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12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

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

16 Plaintiff,

17 v.

18 AQUA LUNG AMERICA,, INC.

19 Defendant.

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

CLASS ACTION

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

Hearing Date: Sept. 15, 2015

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

USDJ: William Q. Hayes

Complaint Filed: May 21, 2015
Trial Date: TBD

DEMAND FOR JURY TRIAL

1 Plaintiff Ralph A. Huntzinger submits this memorandum in further support
2 of his motion to strike the evidentiary submissions of Defendant Aqua Lung
3 America, Inc. (“Aqua Lung”) on its motion to dismiss.

4 **I. AQUA LUNG’S ARGUMENT REGARDING DIFFERENCES IN**
5 **PRODUCT FEATURES IS A CLASS CERTIFICATION ISSUE**
6 **NOT A STANDING ISSUE**

7 Aqua Lung argues that the Court can consider Aqua Lung’s extra-
8 complaint evidentiary submissions because that information goes to whether
9 Plaintiff has “standing” to assert claims “against the 17 dive computers models
10 that Plaintiff neither purchased nor used.” ECF No. 17 at 2. Although Aqua Lung
11 labels its argument as one of “standing,” it is really a class certification issue
12 addressing disputed issues.

13 As the court in *Brazil v. Dole Food Co.*, No. 12-CV-01831, 2013 U.S.
14 Dist. LEXIS 136921 (N.D. Cal. Sept. 23, 2013) explained, the issue is not
15 whether plaintiff has standing to sue over injuries he did not suffer, but whether
16 the injuries he suffered as a result of purchasing a product and the injuries
17 suffered by class members who purchased similar products “are one and the
18 same.” *Id.* at *25; *see also Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524,
19 530 (C.D. Cal. 2011) (“District courts in California routinely hold that the issue
20 of whether a class representative ‘may be allowed to present claims on behalf of
21 others who have similar, but not identical, interests depends not on standing, but
22 on an assessment of typicality and adequacy of representation.’”) (quoting
23 *Greenwood v. CompuCredit Corp.*, No. 08-04878 CW, 2010 U.S. Dist. LEXIS
24 127719, at *8-9 (N.D. Cal. Nov. 19, 2010)).

25 Class certification issues regarding whether plaintiff can represent
26 purchasers of substantially similar models will depend on the record as it
27 developed in discovery. *See, e.g., Elias v. Hewlett-Packard Co.*, No. C12-00421
28 LHK (HRL), 2013 U.S. Dist. LEXIS 178546, at *6-7 (N.D. Cal. Dec. 18, 2013)
(discussing discovery regarding similar products going to typicality). This is

1 precisely the reason why courts allow “plaintiffs to proceed with claims based on
 2 products the plaintiffs did not purchase past the motion to dismiss stage, at least
 3 so long as the products and claims at issue are ‘substantially similar.’” *Brazil*,
 4 2013 U.S. Dist. LEXIS 136921, at *23; *see also* ECF No. 10 at 11 and n.3 (citing
 5 cases).

6 Accordingly, because the fact of whether all of the identified Suunto Dive
 7 Computers are sufficiently similar is disputed and relates to an issue of class
 8 certification, not standing, the Court cannot rely on Aqua Lung’s evidentiary
 9 submissions at the pleading stage.

10 **II. EVEN IF CONSIDERED A STANDING ISSUE, THE COURT**
 11 **CANNOT RELY ON AQUA LUNG’S SELF-SERVING**
 12 **EVIDENTIARY SUBMISSIONS WITHOUT DISCOVERY**

13 Even if the Court finds that this is an issue of standing on which Aqua
 14 Lung can submit evidence at the pleading stage, the Court cannot consider
 15 conclusory statements from an Aqua Lung employee regarding disputed facts on
 16 the differences in the Suunto Dive Computers without first providing Plaintiff the
 17 opportunity to take discovery on those facts.

