for meeting the 2,000 patient goal, and  
5 by failing to disclose the underlying reason that the Provenge launch was progressing  
6 badly.’” (*Id.* (quoting 3d Am. Compl. ¶ 233).) Plaintiffs argue that these omissions  
7 render Defendants’ statements about the 2,000-patient prediction “not merely statements  
8 about future performance” and therefore not protected by the PSLRA’s safe harbor.  
9 (Resp. at 7.)

10 The court disagrees. Unlike the revenue statements analyzed previously, Plaintiffs  
11 do not argue that Defendants’ statements concerning the 2,000-patient forecast were not  
12 identified as forward-looking or were unaccompanied by cautionary statements. (*See*  
13 Resp. at 6-7.) Plaintiffs rely solely on their new allegations to plead themselves out of  
14 the PSLRA’s safe harbor. (*See id.*) Defendants argue that, because the PSLRA’s safe  
15 harbor is a definitive legal bar, it is impossible to plead one’s way out. (*See* Mot. at 5  
16 (citing *In re Quality Sys., Inc. Sec. Litig.*, 60 F. Supp. 3d 1095, 1106 (C.D. Cal. 2014)).)  
17 Whether this is always true or not, Plaintiffs’ additional allegations fail to accomplish the  
18 task here. Irrespective of Plaintiffs’ additional allegations, Defendants’ 2000-patient  
19 forecasts were nonetheless identified as forward-looking and accompanied by appropriate  
20 cautionary language. Unlike the revenue guidance discussed herein, Plaintiffs do not  
21 dispute these facts. Hence, these statements remain within the PSLRA’s safe harbor  
22 provision. Accordingly, the court GRANTS this portion of Defendants’ motion and



1 DISMISSES Plaintiffs' federal securities claims challenging Defendants' 2,000-patient  
2 forecast.<sup>4</sup>

3 **C. New Allegations Challenging August 3, 2011, Statements**

4 In their third amended complaint, Plaintiffs allege for the first time that  
5 Dendreon's August 3, 2011, withdrawal of its previous revenue guidance not only  
6 revealed the fraud previously alleged in Plaintiffs' second amended complaint but also  
7 constituted an additional fraud of its own. (*See* 3d Am. Compl. ¶¶ 292-96.)  
8 Consequently, Plaintiffs expand the relevant time period of Defendants' alleged fraud  
9 from April 29, 2010, through August 3, 2011, to April 29, 2010, through November 2,  
10 2011. (*Compare* 2d Am. Compl. ¶ 2 *with* 3d Am. Compl. ¶ 1.) Although Plaintiffs filed  
11 a red-lined version of their proposed third amended complaint that included these new  
12 allegations (*see* Dkt. # 102-1 at 103-04), Defendants did not challenge these new  
13 allegations in their opposition to Plaintiffs' motion to amend the second amended  
14 complaint (*see generally* 3/9/15 Resp. (Dkt. # 104)). Instead, Defendants waited until  
15 after the court granted Plaintiffs' motion their second amended complaint to raise their  
16 objections to these new allegations on statute of limitations and adequacy of pleading  
17 grounds. (*See* Mot. at 7-9.)

18 First, Defendants argue that the new claim, which is based on allegedly false  
19 statements made when Dendreon withdrew its previous revenue guidance on August 3,

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21 <sup>4</sup> The court denies Plaintiffs leave to amend these claims. Plaintiffs have already had  
22 multiple opportunities to amend these claims. (*See, e.g.*, Am. Compl., 2d Am. Compl., 3d Am.  
Compl.) The court concludes that any further attempt to amend would be futile.

1 | 2011, is barred by the two-year statute of limitations period that applies to Plaintiffs’  
2 | federal securities claims, *see* 28 U.S.C. § 1658(b)(1), and the three-year limitations  
3 | period that applies to Plaintiffs’ state law claims, *see* RCW 4.16.080(4). (Mot. at 7.)  
4 | Defendants assert that Plaintiffs must have discovered this new claim no later than  
5 | November 2, 2011, when Dendreon provided “confirmation that there was a permanent  
6 | demand issue with Provenge.” (Mot. at 7 (quoting 3d Am. Compl. ¶ 327).) Accordingly,  
7 | Defendants argue that the statutes of limitation expired on November 2, 2013 and  
8 | November 2, 2014, respectively, and Plaintiffs’ new claims, which were not filed until  
9 | Plaintiffs’ third amended complaint on May 22, 2015, are therefore barred. (*Id.*)

