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Aqua Lung America, Inc.

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 1146 WQH (KSC)

CLASS ACTION

**DEFENDANT AQUA LUNG
AMERICA, INC.'S MEMORANDUM
OF POINTS AND AUTHORITIES IN
OPPOSITION TO PLAINTIFF'S
MOTION TO STRIKE**

Hearing Date: September 15, 2015

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

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

Trial Date: None Set

Plaintiff Ralph Huntzinger's ("Huntzinger") Motion to Strike should be denied as the law supports a factual attack on standing. None of the cases cited by Huntzinger is applicable to this matter since no evidence was presented by Defendant Aqua Lung America, Inc. ("Aqua Lung"), regarding Huntzinger's failure to state a claim. Huntzinger has failed to meet his burden of proof to

1 establish standing and inappropriately seeks to strike Aqua Lung's proof. The
2 Motion to Strike should be denied.

3 **I. DEFENDANT HAS CHALLENGED PLAINTIFF'S STANDING**

4 Aqua Lung has challenged Huntzinger's standing, pursuant to Rule 12(b)(1),
5 to assert, *inter alia*, claims against 17 dive computer models that Plaintiff neither
6 purchased nor used.¹ See Defendant Aqua Lung America, Inc.'s Memorandum of
7 Points and Authorities In Support of Motion to Dismiss Class Action, Dkt. 7-1, pp.
8 10, 12-14. See, e.g. *Route v. Mead Johnson Nutrition Co.*, No. 12-7350, 2013 WL
9 658251 *3 (C.D. Cal. 2013) (plaintiff had no standing as to products not purchased
10 by that plaintiff); and *Payam Ahdoot v. Babolat VS North America, Inc.*, U.S.
11 District Court, Central District California, Case No. CV13-002823 GAF (Dkt. 18,
12 filed September 6, 2013), attached to Aqua Lung's motion to dismiss (Dkt 7-3)
13 (based on declarations submitted the Court dismissed claims as to all of the
14 different tennis racquets that the plaintiff had not purchased.).

15 Huntzinger purchased from a third party only one model, a Cobra 3. As set
16 forth in Aqua Lung's Memorandum of Points and Authorities, Huntzinger can
17 have no standing to assert claims against the other 17 dive computers since they
18 are substantially different from his Cobra 3. The claims regarding the 17 other
19 models must be dismissed due to a lack of standing pursuant to Rule 12(b)(1).

20 A party cannot waive or forfeit the requirement of standing, nor may a
21 federal court hear a case in which standing is absent. *Arbaugh v. Y&H Corp.*, 546
22 U.S. 500, 514, 126 S. Ct. 1235, 1244 (2006); *Neirbo Co. v. Bethlehem*
23 *Shipbuilding Corp.*, 308 U.S. 165, 60 S. Ct. 153 (1939). The Ninth Circuit has held
24 that "[s]tanding is a threshold matter central to our subject matter jurisdiction."

25 _____
26 ¹ Aqua Lung has also challenged Huntzinger's standing for failure to allege an injury-in-fact, but
27 that challenge is based upon the Complaint allegations, and not supported by outside evidence.
28 Accordingly, it is not addressed herein. It is appropriate to address the question of standing in
deciding a motion to dismiss because "[t]he elements of standing are 'an indispensable part of
the plaintiff's case,' and accordingly must be supported at each stage of litigation in the same
manner as any other essential element of the case." *Cent. Delta Water Agency v. United States*,
306 F.3d 938, 947 (9th Cir.2002)

1 *Bates v. United Parcel Service, Inc.*, 511 F.3d974, 985 (9th Cir. 2007).

2 Accordingly, a court must “assure [itself] that the constitutional standing
3 requirements are satisfied before proceeding to the merits.” *Id.* (citations omitted).

4 This standard applies to all of Huntzinger’s causes of action, and it is his
5 burden to establish standing: “a plaintiff must demonstrate standing separately for
6 each form of relief sought.” *Friends of the Earth, Inc. v. Laidlaw Envt’l Servs.*
7 *(TOC), Inc.*, 528 U.S. 167, 185 120 S. Ct. 693, 706 (2000) (citing *Los Angeles v.*
8 *Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660 (1983)).

9 Huntzinger has failed to meet his burden, and instead attacks the propriety of
10 Aqua Lung’s evidence, namely the Mika Hopalla Declaration and attachments,
11 Dkt. 7-4, 7-5, 7-6, 7-7 and 7-8 (collectively “the Hopalla Declaration”).
12 Huntzinger’s Motion to Strike should be denied since the law supports a factual
13 attack on standing, and the Hopalla Declaration is properly before the Court.

14 **II. A COURT MAY NOT PRESUME COMPLAINT FACTS ARE TRUE**
15 **IN A FACTUAL ATTACK ON STANDING**

16 A defendant may challenge standing either facially or substantively.
17 *Arbaugh*, 126 S. Ct. at 1240; *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). A
18 facial challenge goes only to the allegations of the complaint; but a substantive
19 challenge attacks the factual merits of the plaintiff’s claims. *Gibbs v. Buck*, 307
20 U.S.66, 59 S. Ct. 725 (1939). In this case, Aqua Lung has factually attacked
21 Plaintiff’s standing to pursue claims regarding 17 models of dive computers he
22 neither purchased nor used.

23 The Hopalla Declaration is properly before this Court to establish that the 17
24 dive computer models not purchased by Huntzinger are substantially different from
25 Huntzinger’s Cobra 3. In resolving a factual attack on jurisdiction, a district court
26 may review evidence beyond the complaint without converting the motion to
27 dismiss into a motion for summary judgment. *Savage v. Glendale Union High*
28 *Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir.2003) (citing *White*, 227 F.3d at 1242).

1 Significantly, and contrary to Huntzinger's argument, the court need not
2 presume the truthfulness of the plaintiff's allegations. *White*, 227 F.3d at 1242. In
3 addition, "[o]nce the moving party has converted the motion to dismiss into a
4 factual motion by presenting affidavits or other evidence properly brought before
5 the court, the party opposing the motion must furnish affidavits or other evidence
6 necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage*,
7 343 F.3d at 1039 n. 2.

8 In this case, Huntzinger has presented no evidence whatsoever that the
9 Cobra 3 he purchased is substantially similar to the 17 other dive computer models
10 he did not purchase. Huntzinger has failed to meet his burden of coming forward
11 with proof, as required in *Savage*, or to meet his burden of establishing standing as
12 required in *Friends of the Earth*. In fact, Aqua Lung's record regarding the
13 substantial differences between Huntzinger's Cobra 3 and the 17 other dive
14 computers is un rebutted. The Hopalla Declaration is properly before this Court and
15 Huntzinger's Motion To Strike it must be denied.

16
17 Dated: August 28, 2015

18 Respectfully submitted,

19 SCHIFF HARDIN LLP

20 By: /s/ John S. Worden
21 John S. Worden

22 Attorneys for Defendant
23 Aqua Lung America, Inc.