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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

RALPH A. HUNTZINGER, on Behalf of Himself and All Others Similarly Situated,

Plaintiff,

v.

AQUA LUNG AMERICA, INC.,

Defendant.

Case No. 3:15-cv-01146 WQH (KSC)

CLASS ACTION

DEFENDANT AQUA LUNG AMERICA, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS CLASS ACTION COMPLAINT

Hearing Date: August 17, 2015

NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT

Complaint filed: May 21, 2015
Judge: Hon. William Q. Hayes
Magistrate Judge: Hon. Karen S. Crawford

Trial Date: None Set

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INTRODUCTION

Plaintiff Ralph Huntzinger ("Huntzinger") filed this purported national class action Complaint on May 21, 2015, against Aqua Lung America, Inc. ("Aqua Lung"). Huntzinger alleges that he purchased from a third party only one particular Suunto band dive computer, a Cobra 3. (Cmplt. ¶ 11). Huntzinger alleges that other consumers of certain, unspecified Suunto brand dive computers have had malfunctions, and that their computers were replaced. (Cmplt. ¶¶ 24, 25, 31). Huntzinger does not, however, allege that his Cobra 3 has ever malfunctioned, or that it was serviced or replaced by Aqua Lung. In short, he alleges no direct injury and his Complaint should be dismissed on this basis alone.

Huntzinger asserts three different claims on behalf of all consumers who ever, at any time, purchased a variety of eighteen different models of Suunto brand dive computers. (Cmplt. ¶ 39). Huntzinger has no standing under Article III of the U.S. Constitution to make claims on the diverse array of models which includes some that were discontinued and not sold in the last six years (beyond the statute of limitations), and models that have significant differences in design, components, hardware, software, features, and displays. At most, Huntzinger's standing should be limited to claims he may have relating to the Cobra 3 model which he purchased. But Huntzinger's standing regarding the Cobra 3 is also at issue, because he alleges no direct injury from his purchase of the Cobra 3.

In a similar putative class action in which a plaintiff purchased one model of a consumer product, but asserted a class of purchasers of numerous unpurchased models of products, the District Court in California dismissed all claims regarding product models that the plaintiff himself had ***not*** purchased. The court held:

> Plaintiff lacks standing to pursue claims for products other than the **specific racquet he purchased** and advertisements upon which he **personally relied**." *Ahdoot v. Babolat US North America*, CV-13-02823 (September 6, 2013) (emphasis added).

See Declaration of John S. Worden, filed concurrently herewith, ("Worden Dec."), ¶ 1, Exhibit A).

This case warrants the very same ruling regarding the scope of Huntzinger's standing. Here, Huntzinger alleges that he purchased one Suunto model dive computer, the Cobra 3, presumably based on representations about that specific model. Huntzinger's claims with respect to any other dive computer should be dismissed, consistent with the ruling in the *Ahdoot* case.

Moreover, Huntzinger's claims should be dismissed for the following additional reasons:

The nation-wide class allegations should be stricken and dismissed. It is apparent at this early stage, from the face of the Complaint, that a national class cannot be certified as a matter of law because the class claims would have to be litigated under the laws of all 50 states since California law may not be applied to claims of purchasers of dive computers in other states. *See Mazza v. American Honda Motor Company, Inc.*, 666 F.3d 581, 596 (9th Cir. 2012); *Route v. Mead Johnson Nutrition Company*, 2013 U.S. Dist. LEXIS 35069 (C.D. Cal. February 21, 2013). Plus, Huntzinger has failed to allege that his dive computer has any specific defect, and consequently that he has been injured. The application of the laws of 50 states to an unknown defect or injury is an impractical task.

Counts 1 and 2, alleging violation of California's consumer protection statutes Unfair Competition Law ("UCL"), and Consumers Legal Remedies Act ("CLRA"), should be dismissed because they fail to meet the particularity requirements of Rule 9(b), they fail to allege an injury in fact, and they fail to identify an actual misrepresentation by Aqua Lung, even with respect to the single Cobra 3 Huntzinger alleged bought from a third party.

Count 3, alleging breach of implied warranty, should be dismissed because Huntzinger is not in privity with Aqua Lung.

For these reasons, as more fully explained below, Huntzinger's Complaint should be dismissed in its entirety with prejudice.

STATEMENT OF FACTS

I. Facts Alleged in the Complaint[1]

Huntzinger is an individual and a citizen of California. (Cmplt. ¶ 11). Aqua Lung is a Delaware corporation headquartered in Vista, California. (Cmplt. ¶ 12). The Complaint alleges that Aqua Lung has operations in California, and that "Aqua Lung marketed, and distributed the Dive Computers to thousands of consumers in the United States, including California." (Cmplt. ¶ 12). The Complaint alleges that Huntzinger bought a single Cobra 3 model, on May 14, 2013, from a third party retailer known as leisurepro.com. (Cmplt. ¶11). Huntzinger does not allege that he purchased any other model of dive computer, nor does he allege that he purchased a product from Aqua Lung, or that he had his Cobra 3 serviced by Aqua Lung.

