

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

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

Attorneys for Plaintiff and the Class

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

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

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
 127719, at *8-9 (N.D. Cal. Nov. 19, 2010)).

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

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

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

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

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

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

///

///

///

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 similarly 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.

25 ///

26 ///

27 ///

28 ///

III. CONCLUSION

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

Dated: September 8, 2015

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

By: s/ Timothy G. Blood
TIMOTHY G. BLOOD

701 B Street, Suite 1700
San Diego, CA 92101
Tel: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com
proach@bholaw.com

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

WILLIAMS, KASTNER
& GIBBS, PLLC
JOHN A. KNOX (*pro hac vice*)
DOUGLAS A. HOFMANN
(*pro hac vice*)
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

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

TIMOTHY G. BLOOD

BLOOD HURST & O'REARDON, LLP
701 B Street, Suite 1700
San Diego, CA 92101
Tel: 619/338-1100
619/338-1101 (fax)
tblood@bholaw.com

BLOOD HURST & O'REARDON, LLP