10 | Plaintiffs assert, however, that they did not discover the facts constituting the new  
11 | claim until August 14, 2014, at the earliest, which is the date Defendants began to  
12 | produce documents to Plaintiffs in discovery. (Resp. at 8.) Plaintiffs assert that it was  
13 | through their review of these documents that they discovered facts as to Defendants’  
14 | scienter—that Defendants knew their statements during the August 3, 2011, conference  
15 | call were false. (*Id.*) The federal statute of limitations at issue here states that the  
16 | limitations period does not begin to run until “discovery of facts constituting the  
17 | violation.” 28 U.S.C. § 1658(b)(1). The Supreme Court has expressly held that “facts  
18 | showing scienter are among those that ‘constitut[e] the violation.’” *Merck & Co. v.*  
19 | *Reynolds*, 559 U.S. 633, 649 (2010) (quoting 28 U.S.C. § 1658(b)(1)) (alterations in  
20 | original). Indeed, the Court has specifically noted:

21 | An incorrect prediction about a firm’s future earnings, by itself, does not  
22 | automatically tell us whether the speaker deliberately lied or just made an  
innocent (and therefore nonactionable) error. Hence, the statute may

1 require “discovery” of scienter-related facts beyond the facts that show a  
2 statement (or omission) to be materially false or misleading.

3 (*Id.*) Based on the foregoing, the court concludes that this issue is inappropriate for  
4 disposition on a motion to dismiss. It may be that this issue can be resolved on summary  
5 judgment, but the court declines to dismiss Plaintiffs’ new claim based on the statute of  
6 limitations pending further factual development.

7 Defendants also assert that Plaintiffs’ new claim is inadequately pleaded under the  
8 PSLRA with regard to the required elements of falsity and scienter.<sup>5</sup> (*See Mot. at 7-9.*)  
9 The court has previously set forth the standards for pleading in a securities fraud action,  
10 including the standards under Federal Rules of Civil Procedure 12(b)(6) and 9(b) and the  
11 PSLRA (*see 1/28/15 Order at 11-13; 6/5/14 Order at 12-14*) and, accordingly, need not  
12 restate them here. Having carefully reviewed the new allegations and claim contained in  
13 Plaintiffs’ third amended complaint, the court agrees with Plaintiffs that Defendants’  
14 motion to dismiss this claim fails to address the specific misrepresentations and  
15 omissions actually alleged in Plaintiffs’ new claim. For example, Defendants fail to  
16 address Defendant Gold’s allegedly misleading statement on August 3, 2011, that the  
17 company had signed up more than 265 infusing accounts by the end of the second quarter  
18 of that year, when he knew that this figure was misleading as a result of other information  
19 he had obtain in June 2011. (*Compare Mot. at 7-9 with 3d Am. Compl. ¶ 293.*)

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20 <sup>5</sup> Defendants also argue for the first time in their reply memorandum that Plaintiffs failed  
21 to adequately plead the element of “loss causation.” (*See Reply at 8-9.*) The court need not  
22 address this issue raised for the first time in reply and to which Plaintiffs had no opportunity to  
respond. *See United States v. Wright*, 215 F.3d 1020, 1030 n.3 (9th Cir. 2000) (declining to  
consider an argument raised for the first time in reply brief).

1 Defendants also fail to address Gold’s statement on August 3, 2011, in which he  
2 allegedly misrepresented that Dendreon’s problems were newly discovered although  
3 Defendants allegedly knew of the problems for many months.<sup>6</sup> (*Compare* Mot. at 7-9  
4 *with* 3d Am. Compl. ¶ 294.) Based on its review, the court concludes that Plaintiffs have  
5 met the pleading requirements for the element of falsity by “specify[ing] each statement  
6 alleged to have been misleading, [and] the reason or reasons why the statement is  
7 misleading” and stating with particularity “all facts on which that belief is formed.” *See*  
8 15 U.S.C. § 78u-4(b)(1). The court also concludes that Plaintiffs have met the requisite  
9 standards for pleading an inference of scienter that is “cogent and at least as compelling  
10 as any opposing inference of nonfraudulent intent.” *See Tellabs, Inc. v. Makor Issues &*  
11 *Rights, Ltd.*, 551 U.S. 308, 314 (2007). Accordingly, the court DENIES this portion of  
12 Defendants’ motion.

#### 13 **D. Claim Based on Item 303**

14 Plaintiffs allege for the first time in their third amended complaint that Defendants  
15 breached a duty under Item 303 of Regulation S-K. (3d Am. Compl. ¶¶ 300-04, 352.)  
16 Item 303 requires companies to disclose certain “known trends and uncertainties” in  
17 certain mandatory filings. 17 C.F.R. § 229.303(a)(3)(ii). Defendants move to dismiss  
18 this claim based on *In re NVidia Corporation Securitates Litigation*, 768 F.3d 1046, 1053-  
19 56 (9th Cir. 2014), which held that Item 303’s duty to disclose is not actionable under

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21 <sup>6</sup> Defendants’ attempts to belatedly address these allegations in their reply memorandum  
22 (*see* Reply (Dkt. # 127) at 7-8) do not persuade the court that Plaintiffs fail to meet the necessary  
pleading standards with respect to their newly alleged claim.