Huntzinger does not allege a direct injury ***to him***. The Cobra 3 is a scuba diving computer. But Huntzinger does not allege how the Cobra 3 that he purchased has malfunctioned, if at all. For example, he does not allege that it failed to provide ***his*** tank pressure, or track ***his*** rate of air consumption, or calculate ***his*** remaining air time. Moreover, the Complaint does not allege that Huntzinger's Cobra 3 failed to provide visual and audible alarms for depth and pressure ***to him*** or warn ***him*** when he was running low on air. The Complaint only alleges generally that malfunctions have been reported by others regarding undisclosed, and unspecified Suunto model dive computers. (Cmplt. ¶¶ 24, 25).[2] Accordingly, Huntzinger fails to allege any actual injury, economic or otherwise.

[1] This Background statement is based on the allegations of the Complaint which Aqua Lung assumes to be true only for purposes of this Motion to Dismiss the Complaint.

[2] Huntzinger alleges that one other person was injured by a different model, a Cobra 2, while diving in Hawaii. (Cmplt. ¶ 26). The Cobra 2 was discontinued in 2008. See Declaration of Mika Holappa, filed concurrently herewith, ("Holappa Dec."), ¶ 5. Huntzinger had nothing to do with the prior incident, and he does not allege any accidents with the Cobra 3 he purchased. Huntzinger does not even allege that his Cobra 3 malfunctioned.

The Complaint generally alleges that Aqua Lung states on its website certain things about the functions of a Cobra 3, including that the "Suunto Cobra 3 monitors and displays your tank pressure, tracks your rate of air consumption, and continuously calculates your remaining air time. It also provides visual and audible alarms for depth and pressure and warns you when you're running low on air." (Cmplt. ¶ 20). The Complaint does not allege that Huntzinger read and relied upon any such statements, or that any other purchaser has, and does not allege any direct injury from such reliance. Moreover, the Complaint does not cite to any claims or representations by Aqua Lung regarding the seventeen other, non-Cobra 3s that Huntzinger seeks to include in the class.

The Complaint alleges that "Defendant advertised the Dive Computers as a safe product" (Cmplt. ¶ 35). However, no such advertisement is quoted or cited in the Complaint, not for the Cobra 3 or for any of the other seventeen non-purchased dive computers. Further, the Complaint does not allege that Huntzinger read and relied on the alleged representation, and does not allege any direct injury from such reliance.

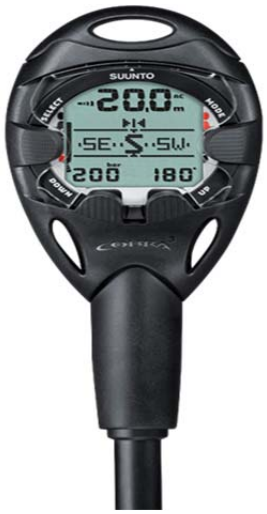
The Complaint alleges that "Aqua Lung continues to cover up the defect and consumers who use the Dive Computers are left using dangerous and defective products." (Cmplt. ¶ 29). Huntzinger does not indicate whether this allegation is directed at his Cobra 3, other Cobra 3 dive computers, or any of the other seventeen specific devices included in the asserted class. Huntzinger does not allege how he was injured by any alleged omission or cover-up.

II. The Cobra 3 Is Substantially Different From Other Suunto Dive Computers

Huntzinger purchased a Cobra 3 dive computer, and no other model. The Complaint fails to allege any details about the claimed defect in his Cobra 3, and whether any specific function has not worked. The Complaint lists seventeen other Suunto models of dive computer, and does not allege any details about the

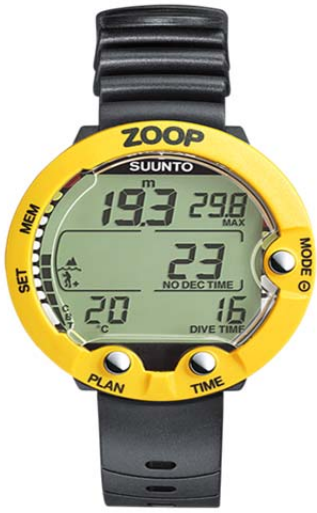
similarity or differences in them. In fact, the computers vary widely, making class treatment of all of them inappropriate on basic Article III of the Constitution grounds.

