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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEE HENSLEY-MACLEAN, and
JENNIFER ROSEN, on behalf of
themselves and all others similarly situated,

No. CV 11-01230 RS

Plaintiffs,

**ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGEMENT
AND DENYING AS MOOT PLAINTIFF'S
RULE 56(d) MOTION**

v.

SAFEWAY, INC.,

Defendant.

I. INTRODUCTION

Plaintiffs Dee Hensley-Maclean and Jennifer Rosen bring this putative class action against defendant Safeway, Inc. They claim Safeway violates various California consumer protection statutes and California common law by failing to notify certain customers of recalls on food items they previously purchased. Safeway moves for summary judgment, arguing California law does not impose a post-sale duty to warn on grocers. Plaintiffs urge the denial of the motion or, in the alternative, move pursuant to Rule 56(d) of the Federal Rules of Civil Procedure to conduct limited discovery pending a final adjudication on summary judgment. Because California negligence law imposes a general duty of care and Safeway advances no basis to carve out an exception, Safeway's

1 motion must be denied. In light of that determination, plaintiffs' Rule 56(d) motion is denied as
2 moot.

3 II. BACKGROUND

4 Safeway is one of the nation's largest grocery retailers, operating 1,739 stores throughout
5 the United States, over 500 of which located in California. Plaintiffs are regular Safeway customers
6 and members of Safeway's "Club Card" loyalty program. Pursuant to that program, Safeway
7 solicits contact information, including phone numbers and email addresses, of Club Card members.

8 Plaintiffs brought this action in state court, alleging they purchased tainted food products
9 ("the Recalled Products") at Safeway stores, which the Food and Drug Administration ("FDA") and
10 the United States Department of Agriculture ("USDA") subsequently recalled ("the Class I
11 Recalls").¹ They claim that, under various California consumer protection statutes and California
12 common law, Safeway is legally obligated to notify its Club Card members of the Class I Recalls.
13 Safeway removed the action to federal court, contending the case falls within the Class Action
14 Fairness Act and that the parties are subject to diversity jurisdiction. *Id.* at ¶¶ 5–10.

15 In May of 2013, plaintiffs filed a motion for class certification. (ECF No. 78). At the
16 motion hearing, it became clear that deciding the legal question of Safeway's duty to warn could
17 simplify, and potentially dispose of, the class certification issues. Consequently, plaintiffs
18 withdrew their motion pending decision on that legal question. Safeway now moves for partial
19 summary judgment, arguing that no California statute, regulation, or other legal authority supports a
20 post-sale duty to warn. (ECF No. 109).

21 III. LEGAL STANDARD

22 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories,
23 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to
24 any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.
25 Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine

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27 ¹ The FDA and USDA each use three classes of recall. (Amended Compl., ECF No. 74 at ¶ 2 &
28 n.1). Plaintiffs' action is limited to Class I Recalls, which occur when there is a reasonable
probability that use of the product will cause serious, adverse health consequences or death.

1 issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant succeeds,
 2 the burden then shifts to the nonmoving party to “set forth specific facts showing that there is a
 3 genuine issue for trial.” Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 323. A genuine issue of
 4 material fact is one that could reasonably be resolved in favor of the nonmoving party and that
 5 could affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
 6 The court must view the evidence in the light most favorable to the nonmoving party and draw all
 7 justifiable inferences in its favor. *Id.* at 255.

8 “[A] federal court interpreting state law is bound by the decisions of the highest state court.”
 9 *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1391 (9th Cir. 1994). However, “federal courts are
 10 not precluded from affording relief simply because neither the state supreme court nor the state
 11 legislature has enunciated a clear rule governing a particular type of controversy or claim.” *Id.*
 12 “Where the state supreme court has not spoken on an issue presented to a federal court, the federal
 13 court must determine what result the state supreme court would reach based on state appellate court
 14 opinions, statutes, and treatises.” *Id.*

15 IV. DISCUSSION

16 Plaintiffs advance their duty to warn theory under several alternative statutory and common
 17 law bases.² They are addressed in turn.