1 Section 10(b) and Rule 10b-5. (Mot. at 9-10.) Plaintiffs do not dispute that this court is  
2 bound by the Ninth Circuit’s ruling in *NVidia*. (See Resp. at 10 (“ . . . Plaintiffs  
3 acknowledge that *NVidia* is binding on the Court.”).) Rather, Plaintiffs assert that they  
4 pleaded claims based on Item 303 “in order to preserve them” because Plaintiffs believe  
5 that the Ninth Circuit’s decision in *NVidia* is “likely to be reconsidered.” (Resp. at 10-  
6 11.) Whether reconsideration of the holding in *NVidia* is likely or not, this court is  
7 presently bound by it. Accordingly, the court GRANTS this portion of Defendants’  
8 motion and DISMISSES with prejudice Plaintiffs’ claims based on Defendants’ alleged  
9 failure to comply with Item 303.

#### 10 **E. Punitive Damages**

11 Plaintiffs request for the first time in their third amended complaint an award of  
12 punitive damages. (3d Am. Compl. at 109 (prayer for relief).) Punitive damages are not  
13 available under the Securities Exchange Act. See *Ambassador Hotel Co., Ltd. v. Wei-*  
14 *Chuan Inv.*, 189 F.3d 1017, 1031 (9th Cir. 1999) (“Punitive damages may not be awarded  
15 for the violation of federal securities law.”) (citing 15 U.S.C. § 78bb(a)). In addition,  
16 punitive damages are prohibited under Washington law unless expressly authorized by  
17 statute. *Dailey v. N. Coast Life Ins. Co.*, 919 P.2d 589, 590-91 (Wash. 1996).  
18 Accordingly, Defendants argue that Plaintiffs’ request for punitive damages should be  
19 dismissed. (Mot. at 10.)

20 Plaintiffs, however, assert that they seek punitive damages based on the laws of  
21 other states in which Plaintiffs are located and where they heard and read Defendants’  
22 alleged misrepresentations or omissions. (Resp. at 11-12.) In so arguing, Plaintiffs cite

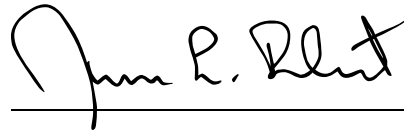
1 to prior decisions from federal district courts in Washington State. (*See id.* at 11 (citing  
2 *Bryant v. Wyeth*, 879 F. Supp. 2d 1214, 1225 (W.D. Wash. 2012); *Braun v. Crown Crafts*  
3 *Infant Prods. Inc.*, No. C12-5811 RBL, 2014 WL 345246, at \*6 (W.D. Wash. Jan. 30,  
4 2014); *Bethlehem Constr., Inc. v. Transp. Ins. Co.*, No. CV-03-0324-EFS, 2006 WL  
5 2818366 (E.D. Wash. Sept. 28, 2006); *Specialty Surplus Ins. Co. v. Second Chance, Inc.*,  
6 No. C03-0927C, 2006 WL 581024 (W.D. Wash. Mar. 8, 2006)).)

7         Despite Plaintiffs’ citation to the federal cases noted above, the court is skeptical  
8 that their request for punitive damages is viable. First, the court notes that despite  
9 Plaintiffs’ recent assertion that they will rely on foreign law—at least with respect to their  
10 claim for damages—they expressly pleaded that their state law claims are governed by  
11 the common law of Washington. (*See* 3d Am. Compl. ¶ 22 (“The claims asserted herein  
12 arise under and pursuant to: (i) Sections 10(b), 20(a) and 20A of the Securities Exchange  
13 Act of 1934 . . . ; and (ii) Washington common law.”).) Further, Defendants persuasively  
14 distinguish the cases upon which Plaintiffs rely because the challenged conduct or the  
15 conduct forming the basis for punitive damages in those cases took place, not in  
16 Washington, but in the foreign state at issue. (*See* Reply at 11 & n.3 (distinguishing  
17 cases).) Finally, the court notes Washington’s strong policy against punitive damages.  
18 *See Barr v. Interbay Citizens Bank of Tampa*, 635 P.2d 441, 443-45 (Wash. 1981),  
19 *amended on other grounds*, 649 P.2d 827 (Wash. 1982) (concluding that Washington’s  
20 strong policy against punitive damages gives it the most significant relationship for  
21 choice of law purposes with respect to the plaintiffs’ claim for punitive damages despite  
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1 Defendants' motion to dismiss portions of Plaintiffs' third amended complaint (Dkt.  
2 # 117) as delineated above.

3 Dated this 9th day of September, 2015.

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6 JAMES L. ROBART  
7 United States District Judge  
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