For example, Huntzinger's Cobra 3 is shown below next to a Zoop model:



Cobra 3

Zoop



These dive computers are substantially different. The Cobra 3 attaches with a hose to a scuba tank in order to monitor tank air pressure; the Zoop does not read tank pressure at all and is worn on the wrist. Holappa Dec., ¶¶ 3, 6. The Cobra 3 has a digital compass and a Matrix display with 4 button function; the Zoop has no digital compass, no Matrix display, and has a 3 button function. The Cobra 3 uses a CPU or central processor from one manufacturer, specific software for the Cobra 3; the Zoop uses a different CPU from a different manufacturer, with software different from the Cobra 3's. Holappa Dec., ¶ 4. A complete set of differences between all of the models is set forth in the Holappa Declaration.

A quick summary of the differences includes:

1. Only the Cobra computers are "air integrated," or attach with a hose to the scuba tank for air pressure – to the extent other computers (all worn on the wrist) monitor air pressure, it is via an ***optional*** wireless transmitter;

2. Six of the accused computers do not read tank air pressure at all (Zoop, Vyper, Vyper 2, Gekko, D6, D4);

3. Eleven of the computers do not have a digital compass (Cobra, Zoop, Vyper, Vyper 2, Vyper Air, Gekko, Vytec, Vytec DS, D9, D6, D4i, D4);

4. Among the eighteen computer models, there are five different processor hardware configurations, plus an equal number of software configurations;

5. Among the eighteen computer models, there are three different pressure sensor units running through different processors, and three different ASICs (application specific integrated circuit); and

6. Three of the computers have a single mode of operation, two have two modes, seven have three modes, two have four modes and four computers have five modes of operation.

See Holappa Dec. at ¶¶ 3, 4, 6. Huntzinger cannot have standing to sue on behalf of purchasers who bought substantially different dive computers.

Huntzinger himself purchased only one dive computer model under the allegations. Thus, the Complaint should be dismissed in accordance with *Ahdoot* and other cases due to Huntzinger's improper attempt to raise claims on behalf of purchasers of numerous other, substantially different dive computers which Plaintiff never purchased himself, and for the advertisement of which he never relied or suffered any pecuniary damage.

III. Nearly Half the Dive Computers Have Been Out of Production and Not Sold For Four or More Years

Nearly half of the accused devices have been out of production for for up to seven years. For example, the Cobra 2 model used by Pamela Siegman (Cmplt. ¶ 26), as well as the Vyper 2, was last manufactured in 2008. Holappa Dec., ¶ 5. The following computers have not been manufactured since 2010: Gekko, Vytec, and Vytec DS. *Id.* Finally, production ended in May 2011 on the following computers: D6, D4. *Id.*

More significantly, these dive computers have not been sold for up to six years ago. Aqua Lung last sold the Cobra 2 June 11, 2009, and the Vyper on July 16, 2009. See Declaration of Don Rockwell, filed concurrently herewith, ("Rockwell Dec."), ¶ 3. The Vytec was last sold by Aqua Lung before 2009. *Id.* The last sale date for the Vytec DS was May 14, 2009, and for the Gekko it was May 11, 2010. *Id.* Aqua Lung last sold the D6 and D4 models in August 2011, and the D9 was last sold in the U.S. on December 28, 2011. *Id.*

The California consumer claims for the putative class have a statute of limitations of ***three years*** for the Consumer Legal Remedies Act (Cal. Civil Code § 1783), and ***four years*** for the Unfair Competition Law (Cal. Business & Professions Code § 17208). Accordingly, a number of models should be dismissed from the case as outside the statute of limitations, and not be included in the putative class.

The implied warranty claim has a statute of limitations in California of ***four years*** (Cal. U. Com. Code § 2725), but in some other states it is a three year limitation period (e.g. Colorado, C.R.S. § 13-80-101(1)(a); Connecticut C.G.S.A. § 52-577(a); Massachusetts, Mass. Ann. Laws Ch. 106 § 2-318; and Rhode Island, R.I.G.L. § 9-1-14 (b)).

Accordingly, not only does Huntzinger lack Article III standing to sue upon dive computers that he did not purchase, and because he has failed to allege a direct injury, but the case should also be dismissed as to numerous accused models as the statute of limitations has expired, or there would be a substantial issue of fact for each class member as to when the limitation period accrued and expired.

ARGUMENT

Huntzinger asserts three claims: (1) violation of California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §1750 et seq.; (2) violation of California's Unfair Competition Law ("UCL"), Cal. Business & Professions Code ("B&P") § 17200 et seq.; and (3) breach of implied warranty. Huntzinger does not

have standing to assert these claims, and his claims are otherwise deficient. Further, the national class allegations should be stricken, since, as a matter of law, the variations in state law make it apparent that a national class is unsustainable.

I. Fed. R. Civ. P. 12(b)(6) Standard

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)). Fed. R. Civ. P. 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. at 678.