18 A. Strict Liability

19 Plaintiffs first contend Safeway has a duty to warn under California common law. Under the
 20 state’s common law concept of strict liability, Safeway has no duty to warn of defects that were
 21 unknown and unknowable at the time of sale. “Strict liability has been imposed for three types of
 22 product defects: manufacturing defects, design defects, and ‘warning defects.’ . . . The third
 23 category describes products that are dangerous because they lack adequate warnings or instructions.”
 24 *O’Neil v. Crane Co.*, 53 Cal. 4th 335, 347 (2012) (internal citations omitted). “The purpose of such
 25 liability is to insure that the costs of injuries resulting from defective products are borne by the
 26 manufacturers that put such products on the market rather than by the injured persons who are

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 28 ² Although not clearly delineated in the Amended Complaint, plaintiffs apparently argue Safeway’s
 common law duty to warn arises under both strict liability and negligence doctrines.

1 powerless to protect themselves.” *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63
2 (1963).

3 The California Supreme Court has extended strict liability to product retailers because, “as an
4 ‘integral part of the overall producing and marketing enterprise,’ they too should bear the cost of
5 injuries from defective products.” *O’Neil*, 53 Cal. 4th at 348 (quoting *Vandermark v. Ford Motor*
6 *Co.*, 61 Cal. 2d 256, 262 (1964)). As the court explained:

7 In some cases the retailer may be the only member of that enterprise reasonably
8 available to the injured plaintiff. In other cases the retailer himself may play a
9 substantial part in insuring that the product is safe or may be in a position to exert
10 pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an
11 added incentive to safety. Strict liability on the manufacturer and retailer alike affords
12 maximum protection to the injured plaintiff and works no injustice to the defendants,
13 for they can adjust the costs of such protection between them in the course of their
14 continuing business relationship.

12 *Vandermark*, 61 Cal. 2d at 262–63 (internal citation omitted); *see also Jimenez v. Superior*
13 *Court*, 29 Cal. 4th 473, 477–87 (2002) (stating strict product liability extends to retailers).

14 “Strict liability encompasses all injuries caused by a defective product, . . . [h]owever, the
15 reach of strict liability is not limitless.” *O’Neil*, 53 Cal. 4th at 348. Under California law, strict
16 liability for a failure to warn is only imposed when the risk of harm is known or knowable.

17 *Anderson v. Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1000–4 (1991) (“[K]nowledge, actual
18 or constructive, is a requisite for strict liability for failure to warn[.]”). Moreover, whether the risk
19 was known or knowable is assessed at the time the product was distributed. *Johnson v. Am.*
20 *Standard, Inc.*, 43 Cal. 4th 56, 64 (2008) (“Typically, under California law, we hold manufacturers
21 strictly liable for injuries caused by their failure to warn of dangers that were known to the scientific
22 community at the time they manufactured and distributed their product.”); *Carlin v. Superior Court*,
23 13 Cal. 4th 1104, 1111 (1996) (noting prior cases “refused to extend strict liability to the failure to
24 warn of risks that were unknown or unknowable at the time of distribution.”); *Brown v. Superior*
25 *Court*, 44 Cal. 3d 1049, 1072 n.8 (1988) (“[A] manufacturer’s knowledge should be measured at the
26 time a [product] is distributed because it is at this point that the manufacturer relinquishes control of
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1 the product.”); *Torres v. Xomox Corp.*, 49 Cal. App. 4th 1, 16 (1996) (“[S]trict liability for failing to
2 warn extends only to risks which are ‘known or knowable’ when a product is sold[.]”).

3 Thus, under well-established principles of California law, Safeway’s duty to warn under
4 strict liability extends only to those risks of which it had actual or constructive knowledge at the time
5 of sale. Without evidence indicating Safeway was aware of the Class I Recalls at the time it sold the
6 Recalled Products, strict liability cannot sustain plaintiffs’ post-sale duty to warn theory.³

7 B. Negligence

8 1. California law imposes a general duty of care

9 California negligence law provides a general duty of ordinary care and Safeway has not
10 shown a statutory or public policy exception justifying a post-sale, no-duty rule. “The existence and
11 scope of duty are legal questions for the court. In determining those questions, we begin always
12 with the command of . . . section 1714[.]” *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 477 (2001)
13 (internal citations and quotations omitted). California Civil Code § 1714 establishes a general duty
14 of care under California law. Cal. Civ. Code § 1714(a) (“Everyone is responsible, not only for the
15 result of his or her willful acts, but also for an injury occasioned to another by his or her want of
16 ordinary care or skill in the management of his or her property or person”); *Cabral v. Ralphs*
17 *Grocery Co.*, 51 Cal. 4th 764, 771 (2011) (“The general rule in California is . . . each person has a
18 duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in
19 the circumstances[.]”) (internal quotation marks omitted). “In the absence of a statutory provision
20 limiting this rule, exceptions to the general principle imposing liability for negligence are recognized
21 only when clearly supported by public policy.” *Christensen v. Superior Court*, 54 Cal. 3d 868, 885
22 (1991) (citing *Rowland v. Christian*, 69 Cal. 2d 108, 112 (1968) *legislatively superseded on other*
23 *grounds in Calvillo-Silva v. Home Grocery*, 19 Cal. 4th 714, 721 (1998)).

