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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**

**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.

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

## II. CONCLUSION

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

Dated: August 17, 2015

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By: s/ Timothy G. Blood  
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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*

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