Under *Fed. R. Civ. P*. 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. Fed. R. Civ. P. 12(b)(6). *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), [**31] *overruled on other grounds* by *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984). In answering this question, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in plaintiff's favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, [citations omitted], a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), citing *Papas an v. Allain*, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

In this case, Huntzinger fails to allege that there was any specific defect or malfunction in his computer, and fails to allege how he himself was injured or damaged. Under the foregoing authority, the complaint should be dismissed.

II. Fed. R. Civ. P. 9(b) Standard

In accordance with *Fed. R. Civ. P.* 9(b), "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In order to meet this standard, a plaintiff is required to plead "the time, place and content of the alleged fraudulent representation or omission; the identity of the person engaged in the fraud; and 'the circumstances indicating falseness' or 'the manner in which [the] representations [or omissions] were false and misleading.'" *Genna v. Digital Link Corp.*, 25 F. Supp. 2d 1032, 1038 (N.D. Cal. 1997) (brackets in original) (quoting *In re GlenFed Sec. Litigation*, 42 F.3d 1541, 1547–1558 n.7 (9th Cir. 1994)). Rule 9(b) controls even where fraud may not be a formal element of the asserted legal claim: It applies to all allegations that "necessarily describe fraudulent conduct." *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103–04 & 1108 (9th Cir. 2003); *Hoey v. Sony Elecs. Inc.*, 515 F. Supp. 2d 1099, 1106 (N.D. Cal. 2007) ("Plaintiffs should also note that Rule 9(b) applies not only to claims in which fraud is an essential element, but also to claims grounded in allegations of fraudulent conduct"). Conclusory allegations of fraud are insufficient. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

Huntzinger fails to allege that he was defrauded by any specific representation, or that he personally relied to his detriment on any misrepresentation. Moreover, Huntzinger fails to allege what defect he has experienced in his Cobra 3, when it manifested, or what specific representation he relied upon, and when, that relates to any such malfunction or defect.

III. Fed. R. Civ. P. 12(b)(1) Standard

Finally, under *Fed. R. Civ. P.* 12(b)(1), a district court should dismiss a complaint that does not establish jurisdictional standing under Article III of the U.S. Constitution. Article III confers federal jurisdiction only when there is an actual case or controversy. An actual case and controversy requires that the plaintiff allege: (1) "injury in fact" that is concrete and particularized; (2) injury that is fairly traceable to the challenged conduct of the defendant; and (3) an injury that will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). See also, *Birdsong v. Apple, Inc.*, 590 F.3d 955, 960-61 (9th Cir. 2009) (suit alleging consumers could be injured by loud audio player dismissed for lack of standing as plaintiff must allege to have "suffered a distinct and palpable injury as a result of the alleged unlawful or unfair conduct").

IV. Huntzinger Does Not Have Standing To Assert Alleged Claims, Both Because of No Injury, And Because He Purchased One Model, Not Eighteen

A. Huntzinger Fails To Allege An Injury Required for Standing

To state a claim under the CLRA and UCL, a plaintiff must plead that he has suffered injury in fact from the alleged violation. While the Complaint attempts to allege misrepresentations and omissions by Aqua Lung, Huntzinger does not allege any injury in fact, nor does he allege that he relied upon any specific misstatement to his detriment. Huntzinger does not allege his Cobra 3 malfunctioned, that it provided inaccurate data or how such data was inaccurate. He does not allege that Aqua Lung did or did not service his Cobra 3, or that it was replaced. Huntzinger fails to even allege he has ever used his Cobra 3 to scuba dive.

Consumers Legal Remedies Act: The Act provides that "any consumer who suffers any damage as a result of the use or employment by any person of a method, act or practice declared to be unlawful by Section 1770 may bring an action . . . ." Cal. Civ. Code § 1780. "This language does not create an

automatic award of statutory damages upon proof of an unlawful act. Relief under the CLRA is specifically limited to those who suffer damage, making causation a necessary element of proof." *Wilens v. TD Waterhouse Group, Inc.*, 120 Cal. App. 4th 746, 754 (2000); *accord Buckland v. Threshold Enterprises Ltd.*, 155 Cal. App. 4th 798 at 809-10 (2007) ("In view of *Caro*, plaintiffs asserting CLRA claims sounding in fraud must establish that they actually relied on the relevant representations or omissions"); *Caro v. Proctor & Gamble Co.*, 18 Cal. App. 4th 644, 664-65 (1993).

Unfair Competition Law: Section 17204 of this Law authorizes a "person who has suffered injury in fact and has lost money or property as a result of the unfair competition" to file an action for injunctive relief. Cal. Bus. & Prof. § 17204. This provision was amended as a result of Proposition 64, and the California Supreme Court emphasized that allegation of injury in fact is required to state a claim:

> [B]ecause it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, we must construe the phrase 'as a result of' in light of this intention to limit such actions. * * * Therefore, we conclude that this language imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *In re Tobacco II Cases*, 46 Cal. 4th 298, 326, 207 P.3d 20, 49 (2009). (citations omitted).