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26 ³ At oral argument, plaintiffs urged their strict liability theory should survive under *Davis v. Wyeth*
27 *Labs, Inc.*, 399 F.2d 121 (9th Cir. 1968). *Davis* states that breach of implied warranty of fitness and
28 strict liability in tort are essentially the same claim. *Id.* at 126 (“[U]nder either approach the
elements remain the same. The difference is largely one of terminology.”). Because the plaintiffs
have not shown Safeway’s post-sale duty to warn arises under an implied warranty, *Davis* does not
support the plaintiffs’ position.

1 Safeway has not pointed to any statutory provision limiting its general duty of care and must
2 therefore rely on a public policy exception. To determine whether such an exception should be
3 recognized, the California Supreme Court set out a variety of factors for consideration, including:

4 the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff
5 suffered injury, the closeness of the connection between the defendant's conduct and
6 the injury suffered, the moral blame attached to the defendant's conduct, the policy of
7 preventing future harm, the extent of the burden to the defendant and consequences to
the community of imposing a duty to exercise care with resulting liability for breach,
and the availability, cost, and prevalence of insurance for the risk involved.

8 *Rowland*, 69 Cal. 2d at 112–13. “[T]he *Rowland* factors are evaluated at a relatively broad level of
9 factual generality.” *Cabral*, 51 Cal. 4th at 772. The court’s task is not to ask whether the facts of
10 the particular case support an exception, but rather “whether carving out an entire category of cases
11 from [the] general duty rule is justified by clear considerations of policy.” *Id.*

12 Safeway has failed to show that consideration of the *Rowland* factors weighs in favor of a
13 post-sale, no-duty rule for this category of cases.⁴ The first three *Rowland* factors are all closely
14 related to the question of foreseeability. *See id.* at 774–81. In the generalized sense of foreseeability
15 pertinent to the duty question, the prospect that a grocer’s customers might consume recalled
16 products and become ill if not warned the goods are dangerous, is plainly foreseeable. Food recalls
17 are imposed precisely because of the risks consumption poses to health and safety. Moreover,
18 common experience shows that, absent intervening circumstances, customers generally consume the
19 products they purchase from grocers. Safeway provides no reason why this category of injury is
20 unforeseeable, nor does Safeway argue that its failure to warn is too attenuated from the plaintiffs’
21 injuries to support liability. *Id.* at 779 (“[W]here the injury suffered is connected only distantly and
22 indirectly to the defendant’s negligent act, the risk of that type of injury . . . is likely to be deemed
23 unforeseeable.”).

24 With respect to *Rowland*’s remaining factors, “the overall policy of preventing future harm is
25 ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible.

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27 ⁴ Because Safeway seeks to prevail on the theory that no California statute, regulation, or case
28 imposes a post-sale duty to warn, it does not fulsomely argue for a public policy exception to that
duty. As explained herein, even if no legal authority affirmatively imposed a post-sale duty, that
would not end the analysis of Safeway’s duty under California negligence law.

1 The policy question is whether that consideration is outweighed, for a category of negligent conduct,
2 by laws or mores indicating approval of the conduct or by the undesirable consequences of allowing
3 potential liability.” *Id.* at 781–82. Safeway does not point to any laws or mores indicating approval
4 of a grocer refraining from contacting customers after a sale. Moreover, Safeway does not offer any
5 negative consequences which would flow from imposing liability on grocers under these
6 circumstances. Safeway presents no evidence, for example, showing as a matter of law that an
7 obligation to warn under the circumstances is too burdensome to justify liability. *See id.* at 784 n.3
8 (noting courts conducting the duty analysis may consider the “overall social impact of imposing a
9 significant precautionary obligation on a class of actors”).

