

BLOOD HURST & O'REARDON, LLP

1 BLOOD HURST & O'REARDON, LLP
2 TIMOTHY G. BLOOD (149343)
3 PAULA M. ROACH (254142)
4 701 B Street, Suite 1700
5 San Diego, CA 92101
6 Tel: 619/338-1100
7 619/338-1101 (fax)
8 tblood@bholaw.com
9 proach@bholaw.com

6 BERMAN & RIEDEL, LLP
7 WILLIAM M. BERMAN (190078)
8 ALICIA M. SIMINOU (279954)
9 12264 El Camino Real, Suite 300
10 San Diego, CA 92130
11 Tel: 858/350-8855
12 858/350-9855 (fax)
13 wberman@bermanlawyers.com
14 asiminou@bermanlawyers.com

WILLIAMS, KASTNER
& GIBBS, PLLC
JOHN A. KNOX
DOUGLAS A. HOFMANN
601 Union Street, Suite 4100
Seattle, CA 98101
Tel: 206/628-6600
206/628-6611 (fax)
jknox@williamskastner.com
dhofmann@williamskastner.com

Attorneys for Plaintiff and the Class

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

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION TO STRIKE
DEFENDANT AQUA LUNG
AMERICA INC.'S EVIDENTIARY
SUBMISSION SUBMITTED IN
SUPPORT OF ITS MOTION TO
DISMISS**

Hearing Date: September 15, 2015

**NO ORAL ARGUMENT UNLESS
REQUESTED BY THE COURT**

Judge: Hon. William Q. Hayes

Complaint Filed: May 21, 2015

Trial Date: TBD

DEMAND FOR JURY TRIAL

1 Plaintiff submits this motion to strike in support of his opposition to
2 Defendant Aqua Lung America, Inc.'s ("Aqua Lung") motion to dismiss.

3 **I. AQUA LUNG'S EVIDENTIARY SUBMISSIONS SHOULD BE**
4 **STRICKEN**

5 In deciding a motion to dismiss, a court may only rely on facts alleged in
6 the complaint and those that are not subject to reasonable dispute and judicially
7 noticeable. *Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th
8 Cir. 2007). The court must accept as true all facts alleged in the complaint and
9 draw all factual inferences in favor of the plaintiff on a motion to dismiss.
10 *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1043 n.2 (9th Cir.
11 2008).

12 A court "may not on the basis of evidence outside the [c]omplaint, take
13 judicial notice of facts favorable to [d]efendants that could reasonably be
14 disputed." *U.S. v. Corinthian Colleges*, 655 F.3d 984, 998-99 (9th Cir. 2011); *see*
15 *also Queen's Med. Ctr. v. Kaiser Found. Health Plan, Inc.*, 948 F. Supp. 2d
16 1131, 1143-44 (D. Haw. 2013) (denying request for judicial notice of evidence
17 used to establish facts that are subject of reasonable dispute on motion to
18 dismiss). Similarly, a court cannot grant a motion to dismiss based on evidentiary
19 submissions concerning disputed facts. *Queen's Med. Ctr.*, 948 F. Supp. 2d at
20 1142.

21 Aqua Lung submits the declarations of a Suunto Oy employee, Mika
22 Holappa, and an Aqua Lung employee, as well as several evidentiary exhibits
23 regarding what Aqua Lung contends are differences in the features of the Dive
24 Computers at issue in the complaint and when the products were sold. *See* ECF
25 Nos. 7-4, 7-5, 7-6, 7-7, 7-8, and 7-9. Although Aqua Lung does not formally
26 request that this Court take judicial notice of this evidence, such a request
27 nonetheless would be improper and the Court cannot otherwise consider the
28 evidence.

1 Plaintiff disputes that the Dive Computers have differences that matter in
 2 this action. Plaintiff alleges that the Dive Computers contain “materially the
 3 same software and hardware that operates the Dive Computer’s critical
 4 functions” and that that software and hardware is defective in all Dive
 5 Computers. ¶3; *see also* ¶21. Additionally, Plaintiff has not had the opportunity
 6 to take discovery on Aqua Lung’s evidentiary submissions to test the facts that
 7 they assert. The Court must accept as true Plaintiff’s allegations in the complaint,
 8 including all inferences in favor of Plaintiff that can be made from those
 9 allegations, and cannot consider Aqua Lung’s evidence that attempts to dispute
 10 those facts.

11 II. CONCLUSION

12 For the foregoing reasons, Plaintiff’s motion to strike Aqua Lung’s
 13 evidentiary submissions (ECF Nos. 7-4, 7-5, 7-6, 7-7, 7-8, and 7-9) should be
 14 granted.

15
 16 Dated: August 17, 2015

BLOOD HURST & O’REARDON, LLP
 TIMOTHY G. BLOOD (149343)
 PAULA M. ROACH (254142)

17
 18 By: s/ Timothy G. Blood
 19 TIMOTHY G. BLOOD

20 701 B Street, Suite 1700
 21 San Diego, CA 92101
 22 Tel: 619/338-1100
 23 619/338-1101 (fax)
 24 tblood@bholaw.com
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 28 ALICIA M. SIMINOU (279954)
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 San Diego, CA 92130
 Tel: 858/350-8855
 858/350-9855 (fax)
 wberman@bermanlawyers.com
 asiminou@bermanlawyers.com

WILLIAMS. KASTNER

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BLOOD HURST & O’REARDON, LLP

1 & GIBBS, PLLC
2 JOHN A. KNOX
3 DOUGLAS A. HOFMANN
4 601 Union Street, Suite 4100
5 Seattle, CA 98101
6 Tel: 206/628-6600
7 206/628-6611 (fax)
8 jknox@williamskastner.com
9 dhofmann@williamskastner.com

10 *Attorneys for Plaintiff and the Class*

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 17, 2015.

s/ Timothy G. Blood

TIMOTHY G. BLOOD

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