See also Hall v. Time, Inc., 158 Cal. App. 4th 847, 853-54; 70 Cal. Rptr. 3d 466, 470 (2009). ("The intent of California voters in enacting Proposition 64 was to limit such abuses by 'prohibit[ing] private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact' . . . *citing Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 227-28 (2006). Huntzinger does not allege that his Cobra 3 malfunctions or could not be repaired under its warranty. Huntzinger has no "injury in fact" standing under the CLRA or UCL.

California courts have dismissed other complaints that were similarly deficient. In *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 1181, 1194 (S.D. Cal. 2005), the Court dismissed claims for violations of the UCL that were based on the allegation that T-Mobile charged sales tax on the full retail price of phones it advertised as "free" or as substantially discounted. As with the Complaint here, "none of the named Plaintiffs allege that they saw, read, or in any way relied on the advertisements; nor do they allege they entered into the transaction *as a result* of these advertisements." 407 F. Supp. at 1194. The claims were dismissed.

In *Cattie v. Wal-Mart Stores, Inc*. 504 F. Supp. 2d 939 (S.D. Cal. 2007), the plaintiff alleged that Wal-Mart violated the CLRA and UCL as a result of deceptive and false advertising regarding bed linens. The Court dismissed all of the claims, holding that the complaint "does not allege Plaintiff relied on the false advertising when entering into the transaction to purchase the linens." *Id.* at 946. The Court rejected as "conclusory" and "not adequately alleg[ing] reliance" the Complaint's allegation that Plaintiff "and members of the Class have been injured … as a result of Defendants' [false advertising] as set forth in this Complaint." *Id.* at 947.

B. Huntzinger Cannot Have Standing As to Seventeen Unpurchased Products

In May, 2013, Huntzinger bought the Cobra 3. He did not purchase any other model of Suunto dive computer. Huntzinger has no standing to assert any claim regarding any dive computer other than the single Cobra 3. In addition, Huntzinger has no standing to make a claim relating to representations or omissions for any dive computer other than the Cobra 3. As set forth above, the various dive computers are substantially different from each other in their hardware, software, interfaces, features, and functionality.

The Ninth Circuit has held that "[s]tanding is a threshold matter central to our subject matter jurisdiction." *Bates v. United Parcel Service, Inc.*, 511 F.3d

974, 985 (9th Cir. 2007). Accordingly, a court must "assure [itself] that the constitutional standing requirements are satisfied before proceeding to the merits." *Id*. (citations omitted). This standard applies to all of Huntzinger's causes of action: "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 185 120 S. Ct. 693, 706 (2000) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660 (1983)).

In *Route v. Mead Johnson Nutrition Co*., No. 12-7350, 2013 WL 658251 (C.D. Cal. 2013), the plaintiff filed a class action against a variety of baby products, but had purchased only one. The Court found that no standing existed as to products not purchased by that plaintiff, reasoning that "asserting the issue of what products Plaintiff purchased is highly relevant to Plaintiff's standing, which, as a component of this Court's subject matter jurisdiction, is a matter the Court may raise *sua sponte*." *Route*, WL 658251, *3, citing *Snell v. Cleveland, Inc.*, 316 F.3d 822, 826 (9th Cir.2002) ("a court may raise the question of subject matter jurisdiction, *sua sponte*, at any time during the pendency of the action"); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000) (a challenge to standing under Article III "pertain[s] to a federal court's subject-matter jurisdiction").

The same result was reached in another Central District case which was essentially the same as the instant case. In *Payam Ahdoot v. Babolat VS North America, Inc*., U.S. District Court, Central District California, Case No. CV13-002823 GAF (Dkt. 18, filed September 6, 2013) (see Worden Dec., Ex. A), the Court held that the plaintiff, who had purchased a single model of tennis racquet from a defendant racquet manufacturer named Babolat, could not maintain an action asserting claims regarding other tennis racquet models, or in reliance on ads that were subsequent to the purchase of his Babolat racquet. The Court clearly stated the rule of law which is applicable to this case: "Plaintiff lacks standing to pursue claims for products other than the specific racquet he purchased and

advertisements upon which he personally relied." *Id.* The same reasoning compels a dismissal of at least all claims other than claims related to the Cobra 3.

Accordingly, Huntzinger's claims as they relate to dive computers he did not purchase, and advertisements he never saw or relied upon, must be dismissed. Huntzinger could only have standing with respect to the Cobra 3 that he alleges he bought, and then ***only*** if he was injured thereby. Because Huntzinger has not alleged that his Cobra 3 has malfunctioned, he cannot have standing to assert his claims – he has not been injured. The Complaint should be dismissed.