10 Indeed, to the extent Safeway presents policy arguments, it claims its duty should be limited
11 because it is a vendor, not a manufacturer. Safeway argues manufacturers are motivated by the
12 market for its products to improve continually and will have superior knowledge of later discovered
13 defects. Moreover, manufacturers are better able to formulate warnings describing the precise
14 dangers of a given product. While these rationales might support differing duties of care for
15 manufacturers and retailers in other contexts, they do not clearly justify a no-duty rule for the
16 category of cases implicated here. Safeway does not claim that after the Class I Recalls are
17 instituted, it lacks adequate knowledge of the dangerous nature of the Recalled Products to formulate
18 a meaningful warning. Nor has Safeway shown it is unable to provide warnings to ultimate
19 consumers or even that food manufacturers are categorically better positioned to do so.⁵ In sum,
20 Safeway has not carried its burden of demonstrating a policy justification for exempting grocers
21 from a duty of ordinary care.

22 2. California case law does not support a “no duty” rule

23 Instead of providing a policy justification to limit its general duty of care, Safeway argues
24 that no California statute, regulation, or case has ever found a post-sale duty to warn in like
25 circumstances. As an initial matter, this argument completely ignores section 1714.⁶ Even

26 ⁵ Safeway has previously argued that it lacks accurate contact information for its Club Card
27 members. Although Safeway remains free to argue that providing notice of the Class I Recalls is
impractical or infeasible, it has not taken these positions for purposes of its present motion.

28 ⁶ Safeway does not mention § 1714 in either its motion or reply.

1 accepting the premise that no California case has ever found a post-sale duty to warn, it would not
2 follow that no such duty exists.⁷ Whether a retailer’s general duty of care continues after the time of
3 sale may very well be a question of first impression, but this does not end the inquiry. In absence of
4 controlling state court precedent, “the federal court must determine what result the state supreme
5 court would reach based on state appellate court opinions, statutes, and treatises.” *Vernon v. City of*
6 *Los Angeles*, 27 F.3d 1385, 1391 (9th Cir. 1994). As noted, the California Supreme Court has
7 consistently stated that in the absence of a statutory or public policy exception, Section 1714’s
8 general duty of care applies.

9 In addition, numerous California decisions have stated or implied a duty of care may extend
10 beyond the point of sale. For example, in *Hasson*, the California Supreme Court upheld a jury
11 verdict of negligence against automobile manufacturer Ford, despite a finding that there was no
12 defect “at the time [the car] . . . was manufactured and sold” *Hasson v. Ford Motor Co.*, 19
13 Cal. 3d 530, 543 (1977) *overruled on other grounds in Soule v. Gen. Motors Corp.*, 8 Cal. 4th 548
14 (1994) (brackets original). In that case, evidence revealed that, even if the car’s brake system was
15 not defective at the time the automobile entered the market, it might have failed as a result of certain
16 conditions present at the time of the accident. In reconciling the jury verdicts, the Court stated “the
17 jury may have concluded that the braking system and the fluid were, at the outset, sound and fit for
18 their intended purpose, but that Ford was nonetheless liable for its failure during the ensuing four
19 years to warn of conditions which might develop in use.” *Id.* The court implicitly recognized that
20 Ford’s failure to warn during the four year period following the sale would be a valid basis for the
21 jury’s negligence verdict.⁸

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23 ⁷ Safeway has similarly pointed to no California case law rejecting a post-sale duty in this or
analogous circumstances.

24 ⁸ Worthy of note, *Hasson* did not hold the jury’s finding was necessarily based on a continuing duty
25 to warn. The court also found that the jury may have believed that failure to warn could not
26 constitute a defect for purposes of the special interrogatories. *See Hasson*, 19 Cal. 3d at 543 (“The
27 jury could reasonably believe that the interrogatory thereby intended to exclude consideration of
any ‘defect’ based on a failure to warn.”). Thus, the jury also may have found Ford’s failure to
warn made the car defective at the time of sale, despite their special interrogatory finding of no
defect. *Id.* That the court described an alternative basis for liability does not diminish the court’s
implicit recognition of Ford’s potential post-distribution duty to warn.

