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The following is a TENTATIVE ruling for 12/5/2005,
Department 71, the Honorable Ronald S. Prager presiding.

Case Number GIC849164

RULING AFTER ORAL ARGUMENT: The Court rules on defendant Safeway, Inc.'s ("Defendant") demurrer and motion to strike as follows:

Based upon the arguments of the parties presented at the hearing, the Court affirms its tentative ruling.

The demurrer to the first (strict liability) and second (negligence) causes of action is sustained without leave to amend. According to CACI No. 1205, to establish a products liability claim based on the failure to warn, plaintiff must prove, among other things, that "the product was used in a way that was reasonably foreseeable" and that "the plaintiff was harmed." Here, Plaintiff did not use the product. See First Amended Complaint ("FAC"), ¶15. "[P]roof that the product has malfunctioned is essential to establish liability for an injury caused by the defect." See Khan v. Shiley (1990) 217 Cal. App. 3d 848, 855-856. A product liability cause of action does not lie for damages purportedly incurred from an alleged fear of future malfunction, or "anticipatory defect." Id. at 855.

The demurrer to the third cause of action for violation of the Consumer Legal Remedies Act ("CLRA"—Civil Code §1750) is sustained without leave to amend. As noted above, Plaintiff did not use the product and, thus, lacks standing to pursue this claim or any of its remedies because he failed to show that he was damaged by the use or employment of the product at issue here. Plaintiff also failed to comply with the provisions set forth in Civil Code §1782. More specifically, the letter Plaintiff's counsel sent to Defendant's counsel came after the original Complaint had been filed and did not notify Defendant of the "particular alleged violations of Section 1770," demand that Defendant "correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770," was not

sent "by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California," and was not sent "to the place where the transaction occurred or to the person's principal place of business within California."

The demurrer to the UCL claim is sustained without leave to amend. As noted above, Plaintiff did not use the product and so could not have suffered an "injury in fact" as is now required pursuant to Proposition 64. In addition, no injunctive relief is available because the injury is hypothetical and there is no immediate threat of irreparable injury.

The demurrer to the class action allegations is sustained without leave to amend. A plaintiff must prove "community of interest" between himself and other similarly situated plaintiffs. A demurrer to a complaint's class allegations are properly sustained where there is no reasonable probability that the plaintiffs can establish a community of interest among the potential class members and that individual issues predominate over common questions of law and fact. See Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 440, TJX Cos., Inc. v. Super. Ct. (2001) 87 Cal. App. 4th 747, 753; See also Canon U.S.A., Inc. v. Super. Ct. (1998) 68 Cal. App. 4th 1, 5, Silva v. Block (1996) 49 Cal. App. 4th 345, 349, and Clausing v. San Francisco Unified School Dist. (1990) 221 Cal. App. 3d 1224, 1234. For the reasons stated above, Plaintiff cannot establish a community of interest among the potential class members.

Based on the foregoing, the motion to strike is moot.

IT IS SO ORDERED.