V. The National Class Allegations Should Be Stricken and Dismissed

Even if it is determined that Huntzinger has standing to assert a claim regarding the Cobra 3, or any other dive computer, no national class ought to be certified in this case. Aqua Lung will be prepared to fully brief all class certification issues if Huntzinger files a motion for class certification. But it is apparent at this point, based on Huntzinger's Complaint and Ninth Circuit precedent, that Huntzinger is **not** entitled to a national class of purchasers of Aqua Lung distributed dive computers, as a matter of law. For that reason, Aqua Lung moves now to strike and dismiss Huntzinger's national class allegations.

Fed. R. Civ. P. 23(c)(1)(A) requires a court to consider issues of class certification "at an early practicable time after a person sues or is sued as a class representative . . . ." Numerous courts, including California District Courts, have recognized that "where the matter is sufficiently obvious from the pleadings, a court may strike class allegations." *Route*, *supra*, 2013 U.S. Dist. WL 658251 at *8-9 (C.D. Cal. February 21, 2013) (striking and dismissing nationwide class); *Rikos v. Proctor & Gamble Co.*, 2012 U.S. Dist. LEXIS 25104 (S.D. Ohio February 28, 2012) (striking and dismissing nationwide class allegations); *Sanders v. Apple, Inc.*, 672 F. Supp. 2d 978, 990-91 (N.D. Cal. 2009) ("not premature" to strike nationwide class allegations); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 948 (6th Cir. 2011) (affirming dismissal of nationwide

class allegations); *In re Yasmin & Yaz Products Liability Litigation*, 275 F.R.D. 276 (S.D. Ill. 2011): "In determining whether a party complies with Rule 23, a court does not have to wait until class certification is sought." *Ross-Randolph v. Allstate Ins. Co.*, 2001 WL 36042162 (D. Md. May 11, 2001).

Huntzinger's claims on behalf of a purported national class "containing many thousands of members" (Cmplt. ¶ 41), are for violations of California consumer protection statutes, and for breach of implied warranty. As discussed below, numerous federal courts have already surveyed the differences in some of these causes of action among the states and have rejected national classes as a result. In addition, Aqua Lung has provided a survey of the differences in laws not yet surveyed by the courts. Appendix A demonstrates the numerous material differences in the state consumer protection laws. These material differences compel rejection of a national class. The variety of rights related to such a national class of persons are far too numerous to litigate in a single case, and would turn this case into a complex nightmare of competing burdens and elements.

A. California Consumer Protection Laws: CLRA and UCL

Huntzinger's allegations regarding and request for a national class should be stricken and dismissed for the reasons that the Ninth Circuit made clear in *Mazza v. American Honda Motor Company, Inc.*, 666 F.3d 581, 596 (9th Cir. 2012). In *Mazza*, the plaintiffs were automobile purchasers who claimed, as Huntzinger does, that Honda violated California's CLRA and UCL by misrepresenting in various advertisements the characteristics of its Collision Mitigation Braking System ("CMBS"). *Id.* at 585. These are the same California statutes asserted by Huntzinger in Claims 1 and 2 of the Complaint. The *Mazza* plaintiff sought to represent a "nationwide class of all consumers who purchased or leased Acura RLs equipped with" CMBS during a three-year period. *Id.* at 585. (Huntzinger's Complaint has no time limitation for its asserted class.)

After determining that the trial court could not apply California's law to the claims of non-California class members, the court explained why a nationwide class could not be certified:

> Because the law of multiple jurisdictions applies here to any nationwide class of purchasers or lessees of Acuras including a CMBS system, variances in state law overwhelm common issues and preclude predominance for a single nationwide class.

Id. at 596.

The Central District reached the same result in *Route*, striking the requested nationwide class of baby products purchasers because "it is clear from the pleadings that application of California law to a nationwide class would be inappropriate . . . ." 2013 U.S. Dist. WL 658251 at *8. As alleged in that complaint, the "transactions forming the subject of the express warranty claims took place in all fifty states," but California had "no connection to this case at all, other than its interest in product sales to California residents." *Id.* at *9. Without "further connections to California . . . the court cannot see how Plaintiff could ever demonstrate that, according to California's choice of law rules as set forth in *Mazza*, certification of a nationwide class could be certified here." *Id.* at *9.

Based on this law, Huntzinger cannot maintain this lawsuit on behalf of a nationwide class. The only connections to California alleged in the Complaint is that Huntzinger lives here and he bought the Cobra 3 here. Aqua Lung is incorporated in Delaware. As in *Route*, the transactions that are the subject of Huntzinger's class claims presumably occurred "in all fifty states." Under these circumstances, and California's choice of law rules, this Court cannot apply California law on a classwide basis. *Mazza*, 666 F.3d at 590-594; *Route*, 2013 U.S. Dist. WL 658251 at *9.