1 Several California appellate decisions have also stated that a manufacturer’s duty of care may
2 continue after sale and distribution. *See Oxford v. Foster Wheeler LLC*, 177 Cal. App. 4th 700, 721
3 (2009) (“[N]egligence of a manufacturer may be established by a failure to act after the product has
4 been distributed to its end user[.]”); *Torres*, 49 Cal. App. 4th at 16 (“[A] duty to warn may also arise
5 if it is later discovered that the product has dangerous propensities, and breach of that duty is a form
6 of negligence.”); *Hernandez v. Badger Constr. Equip. Co.*, 28 Cal. App. 4th 1791, 1827–28 (1994)
7 (finding a “failure to conduct an adequate retrofit campaign may constitute negligence”); *see also*
8 *Rosa v. Taser Int’l, Inc.*, 684 F.3d 941, 949 (9th Cir. 2012) (“[T]hough California law measures the
9 strict liability duty to warn from the time a product was distributed, a manufacturer may be liable
10 under negligence for failure to warn of a risk that was subsequently discovered.”). These cases trace
11 the post-sale duty to *Lunghi v. Clark Equip. Co.*, where the appellate court reversed a trial court for
12 not instructing the jury on a plaintiff’s negligence theory. 153 Cal. App. 3d 485, 491–94 (1984).
13 The trial court refused to give the instruction, based on its understanding that “if there [was] no
14 defect in the machine, negligence in designing the machine could not be a basis for recovery.” *Id.* at
15 492.

16 The appellate court in *Lunghi* reversed for two reasons. First, the strict liability jury
17 instruction failed to indicate that a design defect could be based on a failure to warn or inadequate
18 warning. Second, the plaintiff’s liability theory did not necessarily depend on a strict liability design
19 defect. The court noted the plaintiff “presented evidence on negligence quite apart from the design
20 issue, pertaining to the ‘retrofit campaign.’” *Id.* at 494. Specifically, that the defendant made
21 inadequate “efforts to notify owners of the [product] . . . about the dangerous propensities of the
22 machine discovered after the machine had been on the market for awhile, and the availability of
23 safety devices which the manufacturer would install.” *Id.* The court concluded that, “[e]ven if,
24 properly instructed, the jury had found that none of the mechanical design features in issue . . .
25 constituted a defect, it could still have found that [defendant’s] knowledge of the injuries caused by
26 these features imposed a *duty to warn* of the danger, and/or a *duty to conduct an adequate retrofit*

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1 *campaign.*” *Id.* (emphasis original). Thus, *Lunghi* also recognizes that a seller’s duty of ordinary
 2 care does not necessarily terminate at the point of sale.

3 In short, California negligence law imposes a general duty of ordinary care and Safeway has
 4 not shown either a statutory or public policy exception justifying a post-sale, no-duty rule.
 5 Moreover, numerous California decisions have explicitly or implicitly recognized that a seller’s duty
 6 under negligence may extend beyond the point of sale. Safeway, therefore, has failed to show that
 7 no post-sale duty to warn exists under California negligence law and its motion for summary
 8 judgment must be denied.

9 C. Consumer Legal Remedies Act (CLRA) Claim

10 Plaintiffs maintain that the CLRA provides an independent basis for Safeway’s post-sale
 11 duty to warn. However, the CLRA only applies to representation and omissions that occur during
 12 pre-sale transactions. “The California Consumers Legal Remedies Act bans certain practices that the
 13 California legislature has deemed to be ‘unfair’ or ‘deceptive.’” *Falk v. Gen. Motors Corp.*, 496 F.
 14 Supp. 2d 1088, 1093 (N.D. Cal. 2007). The CLRA, in relevant part, provides:

15 (a) The following unfair methods of competition and unfair or deceptive acts or
 16 practices undertaken by any person in a transaction intended to result or which results
 in the sale or lease of goods or services to any consumer are unlawful:

17

18 (5) Representing that goods or services have sponsorship, approval, characteristics,
 ingredients, uses, benefits, or quantities which they do not have or that a person has a
 19 sponsorship, approval, status, affiliation, or connection which he or she does not
 20 have.

. . . .

21 (7) Representing that goods or services are of a particular standard, quality, or grade,
 or that goods are of a particular style or model, if they are of another.