18 In *St. Clair v. Chico*, 880 F.2d 199, 201 (9th Cir. 1989), the Ninth Circuit
 19 recognized that although a defendant may challenge subject matter jurisdiction
 20 with the submission of evidentiary affidavits, there are limitations placed on a
 21 district court in considering that extra-complaint information. The *St. Clair* court
 22 recognized that a plaintiff should be afforded an opportunity to take discovery on
 23 those challenged facts “if it is possible that the plaintiff can demonstrate the
 24 requisite jurisdictional facts if afforded that opportunity.” *Id.* It is only where
 25 “the extra-pleading material demonstrates that the controlling questions of fact
 26 are undisputed, additional discovery would be useless.” *Id.* at 202.

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1 Here, it is clear from the Holappa Declaration and supporting exhibits that
2 the controlling questions of fact are disputed. With the benefit of discovery
3 Plaintiff could demonstrate that the differences in the products at issue identified
4 by Aqua Lung are not material to the alleged defect but instead, that the Dive
5 Computers all suffer from the same defective hardware and software as alleged.
6 See ECF No.1 at ¶¶3, 21.

7 Indeed, the vast majority of the differences identified in the Holappa
8 Declaration and supporting exhibits concern irrelevant product features. See, e.g.,
9 ECF No. 7-8 (identifying differences in the number of buttons and whether the
10 products have a compass). Even those statements from Holappa regarding
11 features that may relate to the portion of the products at issue are simply
12 conclusory statements without any actual evidence supporting them.
13 Additionally, although Plaintiff alleges that the products contain materially the
14 same defective software and hardware, Holappa says nothing about whether the
15 products do not contain the same software and hardware that Plaintiffs alleges
16 leads to the defect. Thus, it is unclear from the declaration itself whether there
17 are any material differences that actually matter. Without additional discovery on
18 that issue, the Holappa declaration is insufficient to eliminate Plaintiff's standing
19 to seek relief on behalf of class members who purchased the other Dive
20 Computers.

21 *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000), relied on by Aqua Lung
22 supports Plaintiff's position. In *White*, plaintiffs sought declaratory and
23 injunctive relief against the San Francisco HUD for violation of plaintiffs' free
24 speech rights in challenging the construction of a housing project. *Id.* at 1220.
25 Plaintiffs alleged in their complaint that there was a likelihood of future injury
26 sufficient to give them standing because they alleged they had a desire to
27 challenge projects in the future and HUD continued to take actions that prevented
28 such challenges. *Id.* at 1242. HUD moved under Rule 12(b)(1) to dismiss the

1 claims for lack of standing and submitted several documents from HUD
2 regarding HUD's efforts to implement guidelines on free speech. *Id.* The district
3 court denied HUD's motion.

4 On HUD's appeal, the Ninth Circuit held that "[w]ith a factual Rule
5 12(b)(1) attack, . . . a court may look beyond the complaint to matters of public
6 record without having to convert the motion into one for summary judgment." *Id.*
7 at 1242. However, in considering the information submitted by HUD, the Ninth
8 Circuit found that HUD did not establish that plaintiffs did not have standing
9 because the policy regarding free speech was only in existence for one month at
10 the time the complaint was filed and therefore, "was insufficient to eliminate the
11 plaintiffs' standing to seek prospective relief" as alleged in the complaint. *Id.* at
12 1243.

13 Here, unlike in *White*, the Holappa Declaration is not a matter of public
14 record. Instead, the declaration consists simply of conclusory statements on the
15 product features without any actual evidence to support those statements and
16 raises facts reasonably in dispute and on which no discovery has been taken.
17 Additionally, the Holappa Declaration does not address the feature at issue
18 leading to the defect as alleged by Plaintiff. Accordingly, like in *White*, the
19 evidence submitted by Aqua Lung is not sufficient to eliminate Plaintiff's
20 standing to seek relief on behalf of class members who purchased other products.

21 Nonetheless, should this Court be inclined to consider the issue on the
22 similarity of the products as one of standing, rather than class certification,
23 Plaintiff requests the opportunity to take discovery regarding the product features
24 and common defect as alleged in the Complaint.

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1 **III. CONCLUSION**

2 The Court should grant Plaintiff's motion and strike Aqua Lung's
3 evidentiary submissions. Alternatively, the Court should grant Plaintiff the
4 opportunity to take discovery.

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6 Dated: September 8, 2015

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By: *s/ Timothy G. Blood*

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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 September 8, 2015.

s/ Timothy G. Blood

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