Since California law may not be applied across the board to the claims of the alleged national class, this Court would have to apply the laws of all of the other states. That would be a nightmare, because state consumer protection laws of the

49 remaining states differ in material respects, leaving the plaintiff to prove, and defendant to defend, against dozens of different legal standards. See Appendix A. The task for the litigants and Court would be too burdensome and the jury would be overwhelmed with complexity.

Examples of how consumer protection laws vary from state to state include the following: what conduct is prohibited; existence of a private cause of action; who is a "consumer," whether class actions are permitted; whether a showing of intent is required; the measure of deceptiveness; whether required and how reliance is shown; whether non-disclosure is actionable; how "unfair" is defined; how "unconscionable" is defined; what pre-filing requirement exist; and the measure of damages. See Appendix A.

Even the attempt to summarize the differences in state laws in Appendix A is an arduous challenge, indicating that individual questions arising under numerous state laws will overwhelm this case.

B. Breach of Implied Warranty

Huntzinger's claim for breach of implied warranty on a national class basis implicates U.C.C. § 2-318. However, in this instance, "uniform" is a misnomer as the section sets forth three alternatives, A, B, and C[3] for determining the privity requirements for claimants, and the states are divided on them. See Appendix A. California has not adopted any of the UCC alternatives, and requires direct privity.

[3] Alternative A provides that: "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Alternative B provides that: "A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section." Finally, Alternative C provides that: "A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to the injury to the person of an individual to whom the warranty extends. U.C.C. § 2-318.

Anunziato v. eMachines, Inc., 402 F. Supp.2d 1133, 1141 (C.D. Cal. 2005) (California recognizes implied warranty, but requires direct and immediate privity between a buyer and seller – citations omitted). Direct privity is absent in this case since Huntzinger bought the Cobra 3 form a third party internet retailer, not from Aqua Lung. Huntzinger's implied warranty class claim should be dismissed.

Even if the claim is not dismissed as to Huntzinger, no national class can be certified under the *Mazza* standard. Outside of California the states are divided on privity requirements. As to the other states, 29 follow the UCC's Alternative A, eight follow Alternative B, and six follow Alternative C. A summary of the states' differences on privity is included in Appendix A. The Court, and a jury, should not be required to navigate these varying legal requirements for a national class of plaintiffs. As a matter of law, the proposed national class should be stricken. Cf. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (the court vacated certification of a nationwide class of machine tool purchasers because "[s]tates also differ substantially in their willingness to permit buyers of commercial products to recover in tort for defeats that are covered by warranties."); cf. *In re GMC Dex-Cool Prods. Liab. Litig*, 241 F.R.D. 305, 319-320 (S.D. Ill. 2007) (the court denied certification of a nationwide class of GM automobile owners as "a large number of states in the proposed class, possibly a majority, hold that reliance is not an element of an express warranty claim," however, "a significant number of other states in the proposed class require specific reliance on a seller's statements as a condition of recovery . . . . ," and "a small minority of states . . . follow a third approach to reliance, holding that a seller's affirmations and promises relating to goods create a rebuttable presumption of reliance by the buyer.").

Because of the differences in the laws of the various states, Huntzinger cannot satisfy the Rule 23(c) prerequisites as a matter of law, and his allegations and claim for a national class should be stricken and dismissed.

VI. Huntzinger's Claims Are Subject To Dismissal Under Fed. R. Civ. P. 9(b)

Counts 1 and 2 should be dismissed for another reason as well; they fail to plead with the particularity required under Fed. R. Civ. P. 9(b). Rule 9(b) requires that "in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." This applies to UCL and CLRA claims. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Indeed, with allegations of "falsely represent that the Dive Computers will provide certain accurate information," and "Defendant's claims, nondisclosures and misleading statements, as more fully set forth above, are also false, misleading and/or likely to deceive," all of Huntzinger's claims essentially are fraud based. (Cmplt. ¶¶ 33, 61).

"Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess*, 317 F.3d at 1106 (9th Cir. 2003). Huntzinger's Complaint makes broad conclusory allegations of fraud, but fails to provide any particulars. The Complaint fails Rule 9(b)'s particularity requirement. It does not identify any alleged misrepresentation that Huntzinger saw or read and it does not allege when, where or how any such misrepresentation to him was made.

Though the Complaint cites to several statements on Aqua Lung's website, it does not allege that Huntzinger saw and relied upon any of them (and of course none of the "who, what, when, where" is alleged either). Further, statements unrelated to the Cobra 3 are irrelevant. Moreover, Huntzinger fails to allege a malfunction in his Cobra 3, and therefore no nexus can exist between a misrepresentation and any alleged injury. The Complaint simply fails to provide Aqua Lung with sufficient notice to defend the fraud claims.