22 Cal. Civ.Code § 1770(a) (5), (7).

23 Plaintiffs advance two theories for their CLRA claim. First, they maintain that, even if
 24 unaware of any safety risk at the time of sale, Safeway’s failure to warn its customers after learning
 25 of the Class I Recalls violated the CLRA. Plaintiffs argue that, because Safeway represented its food
 26 was safe to eat when purchased, the subsequent failure to inform its customers constituted a
 27 fraudulent omission. *See Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 835
 28

1 (2006) (“[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent
 2 omissions, to be actionable the omission must be contrary to a representation actually made by the
 3 defendant, or an omission of a fact the defendant was obliged to disclose.”). Plaintiffs maintain the
 4 CLRA prohibits omissions where there is a duty to disclose, and that such a duty exists when the
 5 defendant: (1) is in a fiduciary relationship with the plaintiff; (2) had exclusive knowledge of
 6 material facts not known to the plaintiff; (3) actively conceals a material fact from the plaintiff; and
 7 (4) makes partial representations but also suppresses some material fact. *Falk*, 496 F. Supp. 2d at
 8 1095 (citing *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997)). According to plaintiffs,
 9 Safeway had exclusive knowledge of material facts—the identity of the Recalled Products, the dates
 10 they were sold, and the identity of the purchasers—giving rise to a duty to disclose.

11 Assuming Safeway made representations at the time of sale that the Recalled Products were
 12 safe to eat, those representations do not become unfair or deceptive simply because they later prove
 13 false. *See Kowalsky v. Hewlett-Packard Co.*, 771 F. Supp. 2d 1156, 1163 (N.D. Cal. 2011) (“[A]
 14 representation will not violate the CLRA if the defendant did not know, or have reason to know, of
 15 the facts that rendered the representation misleading at the time it was made.”); *Neu v. Terminix Int’l,*
 16 *Inc.*, C 07-6472 CW, 2008 WL 2951390, at *3 (N.D. Cal. July 24, 2008) (dismissing plaintiff’s
 17 CLRA claim because plaintiff failed to aver “Defendants knew that [their] statements were false
 18 when made.”). Although an omission may, in some circumstances, constitute an unfair or deceptive
 19 act, by its terms the CLRA requires that act be “undertaken by [a] person *in a transaction* intended
 20 to result . . . in the sale or lease of goods[.]” § 1770(a) (emphasis added). The flaw in plaintiffs’
 21 approach is that Safeway’s post-sale failure to warn does not occur in the context of a transaction.
 22 Rather, these omissions occur after the transaction had been completed.

23 Accordingly, for purposes of the CLRA, the relevant representations and omissions are those
 24 during transactions leading up to a sale. In *Baba v. Hewlett-Packard Co.*, for example, the plaintiffs
 25 alleged defendant HP knowingly sold computers with defective fans, in violation of the CLRA. C
 26 09-05946 RS, 2010 WL 2486353, at *1 (N.D. Cal. June 16, 2010). The plaintiffs argued HP had a
 27 duty to disclose, because, among other things, the defendant had exclusive knowledge of the defects.
 28

1 *Id.* at *5. While a product defect may give rise breach of warranty claims, the presence of a defect is
 2 not actionable under the CLRA “without proof of more, such as the fact that the defendant sold a
 3 product it was aware was defective.” *Id.* at *4; *see also Kowalsky*, 771 F. Supp. 2d at 1163 (“[A]
 4 representation is not ‘deceptive’ under the UCL or the CLRA simply because an unanticipated
 5 product defect calls the prior representation into question.”). The plaintiffs’ CLRA claim was
 6 dismissed, because there was “no averment that HP actually knew of the alleged defects at the time
 7 of the sales[.]” *Baba*, 2010 WL 2486353 at *5; *see also In re Sony Grand Wega KDF-E A10/A20*
 8 *Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1095 (S.D. Cal. 2010)
 9 (“[Defendant] had no duty to disclose facts of which it was unaware.”). Although the plaintiffs
 10 averred HP was aware of internet postings describing the defect, the postings did not include dates
 11 and “therefore shed no light on when HP knew of the alleged defects.” *Baba*, 2010 WL 2486353 at
 12 *5. Thus, it is the defendant’s pre-sale representations and omissions that matter under the CLRA.
 13 *See id.* (“[Post-sale] behavior is irrelevant to the question of whether HP made false statements to
 14 plaintiffs before or during their respective transactions which induced them to purchase the
 15 computers.”).⁹

16 The cases upon which plaintiffs rely are not to the contrary. They point to decisions stating a
 17 failure to disclose safety hazards may be actionable under the CLRA. *See, e.g., In re Porsche Cars*
 18 *N. Am., Inc.*, 880 F. Supp. 2d 801, 827 (S.D. Ohio 2012) (“A defect that poses an objective,
 19 identifiable safety risk to consumers will trigger a duty to disclose under the CLRA.”). These cases
 20 simply stand for the proposition that the CLRA requires a seller to disclose known safety risks at the
 21 time of sale. For example, in *Porsche Cars* the district court expressly assumed for purposes of
 22 analysis that the defendant “knew of the alleged defect at the time it sold the vehicles.” 880 F. Supp.
 23

24 ⁹ Plaintiffs attempt to distinguish *Baba* and *Kowalski*, as neither involved an alleged safety hazard.
 25 Whether the alleged defect relates to safety is relevant to the defects materiality. Some California
 26 cases hold that, even if a manufacturer knew of a defect at the time of sale, the failure to disclose
 27 that defect may not be material—i.e. actionable under the CLRA—unless it involves a safety risk.
 28 *See Daugherty*, 144 Cal. App. 4th at 836 (finding no duty to disclose engine defect where there
 were no allegations it posed a safety risk); *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d
 1220, 1234 (C.D. Cal. 2011) (“[F]or the omission to be material, the failure must pose ‘safety
 concerns.’”). Neither *Baba* nor *Kowalski* relied on lack of materiality to dismiss their respective
 CLRA claims. Plaintiffs attempt to distinguish on these grounds is therefore unpersuasive.

1 2d at 817. Similarly, in *Cholakyan v. Mercedes-Benz USA, LLC*, the district court denied
 2 defendant’s motion to dismiss a CLRA claim where the plaintiff alleged “that defendant knew and
 3 concealed the defects . . . both at the time of sale and thereafter.” 796 F. Supp. 2d 1220, 1226 (C.D.
 4 Cal. 2011); *see also Collins v. eMachines, Inc.*, 202 Cal. App. 4th 249, 253 (2011) (finding
 5 complaint stated CLRA violation where defendant’s executives “directed the company to continue to
 6 sell the defective computers” after the defect was discovered); *Ehrlich v. BMW of N. Am., LLC*, 801
 7 F. Supp. 2d 908, 919 (C.D. Cal. 2010) (finding plaintiff sufficiently alleged BMW’s knowledge of
 8 the defect “at the time Plaintiff and class members purchased their Minis”).

9 Even if the CLRA does not impose such a duty, plaintiffs maintain that because Safeway
 10 may have had reason to know of the Class I Recalls prior to selling the Recalled Products, they
 11 should be allowed to pursue additional discovery to demonstrate such knowledge. Accordingly,
 12 plaintiffs move pursuant to Rule 56(d) of the Federal Rules of Civil Procedure to continue or deny
 13 Safeway’s summary judgment motion pending completion of limited discovery. As noted above,
 14 Safeway’s representations or omissions may constitute a CLRA violation if Safeway was aware at
 15 the time of sale of facts that would render those representations misleading. Because this order finds
 16 plaintiffs’ action may proceed under a negligence theory, plaintiffs’ Rule 56(d) motion is moot.

17 **D. Unfair Competition Law (UCL) Claim**

18 Plaintiffs claim that Safeway’s duty to warn may be established under the UCL. That statute
 19 prohibits acts or practices which are (1) fraudulent, (2) unlawful, or (3) unfair. Cal. Bus. & Prof.
 20 Code § 17200 *et seq.*; *Falk*, 496 F. Supp. 2d at 1097–98. Plaintiffs allege defendants violated all
 21 three prongs of the UCL.

22 **1. Fraudulent and Unlawful Prongs**

23 With respect to the fraudulent prong, plaintiffs argue the UCL requires the same showing for
 24 misrepresentation as does the CLRA. *See Kowalsky*, 771 F. Supp. 2d at 1162 (“Generally, the
 25 standard for deceptive practices under the fraudulent prong of the UCL applies equally to claims for
 26 misrepresentation under the CLRA.”). Moreover, plaintiffs maintain Safeway’s violations of the
 27 CLRA and “other violations” satisfy the UCL’s unlawful prong. *Kasky v. Nike, Inc.*, 27 Cal. 4th
 28

1 939, 949 (2002) (“By defining unfair competition to include any ‘*unlawful* . . . business act or
 2 practice’ . . . the UCL permits violations of other laws to be treated as unfair competition that is
 3 independently actionable.”) (emphasis original). Safeway does not substantively dispute either of
 4 these positions. Instead Safeway argues that plaintiffs’ UCL claim must fail under these prongs,
 5 because they have not established a CLRA violation and none of their other theories are viable.
 6 Because this order does not find plaintiffs’ negligence claim fails as a matter of law, plaintiffs’ UCL
 7 claim may proceed to the extent it is based upon Safeway’s established negligence.