VII. Count 3 (Breach of Implied Warranty) Should Be Dismissed Due to a Lack of Privity

The Complaint alleges that "By placing the Dive Computers in the stream of commerce, defendant impliedly warranted that the Dive Computers are reasonably safe, effective and adequately tested for their intended use and that they are of merchantable quality." (Cmplt. ¶ 72). Huntzinger does not allege that he purchased the Cobra 3 from Aqua Lung. In fact, the opposite is alleged – Huntzinger never entered into a contract with Aqua Lung because he purchased his Cobra 3 from a third party in California. (Cmplt. ¶ 11).

Huntzinger does not have an implied warranty claim under California law. California requires direct privity between the claimant and the defendant, which is absent in this case. *Anunziato*, *supra*, 402 F. Supp. 2d at 1141 (C.D. Cal. 2005). California recognizes the implied warranty of merchantability. *Torres v. City of Madera*, 2005 WL 1683736 *16 (E.D.Cal.2005). However, a "plaintiff alleging breach of [implied] warranty claims must stand in 'vertical privity' with the defendant." *Id.* "The term 'vertical privity' refers to links in the chain of distribution of goods. If the buyer and seller occupy adjoining links in the chain, they are in vertical privity with each other." *Osborne v. Subaru of America, Inc.*, 198 Cal. App. 3d 646, 656 n. 6, 243 Cal. Rptr. 815 (1988).

Finally, "there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 695, 268 P.2d 1041 (1954). Accordingly, Huntzinger's claim for breach of implied warranty, based on a "stream of commerce" must fail, and the claim should be dismissed.

VIII. The Claims Regarding A Number of Accused Computers Should be Dismissed Due to the Statute of Limitations

It is clear that a number of accused dive computers are so old, and have been so long out of production or sale that they should not be included in this case. The

Cobra 2 and the Vyper 2, were last manufactured in 2008, and last sold in July 2009, six years ago. Holappa Dec., ¶ 5; Rockwell Dec., ¶ 3. Three computer models have not been manufactured since 2010: Vytec, and Vytec DS, Gekko (Holappa Dec., ¶ 5); but U.S. ***sales ended*** in 2008 for the Vytec, and in May 2009 for the Vytec DS (six years ago), with sales of the Gekko ending May 11, 2010. Rockwell Dec., ¶ 3. Finally, sales ended in August 2011 for the D6 and D4 computers, and December 2011 for the D9. *Id*.

The California consumer claims for the putative class have a statute of limitations of three years for the CLRA, Cal. Civil Code § 1783, and four years for the UCL, Cal. Business & Professions Code § 17208. Accordingly, the Cobra 2, Vyper 2, Gekko, Vytec and Vytec DS, D9, D6 and D4 should not be included at all in the putative class on the three- year CLRA claim. All of these models except the D6 and D4 should also be excluded from the four-year UCL claim.

The implied warranty claim has a statute of limitations in California of 4 years, Cal. U. Com. Code § 2725, but in other states it is a three-year limitation period (e.g. Colorado, C.R.S. § 13-80-101(1)(a); Connecticut C.G.S.A. § 52-577(a); Massachusetts, Mass. Ann. Laws Ch. 106 § 2-318; and Rhode Island, R.I.G.L. § 9-1-14 (b)). The same models should be excluded from the implied warranty claim.

It is therefore clear that the CLRA, UCL and implied warranty claims should be dismissed as to the: Cobra 2, Vyper 2, Gekko, Vytec, and Vytec DS since sales stopped more than 4 years ago. In addition, at least the CLRA claim should be dismissed against the all of those plus the D9, D6, and D4 as sales stopped more than three years ago.

CONCLUSION

For the foregoing reasons, this Court should dismiss Huntzinger's Complaint in its entirety with prejudice. *Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir. 2000) (court should not grant leave to amend if it "determines that the pleading could not

possibly be cured by the allegations of other facts"). Huntzinger lacks standing to maintain this action since he fails to allege a malfunction in his Cobra 3, or any impropriety by Aqua Lung in the treatment of ***his*** Cobra 3. Moreover, Huntzinger lacks standing regarding any claim relating to a different dive computer model from the Cobra 3, and to any advertisement or representation Huntzinger did not see and rely upon to his detriment.

This Court should strike and dismiss with prejudice Huntzinger's allegations regarding a request for a national class because of the need to apply conflicting laws of all of the other 49 states. Finally, each of Huntzinger's claims should also be dismissed on the additional grounds that each fails to state a claim or is not adequately pled or both, or is barred by the applicable statute of limitations.

Dated: July 10, 2015

Respectfully submitted,

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