8 2. Unfair Prong

9 Plaintiffs may also proceed under the unfair prong of the UCL. With respect to this prong,
 10 the parties dispute the appropriate test of unfairness. This district recently addressed the question in
 11 *Lyons v. Bank of Am. NA*, 11-01232 CW, 2011 WL 3607608, at *9 (N.D. Cal. Aug. 15, 2011) (“The
 12 definition of an unfair business practice in consumer cases has been unsettled in light of the
 13 California Supreme Court ruling in *Cel-Tech*, which criticized previous definitions as too
 14 amorphous and provided a definition in the context of an antitrust case.”). Because *Cel-Tech* “left
 15 open the definition of unfairness in consumer cases,” *Lyons* looked to the “decisions of state
 16 intermediate appellate courts” to determine the appropriate standard:

17 California appellate courts have applied three different approaches for determining
 18 unfairness in consumer cases. The first approach determines whether the alleged
 19 business practice is immoral, unethical, oppressive, unscrupulous or substantially
 20 injurious to consumers by weighing the utility of the defendant’s conduct against the
 21 seriousness of the harm to the alleged victim. The second approach requires that the
 22 unfairness claim be defined in connection with a legislatively declared public policy
 23 that is “tethered” to specific constitutional, statutory, or regulatory provisions. The
 24 third approach applies the three factors constituting unfairness in the Federal Trade
 25 Commission Act: (1) the injury must be substantial; (2) the injury must not be
 26 outweighed by any countervailing benefits to consumers or competition; and (3) the
 27 injury must be one that the consumer could not reasonably have avoided.

28 *Id.* at 9–10 (internal citations omitted).

The court found the reasoning in *Camacho v. Automobile Club of Southern California*, which
 adopted the third approach, persuasive and followed by many appellate and federal district courts.

Id. at 10 (citing 142 Cal. App. 4th 1394, 1402 (2006)). *Camacho* found that *Cel-Tech* overruled the

1 first approach to unfairness, because “definitions that are too amorphous in the context of
 2 anticompetitive practices are not converted into satisfactorily precise tests in consumer cases.”
 3 *Camacho*, 142 Cal. App. 4th at 1402. *Camacho* also rejected the “tethering” approach that *Cel-Tech*
 4 adopted for antitrust cases. *Id.* at 1402–03. *Camacho* reasoned that the approach did not comport
 5 with the broad scope of the UCL and did not support its underlying principle, that a practice can be
 6 unfair even if it is not unlawful. *Id.* In adopting the third approach, *Camacho* noted that *Cel-Tech*
 7 itself turned to the Federal Trade Commission Act for guidance. *Id.* at 1403. The parties provide no
 8 reason to depart from the reasoning in *Camacho* adopted in *Lyons*.

9 Applying the three factors constituting unfairness, Safeway has failed to show its failure to
 10 inform customers of the Class I Recalls is fair as a matter of law. Safeway provides no evidence that
 11 plaintiffs’ injuries are insubstantial or are outweighed by countervailing benefits to consumers or
 12 competition. Nor has Safeway shown that plaintiffs’ injuries could have been reasonably avoided.
 13 Although Safeway argues plaintiffs could have discovered the Class I Recalls through other
 14 means—such as announcements by the food manufacturer or the FDA—it has not shown these
 15 alternatives reasonably inform plaintiffs of the danger of the Recalled Products.

16 V. CONCLUSION

17 For the reasons stated herein, Safeway’s motion for summary judgment must be denied.
 18 Safeway fails to show that California negligence law does not recognize a post-sale duty to warn.
 19 Because this order finds Safeway is not entitled to judgment as a matter of law, plaintiffs’ Rule
 20 56(d) motion to continue or deny Safeway’s summary judgment motion is denied as moot. The
 21 parties shall appear for a further case management conference on May 15th at 10 a.m. and will file
 22 an updated case management statement one week prior.

23 IT IS SO ORDERED.

24
 25 DATED: 4/7/14



26
 27 RICHARD SEEBORG
 28 United States District Judge